International human rights law and the law of armed conflict in the context of counterinsurgency: With a particular focus on targeting and operational detention

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Chapter II  The Legal Context

This chapter examines the broader legal context against which the interplay between IHRL and LOAC is to be examined. The research question here is: which general aspects can be identified that may determine the analysis of the interplay between IHRL and LOAC in relation to targeting and operational detention? Paragraph 1 identifies and discusses some of the general conceptual underpinnings of IHRL and LOAC, in order to provide a common picture of their object, purpose and mechanisms. Paragraph 2 examines three themes in the legal discourse on the role and interplay of IHRL and LOAC, namely the dogmatic approaches on the relationship between IHRL and LOAC; the discourse on the so-called ‘humanization’ of armed conflict; and the debates on the aptness of IHRL and LOAC to deal with ‘new’ wars. Paragraph 3 functions as a precursor to Chapter III, as it provides a general overview on the subject of norm relationships in international law.

1. Some General Notions of IHRL and LOAC

1.1. IHRL

A first principal legal regime of international law relevant to the deprivation of life and liberty of insurgents resulting from targeting and operational detention in counterinsurgency is IHRL. IHRL is the body of public international law concerning the total sum of civil, political, economic, social, cultural and collective rights, as recognized in international and regional treaties and declaration(s) as well by customary international law, protecting the human dignity of individuals and groups against the arbitrary exercise of power by States.

Its origins can be traced back to “the natural, constitutional, and political rights discourses that emerged in the Enlightenment and found their way into the constitutions of the 18th and 19th centuries.”

Before 1945, international law was formal of character and built on the principle of State sovereignty. It dealt primarily with the relations between States. The principle subject matter was the delimitation of jurisdiction. The very idea of individuals as subjects of international law and, hence, the bearer of (human) rights within the framework of international law was a concept strange to the traditional State outlook on international law, if not for the mere reason that in those days the individual, as explained by Lauterpacht, “played an inconspicuous part because of the international interests of the individual and his contracts across the frontier were rudimentary.”

This is not to say that the individual was not protected at all by international law. However, at that level, States viewed individuals “mostly as aliens and nationals, not as individuals.” In so far another State’s treatment of their nationals coincided with the legitimate (yet predominantly political-economic) sove-

177 Clapham (2007b), 22. For documents, see the Petition of Rights (England, 1628); the Habeas Corpus Act (England, 1679); the Bill or Rights (England, 1689), the Virginia Bill of Rights (US, 1776) and the Declaration of the Rights of Man and of the Citizen (France, 1789). For doctrine, see Locke (1946 (original in 1690)); Rousseau (1762).
178 Lauterpacht (1950), 63.
179 Harris (2004), 654.
reign interests of the State of which the individual was a national, States were willing to enter the realm of international law. These interests found their way into a variety of treaties, doctrines and institutions, most notably the doctrine of humanitarian intervention, the abolition of slavery, the protection of minorities and the Minority System of the League of Nations, the Mandates System of the League of Nations, international labor standards, International Humanitarian Law, the area of diplomatic protection and the area of State responsibility for injuries against aliens. These treaties, doctrines and institu-

180 18th and 19th century: abolition of slavery. Freedom from slavery was accepted as a rule of customary international law since 1815. 1926 Slavery Convention: 60 L.N.T.S., 253; U.K.T.S. 16 (1927) Cmnd. 2910. 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery: 266 U.N.T.S., 3; U.K.T.S. 59 (1957) Cmnd. 257. Abolition of slavery was powered by economic and strategic imperatives, but there was also a genuine belief that slavery was inhuman. League of Nations set up commissions on slavery, adopted the 1926 Slavery Convention and conventions to suppress the trade of women and children.

181 Following the post-World War I political order, the so-called Principal Allied and Associated Powers insisted that those new States with minorities signed special ‘minorities treaties’ containing obligations to respect rights of identified ethnic, national or religious minorities among their inhabitants. The driving force behind the protection of minorities was its potential to upset international peace. Among the signatories were Albania, Austria, Bulgaria, Czechoslovakia, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Turkey, and Yugoslavia. These treaties formed the basis from which the League of Nations, in the absence of a specific mandate thereto in the Covenant, derived its powers to serve as a guarantor of the obligations and to develop a system permitting petitions by minorities to be dealt with by the League Council, and in appeal, by the PCIJ (see e.g. Access to German Minority Schools in Upper Silesia [Advisory Opinion]; German Minority Schools in Upper Silesia [Advisory Opinion]; Minority Schools in Albania [Advisory Opinion]). For a summary history and more detailed examination of the Minorities System, see Buergenthal, Shelton & Stewart (2002), 10-14.

182 Between World War I and World War II, the ILO embarked on a legislative and treaty-making process for the protection of labour rights. It also created a supervisory machinery to promote the implementation of these rights to which workers’ organizations could appeal under certain circumstances.

183 Most notably in relation to the adoption as rules of international law of norms governing the treatment of the wounded, sick and shipwrecked as a result of war, and prisoners of war, which sought to ensure a reciprocal standard of treatment of combatants hors de combat of the parties to the war.

184 The Covenant of the League of Nations introduces a mandates system for the transfer and administration of the former colonies of the States that lost World War I by the mandatory Powers. The mandatory Powers were under an obligation to protection the wellbeing of the native populations and to establish conditions guaranteeing freedom of religion and conscience in the mandated territories, in accordance with Article 22 League Covenant.

185 The international law concerning State responsibility for injuries to aliens conferred upon States an inter-State obligation to treat foreign nationals in compliance with certain minimum standards of civilization and justice. This offered some protection, but only in so far the State of which the injured alien was a national was willing, upon or in absence of a request of the injured national, to accept that the injuring behavior of its national was also an injury to the State and to exercise, as a measure of last resort, its right to assert a claim against the injuring State. See also the Permanent Court of International Justice in the Mavrommatis Palestine Concessions (Jurisdiction) case: “It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint, Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant.” See (1924), The Mavrommatis Palestine Concessions - Greece v. Britain (Jurisdiction), Judgment of 30 August 1924. See also (1927b), United States of America (B.E. Chattin) v. United Mexican States, Award of 23 July
tions are generally viewed by human rights lawyers as the foundation of contemporary IHRL, since they signify efforts to protect the individual at the level of international law, while at the same time they implied a recognition that a State’s treatment of its citizens is a subject not always limited to its domestic jurisdiction.\textsuperscript{186} However, “[…] it may be reasonable to doubt whether those developments authentically reflected sensitivity to human rights generally.”\textsuperscript{187}

By contrast, the position of the individual in international law, and in IHRL specifically, changed significantly after 1945, fueled by the atrocities inflicted upon populations before and during World War II. As a subject of international law, the human rights protected by IHRL are by design, i.e. directly and decisively, rather than incidentally,\textsuperscript{188} bestowed upon individuals. This is reflected in treaty law and customary international law.\textsuperscript{189}

Customary IHRL has developed through the consent and consistent practice of States. At its basis lies the UDHR, adopted by the UN in 1948 and containing a catalogue of fundamental human rights. While not a treaty, it is generally considered to have matured into customary international law. As a subset of the overall catalogue of human rights, fundamental human rights form a category of non-derogable human rights that are binding upon all States, irrespective of their consent to be bound or their codification into treaty law.\textsuperscript{190} While there is no universal agreement on which human rights are fundamental, a State can be said to violate fundamental human rights when it practices, condones or encourages: genocide; slavery; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; violence to life or limb; hostage taking; punishment without fair trial; prolonged arbitrary detention; failure to care for and collect the wounded and sick; systematic racial discrimination; and consistent patterns of gross violations of internationally recognized human rights.\textsuperscript{191}

After the adoption of the UDHR, human rights treaties emerged at both universal and regional level. Important treaties at the level of civil and political rights, with which we are most concerned with in this study, are the ICCPR, the ECHR and the ACHR.\textsuperscript{192} Other treaties are designed to eradicate violations of specific human rights, such as the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment. Human rights and freedoms find further regulation in soft-law documents that may serve as an authoritative source of interpretation of binding rules. In addition, (quasi-)judicial human rights bodies play a crucial monitoring and standard-setting role.

In the event counterinsurgent forces violate human rights, and their conduct can be attributed to the counterinsurgent State, the State can be held accountable for an international wrongful act under the international law of State responsibility, also if it acted on the basis

\textsuperscript{186} Buergenthal (2008)
\textsuperscript{187} Henkin (1989)
\textsuperscript{188} On a discussion of theories viewing individuals as the “incidental” beneficiaries of rights and duties between State parties, see Henkin (1979), 439.
\textsuperscript{189} Lauterpacht (1950), 63.
\textsuperscript{190} Meron (1986)
\textsuperscript{191} American Law Institute (1987), § 701.
\textsuperscript{192} For economic, social, and cultural rights, see the ICESCR.
of a mandate of the UNSC.\textsuperscript{193} An important feature of IHRL is its detailed web of monitoring and enforcement mechanisms, which offers both States as individuals redress for human rights violations. Examples are the UNHRC, which monitors the implementation of the ICCPR and resolves inter-State complaints regarding violations of the ICCPR. In addition, if States have ratified the Optional Protocol to the ICCPR, individuals subject to the jurisdiction of a State may file individual complaints with the UNHRC against States for alleged violations of their human rights. Similar individual complaint mechanisms exist with the European and Inter-American human rights systems. Accusations and condemnations of human rights violations by a counterinsurgent State have a delegitimizing effect and may greatly impact the overall counterinsurgency efforts.

Three aspects will be discussed in order to highlight some of the conceptual underpinnings of IHRL that not only characterize it as a legal regime, but also are determinative of its interplay with LOAC. These concern (1) the nature of the relationships regulated by IHRL, as well as the nature of the rights and obligations protected respectively imposed and (2) the scope of applicability of IHRL and (3) the concept of derogation.

1.1.1. Relationships

IHRL, as a regime of international law, is premised on international obligations arising between States, which denotes to a horizontal relationship. However, as a corollary of its main purpose, the principal relationship IHRL seeks to regulate is a \textit{vertical} relationship, i.e. that between the State and the individual within its jurisdiction.\textsuperscript{194}

\textsuperscript{193}In the case of \textit{Behrami and Behrami v. France and Saramati v. France, Germany and Norway} (hereinafter: \textit{Behrami & Saramati}), the issue of attribution arose in the context of alleged violations of human rights by members of the armed forces of States party to the ECHR who had contributed forces to KFOR and UNMIK, the military and civil organizations established by the UNSC to govern Kosovo, a province of today's Serbia. The ECtHR ruled that the violations of human rights could not be attributed to the States, but to the UN, as they were carried out under the latter's auspices. However, in (2011a), \textit{Al-Jedda v. United Kingdom, App. No. 27021/08, Judgment of 7 July 2011}, which concerned the detention of an individual by UK forces, the ground for which was claimed to lie in UNSC-resolution 1546, the ECtHR held that in this case the UNSC “had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations” (§ 84) and that “in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law” (§ 102).

\textsuperscript{194}This vertical construct is one of the principal conceptual foundations of human rights law in general, finding a (philosophical) basis in the Age of Enlightenment in Europe and the doctrine of natural law. As a result, the individual is placed at the centre of the legal (and social) system, a position that has forced States to review their relationship with the individual. It no longer was one permitting intervention in the rights and freedoms of individuals based in divinity, but one of law, by which States were bound to protect individuals. For the source of this theoretical construct, see Rousseau (1762); Locke (1946 (original in 1690)).
1.1.2. Rights

At the one end of the vertical relationship-spectrum is the individual, which is the principal rights-holder. Since 1945, and reflected in the rapid development of the UDHR and the European and Inter-American human rights systems, the fundamental rights protected by IHRL are by design universally bestowed upon all human beings. As expressed by Haratsch:

Bereits der Begriff “Menschenrechte”, also Rechte des Mensen, verdeutlicht, daß es sich um mit der Natur des Menschen verknüpfte, natürliche Rechte handelt, die unabhängig von jeder Positivierung in einer Rechtsordnung bestehen. Diese natürlichen Rechte sind unveräußerlich und unabdingbar; mit ihnen steht und fällt die menschliche Persönlichkeit, deren Wert und Würde sie kennzeichnen.

From the rights-holders perspective, the above implies firstly that human rights are inalienable, for it is not possible for a human being to loose or modify its human quality in whatever manner, neither willingly nor unwillingly. In addition, it means that, save some excep-

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196 Before 1945, the very idea of individuals as subjects of international law and, hence, the bearer of (human) rights within the framework of international law was a concept strange to the traditional outlook of States on international law. International law was formal of character and built on the principle of State sovereignty. It dealt primarily with the relations between States. The principle subject matter was the delimitation of jurisdiction. As explained by Lauterpacht (1950), 63, it is State sovereignty “[…] which rejects, as incompatible with the dignity of States, the idea of individuals as units of that international order which they have monopolized and thwarted in its growth. It is the sovereign State, with its claim to exclusive allegiance and its pretensions to exclusive usefulness that interposes itself as an impenetrable barrier between the individual and the greater society of all humanity […].” As a result, the treatment by States – and thus the position – of the individual within its territory was merely a matter of the autonomous exercise of domestic jurisdiction. Issues between the State and its own nationals did not belong to the legal periphery of other States. This is not to say that the individual was not protected at all by international law. However, at that level, States viewed individuals “mostly as aliens and nationals, not as individuals” (Harris (2004), 654). In so far another State’s treatment of their nationals coincided with the legitimate (yet predominantly political-economic) sovereign interests of the State of which the individual was a national, States were willing to enter the realm of international law. These interests found their way into a variety of treaties, doctrines and institutions, most notably the doctrine of humanitarian intervention, the abolition of slavery, the protection of minorities and the Minority System of the League of Nations, the Mandates System of the League of Nations, international labor standards, LOAC, the area of diplomatic protection, and the area of State responsibility for injuries against aliens. These treaties, doctrines and institutions are generally viewed by human rights lawyers as the foundation of contemporary IHRL, since they signify efforts to protect the individual at the level of international law, while at the same time they implied a recognition that a State’s treatment of its citizens is a subject not always limited to its domestic jurisdiction. However, whether these developments genuinely reflected concern for human dignity may be doubted. as explained by Henkin, “[i]n general, the principles of customary international law that developed, and the special agreements that were concluded, addressed only what happened to some people inside a State, only in respect with which other States were concerned, and only where such concern was considered their proper business in a system of autonomous States. […] If some norms and agreements in fact were motivated by concern for a State’s own people generally, they did not reflect interest in the welfare of those in other countries, or of human beings generally. State interests rather than individual human interests, or at best the interests of a State’s own people rather than general human concerns, also inspired voluntary inter-State co-operation to promote reciprocal economic interests.” See Henkin (1989), 212.
197 Haratsch (2001), 7-8; Donnelly (2003), 10. See also the second paragraph of the preamble of the American Convention on Human Rights. See also Donnelly (2007), 21.
198 Donnelly (2007), 21 and 38.
tions, human rights are held *equally* by all human beings, irrespective of their relationship to the State or their status in society and regardless of their “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Conventional IHRL is premised on the idea that in order to guarantee the very idea of human rights as rights of individuals, it is necessary to provide individuals with a corollary right to a substantive remedy. This right to a substantive remedy has been expressed in the UDHR, as well as in other international and regional human rights instruments.

Ideally, as Donnelly explains, rights are continuously “actively respected” or “objectively enjoyed,” without there being a need for “assertive exercise”, i.e. exercise of the right through a claim. However, the ability of “assertive exercise” of a right implies having the power and authority to claim that right in the absence of “active respect” of “objective enjoyment”. It is this possession of power or authority that “distinguishes having a right from simply being the (rights-less) beneficiary of someone else’s obligation.”

For that very reason, IHRL provides *international mechanisms* that allow individuals to initiate and participate, fully or partially, in proceedings brought before a (quasi-)judicial body, provided it has competence following the respondent State’s acceptance of its jurisdiction. Right-holders, exercising their procedural competence, can therefore be said to be in discretionary control of the relationship with duty-bearers: the right-holder decides when and how to exercise his or her rights.

The above implies that insurgents, as any other individual, have human rights that must be respected and ensured by the counterinsurgent State. In the event of a violation, insurgents have an ability to enforce these rights by making use of the mechanisms available in IHRL, and, in addition, have a right to a remedy in case of a violation of their human rights. While the above demonstrates that it is non-contentious that IHRL, in potential, is a regime of relevance to the relationship between the counterinsurgent State and insurgents, another significant issue is whether and, if so, to what extent a particular human right (and its com-

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199 The exceptions concern either exclusions from the benefit of some rights or the granting of additional rights to specific groups of persons, such as aliens, citizens and minorities. For an overview and short discussion, see Provost (2002), 25-26.

200 See Article 2(1) UDHR. See also Tomuschat (2003), 2; Donnelly (2007), 21; Provost (2002), 25; Dworkin (1977), 272-273.

201 Provost (2002), 44. However, (as will be demonstrated in Section 3) the entitlement to rights does not immediately imply a competence to exercise them. It remains questionable that a right to a remedy exists in customary IHRL, see Provost (2002), 44; American Law Institute (1987), § 307; Tomuschat (1999).

202 See Article 8 UDHR; Article 2(3) ICCPR; Article 25 ACHR; Article 7 ACHPR; Article 14 CAT; Article 6 CERD. See also Nowak (2003), 2.

203 Donnelly (2003), 9: “Assertive exercise” means that the right is exercised (asserted, claimed, pressed), activating the obligations of the duty-bearer, who either respects the right or violates it (in which case he is liable to enforcement action); “Active respect” means that the duty-bearer takes the right into account in determining how to behave, without it ever being claimed. We can still talk of the right being respected and enjoyed, even though it has not been exercised. Enforcement procedures are never activated, although they may have been considered by the duty-bearer; “objective enjoyment” means that rights apparently never enter the transaction, as in the example of buying a loaf of bread […] ; neither right-holder nor duty-bearer gives them any thought. We perhaps can talk about the right — or at least the object of the right — being enjoyed. Ordinarily, though, we would not say that the right has been respected. Neither exercise nor enforcement is in any way involved.

204 Donnelly (2003), 9.
mensurate obligation) – such as the right to life and the right to liberty – is at all applicable ratione personae to regulate that relationship in a given context. It is to this aspect that we will now turn.

1.1.3. Obligations

To every individual right IHRL is linked a corresponding duty. In IHRL, the State is the principal duty-bearer. While international law does not rule out, and in fact recognizes the possibility to impose obligations on individuals such as insurgents in as much as it can grant them rights, it is generally agreed that non-State actors such as insurgent movements are not bound by obligations of IHRL, not even under customary international law, even though it has been suggested that a process of norm-crystallization to that effect is under way.

The obligations imposed on a State are designed such that they regulate the manner in which a State may take territorial and extraterritorial measures to maintain or restore public security, law and order or to otherwise exercise its authority or power over individuals, objects, or territory. These objective obligations can be categorized in three groups.

205 It is now widely accepted that, next to States, international organizations by virtue of the legal personality in general public international law, have obligations under IHRL, in so far exercise functions similar to the exercise of jurisdiction by a State. See Kleffner (2010b), 67; Clapham (2007a), 573. While, generally, conventional IHRL does not provide the possibility for entities other than States to become a party (in 2010, negotiations have begun between the EU and the Council of Europe for EU accession to the ECHR), international organizations are bound by norms of customary IHRL. Other bases from which to conclude that international organizations have obligations under IHRL are their treaties, internal rules and practice. See, for example, Article 103 UN Charter.

206 Provost (2002), 102: “[…], the normative framework of human rights centres obligations firmly on the state and its agents, in a manner consonant with its basic purpose of protecting individuals against abuses by the state.” In so far a breach of human rights obligations can be attributed to it, States are responsible under the general international law of State responsibility, as laid down in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, see International Law Commission (2001b).

207 In so far it concerns conventional international law, the case of the Jurisdiction of the Courts of Danzig, the Permanent Court of International Justice acknowledged that there is no principle in international law preventing parties to a treaty from conferring obligations upon individuals. See (1928b), Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration), Advisory Opinion of 3 March 1928, 17-18. In so far it concerns customary international law, examples of individual obligations can be found in the prohibition of slave trade, piracy, breach of blockade and war contraband. See Kelsen (1967), 124-131; Nørregaard (1962), 88-95. See also Resolution 95(I) of the General Assembly, 11 December 1946, on the “Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”, in particular the commentary to Principle I on individual criminal responsibility for crimes against international law, which states that “the general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law.”

208 IHRL so far has imposed obligations on individuals only in exceptional cases and the expansion of obligations should be viewed with caution, even though it may support IHRL in its efforts to achieve its primary objective. An underlying reason is fear for a heightened sense of legitimacy amongst non-State armed groups if they are accused of having violated human rights: it may be interpreted to imply that non-State armed groups are State-like entities, for only States have human rights obligations, although this argument is said to have become moot. Clapham (2007a), 576.

209 Kleffner (2010b), 67.

210 Tomuschat (2004), 577-584. Evidence for such a process is found in the many cases in which the UN and other bodies have called upon non-State armed groups to respect human rights. The practice of the non-State armed groups, however, undermines this process and it cannot therefore be concluded that a customary rule has emerged. Zegveld (2002), 39-46.
Firstly, obligations to respect are negative obligations, framed as a prohibition, and connote a State duty to refrain directly or indirectly from interference with the human rights and freedoms of individuals, in so far such interference is not expressly permitted by virtue of limitation clauses within the relevant treaty provisions, as a result of treaty-reservations, or following lawful derogation. Thus, the obligation not to arbitrarily deprive a person of his life or liberty corresponds with the right to life, or the freedom of liberty, or the right to physical and mental integrity.

Secondly, obligations to ensure are positive obligations, and imply a State’s duty to act, in order to protect individuals from infringements by other (private) individuals. Failure to act may imply a violation of the relevant human rights. The obligation to ensure is a generic obligation, and entails two specific obligations: the obligation to fulfill and the obligation to protect.\textsuperscript{211}

As a species of the obligation to ensure, obligations to fulfill human rights concerns a State’s obligation to take the legislative, administrative, judicial and practical – preventive or proactive – measures necessary to ensure that the relevant rights are implemented to the greatest extent possible.\textsuperscript{212}

The obligation to protect places upon States a duty to take the proactive measures necessary to avoid infringement by other individuals in the enjoyment of a right. This obligation is linked to the doctrine of (indirect) horizontal effects of human rights, or Drittwirkung.

Both the obligations to protect and fulfill confer upon a State a duty of due diligence, even in cases where the act is not directly imputable to the State through its agents, but to a private individual. This implies a duty for States to prevent, investigate and punish all violations, and to adopt domestic legislation that confers obligations upon private individuals, the non-compliance of which constitutes an illegal act.\textsuperscript{213}

While being objective in character, and therefore in principle applicable without their consent, States, in a way, have the power to influence the scope of the applicability of human rights obligations. Firstly, States may make reservations to human rights treaties,\textsuperscript{214} a right that has been used on large scale.\textsuperscript{215} Reservations of human rights treaties cannot be made if they are incompatible with the object and purpose of a treaty.\textsuperscript{216} 

\begin{itemize}
  \item \textsuperscript{211} On the division between obligations to respect, fulfill and protect, see Office of the High Commissioner for Human Rights available at: http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx
  \item \textsuperscript{212} UNHRC (2004), § 7. An obligation to fulfill involves the obligations of due diligence. For example, in the case of (1988e), Velasquez Rodriguez v. Honduras, Judgment of 29 July 1988, § 176, the IACiHR ruled that “[t]he State is obliged to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”
  \item \textsuperscript{214} According to Article 2 VCLT, a reservation is a “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a Treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the Treaty in their application to that State.”
  \item \textsuperscript{215} As of 1 January 2013, the ICCPR had 167 State parties and 74 signatories. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en
  \item \textsuperscript{216} Reservations are also prohibited when prohibited by the treaty itself. See Article 19 VCLT. However, with a few exceptions, the human rights treaties remain silent on permissibility of making reservations.
\end{itemize}
Secondly, States may limit the enjoyment of certain human rights in circumstances explicitly set out in the relevant provisions, provided they are prescribed in law, pursue a legitimate aim, and are necessary in a democratic society. It here concerns an adjustment by the State of the scope of a human right. A third instrument that may be used by a State to limit its human rights obligations is derogation. Derogation involves a suspension of human rights in the case of a public emergency threatening the life of the nation, such as an armed conflict. It is subject to strict requirements, as will be separately addressed below. Finally, and limited to human rights obligations under the ECHR, the State Parties to that treaty have a ‘margin of appreciation’ that permits them to implement their obligations in view of their historical, social, political, and legal specificities.

Many human rights obligations can be said to constitute obligations erga omnes, i.e. “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection.” As such, they are IHRL-obligations that principally concern the vertical, rather than the horizontal, relationships between State and those under its control and, whether conventional or customary in nature “represent the adherence of the state to a normative, public order system which is not conditioned on the performance of any parallel obligation by other states.” In other words, while, as argued by Simma “[o]n the normative level, the treaties under consideration set forth reciprocal rights and obligations in precisely the same way as their more traditional counterparts,” at the same time, as explained by Mégret

[the special character of human rights suggests that states’ human rights obligations are in some ways independent of their consent to be bound by them. [...] States are solemnly committing to something which they were already, at least morally or philosophically, obliged

218 A legitimate aim must be “a pressing social need.” Examples are situations threatening national security, public order, public health or morals or the rights and freedoms of others. See (1976d), Handyside v. the United Kingdom, App. No. 5493/72, Judgment of 7 December 1976, § 48.
219 The limitation must be necessary in a democratic society, and it must be proportionate to the achieved aim.
220 For example, the right to life, as set out in Article 2 ECHR, may be limited by the imposition of the death penalty, as a result of lawful acts of war, or in (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection. See also Parts B, Chapter IV, and C, Chapter VI below.
221 (1970), Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium v. Spain), Judgment of 5 February 1970 (Merits), § 33: “[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” See also Jennings & Watts (1992), 4; American Law Institute (1987), 161.
to recognize. Another way of putting it would be to say that becoming a party to a human rights treaty is declaratory of states’ obligations rather than constitutive of them.  

Given the nature of such commitment, it would be “profoundly misleading” and “wrong” to typify human rights treaties as grounded in reciprocity, for there is generally no interest involved for States in the non-compliance with its obligations by another State at the vertical level. As concluded by the ICJ’s Advisory Opinion on the Reservations to the Genocide Convention:

[T]he contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.  

Conceptually, a breach by a State party merely has an “indirect, universal impact on states.”

1.1.4. The Scope of Applicability of IHRL

A second feature characterizing IHRL as a regime is its scope of applicability. Only when IHRL is applicable do rights and obligations between States and individuals arise, and can a State be held responsible for violations of its obligations. As noted, ratification, limitation clauses, derogation and concepts as ‘margin of appreciation’ may limit a State’s human rights obligations, and as such, can be said to limit the applicability of human rights. Other fundamental aspects of applicability concern the question, firstly, whether, upon ratification, a treaty-based obligation arises because an individual can be said to come within the jurisdiction of the State, and secondly, whether the State continues to be bound by IHRL obligations in times of armed conflict. Both aspects will be addressed below.

1.1.4.1. IHRL Obligations Following ‘Jurisdiction’

In drafting human rights treaties, States have sought to introduce a reasonable limit to State responsibility, without encroaching upon their object and purpose. (With the exception of the ACHPR), the principal universal and regional human rights treaties central in this study each provide, in varying formulations, that their substantive and procedural norms only apply to individuals who are “within the jurisdiction” of its State Parties. Thus, the ICCPR, in Article 2(1) requires each State Party to respect and to ensure the human rights guaranteed therein “to all individuals within its territory and subject to its jurisdiction,” whereas Article 1 of the ECHR states that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Similar language can be found in Article 1(1) of the ACHR, which calls upon State Parties “to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and free-

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224 Mégret (2010), 129.
225 Mégret (2010), 127-128.
227 Provost (2002), 167-8. Third States may be affected by another State’s breach of conventional HRL-obligations in various ways, e.g. when it is confronted with the effects of human rights violations in another State (refugees); on the basis of a national, religious, ethnic or other relationship with an individual under the control of another State; when it is economically affected by human rights violations.
228 Emphasis added.
229 Emphasis added.
doms, [...]. It is this concept of ‘jurisdiction’ that provides the conceptual element integrated in IHRL treaties that establishes the vertical relationship between the individual and the State. It serves as a threshold-condition for the applicability ratio personae of IHRL, and implies that an individual’s position outside the State’s jurisdiction obstructs his legal ability to confront the State with its obligation to guarantee his/her human rights, for States have accepted that such a duty does not exist in those circumstances.

1.1.4.1.1. The Meaning of ‘Jurisdiction’ in General International Law

While “a degree of uniformity of usage does exist and may be noticed”, the term ‘jurisdiction’ in general international law is often used as a generic term to cover a wide range of issues. In the most generic terms, ‘jurisdiction’ refers to the scope of a State’s competence to regulate its exercise of power within its public order over persons and property, natural and legal, via its domestic law, and subject to similar competence and sovereignty of other States. The concept of jurisdiction in general international law is premised in the idea that States, in their horizontal relations with each other, must protect their unfettered sovereignty from unlawful interference by another State. In terms of function, the law on jurisdiction primarily imposes limitations on the display of legal power outside the domestic arena to prevent infringements upon another State’s sovereignty. As such, it regulates whether or not a State’s claim to competence of exercising its jurisdiction on the territory of another State is lawful or unlawful. A secondary function of the law of jurisdiction is that it regulates the consequences of unlawful exercise of that power. In general international law, two traditional distinct types of jurisdiction can be identified. The first type concerns a State’s rule or law-making authority – also known as prescriptive or legislative jurisdiction. Secondly, a State has the authority to take action to ensure compliance with the laws – also known as prerogative or enforcement jurisdiction. In the context of military operations, it is jurisdiction to enforce that is of particular relevance.

230 Emphasis added.
231 As was made clear by the ECtHR in the case of Pad and Others v. Turkey, “[...] the exercise of jurisdiction is a necessary condition for a Contracting State to be held responsible for acts imputable to it which give rise to an allegation of infringement of rights and freedoms set out in the Convention.” (2007d), Pad v. Turkey, App. No. 60167/00, Judgment of 28 June 2007, § 52 (emphasis added).
232 It may simply refer to the territory of the State, to its legal system, or to the competence ratione materiae, personae or loci of a court or tribunal. See Gondek (2009), 47. A historical examination of treaty provisions since World War I, carried out by Milanovic, shows that the word ‘jurisdiction’ is used in various contexts, even if they are mentioned in the same provisions.
233 The definition contains elements found in definitions or descriptions of jurisdiction found in Brownlie (2003), 297; Harris (2004), 265; Oxman (1997)55; Shaw (2003), 572; Brownlie (2003), 297; Jennings & Watts (1992), 456; Mann (1984), 20.
234 While ‘sovereignty’-centered, ‘jurisdiction is not to be viewed as an equivalent of – and therefore not to be confused with – sovereignty. See Brownlie (2003); Malanczuk (1997), 109. It is (principally) an “an aspect or an ingredient or a consequence of sovereignty,” and its application is restricted to limits of a State’s sovereignty.” See Mann (1984), 20. Similarly: Brownlie (2003), 297. At the same time, as noted by Gondek: “It is now beyond doubt that the sovereignty of state is no longer unfettered and is itself subject to the limits of international law.” Gondek (2009), 49.
235 Mann (1964), 15; Higgins (1994), 56; Shaw (2003), 573; Brownlie (2003), 297. The first consequence is that an unlawful claim to competence will not be accepted by the State affected. The second consequence is that it may give rise to State responsibility.
236 Lowe (2006), 339. In addition, ‘jurisdiction’ may refer to a State’s authority to settle legal disputes – jurisdiction to adjudicate, or adjudicative jurisdiction. Generally, this third type is considered to be a species of
The authority to enforce jurisdiction is generally only lawful when exercised within a State’s own territory. Given its intrusive character on the sovereignty of other States, the exercise of extraterritorial enforcement jurisdiction by State A on the territory of State B is in principle unlawful, unless it takes place on an exceptional basis accepted in international law. For example: State A, in its lawful exercise of jurisdiction has criminalized terrorism. State A decides to enforce this piece of legislation by sending military forces across its borders to abduct terrorist X from the territory of State B, for the purposes of interrogation. This extraterritorial exercise of jurisdiction to enforce is unlawful, unless it can be based on an exceptional basis recognized in international law. In general, the exceptional basis to enforce jurisdiction extraterritorially follows from the consent, invitation or acquiescence of State

both prescriptive and enforcement jurisdiction. Arguably, as its main principles are that of territoriality and nationality, adjudicative jurisdiction shares more common ground with prescriptive jurisdiction than with enforcement jurisdiction. Schachter (1991), 255.

In its authority of prescriptive jurisdiction, the State has the sovereign power to extend the applicability of its domestic law to any individual, property, territory or situation, regardless of their geographical position or occurrence and even without the consent of another State, provided that there is no rule of international law that specifically prohibits a State from doing so. An example is the law on diplomatic immunities. See Mann (1984); Bernhardt (1997), 55-9; Bernhardt (1995), 337-343; Jennings & Watts (1992), § 137; Brownlie (1998), 287, 301 and 312-314. However, the scope of exercise of lawful prescriptive jurisdiction is regulated by a number of principles, each containing their own limitations on the exercise of jurisdiction. These principles include (1) the principle of territoriality, according to which a State may prescribe legislation with regard to every individual present on its territory; (2) the nationality (or active personality) principle, according to which a State may exercise jurisdiction over (i.e. regulate the conduct of) nationals abroad; (3) the passive nationality principle, which permits a State to prohibit conduct that may harm nationals, even if the perpetrator of the act is not a national and the prohibited conduct takes place outside the State’s territory; (4) the protective principle, according to which a State may prohibit (and adjudicate) acts that (may) harm the security of the State; and (5) the universality principle, which permits a State to prohibit conduct that may affect the international community as a whole, such as war crimes or crimes against humanity. Each principle contains conditions that must be complied with in order to avoid State responsibility for wrongful acts in international law. See also Kamminga (2008), §§ 7-9: “State practice does not support the view that the exercise of any form of prescriptive and adjudicative jurisdiction beyond a State’s borders is permitted as long as there is no specific rule of international law prohibiting it” (emphasis added). Of these principles, the principle of territoriality takes the dominant position. After all, it is on their own territory that States exercise their jurisdiction in the vast majority of cases. However, it is today commonly accepted in doctrine that prescriptive jurisdiction is not essentially and rigidly territorial, but that an approach of flexibility and reasonableness is to be applied in determining the lawfulness of the extraterritorial exercise of prescriptive jurisdiction. This approach holds that “[i]f a sufficiently close connection between the exercise of authority and the extraterritorial situation over which the authority is exercised, subject to the principle of reasonableness, can be shown, a state may lawfully legislate or adjudicate.”

This follows from the PCIJ in the Lotus judgment: “Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.” (1927a), The Case of the S.S. "Lotus" (France v. Turkey), Judgment of 7 September 1927.

Such consent is often obtained through bilateral or multilateral agreements. Examples are the 1984 Inter-American Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments (adopted 24 May 1984, entered into force 24 December 2004, 24 ILM, 468); the 1999 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands concerning a Scottish Trial in the Netherlands, concluded at The Hague, Netherlands, on 18 September 1998 and entered into force on 8 January 1999 (United Kingdom Treaty Series No. 43 [1999]); EU Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction in Civil and Commercial Matters (2001 OJ L12/1, 23). See also the NATO Sta-
B, or if State A is an occupying power in view of the relevant rules of LOAC.\textsuperscript{240} If a legal basis is absent, the State carrying out the extraterritorial forcible act is responsible under international law for the infringement of the sovereignty of State B.

In sum, the notion of ‘jurisdiction’ in general international law is \textit{essentially territorial}. The \textit{extraterritorial} exercise of the jurisdiction to enforce is in principle prohibited, unless it has an exceptional basis in international law. It thus follows that the applicability \textit{ratione personae} of IHRL is, in any case, contingent upon its applicability \textit{ratione loci}, most notably in extraterritorial context. In today’s fragmented and globalized world, the significance of these geographic limits of ‘jurisdiction’ is greater than ever before. The potential for jurisdictional clashes rises, also because States rely in military power to enforce jurisdiction on other States. It is here that tension arises between the meanings of ‘jurisdiction’ in general international law and the ‘jurisdiction’-based applicability of IHRL-treaties. The application of the ordinary meaning of jurisdiction in general international law to extraterritorial military operations States suggests that treaty-based IHRL obligations only arise when a State’s presence in another State finds a basis in the exceptional situations \textit{permitted} by international law. This would imply that the unlawful conduct of a State in the territory of another State would not trigger the applicability of treaty-based IHRL obligations, whereas that very conduct could very well affect an individual’s human rights. Such outcome would be illogical. It is submitted that even the unlawful exercise of authority also constitutes the exercise of IHRL-jurisdiction.

To return to the example of the abduction of insurgent X by counterinsurgent State A: whilst the presence of armed forces in State B requires a lawful basis in international law for it to be in compliance with the notion of jurisdiction as understood in general international law, the fact remains that the very act of abduction affects the human rights of the individual X, and, for the purposes of determining whether State A was under an obligation to respect or ensure the human rights of X, it triggers the issue of whether X came within the ‘jurisdiction’ of State A.\textsuperscript{241} As it appears, the ordinary meaning of jurisdiction is of particular relevance for the question of whether State responsibility arises as a result of its conduct \textit{vis-à-vis} another State, and as such pertains to the traditional horizontal relationship between States. The question therefore arises whether this ordinary meaning in international law also applies to the question of State responsibility following from a State’s conduct \textit{vis-à-vis} individuals, and thus applies to the vertical relationship between State and individual, or whether ‘jurisdiction’ in the applicability-clauses of IHRL-treaties refer to something else. In addition, the question may be asked whether a State’s IHRL obligations under customary international law are also subject to this notion of jurisdiction.

As follows, answers to these issues are of particular relevance for the conduct of military operations in the various situational contexts of counterinsurgency under scrutiny here, particularly in view of their extraterritorial scope. Eventually, the applicability or not of particular IHRL-obligations not only informs us on the potential of IHRL forming a relationship with equally valid norms of LOAC, but also of how such interplay is to be apprehended.


\textsuperscript{241} The example given here takes place in an extraterritorial setting. However, the jurisdiction to enforce may also be unlawfully exercised in a domestic setting, for example when the State orders the abduction, torture or targeted killing individuals, thereby clearly violating its own domestic laws.
ciated and how such appreciation impacts the very conduct of counterinsurgency operations, with a particular focus on those resulting in the deprivation of life and liberty.

1.1.4.1.2. The Meaning of ‘Jurisdiction’ in the Travaux Préparatoires

While they cannot function as a decisive means of treaty interpretation, a first source for determining the meaning of ‘jurisdiction’ in IHRL-treaties is the travaux préparatoires. The preparatory work shows that the drafters struggled with the choice between a ‘territory’- or ‘jurisdiction’-based scope of application, with a general preference for the latter. In particular the drafters of the ICCPR debated at length the implications of a mere ‘territory’-based scope of application, which was proposed by the US delegation. The present formula of Article 2(1) ICCPR, based on a subsequent amendment of the US delegation (“within its territory and subject to its jurisdiction”) is a compromise that was eventually adopted, even though the drafting history shows strong resistance from other States against the inclusion of the words “within its territory”. In addition, arguably, the US’ territorial focus only had a limited scope as, inter alia, it merely appeared to cover positive obligations under the ICCPR which they could not in practice be capable of satisfying “in territories where they do not have the authority to do so” or where the imposition thereof would be excessive. This suggests that the US amendment did not also seek to bar from extraterritorial applicability obligations to respect, as it may have envisaged the effective compliance with this type of obligations as not problematic. In sum, this points at the limited significance of the “with-

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242 The travaux préparatoires, or preparatory work of a treaty is a supplementary means of interpretation. Article 32 VCLT stipulates that recourse may be had to supplementary means of interpretation only “in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” See also (1995c), Loizidou v. Turkey (Preliminary Objections), App. No. 40/1993/435/514, Judgment of 23 March 1995, § 71.

243 In 1950, a proposal for amendment was put forward by the US, according to which Article 2 should read: “[e]ach State Party hereto undertakes to ensure to all individuals within its territory the rights set forth in this Covenant.” The words “within its territory” were intended to replace the words “within the jurisdiction” present in earlier drafts of the provision.

244 Opposition to the US amendment came from France, Yugoslavia, Greece, Italy, Japan, China and Peru who all argued that the ‘jurisdiction’ reference was sufficient. United Nations (1963), § 30.

245 As explained by Mrs. Roosevelt, the US representative, the US amendment “[…] was designed to make clear that the Covenant was applicable only to persons within the territory and jurisdiction of the contracting parties. Otherwise it could be interpreted as obliging a contracting party to adopt legislation applying to persons outside its territory although technically within its jurisdiction for certain questions. That would be the case, for example, in the occupied territories of Germany, Austria and Japan, as persons living in those territories were in certain respects subject to the jurisdiction of the occupying powers, but were in fact outside the legislative sphere of those Powers.” See United Nations (1950), § 53. For additional reasons pointing at the limited scope of the United States amendment, see Gondek (2009), 100-101.

246 Lubell (2010), 201. See also McGoldrick (2004a), 66. Similarly, see Gondek (2009), 100, 107-108. This argument finds further support with the ICJ, which in its Palestinian Wall Advisory Opinion held that “[t]he travaux préparatoires of the Covenant confirm the Committee’s interpretation of Article 2 of the that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence. See (2004), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ (Advisory Opinion of 9 July 2004), § 109. See also Tomuschat’s individual opinion in (1981b), Sergio Euben López Burgos v. Uruguay, Comm. No. 12/52 of 29 July 1981, Appendix.
in the territory” phrase and justifies a disjunctive reading of the two components of Article 2(1). A disjunctive approach interprets “and” as “or” and results into a separation of the phrases “within its territory” and “subject to its jurisdiction.”

Despite some fervent resistance by, most notably, the US and Israel, there is no doubt that this approach is the correct interpretation and that the relevant aspect for determining whether an obligation arises under the ICCPR is the issue of whether the State in question exercised ‘jurisdiction’ over the individual.

As for the ECHR, the first drafts of the ICCPR which still referred to ‘jurisdiction’ – only inspired the drafters of the ECHR to change the initial wording of Article 1 ECHR from ‘residing within the territories’ to ‘within its jurisdiction’. This change was made because the more flexible and ambiguous term ‘jurisdiction’ made it possible to extend the applicability of the ECHR to individuals present on the territory of a State Party beyond the mere range of those residing on the territory of a State party. Indeed, this has been viewed by some, including the ECtHR, to conclude that the words “within its jurisdiction” were not

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247 A literal reading of the word “and” implies a limitation of the applicability of human rights obligations under the ICCPR, to the extent that it (1) excludes its applicability outside a State Party’s territory, even if it can be concluded that an individual is subject to its jurisdiction and (2) that it excludes individuals, such as diplomatic and consular personnel or members of the armed forces of a visiting State, who, while present on the territory of a State Party, are not within its jurisdiction.

248 For an early recognition of the disjunctive approach, see (1982d), Sophie Vidal Martins v. Uruguay, Comm. No. R.13/57 of 23 March 1982; (1983b), Mahel Pereira Montero v. Uruguay, Communication No. 106/1981 of 31 March 1983; (1983d), Varela Nunez v. Uruguay, Comm. No. 108/1981 of 22 July 1983; (1983e), Samuel Lichtenstein v. Uruguay, Comm. No. 77/1980 of 31 March 1983.. See also (1981c), Sergio Esken Lopez Burgos v. Uruguay, Comm. No. 12/52, UNHRC (29 July 1981), and most particularly, Tomuschat. See also (2004), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ (Advisory Opinion of 9 July 2004), § 109. To argue against the disjunctive reading, as argued by some scholars, would lead to results that are inconsistent with the object and purpose of the ICCPR in the sense of Article 31 VCLT, or that are manifestly absurd in the sense of Article 32 VCLT. This takes places at three levels. Firstly, it would lead to absurd results in relation to the application of certain rights, for example in relation to the right to enter one’s own country (Article 12(4) ICCPR). See Buergenthal (1981), 74; McGoldrick (2004a)49. For more examples, see Mose & Opsahl (1981), 297-298; (1983c), Samuel Lichtenstein v. Uruguay, Comm. No. 77/1980 of 31 March 1983, §§ 4.1 and 6.1. Secondly, in relation to territorial State conduct, the literal reading of the phrase would limit the applicability of the ICCPR to only those situations where individuals are present on the territory of a contracting State, and also under its jurisdiction. However, the territorial control by another entity, such as an insurgent movement, an occupying power, or an international organization, could preclude individuals from becoming subject to that State’s jurisdiction, which would prevent individuals from exercising their right to enforce their human rights under the ICCPR. See McGoldrick (2004a)49. Thirdly, in relation to extraterritorial State conduct, the literal reading of the phrase would imply that a State Party could evade its obligations under the ICCPR by carrying out its acts violating human rights outside their own territory. See Nowak (2005), 44; Meron (1995), 79. Similarly, but arguing in relation to human rights obligations in general: Cassese (2005), 386.

250 In its final report to the Committee of Ministers, the Committee of Experts justified the adoption of the change as follows: “The Assembly draft had extended the benefits of the convention to ‘all persons residing within the territories of the signatory States.’ It seemed to the Committee that the term ‘residing’ might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. This word, moreover, has not the same meaning in all national laws. The Committee therefore replaced the term ‘residing’ by the words ‘within their jurisdiction’, which are also contained in the Draft Covenant of the United Nations Commission.” See Report to the Committee of Ministers submitted by the Committee of Experts instructed to draw up a draft Convention of Collective Guarantee of Human Rights and Fundamental Freedoms of 16 March 1950 (Doc. CM/WP I (50) 15; A 924), in Robertson (1975-1985), Volume IV (1977), 20.
adopted with a view to the extraterritorial application of the ECHR, but had a primarily territorial connotation. Gondek argues that nowhere in the travaux préparatoires is the meaning of ‘jurisdiction’ ‘discussed or explained. It is therefore, as Lawson suggests, “not unlikely that the drafters of the Convention did not give much thought at all to any extraterritorial impact of the Convention.” However, the amendment that eventually led to the adoption of the words “within its jurisdiction” expressed as its aim “to widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention.” While it is difficult if not impossible to reach any definite conclusions on the basis of the travaux préparatoires of the Convention, this at least suggests that the ECHR may also apply outside the territories of the State parties.

In regard of the Inter-American human rights system, we will focus on the drafting history of the ACHR only, since the ADRDM is not a treaty. The first drafts of Article 1 ACHR called upon the States Parties “to respect the rights and freedoms recognized herein and to ensure to all persons within their territory and subject to their jurisdiction the free and full exercise of those rights and freedoms, […]” Eventually the reference to “within their territory” was dropped. As corroborated by the IACiHR in the case of Molina

89. The drafting history of the Convention does not indicate that the parties intended to give a special meaning to the term “jurisdiction.”
90. At the time of adopting of the American Convention, the Inter-American Specialized Conference on Human Rights chose to omit the reference to ‘territory’ and establish the obligation of the State parties to the Convention to respect and guarantee the rights recognized therein to all persons subject to their jurisdiction. In this way, the range of protection for the rights recognized in the American Convention was widened, to the extent that the States not

252 Lawson (2004), 89-90.
253 Robertson (1975-1985), 200 (emphasis added). See also Lawson (2004), 89.
254 Article 32 VCLT refers to the preparatory work of treaties. The ADRDM was drafted in 1945. Though not a treaty and not legally binding, it has proved to be a very important instrument in the Inter-American human rights system. Since it “was not intended to function as a treaty and no consideration was given to describing how to apply it to the OAS member states,” the final text ADRDM does not contain a specific jurisdiction clause. However, during the drafting stage, specific reference was made to jurisdiction in draft Article XVIII, the predecessor of the current Article II, which concerns the right to equality before the law and the prohibition of discrimination. In its Resolution XXX, the reference to ‘jurisdiction’ was deleted. The OAS held that, in its personal scope, the “essential rights of man are not derived from the fact that he is a national of a certain State, but are based upon attributes of his human personality” that can only be limited “by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.” It is therefore not surprising that, today, the IACiHR, despite the absence of a specific reference to ‘jurisdiction’ relies on Article II to justify the extraterritorial scope of applicability of the obligations arising from the ADRDM in situations of extraterritorial conduct of the members of the OAS.
256 As annotated in the Report of the US Delegation to the conference, “Panama was particularly interested in this deletion to protect the human rights of persons residing in the Panama Canal Zone which is subject to US jurisdiction but is not US territory.” See Buergenthal & Norris (1982-1993), Volume III, booklet 15 (August 1982), 1-66, at 15. It may be noted, particularly in light of the US’ present position with respect to the phrase “within its territory” in Article 2(1) ICCPR, that the US did not oppose in any way Panama’s proposal. See also Gondek (2009), 111.
only may be held internationally responsible for the acts and omissions imputable to them within their territory, but also for those acts and omissions committed wherever they exercise jurisdiction.\textsuperscript{257}

In sum, the \textit{travaux préparatoires} provide only limited insight in the underlying motives of the drafters of the IHRL treaties central in this study for the choice for the wording used to delineate their scopes of applicability.\textsuperscript{258} While demonstrating a preference for the concept of ‘jurisdiction’ over ‘territory’, the \textit{travaux préparatoires} provide no fundament to draw definite conclusions on the geographical scope that the drafters attached to the concept of ‘jurisdiction’. Nor does it offer insight in the precise meaning of the notion of ‘jurisdiction’. At the same time, however, it follows that the choice for the word ‘jurisdiction’ may be interpreted as a sign that the scope of applicability is not limited to a State’s territory, but may extend to areas where individuals come within that State’s jurisdiction. The subsequent practice of the human rights supervisory bodies and the ICJ, however, offer more insight.

1.1.4.1.3. Subsequent Practice of Human Rights Supervisory Bodies and the ICJ

The practice of the human rights supervisory bodies and, to a lesser extent, of the ICJ on the issue of the ‘jurisdiction’ in an extraterritorial context is extensive. The practice demonstrates a difference in approach between the UNHRC, IACHHR/IACtHR\textsuperscript{259} and ICJ on the one hand, and the ECHR/ECtHR on the other hand. While the former appear to adopt a rather relaxed threshold for the extraterritorial applicability of the ICCPR and the ADRDM/ACHR, the latter takes a more cautious stance, which \textit{inter alia} finds reflection in its position concerning the outer geographic boundaries of the ECHR in extraterritorial situations.\textsuperscript{260}

\textsuperscript{257} (2010c), \textit{Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility), §§ 89-90.}

\textsuperscript{258} For an extensive history of the drafting of the ECHR, see Robertson (1975-1985). See also Gondek (2009), 84-92; Lawson (2004), 88-90.

\textsuperscript{259} The vast majority of the relevant practice concerning the scope of applicability of human rights obligations arising from the Inter-American system follows from the IACHHR, in relation to both the ADRDM and the ACHR. While not a treaty, and not containing a jurisdiction-clause, the ADRDM is nevertheless of significance as it reflects human rights principles of the OAS; it functions as the basis for human rights accountability for those States that have not ratified the ACHR, most notably Canada, the United States and Cuba; and both the IACHHR and IACtHR view the ADRDM’s provisions as binding international obligations for the member-States of the OAS. As argued by Melzer, the ADRDM is of importance not despite, but arguably \textit{because} it does not “interpret a jurisdiction clause of a particular convention, but [focuses] on the generic content of the human rights relationship between the State and the individual exposed to its collective power. It may also be recalled that no provision of the American Convention ‘shall be interpreted as […] excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.’” Melzer (2008), 126.

\textsuperscript{260} In \textit{Bankovic}, the ECtHR excluded the applicability of the ECHR to the territory of States not belonging to the legal space of the ECHR.\textsuperscript{260} In relevant part it held that “[i]n short, the convention is a multi-lateral treaty operating […] in an \textit{essentially regional context} and \textit{notably} in the legal space (\textit{espace juridique}) of the contracting States […]. The FRY clearly does not fall within this legal space. The convention was not designed to be applied throughout the world, even in respect of the conduct of contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the convention” ((2001c), \textit{Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001, § 67}”). This ruling generated a great deal of discontent among scholars, particularly in light of the participation of members of the Council of Europe in the then recently begun conflicts in Afghanistan (and later
Notwithstanding the difference in stance between the bodies examined, upon closer examination of this practice, it is possible to identify two approaches or tests to determine when an individual whose human rights are affected by the extraterritorial conduct of a State come within the jurisdiction of that State for the purposes of the applicability of the relevant treaty-based human rights obligations.

On the one hand, ‘jurisdiction’ arises by virtue of the exercise of State Agent Authority (SAA). The function of this approach is that it brings individuals within the jurisdiction of a State by virtue of the conduct of its State agents, even if this conduct can be considered an unlawful form of enforcement jurisdiction. In these instances, it is not the geographic location or a person’s nationality, rather than the nature of the relationship between the State agent(s) and individuals, which ought to be one of authority and control in order for jurisdiction to arise.

A characteristic feature resulting from the SAA-based practice is that the relevant bodies appear to accept that the obligations arising from rights and freedoms protected in the treaties can be tailored and divided to the degree of authority and control exercised over the individual. In other words, a State is bound to comply with the human rights affected by its conduct only, and not with the entire catalogue of rights protected within the treaty. In addition, it may imply that, as the ICJ suggests, “the obligations of States with regard to the rights of other States and their inhabitants in areas beyond national control are generally limited to the duty to respect, that is to say, not to interfere with those rights, and that additional positive obligations require a express basis in international law.”

SAA features as the dominant approach in the practice of the UNHRC (thereby adopting a disjunctive reading of Article 2(1) ICCPR) and is used as a more general, overarching principle.}

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Iraq). Lawson and Wilde both interpreted the words “essentially”, “notably” and “context” as leaving an opening for the applicability of the ECHR outside the geographical scope of the ECHR. Lawson (2004), 114; Wilde (2005), 794-795. In its subsequent case-law, however, the ECtHR has slowly distanced itself from its ruling in Bankovic. Cases such as Öcalan, Issa and Al-Saadoon and Mujdhibi demonstrate that the ECtHR has accepted the applicability of the ECHR in Kenya and Iraq. Finally, in Al-Skeini, the ECtHR explicitly recognizes the applicability of the ECHR outside its espace juridique: “The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a “vacuum” of protection within the “Convention legal space” [...] However, the importance of establishing the occupying State’s jurisdiction in such cases does not imply, a contrario, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction [...]” (2011b, Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011, § 142.)


262 Melzer (2008), 135, in conclusion of the ICJ’s recognition of the “general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.”

263 See, inter alia, UNHRC (2004), § 10: “States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. [...] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.” See also (1981c), Sergio Echen Lázaro Burgos v. Uruguay, Comm. No. 12/52, UNHRC (29 July 1981), § 12.2 (emphasis added), in which it held that ‘jurisdiction’ re-
ciple allowing for the broad extraterritorial applicability of the relevant human rights instruments, regardless of the nature of the State conduct. Thus, ‘jurisdiction’ is to be understood as a matter of factual exercise of power rather than the lawful competence to exercise jurisdiction as understood in general international law, in any case when it concerns the conduct of a State through its agents infringing upon the conventional rights protected under the ICCPR when present outside the territorial jurisdiction of that State. This view is shared by the IACtHR, and seemingly also the ICJ.

fers “not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.”

A disjunctive reading of Article 2(1) ICCPR entails that the word ‘and’ should be read as ‘or’, implying that jurisdiction under Article 2(1) ICCPR stretches to persons who are within a State Party’s territory, as well as to persons who are subject to a State Party’s jurisdiction. The phrase “to anyone within the power or effective control of that State Party” points out that jurisdiction is linked to the person, and not to a territory (even though the General Comment remains silent on the parameters that determine when the required degree of “power or effective control” is sufficiently satisfied).

It also reached this conclusion in (1981c), Sergio Euben López Burgos v. Uruguay, Comm. No. 12/52, UNHRC (29 July 1981), § 12.3: “Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights “to all individuals within its territory and subject to its jurisdiction”, but does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.”

See also Melzer (2008), 125.

(1999f), Coard and Others v. the United States (US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999, § 37 (emphasis added). The IACtHR used almost identical wording in Brothers to the Rescue (i.e. the case of Armando Alejandro Jr. and Others v. Cuba), a case concerning the shooting down of two small airplanes by Cuban military aircraft in international airspace. See (1999e), Armando Alejandro Jr. and Others v. Cuba (Brothers to the Rescue), Case No. 11.589, IACtHR (29 September 1999), §§ 23 and 25 (emphasis added). Applied to the facts of the case, “[the Commission has examined the evidence and finds that the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. The fact that the events took place outside Cuban jurisdiction does not limit the Commission’s competence ratione loci, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state’s obligation to respect human rights continues – in this case the rights enshrined in the American Declaration. The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the “Brothers to the Rescue” organization under their authority.” For other expressions on the ‘authority and control over persons’-approach, see also Inter-American Commission on Human Rights (1985), § 29 (concerning the extraterritorial assaultination of the former Chilean Minister of State and Ambassador, Orlando Letelier, and the former Chilean Commander-in-Chief of the Army, General Carlos Prats); (1993d), Sales and Others v. the United States (US military intervention in Panama), Case No. 10.573, Decision of 14 October 1993, § 29 (concerning civilian harm arising from the military operations carried out in 1989 by the US in Panama with the objective of removing General Noriega from power); (1999f), Coard and Others v. the United States (US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999 (concerning 17 Grenadian citizens who had been involved in the overthrow of the Bishop government and were detained by the US armed forces. They claimed that they had been held in incommunicado detention for 9–12 days; they had been mistreated and that they had been deprived of their right to a fair trial as a result of US involvement in the judiciary process after having been handed over to the Grenadian authorities); (2002j), Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba, Decision of 13 March 2002 (concerning the request for precautionary measures on behalf of 300 individuals held in detention by the US in Guantanamo Bay, Cuba after their capture in Afghanistan and elsewhere).

In (1996d), Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996, § 29, the ICJ recognizes the continued applicability of the ICCPR during IAC, which indicates that the ICCPR is viewed to apply per definition to a factual exercise of extraterritorial conduct, regardless of the lawfulness of that conduct. According to Melzer (2008), 134, the fact that the ICJ examined the lawfulness of the use of nuclear weapons by States, combined with the assumption that States are not likely to

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In contrast, within the European human rights system the practice of (particularly) the ECtHR demonstrates a more cautious and restrictive approach, by adhering to the traditional interpretation of ‘jurisdiction’ that “[a] State’s jurisdictional competence under Article 1 is primarily territorial, […]”\(^{260}\) and that only in exceptional cases can acts of States carried out, or having effects, extraterritorially constitute an exercise of jurisdiction within the meaning of Article 1.\(^{270}\) While the ECHR and ECtHR have recognized in a number of cases that exceptional circumstances may give rise to the applicability of the ECHR in situations of State conduct carried out, or having effects, in the territory of another State, the existence of such exceptional circumstances has been determined on a case-by-case basis, based on the specific facts at hand.\(^{271}\) As a result, not every situation of State-agent-conduct results in the exercise of jurisdiction on the basis of SAA. In sum, SAA may arise:

1. from acts of diplomatic and consular agents present on foreign territory in accordance with international law (most notably the international law of diplomatic privileges and immunity);\(^{272}\)
2. where a State exercises jurisdiction extraterritorially when, through the consent, invitation or acquiescence of the government of the ‘receiving’ State, it exercises public powers normally to be exercised by that government;\(^{273}\)
3. when a State, through its agents, uses forcible measures that thereby bring the individual under the control of the State;\(^{274}\)


\(\text{\textsuperscript{273}}\) This possibility has been expressly mentioned in the case of (2001b), Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECHR (12 December 2001), § 71 and was reaffirmed in Al-Skeini, where the ECtHR explained that “[…] where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State. (2011b), Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011, § 135. See also (1992a), Drozd and Janousek v. France, App. No. 12747/87, Judgment of 26 June 1992; (2002c), Gentilhomme, Schoff-Benhadji and Zerrouki v. France, App. Nrs 48205/99, 48207/99, 48209/99, Judgment of 14 May 2002; and (1977b), X and Y v. Switzerland, App. No. 7289/75, Decision of 14 July 1977. For more detailed discussion, see Gondek (2009), 147-150.

when a foreign State remains present on another State’s territory following the removal from power of a State’s government, and assumes the exercise of some or all of the public powers normally to be exercised by a sovereign government, but which it is no longer able to fulfill, such as the authority and responsibility for the maintenance of security in a territory or part thereof.\textsuperscript{275}

A second approach detectable from the practice of the relevant human rights bodies (most notably the ECtHR) and the ICJ concerns Effective Control over an Area (ECA). As explained by the ECtHR, ECA concerns the situation when as a consequence of military action — whether lawful or unlawful — [a State] exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.\textsuperscript{276}

The effect of effective overall control over territory is that it is not necessary to demonstrate whether in a particular case jurisdiction arose from the conduct of State agents affecting the human rights of a particular individual. Rather, it automatically generates jurisdiction of the State in relation to all individuals present within the territory of control (i.e. the area of operations), regardless of the nature of the acts of the State. As such, under ECA, the rights and freedoms cannot be tailored and divided in a fashion similar to SAA, but the State is, in principle, bound to guarantee the full range of rights and freedoms protected under the treaty.

Based on the practice of the ECtHR and ICJ, the question of ECA has arisen in the following situations:

(1) a State’s loss of control over part of its own territory;\textsuperscript{277}

(2) military occupation;\textsuperscript{278}

\textsuperscript{275} As per the reasoning applied by the ECtHR in (2011b), Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011, § 149.


\textsuperscript{277} Ilascu and Others v. Moldova and Russia, App. No. 48787/99, Judgment of 8 July 2004, § 313. In casu, this implied that “Moldova still has a positive obligation to take the diplomatic, economic, judicial or other measures that it is in the power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.” See § 331

(3) invitation, consent or acquiescence;\(^{279}\)
(4) when a relationship of dependence exists between a State and a local administration within another State;\(^{280}\)
(5) temporary control over territory.\(^{281}\)
As can be concluded from the above, the question applicability of valid treaty-based IHRL norms pertaining to targeting and operational detention to determine the interplay potential is subject the the counterinsurgent State’s ratification of a relevant treaty as well as the specific context in which the counterinsurgency operation takes place. This will be examined in more detail in Chapter IV below.

1.1.4.1.4. Customary IHRL

The issue of applicability of human rights obligations under regional and universal treaties, particularly in an extraterritorial context, does not affect the continued applicability of human rights obligations under customary international law, irrespective of where, why and how a State operates. As noted by Lubell:

\[
\text{[t]he debate over extraterritorial effect of human rights treaties is paramount to the determination of the competence of treaty monitoring bodies to scrutinize the cases but, regardless of the outcome of this debate, if the affected right is part of customary international law then, by taking the extraterritorial forcible measure, a state may have violated its international legal obligations.} \quad ^{282}\]

The applicability of customary IHRL is not depending on the fulfillment of an applicability clause and as such IHRL is appears not to be territorially limited in its application, particularly not in the case of IHRL-obligations \textit{erga omnes} and \textit{jus cogens}. In sum, therefore, States continue to be bound by customary IHRL obligations wherever they operate, regardless of whether the conventions to which they are a party apply, and irrespective of how applicability of such treaties is determined.

\(^{279}(2001b), Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECHR (12 December 2001), § 71.\)

\(^{280}(2004g), Ilascu and Others v. Moldova and Russia, App. No. 48787/99, ECHR (8 July 2004), § 392 (emphasis added), confirmed in (2012a), Catan and Others v. Moldova and Russia, App. No. 43370/04, 8252/05 and 18454/06, Judgment of 19 October 2012, § 89.\)

\(^{281}(2004j), Isa v. Turkey, App. No. 31831/96, Judgment of 16 November 2004. In the this case, regarding large-scale military operations by Turkish forces in Northern Iraq, the ECtHR held that Turkey, had the applicants established “the required standard of proof” (§ 84), would have exercised de facto temporary control over such territory (§ 74).\)

\(^{282}\)Lubell (2010), 235.\)
1.1.4.2. Applicability in Armed Conflict

As noted, the assumption in this study is that the situational contexts of counterinsurgency take place in the context of armed conflict. The assumption of the existence of an armed conflict is also of relevance for the question of applicability of IHRL. After all, if only LOAC applies in an armed conflict, as some argue, then no interplay will arise. Indeed, a brief look in history teaches us that, in its initial phase as a regime of public international law immediately after World War II, IHRL was not envisaged to be applicable in armed conflicts, in any case not in international armed conflicts.283 This separatist stance changed in the early 1950’s, on instigation of the UN when it invoked human rights in relation to the Korean conflict284 and the Soviet invasion in Hungary.285 The turning point, however, came with the Six Day War, in 1967,286 the 1968 Tehran International Conference on Human Rights and the subsequent adoption by the General Assembly of resolution 2675, in which the principle was laid down that “[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.”287 Not until the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974-1977), and the resulting documents (AP I and II) before the ICRC, albeit seemingly hesitantly at first, acknowledged that human rights continue to apply during armed conflict.288 Both protocols refer expressly to human rights.289 Today, despite persistent objection among some States (most notably Israel and the US) and scholars,290 the applicability ratiocini temporis of human rights is generally accepted to stretches from peace to armed conflict “and any point on the blurred scale between them.”291 In other words: human rights apply at all times. Both the UN and the ICRC have consistently and continuously reaffirmed the applicability of human rights in armed conflict.292

283 The two principal players – the UN and the ICRC – had different goals in mind. Whereas the UN focused on peace, armed conflict and the place of IHRL therein – as the law of peace – was not an issue. Peace was also the principal temporal mindset of the UDHR. The ICRC, on the other hand, concentrated on the regulation of armed conflict, be it international armed conflict or non-international armed conflict. The principal legal regime to regulate armed conflict was LOAC. On the separation between IHRL as the law of peace, and LOAC as the law of war, see Draper (1971); Suter (1976), 393.

284 United Nations (1953) (the resolution dealt with the treatment of captured civilians and soldiers in Korea by North Korean and Chinese forces).

285 United Nations (1958a): “to respect […] the Hungarian people’s enjoyment of fundamental human rights and freedoms.”

286 United Nations (1958b), preamble, § 1(b): “essential and inalienable human rights should be respected even during the vicissitudes of war.”


289 For examples, see Article 72 AP I and the Preamble of AP II.

290 For the States and scholars in question, see the separatist view, discussed in Chapter II (Legal Context).

291 Lubell (2010), 236-237.

the practice of international and regional (quasi-)judicial (human rights) bodies – most notably the UNHRC, the IACHR/IACtHR, ECtHR, ICJ, and ICTY – there is an abundance of evidence demonstrating the acceptance of the applicability of human rights in armed conflict.

In addition to practice of (quasi-)judicial (human rights) bodies, State practice, while not completely uniform, also points in the acceptance of the applicability of IHRL in armed conflict, also in extraterritorial situations.

See, for example, Human Rights Committee (2001c), § 3 (emphasis added). See also UNHRC (2004), § 11; Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003), UNHRC, UN Doc. CCPR/CO/78/ISR (2003).


See, for example, (1998), Ergüs v. Turkey, App. No. 66/1997/850/1057, Judgment of 28 July 1998; (2004n), Özkan v. Turkey, App. No. 21689/93, Judgment of 4 April 2004, (1998g), Güleç v. Turkey, Appl. No. 21593/93, Judgment of 27 July 1998; (2005e), Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005; (2005f), Isayeva, Yasinova and Bazgayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005; (2005b), Khasbeyev and Akayeva v. Russia, App. Nos. 57942/00 & 57945/00, Judgment of 24 February 2005. In relation to this practice, it must be noted that while the existence of an armed conflict became unambiguously clear from the facts of the case, the claimed violations of human rights of the ECHR were never reviewed in that light. The main reasons arguably lie in the ECtHR’s unfamiliarity with LOAC and its reluctance, for political considerations, to take a position as regards the qualification of the situations at hand as an armed conflict when the respondent State has not done so. Also, the States concerned refused to acknowledge the existence of an armed conflict taking place within their own territory (which became, inter alia, clear from the absence to derogate from obligations under the ECHR based on the existence of a state of emergency). See also (2011b), Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011, as demonstrated by its discussion of the ICJ’s view on the interplay between IHRL and LOAC in armed conflict, see § 90 ff, and of the continued duty of States to investigate violations of IHRL in armed conflict, see § 92 ff.


Evidence in support of such State practice can be derived from the reactions, and absence of reactions of respondent States to that effect in State reports and individual complaint procedures. For example, in relation to occupation, in (2004o), Al-Skeini, (2011b), Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011, the UK government did not argue that IHRL was not applicable to its armed forces operating in occupied Iraq, but rather that the UK did not exercise sufficient effective control over the occupied territory. Also, no State party to the ECHR has objected to Turkey’s payment of the damages with respect to its violation of human rights during its occupation of Northern-Cyprus. See (2000k), Loizidou v. Turkey, Interim Resolution DH 105 Concerning the Judgment of the European Court of Human Rights of 28 July 1998 in the case of Loizidou against Turkey, adopted by the Committee of Ministers on 24 July 2000 at the 716th Meeting of the Ministers’ Deputies, available at http://www.coe.int/T/CM/WCD/humanrights_en.asp#. Russia has never challenged the ECtHR’s application of IHRL in the Chechnya cases.
A final important source demonstrating support of the applicability of IHRL in armed conflict are the derogation clauses available in the ICCPR, ACHR and ECHR. These clauses, permitting suspension of certain human rights upon satisfaction of certain requirements, are designed to cover situations public emergency threatening the existence of the State, to include situations of armed conflict.

Notwithstanding the abundance of evidence demonstrating the continued applicability of IHRL during armed conflict, the very impact of such armed conflict on the security and continued existence of the counterinsurgent State may necessitate the suspension of human rights. The principal human rights instruments all provide for specific clauses that permit the derogation from human rights in times of emergency, unless indicated otherwise. The following paragraph will highlight the conditions under which such derogation may take place.

1.1.5. Derogation

A final aspect characterizing IHRL as a regime is the concept of derogation. While not widely resorted to,299 the concept of derogation concerns the authority recognized in IHRL to suspend the applicability of a derogable catalogue of individual human rights in exceptional situations of public emergency that threaten the life of the nation. The purpose of derogation, as expressed by the UNHRC in its General Comment 29, is “the restoration of a state of normalcy where full respect for the Covenant can again be secured […]”.300

States “may” derogate from individual human rights in situations of public emergency threatening the life of the nation,301 such as an armed conflict. This power is expressly regu-

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299 For example, in the context of the ECHR, to date, Albania, France, Greece, Ireland, Turkey and the United Kingdom are the only State parties to have made use of Article 15 ECHR. Between 2 March-14 July 1997, Albania derogated in relation to the “communist armed rebellion” caused by the collapse of the ‘pyramid’ games (Derogation contained in a Note Verbale from the Ministry of Foreign Affairs of Albania). Between 7 February-2 September 1985, France derogated in relation to severe civic disturbances during parliamentary elections and civil war in New Caledonia (Declaration contained in a letter from the Charge d’Affaires a.i. of France, and withdrawn by a letter from the Charge d’Affaires a.i. of France, dated 2 September 1985). Greece derogated in relation to the coup d’etat in 1967. Ireland derogated twice in relation to the IRA, from 20 July 1957-3 April 1962 (Derogation contained in a letter from the Secretary General of the Department of External Affairs of Ireland; Withdrawal of derogation contained in a letter from the Secretary General of the Department of External Affairs of Ireland, dated 3 April 1962, registered at the Secretariat General on 6 April 1962) and from 1976-1977 (Derogation contained in a Note verbale from the Permanent Representation of Ireland; Withdrawal of derogation contained in a letter from the Secretary General of the Department of External Affairs of Ireland). Between 20 July 1957-22 August 1984, the United Kingdom derogated in relation to the situation in Northern Ireland. The United Kingdom derogated again from 23 December 1988-19 February, also in relation to the situation in Northern Ireland (Communication contained in a letter from the Permanent Representative of the United Kingdom, and withdrawn by a Notification from the Permanent Representation of the United Kingdom, dated 19 February 2001). The third derogation by the United Kingdom relates to the attacks of 11 September 2001 and the “terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism”, and refers to the period from 18 December 2001-14 March 2005 (Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom; Withdrawal of derogation as of March 14, 2005, Note verbale from the Permanent Representation of the United Kingdom). See also Warbrick (2004).

300 UNHRC (2001), § 1.

301 Arguably, the concept of state of emergency involves a seemingly subjective discretionary power of self-characterization. Provost (2002), 284 ff. Views as to the nature of the self-characterizing authority to dero-
lated in Article 4 ICCPR, Article 27 ACHR and Article 15 ECHR. Thus, the mere fact that the circumstances within a State’s territory cross the de jure thresholds that permit derogation does not inevitably imply the further non-applicability of derogable human rights. Instead, this requires a deliberate, final decision of the derogating State to invoke the relevant derogation clause. In other words, if a State decides not to invoke his right to derogate, however, differ. The ECtHR has accepted a wide margin of appreciation. See See also (1977a), Ireland v. the United Kingdom, Case No. 5310/71, Judgment of 13 December 1977, § 207; (1993a), Brannigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993, §§ 43, 47. The UNHRC has adopted a, what appears to be, objective approach towards the discretionary power of States to characterize a situation that warrants derogation from human rights obligations. See UNHRC (2001), § 6 and also Siracusa Principle 63, stipulating that “the provisions of the [ICCPR] allowing for certain derogations in a public emergency are to be interpreted restrictively” (United Nations (1985), available at: http://www.unhcr.org/refworld/docid/4672bc122.html [accessed 3 May 2011]) and § 8 of the 1990 ILC Guidelines for Bodies Monitoring Human Rights During a State of Emergency: “in contentious cases arising out of both inter-state and individual applications, the treaty implementing body should not extend a broad “margin of appreciation” to the derogating state but should make an objective determination whether a public emergency as defined in the treaty actually existed […]” (ILA (1990)). Among scholars there is debate as to the proper approach. Adopting a restrictive approach: Higgins (1978); Meron (1987); Oraá (1992). Adopting a wide discretionary power, see Hartman (1981). The better view therefore is that expressed by Provost, namely that “the state does not have exclusive or ultimate powers of characterisation, and that other actors may proceed to their own assessment of the situation. From a legal standpoint, the state cannot effectively […] maintain [a situation] as a state of emergency. Once the equal validity of characterisation by other agents is recognised, there may be some pressure put on the state to revise its opinion, […].” Provost (2002), 291.

Article 4 ICCPR reads:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 27 ACHR reads: “In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.”

Article 15 ECHR reads: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”
gate, its obligations to guarantee individual human rights under the relevant treaty remain fully applicable, even in the case of an armed conflict.

However, a mere decision to derogate is not sufficient, but must be lawful following satisfaction of certain substantive and procedural requirements. These concern:

- the requirement of necessity, requiring States to demonstrate that a public emergency exists that threatens the life of the nation;306

305 While all human rights treaties generally contain the same requirements, the interpretation thereof differs at some points. Relevant sources are the case-law of the relevant human rights bodies, as well as to General Comments 5 and 29 of the UNHRC, both of which provide further explanation and guidance on Article 4 ICCPR (UNHRC (1981); UNHRC (2001). Also, guidance can be derived from Concluding Observations and Comments by the UNHRC on country reports. Other relevant sources of interpretation are, in relation to Article 4 ICCPR, the Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights (hereinafter: Siracusa Principles) of the International Commission of Jurists, the Paris Minimum Standards of Human Rights Norms in a State of Emergency (hereinafter: Paris Standards) and the Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency (hereinafter: Queensland Guidelines), of the International Law Association (ILA (1990).

306 In terms of the ICCPR, these exceptional circumstances exist in “time of public emergency which threatens the life of the nation.” The ECHR refers to “time of war or other public emergency threatening the life of the nation.” The ACHR speaks of “time of war, public danger, or other emergency that threatens the independence or security of a State party.” Fawcett explains that it is sufficient that “[…] there is such a breakdown of order or communications that organized life cannot, for the time being, be maintained.” Fawcett (1987), 308. See also (2009a), A. and Others v. United Kingdom, App. No. 3455/05, Judgment of 19 February 2009, § 79 involving derogation measures of the United Kingdom taken in response to the attacks of 11 September 2001 and the ensuing terrorist threat to, and in the UK. The ECtHR found that while the UK’s measures were disproportionate, it did accept that, in terms of severity, there was a threat to the life of the nation caused by terrorism “even though the institutions of the State did not appear to be imperilled.” While it was questioned by the applicants that terrorism constituted a threat to UK’s institutions and existence as a civil community, the ECtHR held that it “[…] has in previous cases been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the “nation” and has in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled […]” In temporal terms, the use of the verb “threatening” suggests that the threat must be ongoing or, at a minimum, about to become manifest. See Ducheine (2008), 423, and accompanying footnote 369. Preventative derogation is not allowed. O’Donnell (1985), 24. In geographical terms, the threat does not have to affect the State’s entire territory, but may be geographically limited. However, the ECHR adopts a more flexible standard than in the ICCPR. For example, in relation to the former, in Aksoy v. Turkey, the ECtHR acknowledged that “the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a “public emergency threatening the life of the nation.” ((1996a), Aksoy v. Turkey, App. No. 21987/93, Judgment of 18 December 1996, § 70. See also Hartman (1981), 16). It is, however, still required that the effects of the public emergency threaten the life of the entire population. Arguably, the Paris Standards apply a lower threshold as it applies the expression ‘public emergency’ to “exceptional situations of crisis or public danger, actual or imminent, which affects the whole population”, but extends it to “the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed” as well as to threats affecting “the organized life of the community.” This approach seems sensible in respect of States with exceptionally large territories, such as Canada, or the Russian Federation. See Lillich (1985), 1073, Section A, No. 1(b). See, in contrast, the Siracuse Principles, which applies a significantly higher threshold, as it limits derogation to threats that affect “the whole of the population and either the whole or part of the territory of the State, and threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.” See United Nations (1985), 7, No. 39. See also Joseph, Schultz & Castan (2004), 825. Also in geographical terms, the events of 9/11, and the acclaimed subsequent global terrorist threat have raised questions as to whether a threat in State
- the requirement of proportionality, requiring States to take measures that do no go further in intensity, geographical scope and duration than is “strictly required by the exigencies of the situation”;
- the requirement that derogation measures may not be inconsistent with the derogating State’s other treaty-based and conventional obligations under international law, such as those under LOAC;
- the prohibition to derogate from non-derogable human rights, identified as such;
- the requirement that the derogation amounts to discrimination;
- the requirement to officially proclaim the state of emergency;

A can threaten the life of other nations, and even if so, whether it can be imminent. Joseph (2002), 84; Gross & Ni Aolain (2006), 257-258.

307 The requirement of proportionality reflects the principle that derogation measures are viewed as effective means to achieve the return to normal life in a lawful manner. It also reflects the principle that in view of the threat level, “normal measures or restrictions, permitted by the Covenant for the maintenance of public safety, health and order, are plainly inadequate.” See (1969a), “Greek Case”, App. No.3321/67, Decision of 5 November 1969, § 153. This implies that measures of derogation may not be adopted if alternative measures which less restrict individual human rights are available. Also, the measures must not go beyond that which is necessary to remove the threat. This is also known as the principle of subsidiarity, or suitability. See Arai-Takahashi (2010), 465.

308 In relation to the ICCPR, the principle of consistency must be read in conjunction with Article 5 (1) of the ICCPR, which states that ‘there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent’. Also, “other obligations” include those accepted by the UNHRC beyond the list of non-derogable rights mentioned in Article 4(2) ICCPR, to include crimes against humanity as laid down in the Rome Statute of the International Criminal Court, as well as “elements [of human rights] that in the Committee’s opinion cannot be made subject to lawful derogation under article 4.” UNHRC (2001), § 11-13.

309 Article 4 ICCPR mentions the right to life (Article 6); prohibition from torture (Article 7); prohibition from slavery and servitude (Article 8 (paragraphs 1 and 2); prohibition from imprisonment on the basis of inability to fulfil a contractual obligation (Article 11), no punishment without law (Article 15), right to recognition as a person before the law (Article 16); and right to freedom of thought, conscience and religion (Article 18).

Article 15 ECHR specifically mentions right to life (Article 2), “except in respect of deaths resulting from lawful acts of war,” and: prohibition of torture (Article 3); prohibition of slavery or servitude (Article 4 (paragraph 1); no punishment without law (Article 7).

Article 27 ACHR mentions as non-derogable the following human rights: right to juridical personality (Article 3); right to life (Article 4); right to human treatment (Article 5); freedom from slavery (Article 6); freedom from ex post facto laws (Article 9); freedom from conscience and religion (Article 12); rights of the family (Article 17); right to a name (Article 18); rights of the child (Article 19); right to nationality (Article 20); right to participate in government (Article 23).

In its General Comment 29, the UNHRC has extended the list of peremptory non-derogable human rights beyond the list mentioned in Article 4 ICCPR: “States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.” UNHRC (2001), § 11.

310 The list of non-discriminatory grounds is exhaustive and does not mention other elements such as national origin, disability or sexual orientation. Only direct discrimination is prohibited, as the word “solely” makes clear. See McGoldrick (2004b), 413.

311 The duty of proclamation is also referred to as the principle of legality and is designed to prevent arbitrary or de facto derogation. UNHRC (2001), § 2: “The [requirement of proclamation of a state of emergency] is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.” According to Hartman, it requires States “to act openly from the outset of the emergency and
Under customary IHRL, derogation is arguably possible on the basis of general concepts of necessity in public international law. The most suitable doctrines are those of ‘state of necessity’ and ‘force majeure’, even though it is argued by Duffy that the relevance of these doctrines in the context of IHRL is limited.

Thus, under the doctrine of ‘state of necessity’, a public emergency may arguably amount to a circumstance precluding the wrongfulness of an act that contravenes human rights obligations. In that case, derogation is permissible under customary international law if it protects “an essential interest”, i.e. the life of the nation, against “a grave and imminent peril”, i.e. the circumstances leading to a public emergency. In addition, the derogation may not impair an “essential interest” of the derogating State, or of the international community as a whole.

Arguably, respect for human rights is such “an essential interest”

However, necessity may not be invoked, in any case, if (1) the international obligation in question excludes the possibility of invoking necessity; or (2) if the State has contributed to the situation of necessity. The first requirement, most relevant in this respect, raises the question of whether and, if so, which human rights are non-derogable under customary IHRL. Arguably, these are the same rights listed as non-derogable under the ICCPR, ACHR and ECHR, supplemented with other rights that have attained the status of customary law or general principles of law, and which can be considered as non-derogable. Among these principles are, arguably, the requirements of an exceptional threat, proportionality, non-derogability and of non-discrimination.

Under the doctrine of ‘force majeure’, derogation from human rights obligations may be permissible if the situation amounts to “the occurrence of an irresistible force or of an unforeseen external event beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.”

It thus follows that if certain human rights obligations are or cannot be derogated from in armed conflicts, they are forced to co-exist with equally applicable obligations of LOAC, to delegitimize after-the-fact justifications for violation of fundamental rights.” See Hartman (1985), 99-100.

The notification requirement functions to ensure supervision by international bodies of the legality of the establishment of a state of emergency. A notification must be submitted in writing and express the factual circumstances, as well as the measures necessitating the State to derogate. Under the ICCPR, there is a duty to inform the other State parties immediately, via the UNSG, of (1) the provisions from which is has derogated from, and (2) of the reasons necessitating the derogation. With respect to the former, a notification of derogation under the ECHR implies no obligation to notify which human rights are derogated from (unlike the ICCPR), nor does it entail an obligation to declare a state of emergency or to actually enforce the measures of derogation. Nevertheless, the ECHR has stated that some form of public and official announcement is required. (1961b), Lawless v. Ireland, App. No. 332/57, Judgment of 1 July 1961 (Merits), § 47; (1978a), Cyprus v. Turkey, App. No. 8007/77, Decision of 10 July 1978, § 527; (1993a), Branigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993, § 72.

In temporal sense, a State is allowed, to a reasonable degree, to delay the notification after commencement of enforcement of measures of derogation. A delay of twelve (Lawless v. Ireland) and fortieth (Ireland v. United Kingdom) days has been accepted; four months (Greek Case) delay not.

See Article 25, International Law Commission (2001b); Naert (2010), 583-584; Duffy (2005), 297-298; Oráa (1999), 435;

Duffy (2005), 298.

2010), 584; Duffy (2005), 296; Oráa (1999), 437; Seiderman (2001), 81.

Oráa (1999); Kolb, Poretto & Vité (2005), 457.

2001b).
which then triggers issues as to the appreciation of such interplay. In Part B, Chapter IV we will therefore more closely examine the possibility of derogation of human rights affected by targeting and operational detention operations.

1.2. LOAC

Besides IHRL, the regime of LOAC is of fundamental relevance to the question of the lawfulness of deprivations of life and liberty resulting from counterinsurgency operations. The general purpose of LOAC is to govern the conduct of the belligerent parties to an armed conflict. More specifically, LOAC aims to achieve a compromise between a belligerent party’s interests arising from military necessity, on the one hand, and humanitarian considerations, on the other hand, in order to eventually:

(3) safeguard those who do not, or no longer, take a direct part in hostilities; and
(4) limit the use of force to the amount necessary to achieve the legitimate aim of the armed conflict, which — independently of the causes fought for — can be only to weaken the military potential of the enemy.319

From this general purpose several generic themes can be distilled, most importantly (1) the nature of the relationships LOAC seeks to govern, as well as of the rights and obligations attached to those forming part of those relationships; (2) the significance of the delicate balance between military necessity and humanity; and (3) LOACs applicability to situations of ‘armed conflict’ only. These themes merit further attention, for together they form the conceptual underpinnings of LOAC, which characterize it as a regime and distinguish it from IHRL. As such, they may influence the existence, as well as the outcome, of the interplay with IHRL. Moreover, they are informative of the relationship of the concepts of insurgency and counterinsurgency vis-à-vis LOAC. Our focus will therefore now turn to these themes, to begin with the nature of the relationships it seeks to regulate, as well as the nature of the obligations and rights it respectively imposes and affords.

1.2.1. Relationships

LOAC regulates two principal relationships. Firstly, LOAC regulates the horizontal relationship between the belligerent parties to the armed conflict, and, as such, that among individual fighters who take a direct part in the hostilities. More specifically, it imposes upon the parties to the conflict obligations that regulate how they are to behave vis-à-vis each other, most notably in respect of (1) individuals directly participating in hostilities; (2) individuals who no longer take a direct part in the hostilities because they are wounded, sick or shipwrecked, or taken prisoner; and (3) individuals who do not take a direct part in hostilities, i.e. civilians. At the same time, besides obligations, LOAC provides the parties to the armed conflict far-reaching authorizations, enabling them to attain the legitimate objective of warfare, which is to defeat the enemy.

Secondly, LOAC regulates the vertical legal relationship between belligerent parties to the armed conflict, on the one hand, and protected persons, most generally, fighters who are hors de combat (i.e. wounded, sick or shipwrecked, or have been take prisoner) as well as civilians. The precise protection offered to these categories of individuals is subject to the nature of the armed conflict as IAC or NIAC, as well as the fulfillment of the conditions underlying categorization into a protected group.

1.2.2. Rights

1.2.2.1. Standards of Treatment

From the perspective of the protected individual, the protective ‘rights’ under LOAC are to be viewed as objective public order standards of treatment,\textsuperscript{320} “which depend as little as possible, for their application, on the wishes of those concerned.”\textsuperscript{321} In other words, these public order standards of treatment connote a certain dual nature:\textsuperscript{322} protected individuals have no power to renounce the protection provided to them under LOAC, regardless of the nature of their (previous) conduct, but have the right to seek compliance with their protective status. At the same time the individual is dependent on the willingness of States to comply with the public order obligation to afford certain standards of treatment to protected individuals, but when fulfilling its obligation, the State also has the right to afford the protection required, regardless of their behavior or wish.\textsuperscript{323}

1.2.2.2. Authorizations and Privileges

Besides conferring standards of treatment upon protected persons, LOAC also offers ‘rights’ to the parties to the armed conflict and individual members of their armed forces. These ‘rights’ are, on the one hand, to be viewed as authorizations, premised in military necessity. Conduct based on these authorizations may have far-reaching consequences for subjects and objects. For example, LOAC, through its law of hostilities, permits the parties to an armed conflict to directly attack military objectives, resulting in the destruction of objects, or the killing or wounding of individuals, in so far permissible. Also, LOAC permits parties to the conflict to relocate the civilian population to protect them from the dangers of hostilities, or to intern enemy fighters and civilians. At an individual level, the law of IAC grants a qualified privilege to individuals who qualify as combatants, who, under immunity from prosecution, are permitted to kill enemy combatants and other persons directly participating in hostilities. However, these ‘rights’ do not authorize unlimited behavior, but are subject to strict requirements framed in obligations.

1.2.3. Obligations

As a general rule, the obligations arising in relation to the two principal purposes of LOAC are binding upon all entities and individuals who have the substantive ability to participate in an armed conflict by making acts of war,\textsuperscript{324} i.e. the contribution to the armed conflict must

\textsuperscript{320} Provost (2002), 34.
\textsuperscript{321} Pictet (1958b), 75 (emphasis added). Despite occasional – explicit or implicit – mentioning of the term ‘right(s)’ (e.g. Common Articles 6, 7 (GC I, II and III) and 5, 7, 8 (GC IV), the normative framework of LOAC is not based upon a system of ‘rights’ similar to that under IHRL (Provost (2002), 29). This is not to imply that rights under LOAC are – so to speak – ‘blank rounds’ or hollow phrases, lacking any strength. However, the ‘rights’ found in LOAC are generally denied self-executing power.\textsuperscript{321} In other words, the individual in LOAC is incapable of exercising or waiving rights.\textsuperscript{321} For an overview of case-law denying LOAC provisions self-executing power, see Provost (2002), 33, footnote 60.
\textsuperscript{323} Illustrative of this dual nature is Article 85 GC III, which grants continued prisoner of war status to war criminals. As explained by Provost (2002), 31, “the protection given is not in the nature of rights held by individuals but of standards existing independently of any action of the benefited persons.”
\textsuperscript{324} Fleck & Wolfrum (2008), 722.
be effective. This low threshold is to ensure that entities or persons participating in an armed conflict are bound by the norms of LOAC, and no gaps in protection arise.\textsuperscript{325} LOAC, \textit{firstly}, binds States\textsuperscript{326} and their armed forces.\textsuperscript{327} States violating LOAC obligations incur State responsibility for internationally wrongful acts. \textit{Secondly}, international organizations are bound by customary LOAC\textsuperscript{328} in so far the conflicts in its areas of presence cross the threshold of an armed conflict, and in so far troops of troop contributing nations (TCNs) operating under the command and control of these organizations take a part in the hostilities.\textsuperscript{329} \textit{Thirdly}, the obligations arising from LOAC also bind non-State organized armed groups,\textsuperscript{330} although the precise conceptual basis remains a matter of controversy.\textsuperscript{331}

\textsuperscript{325} Kolb & Hyde (2008), 86.

\textsuperscript{326} States are bound either by customary law, in so far they have not persistently objected, or by virtue of their commitment as a party to a treaty; by their obligations under a treaty, whether pertaining to IAC or NIAC (for IAC, see Common Article 1 GCI-IV and Article 1(1) API. For NIAC, see Common Article 3 GCI-IV, which established fundamental rules of humanitarian protection binding all parties to a NIAC; by principles of LOAC in so far they have attained the status of general principles of international law as meant in Article 38(1)(c) of the ICJ Statute; and by norms embodied in binding resolutions of intergovernmental organizations, notwithstanding the applicability of such norms to the State by virtue of the aforementioned sources. Kleffner (2010a), 61, referring to Nolte (2008), 532.

\textsuperscript{327} As part of their overall responsibility under public international law, States are responsible for acts of its agents, and, more in particular, for acts carried out by its armed forces during armed conflicts. See Article 3, 1907 Hague Convention IV; Article 29, 1949 Geneva Convention IV; Article 91, Additional Protocol I. As the principal echelon acting as an organ of the State engaged in hostilities during armed conflicts, and without differentiation in status or rank within the military system, it follows that the armed forces of a State are, albeit more indirect, bound by the obligations of LOAC as well. After all, most of its rules have been designed for those who have to apply them directly on the battlefield. Provost (2002), 75.

\textsuperscript{328} As only States can become parties to treaties, international organizations party to an armed conflict are not bound by conventional LOAC.

\textsuperscript{329} On the applicability of LOAC to international organizations in general, see Kleffner (2010a), 62. See also (2009q), \textit{The Prosecutor v. Sesay, Kallon and Gbao, Trial Chamber (2 March 2009)}, § 233. On the UN, see Secretary General (1999), Section 1 states, in paragraph 1.1: “The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.” See also Greenwood (1998), 16; Shraga (1998), 65. On the EU, see Zwanenburg (2008), 400-401; Naert (2010), 515 ff.

\textsuperscript{330} Support is widespread. CA 3, for example, applies to “each Party to the conflict”. See also See also Articles 7 and 8, 1999 Second Hague Protocol; Article 8(2)(e)(vii) and Article 8(2)(e)(xi) ICC Statute. In \textit{Prosecutor v. Norman}, the Special Court for Sierra Leone held that “[…] it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. See (2004s), \textit{The Prosecutor v. Norman, Case No. SC5L-2004-14-AR72(E)}, \textit{Decision on Preliminary Motion Based on Lack of Jurisdiction, Special Court for Sierra Leone (22 May, 2004)}, § 22. See also (2004q), \textit{The Prosecutor v. Kallon and Kamara, Appeals Chamber Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004)}, § 45. Several resolutions of the UN Security Council call upon “all parties” to an armed conflict to comply with LOAC. See UNSC Resolutions 1868 (2009), Preamble (Afghanistan); 1863 (2009), § 15 (Somalia); 1856 (2008), § 23 (DR Congo), calling upon “all parties” to the respective armed conflicts to comply with LOAC. In 1999, the International Law Commission reflected customary international law by stating that “[a]ll parties to armed conflicts in which non-State entities are parties, irrespective of their legal status […] have the obligation to respect international law” and that “[e]very State and every non-State entity participating in an armed conflict are legally bound vis-à-vis each other as well as all other members of the international community to respect international humanitarian law in all circumstances. See International Law Commission (1999), Articles 2 and 5.

\textsuperscript{331} A first basis is the doctrine of legislative jurisdiction, i.e. that the Geneva Conventions (and other treaties of LOAC) become applicable to non-State groups by virtue of the State’s accession or ratification to a
Fourthly, all individual have obligations in times of armed conflict,332 whether a member of the armed forces of a State; a civilian State agent; a member belonging to a non-State entity; or an individual acting in a purely private capacity.333 All that is required to create obligations for an individual is a nexus to an armed conflict.334 Individuals violating LOAC are individually criminally responsible, independent and without prejudice to any questions of the responsibility of States under international law.335

The availability, density and precision of obligations arising under LOAC is contingent on the nature of the armed conflict. The overall normative framework constituting the law of IAC is extensive, and regulates a wide variety of issues related to armed conflict in numerous treaties. They can be divided in, what can be referred to as Geneva-law, setting forth protective rules, which can be found most notably in the GCs and (partly) in AP I, and Hague-law, aimed predominantly at the conduct of hostilities, and found in HIVR and special treaties on the means of warfare, such as the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. A specific subset of the law of IAC pertains to situations of belligerent occupation. This law of belligerent occupation is particularly comprised of Articles 42-56 HIVR, Articles 47-78 GC IV, and customary international law.

In contrast, the conventional rules applicable to NIAC are limited to those available in CA 3 and AP II (as far as States are a party and so far it applies at all). These rules are very rudimentary, and subsequent legislation for its nationals. Such an act engages the applicability of the treaty’s obligations to all the State’s nationals, including members of a non-State armed group. This theory finds support with Pictet (1960), 34; Baxter (1974), 527; Schindler (1979), 151; Elder (1979), 55; Greenspan (1959), 623; Draper (1965), 96. An alternative view to the doctrine of legislative jurisdiction is proposed by Moir, who contends that “one possible solution is to assert that treaties entered into by States are binding upon insurgents provided the rebel authority exercises effective control over part of the national territory. Insurgents are then said to be bound by reason of the fact, and to the extent, that they purport to represent the State or part of it.” A second basis is that LOAC, in general, imposes individual obligations on each individual, to include members of an insurgent group (see the active applicability ratione personae to individuals, below). Thirdly, some contend that LOAC applies to an organized armed group by virtue of its exercise of de facto governmental functions. See Pictet (1958a), 37. Fourthly, as concluded by the Darfur Commission of Inquiry, an organized armed group may be bound by LOAC because of its international legal personality. See International Law Commission (1999), Articles 2 and 5, available at http://www.idil-iil.org/idilE/resolutionsE/1999_ber_03_en.PDF. A final conceptual basis on which LOAC becomes applicable to a non-State entity is when it consents to be bound by LOAC (or parts) of its contents in a specific armed conflict by virtue of ‘special agreements’, a possibility offered in CA 3. An example is the declaration issued by the Polisario Front of Liberation in Western Sahara, 1975.

332 For an early case, see The Henfield’s case, 11 F. Cas. 1099 (C.C.D.Pa. 1793)(No. 6, 360), reprinted in Paust, Bassiouni & Scharf (2000), 232-238. (1947c), 222-3. The Permanent Court of International Justice held in 1928, in the Danzig Case that the humanitarian conventions in force at that time had been drafted with the purpose of creating individual obligations. (1928b), Jurisdiction of the Courts of Danzig (Pe- centuary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administra- tion), Advisory Opinion of 3 March 1928, 17-18. See also Oppenheim (1952c), 211, footnote 3; Provost (2002), 98; (1997), Tadić, § 573.

333 For case law, see Provost (2002), 75-102.

334 The threshold for the establishment of a nexus is low. According to the ICTY, in Tadić, “it would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties. […] The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole.” (1997), Tadić, § 573.

335 (1997), Tadić, § 573.
mentary in nature and offer a minimum standard of protection. Rules regulating the conduct in hostilities are virtually absent.

It is generally recognized that large portions of conventional LOAC have crystallized into customary international law. This applies to most, if not all, of the provisions of the GCs, as well as many provisions of AP I and AP II. In 2005, the ICRC published its study (CLS) on customary IHL, in which it established the customary status of norms of LOAC by looking at “State practice (usus) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (opinio juris sive necessitatis).” However, the CLS is not free from criticism, particularly in regards to the manner in which the ICRC has concluded the existence of State practice. Nonetheless, the value of the CLS is not to be underestimated, as is illustrated by its use in domestic and international courts.

Customary rules of LOAC are a crucial source in filling gaps left by conventional LOAC, or where States have not ratified treaties. The CLS therefore forms an important source, which should not be overlooked to easily by States. As held by Fleck, 

[where there are gaps in existing positive law, States should be encouraged to use the ICRC Study with a view to closing such gaps, rather than criticizing progressive statements made in the Study, or taking advantage of legal lacunae in a spirit of advocating freedom of operations and even drawing short-sighted unilateral advantage at the expense of victims of armed conflicts.

A final important (potential) source of obligation is the Martens clause, which is considered to fill any voids left by both conventional and customary law, and calls upon States ensure that

337 ICRC (2005a), 178.
338 Scobbie (2007).
341 One of the most fundamental sources and rules of LOAC, the Martens clause was first introduced in the 1899 Hague Peace Conference and holds that “[u]nless a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.” The Martens clause has been readopted in slightly different wording in Article 1(2) AP I and in the Preamble of AP II. According to the ICRC Commentary, the Martens Clause has two functions: “First, despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology (Sandoz, Swinarski & Zimmerman (1987), 38-39). Kolb and Hyde add a number of functions. In their view, “[…] the Martens clause serves as a basis for interpreting the LOAC in a humanitarian sense. Moreover, it can be seen as a call to apply international human rights law in order to complement the LOAC and eventually to fill its gaps. Furthermore, it can be read as a reminder that customary international law applies to all armed conflicts, whether or not a particular situation or event is contemplated by treaty law, and whether or not the relevant treaty law binds as such the parties to the conflict. Finally, the command to consider humanity contained in the clause can serve the purpose of stimulating the states which make the LOAC to heed the interests of the potential victims of armed conflict when negotiating new LOAC norms” (Kolb & Hyde (2008), 63).
in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the law of humanity, and the dictates of the public conscience.\footnote{See Preamble, HIVR. A contemporary version of the Martens clause has been stipulated in Article 63(4) GC I; Article 62(4) GC II; Article 142(4) GC III; Article 158(4) GC IV.}

However, the precise meaning of the Martens clause in today’s LOAC remains subject of debate,\footnote{Meron (2000b); Cassese (2000); Ticehurst (1997).} and this has been taken by some scholars to argue that it may serve as a vehicle to import IHRL into LOAC.\footnote{Kolb & Hyde (2008), 63.}

An important concept underlying obligations under LOAC is \textit{reciprocity}, i.e. the mechanism by which a party to the conflict agrees to comply with restrictions of its actions during hostilities grounded in the faith that the adversary party will do the same. LOAC includes a mélange of reciprocal norms in some areas, while it has rejects the concept in others.\footnote{Osiel (2009), 79.} As concluded by Watts, “the history of the law of war and its relationship with reciprocity reveals a trajectory of development, refinement, and obscuration of reciprocity doctrine.”\footnote{Watts (2009), 386.}

At its outset, reciprocity had a firm presence throughout the \textit{jus in bello} because it primarily served a belligerent parties’ interests.\footnote{An example is the pre-codification practice of so-called \textit{cartels}, by which belligerent parties agreed to conduct warfare on an ‘equal’ basis. Although they reflected practical military interests rather than humanitarian concerns, \textit{cartels} were clear examples of immediate reciprocity, drafted on an \textit{ad hoc} basis and valid between the belligerent parties for a specific battle only.} LOAC’s early international treaties contained general participation and reciprocity clauses or no first-use declarations and reservations.\footnote{For example, the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare amounts to a no first-strike agreement.} For example, both the Hague Conventions of 1907 and the Geneva Convention of 1906 contained so-called \textit{clausula si omnes}, rendering the entire convention inapplicable if a belligerent party to the conflict was a non-party to a convention.\footnote{For example, Article 2 of the 1907 Hague Convention IV provides: “The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.” Article 24 of the 1906 Geneva Convention stipulates that “the provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention.” State practice during World War I, however, showed a willingness of State parties to apply the terms regardless of the fact that one of the belligerent States, Montenegro, was a non-party.} Probably “the most explicit recognition of the reciprocity principle within humanitarian law”\footnote{The legality of belligerent reprisals has been a subject of debate since the early days of PIL. While Grotius (Grotius (1625)) considered them lawful in some circumstances, other’s, such as De Vitoria (de Vitoria (1917)), Calvo (Calvo (1896), 518-519) and Fiori (Fiore (1896), 214), opposed the concept. Nevertheless, the concept found root in PIL and its scope was further crystallized by the Naulilaa Incident Arbitration ((1928c), \textit{Naulilaa Incident Arbitration, Portugal v. Germany}) is the concept of belligerent reprisals.\footnote{The legality of belligerent reprisals has been a subject of debate since the early days of PIL. While Grotius (Grotius (1625)) considered them lawful in some circumstances, other’s, such as De Vitoria (de Vitoria (1917)), Calvo (Calvo (1896), 518-519) and Fiori (Fiore (1896), 214), opposed the concept. Nevertheless, the concept found root in PIL and its scope was further crystallized by the Naulilaa Incident Arbitration ((1928c), \textit{Naulilaa Incident Arbitration, Portugal v. Germany}).} Its fundamental premise is that a party to a conflict may resort to belligerent reprisals in case of a violation of LOAC by another party to the conflict by taking measures normally prohibited under LOAC, provided certain requirements are met. The aim of re-
reprisals is two-fold: on the one hand, to stop the violation of LOAC by a belligerent party and at the same time, to convince that party to resume full compliance with LOAC.\textsuperscript{352}

Under influence of persistent attempts to humanize LOAC, the conventional LOAC developed after World War II shows a change in stance towards the principle of reciprocity in armed conflict. As it progressively moved away from the traditional layer of international law governing inter-State relations and gradually aimed to the governance of the position of individuals under influence of the ‘humanization’ of LOAC, it simultaneously has gradually shifted from “collective responsibility, with the attendant collective sanctions of classical international law: belligerent reprisals \textit{durante bello} and war reparations \textit{post bellum}”\textsuperscript{353} to what can be described as an individual responsibility of States to unilaterally comply with obligations owed \textit{erga omnes}, in the interest of humanity, regardless of the behavior of other States’ conduct.\textsuperscript{354}

This gradual move away from systemic, explicit reciprocity is reflected, \textit{inter alia}, by the abandonment of the \textit{si omnes} clauses from the 1929 Geneva Convention; the incorporation in Article 1 of the GCs to “ensure respect” for the norms embodied in the GCs; the prohibition set forth in Article 60(5) to terminate or suspend “provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against person protected by such treaties”; the limitations imposed in respect of belligerent reprisals;\textsuperscript{355} the generally accepted rule that the appeal on the principle of \textit{tu quoque} is inadmissible the defense of violations of LOAC;\textsuperscript{356} and the incorporation of IHRL-based norms within LOAC, particularly in its protective scope, e.g. that concerning individuals deprived of their liberty.

However, while explicit conditions of systemic reciprocity have slowly disappeared, “reciprocity continues to form a critical component of the law of war and structures both theoretical and pragmatic discourse.”\textsuperscript{357}

Today, reciprocity is more immediate in nature, in that it is characterized by a unilateral willingness of compliance. As explained by Provost:

immediate reciprocity plays a much more prominent role in humanitarian law than in human rights, a reflection of the different place of reciprocity in the substantive inter-state relationships created. […] Shared values are […] significant in humanitarian law, more so now than

\textsuperscript{352} The US Army defines reprisals as follows: “Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognised rules of civilised warfare.” U.S. Army (1956), § 497(a). The UK Ministry of Defence, in its ‘Manual of the Law of Armed Conflict’ defines reprisals as “extreme measures to enforce compliance with the law of armed conflict by the adverse party. They can involve acts which would normally be illegal, resorted to after the adverse party has itself carried out illegal acts and refused to desist when called upon to do so. They are not retaliatory acts or simple acts of vengeance. Reprisals are, however, an extreme measure of coercion, because in most cases they inflict suffering upon innocent individuals. Nevertheless, in the circumstances of armed conflict, reprisals, or the threat of reprisals, may sometimes provide the only practical means of inducing the adverse party to desist from its unlawful conduct.” See U.K. Ministry of Defence (2004), 420-421, § 16.16 ff..

\textsuperscript{353} Abi-Saab (1999), 650.

\textsuperscript{354} See Meron (2000a); Geiß (2006), 772. See also Provost (2002), 137;

\textsuperscript{355} See GCI, Article 14 and 46; GCII, Article 16 and 47; GCIII, Article 13; GCIV, Article 33; API, Article 20, 51(6), 52(1), 53(e), 54(4), 55(2) and 56. See also the Cultural Property Convention 1954, Article 4(4). Also, combatants do not lose their status even if they violate IHL during hostilities (see API). See also Hampson (1988), 831.

\textsuperscript{356} See, e.g. Articles 44(2) or 51(8) AP I.

\textsuperscript{357} Watts (2009), 367; Osiel (2009), 50.
fifty years ago, but there remains in the nature of relationships governed by these norms a pull towards immediate reciprocity which reflects the strong state interests present. Notwithstanding the above, reciprocity has come under strain as a result of the asymmetric nature of contemporary warfare. As put by Pfanner, “[i]n asymmetrical wars, the expectation of reciprocity is basically betrayed and the chivalrous ethos is frequently replaced by treachery.” Asymmetrical conflicts are not merely typified by the rejection of compliance with LOAC by non-State actors such as insurgents, but also by the tempting and often actual counter-rejection of compliance by the State, pushing behavior in combat to a slippery slope. After all, why would the State continue to comply with LOAC if such compliance places it at the disadvantage? This incentive to negative reciprocity may undermine one of LOAC’s basic fundamentals. As explained by Schmitt, when asymmetry disrupts the presumption and one side violates the agreed rules, the practical incentive for compliance by the other fades. Instead, IHL begins appearing as if it operates to the benefit of one’s foes. When that happens, the dictates of the law appear out of step with reality, perhaps even “quaint”. So, the real danger is not so much that the various forms of asymmetry will result in violations of IHL. Rather, it is that asymmetries may unleash a dynamic that undercuts the very foundations of this body of law.

In addition, negative reciprocity may undercut the very foundations of counterinsurgency, namely that of legitimacy. Thus, in view of the potential harm caused by negative reciprocal conduct by the State in response to asymmetric tactics used by insurgents, the continued compliance with obligations under LOAC, notwithstanding violations thereof by insurgents, is of utmost relevance to decision makers, military commanders and individual soldiers engaged in counterinsurgency.

Having established the nature of the relationships, rights, and obligations of LOAC, we will now turn to the fundamental balance constituting the “very foundations” of LOAC, i.e. the balance between military necessity and humanity.

1.2.4. Military Necessity and Humanity

LOAC seeks to regulate a phenomenon – i.e. war – that, while reflecting human nature in its most extreme form, is “perhaps the most ancient form of inter-group relationship.” Its regulation is similarly deeply rooted in history. Indeed, while detached temporarily and geographically, initiatives “to accept an exceptional legal order” designed for the regula-

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358 Provost (2002), 151.
359 Pfanner (2005), 161.
360 Pfanner (2005), 163: “It might then at least entertain the thought that the use of torture just might yield information about the adversary and its intentions, that it would be quicker and easier to take an alleged civilian terrorist out of circulation by deliberately killing him than by putting him on trial and, similarly, that a huge military strike which also hits the civilian population indiscriminately, wiping out not only combatants but also their families and other possible sympathizers, might undermine the morale of a movement.”
361 Schmitt (2007), 47-48. What Schmitt refers to is the issue that lies at the heart of the academic debate that emerged after the US response to the Al-Qaeda-attacks of 11 September 2001, most notably its decisions regarding the treatment of detainees captured in the so-called Global War on Terror and held in detention facilities such as Guantanamo Bay, i.e. the issue of whether the law available must still be upheld, in order to remain on the moral high ground, or whether it should be set aside, to make way for the possibility to breach norms in response an earlier breach grounded in asymmetry.
363 Maurice (1992), 371.
tion of the conduct of human groups in the incomparable circumstances that armed conflict brings about appear to fulfill a universal desire of all times—a desire apparently inherent in human nature, detached from civilization, philosophy or religion. As a consequence, LOAC was among the very first branches of public international law to be codified since the latter’s inception in 1648 and continues to form one of its core regimes. From the outset, it is imperative to stress what LOAC does not try to attain: to prevent war. To the contrary, it accepts the “exigencies of war and […] the military necessity impelling each Belligerent Party to take the requisite measures to defeat the enemy,” regardless of its legal basis, or absence thereof in the jus ad bellum. However, in view of Cicero’s adage ‘inter arma leges silent’—‘in war the law is silent’—one may question what law could add to the waging of war. As accurately described by Osiel:

Still, what could be more absurd, one might fairly ask, than lawyers’ efforts to ensure the recognition of human dignity in situations that essentially amount to suspensions of it? At its best, law is clean, transparent, logical, neat, orderly, civilized, and peaceful, whereas war is dirty, opaquely foggy, irrational, emotional, unkempt, disorderly, and savagely violent. How could the messy experience of the latter ever be made to fit the concepts of the former?

It is therefore not surprising that LOAC can be perceived as to reflect a paradox, attempting to unify two seemingly irreconcilable concepts, i.e. war and law. Some would claim that law should steer clear from war, because it interjects with the effectiveness of the application of force or because it lowers the threshold of acceptability of war. Others would argue that attempts to regulate warfare are vain, because when push comes to shove, the animalistic struggle for life over death will transcend rational values based in law. Walzer, for example, comments that “[w]ar is so awful that it makes us cynical about the possibility of restraint, and then it is so much worse that it makes us indignant at the absence of restraint.” Nevertheless, while the vast majority of other core subjects of public international law regulate inter-State co-ordination and co-operation—a traditional function of public international law—in times of peace, the fact is that States have placed LOAC in the exceptional position to do so when the very existence of international and national institutional frameworks and their underpinning values and traditions, philosophies and cultures are challenged by the violence and inhumanity of armed conflict.

Those who overcome their initial sepsis towards LOAC’s contradictory attempt to unison law and war are immediately confronted with a second paradox, i.e. the manner in which LOAC seeks to achieve its main purpose, namely by balancing the conflicting notions of military necessity and humanity. This paradoxical, yet “delicate” balancing between humanitarian

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364 Sources from Christianity (see inter alia Deuteronomy, XX, 10-14; 19-20 and Kings, VI, 22-23. Cockayne (2002); Islam (Khadduri (1955), 87); Judaism (Roberts (1988); Hinduism (Subedi (2003), 355-356) and Buddhism, to Confucius and Sun Tzu and from ancient Egypt, India and Greece to Rome provide evidence of common, albeit often rudimentary, customs and principles that, albeit in modified form, have continued to be of fundamental significance in the regulation of warfare throughout history.

365 War takes a position within PIL next to subjects as international trade, diplomatic relations, the law of the sea, air- and space law, the protection of the environment and the delimitation of international boundaries. Schindler (2003), 166.


367 Dinstein (2010), 3.

368 Osiel (2009), 44.

369 Greenwood (2003), 789.

370 Walzer (1992), 46.

371 Sassòli & Bouvier (1999), 74.

372 Schmitt (2010b).
considerations and military imperatives is probably the most fundamental conceptual feature of LOAC.

1.2.4.1. A Delicate Balance

The concept of military necessity, as a term of military science, aims to maximize the scope of military conduct, necessary to attain a military advantage and to win the war. In the creation of norms of LOAC, it functions as a fundamental instrument to ensure that the rules leave enough manoeuvring space for military authorities to effectively conduct military operations against the enemy armed forces, in order to suppress the military resistance of the enemy and to end the conflict. [...] The law in itself must accordingly leave enough breathing space for military operation planning if counter-strategies are not to be deemed inadmissible from the outset. A law that would doom the lawful actor to failure from the outset would be a ridiculous enterprise. 373

However, if LOAC would constitute a system that would only reflect considerations of military necessity, “no limitation of any significance would have been imposed on the freedom of action of Belligerent Parties” 374 and it would become a ‘whore of power’, [which] would tend to justify sheer force as it is seen to be necessary by military commanders – and would thus abandon any attempt of disciplining military practice and would simply serve as a rhetorical device disguising the mere pragmatics of power. 375

Given the destructive impact of warfare on any society, several considerations aim to function as a counterbalance to military necessity and intend to impose limitations upon the desired scope of conduct in warfare. These considerations may be environmental, cultural or political in nature, but in view of the devastating effects of war on persons, considerations of humanity, in the wider sense, form the principal counterweight.

Within the normative framework of LOAC, humanity (lato sensu) is reflected, firstly, in the principle of limitation or unnecessary suffering, which derives from the Hague law and entails the idea that the means and methods that may be applied to attain the legitimate aim of the conflict, i.e. to weaken the military potential of the enemy, are limited. 376 Principally, the principle of limitation/unnecessary suffering aims to limit the superfluous injury and unnecessary suffering of individuals taking a direct part in the hostilities, and not of those who do not (protected persons). 377

Secondly, humanitarian considerations find expression in the principle of humanity (stricto sensu), which imposes on parties to the conflict to safeguard those who do not, or no longer, take a direct part in hostilities (i.e. those categories of individuals belonging to the passive scope of the applicability ratione personae of the law of hostilities).

However, if only humanitarian considerations were to guide conduct in warfare, the underlying system of law […] would become a well-sounding, but basically empty habit of ‘doing good’ – a variant of an ethics of conscience that would abandon in reality the attempt of influencing military

373 Oeter (2010), 171-172.
374 Dinstein (2010), 4.
375 Oeter (2010), 169-171. See also Dinstein (2010), 4.
376 1868 St. Petersburg Declaration (The object of disabling the greatest possible number of men “would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.”; Article 22 1907 HIVR. Today, the principle of limitation is embodied in Article 35(1) AP I, which states that “[t]he right of belligerents to adopt means and methods of injuring the enemy is not unlimited.”
377 Solis (2009), 270; Dinstein (2010), 8.
conduct, in order not to 'corrupt' the just way of thinking. Such a radical variant of an ethics of conscience would implicitly have to accept that wrong rules that lead to wrong incentive structures would create a lot of damage in practice – but this would be irrelevant in its perspective since looking at the consequences is a taboo argument in a radical ethics of conscience. The body or rules resulting from such an approach would in reality destroy its own fundaments, since its rules would not be capable of influencing military practice.\(^{378}\)

The “hallmark” of LOAC,\(^{379}\) therefore is to achieve a “delicate”\(^{380}\) balance between military and humanity. This conceptual balance permeates every norm of LOAC, whether conventional or customary.\(^{381}\) As stated by Dinstein:

While the outlines of the compromise vary from one LOIAC norm to another, it can be categorically stated that no part of LOIAC overlooks military requirements, just as no part of LOIAC loses sight of humanitarian considerations. All segments of this body of law are animated by a pragmatic (as distinct from a purely idealistic) approach to armed conflict.\(^{382}\)

This balance is of crucial importance in understanding the mechanics and logic of LOAC in the conduct of warfare.\(^{383}\) In sum, the balance entails that the authoritative scope of the total of military conduct necessary to win the war (i.e. in its use as a term of military science) is limited by the restrictive scope of the total of humanitarian (and other) considerations. The subtraction of this restrictive scope from the authoritative scope results in a netto scope of ultimate lawful conduct within which boundaries the enemy may be defeated. In essence, the rationale that a State’s lawful conduct in warfare results from the balancing of military interests against humanitarian considerations is generally known as the principle of military necessity \textit{latu sensu}.

1.2.4.2. Military Necessity

While formerly present as a concept in legal and military doctrine,\(^{384}\) military necessity was first codified by a State by the US in the Lieber Code of 1863.\(^{385}\) Article 14 stipulates that military necessity:

\[\ldots\] as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

It first appeared in an international treaty in 1864, in the Preamble of the 1868 St. Petersburg Declaration\(^{386}\) and has been explained in case law, most notably in 1948, in \textit{re List and Others.}

\(^{378}\) Oeter (2010), 169-171. See also Dinstein (2010), 4.

\(^{379}\) Meron (2000a), 243.

\(^{380}\) Schmitt (2010b).

\(^{381}\) Dinstein (2009a); Dinstein (2004), 16-20; Draper (1973), 141.

\(^{382}\) Dinstein (2010), 5.

\(^{383}\) Meron (2000a), 243. This is particularly so given the fact that, over time, the weight of military and humanitarian elements within that balance has shifted considerably. See also Schmitt (2010b).

\(^{384}\) The specific idea of military necessity was first introduced by Grotius (‘\textit{necessaria ad finem belli}’). See also Napoleon, who is claimed to have stated that “[m]y great maxim has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules, is excusable only so far it is absolutely necessary; everything beyond that is criminal.” Best (1994), 242.

\(^{385}\) For an extensive account of the motives for the introduction of the principle of military necessity in the Lieber Code, see Carnahan (1998); Carnahan (2001).

\(^{386}\) The Preamble states: “[t]he only legitimate object which states should endeavour to accomplish in war is to \textit{weaken} the military forces of the enemy [and that for that purpose] it is \textit{sufficient} to disable the greatest possible number of men.”
Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. [...] It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill.\textsuperscript{387}

The definition also appears in many military manuals. For example, the UK Manual of the Law of Armed Conflict defines military necessity as to permit

[...] a State engaged in an armed conflict to use that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.\textsuperscript{388}

Military necessity is the \textit{jus in bello}-species of the doctrine of necessity in international law.\textsuperscript{389} It has been described as “a basic principle of the law of war, so basic, indeed, that without it there could be no law of war at all.”\textsuperscript{390} Today, it undisputedly enjoys status as customary law even to the degree of constituting a norm of \textit{jus cogens}.\textsuperscript{391} Under certain conditions its breach may constitute a war crime.\textsuperscript{392}

It may be concluded from the above that in its meaning as \textit{principle} of LOAC, military necessity embodies two functions. \textit{Firstly}, in its \textit{restrictive} function, military necessity allows that kind and degree of force not otherwise prohibited by LOAC and thereby reflects the notion that humanitarian and other considerations may trump sovereign military (and intrinsically political) interests and may subsequently prohibit the employment of any kind or degree of force not indispensable for the achievement of ‘the ends of war’.\textsuperscript{393} \textit{Secondly}, in its \textit{authoritative} function, the principle of military necessity “relates exclusively to conduct that would be

\textsuperscript{387} (1948b), \textit{United States v. Wilhelm List, et al. (Hostages Case)}, UNWCC (8 July 1947-19 February 1948). In relation to property, the court held that in order for its destruction to be lawful, it “must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches may even be destroyed if necessary for military operations.”

\textsuperscript{388} U.K. Ministry of Defence (2004), Section 2.2 (emphasis added). Until August 2010, the UK manual used to state “[...] to use only that degree and kind of force.” The word “only” has been stricken in an amendment of September 2010. See United Kingdom Ministry of Defence (2010), available at <http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/LegalPublications/LawOfArmedConflict/>. See also U.S. Army (1956), § 3.a., at 4: “[M]ilitary necessity [...] has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. [...] Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war.” For an overview of other definitions appearing in military manuals, see Melzer (2008), 283-285.

\textsuperscript{389} The doctrine of necessity covers both the \textit{jus ad bellum} and the \textit{jus in bello}. See Gardam (2004), 4-19.

\textsuperscript{390} O’ Brien (1957), 110.

\textsuperscript{391} ILC (1980b), Part 2, 50, § 37. See also Sandoz, Swinarski & Zimmerman (1987), § 1389 ff (commentary to Article 35 AP I).

\textsuperscript{392} See Rome Statute, Article 8(2)(a)(iv) (Intentionally launching an attack knowing it will cause excessive death and damage); 8(2)(b)(xiii) (Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war).

\textsuperscript{393} Melzer (2008), 286. While in agreement with Melzer on the point that the principle of military necessity has a restrictive function, it must at the same time be emphasized that, in so far it concerns the scope of that restrictive function, Melzer and this study take \textit{differing} viewpoints. This aspect will be subject of more detailed discussion in Chapter VII below.
prohibited under international law in situations other than armed conflict.”\(^{394}\) and which renders permissible measures “indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”\(^{395}\)

Military necessity and humanity are present in LOAC in several ways. 

*Firstly,* a rule may simply *explicitly prohibit* certain conduct. In such cases, the drafters of the rules agreed that humanitarian interests outweigh military interests.\(^{396}\) It is today generally accepted that military necessity may, under no circumstances whatsoever, be invoked as a ground for derogation from a prohibition.\(^{397}\) Thus, a prohibition under LOAC may not be deviated from on the basis of the material impossibility to comply with a rule.\(^{398}\) In addition, appeals on military necessity that overrule prohibited conduct under LOAC in order to avoid defeat,\(^{399}\) or to avert severe danger to the continued existence of the State, or to avoid that compliance to the laws of war could endanger a party’s strategic objectives are *a priori* unlawful.\(^{400}\) Such motives were once relied upon as part of the now commonly rejected\(^{401}\) Prussian doctrine *Kriegsraison* (in short: *Kriegsraison*) in the late 19th, early 20th century\(^{402}\) and *Staatsnotstand* (the principle of self-preservation).\(^{403}\)

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394 Melzer (2008), 286.
395 Article 14, Lieber Code.
396 An example is Article 51(2) AP I, which prohibits attacks or acts or threats violence against “the civilian population as such, as well as individual civilians,” or Article 51(4), which prohibits “indiscriminate attacks.” The provision reflects the compromise that while the killing of civilians may be advantageous, considerations of humanity fully prevail. A prohibitive rule may, however, also reflect that military necessity and humanity are in agreement as to the normative content of that rule, i.e. that the prohibition serves both military and humanitarian interests. The overall protection of combatants hors de combat may serve as an example: it was in the interest of all parties to the conflict that such combatants be respected on a reciprocal basis. While these rules save lives, they also prevented States from having to recruit and train new soldiers once they returned to their units.
398 According to McCoubrey it was *nota bene* Pictet who suggests this. See McCoubrey (1991), 220. Criticising McCoubrey: Hayashi (2010b), 54.
399 Westlake (1913), 126-128; Risley (1897), 125; Oppenheimer (1952b), 231-233.
400 On *Kriegsraison*, see See also Melzer (2008), 279-280.
401 The doctrine of *Kriegsraison* was rejected by the various war crimes tribunals after World War II. See (1948b), United States v. Wilhelm List, et al. (Hostage Case), UNWCC (8 July 1947-19 February 1948); (1948c), US v. von Leeb et al. (Case No. 72: the High Command trial); (1949c), Knapp Case (United States of America v. Alfred Felix Krupp von Bohlen und Halbach et al.) (Judgment) (31 July 1948). For a discussion of post-World War II trials involving the doctrine of military necessity, see Dunbar (1952), 446-452. Several authors have rejected the doctrine of *Kriegsraison*. See e.g. Carnahan (1998), 218; Rauch (1989), 214 ff.; Greenspan (1959), 314; Rogers (2004), 4; Best (1983), 172-179; Melzer (2008), 280; Hayashi (2010b), 52; Sandoz, Swinarski & Zimmerman (1987), 391, § 1386.
402 As explained by Melzer, *Kriegsraison* “essentially elevated the principle of State self-preservation from a general principle of law, to be taken into consideration in the balance inherent in the concept of military necessity, to the level of an absolute value capable of excusing any violation of the laws and customs of war.” Melzer (2008), 280.
403 In support: Stone (1954), 352 ff. Opposing: Sandoz, Swinarski & Zimmerman (1987), 391, § 1387; ILC (1980a), 34, 46-47, 50. The ICJ, in relation to the issue of the legality of the threat or use of nuclear weapons, acknowledged that it could not “lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence […] when its survival is at stake” but nevertheless concluded that it could not “conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake.” See (1996), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, 263. But see Dunbar (1952), 443, who contends that the doctrine of self-preservation and military necessity should be separated: “[T]he phrase ‘necessity in self-preservation’ is more properly employed to de-
Secondly, military necessity becomes visible as an explicit exceptional element in the lex scripta which functions as a basis for deviation of otherwise prohibited conduct, provided that the measure resorted to is required to serve a legitimate purpose and is otherwise in conformity with LOAC. Examples of norms permitting a plea on military necessity are Article 23(g), 1907 HIVR, which principally forbids the destruction or seizure of enemy property, “unless such destruction or seizure be imperatively demanded by the necessities of war” and, of particular interest for the present study, Article 78 GC IV, according to which the Occupying Power may intern persons protected under GC IV when necessary for “imperative reasons of security”. Exceptional military necessity remains undefined in conventional LOAC. While viewed by some as an expression of Kriegsraison, the proper understanding of exceptional military necessity is not that it constitutes a deviation from LOAC as a normative framework, but a deviation in accordance with LOAC based on the fact that in relation to certain norms the drafters have taken into account that under strict conditions States and individual operators applying the norms may invoke military necessity as a legal basis for otherwise foreclosed derogation from a prohibition protecting humanitarian and other considerations. Norms permitting the exceptional call on military necessity demand the verification of its balance with humanitarian interests in each individual case because of the conditions incorporated. It logically follows, as has been generally accepted in doctrine and jurisprudence, that outside the scope of exceptional rules appeals on military necessity as an authorizing instrument are a priori unlawful. Despite its frequent mentioning in conventional LOAC, the precise meaning and mechanics of exceptional military necessity is found by many to be elusive and has led the concept to become “prone to misunderstanding, manipulation and invocation at cross-purposes.” Nonetheless, an appeal on military necessity will only be lawful when it conforms with two requirements underlying the general principle of military necessity as a whole: (1) the re-

scribe a danger or emergency of such proportions as to threaten immediately the vital interests, and, perhaps, the very existence, of the state itself. Military necessity should be confined to the plight in which armed forces may find themselves under stress of active warfare.” On this distinction, see also Greenwood (1999), 249-250.

404 Sandoz, Swinarski & Zimmerman (1987), § 1403; Hayashi (2010b), 59: “As of yet, there is no uniquely authoritative definition of exceptional military necessity. It is proposed here that, as an exception, military necessity exempts a measure from certain specific rules of international humanitarian law prescribing contrary action to the extent that the measure is required for the attainment of a military purpose and otherwise in conformity with that law. Military necessity must be distinguished from necessity as a circumstance precluding wrongful conduct. See ILC (1980a), 45-46). While both may coincide, military necessity must be treated separately as an accepted exception under LOAC, whereas necessity may not be relied upon as a justification for deviation from LOAC. Both have different functions (exceptional v. justificatory) and requirements. See Hayashi (2010b), 58.

405 Despite the absence of a definition, the 1949 Geneva Conventions make specific mentioning of exceptional military necessity in the following provisions: GC I, Articles 8, 30, 33, 34; GC II, Articles 8, 28, 51; GC III, Articles 8, 76, 126, 130; GC IV, Articles 9, 49, 53, 55, 108, 112, 143, 147; AP I, Articles 54, 62, 67, 71; AP II, Article 17; 1907 HR IV, Article 23(g).

406 Gardam (2004), 7, footnote 30; Martin (2001), 394.

407 Melzer (2008), 281.


409 Hayashi (2010b), 41. Melzer (2008), 279 arguing that “hardly any notion of that body of law has been more neglected and misunderstood in legal doctrine” and that military necessity contains a restrictive function that prohibits parties to an armed conflict to apply lethal force in circumstances where such force is manifestly not necessary. Schmitt, on the other hand, also argues that the principle of military necessity is misunderstood, but because it has been interpreted (as Melzer does) “to impose impractical and dangerous restrictions on those who fight.” Schmitt (2010b), 796.
quirement of necessity for the achievement of a *legitimate military purpose*, and (2) the requirement that the *measure* must be otherwise in conformity with LOAC. 

**Thirdly**, military necessity is embedded as an *implicit* basis permitting certain conduct in warfare. Examples in case are the rules implicit in LOAC that permit the capture or placing *hors de combat* of individuals directly participating in hostilities, the hindrance of military deployments, the occupation of territory, or the destruction or seizure of military objectives. In these cases, the parties to the conflict are in principle free to act, provided the act itself is in conformity with LOAC and international law in general. 

It thus follows that in relation to these rules there is no further need, nor legal basis for a distinct *appeal* on military necessity to perform certain desired conduct: the military necessity to resort to a particular measure is presumed to be principally omnipresent, thereby outweighing humanitarian interests. Conversely, inasmuch as military necessity may not be invoked to deviate from a prohibition, neither does LOAC permit the deviation from norms on *humanitarian* interests additional to those already taken in consideration when drafting the norm, unless expressly so provided for. 

As Dinstein explains:

> [e]ach one of the laws of war discloses a balance between military necessity and humanitarian sentiments, as produced by the framers of international conventions or as crystallized in the practice of States. The equilibrium may be imperfect, *but it is legally binding in the very form that it is constructed*. It is not the privilege of each belligerent, let alone every member of its armed forces, to weigh the opposing considerations of military necessity and humanitarianism so as to balance the scales anew. *A fortiori*, it is not permissible to ignore legal norms *on the ground that they are overridden by one of the two sets of considerations.*

As will be addressed in more detail below, recent interpretations of the principle of military necessity in the context of the conduct of hostilities arguably elevate it to the level of an independent norm that demands from States and individual operators to carry out a rebalancing of military interests with humanitarian interests in each individual application of unqualified rules permitting certain “conduct that IHL does not prohibit in the abstract” (i.e. rules that do not contain absolute prohibitions, nor exceptions to prohibitions). 

**Fourthly**, in the absence of a positive rule of LOAC covering desired conduct, the parties to the conflict are “in principle free […]” However, the Martens Clause demands that the lawfulness of the desired conduct must be established by reaching an *ad hoc* and reasonable compromise between military necessity and humanitarian interests in view of the “principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

In sum, the unique balance between military necessity and humanity forms the backbone of LOAC, and understanding this concept is of crucial importance not only in understanding

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410 For a detailed analysis of these requirements, see Hayashi (2010b). See also Chapter IX for an application of exceptional military necessity to the case of internment under Article 78 GC IV.

411 Sandoz, Swinarski & Zimmerman (1987), § 1403: “In other words, when the Parties to the conflict do not clash with a formal prohibition of law of armed conflict, they can act freely within the bounds of the principles of international law, i.e., they have the benefit of a freedom which is not arbitrary but within the framework of law.”

412 Dinstein (2009a), 274 (emphasis added).

413 Melzer (2008), 286.


415 The Martens Clause was firstly adopted at the 1899 Hague Peace Conferences and the Preamble of the 1907 HIVR Preamble. See also (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, 257 for a confirmation of its continuing applicability.
why LOAC functions the way it does, but also in understanding its interplay with other regimes, most notably IHRL. While one could argue that parties to the conflict are in principle prohibited from conduct, unless expressly permitted in principles and rules of positive international law, the conceptual construct inherent in the grammar of LOAC is that, generally, LOAC allows any conduct in order to attain the legitimate purpose of warfare, unless it is specifically prohibited or restricted by rules and principles of positive international law.\footnote{Hampson (2011), 193 f; also Kleffner (2011), 7.}

However, a preliminary issue is whether LOAC at all applies. It is to this issue of \textit{applicability} that we will now turn.

\subsection*{1.2.5. Applicability: ‘Armed Conflict’}

In terms of its applicability \textit{ratione materiae}, LOAC only regulates \textit{armed conflicts}. This concept of ‘armed conflict’ was introduced in 1949, with the adoption of the four GC’s. It meant the termination of ‘the state of war’ as the concept central in classic international law relied upon by States to trigger the applicability of the laws of war.\footnote{Detter (2000), 26; Oppenheim (1952a), 202; Greenwood (2008b), 45; Grob (1949), 64-79. Also Jinks (2003), 1; Lubell (2010), 87-88.} To increase the likelihood of the applicability of LOAC, the concept of ‘armed conflict’ was adopted as an \textit{objective} norm, which provided a practical scope of application for humanitarian law based on actual need rather than political considerations and avoided endless discussions on the legal qualification of certain acts as law enforcement, self-defence, reprisals or war, before the rules on the protection of individuals and populations from the consequences of the hostilities could be invoked.\footnote{Melzer (2008), 247; Pictet (1952b), 32.}

It implies that a State’s mere labeling of a particular tension with another entity as an ‘armed conflict’, or as ‘fight’, ‘war’, ‘civil war’, ‘terrorism’, ‘rebellion’, or ‘insurgency’ does not imply that, at the \textit{legal} level, an armed conflict indeed exists to which LOAC applies.\footnote{In classic international law, legal doctrine recognized three concepts to denote an internal conflict as civil war: rebellion, insurgency and belligerency. The explicit recognition as such entailed certain consequences for the legal position of the insurgents \textit{vis-à-vis} the government, as well as the relationship of the government with third States. In extremis, a formal declaration of recognition of belligerency by the counterinsurgent State implied the applicability of the laws of war in the relationship between the government and the insurgents. In practice, for political reasons mostly, States refused to explicitly recognize belligerency, and in doing so, to admit to the existence of a war.} In contrast, neither is a State’s declaration that its counterinsurgent forces are operating under LOAC sufficient to conclude upon the existence of an armed conflict with the insurgents. At the same time it cannot be \textit{a priori} excluded that a conflict between a counterinsurgent State and insurgents does not constitute an armed conflict and is therefore not governed by LOAC.

What is required is the determination of the existence of an armed conflict based on the merits in each case. As noted, the assumption in this study is that such determination has taken place and that the counterinsurgency takes place in the context of an armed conflict.

One would expect that a notion so key to the applicability of LOAC be set out in a clear and uncontroversial definition. This is, however, not the case. The most authoritative description, other than those found in doctrine, follows from the ICTY’s \textit{Tadić}-judgment of 1995. To recall,
[...] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.\textsuperscript{420}

This ‘definition’ has provided an authoritative starting point for States and international organizations, as well as judicial organs (national and international) and scholars,\textsuperscript{421} although it may be criticized for being over-inclusive.\textsuperscript{422} It makes clear that the notion of ‘armed conflict’ cannot be explicated in a singular definition, i.e. encapsulating any situation of armed conflict, regardless of where and between what parties they take place. The Tadic-definition clearly maintains the traditional dichotomy between two types of armed conflict – IAC and NIAC – based in the nature of the parties to the conflict, and suggests the existence of different thresholds, requiring “a resort to armed force between States” for IAC, and “protracted” armed violence and “organized armed groups” in the case of NIAC. This dichotomy is of fundamental importance to the question of the lawfulness and “protracted‖ armed violence and “organized armed groups” in the case of NIAC. Since long, arguments for a convergence of the regulatory frameworks of IAC and NIAC have been proposed,\textsuperscript{423} so that “what will matter as regards legal regulation will not be

\textsuperscript{420} (1995b), \textit{The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)}, § 70.

\textsuperscript{421} The Tadic-formula has been used by various other tribunals and courts. It has been used by the ICTR ((1998k), \textit{The Prosecutor v. Akayesu, Case No. 96-4-T, Trial Chamber Judgment (2 September 1998)}, § 619; (2005b), \textit{Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Separate Opinion of Judge Simma (19 December 2005)}, § 23; (2005p), \textit{The Prosecutor v. Moinian Fofana, et al., Decision on Appeal against “Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence”, Appeals Chamber Decision (16 May 2005)}, § 32; (2007b), \textit{The Prosecutor v. Labanga, Case No. ICC-01/04-04/06, Décision sur la confirmation des charges (29 January 2007)}, § 233. The Tadic-formula has also been used by the UN Special Rapporteur on the situation of human rights in the Palestinian Territories and by the Commission on Human Rights concerning the situation in Somalia, see United Nations (2001), § 13 and United Nations Commission on Human Rights (1997), § 54 respectively. It has also found its way in the ICC Statute. The latter can be viewed as proof of its development into a rule of customary law.

\textsuperscript{422} As Emmerich de Vattel argued, “the common laws of war, those maxims of humanity, moderation and probity [...] are in civil wars to be observed by both sides.” See de Vattel (1760), 109-110. Rosemary Abu-Saab argues that the Lieber Code is to be regarded, as a minimum, as a progressive move in the direction of a codification of the laws and customs of war in general. See Abu-Saab (1991), 210. But see also Pictet (1956), 29, footnote 1 (“one day the Power will accord at all times and to all men the benefits they have already agreed to grant their enemies in time of war.”) and Schwarzenberger (1968a), 255 (“the distinction between international and internal armed conflicts [was becoming] increasingly relative”). More recently: McDonald (1998), 121; Meron (2000a); Moir (2002), 51; Crawford (2010); Crawford (2007). See also Cassese (1996), § 11. According to Cassese, such convergence has indeed taken place in respect of the customary international law regulating armed conflicts. Cassese based his argument on the findings of the Trial Chamber in the Tadic case. Dealing with the issue of the dichotomy, the Trial Chamber asked and duly answered the following question: “Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a single State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that
whether an armed conflict is international or internal, but simply whether an armed conflict exists per se.”424 Indeed, it can be argued that the normative frameworks of both types have drawn closer together in some areas, such as that of the conduct of hostilities, but in so far this convergence has taken place it did so at the level of customary law, not conventional law. Thus, to conclude that a definite convergence of IAC and NIAC has taken place seems to be premature, to say the least, and to some there are some “insurmountable obstacles that stand in the way of such an amalgamation being effected in the practice of States,”425 particularly in the field of the legal status of individuals in hostilities and detention; the law of neutrality and the body of law relating to belligerent occupation.426 As a minimum, the convergence requires a change in attitude of the community of States that IAC and NIAC are no longer fundamentally different in character. Only such a change would open the door to take a necessary last step to unification of IAC and NIAC, which is to amend the GCs and its additional protocols. As much as this may be desired, it is fair to say that this will not occur in the foreseeable future.

In sum, therefore, this study adopts the position that the traditional dichotomy between IAC and NIAC persists. This is of particular significance in view of the question whether a conflict between counterinsurgent State and insurgents is governed by the law of IAC or NIAC.

The law of IAC applies to four distinct situations. Three of them may be distilled from CA 2,427 which each qualify as genuine types of IAC:

1. armed conflict between two or more States (inter-State armed conflict);
2. declared war; and
3. partial or total occupation, even when unopposed.

Article 1(4) AP I adds a fourth situation that is technically not a type of IAC, but to which the application of the law of IAC is extended, i.e.428 armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

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the aforementioned dichotomy should gradually lose its weight.” See (1995h), The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber), § 97. However, in § 126 the Trial Chamber did acknowledge the fact that “(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal armed conflicts, rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.”

427 CA 2 states: “In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”
428 Technically, liberation movements, upon recognition as belligerents, do not constitute States, and therefore one cannot speak of an inter-State armed conflict, but only of an armed conflict to which the relevant norms of LOAC governing IAC apply.
The situation of declared war, while mentioned in CA 2(1), has become a rare feature of State practice and has rendered that part of the provision practically obsolete.\(^{429}\) Also, while Article 1(4) AP I is still in force, it has never been applied in practice and the likelihood of its application is very small. Wars of national liberation, to which the provision refers, have become a virtually extinct form of armed conflict.\(^{430}\) In addition, notwithstanding the fact that the vast majority of States have ratified AP I, Article 1(4) AP I, it remains very controversial\(^{431}\) and cannot be considered as having crystallized into a customary norm. Given the manner in which insurgent movements operate, it is highly unlikely that a State is willing to recognize the applicability of the laws of IAC to a national liberation movement, for such movements generally will not fulfill the strict conditions required of a party to an IAC, as set out in Article 43 AP I. Thus, subsequent examinations on the applicability of the law of IAC to the situational contexts of counterinsurgency will be limited to the situations of inter-State armed conflict and occupation only.

The second traditional type of armed conflict recognized in LOAC is NIAC. LOAC defines NIAC in two places. Firstly, CA 3 delineates its scope of applicability to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties,” to be determined in each single case.\(^{432}\) Secondly, according to Article 1 of AP II, the material field of application of AP II, while also excluding its applicability to armed conflicts covered by Article 1 AP I, is restricted to armed conflicts

[w]hich take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.\(^{433}\)

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\(^{429}\) However, there are examples of States that expressed their being at war with another State through other means than a formal declaration of war. Examples are the explicit statements of a number of Arab States in 1948 and 1967 with respect to the war with Israel, and those made by Iran and Iraq during the First Gulf War (1980-1988) and that of Pakistan during its conflict with India in 1965. See Greenwood (1987), 290-294. Despite their decline in importance on the international level, declarations of war may be of importance on the domestic level, particularly in relation to the activation of emergency laws allowing for derogation from human rights obligations (for example in the area of deprivation of liberty).

\(^{430}\) From the viewpoint of the purposes of LOAC, the incorporation of wars of national liberation into the scope of IAC has contributed significantly to the ‘internationalization’ of conflicts that before belonged to the domestic jurisdiction of States, a development that must be viewed as a major deviation from the protective shield of State sovereignty to which States held on to until 1977. Today, wars of national liberation are a virtually extinct form of conflict. Article 1(4) AP I is, however, not a dead letter. It has gained significant importance in relation to alien occupation, i.e. “partial or total occupation of a territory which has not yet been fully formed as a State.” Greenwood (1989), 194-96. See also Ducheine (2008), 517; Sandoz, Swinarski & Zimmerman (1987), § 112. Alien occupation must not be confused with belligerent occupation, i.e. the occupation by another State of (a part of) a State’s territory. Sandoz, Swinarski & Zimmerman (1987).

\(^{431}\) It was among the main reasons why many States, including the US and Israel, to date have refused to ratify AP I.

\(^{432}\) (2003n), Rutaganda v. The Prosecutor, Case No. 96-3-A, ICTR, Appeals Chamber Judgment (26 May 2003), § 93: “The definition of an armed conflict is termed in the abstract, and whether or not a situation can be described as an ‘armed conflict’, meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis.”

\(^{433}\) Article 1 AP II clearly limits its applicability to armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups […]” (emphasis added).
The question of relevance for the present study is whether the law of IAC or NIAC regulates the legal relationship between a Counterinsurgent State and insurgents in the various situational contexts of counterinsurgency? This determination will take place in Chapter V. For now it suffices to conclude from the above that the forcible conduct between a counterinsurgent State and insurgents in the contexts of NATCOIN, OCCUPCOIN, SUPPCOIN or TRANSCOIN taking place in armed conflict is always regulated by LOAC, whether the conflict can be qualified as an IAC or a NIAC. Clearly, this qualification is of relevance in view of the significant difference in availability, density and precision of rules in conventional IAC and NIAC, but it also means that conduct in armed conflict cannot take place in a legal vacuum.

2. Themes in the Legal Discourse on the Role and Interplay of IHRL and LOAC

Ultimately, the lawfulness of targeting and operational detention in counterinsurgency operations is contingent upon the very interpretation of concepts underlying the relevant normative frameworks of IHRL and LOAC, as well as the particular outlook on the interplay of both regimes in armed conflict. This section identifies and discusses three themes that may be distilled from the academic discourse on the interplay between IHRL and LOAC, and which together demonstrate that the potential outcome of that interplay is nourished by often seemingly irreconcilable viewpoints.

The themes that will be addressed are (1) the dogmatic approaches with respect to the relationship between IHRL and LOAC that can currently be identified from the legal discourse; (2) the issue of the humanization of LOAC; (3) the legal discourse relating to legal issues following the characteristics of today’s ‘new war paradigm’, in particular the war on terrorism.

2.1. Dogmatic Approaches on the Interplay IHRL-LOAC

From doctrine, practice of (quasi-)judicial bodies and State practice, three principal dogmatic ‘schools’ can be identified: the separatist, the integrationist, and the complementarist school. Each school will be addressed separately below. By looking at the various relevant sources of international law, together, these approaches inform us on the principle arguments put forward on the issue of whether LOAC and IHRL can be applicable at the same time, and if so, how they interrelate. The purpose here is not to place a value to each of the views, but rather to objectively observe their presence within the debate.

2.1.1. Separatist Approach

The separatist approach is founded on the historical divide between LOAC and IHRL in terms of both material and institutional development. It is built on the traditional premise that LOAC and IHRL are two fundamentally different legal regimes that each occupy a distinct area of international law since 1945 and cannot be reconciled in any way. LOAC is

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434 The historical roots of this theory date back to 1945, which marks the birth of both the Geneva Conventions and the UDHR and the separate development of both regimes until 1968. In terms of institutional development, LOAC was principally a regime ‘belonging’ to the ICRC, whereas IHRL was governed by the UN only. The turning point came in 1967, after the 6-Day War. This conflict triggered the debate of the role of human rights in armed conflict, which eventually led to the Tehran Conference in 1968.
preserved as the law of war; IHRL as the law of peace.\textsuperscript{435} LOAC must be viewed as the law that “comes into force when the human rights system is no longer valid, in order to protect those who are unable to continue the fighting (e.g. wounded and sick) or never took part in it (civilians).”\textsuperscript{436}

In essence, therefore, a relationship between them is out of the question: both regimes forcibly lead a life as singles, and are forbidden to even lay eyes on each other. As put by Meyrowitz:

Nous avons constaté que le droit des conflit armés et la notion des droits de l’homme sont, par leur origine, leur fondement, leur nature, leur objet, leur finalité et leur contenu, radicalement différents, s’ils ne sont pas diamétralement opposes, et qu’ils sont irréductibles l’un à l’autre.\textsuperscript{437}

Uniting LOAC and HRL would, it is argued, amount to politicization of both branches and, as a consequence, legal confusion; something that should be avoided.\textsuperscript{438}

The separatist approach in its original form appears to have been overtaken by the progression of law, especially after 1968 with the adoption of the Teheran Declaration, and no longer enjoys systemic or teleological support.\textsuperscript{439} However, the attacks of 11 September 2001 spurred renewed support for the separatist approach, in both literature and State practice, particularly that of the US and Israel.

Several authors have expressed support for the separatist view. For example, while acknowledging that the ICCPR and the ICESCR may be applicable in NIAC, Dennis categorically rejects such application outside a State’s territory in the context of IAC and occupation, in which LOAC is the \textit{lex specialis} and displaces IHRL as the primary source for determining legality of action. To demand the application of IHRL in international armed conflict and occupation “offers a dubious route towards increased state compliance with international norms” and “is likely to produce confusion rather than clarity and increase the gap between legal theory and state compliance.”\textsuperscript{440}

Other authors rely on other arguments to confirm the ongoing separation of LOAC and IHRL. Lattanzi, for example, appears to stress the limited scope of jurisdiction of human rights bodies to apply LOAC.\textsuperscript{441} Bowring argues that LOAC

\textsuperscript{435} Pictet (1975): “humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime.” This strict separation shows similarity with the integrationist view, which, as we shall see, also appears to maintain a division between war law and peace law. Schäfer questions whether the separatist view categorically rules out the applicability of IHRL in armed conflict. He finds room for the acceptance of the applicability of IHRL in Mushkat’s remark that “the human rights system […] is applied \textit{principally} in times of peace”, and not exclusively. See Schäfer (2006), 38, referring to Mushkat (1978), 166 (emphasis added).

\textsuperscript{436} Mushkat (1978), 161.

\textsuperscript{437} Meyrowitz (1972), 1104. Between both branches exists an “antinomie irréductible” or an “incompatibilité foncière” (Meyrowitz (1972), 1095). Other early proponents of separatism are Suter (Suter (1976)), Mushkat (Mushkat (1978)), and Dinstein (Dinstein (1977), 148). Dinstein nowadays appears to have abandoned his earlier radical view and has shifted to a complementarist approach, showing acceptance of the applicability of IHRL in times of armed conflict, in particular in those areas of IHRL where it is able to step into gaps left unregulated by LOAC, such as remedies for breach of the law. See Dinstein (2004), 25.

\textsuperscript{438} Kolb (2006), § 28.


\textsuperscript{440} Dennis (2005), 141. Support for this argument follows in his view from State practice in IAC and occupation, as well as the position of States during the drafting stage of HRL treaties in view of LOAC treaties. See also Hansen (2007), 4.

\textsuperscript{441} Lattanzi (2007), 569-570.
and IHRL are so different, that “[t]here is no unity there in the first place to be fragmented.” Therefore, it is out of the question that LOAC were to be applied by a human rights treaty body. Stein takes a more pragmatic approach and argues that in military practice “it is not easy what one would gain from a “joint venture” between human rights and humanitarian law in an armed conflict, be it international or non-international.” In so far it concerns State practice, the US and Israel openly reject the applicability of IHRL in armed conflict. Adhering to an absolute exclusionist interpretation of the maxim of “lex specialis”, the US has assumed a particular separatist position with respect to activities it has undertaken in view of the GWOT since the attacks of 11 September 2001. This is reflected, inter alia, in its legal position concerning the detention of individuals held at detention centers at various places, of which Guantanamo Bay is the most debated. The US adopted a similar position with respect to its military operations in Iraq, in 2003, and the targeted killing by the CIA of suspected Al Qaeda operatives in Yemen, in 2002, by explaining to the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions that “where humanitarian law is applicable, it operates to exclude human rights law.” In similar vein, Israel has maintained a separatist view towards the application and relationship of IHRL with LOAC in the occupied territories. In relation to the ICCPR and ICESCR, Israel, inter alia, submits that IHRL does not apply since LOAC is the specific legal regime regulating situations of occupation. In light of treaty law, international practice and jurisprudence, the US and Israeli positions are isolated and have been criticized for having no support in systemic and teleological

442 Bowring (2009), 3.
443 Stein (2002), 163-165
444 In response to the decision of the IAGHR to order precautionary measures in the Guantanamo Detainees Case, the United States concluded that: “International human rights law is not applicable to the conduct of hostilities or the capture and detention of enemy combatants, which are governed by the more specific laws of armed conflict.” See (2002k), Response of the United States to Request for Precautionary Measures (Detainees in Guantanamo Bay, Cuba), 1022, available at <http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=7lt0qaX9CP&Content =134>.

445 In similar vein, Israel has maintained a separatist view towards the application and relationship of IHRL with LOAC in the occupied territories. In relation to the ICCPR and ICESCR, Israel, inter alia, submits that IHRL does not apply since LOAC is the specific legal regime regulating situations of occupation.

447 Israel has argued before the ICJ that “the rejection of the application of certain human rights to Palestinian inhabitants of the Occupied Territories was based on the notion that in those areas IHL applied, not human rights law.” See (2004k), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004. See also UNHRC, Second Periodic Report by Israel (CCPR), § 8; ECOSOC, Second Periodic Report by Israel (CECSR), § 5. For condemnations of Israel’s viewpoint, see (1998e), Concluding Observations of the Human Rights Committee: Israel (Concluding Observations/Comments) (18 August 1998), § 21; (2003a), Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003), § 11; (2003b), Concluding Observations on Israel (23 May 2003); Committee on Economic (2001), § 15; (1998d), Concluding Observations on Israel (30 May 1998), § 10; (2002), Summary Records Israel (10 October 2002), § 20.
interpretation. Even if both States would support their position by relying on the persistent objector-principle, as some advise, it remains doubtful that such a claim would be accepted. As Hampson and Salama point out, not only is it questionable that the doctrine of persistent objector can be applied to IHRL, in particular when it concerns human rights norms that have attained the status of *jus cogens*, but “more fundamentally, there is a grave doubt as to the persistence of their objection.” For example, before 11 September 2001, the US relied on a similar reasoning as the ICJ in the Nuclear Weapons Case with respect to the right to life, namely that it continues to apply in armed conflict.

In sum, the arguments underlying the traditional separatist view towards LOAC and IHRL do not provide much insight, if any, into the question of how LOAC and IHRL interrelate once they are in a relationship. It merely points out that in fact no relationship is going to exist. Contemporary views towards the separatist approach barely offer more clarity. It merely becomes clear that the modern-day separatist view appears not to reject the applicability of IHRL during armed conflict all together (e.g. not in traditional intra-State non-international armed conflict), and thus to allow a relationship to evolve, but that both regimes are in such conflict with each other particularly in international armed conflicts and situations of occupation, that separation logically must follow by application of the *lex specialis* principle in an absolute manner.

### 2.1.2. Integrationist Approach

With the separatist view at the one end of the spectrum, it can be said that the integrationist theory is positioned at the other end. Its aim at “*eine Verschmelzung von Menschenrechten und humanitärem Recht* […]”. In other words, LOAC and IHRL are to be seen as two branches belonging to one all-encompassing regime of humanitarian law. Their contents are mutually exchangeable. Some authors refer to this idea as the convergence or merger approach. Views as to how IHRL and LOAC should be integrated differ. Robertson argues that

> […] human rights is the genus of which humanitarian law is a species. Human rights law relates to the basic rights of all human beings everywhere, at all times; humanitarian law relates to the rights of particular categories of human beings – principally, the sick, the wounded, prisoners of war – in particular circumstances, i.e. during periods of armed conflict.

Others, such as MacBride, Draper and Kälin argue that the merger of IHRL and LOAC logically follows from the fact that IHRL, IHRL in cases of emergency, and LOAC form a horizontally connected continuum. Contemporary signs of support for this approach

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447 Lorenz (2005), 212; Salama & Hampson (2005), 17, § 69.
448 In relation to the US position, see Hansen (2007), 61-64.
449 Salama & Hampson (2005), 17, § 70.
450 Alston, Morgan-Foster & Abresch (2008), 193.
451 Lorenz (2005), 205.
453 Quévin (2008), 14. Other verbs used to denote an integrationist approach are “confluence” (Quentin-Baxter (1985)), “meshing” (Meron (1983), 589) and “fusing” (Rogers (1999), 2).
454 Robertson (1984), 797. Compare with Pictet, who, although arguably adhering a complementary view, expresses an integrationist position when arguing that in essence international law contains a larger body of humanitarian law, which consists of a body of humanitarian law in the strict sense, i.e. Geneva Law and Hague Law, applicable only in times of armed conflict, and human rights law, mainly applicable in peace time. See Pictet (1975), 13 ff; Pictet (1966), 7 ff.
455 MacBride, Draper and Kälin; McBride (McBride (1970), Draper (Draper (1971); Draper (1972)) and Kälin (Kälin (1992); Kälin (1994))
among legal scholars follow from the writings of Meron, Martin, Heintze, and Krieger. The UN Secretary-General appears to support the integrationist view. To evade “[…] lengthy debates on the definition of armed conflicts, the threshold of applicability of humanitarian law, and the legality under international law of derogations from human rights obligations,” he recognizes that fundamental standards of humanity, derived from IHRL, LOAC, international criminal law, international refugee law and other related fields, are “applicable at all times, in all circumstances and to all parties.”

An example of integration is the Turku Declaration, which attempts to provide a framework of minimum-guarantees taken from both regimes in situations of conflict that do not cross the threshold of a NIAC (but which admittedly lacks sufficient strength due to its non-bindingness as a ‘soft-law’-instrument).

It is difficult to ignore the underlying idealist stance of the integrationists towards the way in which LOAC and IHRL are to interact. Clear examples de lege lata of integration of LOAC and IHRL are uncommon.

The validity of the integrationist theory has been questioned in international legal literature. Schäfer argues that even though the development of the relationship between LOAC and IHRL points in the direction of integration, “[…] eine tatsächliche Verschmelzung der beiden Gebiete bereits wegen des unterschiedlichen institutionellen Rahmens auf absehbare Zeit weder realistisch noch unbedingt wünschenswert erscheint.” To Lubell, merging LOAC and IHRL would result in a “genetically modified mutation.” In light of the ICJ’s Advisory Opinion in the Palestinian Wall Case, it may be concluded that the integrationist approach does not find support with the ICJ. It seems therefore justified to conclude that the integrationist approach is a reflection at most of lege ferenda, not of lec lata.

2.1.3. Complementary Approach

The complementary theory appears to be the dominant view among scholars and judicial bodies and reflects the lec lata. As to the meaning of ‘complementary’, Kleffner explains that,

“generally speaking, matters or things are described as being ‘complementary’ if and when they are ‘completing something else’ or ‘making a pair or a whole’. ‘Complementarity’, in turn, refers to a relation of different parts and denotes the condition of things that comple-

460 United Nations Secretary-General (1998), § 3.
462 An exception that is often mentioned is Article 38 of the Convention on the Rights of the Child (CRC), a human rights convention that explicitly integrates LOAC as a framework of protection of children in times of armed conflict. See also §§ 12 and 14 of the Preamble and Article 5 to the Facultative Protocol to the CRC.
466 Quenivet (2004).
467 Schäfer (2006), 35-42.
468 Heintze (2004a), 247 ff.
ment one another, while a ‘complement’ is generally understood as something that, together with other things, forms a unit.  

Indeed, supporters of the complementarity-theory accept that while LOAC and IHRL have different historical, conceptual, applicability and material backgrounds and must be considered as unique regimes, this does not preclude the possibility that both can be applicable in parallel: IHRL continue to be applicable during armed conflict and, following their simultaneous applicability, the one regime may come to the assistance in the completion of the other if the latter shows insufficient or no regulation. As explained by Schäfer:

Nach der komplementaristischen Theorie sind das humanitäre Völkerrecht und die Menschenrechte weiterhin gleichgeordnete und voneinander verschiedene, wenn auch eng verbundene und sich zum Teil überlappende Gebiete des Völkerrechts, die sich gegenseitig ergänzen [...] wodurch Lücken im materiellrechtlichen Bereich geschlossen werden und Zwei verschiedenartige Überwachungsmechanismen greifen und damit besseren Schutz bieten können.

In spite of what is often thought, complementarity is reciprocal. In other words, as much as IHRL can complement LOAC, so can LOAC complement IHRL. It is generally recognized that the determination of the complementarity of IHRL and LOAC must take place on a case-by-case basis, in view of the specific norms in case and the context in which they are used.

Given the abundance of evidence within the various sources of international law, the complementary character of the relationship between IHRL and LOAC is difficult to deny. It “currently enjoys the status of the new orthodoxy.” A large amount of treaty norms, either implicitly or explicitly, arguably provides an opening for IHRL to step in and to complement gaps, or clarify vague areas. Decisions and pronouncements of various quasi-judicial and judicial organs, at the international, regional or domestic level, or estab-

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469 Kleffner (2010a) 73.
472 Abi-Saab (1997), 122-123; Duffy (2005), 300.
474 Ben-Naftali (2011a), 5.
475 Examples of treaty texts are, in so far it concerns LOAC-treaties: CA3; Article 7 GC I; Articles 6 and 7 GC II, Articles 6, 7, 14, 84, 105, 109, 130 GC III; Articles 5, 7, 8, 27, 30, 38, 78, 80, 146, 158 GC IV; Articles 11, 44(5), 45(3), 75, 85 API; the Preamble and Articles 4, 6(2) APII.
478 See, for example, (2005d), HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005).
lished _ad hoc_ tribunals contain proof of complementarity. Similarly, statements, resolutions and reports of international organizations and NGOs contribute to the complimentary approach. In addition, there exists overwhelming support among a large group of authors for the existence of a state of completion between IHRL and LOAC. Supporters of the complementary approach see a potential for increasing the protective scope of norms regulating armed conflict. In their view human rights strengthen the position of the individual in armed conflict _vis-à-vis_ the State. This aspect will be further highlighted in the following section.

2.2. The Discourse on the ‘Humanization’ of Armed Conflict

A second theme identifiable from the legal discourse concerns the so-called ‘humanization’ of armed conflict, a term introduced by Meron in his seminal article ‘The Humanization of Humanitarian Law.’ This process of ‘humanization’ of armed conflict, particularly in its modern stage, has caused a lively academic discourse between those who seek to advance humanity in warfare, and those who seek to preserve sovereign military interests. This section addresses the notion of ‘humanization’ of armed conflict as understood in this study. It then points out the different views towards this process, views that also color the discourse on the relationship between IHRL and LOAC.

2.2.1. The Meaning of ‘Humanization’

‘Humanization’ can be viewed as one of the venues by which restraint in warfare, legal or extra-legal, can be achieved. According to Meron, humanization has influenced almost every aspect of LOAC. For the purposes of this study, humanization of armed conflict is defined as:

the process of legal expansion of protective norms for individuals affected by armed conflict through (1) the interpretation and modification of existing – and (2) the development of new norms of LOAC, of either conventional or customary nature, by States or other subjects operating in the realm of LOAC.

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479 ICTY: (1998n), _The Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment of 10 December 1998_.
483 Meron (2000a)). Its definitional scope in this study, however, deviates from that meant by Meron, as will be explained.
484 As will be explained, the definitional scope of ‘humanization’ meant in this study deviates from that meant by Meron.
485 Other incentives for restraint in warfare can be reasons of economical, political or military nature in so far the use of excessive force would endanger the political objectives. This is also called economy of force and it is one of the fundamental principles of military doctrine.
486 Meron (2000a), 239. Traces can be found in the prohibitions on unnecessary suffering and indiscriminate warfare on the regulation of weapons; the ban on antipersonnel mines and blinding laser weapons; the protection of combatants; the scope of the principle of reciprocity in LOAC; the accountability for violations of LOAC; and innovations in the formation, formulation and interpretation of rules.
At a deeper level, humanization refers to the ongoing process of recalibration of the balance between military necessity and humanity. As noted, the positioning of both elements is of crucial importance in understanding the mechanics and logic of LOAC in both legal and military practice.\(^\text{487}\) While in rare occasions both point in the same direction,\(^\text{488}\) they ordinarily reflect diametrically opposed interests that somehow have to be harmonized.\(^\text{489}\) The process of humanization is one of \textit{cost and benefit}. On the one hand, humanization is intrinsically linked with the principle of humanity, which functions as the LOAC-gateway to achieve the desired benefit: to increase of protection of individuals \textit{bors de combat}, and their property. On the other hand, humanization encounters resistance in the principle of military necessity. To maintain the traditional balance of LOAC, every desired increase in humanitarian protection must be weighed against the costs for sovereign military interests. While increasing the humanitarian value of LOAC is a laudable endeavor, it is understandable that States view the ‘fiddling’ with the traditional balance under pressure of ‘humanization’ as potentially dangerous because it risks making warfare potentially more difficult than it already is.

Humanization, commensurate to the development of LOAC, has been a \textit{responsive} process. Following developments in warfare in the last century and a half, most notably after both World Wars, LOAC has enjoyed a progressive increase in ‘weight’ attached to the element of humanity. This process is marked by a number of shifts at various levels.

Firstly, the process of humanization marks a shift in the \textit{substantive} character of limitations on warfare. Assuming a conservative, protectionist stance of preserving military necessity, States initially accepted restrictions that would not affect disproportionately sovereign military interests. However, as warfare developed, States progressively shifted to restrictions in which they increasingly, and genuinely have added weight to aspects of humanity. In addition, by imposing humanitarian restrictions on warfare, States have shifted from predominantly combatant-related protections and limitations to civilian-related protections and limitations.

Secondly, a \textit{participatory} shift has taken place in the process of humanization, meaning that besides States, today non-State actors, such as NGOs, judicial bodies and legal scholars, principally based in the human rights movement, are engaged in attempts to further humanize LOAC.

Thirdly, the process of humanization is characterized by a \textit{methodological} shift. For decades, humanization was ‘controlled’ by States, subject to their willingness to ‘pull in’ self-imposed restrictions grounded in humanity while relinquishing sovereign military interests through codifications of the law. As explained by Schmitt

\begin{quote}
Although not all states agree on the suitability of the balancing set forth in the various IHL instruments, they remain free to opt out of legal regimes that they believe have inappropriately tilted the law in one direction or the other. Since only states make international law, the risk of becoming bound by laws (or legal interpretations) to which they do not consent, either \textit{de jure} or \textit{de facto}, has generally remained slight.\(^\text{490}\)
\end{quote}

\(^{487}\) The balance between humanitarian considerations and military interests has been codified in the 1868 St. Petersburg Declaration, which “fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity,” and the IV Hague Convention on the Laws and Customs of War on Land of 1907, which speaks of “the desire to diminish the evils of war, \textit{as far as military requirements permit}.”

\(^{488}\) See for example Article 25 of the 1899 Hague Convention II and 1907 Hague Convention IV.

\(^{489}\) For similar wording, see the Preamble of the 1899 Hague Conventions II and the 1907 Hague Convention IV.

\(^{490}\) Schmitt (2010a), 716.
Today, humanization appears to take place more on ‘push’-basis. That is to say, in rather innovative ways, non-State actors seek to ‘superimpose’ upon States elements of humanization outside the realm of the process of international codification, and to a certain degree tempting the limits acceptable by States. As argued by Anderson, this movement represents […] a long-term historical project of international regulation of armed conflict with a certain political vision of gradually emerging supranational governance, on the one hand, and a more immediate politics of constraining the superpower by constraining how it fights, on the other.491

Fourthly, the process of humanization is characterized by a shift in origin of the restrictions imposed on warfare. While traditionally the humanization of armed conflict was a process to be regulated solely by LOAC, a trend appears to emerge that limits the conduct of hostilities in warfare by incorporating elements ‘foreign’ to LOAC, such as those belonging to IHRL.

In sum, the above shows that the recalibration of the weight attached to humanity in warfare essentially springs from two sources: one of so-called traditional humanization, the other of so-called innovative humanization. Traditional humanization concerns the promulgation of restrictions on warfare to the benefit of individuals affected by it initiated by, and with the consent of States. This may involve the adoption of restricting norms in treaties, or the acquiescence to rules of customary nature. In other words, traditional humanization reflects the desire of States, as the principle law-making subjects of international law, to retain control over the balance between humanity and military necessity, and as such may be said to come from within LOAC. Innovative humanization refers to the expansion of the protective scope of LOAC as the result of the penetration into LOAC of sources coming from outside LOAC, most dominant-ly from IHRL. This process is led by international law-actors other than States, such as international organizations, NGOs and legal scholars. Exploring innovative routes to modify the law without State consent, they attempt to “take human rights to places, […] where, as a matter of practical reality, no human rights have gone before.”492 The latter development has spurred a great deal of debate. The question is: what are the legal arguments put forward in this debate.

2.2.2. Support for Innovative Humanization

Premised in the complementary character of the core values of both IHRL and LOAC, combined with the universality of human rights, the proponents of innovative humanization seek “to weave a net, thicker than hitherto available, for the protection of the rights to life, liberty, and dignity of all individuals under all circumstances”,493 with the aim to further humanize armed conflict. In their view, such an endeavor is legitimate because both armed conflict and LOAC have progressively moved from State-centric to people-centric.494 With the demise of inter-State conflicts – involving States – and the rise of intra-State conflicts – involving the population – the claim is that the regulation of warfare ought to no longer be an affair solely reserved for States, and should not be depending on States’ willingness to

491 Wippman (2005), 7.
492 Milanovic (2011a), 96.
493 Ben-Naftali (2011a), 4.
494 As we have seen in Chapter I, this is a shift that is also present in the evolution of warfare, and which is especially visible in the shift from inter-State to intra-State conflicts, such as insurgencies.
impose on themselves limitations grounded in reciprocity. “Rather, human beings embroiled in armed conflict still retain those rights that are inherent in their human dignity, which are more, not less, important in wartime, and which apply regardless of considerations of reciprocity between the warring parties.” Therefore, non-State actors ought to have a say in the progression of LOAC as well.

A principal mechanism to achieve the humanization of LOAC is the (re)interpretation of the relationship between LOAC and IHRL. In doing so, innovative humanitarians search for weaknesses within the contemporary LOAC framework at conceptual, applicability and normative level and examine their legal potential to be ‘cured’ with relevant elements available within IHRL.

For example, at the conceptual level, a principle weakness of LOAC is its lack of enforcement mechanisms available for individuals affected by violations of LOAC. Innovative humanitarians, however, see a potential in human rights mechanisms at international and domestic level to alleviate this problem.\(^496\) This may be particularly pregnant in ‘grey area’ situations, such as NIAC, occupation and the UN-mandated international administration of territory.\(^497\)

At the applicability level, the separation line between peace and armed conflict, and thus the issue of whether LOAC applies or not, remains ambiguous, particularly in NIAC. Supporters of innovative humanization favor a high threshold for NIAC to arise and call for the application of IHRL, as its applicability is not subject to the determination of the existence of an armed conflict.

At the normative level, innovative humanization, in a more revolutionary and controversial fashion, seeks to recalibrate the normative balance between military necessity and humanity presently reflected in State-consented treaty law and attempts to push it in the direction of the latter. It does so, on the one hand, by exploiting the presence of IHRL elements already present in LOAC, and on the other hand “by using human rights norms to fill the gaps or areas left unregulated or very sparsely regulated by IHL, for example with regard to non-international armed conflicts, and partly by trying to change some outcomes that are in fact determined by IHL through the introduction of human rights rules and arguments into the equation.”\(^498\) In the latter fashion, it uses the principle of humanity as a gateway for the gradual infiltration of IHRL concepts into the realm of LOAC. This is why authors such as Kretzmer and Watkin,\(^499\) as well as in international\(^500\) and domestic\(^501\) judicial bodies, call for

\(^{495}\) Milanovic (2011a), 95. See also Ben-Naftali (2011a), 4.


\(^{500}\) (2004k), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004 [implicitly pointing at a mixed model by stating that “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” (emphasis added)].

\(^{501}\) (2005d), HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005) [introducing, through an interpretation of the principle of proportionality, a duty to resort to least harmful measures even in relation to lawful targets under LOAC; (2008a), A. and B v. Israel, CrimA
a ‘mixed’ model, which combines ‘the best of both worlds’, to cope with terrorism and other ‘new’ conflicts.

Views towards the reach of innovative humanization differ. Some, such as Koller, Bennoune, and Martin, adopt a rather unlimited view and argue that human rights should be the dominant regime regulating armed conflict, regardless of the practical realities that war entails. Others take a more moderate or pragmatic approach. For example, Meron, one of the principle driving forces behind ‘innovative’ humanization admits that its parameters “[…] need to be drawn so that it can be related to the reality of armed conflicts.” Similarly, Milanovic cautions that, firstly, there are limits to the mechanisms available in international law to harmonize norms of IHRL and LOAC, and secondly that humanization ought to remain pragmatic and realistic, rather than “some sort of abstract discovery of the law […]” creating “[…] the impression of a fluffy, utopian human rightist disregard for the realities of international relations.”

This implies that humanization can only be successful, in terms of effectiveness and acceptance, if it produces “some relatively clear, workable rules on both threshold applicability issues and on substantive issues that can arise from the joint application of IHL and IHRL” and if it realizes that “[[…] human rights norms cannot be applied in a business-as-usual kind of way, […]” but need, to an acceptable degree, to “[[…] be watered down to be applied jointly with IHL.”

An important effect, intended or not, of the increased humanitarian standard within LOAC through the injection of IHRL is the imposition on States of obligations with normative contents the specificity of which go beyond requirements currently present in LOAC. In other words, via ‘gapfilling’ and reinterpretation, innovative humanitarians seek to subject States to norms that narrow down the existing permissible scope of action. Examples of ‘new’ IHRL-based norms are attempts to introduce a duty, strange to LOAC, to pay individual reparations to individuals killed or injured in military operations; or to fill gaps within

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3261/08 [pointing at duty for the State (in casu, Israel) to determine prisoner of war status on an individual basis, not on the mere basis of group affiliation]; (2008e), HCJ 9132/07, Ahmad v The Prime Minister, ILDC 883 (IL 2008) [indicating that even though Israel is not longer occupying Gaza, it continues to be bound by an obligation to maintain a minimum level of humanitarian conditions in Gaza].

Koller (2005).


Meron (2000a), 239: “Humanizing the law can and should temper the treatment of civilians and POWs and protect civilian, especially cultural, objects. But it does little to discourage resort to war. It cannot give complete protection to civilians and outlaw collateral damage that does not violate the rules of proportionality. It has a limited role on the battlefield except in the protection of the sick and wounded, and offers very little succor to combatants except with regard to such rules of fair play as the obligation not to refuse quarter.”

Milanovic (2011a), 97. Similarly, Goldstone: asked what change he would make to international law, Richard Goldstone, presiding the United Nations fact-finding commission to the Israeli military operations in Gaza in the winter of 2008-2009, and criticized for having relied on HRL in interpreting norms of LOAC, responded: “[t]he first change is to require all international human rights lawyers to get a serious education in military affairs,” so they could learn “to balance military necessity and human concerns.” The balance is “immensely difficult in the new age of warfare,” he said, where “liberal democracies are fighting transnational terrorists.” Haven (2011).

Milanovic (2011a), 97. Human rights “must not be watered down too much. Not only would this defy the whole purpose of the exercise, but it would also potentially compromise the values safeguarded by the human rights regime in peacetime. For instance, allowing the State to kill combatants or insurgents under human rights law without showing the absolute necessity for doing so, or to detain preventively during armed conflict, might lead to allowing the State to do the same outside armed conflict.”

LOAC in relation to detention with IHRL-based due process guarantees. One of the most controversial topics of supporters of innovative humanization concerns the subject of targeting – more precisely targeted killing – and the issue of whether there exists in international law regulating armed conflict an obligation to consider alternatives to killing before resorting to lethal force.

To attain this intended effect – more restrictions, more humanity – innovative humanitarians resort to norm-creating tactics that bypass States and their, normally required, consent. As noted by Benvenisti:

NGOs, private legal experts, and other non-state actors have noted the willingness of tribunals to move the law beyond formal state consent and have embarked on several efforts to generate new law by adopting soft law “guiding principles” and other such informal norms that ostensibly interpret the law. These norms practically move the law beyond state consent and below the radar screens of governments in the hope that domestic and international courts will resort to them as reflecting evolving law.509

An important international judicial body that can be said to have contributed in further humanizing LOAC in an ‘innovative’ fashion is the ICTY.510 For example, it concluded that “[a] State sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.”511 And, quite controversially, in relation to the customary status of the prohibition of belligerent reprisals against civilians, the ICTY held that

509 Benvenisti (2010), 345-346. See also: Abbott (2007)168-169: “NGOs and other advocates often expect privately generated soft law […] to develop greater normative authority than sovereignty-conscious states and other objectors anticipate, in part by mobilizing and empowering affected groups.” An example is the development of the Guiding Principles on Internal Displacement of 1998, a soft-law instrument designed “to progressively develop certain general principles of human rights law where the existing treaties and conventions may contain some gaps.” See Deng (2007); Cohen (2004). Another example is the Draft Declaration of International Law Principles on Compensation for Victims of War by the International Law Association, which proposes an obligation for States to pay reparations to individuals rather than States in the case of inter-State use of force. This proposal has been recognized as a right by some national courts and the ICJ also appears to see it that way. (2004k), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, 138. Clearly, such developments may also occur in relation to the injection of IHRL elements into the voids left in LOAC.

510 Admittedly, it has made significant contributions to clarifying various areas of LOAC, in which it has shown sensitivity to the military necessity-humanity balance. Examples are numerous, and include, inter alia, interpretations of command responsibility (see (2000p), The Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Chamber Judgment (3 March 2000), § 332; (2008n), The Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment of 17 July, 2008 (Appeals Chamber), § 299; the defense of superior orders (see (1997m), The Prosecutor v. Eristimovic, Case No. IT-96-22-A, Judgment of 7 October 1997, Separate Opinion of Judge McDonald and Judge Vlreb (Appeals Chamber), § 34); the conduct of hostilities (e.g., on the scope of the prohibition on terror, see (2006f), The Prosecutor v. Galic, Case No. IT-98-29-A, Judgment of 30 November 2006 (Appeals Chamber), §§ 90, 103-104; (2004p), The Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment of 29 July 2004 (Appeals Chamber), §§ 109, as well as on the relationship between military objectives and military necessity, see (2008n), The Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment of 17 July, 2008 (Appeals Chamber), §§ 293-294); the definition of non-international armed conflict, and status of CA3 (see (1995h), The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber), §§ 98-99; (2001r), The Prosecutor v. Delali, Muci, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2003 (Appeals Chamber), §§ 157, 174); the extent to which norms of international armed conflict have the status of customary international law in non-international armed conflicts (see (1995h), The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber), § 127

principles of international humanitarian law may emerge through a customary process under the
demand of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. […] [A] slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred […] so that […] belligerent reprisals against civilians and fundamental principles of human beings are absolutely inconsistent legal concepts.\footnote{107}

In various cases concerning the, in essence, non-international armed conflict in Chechnya, the ECtHR has examined the Russian military operations through the lens of human rights, which resulted in standards of necessity and proportionality in armed conflict that not only appeared to be stricter than those applicable in peacetime, but also conflict with fundamental principles of LOAC.\footnote{512}

Attempts to further humanize armed conflict are also made through the reliance on human rights norms in reports of NGOs. Examples are the Goldstone report, issued by a fact-finding committee of the UNHRC, and which examined the military operations of Israel in Gaza in the winter of 2008-2009;\footnote{513} Amnesty Internationals Report on the NATO air campaign in Kosovo,\footnote{514} and Human Rights Watch’s Report on the invasion of Iraq in 2003.\footnote{515}

Similarly, the ICRC appears to be also supporting innovative ways to influence the development of the law towards more humanity through the lens of HRL. While cast in an interpretation of LOAC, evidence of this development can be found in Section IX of its Interpreative Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law, which calls for the restraint on the use of force against individuals who can be identified as direct participants in the hostilities. Presented as limitations already present in the principles of humanity and restrictive interpretations of the principle of military necessity, they are in essence restrictions based in IHRL.

Another approach of innovative humanization involves military doctrine on counterinsurgency, as well as State practice in counterinsurgency operations in Afghanistan and Iraq. Restrictions on the use of force and detention imposed on troops may be viewed by IOs, NGOs, (quasi-)judicial bodies and legal experts as humanitarian restrictions that find their basis in IHRL, and as such may support an argument that States themselves are consenting to the recalibration of military necessity and humanity, and thus take effective part in the interpretation of the relationship between IHRL and LOAC.

\footnote{512}{(2000q), The Prosecutor v. Kupreskic et al., Case No. IT-95-16-Y, Judgment of 14 January 2000 (Trial Chamber), §§ 527, 529. For a rejection of this standpoint, see Schmitt (2010b), 820-821. See also the expressions on belligerent reprisals in United States Department of the Navy (2007), § 6.2.4. (“Reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property”) and U.K. Ministry of Defence (2004), 421, in line with its reservation made by AP I (reprisals “may sometimes provide the only practical means of inducing the adverse party to desist from its unlawful conduct.” Specific reference in footnote 62 is made to the Kupreskic case, qualifying the ICTY’s “reasoning [as] unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists.” The ICRC does not share the viewpoint of the ICTY either. See ICRC (2005a), 523: “Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals against civilians.”}

\footnote{513}{(2005e), Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005; (2005f), Isayeva, Yusupova and Bazayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005}

\footnote{514}{While this report relies on LOAC sources, it contains human rights related elements. Examples thereof can be found in its interpretation of the term “effective warning” in Article 57(2)(c) AP I, in relation to the so-called Israeli applied ‘knock on the roof’ warning system. The Goldstone-committee concluded that Israel had not complied with a range of strict precautionary measures, elements of which appear to be rooted in IHRL and which the drafters of Article 57(2)(c) AP I arguably had not envisaged.}

\footnote{515}{Amnesty International (2000).}

\footnote{516}{Human Rights Watch (2003a).}
2.2.3. Criticism of Innovative Humanization

It is not surprising that supporters of traditional humanization view the shift from traditional to innovative humanization with concern (and disgust, to some). A first strain of concern is based on the fact that innovative humanization takes place outside the traditional control of States. Actors such as international tribunals and NGOs replace States in their role as the ultimate arbiter on the balance between military necessity and humanity. In the view of Anderson, NGOs play a crucial role in this process, but the pendulum shift toward them has gone further than is useful, and the ownership of the laws of war needs to give much greater weight to the state practices of leading countries. The state practice of democratic sovereigns that actually fight wars should be ascendant in shaping the law. And this includes raising the standards of the laws of war to reflect, for example, advances in technology and precision weapons, standards that should become the norm for leading militaries, first for NATO and then beyond.

Secondly, as a consequence of uncontrolled innovative humanization, it is feared that LOAC “with its greater tolerance for operational mistakes committed during the fog of war is cast aside, and human rights law, which arguably imposes a more exacting standard of care, is selected as the principal legal framework for the imposition of liability.” This may result in a disconnect between legal theory and practical reality that may eventually not lead to more, but to less protection. As Hansen explains

.. moderating warfare through the application of the human rights regime, if not filtered through the lens of humanitarian law and tempered by reference to the realities of modern armed conflict, will result in the eventual “emasculating of warfare.” That is, it will unnecessarily restrict warfighters to a point never envisioned by those who framed and ratified the major instruments designed to regulate warfare. It could make winning wars nearly unachievable for those who try to comply with its strict requirements, and “[e]xcessive humanization might exceed the limits acceptable to armed forces, provoke their resistance, and thus erode the credibility of the rules.” Furthermore, humanization also could serve to unnecessarily prolong armed conflict, and thereby increase the evils of war that it purports to eradicate. Therefore, the unconstrained expansion of human rights law into matters of war must be stopped, for the sake of Soldiers and humanity alike.

A third claim of concern is that the liberal introduction of IHRL-idealism upsets the fundamental ‘realist’ tenets and “lines of logic” on which LOAC is built. Uttering concern for the fundamentals of LOAC, Osiel writes that for supporters of innovative humanization, the empire of human rights knows no limits; it knows exceptions “in no circumstances.” A state of armed conflict is apparently irrelevant to whether or how human rights should be applied, [...]. There is no need for compromise or accommodation, in other words, between the differing purposes and provisions of each legal universe.

While acknowledging that “the momentum behind the complimentary application of both the law of armed conflict and human rights is too powerful a trend to reverse” Corn contends that the expansion of human rights principles into the realm of armed conflict “borders on the absurd, [...]” and that “a blurring of the proverbial lines of logic was inevitable”

517 Schmitt (2010a), 822.
518 Anderson (2003), 42.
519 Shany (2011)
521 Osiel (2009), 131.
and “is now reaching a wholly illogical context.” In addition, Anderson fears negative effects for the value of reciprocity in LOAC. He argues that the injection of “[…] an even more utopian law of war […]” grounded in an “absolutist human rights ideology” may undermine the reciprocal nature of LOAC. In his view, the resulting raising of standards to protect the civilian population increases the burden of ‘correct’ warfare on the stronger State, and at the same time “assumes, indeed permits, that the weaker side must fight by using systematic violations of the law and its method. This is unsustainable as a basis for the law of war. Reciprocity matters.”

In sum, humanization is a “complex partnership – dance, even – between idealism and realism.” At the same time, it is a process that cannot be marginalized. Claims as to its normative crystallization in certain areas of LOAC should be viewed with caution, particularly when its roots lie in IHRL. The difficulty in establishing the scope and limits of humanization is to establish in which areas it reflects the lex lata and where it is merely an expression of the lege ferenda. As will become clear, innovative humanization is a trend that manifests itself particularly in the interplay of the normative frameworks of IHRL and LOAC relevant to the deprivation of life and liberty. The outcome of this interplay informs us on the outer limits of innovative humanization.

2.3. IHRL, LOAC and the ‘New Paradigm’ of Warfare

A third theme influencing the role and interplay of IHRL and LOAC in armed conflict concerns the legal discourse on the choice for the ‘right’ paradigm to fight ‘new wars’; the alleged obsoleteness of present LOAC and the need for its revision which have arisen in the aftermath of the terrorist attacks on the US by Al Qaeda, on 9/11; and the subsequent US response in its GWOT, which has led it to carry out counter-terrorism operations all over the world. The factual make-up of this ‘new war’ has laid bare areas of discontent among supporters on both sides of the military necessity-humanity equation that continue to spark debate today. Three responses can be identified: (1) the law enforcement response; (2) the armed conflict response; and (3) the mixed response.

2.3.1. The Law Enforcement Response

Traditionally, States perceived the fight against terrorism as a law enforcement enterprise, as any other criminal activity. Domestically, terrorism was an issue governed by criminal law and human rights law. While terror has been commonly perceived as a – potentially global – threat to national security, on an international level, the approach to counter it was one of enhanced international coordination and cooperation.

522 Corn (2010), 56, 93-94.
523 Anderson (2003), 43. See also Osiel (2009), 110.
524 Kennedy (2006), 137.
525 Upon its ratification of AP I in 1998, the UK, for example, made a ‘statement of understanding’ that, in its view, “the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.”
526 This law enforcement basis is clearly visible in all thirteen counter-terrorism treaties currently existing. See Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 704 UNTS 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), 16 December 1970, 860 UNTS 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), 23 September 1971, 974 UNTS 177; Protocol for the Suppression of Unlawful Acts
To many States, however, the attacks of 9/11 were of a magnitude that rose above the level of mere criminal conduct, a magnitude that, in their view, exposed the flaws in the existing international counter-terrorism treaties and reached the legal boundaries of a domestic law enforcement response. While acknowledging the external dimension to national security of terrorist acts such as those of 9/11, most European States have continued to confront terrorism as a criminal act, to be dealt with under a normative paradigm of law enforcement, even when attacks take place on their own territory, such as those in Madrid (2004) and London (2005). Generally, the counterterrorism strategy of most European States has aimed at the prevention of terrorist acts through a holistic approach, centered in democracy, human rights and social justice, to be achieved by international cooperation, rather than at retribution and repression by military means alone. As explained by German Federal Minister for Foreign Affairs, Joschka Fischer:

Tough action and repression alone do not […] constitute a satisfactory response to the threat posed by modern terrorism. We will only be able to curb it through a policy of prevention, if we manage to take a new joint approach to effectively fighting its many different causes. This includes new strategies against hunger, poverty and lack of opportunities as well as the socially just management of economic globalization. But this includes above all protection of human rights, civil, political, as well as socio-economic and cultural rights.

Also among many legal scholars there is support for the argument that the fight against terrorism is principally, if not solely, a law enforcement issue. Overall, they adopt a more human rights centered law-enforcement stance, and aim to prevent “the removal of large parts of the fight against terror from the purview of domestic legal systems to an underdeveloped international legal framework, with fewer hard and fast rules in place, and even more limited supervisory mechanisms.”


Schorlemer (2003), 267. See also Van Sliedregt (2010), 413; Dworkin (2009), 2.

Fischer (2002).

Greenwood (2006), 431-432: “In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals”; Drumbl (2002); Paust (2004), 1340-1343; Paust (2002); Paust (2003); Amnesty International (2003), available at http://web.amnesty.org/library/pdf/mde310062003english/$file/mde3100603.pdf: “Under existing international humanitarian law, it is not possible to have an international armed conflict between a state on the one hand and a nonstate actor on the other, should the armed group not form part of the armed forces of a Party to the Geneva Conventions.”


This measure is part of a package of measures directed against presumed terrorists authorized by UNSC Res. 1267, U.N. Doc. S/RES1267 (Oct. 15, 1999) (which aimed at supporters and members of the Tali-
that allows more flexibility in relation to the detention (such as prolonged pre-trial detention, lower thresholds for pre-trial detention, administrative detention for imperative reasons of security, or detention on the basis of extensive interpretation of immigration laws), legislation permitting the authorization and regulation of coercive interrogation of terror suspects, and laws regulating the prosecution of terrorist suspects (inter alia, the prosecution of terrorist suspects on the basis of conspiracy, more liberal rules on evidence admissibility, the establishment of special courts or chambers, restrictions on the right to meet with legal representatives, and the policy of punitive house demolitions. These changes can be said to have led to a normative shift, eroding liberties to enhance security, as well as a shift in responsibilities from the judiciary to the executive branch, weakening the judicial controls to guarantee such rights. As some argue, these developments have incited States to enter a slippery slope, risking overreaction and inflation of threats to


533 See for the Netherlands, Article 67(1) of the Dutch Code of Criminal Procedure; Italy, Article 270(5) of the Penal Code.

534 See for example: the Anti-Terrorism Act (No. 2) (2005) of Australia (Sch 4, Div 105); The Emergency Powers (Detention) Law 1979 of Israel; and the Indian Code of Criminal Procedure 1973, Sections 107 and 151.

535 See for example: Part 4 of the Anti-Terrorism, Crime and Security Act 2002 of the United Kingdom; Title 4 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) of the United States; and Sections 77-85 of the Immigration and Refugee Protection Act 2001 of Canada.

536 See, for France: reference made by Dworkin (2009), 3; for the Netherlands, see Bulletin of Acts and Decrees (Staatsblad), 2004, 290, 373.

537 See, for Germany: Criminal Procedure Code, Section 110a; for Canada: the Anti-Terrorism Act 2001, Part 3; for the United Kingdom: the Terrorism Act 2000, Section 109.

538 For example in India, see Section 23 of the Prevention of Terrorism Act.

539 For example in Israel, according to Section 35 of the Criminal Procedure Law (Enforcement Powers – Detention) 1996 (amended in 2005).


541 For an overview of measures taken by European States and the EU, see Van Sliedregt (2010).
justify counterterrorist measures.\footnote{For example, Russia used the attacks of 9/11 as pretext to justify its actions in the Chechnya conflict, as allegedly Chechen rebels were linked with the Taliban and Al-Qaeda. Similar justifications followed from China in relation to the insurgency in Xinjiang province.} In addition, some fear a spillover of human rights restrictions based on terrorism to other areas of social tension. Not surprisingly, these measures have led to criticism among scholars and domestic, regional and universal judicial institutions who fear that counter-terrorism measures may affect human rights such as the presumption of innocence; the right to a fair trial; freedom from torture; freedom of thought; privacy rights; freedom of expression and peaceful assembly; the right to seek asylum; freedom from discrimination.\footnote{The United States views the attacks of Al-Qaeda as an armed attack in terms of the \textit{jus ad bellum}, i.e. an act to which it is entitled under Article 51 of the UN Charter to defend itself against. This viewpoint is supported by the United Nations (see U.N. S.C. Res. 1368, U.N. Doc S/RES/1368 (12 September 2001); U.N. S.C. Res. 1373, U.N. Doc. S/RES/1373 (28 September 2001), NATO (see NATO (2001), available at http://www.nato.int/cps/en/natolive/official_texts_18848.htm.), the OAS, and States such as Australia, New Zealand, the United Kingdom, Israel and others. See also Dworkin.}

Nonetheless, the overall law enforcement approach by most States differs significantly from the strategy chosen by the US in response to 9/11. It is particularly this approach that has ignited the debate on the re-evaluation of LOAC and the position and role of IHRL in armed conflict.

2.3.2. The Armed Conflict Response

While some States resorted to adaptation of their domestic law enforcement paradigms, leading to limitations of human rights protections, other States, most notably the US, made a more rigorous move, and held that the attacks of 9/11 constituted the beginning of an armed conflict, to which the law enforcement paradigm no longer applied.

To the US, the Al Qaeda attacks of 9/11 marked the day on which its “presumption of invulnerability was irretrievably shattered.”\footnote{President George Bush, Remarks by The President Upon Returning to the White House, 16 September 2001, available at http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html (23 September, 2001). President Obama, too, has repeatedly publicly stated that the US is at war with Al Qaeda and that the law of armed conflict is the proper legal regime to govern its operations in this war; not US federal criminal laws. See President Barack Obama (2009), transcript available at http://www.whitehouse.gov/search/site/remarks%20by%20the%20president%20on%20national%20security%20-May%202009, and President Barack Obama (2010), transcript available at http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security.}

The Bush Administration argued that the attacks formed an “armed attack”\footnote{White House (2002), 27.} of terrorists on the US, and constituted the beginning of a “war against terrorism – the first war of the twenty-first century”.\footnote{546 The United States views the attacks of Al-Qaeda as an armed attack in terms of the \textit{jus ad bellum}, i.e. an act to which it is entitled under Article 51 of the UN Charter to defend itself against. This viewpoint is supported by the United Nations (see U.N. S.C. Res. 1368, U.N. Doc S/RES/1368 (12 September 2001); U.N. S.C. Res. 1373, U.N. Doc. S/RES/1373 (28 September 2001), NATO (see NATO (2001), available at http://www.nato.int/cps/en/natolive/official_texts_18848.htm.), the OAS, and States such as Australia, New Zealand, the United Kingdom, Israel and others. See also Dworkin.} Unlike the general perception in Europe, where the phrase ‘war against terrorism’ was viewed as mere rhetorics...
and a statement with no more than political implication, to the US it was more than that: it also implied an armed conflict in the legal sense, to be regulated by LOAC. To preserve national security, the US concluded that domestic legal innovations similar to those in European and other States were highly unlikely given the historically conservative line of constitutional interpretation by the US Supreme Court, and as a result would be inadequate to deal with this 'new' phenomenon. Neither would such an approach be logical: given their scale and characteristics, these attacks resembled ordinary inter-State war, although performed by non-State actors.

Among legal scholars, some support the separatist viewpoint of the US government and argue that, because the conflict constitutes an armed conflict, the applicable normative framework can only be found in the LOAC-based 'armed conflict'-paradigm, not in the IHRL-based 'law enforcement'-paradigm. The aim of this view is to create as much flexibility as possible within the boundaries of LOAC to enable a workable response to the threat of terrorism. The trigger for its applicability is no longer whether the facts cross the thresholds of CA 2 or CA 3 of the GCs, but whether

 […] the de facto nature of the operation justifies an armed conflict characterization, if for no other reason than the State’s implicit invocation of the principle of military objective as a justification for the use of deadly force. […] Depriving warriors of the value of such an important set of principles – a value validated by hundreds of years of history – on the basis of technical legal analysis of two treaty provisions is no longer acceptable. Instead, all warriors must understand that when they “ruck up” and “lock and load” to conduct operations during which an opponent will be destroyed on sight, the laws of war go with them.

Under the umbrella of the armed conflict paradigm, the US went forward with a range of controversial measures. For example, the US takes the viewpoint that it is legally entitled to kill terrorist suspects anywhere in the world. Such killings are governed by the norms and principles underlying the law of hostilities of LOAC, and may also result in the death or injury of innocent civilians and the destruction of their property if this does not outweigh

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548 For example, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office (Baroness Amos), in answer to questions posed in the House of Lords, stated that “[t]he term “the war against terrorism” has been used to describe the whole campaign against terrorism, including military, political, financial, legislative and law enforcement measures.” (Hansard 22 Nov 2001: Col. WA153).

549 As viewed by Jackson, “[t]he language of the ‘war on terrorism’ is not a neutral or objective reflection of policy debates and the realities of terrorism and counter-terrorism,” but Jackson (2005) “a very carefully and deliberately constructed—but ultimately artificial—discourse that was specifically designed to make the war seem reasonable, responsible, and ‘good,’ as well as to silence any forms of knowledge or counter-argument that would challenge the exercise of state power.” See Jackson (2005), 148

550 The US administration adopts a very broad concept of ‘armed conflict’. Its instructions to Military Commissions explain that armed conflict: “does not require […] ongoing mutual hostilities […]. A single hostile act or attempted act may provide sufficient basis […] so long as its magnitude or severity rises to the level of an ‘armed attack’ or an ‘act of war’, or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.” See Section 5(C) of Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, April 30, 2003, www.dtic.mil/whs/directives/corres/mco/mci2.pdf.


552 Koh (2010); Bellinger III (2010); Dennis (2007); Hays Parks (2010a).

553 Corn (2009), 30, 36.

554 Dworkin (2009), 3.
the concrete and direct military advantage anticipated. This standpoint has found its peak moment in the targeted killing of Osama bin Laden, Al-Qaeda’s leader, on 2 May 2011. Another highly sensitive measure is the US’s claim to a right to global detention power. For the reasons outlined above, the Bush administration has made a number of far-reaching determinations regarding the status and treatment of Al-Qaeda and Taliban detainees, which has attracted a great deal of criticism from many directions.556 Other highly sensitive measures taken by the Bush administration were the secret detention of individuals under a classified CIA program,557 the authorization of interrogation techniques such as ‘water-boarding’ based on flexible interpretations of the definition of torture as laid down in Article 1 of the CAT, to which the US is a party;558 as well as rendition, i.e. the extra-judicial transfer of individuals from one State to the US for purposes of trial or from one State to another State for purposes of legal process or interrogation.559 A final controversial measure taken by the Bush administration was the establishment of military

555 A well-known example is the CIA-led aerial strike against Al-Qaeda suspects in Yemen, in 2002. President Obama has continued this controversial program with drone strikes against Al-Qaeda and Taliban targets in Pakistan. According to Harold Koh, the Legal Advisor of the U.S. Department of State, “[t]he considered view of this Administration […] that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.” See Koh (2010). In a less confident fashion on the legality of targeted killings, see John Bellinger III, the former Legal Advisor to the U.S. Department of State who argues that even if LOAC is an acceptable framework, after eight years, it is still not clear to the United States or any other country what legal rules apply to targeting and detention issues.”555 See Bellinger III (2010), 336, (emphasis added)

556 Shortly after his inauguration, President Obama announced a range of measures. He announced the intention of closing the detention facility on Guantanamo, (see The White House (2009c)). At the time of this writing, Guantanamo has not closed, as the U.S. Congress has barred the President’s authority to transfer detainees to the United States. See Associated Press (2011), available at http://www.foxnews.com/us/2011/02/17/gates-prospect-low-guantanamo-closes/. He also introduced, inter alia, the more strict requirement of “substantial support” (as a deviation from mere “support”) as a basis, next to membership, to detain Taliban or Al-Qaeda forces or associated forces anywhere in the world (see (2009f), Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, (13 March 2009), 2, 7) This includes a right of preventive detention for security reasons – i.e. detention of “people who cannot be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States” – under the premise that such individuals are to be prosecuted when feasible (see (2009g), available at http://www.nytimes.com/2009/05/21/us/politics/21obama.txt.html). In addition, he announced to bring detention in line with international law, for which purposes he set up the Special Interagency Task Force on Detainee Disposition (see The White House (2009d). On the Task Force, see http://www.whitehouse.gov/the_press_office/Review_of_Detention_Policy_Options. The task force established to review detention policy was to report six months after its establishment, but its mandate was extended with another year. At the time of this writing, the task force is still struggling with the issues and has not reported.

557 Allegedly, and contrary to official government statements, such detentions continued at least until 2006, when President Bush announced the transfer of fourteen detainees from the CIA to Guantanamo. In addition, it is now known that the CIA operated from secret detention facilities in Poland and Romania, even though to date neither State has confirmed these allegations nor publicly acknowledged to have given permission to do so. The program has been closed down by President Obama, see http://nytimes.com/2009/01/23/us/politics/23GITMOCND.thtml?pagewanted=all&r=0.

558 Bybee (2002a).

The MILITARY COMMIS-
SIONS ACT of 2006.

2.3.3. The ‘Mixed’ Response

The third response detectable is the ‘mixed’ response. This response argues that neither the law enforcement model, nor the armed conflict model provides a suitable framework for conflicts between a State and transnational terrorist groups. Kretzmer, for example, proposes to replace the concepts of military necessity and proportionality under LOAC with those governing the right to self-defense under Article 51 UN Charter, with the aim to restrict the use of force against terrorists to that strictly necessary in light of the circumstances, including the risk that civilians may be killed.

In sum, on a more conceptual level, the different responses seem to reflect a process of recalibration of the equilibrium between national security interests and humanitarian concerns, in favor of the former. On the one hand, they represent a shift within the law enforcement paradigm to a regime with fewer human rights protections. On the other hand they posit a shift from individual-based law enforcement measures to collective-based armed conflict measures.

2.3.4. LOAC: Outdated? Revision?

Generally, the evolution of LOAC has always followed the evolution of warfare. In a way, “[e]very war is a petri dish for the next round of the laws of war.” To many, the events of 9/11 mark the most recent benchmark to reconsider LOAC. While, in its view, the regime of LOAC offered the US the proper toolbox to deal with terrorist threats of this magnitude, the determination of the applicability of LOAC soon presented the Bush administration with a major dilemma: a dilemma that has proved to be the starting point of a fierce debate that continues today. Indeed, to the US, the conflicts with Al Qaeda and the Taliban (predominantly the former) appeared to imply a paradigmatic shift away from the traditional categories of armed conflict and an encompassing breakdown of traditional boundaries of armed conflict, i.e. between

[...]

armed conflict and “internal disturbances” that do not rise to the level of armed conflict; between states and nonstate actors; between combatants and noncombatants; between spatial zones in which conflict is occurring and zones in which conflict is not occurring; between temporal moments in which there is conflict and temporal moments in which there is no conflict and temporal moments in which there is no conflict...

\footnote{Under President Obama, these military tribunals are being reformed to ensure that they are “[…] a legitimate forum for prosecution, while bringing them in line with the rule of law.” Particularly, the military commissions will be governed by new rules, to “[…] ensure that: First, statements that have been obtained from detainees using cruel, inhuman and degrading interrogation methods will no longer be admitted as evidence at trial. Second, the use of hearsay will be limited, so that the burden will no longer be on the party who objects to hearsay to disprove its reliability. Third, the accused will have greater latitude in selecting their counsel. Fourth, basic protections will be provided for those who refuse to testify. And fifth, military commission judges may establish the jurisdiction of their own courts.” See The White House (2009e), available at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions/.

\footnote{Kretzmer (2005). See also Rona (2003); Garraway (2006); Dworkin (2005).

\footnote{Shany (2011), 23.

\footnote{For an overview of the evolution of warfare and LOAC, see Section 2.

\footnote{Anderson (2003), 42.}
conflict; and between matters that clearly affect the security of the nation and matters that clearly do not.\textsuperscript{565}

The Bush administration decided that it was engaged in two conflicts. On the one hand it was party to a global armed conflict involving al-Qaeda and affiliated terrorist organizations – viewed as a ‘new paradigm’ and called the GWOT. On the other hand, it was in armed conflict with the Taliban, the \textit{de facto} government of the recently invaded Afghanistan, a safe haven for Al Qaeda.

In relation to the qualification of the nature of both armed conflicts, the Bush administration took decisions that continue to be at the heart of academic and practical debate today. First, in relation to the armed conflict with Al Qaeda, President Bush decided – pursuant to his authority as Commander in Chief and Chief Executive of the United States, and following legal advice of the Department of Justice and its 'Attorney General\textsuperscript{566} – that in relation to the conflict with Al Qaeda in Afghanistan or elsewhere throughout the world,” none of the provisions of the GCs pertaining to international armed conflicts applied since, “among other reasons, Al Qaeda is not a High Contracting Party to Geneva.”\textsuperscript{567} Neither could the armed conflict with Al Qaeda be dealt with under CA 3 to the GCs, because – following a strict interpretation – the conflict was not limited to “the territory of one of the High Contracting Parties”, i.e. the US, but was a conflict of an international character, and CA 3 applies only to “armed conflict not of an international character.”

In relation to the armed conflict in Afghanistan, against the Taliban, the Bush Administration viewed the conflict as an IAC, to which the GCs applied, even though legal advice concluded that President Bush had “the authority under the Constitution” to suspend their applicability. As with Al Qaeda detainees, Taliban detainees were not protected by CA 3. In addition, President Bush determined that Taliban detainees did not fulfill the requirements for combatant status, nor were they to be awarded the protection of civilians, as they lost such protection due to their participation in the hostilities. Hence, they were “unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.” Nor were ‘unlawful combatants’ to be dealt with under domestic law or benefit from protection following obligations under IHRL.

However, as it turned out, the determination of the non-applicability of the GCs and CA 3 to Al Qaeda and Taliban detainees was rather lop-sided, for it merely referred to a denial of the protective standards of enemy fighters; not to a denial of privileges to the US.

\textsuperscript{565} Brooks (2004), 677.

\textsuperscript{566} For the legal advice provided to President Bush, see Gonzales (2005), also available at http://www/gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf. See also Former U.S. Deputy Assistant Attorney General John Yoo, who argued that the United States was at war with Al Qa’eda, in Yoo & Ho (2003); and the memorandum by Jay S. Bybee to Alberto Gonzales and William J. Haynes II, General Counsel of the Department of Defense of 22 January 2002, stating that the GCs did not apply because the US was not at war with another State (which barred that application of LOAC pertaining to international armed conflicts), not was it involved in an armed conflict taking place in the territory of one State (which barred the application of CA3 relating to NIACs), see Bybee (2002), available at http://news.findlaw.com/hdocs/docs/doi/bybee80102ltr.html. As to the interpretation of the Convention Against Torture, see the so-called Bybee Memo, Bybee (2002a), available at http://news.findlaw.com/hdocs/docs/doi/bybee12202mem.pdf. See also Former U.S. Deputy Assistant Attorney General John Yoo, who argued that the United States was at war with Al Qa’eda, in Yoo & Ho (2003); and the memorandum by Jay S. Bybee to Alberto Gonzales and William J. Haynes II, General Counsel of the Department of Defense of 22 January 2002, stating that the GCs did not apply because the US was not at war with another State (which barred that application of LOAC pertaining to international armed conflicts), not was it involved in an armed conflict taking place in the territory of one State (which barred the application of CA3 relating to NIACs), see Bybee (2002), available at http://news.findlaw.com/hdocs/docs/doi/bybee12202mem.pdf. As to the interpretation of the Convention Against Torture, see the so-called Bybee Memo, Bybee (2002a), available at http://news.findlaw.com/hdocs/docs/doi/bybee80102ltr.html.

\textsuperscript{567} The reference to “other reasons” possibly refers to the United States viewpoint on the applicability of the LOAC pertaining to international armed conflicts to terrorists and other non-State actors as expressed in 1987, in its explanation for not ratifying AP I. This viewpoint entails that acceptance of the applicability of LOAC governing international armed conflict to non-State actors would be tantamount to recognition of a right for such groups to resort to armed force, a right that is prone to abuse.
Thus, while the Bush administration claimed it ought to benefit from the privileges awarded to a party under the LOAC pertaining to IACs, to include, most importantly, the privilege to attack enemy combatants without prior attempt of arrest or detention, and the right to intern Al Qaeda fighters until the end of hostilities of the GWOT, on the other hand it felt it was not under an obligation to provide Al Qaeda and Taliban detainees the standards of treatment normally provided to POWs under GC III.568

The rationale for this position is that:

[s]imply put, the United States did not want to be handicapped by rules more suited to conflicts between states with professional armed forces that can be expected generally to observe the laws of war. To fight an enemy intent on hiding among the civilian population in order to launch attacks on civilians, the Bush Administration wanted as free a hand as possible in deciding when to use force, whom to detain, how to interrogate them, and how long to keep them incarcerated. The Administration feared that applying the laws of war in full would tie its hands while imposing no constraints on al Qaeda and other terrorists organizations.569

As such, the US’ ‘armed conflict’ response can be said to reflect a post-modern form of Kriegsraison.

Consequently, as argued by many, it becomes increasingly difficult to cast the nature of the today’s threats in terms of applicable law.570 In addition, the question is raised whether the ‘enforced’, perhaps artificial application of traditional norms of LOAC would not undermine the traditional and foundational balance between military necessity and humanity.571

The seminal question underlying this ongoing discussion, posed by many, appears that if (transnational) armed conflicts against non-State actors become the norm, and inter-State armed conflicts the exception, is it now not the time to review and, if necessary, update LOAC to a standard which permits States to preserve national security from these new threats?572

Answering the question in the affirmative, some refer to today’s conflicts as “new wars”, requiring “new laws”.573 This group points at LOAC as a regime that is outdated, because it contains norms that are unreasonable and impracticable.574 A revision of LOAC is required

568 Despite these determinations on the applicability of the Geneva Conventions, President Bush held that “our values as a Nation, […] call for us to treat detainees humanely, including those who are not legally entitled to such treatment.” Therefore, “[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” President George Bush (2002).

569 Wippman (2005), 10. See also Dworkin (2009), 3.


572 Pfanner, for example, asks if “wars between States are on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well.” Pfanner (2005), 158; in a similar fashion, Rona questions whether LOAC is “passé, or at least stale and in need of revision—inadequate to deal with the demands of modern day terrorism and the efforts to combat it?” Rona (2003), 56 (answering that it is not).

573 Ravid & Pfeffer (2009), available at: http://www.haaretz.com/hasen/spages/1122546.html (“Prime Minister Benjamin Netanyahu instructed the Foreign, Justice and Defense ministries to prepare an international initiative that would see the laws governing warfare adjusted to combating terrorism. Netanyahu would like to rally Western countries involved in the war on terror in formulating changes to the international law on warfare, so that it would be possible for countries to have enshrined in law their right to defend themselves against acts of terrorism.”)

574 For example, Alberto R. Gonzales, Counsel to the President, in a memorandum of 25 January 2002 to President Bush, qualifies certain parts of the Geneva Conventions as “obsolete” and “quaint.” See Gonzales (2005)118-121, 119.
to increase the permissible scope of action to cope with the changing, terrorist face of warfare and the manner in which to counter the threats arising there from.\textsuperscript{575} For example, Rieff argues that “[t]he crisis of international humanitarian law was an accident waiting to happen” and “[…] when law and material reality no longer coincide, it is, of course, law that must give way.”\textsuperscript{576}

Others, arguably from a human rights/humanization point of view, support a change of LOAC because they fear that State responses may lead to overreaction, lawlessness, and abuse of power at the detriment of human rights safeguards. Their principle aim is, as Ignatieff argues, to engage in “the battle of ideas: it has to challenge directly the claim that national security trumps human rights.”\textsuperscript{577}

Another group calls for the need for a set of norms, between law enforcement and armed conflict, that reflect the transnational character of modern-day conflict, but that find a balance between civil liberty and national security. Some focus on the US’ domestic legal situation. For example, Ackerman proposes an “Emergency Constitution;” Hakimi suggests an administrative approach.\textsuperscript{578} Others look for balanced and pragmatic solutions with LOAC and IHRL, and appreciative of the complex military situation on the ground. Sloane, for example, proposes a “voluntarist war convention” which balances between “security and freedom from fear” and “conceptions of human dignity and rights that have been rightly acknowledged as laudable hallmarks of the postwar international legal order.”\textsuperscript{579}

Sitaraman identifies a disconnect between present LOAC and counterinsurgency and argues that “if we are to devise a legal regime for contemporary conflict, it must be based on the right understanding of the strategic balance” and that “in the face of today’s challenges – in this age of counterinsurgency – the laws of war must continue to keep up with the realities of war or else become increasingly irrelevant and potentially ignored.”\textsuperscript{580}

Another group, however, sees no need for change. Instead, they argue for “a candid recognition of the true nature of the “conflict” in which the US is engaged – and a good faith adherence to both the law of armed conflict and the other controlling principles of international law.”\textsuperscript{581} In search for the flexibility of its boundaries in the permissive sense, they call not for a codified revision of LOAC through a diplomatic conference, but rather a reinterpretation of LOAC in such ways to lower its threshold of applicability, or to find arguments to circumvent its applicability.\textsuperscript{582} Others strongly oppose a revision. As explained by Sassoli:

As with all laws, the laws of war can and must adapt to new developments. However, no law can be adapted in every new case of application to fit with the results desired by those (or some of those) involved. As part of international law, and pending a Copernican revolution

\begin{footnotesize}\begin{enumerate}
\item This group includes Israel. Ravid & Pfeffer (2009), available at http://www.haaretz.com/hasen/spages/1122546.html (referring to Prime Minister Netanyahu’s initiative to “see the laws governing warfare adjusted to combating terrorism.”)
\item Ignatieff (5 February 2002), Is the Human Rights Era Ending?
\item Ackerman (2006), 1-9; Hakimi (2008), 373.
\item Sloane (2007), 484-485.
\item Sitaraman (2009), 1749.
\item Graham (2003), 335-336. See also President Bush, writing the National Security Council that “[T]he war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva. President George Bush (2002), available at: http://www.whitehouse.gov/fsr/nation/documents/020702bush.pdf.
\item As President Bush wrote to the National Security Council:
\end{enumerate}\end{footnotesize}
of the Westphalian system, the law must, in addition, be the same for all States. To see it only as a means, to be immediately adapted to new claims, or to apply it selectively undermines the predictability and therefore the normative force that defines legal rules. 583

To accept too easily that LOAC fails to deal with a new set of facts obviously undermines the normative content of its prohibitions. 584 They also caution against the danger of modifying the boundaries of LOAC. While LOAC aims to humanize armed conflict, at the same time it contains a permissible area of action that goes further than what domestic law or IHRL allows. Some fear that the modification of LOAC opens an opportunity for States to negotiate more lenient rules to combat terrorism, at the cost of humanitarian interests. The risk is that “fiddling with the boundaries or, more accurately, with the overlap between humanitarian law and other legal regimes can have profound, long-term, and decidedly “unhumanitarian” consequences on the delicate balance between state and personal security, human rights, and civil liberties.” 585

Others argue that changes to LOAC actually admit to the claim that LOAC is not capable to impose limitations on the measures taken by the US. 586 They rather seek to clarify the thresholds for applicability of LOAC, and, in those areas in which it is ambiguous, to clarify the normative content of LOAC. Dworkin, for example, “acknowledges the unprecedented nature of a non-international armed conflict on a global battlefield, but maintains that it can nevertheless be adequately regulated through a proper interpretation of existing law.” In his view

[…] the principle legal regimes that apply are domestic law and, most importantly, human rights law. In the face of armed challenge of al Qaeda, the United States may appeal to military necessity to justify the use of force under some circumstances, but it must always do so within the limits set by the law of human rights. Indeed, the most important question raised by the war on terror is how human rights principles should apply in this kind of transnational but not inter-state conflict. 587

Others emphasize that such an interpretation and clarification of the existing norms and principles of LOAC takes account of the complexities and nature of contemporary warfare. Watkin, while stressing that the challenge of ‘three block wars’ is not new, argues that “the complexity of the security situation appears to require an approach that acknowledges the humanitarian law principles, but seeks to temper their application by considering less violent means to contain the threat where feasible. […]” 588 Garraway calls for “a holistic approach to the law” that offers “some sort of rapprochement between the strict standards of human rights law and the more relaxed provisions of the law of armed conflict […] in ways that respect the rights of all as well as reflecting a proper understanding of the realities on the ground.” 589 Stephens and Lewis stress “that the ambiguities inherent in key aspects of the

583 Sassoli (2004), 221; See also Rona (2003); Lubell (2010), 125 ff;
584 Rona (2003), 57.
585 Rona (2003), 57-58; Stahn (2002), 195; Dinstein, 2009 #2120, 54-55. See also Paust (2002), 12: “[…], claimed changes in the status of war, thresholds for application of the laws of war, and “combatant” status could have serious consequences for the United States, other countries, U.S. military personnel, military personnel of other countries, and the rest of humankind. In some ways, claimed changes could even serve those who attacked the United States on September 11th as well as other nonstate actors who might seek to engage in various forms of transnational terrorism in the future. Mean-spirited denials of international legal protections would not merely be unlawful, but would also disserve a free people. Such denials have no legitimate claim to any role during our nation’s responses to terrorism.”
587 Dworkin (2005), 55.
589 Garraway (2006)
law of armed conflict may contribute to neither the proper realisation of humanitarian goals nor the attaining of effective victory on the battlefield. There is a need for a more pragmatic assessment of many of the principles underpinning the law and a recognition that the law should evolve to take account of current operational and technological realities, especially in the context of targeting decisions.”\textsuperscript{590} In other places, links between interpretation of LOAC and counterinsurgency are made. Most notably, Stephens notes that

\[\ldots\] within established mainstream legal thinking, [...] [a] formalist methodology of interpretation and a continued commitment to the attritional focus of the law of armed conflict (LOAC) remain the prevalent orthodoxy, notwithstanding that such binary thinking has proven to have limited utility within counterinsurgency (COIN) and stabilization operations. There is plainly a need for renewed thinking, or at least an appreciation of the direction warfare is going, so that interpretative techniques employed in LOAC may be reimagined and recalibrated in order to remain relevant to operational realities.\textsuperscript{591}

A principal player in the field of LOAC, the ICRC, argues that LOAC as it stands today is sufficient, but requires clarification at certain points.\textsuperscript{592} Noteworthy in this regard is its recently completed Study on the Current State of International Humanitarian Law aimed at strengthening legal protection for victims of armed conflicts, which identified four core areas that require further legal development or clarification.\textsuperscript{593} In his address of 21 September 2010, ICRC President Dr. Jakob Kellenberger stated that LOAC

\[\ldots\] remains, on the whole, a suitable framework for regulating the conduct of parties to armed conflicts, international and non-international. [...] What is required in most cases - to improve the situation of persons affected by armed conflict - is greater compliance with the existing legal framework, not the adoption of new rules. [...] All attempts to strengthen humanitarian law should, therefore, build on the existing legal framework. There is no need to discuss rules whose adequacy is long established. [...] However, the study also showed that humanitarian law does not always respond fully to actual humanitarian needs. Some challenges that exist - in protecting persons and objects during armed conflict - are the result of gaps or weaknesses in the existing legal framework, which requires further development or clarification.\textsuperscript{594}

\textsuperscript{590} Stephens & Lewis (2005), 55.
\textsuperscript{591} Stephens (2010), 290.
\textsuperscript{592} For example: Roberts (2003), 230: “Suggestions that the existing laws of war are generally out of date in the face of the terrorist challenge are wide of the mark. […] However, some modest evolutionary changes in the law can be envisaged. […] Some changes in some of these areas may require a formal negotiating process. Some, however, may be achieved – indeed, may have been achieved – by the practice of states and international bodies, including through explicit and internationally accepted derogations from particular rules that are manifestly inappropriate to the circumstances at hand; and also through the application of rules in situations significantly different from inter-state war.”
\textsuperscript{593} This process follows an earlier project, launched in 2002, “on the Reaffirmation and Development of IHL”. Recognizing the renewed interest in LOAC following the events of 11 September, 2001 and the international response to them, the ICRC launched the “Project on the Reaffirmation and Development of IHL” to examine issues relating to the applicability of LOAC to the global war on terrorism, the conflicts in Iraq and Afghanistan, the rise of internal armed conflicts and the compliance of parties to an armed conflict with LOAC. The Study was sponsored by the Swiss Foreign Ministry to “[…] provide a space for debate on the reaffirmation and development of international humanitarian law in light of the new and evolving realities of contemporary conflict situations.” The Study addressed seven topics in expert meetings. One of those topics concerned the study to explore the notion of “direct participation in hostilities under IHL”, which in 2009 resulted in the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.
\textsuperscript{594} Address by Dr. Jakob Kellenberger, President of the ICRC, 21 September 2010, on the ICRC study on the current state of international humanitarian law.
In this process, IHRL is being looked at – explicitly or implicitly – as an appropriate vehicle to fill these gaps and provide clarification. While this may increase protection of the victims of armed conflict, such developments may also lead to (further) restrictions of the permissible scope of action, or may viewed upon as having such effect.

3. The Regulation of Norm Relationships in International Law

3.1. International Law as a Legal System

The starting point for examining norm relationships in international law is the idea that international law is generally to be viewed as a legal (sub-)system within the system of law as whole with features distinct from other legal systems. As explained by the ILC Report:

[j]ts rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.

Based on this systemic vision, legal practitioners are able to identify norms, interpret them, determine their mutual relationship and solve friction between them “not only by resorting to the specific treaties at hand but also by relying on the basic principles of the system and its underlying norms.”

3.2. Norm Relationships: ‘Valid’ and ‘Applicable’

Norm relationships only develop when norms are valid and applicable to the same situation. A norm is valid in relation to a situation if it covers “the facts of which the situation consists.” A relationship is only then established if both norms are valid. If only one regime provides a norm, no relationship will be formed. In addition to its validity, the applicability of the norm must be determined. According to the ILC Report, the fact “[t]hat two norms are applicable in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation.”

This binding effect can be determined by assessing whether a treaty applies ratione materiae, personae, temporis and loci to a particular situation; whether the State is party to a treaty provid-

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595 See, again, Kellenberger, who stressed that “[…], it bears reminding that strengthening the legal framework applicable to armed conflict also requires that other relevant legal regimes - besides humanitarian law - be taken into consideration.” At the same time he cautions that “[i]t is essential that any development or clarification of humanitarian law avoids all unnecessary overlapping with existing rules of human rights law. Any risk of undermining these rules must be avoided. However one essential fact must always be kept in mind: humanitarian law has to be respected in all circumstances whereas derogation from some provisions of human rights law is permitted during emergencies. The codification of humanitarian law may therefore help to prevent legal gaps in practice.”


597 The systemic approach to international law is strongly influenced by the systemic German approach in constitutional law, vis-à-vis the more contractual American approach to constitutional law. On that topic, see Nolte (2005). On the influence of German legal scholarship on the systemic approach to international law, see Benvenisti (2008). See also Vogenauer (2006), 657, who characterizes German legal culture as “[…] the emphatically academic and scientific spirit of legal scholarship with its struggle for rationality, systematic coherence, logical consistency, building on first principles, obsession with taxonomy, abstractness, precision and clarity of concepts […].”

598 Benvenisti (2008), 397


ing the norm; whether it has made reservations to the norm; whether it has derogated from the norm; whether it has indicated to be a persistent objector to the norm in case it is of customary nature; and whether the norm applies extraterritorially. A relationship is only then established if both norms are applicable. As such, relationships may exist between general norms and more special norms, between norms at different hierarchical levels, between older and newer norms and between norms and their larger ‘normative environment’.

In sum, it may thus be that both norms are valid, but that one of the norms, or even both, lacks applicability. In extremis, it may be that a particular matter is only regulated by a valid norm of regime A, and another regime B does not provide a valid norm, but that ultimately the matter remains unregulated, because the norm of regime A, while valid, is not applicable.

3.3. Complementarity, Harmonization and Normative Conflict

It is a well-established principle of law that once it is established that norms are both valid and applicable in relation to a particular subject matter – and thus it is certain that they are in a state of relationship – an obligation arises to search for their ability to complement each other so as to give each of them maximum – not necessarily equal – effect. This general principle of complementarity,602 is not limited solely to international law, but it is inherent to the law as a whole, although in international law it may play a more important role in the absence of a more formal hierarchical structure that one may normally find in other legal systems, such as domestic law.

Complementarity is a reflection of the function of all general principles underlying the legal system as a whole, namely to provide a coherent legal methodology that will enable the lawyer to reconcile differences between different legal systems and to provide a general framework for the relationship between different legal regimes and the rules and principles that form part of those regimes. In international law, this desire for complementarity is a reflection of the desire for the harmonization of norms to the fullest extent, so as to ensure that both norms “appear as parts of some coherent and meaningful whole.”603 When a state of harmonization is reached “there appears to be no conflict or divergence at all.”604

As stated by the ILC Report, “in international law, there is a strong presumption against normative conflict.”605 Normative conflict is “a phenomenon in every legal order.”606 Under-

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602 As to the meaning of ‘complementary’ as a concept, Kleffner (2010a), 73, explains that, “[g]enerally speaking, matters or things are described as being ‘complementary’ if and when they are ‘completing something else’ or ‘making a pair or a whole’. ‘Complementarity’, in turn, refers to a relation of different parts and denotes the condition of things that complement one another, while a ‘complement’ is generally understood as something that, together with other things, forms a unit.”

603 Koskenniemi (2007b), 208, § 214.


605 Koskenniemi (2007b), 25, § 37. The issue of normative conflict is intrinsically linked with the issue of fragmentation of international law. Fragmentation of international law can be described as the process in which “specialized and (relatively) autonomous rules or rule-complexes” (Koskenniemi (2007b), 11, § 8) have emerged, developed and become functional in a spontaneous, decentralized and non-hierarchical fashion along separate historical, functional and regional lines (Jenks (1953), 403), both in substance (i.e. primary rules) and procedure (i.e. secondary rules) (Pauwelyn (2006), § 1). Fragmentation is the logical consequence of the absence in international law of a general legislative body, the multiplicity of national legal regimes and the “functional differentiation” of the international and national society due to globalization. Exemplary of such rules or rule-complexes are fields such as trade law, environmental law, international refugee law, the law of the sea, European law, and, of relevance, LOAC and IHRL. Each has its
understanding the meaning of the notion of ‘conflict’ is crucial for the understanding of normative relationships. While the exact meaning of ‘conflict’ is disputed among contemporary scholars there appears to be support for a broad definition, both in general legal theory as well as in international law. For the purposes of this study, we will adhere to the definition adopted in the ILC Report, which defines conflict “as a situation where two rules or principles suggest different ways of dealing with a problem.”

The ILC Report’s definition goes beyond the more traditional (and “bland”) narrow view that ‘conflict’ “in the strict sense of direct incompatibility” occurs (only) “where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.” According to the ILC Report such a focus on “mere logical incompatibility mischaracterizes legal reasoning as logical subsumption.” The definition in the ILC Report instead adopts a ‘looser understanding of conflicts’, i.e. those arising from relationships where norms “may possess different background justifications or emerge from different legislative policies or aim at divergent ends.” Central in this view appears to be the focus on the competing interests involved, whether they originate from prohibitions, obligations or permissions.

own sets of rules and principles, legal institutions and legal practice. As a result, “[a]lthough these systems are part of the wider framework of international law, their relationship to it and to each other is far from clear” (Lindroos (2005), 31). While some perceive fragmentation to constitute a principal cause of forum-shopping, normative conflict, conflicting jurisprudence, erosion of the unity of general international law and legal security (DuPuy (2002); Jennings (1997); Guillaume (1996); Schwebel (1999); Hafner (2004); Brownlie (1987)), according to the ILC Report “[…] the fragmentation of the substance of international law […] does not pose any very serious danger to legal practice. It is as normal a part of legal reasoning to link rules and rule-systems to each other, as it is to separate them and to establish relations of priority and hierarchy among them. The emergence of new “branches” of the law, novel types of treaties or clusters of treaties is a feature of the social complexity of a globalizing world. If lawyers feel unable to deal with this complexity, this is not a reflection of problems in their “tool-box” but in their imagination about how to use it” (Koskenniemi (2007b), 114-115, § 222 (emphasis added). See also Pauwelyn (2006), § 7: “[…] its benefits – a laboratory of ideas, efficiency and legitimacy through specialization, contestation and competition, as well as respect for the diversity between States – should normally outweigh its risks, i.e., the potential of overlaps and conflicting rules and rulings. This ought to be the case especially when all actors involved respect a minimum of dialogue, tolerance and curiosity toward other legal regimes and actors.” In sum, therefore, the acceptance of fragmentation as a development inherent to the international legal system implies acceptance of the fact that valid and applicable international norms are not always in harmony with each other, but that international law is flexible enough to withstand conflicts before reaching a breaking point.

607 See for example Engisch (1935), 46.
608 Karl (1983); Klein (1962), 555; Falke (2000), 328; Pauwelyn (2003), 176;
610 Kammerhofer (2005), 2. See also Vranes (2006), 404, for a critical analyses of the narrow definition.
611 Jenks (1953), 426 (emphasis added). In Jenks view, ‘conflicts’ between other norms than obligations are to be called divergences. Narrow definitions are also found with Czapliński & Danilenkow (1990), 12-13 and Wolfrum & N (2003), 4, although there is debate on their exact scope and meaning. For a discussion see Vranes (2006), 402 and footnotes 44 and 45.
614 Bentham (1970), 93-109 and 153-183. See also Vranes (2006) for support of a definition allowing accepting conflicts between prohibitions, obligations or permissions. Not all authors support such broadening. Jenks (1953), 401, for example, argues that the simultaneous applicability of a right and an obligation should be viewed as a situation of conflict avoidance. After all, if a right conflicts with an obligation, the State can opt not to exercise its right in order to comply with the obligation. Pauwelyn (2003), 184-188, in turn, rejects this view and argues that the forcible non-enforcement of a right frustrates the right as much as would the non-compliance with the obligation.
This would allow for the qualification as a proper norm-conflict the friction between a permissive norm and an obligation; a permissive norm and a prohibition; and a prohibition and an obligation.\footnote{615} In addition, the ILC Report’s definition also appears to go beyond the rather absolute view that a potential breach only results from ‘total conflict’, i.e. if in relation to a particular subject-matter one norm prohibits certain behavior prescribed by the other norm.\footnote{616} Adherence to such incompatibility would exclude from the definition of normative conflict situations of ‘partial conflict’, i.e. where two norms are generally in harmony, but one of them diverges from the other only partially.\footnote{617}

Notwithstanding the nature of the conflict (be it total or partial), when not avoided or resolved it will result in the – equally total or partial – breach of one of the norms. Clearly, such result could undermine the aim for harmonization.\footnote{618} It thus follows that a need arises, in each situation of norm relationships, to ascertain the nature of the norm relationship – one of natural harmony or one of conflict – and in case of conflict, to determine the potential for harmonization by making use of the available techniques or ‘tools’ of conflict avoidance or conflict resolution.

### 3.4. Conflict Ascertainment, Avoidance, and Resolution

Intrinsically linked to the questions of conflict ascertainment, avoidance and resolution is the concept of interpretation.\footnote{619} According to Kammerhofer, interpretation is, in sum

> [...] the cognition of legal norms. Legal norms need to be cognized in order to be understood by humans. Humans, whether legal professionals or individuals in an organ, start a process of interpretation as soon as they look at a legal text, irrespective of whether they succeed in the process or not. Interpretation necessarily takes place, however clear the words may sound to us, because they only sound clear to us as a result of interpretation.\footnote{620}

When examining a norm more closely, it can be said to provide a frame that delineates the outer limits within which there is room for the formulation of differing opinions of the

\footnote{615} According to Vranes (2006), 396, this opens up the possibility to apply conflict principles such as lex specialis and lex posterior. Their application would be foreclosed when adhering to a narrow definition and bar the priority of rights over obligations even when the former are more specific or later in time.

\footnote{616} Kelsen (1968), 1438.

\footnote{617} Kelsen (1968), 1438.

\footnote{618} The emphasis is on the breach of a norm. See Kelsen (1960), 26-27, 77, 209: “[e]in Konflikt zwischen zwei Normen liegt vor, wenn das, was die eine als gesollt setzt, mit dem, was die andere als gesollt setzt, unvereinbar ist, und daher die Befolgung oder Anwendung der einen Norm notwendiger- oder möglicherweise die Verletzung der anderen involviert” (English: “A conflict between two norms occurs when there is an incompatibility between what one ought to do under the first norm and what one ought to do under the second norm, and therefore obeying or applying one norm necessarily or possibly involves violating the other” (translation by Kammerhofer (2005), 2, footnote 10). References to sources using similar definitions can be found in Kammerhofer (2005), 2, footnote 11. This is the ‘classic’ example of ‘Nicht-gleichzeitig-existieren-Können’ (“[t]he state of not being able to exist at the same time”) of the simultaneously valid and applicable obligations A and B. Not only is it factually impossible, but it is also “rein logischer Natur (“purely logical nature”) that these norms cannot exist together when applied to the same situation. See Weinberger (1981), 99 (translation: Kammerhofer (2005), 3, footnote 16). See also Pauwelyn (2003), 176, who speaks of conflict when “one norm constitutes, has led to, or may lead to, a breach of the other” and Vranes (2006), 415: “There is a conflict between two norms, one of which may be permissive, if in obeying or applying one norm, the other one is necessarily or possibly violated.”

\footnote{619} Koskenniemi (2007b), 207, § 412.

\footnote{620} Kammerhofer (2009), 6-7 (emphasis added).
possibilities for application, independently from other valid and applicable norms. In other words, in order to ‘get to know’ a norm, the frame leaves room for a meaning; it does not necessarily represent one meaning. Much therefore depends on the clarity of the norm: if the frame is hardly visible, it is difficult to determine the interpretative boundaries. As such, interpretation is applied as a technique of norm cognizance.

Norm cognizance is a condition sine qua non for conflict ascertainment. It is only possible to draw conclusions as to the possible application of a norm vis-à-vis another norm and vice versa if a decision is made on the possible meaning of both norms. Thus when, following the application of interpretation as technique of norm cognizance, the interpretative outcome of a norm A is placed next to the interpretative outcome of norm B, conclusions can be drawn as to whether both norms are in harmony or conflict, and, in the event of the latter, how to deal with such conflicts.

Two basic types of types of conflicts can be discerned, and the objective is, in view of the principle of harmonization, to interpret them, “to the extent possible [...] so as to give rise to a single set of compatible obligations”.

A first type of conflicts concerns apparent conflicts. Apparent conflicts involve norms that appear to be in disagreement at first sight, but can be harmonized through the application of techniques of conflict avoidance. By avoiding conflict, the norms can be said to exist in a relationship of interpretation. A case of relationships of interpretation arises where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating or modification of the latter. In such a situation, both norms are applied in conjunction.

As follows, besides functioning as a technique of norm cognizance and conflict ascertainment, interpretation also plays a fundamental role in the recognized techniques of the avoidance of apparent conflicts. Examples of conflict avoidance techniques – or interpretation techniques – are, inter alia, the maxims of lex specialis derogare lege generali and lex posterior derogat lege priori.

In the event that the ‘ordinary’ conflict avoidance techniques fail to harmonize treaty norms, recourse may be had to Article 31(3)(c) VCLT, which stipulates that

[t]here shall be taken into account, together with the context: [...] (c) any relevant rules of international law applicable in the relations between the parties.

This provision reflects, what is referred to as, the principle of complementarity or systemic integration. Dubbed by Kammerhofer as a “new trend in international legal scholarship”.

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621 Kelsen (1960), 348-349; Kammerhofer (2009), 7.
622 Kammerhofer (2009), 7-8.
623 Milanovic (2011a).
625 Koskenniemi (2007a), 263, § 14(2).
the objective of systemic integration is that “whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.”\textsuperscript{628} Beyond interpretation of the words in a treaty giving expression to the intent of parties, systemic integration calls for the appreciation of the international law as a legal system and thus to take into account other treaty rules, customary international law and the general principles of law in situations where a treaty rule is unclear or open-textured;\textsuperscript{629} where a term in a treaty rule has a particular meaning recognized in customary international law or a general principle of law; or where a treaty does not regulate a particular matter.\textsuperscript{630} As expressed by Pauwelyn,

tthis fall-back on other rules of international law, without the need for any explicit incorporation or reference in the treaty under examination, is a crucial, if not the most important, tool to maintain a modicum of coherence and interaction between the branches of international law. In that sense, it can be seen as the gene-therapy against excessive fragmentation of international law, in particular, the risk of sealed-off compartments or self-contained regimes operating independently from the broader corpus of international law.\textsuperscript{631}

As such, the provision is held to serve as “a master key” to the house of international law.\textsuperscript{632}

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\begin{itemize}
\item No. 37112/97, Judgment of 21 November 2001; (2000), McElhinney v. Ireland and the United Kingdom, App. No. 30882/96, Judgment of 9 February 2000; (2005a), MOX Plant Case, Request for Provisional Measures Order (Ireland v. the United Kingdom) (3 December 2001). (1998e), EC Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body (16 January 1998) WT/DS-26/AB/R; (1998o), United States: Import Prohibition of Certain Shrimp and Shrimp Products - Report of the Appellate Body (12 October 1998) WT/DS58/AB/R; (2002g), Pope & Talbot v. Canada, Merits (10 April, 2001); Damages (31 May 2002) and the ILC. (ILC (2004a), § 729; see also the preliminary study carried out by McLachlan and Mansfield on the topic of Article 31(3)(c) (ILC(LVI)/SG/FIL/CRD.3/Rev 1) presented at the ILC’s Fifty-sixth Session (ILC (2004b). According to the ILC Study Group, Article 31(3)(c) VCLT “provides one means within the framework of the VCLT, through which relationships of interpretation […] may be applied” (Koskenniemi (2007a), § 14(17). Although Kammerhofer maintains that “[t]here are several theoretical problems” to identify the principle of systemic integration laid down in Article 31(3)(c) VCLT as such (Kammerhofer (2009), 6), it is according generally held to be a rule of customary international law. See Koskenniemi (2007b), 215, § 427; McLachlan (2005), 293; Villiger (1985), 334-43 (although he qualified Article 31(3)(c) to be among the “emerging customary rules on interpretation which originated in Vienna”. For case-law, see (1994c), Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment of 3 February 1994, 6; (1975c), Golder v. the United Kingdom, App. No. 4451/70, Decision of 21 February 1975; (1986c), Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R.; (1996d), United States - Standards for Reformulated and Conventional Gasoline AB - 1996-1 WT/DS2/AB/R, 29 April 1996, 16 ). McLachlan contends that it has the status of a constitutional norm within the international legal system and as such serves as a “master key in a large building” (McLachlan (2005), 279-280, who adopted this expression from the Ambassador to China in the Netherlands and member of the ILC, Xue Hanquing: “Mostly the use of individual keys will suffice to open the door to a particular room. But, in exceptional circumstances, it is necessary to utilize a master-key which permits access to all of the rooms. In the same way, a treaty will normally be capable of interpretation and application according to its own terms and context. But in hard cases, it may be necessary to invoke an express justification for looking outside the four corners of a particular treaty to its place in the broader framework of international law, applying general principles of international law.” See also Koskenniemi (2007b), 211, § 420.

\item Kammerhofer (2009), 16.
\item Koskenniemi (2007a), § 14(17).
\item (1928a), Georges Pinson Case (France/United Mexican States), Award of 19 October 1928, 422.
\item McLachlan (2005); Koskenniemi (2007b), 244, § 480. For a critical view, see Kammerhofer (2009), 16.
\item Pauwelyn (2006), § 28.
\item Koskenniemi (2007b), 211, § 420.
\end{itemize}
\end{flushright}
In some cases, harmonization through the application of interpretation techniques is achieved relatively consistently, through reconciliation of the language, object and purpose, and other structural elements of the two (apparently) conflicting norms. While this could imply the ‘reading down’ of norm A in order to enable it to inform norm B, it is a type of avoidance that remains consistent with the law. The aim here is to interpret “the relevant materials from the perspective of their contribution to some generally shared – “systemic” – objective.” In such cases “the process of reasoning follows well-worn legal pathways: references to normal meaning, party will, legitimate expectations, good faith, and subsequent practice, as well as the “object and purpose” and the principle of effectiveness.” In other cases, conflict is avoided in a more creative manner, by legally or illegally bending norms or even inventing rules. In its most extreme form, conflicts are avoided forcibly by rewriting the rules.

A second type of conflict concerns genuine conflicts. The norms “point to incompatible decisions, and the conflict cannot be avoided.” A choice must be made in order to solve a normative conflict. Here, interpretation meets its outer boundaries: it only offers the opportunity to attach a meaning to the content of a norm within the outer limits of its frame. It cannot make or invalidate a new norm.

Genuine conflicts are more easily solved in the case of incongruities within one single regime, as they are often the result of “legal-technical” mistakes, e.g. a divergence of norms that ‘slipped’ into a treaty during its drafting process, “that could be “avoided” by a more sophisticated way of legal reasoning.” Such reasoning is possible, because the parties often share the same interests. This is different with respect to conflicts between regimes. In such situations,

the positions of the parties are so wide apart from each other – something that may ensue from the importance of the clash of interests or preferences that is expressed in the normative conflict, or from the sense that the harmonizing solution would sacrifice the interests of the party in a weaker negotiation position. In this respect, there is a limit to which a “coordinating” solution may be applied to resolve normative conflicts.

In order to attain harmonization of the norms, genuine conflict between them must be resolved by application of the available conflict resolution techniques. These techniques will lead to the prioritization of one of the norms over the other. The principal recognized ways of resolving conflict by prioritization are (1) jus cogens; (2) obligations erga omnes; (3) Article 103 of the UN Charter; (4) conflict clauses in treaties; (5) lex specialis derogat legi generali; and (6) lex posterior derogat legi priori.

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633 This is what Milanovic dubs ‘consistent avoidance’. Milanovic (2011a), 106.
634 Koskenniemi (2007b), 208, § 412.
635 Koskenniemi (2007b), 208, § 412.
636 The latter situations of conflict avoidance are called ‘creative avoidance’ and ‘forced avoidance’. See Milanovic (2011a), 106 (including examples).
637 Koskenniemi (2007b), 27, § 42.
638 Koskenniemi (2007a), § 14(2).
639 Kelsen (1979), 179 (emphasis EP); Kammerhofer (2009), 9.
640 Koskenniemi (2007b), 245, § 484.
641 Koskenniemi (2007b), 27, § 42.
642 Some argue that some genuine normative conflicts cannot be resolved in a legal fashion; they must be resolved by policy. See Milanovic (2011a), 108. The viewpoint taken in this Study, however, is that genuine norm conflicts are never unresolvable.
This paragraph has demonstrated how international law functions as a legal system in which norms belonging to different regimes may, once they are valid and applicable to the same situation, enter into a relationship of harmony or conflict. In that case, “[i]n applying international law, it is often necessary to determine the precise relationship […]”\(^\text{643}\)

We have also concluded that the principal desired outcome is to examine the ability of norms to complement each other so as to give each of them maximum effect, in order to harmonize them. In some cases it is not necessary to put in any effort to harmonize them; in other situations however there is apparent conflict that can be avoided by applying interpretative techniques. In other situations, conflict cannot be avoided, and must be resolved via conflict resolution techniques.

The above brings us to the question of how this general conceptual framework governing normative relationships in international law plays out in the context of the relationship of the legal subsystems of international law central to the present study, i.e. IHRL and LOAC. This will be examined in the next chapter, where the aim is to formulate a conceptual framework for analysis of the interplay of norms of IHRL and LOAC.

\(^{643}\) Koskenniemi (2007a), § 14(2).