

**HASSAN v. UNITED KINGDOM**

29750/09

*AMICUS CURIAE* BRIEF SUBMITTED BY  
PROFESSOR FRANCOISE HAMPSON AND PROFESSOR NOAM LUBELL  
OF THE HUMAN RIGHTS CENTRE, UNIVERSITY OF ESSEX

1. On 7<sup>th</sup> August 2013, the Human Rights Centre (HRC), University of Essex, UK requested the permission of the European Court of Human Rights to submit a third party intervention in the case of *Hassan v. United Kingdom*, 29750/09. In September, the President of the Court granted permission. The HRC sought an extension for its submission and was granted an extension until 30<sup>th</sup> October 2013.
2. The Court required the intervention to address two issues: first, the relationship between the law of armed conflict (LOAC), also known as international humanitarian law (IHL), and human rights law and, second, the detention regime applicable under LOAC/IHL in situations of international armed conflict, including under belligerent occupation.
3. This brief does not address the facts of the case, which are a matter of dispute between the parties. The only exception is that it takes as a given the facts on the basis of which the conflict is classified as international under LOAC/IHL. That is not disputed by the parties or by anyone else. It also does not address the scope of the extra-territorial applicability of the Convention, on the basis that it is settled case-law that a person who is detained outside national territory is within the jurisdiction of the detaining power.<sup>1</sup> Similarly, it is taken as settled that the intervening States bore legal responsibility for detention in Iraq in 2003, rather than the UN, on the basis of *Al Jedda v. United Kingdom*.<sup>2</sup>
4. The intervention will first address the relationship between LOAC/IHL and then the applicable LOAC/IHL detention regime. It will, finally, assess how the LOAC/IHL regime should affect the human rights regime otherwise applicable, in the light of the analysis of the two bodies of rules.

## **A. RELATIONSHIP BETWEEN LOAC/IHL AND HUMAN RIGHTS LAW<sup>3</sup>**

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<sup>1</sup> The respondent government itself used the case of extra-territorial detention as an example of the “classic exercise of such legal authority or jurisdiction” in the case of *Bankovic & others v. Belgium and 16 NATO States*, 52207/99, Grand Chamber, Admissibility Decision of 12<sup>th</sup> December 2001, para. 37. Since then, the European Court of Human Rights (ECtHRs) has held persons detained outside national territory to be within the jurisdiction of the detaining State in a range of cases including *Ocalan v. Turkey*, 46221/99, judgment of Grand Chamber, 12<sup>th</sup> May 2005; *Al-Saadoon and Mufdhi v. the United Kingdom*, 61498/08, judgment of 2<sup>nd</sup> March 2010; *Medvedev v. France*, 3394/03, judgment of Grand Chamber of 29<sup>th</sup> March 2010; *Al Jedda v. UK*, 27021/08, judgment of Grand Chamber of 7 July 2011 and *Al-Skeini and Others v. the United Kingdom*, 55721/07, judgment of Grand Chamber of 7 July 2011.

<sup>2</sup> Note 1, *supra*.

<sup>3</sup> It is necessary to clarify the issue of terminology. The law of war, which is synonymous with the law of armed conflict, consists of two strands. There are rules on the means and methods for the conduct of hostilities, known in the past as “the law of the Hague”. Other rules address the protection of the victims of war, known in the past as “the law of Geneva”. In 1949, the categories of victims were the military wounded, sick and shipwrecked, prisoners of war and enemy civilians in the power of the other side, whether in the territory of the other side or in occupied territory. Until 1977, the term international humanitarian law was used just to describe the law of Geneva. The terms law of war and law of armed conflict were used to describe the totality of the applicable rules, both the law of the Hague and the law of Geneva. In 1977, two Protocols were adopted, additional to the four Geneva Conventions of 1949. Protocol I addresses international armed conflicts (i.e. conflicts between two or more States and belligerent occupation). That Protocol contains some provisions on the means and methods for the conduct of hostilities and others on the protection of victims. The latter category was extended to civilian wounded, sick and shipwrecked. The Protocol does NOT represent the merger of the law of the Hague and the law of Geneva. It is simply that it contains provisions of both types. The International Court of Justice (ICJ), the UN and the International Committee of the Red Cross (ICRC) and a significant number of States have, since then, adopted the term international humanitarian law (IHL) as a synonym for the law of armed conflict or the law of war. A number of other States still make a distinction and only use IHL to refer to rules on the protection of war victims. The military manual of the respondent government, for example, is entitled ‘the Manual of the Law of Armed Conflict’, MOD, 2004, OUP.

5. Three different issues require to be addressed, the first two very briefly. The relationship between LOAC/IHL and human rights law is a specific, but extremely important, example of a more general issue: the relationship between human rights law and other areas of international law. This will only be considered in the light of the case-law of the Court. It is, second, necessary to understand something of the key characteristics of LOAC/IHL as a body of law in order to be able to understand the operation of the regime. Finally, the specific issue of the relationship between LOAC/IHL and human rights law will be addressed.

#### *A.1 The relationship between human rights law and other areas of international law*

6. The Court held, in *Al Adsani v. United Kingdom*<sup>4</sup>, “The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, mutatis mutandis, *Loizidou v. Turkey* (merits), judgment of 18 December 1996, Reports 1996-VI, p. 2231, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.” This has been reiterated in subsequent decisions.<sup>5</sup> There is another, discrete, strand of case-law which requires a State to take account of its obligations under the ECHR when accepting other international obligations or giving effect to them.<sup>6</sup> The two strands deal with different issues. The first deals with *whether* to take account of other areas of international law<sup>7</sup> and the second with specific examples of *how* to take account of differing obligations.
7. It is noteworthy that, to date, the Court has taken account of rules which concern the operation of the international legal system. Rules on sources of international law, on treaty law and on sovereign immunity apply to every substantive area of international law. Nevertheless, it is submitted that the principle that the Court should take account of other applicable rules of international law is both desirable and necessary to avoid States being faced with irreconcilable legal obligations<sup>7</sup> and controversial results.<sup>8</sup> This is particularly important where the rules in question have been specifically designed to address the situation. The detention regime applicable in international armed conflicts is perhaps the best example. It is both specifically designed for situations of international armed conflict and specifically addresses, in

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<sup>4</sup> 35763/97, judgment of Grand Chamber of 21<sup>st</sup> November 2001, para.55.

<sup>5</sup> E.g. *Bankovic*, note 1, paras. 55-58.

<sup>6</sup> Re immunity of intergovernmental organisations, see *Waite and Kennedy v. Germany*, 26083/94, judgment of Grand Chamber of 18<sup>th</sup> February 1999; re national implementation of Security Council resolutions, see *Al Jedda*, note 1; *Nada v. Switzerland*, 10593/08, judgment of Grand Chamber of 12<sup>th</sup> September 2012. For the decisions of other bodies re Security Council resolutions, see *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (joined cases C-402/05 P and C-415/05 P) [2008] ECR I-0000, [234]–[236] and *Sayadi and Vinck against Belgium*, Human Rights Committee, communication no. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006 (2008).

<sup>7</sup> See generally ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, International Law Commission, Ybk ILC, 2006, vol.II, Part Two.

<sup>8</sup> In the joined first and second cases of *Cyprus v. Turkey*, 6780/74 & 6950/75, Report of the Commission, adopted on 10 July 1976, a majority of the Commission did not acknowledge the existence of an international armed conflict, with a specific regime for the detention of prisoners of war (POWs), since Turkey had neither derogated nor invoked the law of armed conflict. The majority held that the detention of POWs was unlawful. A minority (Messrs. Trechsel and Sperduti) said that the applicability of another detention regime, applicable by virtue of the factual situation, had to be recognised.

considerable detail, the detention regimes applicable. Furthermore, the treaties in question (Geneva Conventions III and IV of 1949) enjoy universal ratification.

8. One sentence in the judgment of the Court in *Al Jedda*<sup>9</sup> might be read as suggesting that the Court will only take account of LOAC/IHL where it imposes an obligation and not where it authorises a course of conduct. At para. 107, the Court stated, "...the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial." It is submitted that, whilst taken in isolation the sentence does appear to bear that meaning, in context it is open to another meaning. The Court was not looking at LOAC/IHL in its own right but as a source of possible rules which could be read into a Security Council resolution. The British government *could* have chosen to raise LOAC/IHL as an independent basis for detention but chose to rely instead exclusively on the Security Council resolution. As indicated in paragraph 6 above, Security Council resolutions raise a different issue. It is submitted that the Court was not indicating that it would only take account of LOAC/IHL where it imposed an obligation on States.
9. It therefore appears that the Court, in interpreting the ECHR, takes account of other obligations under international law. How it may be able to do so will be examined at 3. And C. below.

#### *A.2 Key characteristics of LOAC/IHL as a body of law*

10. The origins of LOAC/IHL predate the emergence of the nation State. The LOAC/IHL field was amongst the first areas to be the subject of codification through treaty provisions, starting in 1864. By 1907, it was regulated in considerable detail. Between 1907 and 1977, there was significant development of the provisions on the victims of war through subsequent treaties, most notably the four Geneva Conventions of 1949. There was, however, a reluctance to address the rules on the means and methods for the conduct of hostilities, not least owing to the outlawing of war as an instrument of policy following the first and second world wars. In that period, there was the development of customary law. Many, but not all, of the provisions of Protocol I of 1977 on international armed conflicts were seen as reflecting customary law either at that time or subsequently. Protocol I has been ratified by 173 States, including the respondent Government. It should be remembered that, like human rights law, LOAC/IHL is civil in character. It should not be confused with international criminal law.
11. In common with many areas of international law which have been developed as comprehensive regimes for particular fields of activity,<sup>10</sup> LOAC/IHL has developed its own internal coherence and understandings.<sup>11</sup> Examples of such understandings across human rights law include, first, the view that human right treaties are living instruments; second, that rights should be real and not theoretical or illusory and, third, limitations or restrictions on rights should be interpreted restrictively. The key underlying assumption of LOAC/IHL is that it represents a balance between military necessity and humanitarian considerations. This means that there can be no appeal to military necessity outside the treaty rule, which itself takes account of military exigencies. It also means that there is no presumption in favour of protection, with military

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<sup>9</sup> Note 1.

<sup>10</sup> E.g. world trade law; international environmental law, the law of the sea and human rights law.

<sup>11</sup> This development of discrete fields of international law, with their own monitoring and enforcement mechanisms, is at the root of the fragmentation debate; see McLachlan, "The principle of systemic integration and Article 31(3)(c) of the Vienna Convention", *ICLQ*, Vol.54, April 2005, 279 at 284 *et seq.*

demands being interpreted restrictively. This applies to the provisions on the protection of victims as much as it does to those on the conduct of hostilities. Having said that, the treaty provisions themselves are tilted towards military necessity the closer they are to the conduct of operations and towards humanitarian considerations the further they are away from the battlefield. A second underlying principle is that LOAC/IHL is based not on rights, however the treaty may be drafted, but on the obligations of parties to a conflict. Third, the rules applicable to an individual depend on his status as a member of a group (e.g. combatant; civilian). Fourth, whilst reference is often made to *principles* of LOAC/IHL, such as the principle of distinction and the principle of proportionality, the principles themselves are not legal rules. The rules are found in treaty provisions which represent the articulation of those principles in legally binding form. There can be no reference to the principles outside the law. It is clear then that the internal coherence of LOAC/IHL is significantly different from that of human rights law.

### *A.3 The relationship between LOAC/IHL and human rights law*

12. Of the relationships between various fields of international law, that between LOAC/IHL and human rights law is not alone in being problematical but it is the one that has received most attention. In part that may be due to the effectiveness of human rights enforcement machinery, particularly where the right of individual petition exists. Specialised human rights bodies, some of which have the authority to deliver binding legal judgments, have had to address the issue. It is not confined to lawyers within foreign ministries. This sub-section will consider briefly how the problem has arisen. It will then examine what the International Court of Justice (ICJ) has said and done and the inferences to be drawn from that. Finally, it will seek to identify the criteria to be applied to the two approaches proposed by the ICJ.

#### *i. How the problem arises*

13. By virtue of the express terms of certain human rights treaties, they continue to apply in situations of “war or other public emergency”.<sup>12</sup> Those treaties expressly envisage the possibility of modifying the scope of certain rights in such circumstances by means of derogation but also identify rights which are non-derogable.<sup>13</sup> That means that certain human rights treaties remain applicable, possibly in a modified way, in circumstances in which LOAC is also applicable. The applicability of LOAC is determined by the facts on the ground. The rules on international armed conflicts (IACs) apply whenever there is an armed conflict between two or more States, including where one State occupies part or all the territory of another.<sup>14</sup> The rules applicable to non-international armed conflict (NIACs) apply to protracted armed violence between a State and an organised armed group or between two or more organised armed

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<sup>12</sup> The ECHR derogation clause applies to ‘ war or other public emergency threatening the life of the nation ’. ECHR, Art. 15(1). The analogous clause in the IACHR provides ‘ In time of war, public danger, or other emergency that threatens the independence or security of a State Party ’. IACHR, Art. 27(1). The ICCPR provides “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ...”, ICCPR, Art.4.1.

<sup>13</sup> The list of non-derogable rights varies in each treaty; ICCPR, Art. 4(2) ; ECHR, Art. 15(2) ; IACHR, Art. 27(2). There is no equivalent provision in the African Charter of Human and Peoples’ Rights.

<sup>14</sup> “... 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.” *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, entered into force Oct. 21, 1950. (GC.III), Article 2 common to the four Conventions.

groups.<sup>15</sup> The rules concerning NIACs will not be considered further, since they are not relevant to the case at hand. Whilst it is more common for the concurrent applicability between LOAC/IHL and human rights law to arise in NIACs, that is simply owing to the greater prevalence of such conflicts. There is nothing in the basis for concurrent applicability to distinguish between IACs and NIACs. Indeed, the Court itself has had experience of co-applicability in an IAC.<sup>16</sup>

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

14. The ICJ has addressed the relationship on three occasions, in two Advisory Opinions and one contentious case. In the first case, the Advisory Opinion on *Nuclear Weapons*, the Court stated, “The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”<sup>17</sup> It went on to say, “In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”<sup>18</sup>
15. The second Advisory Opinion concerned the *Legal Consequences of the Construction of a Wall*. The Court stated, “As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”<sup>19</sup>

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<sup>15</sup> ICTY, *Prosecutor v. Kunarac, Kovac and Vokovic*, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), 12 June 2002, para. 56, citing *Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70, interpreting the concept of an “armed conflict not of an international character” found in common Article 3 of the Geneva Conventions, note 14..

<sup>16</sup> The most obvious examples are the four inter-State cases brought by Cyprus against Turkey; joined first and second cases, note 8; third case 8007/77, Report of Commission of 4<sup>th</sup> October 1983; fourth case (the only one to be submitted to the Court), 25782/94, judgment of Grand Chamber of 10<sup>th</sup> May 2001. Some elements of those cases involved activities during the invasion and hostilities, whilst others concerned the occupation. In addition, there have been the individual cases arising out of the same situation. Whilst many involved the right of access to property located in occupied territory (e.g. *Loizidou v. Turkey*, 15318/89, judgment of Grand Chamber of 18<sup>th</sup> December 1996), others have concerned on-going issues which arose at the time of the invasion e.g. *Varnava & others v. Turkey*, 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgment of Grand Chamber of 18 September 2009. Other situations arguably in the international armed conflict category include the position of Russian forces in Transdnistria, *Ilascu & others v. Moldova & the Russian Federation*, with Romania intervening, 48787/99, Judgment of 8th July 2004; and Turkish forces in northern Iraq, *Issa & others v. Turkey*, 31821/96, Admissibility Decision of 30 May 2000, Decision of Second Chamber, 16 November 2004. Elements of the inter-State case currently before the Grand Chamber also involve an IAC; *Georgia v. Russia (no.2)* no. 38263/08, Admissibility Decision of 13<sup>th</sup> December 2011.

<sup>17</sup> ICJ, *Legality or Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25

<sup>18</sup> *Ibid*

<sup>19</sup> *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106;

16. In the contentious case, *DRC v. Uganda*, the Court repeated its statement in the second Advisory Opinion but it did not include in the quotation the last sentence.<sup>20</sup> It then went on to find Uganda responsible for violations of LOAC/IHL and human rights law both in Ituri, which it considered to have been occupied, and in areas of the DRC which Ugandan forces did not occupy. The findings involved unlawful killings. The Court did not explain whether it *only* found a violation of Article 6 of the Covenant on Civil and Political Rights *because* the killings were in violation of the applicable rules of LOAC/IHL or whether the two findings were independent of one another. The ICJ does not face the problem confronting human rights bodies. It is free to find violations of both LOAC/IHL and human rights law. A human rights body, on the other hand, only has the competence to find a violation of human rights law. It is therefore essential that it knows in what circumstances it can only find a violation of human rights law if there is a violation of LOAC/IHL.
17. Certain elements do emerge clearly from the statements of the ICJ. First, the applicability of LOAC/IHL does not displace the jurisdiction of a human rights body. That results from the finding that human rights law remains applicable in all circumstances. Second, where LOAC/IHL is applicable, a human rights body has two choices. It must either apply human rights law through the lens of LOAC/IHL or it must blend LOAC/IHL together. That is the only possible interpretation of certain matters being the province of *both* bodies of rules, whilst others are regulated by LOAC/IHL.
18. The reference to *lex specialis* is unhelpful, which may account for why the ICJ did not include the final sentence in its quotation from para.106 of the Advisory Opinion in the subsequent contentious case. Whilst in general terms its meaning is clear, its specific meaning and application appears to be interpreted in a different way by every commentator. Use of this term has served to obfuscate the debate rather than provide clarification. It was designed to deal with a different situation – a vertical relationship between a general regime and specific regimes.<sup>21</sup> The relationship between LOAC/IHL and human rights law involves a different problem – the horizontal collision of two separate legal regimes. One is not a more specific form of the other. That being said, it seems that according to the ICJ, in some circumstances, there will only be a violation of human rights law if there is a violation of LOAC/IHL. That is not, however, the only manifestation of the relationship. There are other circumstances in which the ICJ regards it as necessary to apply a mixture of LOAC/IHL and human rights law. The question then becomes in which circumstances should a human rights body apply which approach?
19. There are two issues which the ICJ did not expressly address. The first is whether the reference to LOAC/IHL includes reference to customary humanitarian law. The Court did address that indirectly. In *DRC v. Uganda*, it included amongst relevant texts Hague Convention IV of 1907, on the basis that its provisions represent customary law.<sup>22</sup> The issue will not be further addressed here, since it is not relevant in this case.<sup>23</sup>

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<sup>20</sup> ICJ, *Case concerning armed activity on the territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, paras. 216–220 at para.216.

<sup>21</sup> Hampson, “The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body”, *IRRC*, (2008) Vol.90, No.871, p.549 at pp.558-562; see generally, Prud’homme, ‘Lex specialis: oversimplifying a more complex and multifaceted relationship?’ *Israel Law Review*, Vol.40 (2) (2007), pp.355–95

<sup>22</sup> Note 20, para. 217.

<sup>23</sup> The issue is likely to be most relevant to cases involving the conduct of hostilities and extra-territorial detention in non-international armed conflicts (NIACs).

20. Second, what is the relationship between derogation and the taking into account of LOAC/IHL by a human rights body? There would appear to be four possible permutations. First, if the State invokes LOAC/IHL where it is not applicable, and whether or not the State has also derogated, the human rights body should refuse to apply LOAC/IHL owing to its non-applicability. Second, if the basis for using LOAC/IHL at all is that human rights bodies should take account of other relevant areas of international law, that might be thought to point to its use whether or not a State has derogated and whether or not the State has invoked LOAC/IHL. On the other hand, where the State has done neither, the human rights body may wish to refer to the applicability of LOAC/IHL, whilst saying that the State has chosen to be judged by a higher standard (i.e. peacetime human rights law). The danger is that the result runs the risk of appearing disconnected from reality.<sup>24</sup> Third, where the State has not derogated but *has* relied on LOAC/IHL, the human rights body has two choices. It can either take account of LOAC/IHL, on the basis that it is an independently applicable body of rules, or it can argue that the only way of modifying human rights law is by derogating. In other words, it could argue that the ‘gateway’ to taking account of LOAC/IHL is derogation and not merely the applicability of LOAC/IHL. In that case, the human rights body would presumably also need to find that a State both can and should derogate when involved in armed conflicts outside national territory. Finally, where a State has derogated but has not invoked LOAC/IHL, the human rights body could either refer to the applicability of LOAC/IHL but say that the State has chosen to be judged by a higher standard or else it could take account of LOAC/IHL as an independently applicable relevant body of rules. It is important that a human rights body should not, by words or omission, appear to suggest that LOAC/IHL is not applicable when it is in fact applicable.
21. Finding a coherent way through all these permutations has become much more difficult in the past twenty years. Until the mid 1990s, there appeared to be no rules on the conduct of hostilities in NIACs. Since then, through the work of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the drafting of the Rome Statute, it appears that there are many such customary rules. That has a potentially very significant impact on a human rights body.<sup>25</sup> Since the question of the relationship between derogation and the use of LOAC/IHL appears to be a question of principle, it is not open to a human rights body to choose one solution for IACs and another for NIACs, unless it can do so on the basis of principle.
22. Apparently conflicting guidance on the issue is provided by the ICJ. On the one hand, human rights law remains applicable in all circumstances, *subject only to derogation*. This appears to point to the necessity of derogation. On the other hand, in some circumstances LOAC/IHL is the guiding law. It is possible to reconcile, somewhat artificially, the two approaches by limiting

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<sup>24</sup> Note 8 *supra* and accompanying text.

<sup>25</sup> It might, for example, permit a shift from a law and order paradigm to an armed conflict paradigm, which permits targeting on the basis of status or membership of a group, at a relatively low level of disruption. The general view is that common Article 3 of the four Geneva Conventions, which applies in NIACs, was applicable at least at certain times and places in Northern Ireland and that it was applicable to the situation in eastern Turkey in the late 1980s and early 1990s. Both governments denied the applicability of Common Article 3. Common Article 3 does not address the conduct of hostilities. If the recently discovered customary rules apply at the common Article 3 threshold, established case-law would have to be called into question in future cases. See generally, Melzer, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law, ICRC, 2009; Hampson, ‘Direct participation in hostilities and the interoperability of the law of armed conflict and human rights law’, in *International Law Studies*, Vol.87, US Naval War College, 2011, pp.187-213. It would also radically change the meaning of proportionality; see Lubell, ‘Challenges to applying human rights law to armed conflict’, *IRRC*, (2005) Vol.87, No. 860, p.737 at pp. 744-746.



the former to human rights law itself and understanding the second as not modifying human rights law itself but rather as explaining how it is to be applied in certain circumstances.<sup>26</sup> No other guidance is available.

23. Even absent derogation, the factual existence of armed conflict (as opposed to the application of LOAC/IHL) may affect human rights obligations. A distinction should be drawn between the very applicability of human rights law and the scope of the obligations imposed.<sup>27</sup> The circumstances at hand may affect the manner or extent to which the State can fulfil, or fail to fulfil, its obligations. The factual circumstances in which the State finds itself are already taken into account by the Court, even without a derogation.<sup>28</sup>
24. It is necessary to comment briefly on what other bodies have said about the relationship. Two of the UN Special Procedures have had to take account of the relevance of LOAC/IHL: the Special rapporteur on Summary, Arbitrary and Extra-Judicial Executions and the Working Group on Arbitrary Detention. Their work has to been subject to some criticism either/both on the grounds that their mandate does not include LOAC/IHL or/and on account of the manner in which they have taken account of LOAC/IHL.<sup>29</sup> The Human Rights Committee has produced a General Comment on derogation which refers *en passant* to the applicability of LOAC/IHL but does not address the relationship in any detail.<sup>30</sup> It does not appear that the Human Rights Committee has addressed the issue in any detail in Concluding Observations or in its jurisprudence.
25. The Inter-American Commission and Court of Human Rights have addressed the question on a few occasions but principally in the context of NIACs.<sup>31</sup> The Inter-American Court has held that it can take account of common Article 3 of the Geneva Conventions when determining whether there has been a violation of the American Convention but that it can only find a violation of the latter. The Inter-American Commission of Human Rights has dealt with IACs but only when exercising its functions under the American Declaration of Human Rights.<sup>32</sup> The

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<sup>26</sup> It could be that derogation would be of relevance in NIACs as part of the evidence establishing the applicability of LOAC/IHL.

<sup>27</sup> Lubell 'Human Rights during Military Occupation' (2012) 885 *IRRC* 317

<sup>28</sup> *Ilascu & others v. Moldova & the Russian Federation*, note 16; *Isayeva & others v. Russian Federation*, 57947-9/00, Judgment of 24 February 2005; *Finogenov v. Russian Federation*, 18299/03 and 27311/03, Judgment of 20 December 2011; *Al-Skeini and Others v. the United Kingdom*, note 1, para. 168; The need to take factual circumstances into account is not limited to armed conflict. Detention on the high seas, or privacy of correspondence in a prison, are examples in which the obligations might be interpreted differently in light of the circumstances. See Human Rights Committee, *Miguel Angel Estrella v. Uruguay*, Communication No.74/1980, UN Doc.CCPR/C/OP/2 at 93 (1990), para.9.2; ECtHR, *Rigopoulos v. Spain*, Application No.37388/97, Decision of 12 January 1999; see also ECtHR, *Medvedyev and Others v. France*, note1, paras. 127–134.

<sup>29</sup> The most relevant mechanism to the present case is the Working Group on Arbitrary Detention; see Hampson, 'The relationship between international humanitarian law and international human rights law' in Sheeran & Rodley (Ed.s), *The Routledge Handbook of International Human Rights Law*, Routledge, December 2013 (forthcoming), ch.12; (copy available from author).

<sup>30</sup> Human Rights Committee, General Comment No. 29, CCPR/C/21/Rev.1/Add.11

<sup>31</sup> IACHR, *Abella v. Argentina*, Case 11.137, Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997), and IACtHR, *Ba'maca Vela'squez Case*, Judgment of 25 November 2000, (Ser. C) No. 70 (2000).

<sup>32</sup> US operations in Grenada were at issue in IACHR, *Disabled Peoples' International*, Case 9213, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987) (Annual Report 1986–1987) ; IACHR, *Coard and others v. the United States*, Report No. 109/99, Case No. 10,951, 29 September 1999, Ann. Rep. IACHR 1999 ; and the invasion of Panama in IACHR, *Salas and others v. the United States*, Report No. 31/93, Case No. 10,573, 14 October 1993, Ann. Rep. IACHR 1993, 312. The United States disputed the jurisdiction of the Inter-American Commission, on the grounds that the applicability of LOAC/IHL displaces that of human rights law and that the Commission is not competent to deal with LOAC/IHL.

Inter-American Commission currently has an inter-State case based on the Convention pending before it which appears to involve an armed conflict, although it is not yet clear whether it is being characterised as an IAC or a NIAC. The case has been declared admissible.<sup>33</sup> The respondent government has invoked LOAC/IHL. It would appear that the Commission will have to analyse the relationship between LOAC/IHL and human rights law at the merits stage.

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

26. The first question to be addressed is the identification of those issues where there will only be a violation of human rights law if there is a violation of LOAC/IHL. There is no general, top-down principle which can be applied to establish if an issue should be handled one way or another.<sup>34</sup> The answer will vary not only in relation to the issue involved but also in relation to other variables. Issues involving the protection of victims are more likely to involve a blend of LOAC/IHL and human rights law. Issues involving the conduct of hostilities are more likely to require a human rights body only to find a violation of human rights law if there is a violation of LOAC/IHL. Even that general proposition is subject to at least five variables. First, is the situation an IAC or a NIAC? The degree of intensity of a NIAC may also be relevant.<sup>35</sup> Second, it may be relevant to consider whether any military operation is proactive or reactive.<sup>36</sup> Third, it may be necessary to consider the means used to conduct the operation, bearing in mind that too much reliance on this element may reduce the level of scrutiny applied.<sup>37</sup> Fourth, it may be necessary to consider whether there is an existing provision of LOAC/IHL and, if so, whether it is customary or treaty based.<sup>38</sup> Fifth, it may be relevant to know whether the State has derogated and/or acknowledged the applicability of LOAC/IHL.<sup>39</sup> Putting these elements together will produce a spectrum. At one end will be issues where, in the circumstances, there will only be a

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<sup>33</sup> REPORT No. 112/10, Inter-State petition IP-02, *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, Decision of Admissibility October 21, 2010.

<sup>34</sup> For example, proximity to the battlefield might point to applying human rights law through the prism of LOAC/IHL but where does that leave the drone operator based thousands of miles from the point of impact? Similarly, it might be thought that rules on the conduct of hostilities would point the same way but that rules on the protection of victims would point to reliance on human rights law. That would, however, suggest that the specificities of the POW detention regime would be diluted, even though it has evolved over centuries, responds to the exigencies of the specific situation faced in IACs and is contained in a treaty which has received universal ratification. Similar objections can be raised with the regard to the blanket application of any individual criterion.

<sup>35</sup> Under LOAC/IHL treaty rules, there are only rules on the conduct of hostilities in a NIAC at a high level of intensity (*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*), 8 June 1977, 1125 UNTS 609 entered into force 7 December 1978 and not merely Common Article 3 of the Geneva Conventions).

<sup>36</sup> This is a relevant distinction in human rights law; *McCann & others v. United Kingdom*, 18984/91, judgment of Grand Chamber of 27<sup>th</sup> September 1995; *Ergi v. Turkey*, 23818/94, judgment of 28<sup>th</sup> July 1998.

<sup>37</sup> If the use of air strikes were thought to indicate the need to apply human rights law through the prism of LOAC/IHL, there would be a temptation for States to resort to such strikes, as opposed to ground operations, to achieve that result.

<sup>38</sup> It is sometimes suggested that LOAC/IHL should be the law applied where it contains a specific provision. Whilst it may be an element to include in the mix, to place exclusive or even primary reliance on this element would lead to arbitrary results. It would also require a definition of "specific provision". Does the fact that there are detailed detention regimes in IACs mean that it is "specific", leaving no room for the use of human rights law, or does the absence of specific provision about access to information and access to legal representation mean that there is no specific provision? The problem identified here arises where an activity is regulated under LOAC/IHL provision but they do not address specific details regarded as routine under human rights law. There is a separate problem where LOAC/IHL does not address a particular issue at all. Examples include the manner and circumstances in which a search is conducted, the policing of demonstrations and controls on the operation of the media, for example to protect national security or to prevent the incitement of genocide, war crimes or crimes against humanity. Here, there is no overall context of LOAC/IHL regulation. There may be a temptation to suggest that nothing should displace the normal operation of human rights law. It is submitted that the better approach is set out above at para.23.

<sup>39</sup> See discussion at para.20.

breach of human rights law if there is a breach of LOAC/IHL. At the other end, a human rights body will be required to blend LOAC/IHL and human rights law. Some issues will be generally at one end of the spectrum but, on occasion, a different solution will be required. This spectrum approach appears to offer the best chance of providing flexibility for a human rights body, whilst providing sufficient guidance for the armed forces. An example of an activity where it is likely that in most circumstances there will only be a violation of human rights law if there is a violation of LOAC/IHL is the conduct of a military operation involving the armed forces of two opposing States and sophisticated weaponry.

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

- The status of affected individuals: for example, circumstances involving detention of POWs lend themselves more to LOAC/IHL than to the rules of human rights law;
- The proximity to hostilities and the level of control that the military has over the situation: LOAC/IHL will dominate in a typical battlefield scenario, whereas human rights law will play a greater role when dealing with situations that do not involve hostilities and in which there is greater control (and therefore a range of riskless options), such as demonstrations which become violent;
- The means used in the operation: for example, use of the air force will indicate that LOAC/IHL is likely to provide regulation of force. Notwithstanding, this must not become an incentive to utilise heavy weaponry unnecessarily in order to rely on LOAC/IHL.<sup>40</sup> It should be recalled that LOAC/IHL will not be applicable if the situation has not reached the threshold of armed conflict.
- As noted earlier, whether or not the state concerned has relied upon LOAC/IHL, and whether or not it has derogated, may also affect the legal analysis of the interplay.

28. Specific situations cannot be reduced to one applicable rule, and any set of circumstances will require a number of rules to be utilised. In other words, a specific LOAC/IHL provision can only relate to one single aspect of a situation but does not provide a solution for the legal regulation of the circumstances as a whole. Moreover, the reliance on the notion of "specific" does not provide an answer in the case of absence of a rule: does the absence of a specific LOAC/IHL provisions mean that LOAC/IHL specifically says that these are not required, or would it mean that human rights law is required to fill the gap?<sup>41</sup> Situations of detention, for example, can trigger the examination of grounds of detention, review, treatment, fair trial (if a criminal charge is laid), and more. It may be the case that some of these matters will need to be

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<sup>40</sup> *Supra*, n.37; see generally *Gulec v. Turkey*, 21593/93, Judgment of 27 July 1998.

<sup>41</sup> *Supra*, n.38.

determined primarily by LOAC/IHL and others by human rights law. Any given situation is likely to require elements of both bodies of law working together, but the balance and interplay will vary.

29. Accordingly there may be situations – such as detention of POWs – in which the combination of criteria lead to the conclusion that LOAC/IHL would carry more weight in the interplay, and determination of human rights violations regarding issues such as grounds and review of detention will be based on the relevant LOAC/IHL rules. Even in such contexts, however, human rights law would not be under absolute subjection to LOAC/IHL. For example, if there are allegations of inhumane treatment, human rights law would still assist in determining issues such as the specificities of acts which constitute a violation. Conversely, in other contexts the combination of criteria will require heavier reliance on human rights law in the interplay. This may be the case, for example, when attempting to detain a civilian who does not pose a direct threat at that precise moment, in an area under the complete control of the military and in which they can operate unhindered. In such circumstances, even if the individual may have lost civilian protection under LOAC/IHL due to rules on participation in hostilities, human rights law may require a graduated use of force rather than direct lethal force. LOAC/IHL will remain relevant, and can affect matters such as the composition of the detention review mechanism, while human rights law will feed in once more on certain safeguards.
30. From the perspective of a human rights body, it would be advantageous to use human rights law as the first step to identify the issues which need to be addressed (e.g. periodicity of review of lawfulness of detention; access to information about reasons for detention; legal assistance before the review mechanism). The second step, determining applicable law in relation to the alleged violations, would then require a contextual analysis using both LOAC/IHL and human rights law, in light of the circumstances of the case at hand. On condition that the human rights body presents its analysis with sufficient coherence and clarity, the decisions generated will provide guidance to States and armed forces ahead of future action. It goes without saying that the approaches and the result must be capable of being applied in practice in situations of armed conflict.

## **B. B. NON-CRIMINAL DETENTION UNDER LOAC/IHL IN INTERNATIONAL ARMED CONFLICT**

### *B.1 Grounds for detention*

31. Detention can take a number of different forms, whether in times of armed conflict or in times of peace. In the latter, the most common form of detention is for the purpose of bringing criminal proceedings, and other forms such as administrative detention are the exception. Conversely, during armed conflict, detention for security reasons and without a view to bringing criminal charges is a common practice recognised by LOAC/IHL. The current intervention, as informed by the case, focuses on non-criminal detention. LOAC/IHL rules in this context mainly use the terms internment and, on occasion, assigned residence. Notwithstanding, in light of common practice and the facts of this case, this intervention uses detention as the generic term for all such measures. The examination below focuses solely on the law applicable in situations of international armed conflict and occupation. It should be noted that on matters

relating to the legal status of individuals in internment there may be considerable differences between international and non-international armed conflicts.<sup>42</sup>

32. Unlike international human rights law, the legal regulation of detention under LOAC/IHL applicable in international armed conflict places a heavy emphasis on the categorisation of the individual as having a particular status, rather than being based on the specific behaviour of the individual. Specifically, the key determining factor is whether the individual is a member of the armed forces entitled to prisoner of war (POW) status upon capture, or is a civilian. The grounds for detention and the procedural safeguards will differ depending on the individual's status. The third Geneva Convention (GC.III) provides the rules for prisoners of war,<sup>43</sup> and the fourth Geneva Convention (GC.IV) includes the regulation of detention for civilians.<sup>44</sup> Further rules for all individuals are found in the 1977 Protocol (AP.I).<sup>45</sup>

33. Article 21 of GC.III notes that

“[t]he Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter.”

The grounds for detaining a POW do not require that the individual will have engaged in some form of behaviour that constitutes a crime; rather, it is by virtue of the security threat that a captured member of the armed forces poses *ipso facto* that these individuals are automatically subject to the power of detention by the opposing party to an international armed conflict. This detention is not punitive, but simply a measure taken to prevent members of the armed forces of opposing parties from returning to the fight, and POWs must be released at the end of active hostilities.<sup>46</sup>

34. Individuals fulfilling the requisite criteria for POW status may be detained under the third Geneva Convention. Members of the armed forces of the opposing party, specifically combatants,<sup>47</sup> are in most cases considered POWs, as are certain other groups as defined in Article 4 of GC.III.<sup>48</sup> Entitlement to POW status is considered an advantage, since with it

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<sup>42</sup> Most notably, there is no prisoner of war status in non-international armed conflicts.

<sup>43</sup> *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, entered into force Oct. 21, 1950. (GC.III).

<sup>44</sup> *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287, entered into force Oct. 21, 1950. (GC.IV)

<sup>45</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978. (AP1)

<sup>46</sup> “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” Article 118, GC.IV; see below section on release.

<sup>47</sup> Combatants are members of the armed forces of a party to an international armed conflict who have the explicit right to participate directly in hostilities. See AP I, article 43.

<sup>48</sup> “A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

comes immunity from prosecution under the domestic law of the detaining State for all acts of war that are lawful under LOAC/IHL (this does not include war crimes).<sup>49</sup> POW status also carries entitlement to a wide range of detailed rules regulating the treatment and conditions of detention that must be provided to POWs.<sup>50</sup> There is, however, a perceived disadvantage, as POWs may be held until the end of active hostilities simply on account of their status.

35. With regard to civilians in IAC the presumption is reversed and civilians may not be detained unless they engage in particular behaviour which requires their detention for security reasons. GC.IV allows for recourse to internment (or assigned residence) of civilians in a party's own territory or in occupied territory, but as an exceptional measure and only if necessitated by imperative reasons of security in the latter case.<sup>51</sup> There must be an individual decision on detention taken on a case by case basis.<sup>52</sup> Furthermore, all protected persons are covered by the principle of non-discrimination.<sup>53</sup> While there is no definition of what would constitute "imperative reasons of security", the reasons must relate to the actions of the individual detained. The standard would, for example, clearly be met where a civilian took a direct part in hostilities against the opposing party. However, hostage-taking or the detention of civilians as a 'bargaining chip' is strictly prohibited.<sup>54</sup> Unlawful confinement of protected persons is a grave breach of the fourth Convention.<sup>55</sup>

## *B.2 Status determination*

36. During international armed conflicts when most of the individuals fighting are uniformed members of the opposing military, the status of individuals will often be readily apparent. However, in situations of occupation and in circumstances in which significant numbers of civilians take up arms, maintaining the distinction between those entitled to POW status and

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(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."

<sup>49</sup> "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities." article 43(2) API.

<sup>50</sup> See for example, articles 25-31, 34-38, GC.III.

<sup>51</sup> GCIV article 41, 42 and 78. The standards of "absolute necessity" and of "imperative reasons of security" are understood to essentially be the same.

<sup>52</sup> Commentary to article 78, *Commentary: Convention (IV) relative to the Protection of Civilian Persons in Time of War*. (ICRC, J. Pictet ed., 1958); See also prohibitions of collective punishment, in article 33 GC.IV, and article 50, *Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land*, 1907.

<sup>53</sup> "Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion." GC.IV article 27.

<sup>54</sup> GC.IV article 34; Common Article 3 to the four Geneva Conventions; See also case before the Supreme Court of Israel, CrimFH 7048/97 A v. *Minister of Defence* [2000] IsrSC 44(1) 721.

<sup>55</sup> GC.IV article 147.

civilians becomes a greater challenge. In certain cases, Article 45 of AP.1 provides for a presumption of POW status for individuals who have taken part in hostilities.<sup>56</sup>

37. The circumstances in which individuals are captured during an IAC, as well as the sheer number of detainees, will often require that the initial assessment of status be made quickly and that it will be of a relatively general nature. This fact is tempered by the obligation to extend the protections of the third Geneva Convention to any person who has committed a belligerent act until possible doubt over his or her entitlement to POW status has been determined by a competent tribunal.<sup>57</sup> There is no definition of the circumstances constituting ‘doubt’. If one relies on the AP.1 presumption, situations of doubt can include circumstances when the detainee disputes the initial status determination made by the detaining power. In such cases, the detainee must be brought before a status review tribunal. In accordance with the assumption that POW status is in most cases advantageous to the detainee, until the tribunal takes place the detainee will enjoy the more favourable protections of POW status.

### *B.3 Review of lawfulness of detention*

38. As the grounds for detaining POWs are based on their status, the key determination is whether their status has been correctly assessed. Beyond this there is no need under LOAC/IHL to review the lawfulness of POW detention. Recalling that detention of POWs is not based on the specific actions of an individual - but rather on the security threat they pose as a result of their membership in the armed forces of an opposing party - the usual process of reviewing the lawfulness for detention of a particular individual would contradict the basic underlying premise of POW detention. Accordingly, other than the status review tribunal in cases of doubt, LOAC does not provide POWs with recourse to a court to review lawfulness of detention.
39. Conversely, the case by case approach to civilians means that under LOAC/IHL, any civilian detained must be released as soon as the reasons necessitating detention no longer exist, and in any case, like POWs, be released after the end of hostilities.<sup>58</sup> LOAC/IHL thus requires that there be a review of the lawfulness of civilian detention. GC.IV requires that decisions regarding detention be taken in accordance with a regular procedure, thereby imposing a condition of legality and prohibiting arbitrary decisions on detention, and entitles individuals to appeal against the decision with the least possible delay.<sup>59</sup> Under GC.IV the reviewing body can be a court or an administrative board, but it must operate under the guarantees of independence and impartiality.<sup>60</sup> In principle, this allows for decisions on civilian detention to be taken by a military board, which is one of the few areas of detention where there may, *prima facie*, be a clash between LOAC/IHL and human rights law. In addition, there must be a process of

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<sup>56</sup> “A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power.”; With regard to the current case, since neither the US nor Iraq were party to the Protocol, this treaty provision is not directly applicable, and it is debatable whether it represents a rule under customary international law.

<sup>57</sup> “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” GC.III article 5.

<sup>58</sup> GC.IV article 132.

<sup>59</sup> GC.IV articles 78, 43, and commentaries to articles.

<sup>60</sup> The commentary to article 78 notes that the stipulations from article 43 must apply in these cases; see also commentary to article 43.

periodical review every six months to determine whether there is a need to continue the detention.<sup>61</sup>

40. Article 75 of AP1 additionally requires that

“[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.”

This rule is also reflected in the UK Manual of the Law of Armed Conflict.<sup>62</sup> Outside of the requirements to hold initial and periodical reviews, LOAC/IHL treaty law contains little guidance with regard to further procedural safeguards (such as legal representation) for non-criminal detention, and international human rights law is often utilised to fill the gaps.<sup>63</sup> Such reliance on human rights law in the context of detained civilians is expressly advocated within LOAC/IHL, in article 72 of AP1:

“The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.”

#### *B.4 Treatment in detention*

41. All detainees, whether civilian or POW, are entitled to protection from torture or other ill-treatment. This is a cardinal rule of LOAC/IHL, forming a central component of Common Article 3 to the four Geneva Conventions, as well as appearing in numerous provisions of all the treaties applicable in IAC.<sup>64</sup> The scope of the prohibition of torture and other ill-treatment is generally the same as in international human rights law, and has been developed through a succession of cases both before human rights bodies and through prosecution of war crimes before international tribunals. In addition to these prohibitions, the legal regime for detaining POWs and civilians contains a wide range of substantive positive obligations, including provision of healthcare and associated needs.<sup>65</sup> Detailed rules also exist for regulation of labour that can be undertaken by POWs and civilians, as well as work that is prohibited.<sup>66</sup>

#### *B.5 Record keeping*

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<sup>61</sup> According to GC.IV article 78, this should take place “if possible every six months”.

<sup>62</sup> UK Ministry of Defence *The Manual of the Law of Armed Conflict* (OUP Oxford 2004), para. 9.5.

<sup>63</sup> See for example the analysis in the ICRC study on customary international law: J.Henckaerts and L.Doswald-Beck *Customary International Humanitarian Law Vol. 1: Rules* (Cambridge: CUP, 2005), chapter 32 “Fundamental Guarantees”.

<sup>64</sup> “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;”, Common Article 3 (applicable in non-international armed conflicts); article 130 GC.III; article 147 GC.IV; article 75 AP.1.

<sup>65</sup> Articles 29-31, GC.III.

<sup>66</sup> Articles 49-57, GC.III.



42. For POWs, GC.III requires that “each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power.”<sup>67</sup> Information must be shared with a Central Prisoners of War Information Agency located in a neutral country,<sup>68</sup> a function which is nowadays fulfilled by the International Committee of the Red Cross. In addition to the details of the POWs in detention, the Bureau must hold “information regarding transfers, releases, repatriations, escapes, admissions to hospital, and deaths”.<sup>69</sup>

43. GC.IV contains a similar requirement of an Information Bureau.<sup>70</sup> On the subject of detention, this provision requires that

“[e]ach of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned.”<sup>71</sup>

It also requires the holding of

“information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.”.<sup>72</sup>

44. Although this provision appears limited to individuals detained for over two weeks, it does not relieve the detaining power of also holding records for shorter periods of detention. LOAC/IHL contains rules requiring facilitation of enquiries by people searching for their family members,<sup>73</sup> and international human rights law obligations in relation to disappearances will also be applicable in these circumstances.<sup>74</sup> By implication, these obligations require that detaining powers hold information on anyone within their custody; otherwise they would not be able to comply with the associated rules. Moreover, accountability is required with regard to violations of the rules on treatment of detainees no matter how long they are held for,<sup>75</sup> and investigations into allegations of violations would be impossible if there were no records of the detainees.

45. International armed conflicts can present a unique problem in the context of record keeping when it comes to the translation and transcribing of names from another language and alphabet. The accuracy of information is paramount to its relevance. To counter this challenge, states can coordinate their name transcription methods with the ICRC’s Information Agency.<sup>76</sup>

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<sup>67</sup> Article 122, GC.III

<sup>68</sup> Article 123, GC.III

<sup>69</sup> Article 122, GC.III

<sup>70</sup> Article 136, GC.IV.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Article 26, GC.IV.

<sup>74</sup> *Varnava v. Turkey*, note 16.

<sup>75</sup> “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.” Article 146, GC.IV.

<sup>76</sup> See practice in 90-91 Gulf war. Rowe, ‘Prisoners of war in the Gulf area’ in Rowe (Ed.), *The Gulf War 1990-91 in International and English Law*, RKP, 1993, p. 188 at pp.199-200.

## B.6 Transfer

46. There is no agreed definition to determine when a transfer takes place. However, a useful approach can be found in the 2012 Commentary to the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations:<sup>77</sup>

“For the purposes of The Copenhagen Process Principles and Guidelines the term ‘transfer’ refers to situations where a detainee is physically handed over from the custody of one State or international organisation to the custody of another State or authority. The term ‘authority’ here refers to an entity that is recognised as a matter of international law or national law as an entity that may lawfully hold detainees.”<sup>78</sup>

47. POWs may be transferred to the power of another state, provided this does not make their conditions less favourable.<sup>79</sup> Both the transferring power and the receiving power will continue to have obligations after the transfer takes place:

“Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody. Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.”<sup>80</sup>

48. GC.IV provides a similar rule on transfer of civilians in the context of aliens located within the territory of a party to the conflict.<sup>81</sup> The equivalent obligation is even stronger in the case of civilians in occupied territories, under which a party is prohibited from both transferring a civilian outside of occupied territory to the territory of the occupying state, or to that of any other country.<sup>82</sup> The above rules on transfer demonstrate that LOAC/IHL recognises the general principle that transferring states can have obligations of *non-refoulement*. While not framed in the same manner in LOAC/IHL as in international human rights law, there is strong reason to hold that the combination of both frameworks supports interpreting this principle as applying to all cases of transfer of detainees, regardless of category of person, type of conflict, or location

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<sup>77</sup> The *Copenhagen Process on the Handling of Detainees in International Military Operations* was a joint exercise by states (including Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, India, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the United Kingdom, and the United States of America), focusing on handling of detainees in international military operations in the context of non-international armed conflicts and peace operations.

<sup>78</sup> The Copenhagen Process on the Handling of Detainees in International Military Operations, Chairman's Commentary to the Copenhagen Process: Principles and Guidelines, 15.1.

<sup>79</sup> Article 46, GC.III.

<sup>80</sup> Article 12, GC.III.

<sup>81</sup> Article 45, GC.IV.

<sup>82</sup> Article 49, GC.IV.

of the transfer.<sup>83</sup> This approach is further bolstered by the general requirement on all state parties to ensure respect for the Geneva Conventions in all circumstances.<sup>84</sup>

49. Recognising the challenges posed by coalitions and other joint operations, the Commentary to the Convention notes that:

“Whether the case involves a coalition of States, an international armed force or any other organization within which military personnel of several States fight side by side, one general principle prevails: wherever it is impossible or difficult, for any reason, to determine which is the State which has captured prisoners of war and consequently is responsible for them, this responsibility is borne jointly by all the States concerned.”<sup>85</sup>

### *B.7 Release from detention*

50. Article 118 of GC.III requires that “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”<sup>86</sup> The requirement of repatriation to their own country has been modified by state practice, largely in order to conform with principles of *non-refoulement* and human rights law in cases of risk to the individual upon return.

51. As also mentioned above, a civilian held under the internment provisions of GC.IV must be released “as soon as the reasons which necessitated his internment no longer exist.”<sup>87</sup> Ensuring adherence to this rule is one of the primary purposes of the periodical review. The UK Manual of the Law of Armed Conflict notes that

“Internment must cease as soon as possible after the close of hostilities or the end of occupation. The parties must endeavour to ensure the return of internees to their last place of residence, or facilitate their repatriation.”<sup>88</sup>

52. With regard to the safety of released individuals, the ICRC study on Customary International Humanitarian Law notes the following:

“Practice indicates that the responsibility of the former detaining power does not end at the moment of release, but continues in the sense of ensuring the safety of persons during return and providing subsistence for the duration of the journey. The Third Geneva Convention requires that the repatriation of prisoners of war take place under the same humane conditions as transfers of prisoners. Additional Protocol II provides that “if it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding”.”<sup>89</sup>

## **C. APPLYING THE PRINCIPLES ON THE RELATIONSHIP BETWEEN LOAC/IHL AND HUMAN RIGHTS LAW TO THE DETENTION REGIME UNDER GENEVA CONVENTIONS III AND IV.**

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<sup>83</sup> See, for example, UK Manual of the Law of Armed Conflict, para. 9.35; For non-international armed conflicts, see commentary to the Copenhagen Process on the Handling of Detainees in International Military Operations, principle 15.

<sup>84</sup> “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Common Article 1.

<sup>85</sup> Commentary to Article 12, GC.III.

<sup>86</sup> They can also be released earlier under certain conditions, see articles 21, 109. GC.III.

<sup>87</sup> Article 132 GC.IV; article 75.3 AP.1;

<sup>88</sup> UK Manual of the Law of Armed Conflict, para. 9.111

<sup>89</sup> *Customary International Humanitarian*, p.456; Articles 119, 46, 48, GC.III; Article 5(4) AP.2.

53. In IACs, the situation with regard to detention is, in various respects, totally different from that which exists in a domestic crisis or state of emergency. For example, POWs are not detained because they have or are suspected as having done anything unlawful. They are detained for the sole purpose of preventing them from fighting. The civilians detained for imperative reasons of security are neither citizens nor do they owe a form of temporary or provisional allegiance based on residence. Given that their home State is involved in an armed conflict with the detaining power, they owe no allegiance to that power. Again, their detention is preventive, rather than punitive. In these circumstances, on certain issues it is appropriate to regard the interplay between the regimes as resting heavily on the relevant rules of Geneva Conventions III and IV. These include the grounds of detention; the type of review mechanism applicable (but not necessarily the detailed procedural rules) and the trigger for release. In other words, in relation to those particular issues, there would only be a violation of human rights law if there were a violation of the relevant provisions of Geneva Conventions III and IV. It would be up to the human rights body to determine whether there had been a violation of those provisions. Certain other issues, which are not of relevance to this case, particularly in relation to Geneva Convention III, might also be treated in a similar way, owing in part to the extraordinary specificity of the POW regime.<sup>90</sup>
54. Other issues would require a blending of LOAC/IHL and human rights law in a manner which utilises more human rights law. That would involve using human rights law to identify the questions to be asked. The degree to which a departure from human rights law would be regarded as acceptable would depend on where the issue was located on the contextual spectrum. For example, the composition of the review mechanism would be toward the LOAC/IHL prism end of the spectrum. Periodicity of review, procedural rights, rights to information and to legal advice and rights of communication would probably be in the middle of the spectrum. Physical and psychological conditions of detention, including safeguards, and release/transfer in safe conditions would be at the human rights end of the spectrum.<sup>91</sup> To some extent, that is already recognised. Article 118 of Geneva Convention III has been completely displaced by the practice of States.<sup>92</sup> Individuals may decline the right of repatriation, if they do so of their own free will.
55. This case appears to involve grounds of detention and the circumstances of release or transfer. This intervention has identified not only a general approach to the relationship between LOAC/IHL and human rights law but also a specific approach to those issues.

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<sup>90</sup> E.g. the rules regulating the work that can be done by POWs and the detention regime applicable to POWs who break the rules of the POW camp.

<sup>91</sup> The solution should take account of the specific requirements of Article 12 of Geneva Convention III in the case of transfers.

<sup>92</sup> See para. 50.