

INFORMATION PAPER SERIES

Presented by the International Law Department, U.S. Naval War College
SERIES NUMBER 13-2 (2013)



Subject: The Interface between International Human Rights Law and the Law of Armed Conflict, and Why It Matters to a US Military Commander
Author: Lt Cdr James Farrant, UK Royal Navy, Faculty, U.S. Naval War College
Maj Tim Kelly, U.S. Marine Corps, Faculty, U.S. Naval War College
Date: 15 May 2013

1. Purpose. To examine how International Human Rights Law (IHRL) interacts with other international law, principally the law of armed conflict (LOAC), and the extent to which it may apply outside U.S. territory. Three key areas will be examined: targeting, detention and post-incident investigation.

2. Background. The law of armed conflict is “that part of international law that regulates the conduct of armed hostilities.”¹ LOAC, through both customary norms and treaty provisions, in part, provides protection to non-combatant civilians on the battlefield. For example, pursuant to LOAC principles, combatants are required to direct attacks only against lawful military targets. U.S. Department of Defense policy is to comply with LOAC during all armed conflicts, however such conflicts are characterized, and in all other military operations.²

International Human Rights Law prescribes certain fundamental protections which States are obliged to afford their citizens or subjects.³ Generally, States are prohibited by IHRL from arbitrary deprivation of human life, slavery, torture, prolonged arbitrary detention or systematic discrimination. IHRL obligations stem from both customary⁴ and treaty⁵ sources. As many IHRL

¹ U.S. DEP’T OF DEFENSE, DEP’T OF DEFENSE DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM (May 9, 2006).

² *Id.*

³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §701 (1987) [hereinafter Restatement].

⁴ Restatement §701;

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

(a) genocide,

(b) slavery or slave trade,

obligations are customary in nature, all States are bound to protect the rights which those obligations protect. This law remains applicable during an armed conflict, unless States make permitted derogations under the treaty regime to which they belong.⁶ For example, the ECHR allows States-Parties to derogate from some of its provisions in time of war or other public emergency threatening the life of the nation is threatened.⁷ There is no mechanism in customary IHRL which allows for derogations.⁸

3. Applicability of LOAC and IHRL. Traditionally, LOAC and IHRL were viewed as applying in distinct situations. Under this view, LOAC, being the body of law containing rules specific to situations of armed conflict, applies during times of armed conflict in lieu of peacetime laws, such as IHRL.

An emerging (majority) view is that LOAC and IHRL overlap in significant ways. Only in situations in which the bodies of law conflict would a LOAC provision supplant that of an IHRL provision. The U.S. position in this regard is articulated as:

*Under the doctrine of lex specialis, the applicable rules for the protection of individuals and conduct of hostilities in armed conflict are typically found in [LOAC]. . . . [IHRL] and [LOAC] are in many respects complimentary and mutually reinforcing [and] contain many similar protections. . . . Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized. . . .*⁹

As an example, under this view IHRL laws prohibiting the extrajudicial killing of civilians would be supplanted by the LOAC rules related to distinction and proportionality.¹⁰ As such, noncombatant civilians are still afforded protection from arbitrary killings but the applicable law would be one which accommodates the necessities of military action.

-
- (c) the murder or causing the disappearance of individuals,
 - (d) torture or other cruel, inhuman, or degrading treatment or punishment,
 - (e) prolonged arbitrary detention,
 - (f) systematic racial discrimination, or
 - (g) a consistent pattern of gross violations of internationally recognized human rights.

Restatement §702.

⁵ The US is a party to the 1966 International Covenant on Civil and Political Rights (ICCPR) as are several current or potential partner States. The United Kingdom and many other European and Eurasian States, including all of the NATO members and all European Union (EU) member States, are parties to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, or ECHR).

⁶ The ICCPR recognizes the following as nonderogable:

- (a) Arbitrary deprivation of life,
- (b) Torture or cruel, inhumane or degrading treatment or punishment,
- (c) Slavery,
- (d) Involuntary servitude,
- (e) Ex post facto prosecution,
- (f) Protection of freedom of thought, conscience or religion.

Int'l Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

⁷ ECHR, Art. 15.

⁸ Restatement §702 commentary.

⁹ U.S. DEP'T OF STATE, UNITED STATES FOURTH PERIODIC REPORT TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS, para. 507 (Dec. 30, 2011), available at <http://www.state.gov/g/drl/rls/179781.htm>.

¹⁰ See ECHR, Art. 15. "No derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war"

4. Extra-territorial application of IHRL. The U.S., unlike many other States, holds the view that human rights treaties apply only to persons both within the territory of the United States *and* subject to its jurisdiction. The result of this interpretation is that international human rights agreements do not create treaty-based obligations for U.S. forces operating outside U.S. territory.

Allies and partner nations are likely to have very different obligations with respect to extra-territorial application of human rights treaties. Both the Human Rights Committee of the ICCPR and the European Court of Human Rights (ECtHR) have concluded that those treaty regimes can apply extraterritorially. This is important to a US military commander because allies who are parties to the ECHR in particular (and bound in law by the judgments of the ECtHR) will operate under additional legal constraints. This could easily lead to friction, making at least a basic understanding of the IHRL obligations of current and potential allies critical.

The ECtHR has found in several cases that States are bound to secure ECHR rights outside of their territory. The court's jurisprudence was summarized in the leading case of *Bankovic v Belgium*:

*Recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.*¹¹

The test is usually referred to as the “effective control” test.¹²

5. Targeting. Targeting issues are often resolved by ensuring reference to the appropriately applicable body of law. As mentioned above, under the doctrine of *lex specialis*, where a specific body of law governs a situation, that law takes precedence over any general principles of international law, including IHRL. During an armed conflict, the LOAC targeting rules take precedence over IHRL. Commanders should be conscious that, in modern conflicts in which combatants are sometimes

¹¹ *Bankovic and others v. Belgium and others* (2001) BHRC 435, at paragraph 71.

¹² Three examples serve to demonstrate the test in practice.

(1) Naval visit and search operations. The ECtHR has held that where a naval boarding party carries out a visit and search operation, the boarding party has “effective control” of the object vessel and its crew (vice “territory and its inhabitants”) only after the boarding party has achieved the capture of the vessel. *Medvedyev and Others v. France*, Application no. 3394/03 Eur. Ct. H.R. (2008). This position has been viewed reflective of customary IHRL. The Public Commission to Examine the Maritime Incident of 31 May 2010, Jerusalem, January 2010, p. 230.

(2) Occupation. In *Al Skeini v. UK*, the ECtHR determined that where a power was in occupation of foreign territory, this amounted to “effective control.” The court dismissed the UK government’s argument that its relatively small occupying force and the ongoing unrest in Basra precluded it from having the requisite level of de facto control, as the UK House of Lords had ruled. The court found on the particular facts that the UK did have sufficient control. The effect of its judgment is that a de jure occupation will practically always lead to a finding of “effective control.” This is unsurprising given specific mention of “occupation” in the *Bankovic* test and it no doubt represents customary IHRL. *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Eur. Ct. H.R. (2011) ¶ 143-149.

(3) Use of military force. *Bankovic* is itself authority that the exercise of military power by a State in on or over foreign soil does not ipso facto lead to the conclusion that that State has “effective control” over that territory. In *Bankovic*, the context was air strikes conducted by NATO against targets in the Federal Republic of Yugoslavia (FRY) where the respondent States did not have control of the territory or airspace of that State or any part of it. The Court declined jurisdiction because those facts failed the “effective control” test. *Bankovic*, ¶ 74-82.

targeted outside of an active area of combat, some might view the combatants as having aspects of criminality and, therefore, attempt to inject aspects of IHRL into the justification for targeting them. Additionally, partner nations may have particular concerns in targeting individuals in areas under their control.¹³

6. Detention. Issues surrounding the detention of individuals during operations overseas may implicate IHRL issues, particularly for U.S. partners.¹⁴ The attached table summarizes the categories of persons who might be detained during a military operation.

7. Post-incident investigations. The LOAC obligation to investigate and prosecute “grave breaches” of the Geneva Convention or other war crimes is not well defined, although has received recent academic attention.¹⁵ Whatever the scope of the LOAC obligation to investigate may be, where IHRL applies, it will likely entail broader and more onerous investigative duties.¹⁶

8. Conclusion. The U.S. military operates under various obligations aimed at protecting non-combatant civilian populations. Certain fundamental protections are reflected in LOAC and IHRL, as well as in domestic and criminal law. The protections reflected in these bodies of law often overlap.

**The views expressed are those solely of the author and should not be understood as necessarily representing those of the U.S. Department of Defense or any other government entity.

¹³ *Bankovic* is authority that the act of targeting military objectives abroad does not of itself engage IHRL. However, very often a State will target objects or individuals in areas where it already has effective control (through occupation or otherwise) and where IHRL has therefore already been engaged. An example is *Al Skeini*. In that case, some of the applicants were relatives of persons who had been killed by UK armed forces acting in self-defense while patrolling in occupied Basra. The UK had “effective control” by virtue of being in occupation. The relatives alleged the deceased’s right to life had been violated. However, use of lethal force in self-defense is a specific exception from the obligation to secure the right to life (*ECHR article 2(2)(a)*) so the deceased’s article 2 rights had not been violated in this respect (although the Court did find procedural breaches – see “Post-incident investigations” paragraph (paragraph 7) in text below).

¹⁴ In the case of *Al Jedda v. UK* in the ECtHR, the applicant was detained by UK armed forces in Iraq pursuant to an authority in a UN Security Council Resolution. UNSCR 1483 allowed for internment where this is necessary for imperative reasons of security. The applicant alleged breach of his Convention Article 5 right to liberty on the grounds that “imperative reasons of security” was not a listed ground for detention in Article 5, a point readily conceded by the UK. The UK argued instead that the UNSCR authorized the detention on those grounds and that the effect of UN Charter article 103 was that the UNSCR took precedence over IHRL and the Convention. The Court did not demur from this view. It ruled instead that, despite the clear wording of the UNSCR, the UNSC would not have intended that capture and detention in breach of the IHRL right to liberty and security was authorized. Accordingly, the UK was in breach of Article 5 in detaining the applicant.

Read narrowly, this ruling is only authority that the specific UNSCR was insufficient to displace an ECHR Contracting State’s Convention obligations. More broadly, if a clearly worded UNSCR backed by the weight of UN Charter Article 103 is insufficient to displace IHRL, it is difficult to argue that *lex specialis* (LOAC) is sufficient to do so. ECHR member States may be reluctant to undertake detention operations following the decision in *Al Jedda*. If *Al Jedda* is correctly decided, any detention which is conducted under LOAC or UN law, rather than on any of the exemptions in Article 5, might be unlawful. For this reason, the present authors believe *Al Jedda* to be incorrectly decided.

¹⁵ See e.g. Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT’L SEC. J., 31 (2011).

¹⁶ *Al Skeini*, ¶ 173-174.

Annex - Classification of Captured Persons¹⁷

Type of Operation	Captured Persons	Examples	Rules Governing Captured Personnel
International Armed Conflict	Prisoners of war	Combatants	Geneva Convention (GC) III and Additional Protocol (AP) I [for signatory States]
	Retained persons	Medical, chaplains	
	Others entitled to prisoner of war status	War correspondents, supply contractors and others authorized to accompany armed forces <i>Levée en masse</i>	
	Internees	Civilians belonging to the opposing state interned for imperative reasons of security Criminal detainees sentenced to internment	GC IV
	Detainees	Civilian criminals Civilians taking a direct part in hostilities Criminal detainees prior to sentence to internment Insurgents/agitators Spies Mercenaries	AP I Article 75
Non International Armed Conflict	Internees	Dissident armed forces or other organized armed groups interned for imperative reasons of security	GCs Common Article 3 and AP II (if conflict meets AP II criteria)
	Detainees	Civilians detained for committing a criminal offence under the host nation law Civilians taking a direct part in hostilities	
Other Operations*	Internees	Individuals who are threatening mission accomplishment	Domestic law of 'sending' State
	Detainees	Individuals who are threatening mission accomplishment or committing criminal acts	Domestic law of host State

Customary International Law and Applicable IHRL

* E.g., a non-combatant evacuation or peace support operation

¹⁷ Adapted from UK Joint Doctrine Publication (JDP) 1-10 Second Edition: Captured Persons, Annex 1C.