Georgia v. Russia (II)

38263/08

AMICUS CURIAE BRIEF SUBMITTED BY

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INTRODUCTION

1. On 26 February 2014, the Human Rights Centre, University of Essex, UK requested permission to intervene in *Georgia v. Russia (II)*. On 6 March 2014, the President of the Court granted leave, under Rule 44 para. 3 of the Rules of Court.

2. The intervention addresses the scope of extra-territorial applicability of the Convention and the relationship between the law of armed conflict (LOAC), also known as international humanitarian law, and human rights law. It does not deal with the facts of the present case. Nor does it address the recognition by Russia of Abkahzia and South Ossetia, save insofar as it may affect the scope of the issues under examination in this brief. The brief refers to the intervention of the Human Rights Centre in *Hassan v. UK*, 29750/09, which also addressed the relationship between the law of armed conflict and human rights law in the context of an international armed conflict. For convenience, excerpts from the earlier intervention are attached as an appendix to this document.

3. The question of extra-territorial applicability of the Convention must be examined separately from the relationship between human rights law and LOAC, as the two matters are capable of arising independently of each other. Extra-territorial applicability of the Convention will remain a crucial issue for actions taken outside of an armed conflict in the territory of another state.[1] Conversely, the relationship between the two bodies of law will arise in the context of non-international armed conflicts in which there is no crossing of borders. Accordingly, this brief proceeds with a general examination of extra-territorial applicability of the Convention, before moving to the question of its relationship with LOAC.

THE SCOPE OF EXTRA-TERRITORIAL APPLICABILITY OF THE CONVENTION

4. It is important to distinguish between the *fact* of the exercise of jurisdiction outside national territory and the *scope* of the jurisdiction exercised. Just because a State exercises jurisdiction over X (e.g. the decision to open fire) does not mean that it has jurisdiction over Y (e.g. the right to education). Conversely, just because a State does not have plenary jurisdiction does not mean that it has none.[2]

5. Whether or not the State had lawful grounds to act in the foreign territory is virtually immaterial to applicability of human rights obligations regarding its actions. If prior jurisdictional authority to act on the territory of another state were a prerequisite for the applicability of human rights obligations, this would provide a license to abuse rights with no repercussions for those States acting without authority. The deciding matter for the applicability of obligations is the factual exercise of jurisdiction, whether lawful or not.[3]

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[1] For example in cases of detention of drug-traffickers on the high-seas. *Rigopoulos v. Spain* (dec.), Application No. 37388/97, Decision of 12 January 1999; *Medvedyev and others v. France*, (Application No. 3394/03,) Grand Chamber, Judgment of 29 March 2010.

[2] *Ilascu & others v. Moldova & Russia*, (Appllcation No. 48787/99), Grand Chamber, Judgment of 8 July 2001; *Al Skeini & others v. UK*, (Application No. 55721/07), Grand Chamber, 7 July 2011

[3] *Issa v. Turkey*, (Application No. 31821/96, Judgment of 16 November 2004, para.71. "… a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating - **whether lawfully or unlawfully** - in the latter State" emphasis added.

6. States, in ratifying the Convention, undertake to secure to persons "within their jurisdiction" the rights and freedoms defined in Section 1 of the Convention.[4] Generally speaking, a State exercises its jurisdiction within its own territory.[5] There are a range of situations, however, in which a State exercises its jurisdiction outside national territory.[6]

7. From the significant number of cases arising outside the national territory of the respondent State which the Court has had to address, it is clear that the key concept in determining whether an act or omission is within the jurisdiction of the respondent State is the question of control. Control is evidenced in a range of ways.

8. The first is physical control over the applicant. An obvious example is extra-territorial detention.[7] Detention can occur in any place; it does not have to take place in a recognised place of detention.[8] The second is control over the act or omission said to constitute a violation of the applicant's rights as a result of the State's control over its agents. An example is the decision of armed forces to open fire against an individual.[9] In both the first and second examples, the State exercises a direct control over events. It should be remembered that where there is physical control over the applicant, that control is exercised by state agents. In other words, extra-territorial detention comes within both types of control. The third example of control is where the State exercises direct control in a particular area, usually through the presence of its security forces.[10] The area does not need to be large and the control does not need to be of long duration. What matters is the exercise of control at the time of the event said to constitute the violation. The fourth example is general control over territory. This occurs during occupation[11]. It can also arise where the control is exercised through a subordinate administration.[12] In either case, the State, by virtue of the total control which it exercises, has analogous responsibilities to those within its national territory. The final example arises where a State exercises a decisive influence over the local government, even if it is not technically a subordinate administration.[13] It is possible that the State exercises a decisive influence in some spheres (e.g. public security) and not others (e.g. regulation of private law relations). That possible limitation in the scope of the decisive influence exercised does not arise in the case of occupation or control through a subordinate administration. The first three examples have in common that the control is directly exercised by

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[4] European Convention on Human Rights (ECHR) Art.1.

[5] *Georgia v. Russia (II)*, (Application No. 38263/08), Admissibility Decision of 13 December 2011, para. 66 and sources cited therein.

[6] For a discussion of the range of situations in which the Convention may apply outside national territory, see *Al Skeini*, note 2, *supra*, paras. 130-150.

[7] Al-Skeini, note 2, *supra*; *Hess v. United Kingdom* (1975) 2 D&R 72.

[8] *Ocalan v. Turkey*, (Application No. 46221/99), Judgment of 12 May 2005; see also the case of the 5th applicant in *Al Skeini*, note 2 *supra.*

[9] *Al Skeini*, note 2 *supra*, 4th applicant; see also *Isaak v. Turkey*, Application No.44587/98, judgment of 24 June 2008.

[10] *Issa*, note 3 *supra.*

[11] *Loizidou v. Turkey*, (Application No. 15318/89, Grand Chamber, judgment of 18 December 1996; *Cyprus v. Turkey*, Application No. 25781/94, Grand Chamber, judgment of 10 May 2001.

[12] "Where the fact of such domination [i.e. through a subordinate administration] over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified." *Catan & others v. Moldova & Russia*, (Application No.43370/04, 8252/05 & 18454/06), Grand Chamber, judgment of 19 October 2012, para. 106.

[13] *Ilascu & others*, note 2, para. 392.

state agents, who determine the course of events. In the fourth and fifth examples, the State exercises control through its control over legislation and policies of the government and its control over the administration, including the police and the judiciary. This is in addition to the control it exercises over its armed forces. In other words, the range of issues within its control is much broader in the case of the fourth and fifth examples than in the case of the first three.

9. The different range of issues within the control of the State in the different examples affects the scope of the State's human rights obligations. For example, in the case of extra-territorial detention, the detaining State has – at a minimum – obligations under Articles 2, 3 and 5 of the Convention, since it controls the physical environment in which the person is detained and the regime applicable to the detention. The State is less likely to be exercising the type of control necessary to be responsible for the education or rehabilitation of detainees, unless it is also in occupation of the territory. Or again, where the State is operating a roadblock, in territory over which it is in the process of establishing control but has not as yet done so, the State's geographical control may be limited to the area in the immediate vicinity of the roadblock but it does control the circumstances in which its armed forces open fire.[14] As far as a person approaching the roadblock is concerned, the State is in a position to control whether or not its forces open fire but not to determine respect for the individual's freedom of expression or assembly. Its control over the circumstances in which the armed forces open fire also means that the State has the control necessary to conduct an investigation into that decision.[15]

10. For those rights found to be applicable, the context of the particular situation can affect the level of the obligation and the criteria against which the State's actions must be examined. For example, the scope of the obligation to investigate may well be more limited than in a similar situation in national territory, particularly if the State does not exercise control over a sufficiently wide area as to enable it to travel around freely in order to have access to witnesses. This could even be true in a military occupation when the whole spectrum of human rights obligations will apply.[16] In other words, the contextual approach will affect not only the question of which human rights obligations are applicable (which may be fairly narrow in situations of limited control over an individual), but also the level of obligation and actions required by the State to fulfil its obligations.

11. The focus so far has been on the obligation to respect and protect the rights of the applicant where the alleged perpetrator is an agent of the State. In certain circumstances, even in the first three types of control, the State may have an obligation to protect an individual from the acts of third parties. This can only arise where the State exercises the necessary control over a situation. An example of this type of situation would be where a group of people is being beaten up by a local militia in a situation in which the armed forces of the State are present in sufficient number to be considered as having control of the immediate environment. In such circumstances, the State forces cannot stand by and watch the beating take place without intervening.

12. In certain circumstances, the State may be directly responsible for the acts of non-State agents. If the State exercises "effective control" over the acts of an organised armed group, those acts will

[14] *Al Skeini*, note 9 *supra*.
[15] *Al Skeini, note 2* supra, paras. 161-167.
[16] *Ibid*, para.168; see note 76 *infra* and accompanying text.

be attributable to the State, under general principles of state responsibility.[17] This is independent of the question of control exercised through a subordinate administration.

13. The foregoing suggests that, in order to determine whether alleged violations were within the jurisdiction of the Russian Federation, the Court needs to ask itself a number of questions. 1. What was the nature of the control, if any, exercised by Russia in South Ossetia and Abkhazia prior to the armed conflict? In particular, was it in occupation or did it exercise a decisive influence over the local authorities? 2. Did the nature of the control exercised by Russia in South Ossetia and Abkhazia change upon the outbreak of hostilities? Did it exercise "effective control" over the local militia? 3. In "Georgia proper" was the nature of the control exercised during the armed conflict confined to the first three types of control discussed above? 4. After the end of the active hostilities, what was the nature of the control exercised by Russia in areas outside South Ossetia and Abkhazia (i.e. the buffer zones)? 5. After the end of the active hostilities, what was the nature of the control exercised by Russia within South Ossetia and Abkhazia? In particular, what was the nature of its relationship with the local authorities in control of those areas?[18]

THE RELATIONSHIP BETWEEN LOAC AND HUMAN RIGHTS LAW (HRsL)

Preliminary issues

14. A number of preliminary issues need to be addressed, before examining the principles regulating the relationship between LOAC and HRsL. First, the rules on the resort to armed force (*ius ad bellum*) are irrelevant to the analysis of LOAC. Whether the State is acting in self-defence or not, it is required to obey the same rules in the conduct of the hostilities and the protection of victims.[19]

15. Second, LOAC distinguishes between international and non-international armed conflicts. If the LOAC rules are of any relevance, it is necessary to classify the conflict(s). It is possible for more than one conflict to be occurring at the same time. An international armed conflict is a conflict between two States.[20] There appears to be no minimum threshold to the violence required to constitute an armed conflict, at least where it involves the armed forces of the two States.[21] The conflict between Georgia and Russia was therefore an international armed conflict. The conflicts between Georgia and the militia in South Ossetia and Abkhazia are more difficult to classify. At first sight, they were non-international armed conflicts, since they were between a State and what were *prima facie* two organised armed groups. According to the *Tadic* case, a non-international

[17] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, (Nicaragua v. USA), I.C.J. judgment of 27 June 1986, paras. 115-6.

[18] Recognition of a local administration does not prevent the recognising State from in fact exercising control through its own forces and/or a subordinate administration e.g. *Loizidou v. Turkey*, note 11 *supra*.

[19] Adam Roberts, "The Principle of Equal Application of the Laws of War" in Rodin & Shue (Ed.s), *Just and Unjust Warriors*, OUP, 2008.

[20] Geneva Conventions of 1949, common Article 2; Additional Protocol I of 1977, Article 1.

[21] "Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims." ICRC Commentary on the Four Geneva Conventions of 1949, pp. 20–21.

armed conflict exists where there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[22]

16. Where the acts of an organised armed group are, in fact, attributable to a State, the conflict will be international. The test which is to be applied to determine whether the relationship between an organised armed group and a State is such as to make the conflict international is unclear. In the *Nicaragua Case*, the International Court of Justice addressed the issue of attribution under the law of state responsibility, rather than the classification of an armed conflict.[23] It held that the test was whether the State exercised "effective control". The provision of weapons, finance or training was not sufficient. What was required was control over the operations of the group.[24] In the *Tadic Case*, the International Criminal Tribunal for the former Yugoslavia was dealing with the classification of conflicts. It determined that the appropriate test was "overall control".[25] The ICJ confirmed its own test in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 Feb. 2007.[26] This potentially gives rise to a major difficulty. If a conflict is international because an organised armed group is under the "overall control" of a State, this means that the rules applicable to international armed conflicts apply to the acts of the group. If, however, the group is not under the "effective control" of the State, its acts are not attributable to that State. The group presumably remains responsible for its own acts. But the rules applicable in international armed conflicts, at least under treaty law, apply to States and to organised militia belonging to States. In other words, it is not clear how such an organised armed group can be bound by the treaty rules applicable to international conflicts. It would, therefore, be prudent to apply the same control test for classification and attribution. Whether this should be the "overall" or the "effective" test remains a subject of debate.[27]

17. If Russia exercised control over the acts of the South Ossetian and Abkhaz militia, the conflicts were all international. If Russia did not exercise control over the acts of the two militia, the Georgia/Russia conflict was international but the Georgia/two militia conflicts were non-

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[22] *Tadić case*, ICTY, No. IT-94-1-AR72, § 70.

[23] Note 17 *supra.*

[24] "The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras,* the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State." *Ibid*, para.115.

[25] Cassese, who was the President of the Appeal Court in *Tadic*, has pointed out that whilst the ICTY was indeed classifying the conflict, it based its analysis on the rules of attribution under the law of state responsibility, since no guidance was afforded by international humanitarian law; "The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *Eur J. Int. Law* (2007) 18(4) 649-668, http://ejil.oxfordjournals.org/content/18/4/649.full

[26] *(Bosnia and Herzegovina v. Serbia and Montenegro)* , I.C.J., judgment of 26 Feb. 2007

[27] Cassese, note 25 *supra*. It should be noted that, where the acts of a group are not attributable to a State, the State may still bear responsibility for failing to prevent the act from being committed in those cases where the State has an obligation to prevent the commission of such wrongs.

international. It is possible that the relationship between Russia and the two militia was different (i.e that Russia exercised control over one but not the other).

18. Whatever the general relationship between Russia and the militia throughout the conflict, it is possible that the latter was under the control of Russian forces in a particular incident. This means that, in order to determine the LOAC rules potentially relevant, the Court has to examine each incident, to see which forces were involved.

19. Third, it is necessary to consider the source of alleged LOAC rules. Georgia and Russia are both parties to the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. In addition, Russia has accepted the jurisdiction of the International Humanitarian Fact-Finding Commission, under Article 90 of Protocol I.[28] Georgia and Russia are both parties to the 1980 Certain Conventional Weapons Convention and all its Protocols. The regulation of international armed conflicts is largely treaty based, in the sense both that the treaty regime is fairly comprehensive and also that the treaties in question are widely ratified (and have been ratified by both parties to the current case). That is not true of the treaty rules applicable in non-international armed conflicts. Common Article 3 of the Geneva Conventions and Additional Protocol II of 1977 apply principally to the protection of victims.[29] There are very few rules on the conduct of hostilities. Having said that, Article 13 of Additional Protocol II prohibits attacks on civilians and Article 17 prohibits the forced movement of civilians. Nevertheless, there is nothing like the detail contained in Additional Protocol I. Since the mid-1990s, many rules of customary international law applicable in non-international armed conflicts have been revealed, notably through Henckaerts and Doswald-Beck (ICRC), *Customary International Humanitarian Law*[30] and the decisions of the International Criminal Tribunal for the Former Yugoslavia. Many of those decisions were subsequently endorsed by States in the Statute of the International Criminal Court.[31] Whilst generally the identification of rules is not controversial, there is disagreement regarding the scope of some rules in the accompanying commentary and some controversy about the application of the methodology.[32]

20. The judicial pronouncements regarding the relationship between LOAC and HRsL do not distinguish between international and non-international armed conflicts or between rules of treaty law and rules of customary law. It would appear that all LOAC rules are to be treated in the same way.

21. Finally, it must be remembered that not everything that occurs during an armed conflict is regulated by the law of armed conflict. If an individual, during the course of an armed conflict, burgles his neighbour's home in an act not directly related to the conflict (other than taking advantage of reduced policing in the vicinity), the actions of individual and State in relation to this

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[28] http://www.icrc.org/ihl; States party to the main treaties.

[29] Certain actions prohibited under LOAC are identified but there is very little on those things that are permitted during armed conflict which would be prohibited under "normal" HRsL.

[30] Volume 1: Rules, ICRC & CUP (2005)

[31] Statute of the International Criminal Court, Article 8.2.e deals with violations of the laws and customs of war applicable in NIACs, other than violations of common Article 3 of the Geneva Conventions of 1949. The list is based on what is thought to be both prohibited *and* criminalised under customary law.

[32] Letter from John Bellinger III,Legal Adviser, US Dept of State, and William J. Haynes, General Counsel, US Dept of Defense, to Dr. Jakob Kellenberger, President, Intl Comm of the Red Cross, Regarding Customary International Law Study, 46 ILM 514 (2007);

event are regulated by domestic criminal law and human rights law. In order to be regulated by LOAC, the act or omission should have a clear nexus to the conflict.

When LOAC may be relevant to the decision of a human rights court

22. In the third party intervention in *Hassan v. UK*,[33] the present interveners set out, first, what the International Court of Justice (ICJ) has said about the relationship between the two bodies of rules[34] and, second, how the view of the ICJ is to be operationalised. It was emphasised that the applicability of LOAC is not a reason for a human rights Court not to exercise jurisdiction. Rather, LOAC may need to be taken into account by the body when determining if there is a violation. It was suggested that situations form a spectrum.[35] At one end, there will only be a violation of human rights law (HRsL) if there is a violation of LOAC. At the other end, the only law applicable will be HRsL, but the situation of conflict may be relevant as part of the background. In the middle, the two bodies of rules may both be relevant. In summary, it is more likely that incidents involving the rules on the conduct of hostilities between the belligerents, including rules on weapon use, will be at one end of the spectrum, at least in the case of incidents of high intensity. Situations involving the rules on the protection of victims, particularly where they arise away from the immediate scene of hostilities, are more likely to involve a mixture of LOAC and HRsL. This approach means that there can be no general rule mandating the same balance of LOAC and HRsL in each case. Rather, each type of situation has to be examined in turn.

23. It should be noted that, in practice, there is less likely to be a conflict between LOAC and HRsL at the lower end of the spectrum. The LOAC rules on the protection of victims tend to prohibit similar behaviour to that prohibited under HRsL. Where most difficulty is likely to arise is where LOAC permits behaviour prohibited under HRsL. One example is targeting based on status (i.e. on membership of a group, rather than on the behaviour of the individual targeted). Another is use of weapons normally prohibited in the context of law enforcement. It should be noted, however, that in some circumstances, LOAC prohibits the use of a weapon in an armed conflict that is permitted in law enforcement. An example is the prohibition of the use of "dum-dum" or expanding bullets in international armed conflicts.[36]

24. The *Hassan* intervention also addressed the question of the relationship between derogation, including the absence of derogation, and the relevance of LOAC.[37] That will not be further addressed here.

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[33] Application No. 29750/09; the most relevant parts of that document are set out in an Appendix to this intervention.
[34] Appendix, paras. 14-18.
[35] *Ibid*, paras. 26-30.
[36] Expanding bullets may be a useful tool of law enforcement. They permit the targeting of an individual whilst minimising the risk that those in the vicinity will be harmed by the bullet passing through the person targeted and also hitting others. It is therefore useful in hostage situations. The reason for its general prohibition under LOAC is that it gives rise to injuries that are very difficult to treat. In other words, it gives rise to *superfluous* injury or *unnecessary* suffering, since the person hit could have been rendered *hors de combat* in medically less damaging ways. At the Kampala Review Conference of the ICC, an amendment was adopted which will prohibit the use of expanding bullets in NIACs. The implications for Special Forces, who often have to act in hostage type situations, are unclear.
[37] Appendix, paras. 20-21.

25. The issues of killings and injuries, ill-treatment, damage to and destruction of property, detention, forced movement, access to education, investigations and the right to a remedy will be examined in turn. There will also be an examination of the situation at the end of active hostilities.

Killings & injuries

26. There will only be a violation of the European Convention on Human Rights (ECHR) in the case of deaths and injuries resulting from acts of violence between the armed forces of two States where there has been a violation of the relevant rules of LOAC. That means that individuals can be targeted where they are members of the opposing State armed forces, irrespective of whether they pose any threat at the time, or if they are taking a direct part in hostilities at the time they are targeted.[38]

27. It should be noted that LOAC not only prohibits attacks against civilians but also requires that, in targeting combatants or military objectives, the State take account of the risk to civilians and civilian property. The foreseeable harm to civilians and civilian objects must not be excessive in relation to the military advantage anticipated.[39] This represents a completely different concept of proportionality to that used in HRsL.[40] Furthermore, in carrying out an attack, a State is required to take precautions in attack with a view to minimising (sic) civilian casualties.[41] A State can use any weapon on condition, first, that its use is not prohibited by LOAC and, second, subject to the restrictions imposed on the use of certain weapons, notably as a result of the Protocols to the Certain Conventional Weapons Convention.[42] The general rules on proportionality and precautions in attack have implications for the choice of weapons, in addition to the specific rules relating to weapon use.

28. In the case of a major clash between a State and an organised armed group (OAG) during a non-international armed conflict, there will only be a violation of the ECHR where there has been a violation of the relevant rules of LOAC. By necessary implication, under treaty law, the parties may attack a person who is directly participating in hostilities at the time.[43] There is no such thing as combatant status for members of armed groups in NIACs. The practical difficulties to which the direct participation test gives rise led the International Committee of the Red Cross (ICRC) to convene a series of meetings with experts meeting in their personal capacity. This resulted in the production of interpretive guidance which has proved highly controversial for a variety of

[38] Additional Protocol I of 1977, Articles 43, 48 & 51. Protection from attack is provided for those who are *hors de combat*, Article 41.
[39] Indiscriminate attacks are prohibited. They include "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"; *ibid*, Article 51.5.b.
[40] Lubell, "Challenges to applying human rights law to armed conflict", *IRRC*, (2005) Vol.87, No. 860, p.737.
[41] Those who plan or decide upon an attack shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects"; Additional Protocol I of 1977, Article 57.2.(a)(ii).
[42] The principal Protocols to the Certain Conventional Weapons Convention regulate the use of anti-personnel mines, incendiary weapons, blinding laser weapons, cluster munitions and explosive remnants of war.
[43] There is no combatant status in NIACs. Civilians are protected from attack "unless and for such time as they take a direct part in hostilities"; Additional Protocol II of 1977, Article 13.3

reasons.[44] The report clarifies what activities constitute direct participation and the time window in which a person is regarded as directly participating. Those elements are relatively uncontroversial. The report treats members of an OAG as, in one sense, the equivalent of a State's armed forces.[45] It states that a person who is a member of an OAG and who exercises a continuous combat function may be targeted, irrespective of the threat he poses at the time.[46] It is hard to see how continuous combat function is to be evidenced other than by direct participation in hostilities (i.e. behaviour, rather than status). The response of States suggests that they think they may target a member of an OAG, without the need to establish that he performs a continuous combat function.[47] There is probably a similar requirement as to proportionality and precautions in attack under customary international humanitarian law as in the case of IACs but the express treaty rules refer to neither. [48] Generally speaking, weapons prohibited in IACs are prohibited in NIACs.[49] The Protocols of the Certain Conventional Weapons Convention apply to both types of conflict as a result of a treaty amendment.[50]

29. In the case of deaths and injuries inflicted away from an area of active hostilities, HRsL will carry greater weight, although aspects of LOAC can remain relevant.[51] The reliance on a HRsL approach increases wherever there is a decrease in the factors that signify an act between parties to an armed conflict. This includes a combination of the proximity to active hostilities, the individual status determination as a combatant or behaviour that leads to loss of protection, the weapons used on both sides, and the amount of control over the situation and possible alternatives to action.

30. In the case of the death, injury or ill-treatment of a person under the control of opposing forces, the issue can be dealt with under HRsL. LOAC equally prohibits the ill-treatment of such persons.[52] There will, however, be a need to take into account the background of conflict in assessing the matters such as the handling of an investigation.[53]

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[44] Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law, ICRC, 2009. For criticisms, see Issue 42.3 of the New York University Journal of International Law and Politics (2010) and US Naval War College, International Law Studies, Vol.87, Pedrozo & Wollschlaeger (Ed.s), International Law and the Changing Character of War, (2011).

[45] "In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function")"; Melzer, note 44 *supra*, p.27. They are not the true equivalent of a State's armed forces because, whilst they can themselves be targeted, they do not have a right to participate in hostilities or to target the armed forces.

[46] *Ibid*, p.36. It must, however, also be noted that the ICRC Guidance speaks of the need to consider alternatives when using force against legitimate targets "where there manifestly is no necessity for the use of lethal force". This section was subject to particular debate. Note 44 *supra.*

[47] E.g. Authorities cited in Note 44, *supra*.

[48] Note 30 *supra*, Rule 14 proportionality and Rules 15-21 precautions in attack.

[49] *Tadic*, note 22 *supra*, para.119; "What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."

[50] See also Convention prohibiting Certain Conventional Weapons, amended Article 1, 2001.

[51] For example, a missile strike in an international armed conflict against the military command of an opposing party in a building far from the actual battlefield, will in most circumstances be an acceptable act under LOAC and should not be considered a violation of HRsL.

[52] A possible exception is the use of force to prevent the escape of a prisoner of war, which is the subject of express regulation; Geneva Convention III, Article 42.

[53] Notes 75 & 76 *infra*.

Damage to or destruction of property

31. There will only be a violation of the European Convention on Human Rights in the case of damage to or destruction of property resulting from acts of violence between the armed forces of two States where there has been a violation of the relevant rules of LOAC. Those rules permit the targeting of military objectives.[54] Civilian objects, defined as all objects which are not military objectives, cannot be targeted. There is a presumption that buildings normally used for civilian purposes, such as homes and schools, are being so used.[55] Specific provisions apply to cultural property, including places of worship, and to things such as foodstuffs on which civilians depend for their survival.[56] Civilian property benefits from the protection of the principle of proportionality and the requirement of precautions in attack, but can equally fall within the LOAC rules recognising what is often the inevitability of limited collateral damage.[57]

32. There is no express definition of military objectives or general protection of civilian property in NIACs.[58] There are provisions on specific types of property. It appears that the position under customary international law is broadly similar to that in IACs.

33. In the case of damage or destruction of property inflicted away from an area of active hostilities, HRsL will carry greater weight and can be used to regulate State action, whilst taking account of the context of conflict. This would be the case, for example, if a party to the conflict attacked a village where there were only civilians and destroyed their homes.[59] Such actions would be equally in violation of LOAC prohibitions on a range of activities in relation to property, such as looting, pillage and wanton destruction.[60]

Detention

34. It is necessary to distinguish between different elements in a detention regime.[61] There may only be a violation of the ECHR where there is a violation of relevant LOAC provisions in the case of certain elements but others may require a mixing of LOAC and HRsL. In the case of detention

[54] Additional Protocol I of 1977, Article 52.2.
[55] *Ibid*, Article 52.1 (definition of civilian objects) and 52.3 (presumption).
[56] *Ibid*, Articles 53 (cultural property) and 54 (objects indispensable to the survival of the civilian population); see also Hague Convention for the Protection of Cultural Property 1954 and the Second Protocol to that Convention 1999, extending its applicability to NIACs. Georgia and Russia are both parties to the 1954 Convention. Georgia became a party to the Second Protocol on 13 September 2010. Russia is not a party to that Protocol.
[57] In order for damage to or destruction of civilian property to be unlawful, it must 1. have been deliberately targeted, or 2. have been foreseeably excessive in relation to the military advantage anticipated or 3. have been inflicted in violation of the rules on precautions in attack. There are special rules about the taking, damage or destruction of property in occupied territories; Hague Convention IV of 1907 on War on Land, Regulations, Articles 46, 47, 52, 53, 55 & 56. Further, the seizure or destruction of enemy property is unlawful generally (i.e. not just in occupied territory) unless "imperatively demanded by the necessities of war"; *ibid*, Article 23 g.
[58] The reason for the lack of a definition of what can be lawfully targeted in NIACs is similar to the reason for the lack of combatant status. States do not wish to grant members of an organised armed group a lawful right to target certain people or certain things. Instead, they define what is *un*lawful, whilst remaining silent about the lawfulness or otherwise of other acts. The only provisions in Additional Protocol II of 1977 relating to property are Articles 14-16.
[59] E.g. *Selcuk & Asker v. Turkey*, (Application No. 23184/94), Judgment of 24 April 1998; *Ayder & others v. Turkey*, (Application No. 23656/94, Judgment of 8 January 2004. It should be noted that Turkey denied that the situation in eastern Turkey came within common Article 3 to the Geneva Conventions.
[60] Pillage – Hague Convention IV of 1907 on War on Land, Regulations, Article 28; Geneva Convention IV of 1949, Article 33; wanton destruction – Hague Convention *supra* Regulations, Article 23 g.
[61] Third party intervention in *Hassan*, Appendix, paras.29-30.

effected during the course of an IAC, the grounds of detention are determined by LOAC, together with the general system (not necessarily the detail) of review of detention and the circumstances in which detention must end. On that basis, members of the opposing armed forces can be detained as prisoners of war.[62] Civilians can only be detained on imperative grounds of security, whether in occupied territory or not.[63] Their detention has to be reviewed by a board at six monthly intervals.[64] The details of their treatment and their rights in the review process are regulated by a mixture of LOAC and HRsL.

35. The position in NIACs is less clear. It may be necessary to distinguish between NIACs in national territory and those outside national territory.[65] Treaty law does not expressly provide for a power to detain but assumes that detention occurs and regulates certain aspects of it. Customary international law appears to provide a power to detain.[66] It would indeed be strange if international law allowed certain people to be killed (those taking a direct part in hostilities) but did not allow them to be detained. The ground of detention in a NIAC is presumably that the detainee represents a serious security threat to the armed forces and/or the civilian population. Other elements of the detention regime are regulated by a mixture of LOAC and HRsL. The nature of the ground of detention is likely to have implications for the general system of review of detention, particularly in the case of NIACs outside national territory.[67]

Forced movement

36. In IACs and NIACs, LOAC may regulate the grounds on which civilians are moved. Other aspects of their treatment during such a movement will be based on a mixture of LOAC and HRsL. On that basis, civilians can only be moved for their own safety or imperative reasons of security.[68] This clearly implies that such forced movement can only be short term, whilst the need for it exists. Civilians cannot be deported out of their own territory into that of an occupying power or any other State.

Access to education

37. LOAC does not address access to education during active hostilities. Clearly the application of HRsL in this field needs to take account of the existence of an armed conflict. In occupied territory, the

[62] Geneva Convention III of 1949, Article 21.
[63] Geneva Convention IV of 1949, Articles 41, 42 & 78.
[64] Geneva Convention IV of 1949, Article 78.
[65] Generally speaking, NIACs occur in national territory, but they can also occur in extraterritorial situations. For example, where one or more States are assisting the territorial State in its armed conflict with an OAG, the assisting States are involved in a NIAC because the opposing party is a non-State actor e.g. Afghanistan after the installation of Hamid Karzai. The national legislation of the assisting States (e.g. authorising internment in an emergency) is unlikely to apply outside national territory. Nevertheless, the assisting States need the power to detain those who present a real security threat to the armed forces and the civilian population.
[66] Pejic J., '*Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*' (2005) 87 (858) International Review of the Red Cross 375, 377; Gill & Fleck, *The Handbook of the International Law of Military Operations*, OUP (2010).
[67] E.g. if detention is based on the threat posed by the detainee but where the evidence cannot be used as the basis for criminal prosecution before a court.
[68] In IACs, Geneva Convention IV of 1949, Article 49 (occupied territory); in NIACs, Additional Protocol II of 1977, Article 17.

occupying power has additional specific LOAC obligations to ensure the functioning of educational institutions.[69]

After the end of active hostilities

38. Generally, LOAC ceases to apply at the end of active hostilities but there are provisions designed to secure the protection of individuals even after this time.[70] Whilst, in the period immediately after the close of active hostilities, it may be necessary to recognise LOAC grounds of detention, that period will not last long.

39. Where the close of hostilities also represents the start of occupation, a specific LOAC regime applies. Given the control over the territory which an occupier has to be able to exercise, it is appropriate for the occupying power to have the full range of HRsL obligations.[71]

Investigation of alleged violations

40. Although LOAC can require investigations in certain circumstances, there may be perceived differences between LOAC and HRsL in this regard. For example, while under LOAC there is a need for investigation if there appears to have been a violation which amounts to a war crime,[72] civilian deaths which appear to be lawful under LOAC (e.g. circumstances whereby it was indisputably within the proportionality formula) might fall outside this obligation.[73] There is also a question as to the type of investigation (if any) required for violations of LOAC that do not amount to war crimes.[74] HRsL, however, could arguably require an investigation for most civilian deaths,[75] and thus of incidents which might fall outside those requiring an investigation under LOAC. In practice,

[69] Geneva Convention IV of 1949, Article 50.
[70] Geneva Convention I of 1949, Article 5; II, Article 6; III, Article 5; IV, Article 6; Additional Protocol I of 1977, Article 3 (modifying Geneva Convention IV, Article 6).
[71] *Loizidou v. Turkey*, (Application No. 15318/89, Grand Chamber, judgment of 18 December 1996; *Cyprus v. Turkey*, Application No. 25781/94, Grand Chamber, judgment of 10 May 2001. The scope of each particular obligation raises a different issue; see note 76 *infra*.
[72] This is most clearly the case with regard to the Grave Breaches regime, but also goes beyond this and stems, for example, from the duties to ensure respect and supress violations, and from customary international law; see analysis of customary international law in ICRC study, note 30 *supra*, pp.607-610; for examinations of the duty to investigate and a number of possible approaches to its implementation, see: A. Cohen and Y. Shany 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts', *Yearbook of International Humanitarian Law*, 14 (2011), pp 37-84; M. Schmitt, 'Investigating Violations of International Law in Armed Conflict' *Harvard National Security Journal*, Vol.2.1 31-84 (2011); The Public Commission To Examine the Maritime Incident of 31 May 2010 (Turkel Commission), *Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law.*
[73] "The incidental death or injury of a civilian during an armed conflict, conversely, does not necessarily give rise to an automatic suspicion of criminality; it will be the context in which the incidental death or injury occurred that will determine whether there is a reasonable suspicion of the perpetration of a war crime. Any such reasonable suspicion will immediately trigger an investigation." Turkel Commission, *ibid,* p.102.
[74] The Turkel Commission was of the opinion that war crimes require an *investigation*, while other violations require "some form of *examination*", *ibid*, p.99.
[75] *Isayeva, Yusupova And Bazayeva v. Russia* (Applications Nos. 57947/00, 57948/00 And 57949/00), Judgment, 24 February 2005, para.208; "The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict" *Al-Skeini v UK*, note 2 *supra*, para.163-4.

cases that come before human rights bodies are likely to be of the type that would have required investigation also under LOAC, due to circumstances pointing to alleged breaches of LOAC and not only HRsL. Finally, the precise shape of investigations conducted in the context of armed conflict cannot always reasonably be expected to meet the same standards as peace time domestic police investigations.[76] Many aspects of an investigation, from collection of forensic evidence to using experts at the alleged scene of crime might be difficult – if not impossible – to fulfil on the battlefield, and the specificities of the obligation must be interpreted in context.[77]

The right to an effective remedy

41. The relevance of LOAC to the right to an effective remedy only arises where the violation of HRsL depends upon a violation of LOAC. Otherwise, the question of the right to remedy would appear to be solely regulated by HRsL. Where there has been a violation of the State's LOAC obligations, LOAC does not appear to make express provision for individual redress but it does not prohibit it. Furthermore, there is significant evidence that, at the time of the drafting of Hague Convention IV of 1907 on War on Land and its annexed regulations, it was assumed that Article 3 of the Convention provided for an individual right of reparation.[78] Where HRsL provides for a right to a remedy in the case of a violation of HRsL, it would be perverse for such a right not to apply to violations of *both* LOAC and HRsL.

[76] "The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading inter alia to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators." *Al-Skeini v UK*, note 2 *supra*, para.168.

[77] *Ibid*.

[78] Kalshoven F., "State Responsibility for Warlike Acts of Armed Forces: From Article 3 of Hague Convention IV to Article 91 of Additional Protocol I of 1977 and Beyond", 40 ICLQ (1991) 827-858. It should be noted that the *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of IHRsL and serious violations of IHL* (van Boven/Bassiouni), GA Res. 60/147, 16 December 2005 refer equally to violations of HRsL and LOAC. The Statute of the International Criminal Court, in Article 75, provides for the possibility of reparations payable to victims. This includes victims of violations of the laws and customs of war.

APPENDIX

HASSAN v. UNITED KINGDOM, 29750/09

INTERVENTION SUBMITTED BY PROF. FRANCOISE HAMPSON & PROF. NOAM LUBELL OF THE HUMAN RIGHTS CENTRE, UNIVERSITY OF ESSEX

Excerpts:

ii. What the ICJ has said and done about the relationship and the inferences to be drawn

14 The ICJ has addressed the relationship on three occasions, in two Advisory Opinions and one contentious case. In the first case, the Advisory Opinion on *Nuclear Weapons*, the Court stated, "The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[1] It went on to say, "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[2]

15. The second Advisory Opinion concerned the *Legal Consequences of the Construction of a Wall*. The Court stated, "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."[3]

16. In the contentious case, *DRC v. Uganda*, the Court repeated its statement in the second Advisory Opinion but it did not include in the quotation the last sentence.[4] It then went on to find Uganda responsible for violations of LOAC/IHL and human rights law both in Ituri, which it considered to have been occupied, and in areas of the DRC which Ugandan forces did not occupy. The findings involved unlawful killings. The Court did not explain whether it *only* found a violation of Article 6 of the Covenant on Civil and Political Rights *because* the killings were in violation of the applicable rules of LOAC/IHL or whether the two findings were independent of one another. The ICJ does not face the problem confronting human rights bodies. It is free to find violations of both LOAC/IHL and human rights law. A human rights body, on the other hand, only has the competence to find a violation of human rights law. It is therefore essential that it knows in what circumstances it can only find a violation of human rights law if there is a violation of LOAC/IHL.

17. Certain elements do emerge clearly from the statements of the ICJ. First, the applicability of LOAC/IHL does not displace the jurisdiction of a human rights body. That results from the

[1] ICJ, *Legality or Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25
[2] *Ibid*
[3] *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106;
[4] ICJ, *Case concerning armed activity on the territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, paras. 216–220 at para.216.

finding that human rights law remains applicable in all circumstances. Second, where LOAC/IHL is applicable, a human rights body has two choices. It must either apply human rights law through the lens of LOAC/IHL or it must blend LOAC/IHL together. That is the only possible interpretation of certain matters being the province of *both* bodies of rules, whilst others are regulated by LOAC/IHL.

18. The reference to *lex specialis* is unhelpful, which may account for why the ICJ did not include the final sentence in its quotation from para.106 of the Advisory Opinion in the subsequent contentious case. Whilst in general terms its meaning is clear, its specific meaning and application appears to be interpreted in a different way by every commentator. Use of this term has served to obfuscate the debate rather than provide clarification. It was designed to deal with a different situation – a vertical relationship between a general regime and specific regimes.[5] The relationship between LOAC/IHL and human rights law involves a different problem – the horizontal collision of two separate legal regimes. One is not a more specific form of the other. That being said, it seems that according to the ICJ, in some circumstances, there will only be a violation of human rights law if there is a violation of LOAC/IHL. That is not, however, the only manifestation of the relationship. There are other circumstances in which the ICJ regards it as necessary to apply a mixture of LOAC/IHL and human rights law. The question then becomes in which circumstances should a human rights body apply which approach?

19. There are two issues which the ICJ did not expressly address. The first is whether the reference to LOAC/IHL includes reference to customary humanitarian law. The Court did address that indirectly. In *DRC v. Uganda*, it included amongst relevant texts Hague Convention IV of 1907, on the basis that its provisions represent customary law.[6] The issue will not be further addressed here, since it is not relevant in this case.[7]

20. Second, what is the relationship between derogation and the taking into account of LOAC/IHL by a human rights body? There would appear to be four possible permutations. First, if the State invokes LOAC/IHL where it is not applicable, and whether or not the State has also derogated, the human rights body should refuse to apply LOAC/IHL owing to its non-applicability. Second, if the basis for using LOAC/IHL at all is that human rights bodies should take account of other relevant areas of international law, that might be thought to point to its use whether or not a State has derogated and whether or not the State has invoked LOAC/IHL. On the other hand, where the State has done neither, the human rights body may wish to refer to the applicability of LOAC/IHL, whilst saying that the State has chosen to be judged by a higher standard (i.e. peacetime human rights law). The danger is that the result runs the risk of appearing disconnected from reality.[8] Third, where the State has not derogated but *has* relied on LOAC/IHL, the human rights body has two choices. It can either take account of LOAC/IHL, on the basis that it is an independently applicable body of rules, or it can argue that the only way of modifying human rights law is by derogating. In other words, it could argue that the 'gateway' to taking account of LOAC/IHL is derogation and not merely the applicability of LOAC/IHL. In that case, the human rights body would presumably also need to find that a State both can and should derogate when involved in armed conflicts outside national territory.

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[5] Hampson, "The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body", *IRRC*, (2008) Vol.90, No.871, p.549 at pp.558-562; see generally, Prud'homme, 'Lex specialis: oversimplifying a more complex and multifaceted relationship?' *Israel Law Review*, Vol.40 (2) (2007), pp.355–95

[6] Note 20, para. 217.

[7] The issue is likely to be most relevant to cases involving the conduct of hostilities and extra-territorial detention in non-international armed conflicts (NIACs).

[8] Note 8 *supra* and accompanying text.

Finally, where a State has derogated but has not invoked LOAC/IHL, the human rights body could either refer to the applicability of LOAC/IHL but say that the State has chosen to be judged by a higher standard or else it could take account of LOAC/IHL as an independently applicable relevant body of rules. It is important that a human rights body should not, by words or omission, appear to suggest that LOAC/IHL is not applicable when it is in fact applicable.

21. Finding a coherent way through all these permutations has become much more difficult in the past twenty years. Until the mid 1990s, there appeared to be no rules on the conduct of hostilities in NIACs. Since then, through the work of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the drafting of the Rome Statute, it appears that there are many such customary rules. That has a potentially very significant impact on a human rights body.[9] Since the question of the relationship between derogation and the use of LOAC/IHL appears to be a question of principle, it is not open to a human rights body to choose one solution for IACs and another for NIACs, unless it can do so on the basis of principle.

22. Apparently conflicting guidance on the issue is provided by the ICJ. On the one hand, human rights law remains applicable in all circumstances, *subject only to derogation*. This appears to point to the necessity of derogation. On the other hand, in some circumstances LOAC/IHL is the guiding law. It is possible to reconcile, somewhat artificially, the two approaches by limiting the former to human rights law itself and understanding the second as not modifying human rights law itself but rather as explaining how it is to be applied in certain circumstances.[10] No other guidance is available.

23. Even absent derogation, the factual existence of armed conflict (as opposed to the application of LOAC/IHL) may affect human rights obligations. A distinction should be drawn between the very applicability of human rights law and the scope of the obligations imposed.[11] The circumstances at hand may affect the manner or extent to which the State can fulfil, or fail to fulfil, its obligations. The factual circumstances in which the State finds itself are already taken into account by the Court, even without a derogation.[12]

iii. criteria to apply to determine the interplay between the two regimes

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9 It might, for example, permit a shift from a law and order paradigm to an armed conflict paradigm, which permits targeting on the basis of status or membership of a group, at a relatively low level of disruption. The general view is that common Article 3 of the four Geneva Conventions, which applies in NIACs, was applicable at least at certain times and places in Northern Ireland and that it was applicable to the situation in eastern Turkey in the late 1980s and early 1990s. Both governments denied the applicability of Common Article 3. Common Article 3 does not address the conduct of hostilities. If the recently discovered customary rules apply at the common Article 3 threshold, established case-law would have to be called into question in future cases. See generally, Melzer, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law, ICRC, 2009; Hampson, 'Direct participation in hostilities and the interoperability of the law of armed conflict and human rights law', in International Law Studies, Vol.87, US Naval War College, 2011, pp.187-213. It would also radically change the meaning of proportionality; see Lubell, "Challenges to applying human rights law to armed conflict", *IRRC*, (2005) Vol.87, No. 860, p.737 at pp. 744-746.

[10] It could be that derogation would be of relevance in NIACs as part of the evidence establishing the applicability of LOAC/IHL.

[11] Lubell 'Human Rights during Military Occupation' (2012) 885 *IRRC* 317

[12] *Ilascu & others v. Moldova & the Russian Federation*, note 16; *Isayeva & others v. Russian Federation*, 57947-9/00, Judgment of 24 February 2005; *Finogenov v. Russian Federation*, 18299/03 and 27311/03, Judgment of 20 December 2011; *Al-Skeini and Others v. the United Kingdom*, note 1, para. 168; The need to take factual circumstances into account is not limited to armed conflict. Detention on the high seas, or privacy of correspondence in a prison, are examples in which the obligations might be interpreted differently in light of the circumstances. See Human Rights Committee, *Miguel Angel Estrella v. Uruguay*, Communication No.74/1980, UN Doc.CCPR/C/OP/2 at 93 (1990), para.9.2; ECtHR, *Rigopoulos v. Spain*, Application No.37388/97, Decision of 12 January 1999; see also ECtHR, *Medvedyev and Others v. France*, note1, paras. 127–134.

26. The first question to be addressed is the identification of those issues where there will only be a violation of human rights law if there is a violation of LOAC/IHL. There is no general, top-down principle which can be applied to establish if an issue should be handled one way or another.[13] The answer will vary not only in relation to the issue involved but also in relation to other variables. Issues involving the protection of victims are more likely to involve a blend of LOAC/IHL and human rights law. Issues involving the conduct of hostilities are more likely to require a human rights body only to find a violation of human rights law if there is a violation of LOAC/IHL. Even that general proposition is subject to at least five variables. First, is the situation an IAC or a NIAC? The degree of intensity of a NIAC may also be relevant.[14] Second, it may be relevant to consider whether any military operation is proactive or reactive.[15] Third, it may be necessary to consider the means used to conduct the operation, bearing in mind that too much reliance on this element may reduce the level of scrutiny applied.[16] Fourth, it may be necessary to consider whether there is an existing provision of LOAC/IHL and, if so, whether it is customary or treaty based.[17] Fifth, it may be relevant to know whether the State has derogated and/or acknowledged the applicability of LOAC/IHL.[18] Putting these elements together will produce a spectrum. At one end will be issues where, in the circumstances, there will only be a breach of human rights law if there is a breach of LOAC/IHL. At the other end, a human rights body will be required to blend LOAC/IHL and human rights law. Some issues will be generally at one end of the spectrum but, on occasion, a different solution will be required. This spectrum approach appears to offer the best chance of providing flexibility for a human rights body, whilst providing sufficient guidance for the armed forces. An example of an activity where it is likely that in most circumstances there will only be a violation of human rights law if there is a violation of LOAC/IHL is the conduct of a military operation involving the armed forces of two opposing States and sophisticated weaponry.

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[13] For example, proximity to the battlefield might point to applying human rights law through the prism of LOAC/IHL but where does that leave the drone operator based thousands of miles from the point of impact? Similarly, it might be thought that rules on the conduct of hostilities would point the same way but that rules on the protection of victims would point to reliance on human rights law. That would, however, suggest that the specificities of the POW detention regime would be diluted, even though it has evolved over centuries, responds to the exigencies of the specific situation faced in IACs and is contained in a treaty which has received universal ratification. Similar objections can be raised with the regard to the blanket application of any individual criterion.

[14] Under LOAC/IHL treaty rules, there are only rules on the conduct of hostilities in a NIAC at a high level of intensity (*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 entered into force 7 December 1978 and not merely Common Article 3 of the Geneva Conventions).

[15] This is a relevant distinction in human rights law; *McCann & others v. United Kingdom*, 18984/91, judgment of Grand Chamber of 27th September 1995; *Ergi v. Turkey*, 23818/94, judgment of 28th July 1998.

[16] If the use of air strikes were thought to indicate the need to apply human rights law through the prism of LOAC/IHL, there would be a temptation for States to resort to such strikes, as opposed to ground operations, to achieve that result.

[17] It is sometimes suggested that LOAC/IHL should be the law applied where it contains a specific provision. Whilst it may be an element to include in the mix, to place exclusive or even primary reliance on this element would lead to arbitrary results. It would also require a definition of "specific provision". Does the fact that there are detailed detention regimes in IACs mean that it is "specific", leaving no room for the use of human rights law, or does the absence of specific provision about access to information and access to legal representation mean that there is no specific provision? The problem identified here arises where an activity is regulated under LOAC/IHL provision but they do not address specific details regarded as routine under human rights law. There is a separate problem where LOAC/IHL does not address a particular issue at all. Examples include the manner and circumstances in which a search is conducted, the policing of demonstrations and controls on the operation of the media, for example to protect national security or to prevent the incitement of genocide, war crimes or crimes against humanity. Here, there is no overall context of LOAC/IHL regulation. There may be a temptation to suggest that nothing should displace the normal operation of human rights law. It is submitted that the better approach is set out above at para.23.

[18] See discussion at para.20.

27. The second question arises where it is determined that the norms applicable involve a mixture of LOAC/IHL and human rights law. In this situation, the answer requires the application of both bodies of rules. That still leaves the question of how great a departure from "normal" human rights law will be permitted. Any given situation is likely to require elements of both bodies of law working together, but the balance and interplay will vary. The elements referred to in the previous paragraph will be relevant. The interplay between the regimes must be context dependant, and must lead to practicable obligations based on a respect for the objectives of the two regimes in light of the circumstances at hand. A number of criteria can provide guidance, but no single criterion is independently determinant. The criteria that can affect the interplay will include (but are not limited to):

    - The status of affected individuals: for example, circumstances involving detention of POWs lend themselves more to LOAC/IHL than to the rules of human rights law;
    - The proximity to hostilities and the level of control that the military has over the situation: LOAC/IHL will dominate in a typical battlefield scenario, whereas human rights law will play a greater role when dealing with situations that do not involve hostilities and in which there is greater control (and therefore a range of riskless options), such as demonstrations which become violent;
    - The means used in the operation: for example, use of the air force will indicate that LOAC/IHL is likely to provide regulation of force. Notwithstanding, this must not become an incentive to utilise heavy weaponry unnecessarily in order to rely on LOAC/IHL.[19] It should be recalled that LOAC/IHL will not be applicable if the situation has not reached the threshold of armed conflict.
    - As noted earlier, whether or not the state concerned has relied upon LOAC/IHL, and whether or not it has derogated, may also affect the legal analysis of the interplay.

28. Specific situations cannot be reduced to one applicable rule, and any set of circumstances will require a number of rules to be utilised. In other words, a specific LOAC/IHL provision can only relate to one single aspect of a situation but does not provide a solution for the legal regulation of the circumstances as a whole. Moreover, the reliance on the notion of "specific" does not provide an answer in the case of absence of a rule: does the absence of a specific LOAC/IHL provisions mean that LOAC/IHL specifically says that these are not required, or would it mean that human rights law is required to fill the gap?[20] Situations of detention, for example, can trigger the examination of grounds of detention, review, treatment, fair trial (if a criminal charge is laid), and more. It may be the case that some of these matters will need to be determined primarily by LOAC/IHL and others by human rights law. Any given situation is likely to require elements of both bodies of law working together, but the balance and interplay will vary.

29. Accordingly there may be situations – such as detention of POWs – in which the combination of criteria lead to the conclusion that LOAC/IHL would carry more weight in the interplay, and determination of human rights violations regarding issues such as grounds and review of detention will be based on the relevant LOAC/IHL rules. Even in such contexts, however, human rights law would not be under absolute subjection to LOAC/IHL. For example, if there are allegations of inhumane treatment, human rights law would still assist in determining issues such as the specificities of acts which constitute a violation. Conversely, in other contexts the combination of criteria will require heavier reliance on human rights law in the interplay. This may be

[19] *Supra*, n.37; see generally *Gulec v. Turkey*, 21593/93, Judgment of 27 July 1998.
[20] *Supra*, n.38.

the case, for example, when attempting to detain a civilian who does not pose a direct threat at that precise moment, in an area under the complete control of the military and in which they can operate unhindered. In such circumstances, even if the individual may have lost civilian protection under LOAC/IHL due to rules on participation in hostilities, human rights law may require a graduated use of force rather than direct lethal force. LOAC/IHL will remain relevant, and can affect matters such as the composition of the detention review mechanism, while human rights law will feed in once more on certain safeguards.

30. From the perspective of a human rights body, it would be advantageous to use human rights law as the first step to identify the issues which need to be addressed (e.g. periodicity of review of lawfulness of detention; access to information about reasons for detention; legal assistance before the review mechanism). The second step, determining applicable law in relation to the alleged violations, would then require a contextual analysis using both LOAC/IHL and human rights law, in light of the circumstances of the case at hand. On condition that the human rights body presents its analysis with sufficient coherence and clarity, the decisions generated will provide guidance to States and armed forces ahead of future action. It goes without saying that the approaches and the result must be capable of being applied in practice in situations of armed conflict.