

A brief overview of legal interoperability challenges for NATO arising from the interrelationship between IHL and IHRL in light of the European Convention on Human Rights

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Abstract

This article briefly overviews some of the current and future challenges to NATO legal interoperability arising from the relationship between international humanitarian law (IHL) and international human rights law generally and between IHL and the European Convention on Human Rights in particular.

Keywords: interrelationship between IHL and IHRL, interrelationship between IHL and the ECHR, legal interoperability, NATO, *lex specialis*.



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The most challenging contemporary legal interoperability issues for any coalition operation taking place in armed conflict often turn on the interplay between international humanitarian law (IHL) and international human rights law (IHRL).¹ The North Atlantic Treaty Organization (NATO) is no different in this regard. The legal relationship between IHL obligations and obligations under the European Convention on Human Rights (ECHR) is a real challenge for NATO legal interoperability, and will become even more so in the future.

Generally speaking, legal interoperability of NATO Member States has historically been possible. NATO's doctrine and use of force frameworks for operations occurring in the context of armed conflict have been primarily shaped by IHL. However, there is a real and currently emerging potential for the transatlantic link of legal interoperability between North American and European NATO Member States to be strained or severed, and for divergence among NATO's European members, due to the influence of litigation arising from the European Court of Human Rights (ECtHR). This litigation, in turn, is redefining, and has the potential to further redefine, NATO's use of force doctrine and Rules of Engagement (ROE), targeting and detention frameworks. It also has the potential to impact on how NATO Member States, as a matter of law and policy, view the overall interrelationship between IHL and IHRL.

Should NATO Member States eventually diverge on whether the use of force frameworks are to be defined primarily by a law enforcement paradigm (regulated by IHRL generally and the ECHR specifically) or by a war-fighting ("conduct of hostilities") paradigm regulated by IHL, it would be difficult to say that NATO would be legally interoperable in any meaningful sense. The two paradigms, while sharing much overlap, are different in fundamental ways. As an example, the rules for applying kinetic force to, and detaining, members of an opposing party to an armed conflict are very different under the IHL and IHRL frameworks. Under IHL, members of an opposing force can, generally speaking, be killed based on status/function, while under an IHRL framework, force can only be used when absolutely necessary to preserve life or prevent serious injury. Under IHL, members of an opposing force may be administratively detained without criminal charges (e.g., the prisoners-of-war regime), while such charges would be required under an IHRL framework.

These differences in approaches between the IHL and IHRL frameworks may pose several challenges for interoperability between NATO Member States. First, if commanders of different NATO Member States are operating under different legal paradigms, subordinate forces may be led to operate either under a more restrictive paradigm or under a more permissive one, thus exposing, politically and legally, higher-level commanders. Some may say that the simple

1 The International Committee of the Red Cross (ICRC) is taking the initiative on promoting discussion on this topic and has created a useful resource that introduces some of the complexities. See ICRC, *Expert Meeting: The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Enforcement Law Paradigms*, October 2013, available at: www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf (all internet references were accessed in October 2014).

solution to managing this is for the North Atlantic Council to authorize operations with broad use of force frameworks that can then be caveated (or restricted) by Member States. If this is the way of the future, I would not consider NATO to be “legally interoperable” because distinct legal regimes would be used by different Member States. This would no longer be a situation of all Member States agreeing to apply an IHL framework but allowing for differences within it, for example, on the use of anti-personnel mines. Rather, this new reality would involve Member States regulating the use of force in two very distinct ways. Second, the real impact of this divergence would result in some Member States taking on more war-fighting operations than others, and potentially suffering greater casualties. A third consequence of this—and this has already unfolded in Afghanistan and Libya, though perhaps not solely for legal reasons—is that NATO Member States may choose to participate in the NATO mission but also, concurrently, act on a national basis, in a separate mission within the same geographic area of operations.

This paper will briefly identify some of the potential “wedge” issues arising from IHL’s interrelationship with IHRL generally, and in particular in light of the ECtHR’s case law, which may impact on NATO’s legal interoperability today and in the future.

The NATO Context

It is important to understand the NATO context.² First, the Alliance is comprised of twenty-eight *sovereign* nations, two of which (the United States and Canada) are not, and cannot become, parties to the ECHR. Second, an understanding of the central role played by “consensus” is crucial. Any NATO decision to participate in a mission requires the consensus of all Member States. Likewise, all Operational Plans (OPLANs), which define the geographic scope and operational parameters of an operation including tasks, and all use of force authorizations in ROE, as well as targeting frameworks, require consensus. Consequently, under NATO doctrine relating to planning, operational plan development, ROE and targeting, there are expressly defined processes and procedural moments that allow States to break consensus, or to limit their involvement, because of legal, policy or operational reasons, through the use of “restrictions” or “caveats”. If a State blocks consensus on the mission as a whole, the ROE or the targeting framework, the operation will not proceed. A State may take the position that a mission is politically or legally questionable and yet not block consensus, but then instead

2 For a few analytical pieces on the NATO perspective, see Peter M. Olson, “Perspectives on IHL and Multinational Forces: A NATO Perspective on Applicability and Application of IHL to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891–892, pp. 653–657; Marten Zwanenburg, “International Humanitarian Law Interoperability in Multinational Operations”, *International Review of the Red Cross*, Vol. 94, No. 891–892, pp. 681–705; see also Peter M. Olson, “Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations: A NATO Perspective”, in Erika De Wet and Jann Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria University Law Press, Pretoria, 2014, p. 227.

may choose not to participate in the mission (as was the case with Germany during the Kosovo and Libya air campaign). A State may choose not to participate but may, at the same time, insist on significant restrictions on the ways in which the other participating Member States may use force (such as a NATO Member State deciding not to participate in the NATO Libya campaign, but not blocking consensus on going forward with the mission, while insisting on a zero civilian casualty cut-off requirement in order for targets to be engaged—in other words, to abort targeting a military objective if it may lead to a single civilian death).

For those States that do choose to participate in an operation, doctrinally created moments allow sovereign legal approaches to be exercised in a number of ways. These include caveats or restrictions on where, when and how their forces will be employed (for instance, in geographic areas where there are no ongoing hostilities), caveats limiting how force will be used within ROE (for instance, restricted to a law enforcement rather than a conduct of hostilities paradigm, as was the case in Afghanistan), restrictions on targeting frameworks (such as the requirement of zero civilian casualties in Libya, even though IHL would allow for incidental loss of life during a proportionate strike) and exercising the “red card” in order to refuse an assigned task or target (for instance, refusing to target a drug facility in Afghanistan or refusing to “block” an airfield in Kosovo).

Additionally, while usually giving NATO commanders operational control (within the constraints set by caveats and other restrictions), contributing Member States retain operational command. Thus, NATO commanders have little (if any) administrative or disciplinary power over their “subordinates”, since accountability, compensation to civilians adversely affected by operations and substantial investigative powers often remain with the contributing State. This can be incredibly challenging for a NATO commander at the best of times; it is even more challenging if the mission is dynamic, such as the one in Afghanistan, where the situation transformed from an international armed conflict (IAC) to a non-international armed conflict (NIAC) while a series of authorizing United Nations (UN) Security Council resolutions continually redefined the mission’s scope and focus. The complexity increases if Member States have divergent legal frameworks, with some working within an IHL framework while others work within an IHRL framework. This is significant, as it would directly impact on the tasks that could be assigned and the way in which national forces could be employed.

Ultimately, this legal divergence can create significant operational interoperability issues, which may in turn create policy tensions—particularly if the divergence leads to an unequal distribution of risk between national forces. Lastly, while the NATO ROE and targeting doctrines display a very traditional IHL, “*lex specialis*” approach, NATO does not have a doctrine *per se* that allows its Member States to collectively define the relationship between IHL and IHRL/ECHR.³ There is a potential, therefore, for national legal approaches to diverge, including those expressly or implicitly related to IHL and IHRL/ECHR interaction.

3 Editor’s Note: The expression “IHRL/ECHR” is used by the author to point the reader to the *specific* tension that ECHR-related case law may create for the interrelationship between IHL and IHRL.

Consequently, practitioners have remarked that:

given this general context, NATO addresses legal questions, including issues of the relationship of IHL and IHRL pragmatically rather than doctrinally ... [R]ather than requiring adherence to a *single common body of law*, the Alliance's expectation is that all states participating in a NATO or NATO-led operation will act lawfully within the legal framework applicable to them.⁴

There is no NATO doctrinal definition of "legal interoperability". If legal interoperability is defined simply as the ability of NATO States to work together in an operation, then NATO will always be legally interoperable.⁵ Within this understanding of the term, NATO would be legally interoperable even where one Member State views the operation as occurring within a situation of armed conflict, with the use of force being regulated primarily by IHL, while another views the situation as not being one of armed conflict, with IHRL or the ECHR regulating the framework for the use of force. While the ability of each NATO Member State to participate in a mission with its own national legal approach is crucial given that NATO is a political organization, a significant divergence of legal frameworks, or a disagreement on the applicable legal paradigm regulating the use of force (law enforcement based on an IHRL framework versus war-fighting based on an IHL framework), will hinder operational interoperability as there will be a divergence among nations with regard to what they can and cannot do, thus impacting on how a commander can employ national forces and assign tasks.

If legal interoperability is supposed to mean that all participating Member States have a shared agreement on the applicable international legal regime (allowing for some variations in national interpretations) and its relationship with other regimes, then legal interoperability will *not* exist if some Member States view the operation as legally requiring a law enforcement paradigm while others view it as a war-fighting operation.

For analytical reasons (and hopefully to provoke debate), this article defines legal interoperability as the acquisition of a generally shared international legal regime or paradigm, as this allows for a critical analysis to focus, compare and identify potential areas of legal divergences and strains and, in turn, assess, for the operational commander, the impact these divergences may have on operational interoperability. In other words, I would consider NATO to be legally interoperable if all Member States were relying on the same legal regime, such as IHL, to regulate the use of force during armed conflicts and shape OPLAN, ROE and targeting framework development, despite the fact that some Member States may not have ratified the same weapons treaties (such as the Ottawa Convention). I would *not* consider NATO to be legally interoperable, in any meaningful sense, if one group of Member States was conducting kinetic

4 P. Olson, "Convergence and Conflicts", above note 2, p. 234 (emphasis added).

5 M. Zwanenburg, above note 2.

operations based on one legal regime, such as IHL, while another group was relying on IHRL (and ECHR obligations in particular).

Although there is significant practical operational overlap between IHL and IHRL (see section below), the potential divergence between the two regimes is also operationally noteworthy when one considers the key differences between the two paradigms.⁶ Unlike IHRL, IHL allows for the following: targeting based on status/function (e.g., whether as a combatant or as a member of an organized armed group party to an armed conflict who carries out a continuous combat function), incidental loss of civilian life (when a strike is compliant with IHL requirements of proportionality and precautions), administrative or preventive detention without criminal charge and trial, different triggers for investigations and their procedural requirements, different definitions of necessity, proportionality and precautions, and so on. While some of these issues may be reconciled by application of the *lex specialis* doctrine or other related techniques, there is debate in this area (see the subsections below on *lex specialis*). When one folds the application of the ECHR into the discussion, the issues of interrelationship and interoperability become even more complex, given the ECtHR's inability to date, for various reasons, to consider the relationship between the ECHR and IHL when assessing the legality of military actions in situations that could have been expressly qualified as armed conflict or occupation.⁷ As outlined below, there are many potential "wedge" issues where NATO Member States may diverge on the IHL and IHRL/ECHR relationship, which may impact legal interoperability and consequently the practical ability to be interoperable.

The relationship between IHL and IHRL

Issues on the interrelationship between IHL and IHRL/ECHR are complex,⁸ even within government ministries, let alone among allies. There are a number of

6 For a helpful discussion on the differences between the two regimes, see ICRC, above note 1, pp. 4–9.

7 ECtHR, *Georgia v. Russia II*, Case No. 38263/08, Decision (Former Fifth Section), 13 December 2011, and ECtHR, *Hassan v. United Kingdom*, Case No. 29750/09, heard 11 December 2013, may finally address some of these issues and, for the first time, include IHL into their analysis. These decisions will be a key moment on the future interrelationship (or lack thereof) between IHL and the ECHR, and possibly the approach that European NATO Member States take in the future when creating use of force frameworks within NATO.

8 For an introduction to the complexity, debates and trends on this topic, see the following sampling: Theodor Meron, "The Humanization of Humanitarian Law", *American Journal of International Law*, Vol. 94, 2000, p. 239; ICRC, above note 1; Cordula Droegge, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", *Israel Law Review*, Vol. 40, No. 2, 2007, p. 310; Noam Lubell, "Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate", *Israel Law Review*, Vol. 40, No. 2, 2007, p. 648; Nancie Prud'homme, "Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship", *Israel Law Review*, Vol. 40, 2007, p. 356; Orna Ben-Naftali, "Introduction: International Humanitarian Law and International Human Rights Law—Pas de Deux", in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, p. 3; Marko Milanovic, "A Norm Conflict Perspective on the

current or potentially emerging issues that will challenge NATO's legal interoperability even further in the future. These include, but are by no means limited to, extraterritorial application of relevant IHRL treaties, redefining the temporal and geographical scopes of application, as well as the intensity threshold of armed conflict. These challenges are also linked to other issues such as limiting the application of IHL to "hot" battlefields, the scope and ambit of the *lex specialis* doctrine and methodology, reinterpretation of IHL principles and concepts with reference to IHRL, and IHRL institutional encroachment into areas of IHL. The section below will look briefly at each of these in turn.

The extraterritorial application of relevant IHRL treaties

An obvious and fundamental but sometimes overlooked threshold issue *prior* to any consideration of the interrelationship between IHL and IHRL generally is whether all NATO Member States agree that key IHRL treaties such as the International Covenant on Civil and Political Rights (ICCPR) apply extraterritorially to the State's conduct of military operations.⁹ As the International Committee of the Red Cross (ICRC) has noted in its report *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, "not all States accept the extraterritorial application of human rights law".¹⁰ While the United States does not concede the extraterritorial application of the ICCPR, Canadian case law has accepted extraterritorial application in "control

Relationship between International Humanitarian Law and Human Rights Law", *Journal of Conflict and Security Law*, Vol. 14, 2009, p. 459; Marko Milanovic, "Norm Conflict in International Law: Whither Human Rights?", *Duke Journal of Comparative & International Law*, Vol. 20, 2009/10, p. 69; Françoise Hampson, "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Body", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 547; Oona Hathaway *et al.*, "Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law", *Minnesota Law Review*, Vol. 96, 2011–12, p. 1883; Daniel Bethlehem, "The Relationship between International Humanitarian Law and International Human Rights Law and the Application of International Human Rights Law in Armed Conflict", *Cambridge Journal of International and Comparative Law*, Vol. 2, No. 2, 2013, p. 180; John Bellinger III and Vijay Padmanabhan, "Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law", *American Journal of International Law*, Vol. 105, 2011, p. 201; Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict", *American Journal of International Law*, Vol. 98, No. 1, 2004, p. 1; Kenneth Watkin, "Use of Force during Occupation: Law Enforcement and Conduct of Hostilities", *International Review of the Red Cross*, Vol. 94, No. 885, 2012, p. 267; Geoffrey Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict", *International Humanitarian Legal Studies*, Vol. 1, 2010, p. 52; Michelle Hansen, "Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict", *Military Law Review*, Vol. 194, 2007, p. 1; Michael Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *American Journal of International Law*, Vol. 99, 2005, p. 119; Brian Bill, "Human Rights: Time for Greater Judge Advocate Understanding", *Army Lawyer*, Vol. 54, 2010, p. 54.

9 F. Hampson, above note 8, p. 566, noting this often overlooked point: "Clearly, the importance of the relationship between IHL and human rights law is very significantly reduced if the latter is not applicable extraterritorially."

10 ICRC, above note 1, p. 5.

over territory” situations that equate to situations of occupation.¹¹ On the other hand, Canadian courts considered and rejected the “State agent authority” or “control over the person” tests, as adopted in the ECtHR’s post-*Bankovic*¹² decision, *Issa v. Turkey*,¹³ and in the Human Rights Committee’s General Comment 31.¹⁴ The key point to be made for the purposes of this article is that there is a transatlantic legal interoperability divide between NATO’s North American States and ECHR States, who are bound by the ECtHR’s “State agent authority” or “control over the person” test as a trigger for a broader extraterritorial application of IHRL treaty obligations.

A sliding scale to limit IHL to the “hot battlefield”

Some commentators have suggested that the geographical scope of IHL should be narrowed within the context of armed conflict. When government forces reach a certain “sliding scale” of control over territory and intensity of violence, there should be a paradigm shift from IHL to IHRL. IHL should regulate kinetic force only within the geography of the “hot battlefield”. In areas outside the “hot battlefield” where territory is not as contested, there should be an increased reliance on the law enforcement paradigm, defined primarily by IHRL, to regulate the use of force.

From a NATO perspective, there may be a policy attraction to this line of argument by the contributing Member States who do not wish to war-fight but do wish to deploy to a NATO-defined geographical area of operations. So in Afghanistan, for instance, where there are regional differences in the intensity of violence, some Member States may prefer to deploy in northern Afghanistan rather than the more active Helmand or Kandahar provinces. Variations on this theme sometimes make a distinction between NIAC as defined by Additional Protocol II and NIAC “of lesser intensity”, with the latter being predominately regulated by IHRL. Some scholars go further and suggest that all NIACs are

11 For a review of jurisprudence on extraterritorial application, including the positions of the United States and Canada, see also M. Dennis, above note 8; Michael Dennis, “Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict”, *Israel Law Review*, Vol. 40, p. 453; Blaise Cathcart, “The Role of the Legal Advisor in the Canadian Armed Forces Addressing International Humanitarian Law and International Human Rights Law in Military Operations”, in E. De Wet and J. Kleffner (eds), above note 2; Federal Court of Canada (Trial Division), *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, Decisions of 25 January and 12 March 2008. These cases were upheld on appeal to the Federal Court of Appeal and leave to appeal was denied by the Supreme Court of Canada.

12 ECtHR, *Bankovic and Others v. Belgium and Others*, Case No. 52207/99, Decision (Grand Chamber), 12 December 2001.

13 ECtHR, *Issa v. Turkey*, Case No. 31821/96, Judgment (Second Section Chamber), 16 November 2004.

14 UN Human Rights Council (HRC), General Comment 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10, articulates the jurisdictional scope of the ICCPR by noting that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State Party This principle applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances.”

regulated primarily by IHRL.¹⁵ Some of the factors advanced to support this approach are (with the exception of Additional Protocol II, some weapons conventions and Article 3 common to the four Geneva Conventions): the absence of treaty-based IHL applicable to a NIAC, the absence of the “extraterritorial issue” given that IHRL would apply within the State where the NIAC is occurring, a transference of law enforcement in occupation situations by analogy to NIAC scenarios, and the ECtHR’s jurisprudence arising from the Turkey and Chechnya cases.¹⁶ Various aspects of this approach have received critical comment. First, the analysis fails to consider countries like Canada and the United States, which may have alternative views on the extraterritoriality of IHRL treaty law than another country participating in a NIAC. Second, the sliding scale has been seen as practically too complex for soldiers on the ground to implement.¹⁷ Lastly, with reference to the argument that there is an absence of IHL in NIAC situations, there is a failure to consider the existence of customary IHL which proves that the “gap” left by limited NIAC treaty law is not as large as proposed. The ICRC, citing the existence of customary IHL, has rejected the position that force used during a NIAC is to be regulated primarily by IHRL due to the absence of applicable customary IHL.¹⁸ Similarly, during an ICRC roundtable on the use of force in 2011, the scenario of a fighter in an organized armed group sleeping at home in a part of a territory controlled by the government, during an ongoing armed conflict, was discussed in relation to in/outside the conflict zone, intensity of violence and degree of control; a small majority of experts maintained that an IHL, not IHRL, paradigm would apply.¹⁹

Lex specialis and its methodological challenges

Leaving aside issues of extraterritorial application, most military lawyers would take the position that IHL regulates the use of force during both IACs and NIACs and would invoke the *lex specialis* doctrine when discussing the interrelationship between IHL and IHRL, while, perhaps, quoting the famous paragraph 25 from the International Court of Justice’s (ICJ) *Nuclear Weapons* Advisory Opinion.²⁰

15 William Abresch, “A Human Rights Law of Internal Armed Conflicts: The European Court of Human Rights in Chechnya”, *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 746.

16 For an exploration of these types of issues, see Marco Sassòli and Laura Olson, “The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 599; W. Abresch, above note 15; Louise Doswald-Beck, “The Right to Life in Armed Conflicts: Does International Humanitarian Law Provide All the Answers?”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, p. 881; ICRC, above note 1, p. 16. For an example of a Turkish and a Russian case where the ECtHR chose not to explore IHL on its own initiative, see ECtHR, *Ergi v. Turkey*, 32 EHRR 18, 2001, and *Isayeva and Others v. Russia (No.2)*, 41 EHRR 38, 2005.

17 ICRC, above note 1, p. 16.

18 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, October 2011, p. 20.

19 ICRC, above note 1, p. 16.

20 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 25: “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

As noted above, NATO does not have a doctrine that defines the interrelationship between the two bodies of law, nor is there a doctrinal elaboration on how the *lex specialis* methodology would guide the application of the doctrine in practical operational scenarios where IHL and IHRL may possibly overlap.²¹ However, NATO's ROEs and targeting doctrine do display a traditional *lex specialis* approach. Questions of potential debate include: does the *lex specialis* doctrine mean that IHL displaces IHRL as a legal regime, or that it simply displaces a particular norm in certain situations, or only when there is conflict between the regimes or norms in areas where the use of force during an armed conflict is regulated? Does it apply to situations not directly involving the use of force (to procedural rights arising from detention in NIAC, to procedural triggers and requirements for investigations, to privacy and mobility rights during cordon and searches and freedom of movement operations, etc.)? How is a "conflict" defined to trigger the application of the doctrine – only when two express norms apply to the same situation, or when a more specific norm operates in the area covered by the other regime despite the fact that the latter regime contains no specific rule, thus creating a "gap" or "lacuna"? The questions go on. NATO Member States have different responses to these questions – there is no shared approach.

A good first step, to move beyond the level of rhetoric that often divides and polarizes the debate, is to recognize that there are indeed significant areas which are regulated by only one particular norm, and importantly many situations where there is overlap but where IHL and IHRL produce the same operational result. One such situation is where there are express IHL provisions which incorporate IHRL norms or expressly allow for IHRL norms to apply – for instance, the prohibition on torture

the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life ... is to be considered an arbitrary deprivation of life ... can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

- 21 F. Hampson, above note 8, p. 559: "Whilst the ICJ may not have used the most appropriate formulation, it is clear in general terms what the Court meant. It appears to have meant, first, that where both IHL and human rights law are applicable, priority should be given to IHL. Second, given the ICJ's view that human rights law remains applicable at all times, by necessary implication the ICJ also meant that the human rights body should make a finding based on IHL and expressed in the language of human rights law. This sounds straightforward, but does not in fact explain how the *lex specialis* doctrine should work in practice. There are various possibilities." Hampson goes on to list several approaches. A similar theme – lack of methodology – has been identified by Sir Daniel Bethlehem QC, the former UK Foreign Office legal adviser, in his piece "The Relationship between International Humanitarian Law and International Human Rights Law and the Application of International Human Rights Law in Armed Conflict", above note 8, p. 193. He concludes by noting that "the anxiety on this area is largely driven by warranted concern over the methodological shortcomings of courts and other bodies seized of these issues, particularly on the human rights side of the equation." J. Bellinger III (former United States State Department Legal Advisor) and V. Padmanabhan, above note 8, also comment: "When the rules offered by both bodies of law are in conflict, or when one body of law has deliberately left discretion to states, a methodology is needed to prioritize between the rules" (p. 210). See also Stephen Pomper, "Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back Before Looking Ahead", *International Law Studies Series*, US Naval War College, Vol. 85, 2009, p. 529, who reviews American and Canadian litigation that considered European jurisprudence, and notes that "States purporting to apply the law of armed conflict and human rights law conjointly to extraterritorial armed conflicts did not appear to have a clear understanding about how to balance certain fundamental tensions between the two bodies of law". For an overview of the debate surrounding *lex specialis*, see C. Droege, above note 8, p. 338.

and ill-treatment of persons detained, or the intentional targeting of civilians not directly participating in hostilities, or the fundamental guarantees found in Article 75 of Additional Protocol I. This limits the potential scope of conflict between norms within the two bodies of law when issues are confronted in an operational setting. This has been highlighted by both Bethlehem and Watkin, both practitioners of considerable experience.²² Only once this first step has been taken can norm conflict be identified. A number of potentially practical models that identify IHL as the primary body of law regulating kinetic force during armed conflicts have been offered which could frame discussions on establishing a clear methodology.²³

The complexities surrounding the *lex specialis* doctrine should not, however, be grounds for jettisoning the doctrine altogether. This is an important point that is often overlooked in the debate between those who are entrenched in the different “camps”. The potential area of legal interoperability divergence within NATO is, generally speaking, not whether *lex specialis* applies but rather the methodology used to implement the doctrine. It appears that the ICRC has rejected a call to abandon the doctrine, and this position would be consistent with the practice of most, if not all, NATO States. The ICRC has noted: “While the meaning and even the utility of the doctrine of *lex specialis* have been called into question, it is believed that this interpretative tool remains indispensable for determining the interplay between IHL and human rights law.”²⁴

Abandoning *lex specialis*?

As noted, there is a growing body of literature that argues for the abandonment of the *lex specialis* doctrine altogether.²⁵ A traditional starting point is to note that the ICJ’s Advisory Opinion on the *Wall* case²⁶ applied a new test for defining the

22 D. Bethlehem, above note 8; K. Watkin, “Use of Force during Occupation”, above note 8. Consideration should also be given to the precision with which the application of *lex specialis* is approached by M. Milanovic, “A Norm Conflict Perspective”, above note 8.

23 In addition to Bethlehem and Watkin, *ibid.*, see, e.g., G. Corn, above note 8; F. Hampson, above note 8; O. Hathaway *et al.*, above note 8.

24 ICRC, above note 18, p. 14. See also D. Bethlehem, above note 8, p. 186, where he discusses the continuing utility of the *Nuclear Weapons* Advisory Opinion, stating that “the conclusions flowing from the *Nuclear Weapons* Advisory Opinion are both more considered and more useful, and better attuned to the complexity of these issues, than those flowing from the more recent *Wall* Advisory Opinion”; Public Commission to Examine the Maritime Incident of 31 May 2010, *Second Report—The Turkel Commission: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013, p. 69.

25 See, as an example, Jean Paul Costa and Michael O’Boyle, “The European Court of Human Rights and International Humanitarian Law”, in Dean Spielmann, Marialena Tsirli and Panayotis Voyatzis (eds), *The European Convention on Human Rights: A Living Instrument—Essays in Honour of Christos L. Rozakis*, Bruylant, Brussels, 2011, pp. 107, 113–114.

26 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 106: “As regards the relationship between international humanitarian law and human rights law, there are 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 branches of international law.”

relationship between the two bodies of law than that found in its *Nuclear Weapons* Advisory Opinion, and in turn *lex specialis* was not even referenced in the *DRC v. Uganda* judgment.²⁷ In short, the argument goes, the ICJ no longer follows the *lex specialis* doctrine when assessing the relationship between the two bodies of law.²⁸ This line of argument ignores the fact that the *Wall* case dealt with a situation of occupation while the *Nuclear Weapons* Advisory Opinion was addressing the use of force and remains a useful framework in that regard.²⁹

In the trilogy of ICJ decisions, the “*DRC v. Uganda* interpretation” is often interwoven by those who wish to abandon the *lex specialis* doctrine with a deconstruction of that doctrine in a way that demonstrates its inapplicability to resolve norm conflict.³⁰ Some commentators have argued that the *lex specialis* doctrine “appears to add confusion rather than solve it”, and is perhaps an “inept approach”; they assert that the doctrine suffers from a “vagueness and ambiguity that too easily lends itself to legal manipulation”,³¹ and should be “abandoned as a sort of magical, two-worded explanation of that relationship between IHL and IHRL as it confuses far more than it clarifies”.³² Consequently, as the argument goes, *lex specialis* is abandoned in one form or another, and alternative models to define the relationship are then proposed.³³

Prud’homme,³⁴ relying on Lindroos³⁵ and Koskenniemi,³⁶ notes the ICJ’s methodological shortcomings with regard to the *lex specialis* doctrine, and covers the various ways in which it has subsequently been interpreted. She notes that *lex specialis* is best used to resolve norm conflicts within a treaty or a domestic legal system but that its utility is questionable within the context of international law, which is fragmented and unorganized. Prior to embarking on a proposed set of practical alternative models, she notes the vagueness of the principle and its inability to “provide any guidance to set apart the *lex specialis* from the *lex generalis*” and “articulate an agreeable and legally sound theoretical model for the parallel application” of the two bodies of law.³⁷ Others, too, have proposed

27 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, paras 215–221.

28 See above note 24.

29 This would be significant for countries like Canada, which participate, for example, in a NIAC in Afghanistan, and which concede extraterritorial application of human rights for situations of occupation but not for “control over the person”. While the ICCPR would apply to the State of Afghanistan in Afghanistan, it would not do so for Canada.

30 For an overview, see William Schabass, “Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights and the Law of Armed Conflict, and The Conundrum of Jus Ad Bellum”, *Israel Law Review*, Vol. 40, No. 2, 2007, p. 592.

31 N. Lubell, above note 8, pp. 654–656.

32 M. Milanovic, “A Norm Conflict Perspective”, above note 8, p. 462.

33 See N. Lubell, above note 8; N. Prud’homme, above note 8.

34 N. Prud’homme, above note 8.

35 Anja Lindroos, “Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis”, *Nordic Journal of International Law*, Vol. 74, No. 1, 2005, p. 27.

36 Martti Koskenniemi, “Study on the Function and Scope of the Lex Specialis Rule and Question of ‘Self-Contained Regimes’”, International Law Commission, UN Doc. ILC (LVI)/SG/FIL/CRD.1, 2004.

37 N. Prud’homme, above note 8, pp. 382, 384.

alternative models after dismantling the doctrine or significantly restricting its application.³⁸

While lawyers from governments who retain *lex specialis* as a viable legal doctrine or principle may wish to set aside this “abandon *lex specialis*” school of thought as an academic exercise with no relevance in the “real world”, they should note that it is being incorporated into litigation strategies and is being considered by courts which are ruling, or will rule, on the legality of State action during military operations. Rather than simply entrench themselves into one camp or the other, it would be wise for government lawyers to look beyond the rhetoric and carefully examine not only the counter-arguments to the *lex specialis* doctrine but also the alternative models proposed. While many proposals would not be consistent with State practice or litigation positions, some proposals’ end results would be very similar to what a government lawyer might come up with – albeit by way of a very different line of reasoning.³⁹ Any models that champion or challenge a *lex specialis* approach must be scrutinized before determining their operational utility.

Reinterpretation of IHL through IHRL

Another challenge to traditional IHL approaches arises from reinterpreting IHL norms in light of IHRL in a manner consistent with a law enforcement paradigm. This aspect of the “humanization of humanitarian law” is not a recent phenomenon. For some, this “project” has

a more radical purpose ... to shift the balance between effectiveness and humanitarianism ... in the direction of humanitarianism ... by using human rights norms to fill the gaps left unregulated or very sparsely regulated by IHL, ... and partly by trying to change some outcomes that in fact are determined by IHL by introducing human rights rules and arguments into the equation.⁴⁰

In this vein, some limited aspects of the ICRC Customary Law Study,⁴¹ the Israeli *Targeted Killings* case,⁴² Chapter IX of the ICRC Direct Participation in Hostilities

38 In the seminal Volume 40 of the *Israel Law Review*, N. Lubell, above note 8, identifies a multitude of undefined terms that are used in the volume, such as “complementarity”, “cross fertilization”, “harmonization”, “parallel applicability”, “convergence” and “integration”.

39 At the time of writing, argument in the ECtHR case of *Hassan v. United Kingdom*, above note 7, has been concluded and a decision is pending. Hassan was captured by UK forces in Iraq, during the ongoing armed conflict, prior to occupation, and screened as a possible prisoner of war or a person falling within the scope of Geneva Convention IV who is subject to internment for imperative reasons of security. The UK government is arguing for the application of IHL as *lex specialis*, as the relevant body of law over the ECHR. A third-party brief filed by Noam Lubell and Françoise Hampson, on behalf of the Human Rights Centre of the University of Essex, challenged the usefulness of the *lex specialis* doctrine but did propose a model that asserts that there would only be an IHRL breach in areas of grounds for detention, the type of review mechanisms and the trigger for release if the relevant Geneva Convention III and IV provisions were breached.

40 M. Milanovic, “A Norm Conflict Perspective”, above note 8, p. 460.

41 Jean Marie Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

42 Israeli High Court of Justice, *The Public Committee against Torture et al. v. The Government of Israel et al.*, HCJ (769/02), 13 December 2006.

Study,⁴³ International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence⁴⁴ and academic writings⁴⁵ are cited. Marten Zwanenburg has highlighted in a previous contribution to this journal a legal interoperability issue arising from divergent national IHL understandings of the concept of “military objective” within the context of NATO’s attempt to target drug-making facilities in Afghanistan.⁴⁶ This sort of IHL interpretative divergence may also occur if one nation adopts a “traditional” IHL approach to the concept of “intent” while another national commander and his legal adviser, perhaps acting as a higher-level target engagement authority, take an alternative view within the context of targeting.

IHRL institutional encroachment into IHL

As Meron noted fourteen years ago, the “humanization of humanitarian law”, does not just involve the incorporation of IHRL principles and methodology into IHL concepts but also involves IHRL institutions and bodies expanding their ambit into areas concerning IHL compliance. The starting point for most justifications for IHRL “institutional encroachment” is that IHL lacks a sufficiently robust enforcement, investigative and/or accountability mechanism that also allows victims of IHL violations to obtain redress, or to initiate a legal action and receive compensation.⁴⁷ As has been noted:

[A]nother purpose of the IHL/IHRL project is the enforcement of IHL through human rights mechanisms. Thus, even if human rights substantially added nothing to IHL, there would still be a point in regarding IHL and IHRL as two complementary bodies of law. IHL, now (jurisdictionally) framed in human rights terms, could be enforced before political bodies, such as the Human Rights Council, or UN political organs more generally, or through judicial and quasi-judicial mechanisms, such as the ICJ, the ECtHR, the UN treaty bodies or domestic courts.⁴⁸

43 ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009.

44 See Jens David Ohlin, “Targeting and the Concept of Intent”, *Michigan Journal of International Law*, Vol. 35, 2013, p. 79, where he considers a series of ICTY decisions (*Galic, Blaškić, Kordić, Strugar and Perišić*), arguing that the Court has “reinterpreted” and expanded the concept of intent to broaden it to include foreseeable civilian loss in targeting, thus conflating “distinction” and “proportionality”. Ohlin distinguishes between the civil law jurisdiction (or “European approach”) that is “nonplussed” by this development and the Anglo-American approach when assessing ICTY jurisprudence.

45 As an example, see Ryan Goodman, “The Power to Kill or Capture Enemy Combatants”, *European Journal of International Law*, Vol. 24, 2013, p. 819, where he argues that “in certain well-specified and narrow circumstances, the use of force should instead be governed by a least-restrictive-means analysis” and then introduces various scenarios, consistent with the capture versus kill debate, that are possibly subject to “restraints on the use of force”. See also Michael Schmitt, “Wound, Capture, or Kill: A Reply to Ryan Goodman’s ‘The Power to Kill or Capture Enemy Combatants’”, *European Journal of International Law*, Vol. 24, 2013, p. 855, and Goodman’s rejoinder in the same volume. An analysis of the capture versus kill debate and the struggle between IHL and IHRL approaches is presented in Jens Ohlin, “The Duty to Capture”, *Minnesota Law Review*, Vol. 97, 2013, p. 1268.

46 M. Zwanenburg, above note 2.

47 For an example of this justification see, J. P. Costa and M. O’Boyle, above note 25.

48 M. Milanovic, “A Norm Conflict Perspective”, above note 8, p. 460.

This type of “lawfare” moment occurred between NATO and the Independent Commission of Inquiry into Libya (ICIL), which was created by a UN Human Rights Council (HRC) resolution. The HRC was created by General Assembly resolution to exclusively focus on IHRL, not IHL, violations.⁴⁹ Nowhere in the resolution was there a defined role for the HRC within the area of IHL. The ICIL was created, prior to NATO’s involvement in Libya, by an HRC resolution to “investigate all alleged violations of international human rights law”.⁵⁰ Security Council Resolution 1970 referred the situation in Libya to the prosecutor of the ICC on 26 February 2011.⁵¹ Within this context, and possibly in the shadow of the HRC’s “Goldstone Report”,⁵² the NATO legal adviser, in response to an ICIL request for information, cited the Commission’s limited mandate “to investigate alleged violations of international human rights law”, the referral to the ICC by the Security Council and the fact that NATO had already been in contact with the ICC.⁵³ The response by the ICIL noted that its mandate was created at a time when Libya was in “a formal state of peace” and consequently the mandate could not have referred to IHL, and that the commission interpreted its mandate in light of prevailing circumstances. After referring to its previously filed Interim Report that clearly showed its intention to examine NATO and IHL violations, the ICIL noted that “there were no objections to or comments in the Human Rights Council subsequent debates or separately from state delegations”.⁵⁴

The ICIL, in its Final Report, also went beyond what was considered to be its mandate in other ways, not only by simply assessing the compliance of NATO with IHL but also by making assessments on whether NATO met its own internal targeting guideline of zero civilian casualties for each strike and issues of NATO compensation and investigations. While not finding any violations of IHL by NATO arising from its over 7,800 strikes – all with precision-guided munitions – it did identify a handful of cases which merited further investigation due to the absence of information. The ICIL also transferred its report to, and worked with, the ICC during its inquiry, showing the ability of an IHRL body to make institutional links with the ICC despite the absence of an express mandate to do so.⁵⁵

49 UNGA Res. 60/251, 3 April 2006.

50 UNHRC Res. S-15/1, 25 February 2011.

51 UNSC Res. 1970, 26 February 2011.

52 See *Human Rights in Palestine and Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 15 September 2009, which triggered criticism for the way it misapplied IHL, a retraction by Goldstone, a subsequent UN report and the creation of the Turkel Commission by the government of Israel. See Laurie Blank, “The Application of IHL in the Goldstone Report: A Critical Commentary”, *Yearbook of International Humanitarian Law*, Vol. 12, 2009, p. 347.

53 Letter from NATO Legal Adviser to ICIL, 20 December 2011. NATO subsequently provided detailed information on a number of strikes, and those letters are contained in Annex II of the ICIL’s Final Report, *Report of the International Commission of Inquiry on Libya*, UN Doc. A/HRC/19/68, 2 March 2012. The letters sent by the ICIL to NATO are not included in the ICIL’s report.

54 Letter from ICIL to NATO Legal Adviser, 24 December, 2011.

55 This was the first, and perhaps last, IAC conducted with *only* precision-guided munitions (PGMs). Most IHRL and non-governmental organization bodies, when reviewing NATO’s actions, did not adjust their advocacy tactics in light of this historic development, and they probably missed an opportunity to shift the nature of the dialogue with NATO. Rather, they stuck to their traditional practice and focused on a few

This type of “mandate and IHRL institutional creep” can be expected to confront NATO in the future as well. The continued expansion into the domain of IHL by IHRL bodies, in the absence of State objection, is likely to continue.⁵⁶ The United States has been an exception to State acquiescence in this area.⁵⁷ The HRC in the past has been active in inquiring into IHL violations and will no doubt continue to be so. This will continue to be an issue for NATO and its Member States as future missions and scrutiny by IHRL bodies, including the HRC and ECtHR, arise.

The above paragraphs have briefly presented only some of the current IHL/IHRL issues confronting NATO Member States. These issues are complex and, in the absence of NATO doctrine on the interrelationship between IHL and IHRL, create legal and policy moments for divergent approaches and consequently an inability to maintain minimal levels of legal interoperability—a shared legal paradigm. Given the NATO requirement for consensus, this has the potential to produce mission parameters, OPLANs, ROE packages and targeting frameworks that are far more restrictive than some NATO partners would desire. Alternatively, Member States which maintain a more restrictive legal approach to the issues outlined above may not break consensus on an expansive operational framework but would insert various caveats that would limit their participation to fit their more restrictive legal frameworks. This will end in some Member States bearing a disproportionate war-fighting burden in terms of costs, risks and losses of equipment and personnel.

The relationship between IHL and the ECHR

From a NATO perspective, the ECHR, as the key regional IHRL treaty, raises a *very* different set of IHL–IHRL interrelationship and interoperability issues. This is because the ECtHR, to date, has not considered IHL or opined on the relationship between IHL and the ECHR when assessing the lawfulness of State military operations.⁵⁸ This will change with the decisions in *Hassan v. United Kingdom* and *Georgia v. Russia II*. Lawfulness, to date, has completely been assessed with reference to the ECHR itself and not by direct application of IHL. ECtHR decisions in cases which were not, but could have been, classified as

strikes that caused incidental civilian loss, while giving this fact—7,800 strikes, all with PGMs—only a passing reference in a few sentences.

56 C. Droege, above note 8, p. 323.

57 See Philip Alston *et al.*, “The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the ‘War on Terror’”, *European Journal of International Law*, Vol. 19, No. 1, 2008, p. 183, for a review of some of the US practice and response from the perspective of those aligned with the HRC.

58 F. Hampson, above note 8, pp. 70–71. The ICRC, above note 1, Appendix 3, has rightly cautioned: “It cannot be assumed that just because a human rights body uses words more commonly found in an IHL context (e.g. civilian) that it is taking account of IHL The case-law of the European Court of Human Rights ... is only relevant as a very detailed analysis of the requirements of human rights law. Not once has it addressed on the merits the relationship between IHL and human rights law, whether IHL was relevant or how it should take account of IHL.”

situations of armed conflict *may* not (debatable in some of the Turkish and Chechen cases and possibly in the situation of the third applicant in *Al-Skeini*⁵⁹) have resulted in a different conclusion, had legality been assessed exclusively with reference to IHL, given that there is significant overlap between the two bodies of law as it relates to the protection of civilians who are directly targeted, are victims of disproportionate strikes, or are ill-treated or tortured in detention scenarios. The current approach of the ECtHR, however, sets up the possibility that, in the future, a State may be held in violation of the ECHR even while having acted lawfully under IHL.⁶⁰ We will see if this current approach starts to change with the *Hassan* and *Georgia* cases.

One commonly asserted explanation for the ECtHR's unwillingness to consider IHL is that respondent States have failed to "derogate" in accordance with ECHR Article 15. If they did, this would, as the argument goes, allow the Court to consider IHL.⁶¹ ECHR Article 5 (liberty and security) rights may be subject to an Article 15 derogation "in times of war or other public emergency threatening the life of a nation", and ECHR Article 2 (right to life) rights can only be derogated, under Article 15, "in respect of deaths resulting from lawful acts of war". Whether extraterritorial armed conflicts would even fall within the ambit of these provisions, and if so, whether this would mean that IHL would "displace" the ECHR or simply be used to interpret ECHR provisions, remain open questions.

To date, no State has invoked an Article 15 derogation, and its scope, ambit and procedural application are subject to speculation and debate. Commentators have answered these questions differently. One group views an Article 15 derogation as the only way in which the ECtHR can consider IHL and relies on previous ECtHR decisions in which the Court could have classified the situation as one of armed conflict and thus applied IHL, but chose not to in light of the respondent State not derogating, as support for its position. Others are of the view that the ECtHR can, and should, consider IHL without the requirement of derogation. This is because courts should consider general principles of international law, including IHL principles when that body of law is relevant.⁶² To do otherwise may lead to the absurd result, from a NATO legal interoperability perspective, that a State may have acted in violation of the ECHR but not IHL in situations where IHL should be the primary body of law to be applied.⁶³ A classic example of such an absurdity would be a finding that a

59 ECtHR, *Al-Skeini and Others v. United Kingdom*, Case No. 55721/07, Judgment (Grand Chamber), 2011.

60 See J. P. Costa and M. O'Boyle, above note 25, p. 129, where they comment: "The consequence is that the same military operation may be in violation of the provisions of the Convention but not of the relevant norms of IHL."

61 See *ibid.* and Olga Chernishova in ICRC, above note 1, Appendix 6, p. 89.

62 Third-Party Brief, Human Rights Centre of the University of Essex (see above note 39), filed in ECtHR, *Hassan*, above note 8.

63 See F. Hampson, above note 8; in ICRC, above note 1, Appendix 3, p. 77; Andrea Gioia, "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights*

NATO European State has acted unlawfully through a violation of ECHR Article 2 by killing a combatant during an IAC in accordance with IHL.

These issues are about to be confronted by the ECtHR in the *Georgia v. Russia II* and *Hassan v. United Kingdom* cases.⁶⁴ In both cases, the respondent States have not derogated but have asserted IHL in a variety of ways, including as a basis to displace or oust ECHR jurisdiction. These cases involve questions of legality centred on the treatment of members of the Georgian armed forces and, in the case of *Hassan*, a civilian suspected, at the time of capture, of having been either a combatant or possibly a person posing a security threat. Both cases have occurred within the context of an IAC. If the ECtHR does not consider the IHL regime relating to the detention of civilians and prisoners of war because respondent States have not derogated, it will miss an opportunity to define the relationship between the ECHR and IHL and quite probably open itself up to further criticism for not considering other relevant principles of international law. The third-party brief to the Court in *Hassan* has shown it a road map out of this quagmire.

Within this backdrop there are other key ECHR issues which currently, or may in the future, affect the ability of NATO to be legally interoperable. They include: issues of extraterritorial application, whether ECHR rights can be “divided and tailored”, the interpretation given to the right to life, the trigger and procedural content of the duty to investigate, the interpretation given to UN Security Council Resolutions authorizing the use of force under Chapter VII of the UN Charter and the interplay between the ECHR and Article 103 of the UN Charter, and treaty-based non-criminal administrative or preventive detention.

Extraterritorial application of the ECHR

The ECtHR decision in *Al-Skeini* on extraterritorial application of the ECHR has added to the confusion relating to the scope and ambit of the “control over the person” or “State agent authority” (SAA) tests—which, as noted above, have not been adopted by NATO’s North American partners. In *Al-Skeini*, although noting that the UK formally recognized a situation of occupation while still attempting to gain control over Basra and its surrounding area, the Court identified the key facts leading to jurisdictional application of the ECHR:

the exercise of some of the public powers that would normally be exercised by the sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security In these exceptional circumstances ... the United Kingdom ... through its soldiers engaged in security operations ... exercised authority and control over individuals killed in the course of such security operations.⁶⁵

Law, Oxford University Press, Oxford, 2011, pp. 215–218; J. P. Costa and M. O’Boyle, above note 25, p. 107; W. Abresch, above note 15.

⁶⁴ ECtHR, *Georgia* and *Hassan*, above, note 7.

⁶⁵ *Ibid.*, para. 149.

It was a surprise that the ECtHR bypassed a discussion of the legal relevance of occupation, as outlined in *Bankovic*, and did not simply rely on an “effective control over area” (ECA) test to assert jurisdiction given the absence of direct physical control over some of the victims (for instance, the subject of the third applicant in the *Al-Skeini* case who was killed by a stray bullet while sitting at her dinner table inside her house). In any event, the decision’s ambiguity has sustained a variety of interpretations on what test the ECtHR used to define extraterritorial jurisdiction. One approach is that the Court has created some sort of “middle ground” test between ECA and SAA, where some physical control of the person in the context of the “exercise of some public powers” is “pivotal”. Another interpretation sees an expanded SAA test in the sense that it does not require direct physical control or custody but does include a broader control over the person by shooting at a distance. If the former “middle ground” test has been created, this raises questions about whether the “exercise of some public powers” is a lower threshold to establish jurisdiction than occupation, as the term is understood in IHL. If the latter test is the case (an expanded notion of control over the person), then questions arise over the limits of SAA – namely, is there a difference between horizontal shooting versus vertical shooting (such as *Bankovic*-type scenarios, drones in Afghanistan or NATO’s Libyan operation)?⁶⁶

Even if SAA is limited to situations where the military force is exercising some public powers, what does this mean for the continued relevance of other ECtHR cases that relied on SAA or control over the person in situations that did not include occupation or exercise of public powers?⁶⁷ Additionally, what is the “exercise of some public powers”? It would seem that most NATO Chapter VII operations (Bosnia, Kosovo, Afghanistan etc.), designed to “maintain security”, would consequently engage the ECtHR’s jurisdiction despite the absence of ECA. Given the vagueness and ambiguity of the Court’s decision, it should not be surprising if European NATO Member States have divergent views on when jurisdiction is engaged and, consequently, on when force is regulated within an ECHR framework. This, in turn, will have impacts on OPLAN, ROE and targeting framework consensus. This creates a potential widening of the

66 For a review of the development of ECtHR jurisdictional cases and the interplay between SAA and ECA, see Barbara Miltner, “Revisiting Extraterritoriality after Al Skeini: The European Court of Human Rights and Its Lessons”, *Michigan Journal of International Law*, Vol. 33, 2011–2012, p. 693; O. Hathaway *et al.*, above note 8, p. 389; Marko Milanovic, “Al-Skeini and Al-Jedda in Strasbourg”, *European Journal of International Law*, Vol. 23, No. 1, 2012, p. 121; Anna Cowan, “A New Watershed? Re-Evaluating *Bankovic* in Light of Al-Skeini”, *Cambridge Journal of International and Comparative Law*, Vol. 1, No. 1, 2012, p. 213. Both Cowan and Milanovic appear to view the SAA test in *Al-Skeini* as being coupled to the existence of exercise of public powers, thus preserving *Bankovic*. For a perspective which views the possibility of equating killing with SAA as a standalone jurisdictional trigger, without the requirement of being coupled with the exercise of some public powers, and consequently going beyond *Bankovic* to include killing by aircraft and drones, see Marek Szydło, “Extra-Territorial Application of the European Convention on Human Rights after Al-Skeini and Al-Jedda”, *International Criminal Law Review*, Vol. 12, No. 2, 2012, p. 271; and see, importantly (given their activism within UK domestic courts and the ECtHR), Public Interest Lawyers, “Public Interest Lawyers: UK’s Use of Drones in Afghanistan ‘Highly Likely’ to Breach International Law”, which relies upon *Al-Skeini* in their 52-page legal opinion, available at: www.publicinterestlawyers.co.uk/news_details.php?id=315.

67 See B. Miltner, above note 66, pp. 727–739, tracing the historical development of this issue.

separation that already exists with the North American partners in NATO on extraterritorial application of IHRL treaties in general.

ECHR rights can be “divided and tailored”

Another significant development in the *Al-Skeini* decision is the apparent reversal from *Bankovic* that ECHR rights can indeed be “divided and tailored”. Whether this applies equally to ECA and SAA (with or without a requirement for there to be an exercise of public powers) remains unclear.⁶⁸ The ECtHR gave little guidance as to when or how this is to be applied.⁶⁹ This is operationally very significant when one considers the wide range of activities that military forces conduct, whether in situations of armed conflict, peace enforcement operations or a combination thereof in “three block” war scenarios (in other words, conducting war-fighting, law enforcement and humanitarian assistance all in the same geographic area), or while conducting hostilities within the context of occupation. These wide range of military activities include the familiar ones, such as killing based on status, administrative detention in NIACs, incidental civilian loss of life or property arising from proportionate strikes, but also other common activities including: road side checks, cordon and searches, clearing houses to capture or kill persons directly participating in hostilities, tactical questioning, restricting freedom of movement and traffic control, control and restricting access to territory, enforcing curfews, prevention of looting, monitoring the security of election sites, supervising peaceful demonstrations, controlling airspace, etc. These types of activities may occur as part of the war-fighting tasks during an armed conflict or may occur within an exercise of law enforcement, or maintaining security.

A key unanswered question is that of the degree of control and temporal scope required to trigger a particular right (such as those relating to privacy, assembly and speech) becoming “relevant to the situation of the individual”. An inextricably linked question is to what extent a State has to be in a position to ensure that it can guarantee and enforce the rights in question – if at all – before they are triggered. This was an area of great emphasis in the UK House of Lords decision in *Al-Skeini* that placed emphasis on control over the territory and the capacity/ability of the State to administer and enforce rights. The ECtHR did not address this issue with the same degree of analysis, and this creates significant ambiguity. Lastly, rights, such as the right to privacy or assembly, are automatically triggered as troops have contact (however briefly) with civilians

68 A. Cowan, above note 66, p. 218; B. Miltner, above note 66, p. 699, after wondering whether the divide and tailor of rights applies to the newly formulated SAA test only or to ECA as well, notes that *Al-Skeini* “arguably leads it further down a path of incoherence”.

69 See ECtHR, *Al-Skeini*, above note 59, para. 137: “It is clear that, whenever the State through its agents exercises control and authority over an individual and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be divided and tailored” (emphasis added).

(who are, are not or are no longer directly participating in hostilities), while restoring international peace and security within, and outside, the context of armed conflict under the wording of a Chapter VII “all necessary means” Security Council resolution. Are they subject to the requirement of having an express exemption from a particular right if they wish to avoid the obligations that those rights would entail, as contemplated in *Al-Jedda*⁷⁰ for situations of administrative detention? As with the jurisdictional issue, one would expect a divergence of views amongst the European NATO Member States given the ECtHR’s ambiguity, thus potentially creating additional legal interoperability challenges with respect to planning and ROE—and a widening of the transatlantic divide.

The unique wording of Article 2 of the ECHR: Right to life

The right to life under Article 2 of the ECHR and its possible relationship to IHL are different from the issues that arise within the context of the *lex specialis* analysis occurring within other IHRL treaties.⁷¹ Unlike the ICCPR and the American Convention on Human Rights (ACHR), which prohibit “arbitrary” killings and consequently allow for an interpretative gateway to consider IHRL rights in light of IHL (as the ICJ did in the *Nuclear Weapons* Advisory Opinion, or the Inter American Commission in the *Abella* case), the ECHR’s language does not easily provide such an opportunity. The ECHR’s Article 2 protecting the “right to life” exhaustively lists the permitted grounds on which deadly force could be used. The article essentially codifies an IHRL law enforcement paradigm, and it does not include uses of force that would be lawful under an IHL framework. The same can be said of Article 5 of the ECHR’s protections of liberty and security. Although Article 15 does provide for derogation from Article 2, this would not engage an application of the *lex specialis* doctrine *per se*.

In *Georgia v. Russia II* and *Hassan v. United Kingdom*, neither respondent State made an Article 15 derogation. The ECtHR will be required to consider whether IHL displaces the jurisdiction of the Court or whether Article 2 of the ECHR will be interpreted on use of force issues arising within the context of an IAC by considering general principles of international law, including IHL principles, when that body of law is relevant. There is no guarantee that the Court will do so given its jurisprudence to date. The Court may decide that there was no violation of Article 2 given that the situation does not readily factually

70 ECtHR, *Al-Jedda and Others v. United Kingdom*, Case No. 27021/08, Judgment (Grand Chamber), 2011.

71 ECHR, Art. 2, reads:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

disclose ill-treatment or the death of Mr. Hassan while in custody. If the ECtHR *does* decide to look into the interrelationship between IHL and Article 2, another legitimate issue would be whether it would apply IHL properly.⁷² If it chooses to consider IHL to assist in its interpretation of ECHR Article 2, that does not necessarily mean that the end result would be the same as if the right to life provision under the ICCPR (which includes the gateway language of “arbitrariness”) were considered, given the unique language and construction found in Article 2.

Consequently, consideration of IHL within the framework of the ECHR may not determine the legality of State action in the same way as if IHL was the only legal regime being considered. Furthermore, any judgement on the interrelationship between IHL and the ECHR which accepts the application of IHL, arising from the *Hassan* and *Georgia* cases, would be limited to IAC situations. Many thorny and more complex issues revolving around the lawfulness of killing arising from situations of occupation and NIACs would remain open in the “post-*Hassan* and *Georgia v. Russia* world”.

This is a key point for NATO legal interoperability. It is possible for the ECtHR to find that a State acted in contravention of the ECHR while being compliant with IHL. This has implications for situations involving killing based on status, such as combatancy or membership in an organized armed group that is a party to an ongoing NIAC. It also has obvious consequences for civilian deaths and injury arising from attacks that may have been fully compliant with IHL proportionality and precautionary principles.

This possibility was contemplated by Costa and O’Boyle, writing in 2011, when they were the ECtHR president and deputy registrar respectively. They noted:

The consequence is that the same military operation may be in violation of provisions of the Convention but not of the relevant norms of IHL. Given the differences between the two rule systems this is perhaps not as unusual as it might appear.⁷³

For many (North American) military and government lawyers, this will seem like an impossible result. But for many in Europe, there is nothing unusual about it. This assertion is consistent with Appendix 6 of the ICRC’s Expert Meeting document, *The Use of Force in Armed Conflicts*, which is a summary prepared by the head of the Legal Division of the ECtHR of relevant ECtHR case law arising from high-intensity situations, including those which could have been classified as armed conflict.⁷⁴

While this may not be a significant issue for cases involving the deaths of civilians who are not directly participating in hostilities and are not killed in a

72 T. Meron, above note 8, p. 247, cautions that one of the dangers of having IHRL institutional encroachment is that the IHRL body may lack expertise in IHL. J. P. Costa and M. O’Boyle, above note 25, p. 127, when discussing the ECtHR confronting IHL, note: “The Court is understandably brought outside its comfort zone, the more so when it has to decide inter-temporal questions of IHL.”

73 *Ibid.*, p. 129.

74 O. Chernishova in ICRC, above note 1, Appendix 6, p. 89.

proportionate strike, or those who are ill-treated while detained, as those circumstances are prohibited by IHRL and IHL, it means that any act of killing, including the killing of combatants or civilians in strikes which are compliant with the IHL requirements of proportionality, could be in violation of Article 2 if the ECtHR does not apply IHL or only considers IHL to the extent that it does not undermine the wording of Article 2.⁷⁵

Investigations under Article 2 through of the ECHR

Under the ECHR, the duty to investigate is an implied obligation under Article 2.⁷⁶ An applicant may simply allege a violation of the implied duty to investigate without directly alleging a violation of the right to life *per se*. In 2010, the ECtHR found sixty-four violations of the obligation to investigate.⁷⁷ *Al-Skeini*, in 2011, was another. From the perspective of the interplay between IHL and ECHR, a key issue is whether there would be a violation of the duty to investigate in cases where persons were killed or injured in IHL-compliant situations. Given the above discussion and the ECtHR's ambiguous reasoning in *Al-Skeini* (by adopting the Alston Report without qualification), the approach of the ECtHR suggests that it would consider there to be a violation, or at a minimum, that it would leave the possibility open. In *Al-Skeini*, the ECtHR adopted the following extract from the Alston Report:

Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance. This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the Human Rights Committee has held, "It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [International Covenant on Civil and Political Rights] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights." It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right

75 See J. P. Costa and M. O'Boyle, above note 25, as they emphasize that any consideration of IHL would be within the framework of the ECHR: "At the same time, when confronted with non-international or international armed conflict, the Court should not bury its head in the sand. If it is to avoid findings that contradict IHL – as the Commission did successfully in *Cyprus v. Turkey* – it must at least be aware of the relevant provisions of IHL. The suggestion is *not* that it should seek to interpret and apply these principles in cases relating to armed conflict as the *lex specialis* but simply that it should be aware of them when it applies the Convention law in order to ensure the greatest harmony possible, *without* lowering its own often higher threshold of protection, for it is undoubtedly in times of crises that the need for vigilance is at its greatest" (emphasis added).

76 See ECtHR, *McCann and Others v. United Kingdom*, Case No. 18984/91, Judgment (Grand Chamber), 1995, para. 161; ECtHR, *McKerr v. United Kingdom*, Case No. 28883/95, Judgment (Third Section Chamber), 2001, para. 171.

77 O. Chernishova in ICRC, above note 1, Appendix 6, p. 92.

to life – but they may affect the modalities or particulars of the investigation ... Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.⁷⁸

From a NATO perspective, the trigger for an investigation within the context of an armed conflict is crucially important. It should be noted that not all commentators or States would agree with the assertion that all deaths “regardless of circumstance”, including those that are IHL-compliant, require an investigation. In a very detailed comparison of IHL, IHRL and international criminal law requirements of investigation, the Turkel Commission’s Second Report took a different perspective from that of the ECtHR.⁷⁹ It recognized that there might regrettably be incidental losses of civilian life that are “not ‘excessive’ in relation to the concrete and direct military advantage anticipated from the attack” and, unlike the killing of a civilian in a law enforcement operation, “the incidental death of an uninvolved civilian during combat operations ... does not immediately trigger a duty to investigate”.⁸⁰

The ICRC also appears to be of the view that deaths arising from the use of military force that are compliant with IHL do not trigger an obligation to investigate. It has noted:

In any case, it is clear that, under IHL, not every death triggers the obligation to investigate. This is so because, under IHL, legitimate targets – i.e. combatants, fighters and civilians directly participating in hostilities – can be killed lawfully and incidental loss of civilian life is not contrary to IHL as long as the principles of proportionality and precautions have been respected.⁸¹

During the ICRC-led expert roundtable discussion on *The Use of Force in Armed Conflicts*, the following proposition was submitted to the group of experts:

Legally speaking a State does not breach a human rights law obligation to investigate if legitimate targets are killed in accordance with IHL or when there is incidental loss of civilian life which is not contrary to IHL as long as the principle of proportionality has been respected.⁸²

The Expert Meeting report noted that:

78 ECtHR, *Al-Skeini*, above note 59, para. 93, citing P. Alston, UN Special Rapporteur, *Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/cn.4/2006/53, 8 March 2006, para. 36.

79 *The Turkel Commission*, above note 24.

80 *Ibid.*, pp. 101, 103. See also the treatment of the *Al-Skeini* decision by the Commission at p. 109. The procedural requirements of an “investigation” under IHRL are beyond the scope of this paper. See Juliet Chevalier-Watts, “Effective Investigations under Article 2 of the European Convention on Human Rights”, *European Journal of International Law*, Vol. 21, No. 3, 2010, for a review of the various components that are part of an ECHR obligation to investigate; and Michael Schmitt, “Investigating Violations of International Law in Armed Conflict”, *Harvard National Security Journal*, Vol. 2, 2011, p. 31, who, with reference to state practice, discusses how the relationship between IHL and IHRL impacts on investigations occurring within the context of armed conflict.

81 ICRC, above note 1, p. 49.

82 *Ibid.*, p. 53.

there was in general no formal objection of the statement posed, except for one expert who clearly disagreed, recalling that in the context of the European Convention on Human Rights, a State would have to investigate any violent loss of life—including in cases of killing of enemy combatants or of apparently lawful incidental civilian casualties under IHL—unless the State derogated to the right to life in accordance with Article 15 of the European Convention on Human Rights.⁸³

If the ECtHR refused to consider IHL and were to be confronted with a situation involving the death of a combatant or a person directly participating in hostilities, or a civilian incidentally killed in an IHL-proportionate strike within the context of an armed conflict, and decided the issue strictly with reference to Article 2, the point made by the expert in the above quotation could be considered accurate. In the post-*Al-Skeini* era, the ECtHR has paved the way under Article 2 for a real divide between the North American and European frameworks on the trigger for when an investigation would have to occur within armed conflicts. Challenging State military action only on the basis that the State failed to carry out a proper investigation, while avoiding issues surrounding the use of force, as was done in *Al-Skeini*, is becoming a popular litigation strategy and line of attack in advocacy by non-governmental organizations. NATO and its Member States should clearly anticipate “failure to investigate” cases in the future. Even if the ECtHR does allow for a legal basis to detain under IHL in the case of *Hassan*, there is certainly no guarantee that the Court would apply IHL when addressing the question of when an Article 2 obligation to investigate is triggered in the event that a detainee is unlawfully killed.

IHL treaty-based non-criminal administrative/preventive detention and Article 5 of the ECHR

The issues of preventive or administrative detention during armed conflict and occupation raise complex legal interoperability and interrelationship challenges, particularly within the context of Article 5 of the ECHR, which defines the right to liberty within a law enforcement/criminal law framework and which does not allow for non-criminal preventive or administrative detention as contemplated by IHL treaties.⁸⁴ The language of Article 5 does not readily allow a reinterpretation based on IHL and indeed may be even more restrictive than Article 2 in that

⁸³ *Ibid.*

⁸⁴ ECHR, Art. 5, reads:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

regard.⁸⁵ In the *Al-Jedda* decision, the ECtHR stated as much when it noted: “It has long been established that the list of grounds of permissible detention in Article 5§1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time.”⁸⁶

The ECHR addresses issues relating to criminal detention. Treaty-based IHL addresses issues related to non-criminal detention arising from threats posed by either a combatant or a civilian requiring internment for imperative reasons of security. Detention in an IHL scenario is not punitive but rather preventive (to keep threats off the battlefield). Each regime has its own rationale and logic and consequently different procedural requirements. Under IHL, particularly in IACs and situations of occupation, it is permitted to detain without charge or trial, and while there is a requirement for administrative review in defined circumstances, there is no express right to judicial review of the grounds of administrative detention.⁸⁷ Persons under administrative detention would only have their criminal rights engaged if they were subjected to a criminal process.

In the ECtHR’s *Al-Jedda* decision, the applicant was a UK/Iraqi citizen who was interned for security reasons by UK forces in Iraq during the period of occupation and held in a UK detention facility, allegedly for facilitating the travel into Iraq of a terrorist and explosives, and who allegedly conspired to launch improvised explosive device attacks in Iraq. *Al-Jedda* challenged his internment on the basis that it violated Article 5(1) of the ECHR. The UK government relied not on IHL as the primary legal basis for his detention but rather on UN Security Council Resolution 1546, which, under the authority of Chapter VII of the UN Charter, authorized “all necessary means” to “contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution”. Annexed to the resolution were letters that authorized internment for

- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

85 A. Gioia, above note 63, pp. 238–239.

86 *Al-Jedda*, above note 70, para. 100.

87 A. Gioia, above note 63; J. Bellinger III and V. Padmanabhan, above note 8; Jelena Pejic, “The ECtHR’s *Al-Jedda* Judgment: The Oversight of IHL”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011, p. 837; M. Sassòli and L. Olson, above note 16; K. Watkin, “Use of Force during Occupation”, above note 8.

(using the language of Geneva Convention IV) “imperative reasons of security”. The degree of detail in the 1546 authorization was not previously seen in any similar UN Security Council resolution. The UK government argued that, pursuant to Articles 25 and 103 of the UN Charter (which ensure that Charter-based obligations prevail over other treaty obligations in the event of a conflict), Resolution 1546 authorization prevailed over the ECHR’s Article 5 obligations.

The ECtHR framed the issue differently, with a different understanding of “obligation”. It asked “whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment”.⁸⁸ It then ruled that Resolution 1546 did not create an “obligation”, and consequently the Article 103 issue – that there was a conflict of obligations – was not engaged.

The ECtHR then turned to consider whether there was “any other legal basis” for the detention that would “disapply” the requirements of Article 5. It was at this moment in the judgment that the court briefly, and erroneously,⁸⁹ considered IHL and noted that it does not place an “obligation on an Occupying Power to use indefinite internment without trial”.⁹⁰ The Court conflated the obligation issue in the UN Security Council Resolution and in IHL rather than simply referring to IHL as a possible legal basis to intern.

Aside from its treatment of the legal effect of a Chapter VII authorization of military operations, the decision may very well demonstrate the inability of the ECHR’s language to relate to, and the ECtHR’s inability to properly understand, the IHL framework on detention under Geneva Conventions III and IV, given that the court’s broad language has implications for both. While the *Hassan* case will permit the Court to revisit IHL (and criticisms arising from its *Al-Jedda* decision), given that it is central to the UK government’s argument, the potential impact of maintaining that “Article 5 does not include internment or preventive detention” has obvious legal interoperability consequences for NATO allies. As Jelena Pejic has noted:

Al-Jedda casts a chilling shadow on the current and future lawfulness of detention operations carried out by the ECHR States abroad. In addition their ability to engage with other non ECHR countries in multi-national forces with a detention mandate currently remains, at best, uncertain.⁹¹

Only time will tell whether the ECtHR in the *Hassan* and *Georgia* cases takes up the opportunity to consider the relationship with IHL arising from Article 5 detention cases so that international legal principles on detention found in Geneva Conventions III and IV are properly addressed.

88 ECtHR, *Al-Jedda*, above note 70, para. 101.

89 See J. Pejic, above note 87, p. 851.

90 *Al-Jedda*, above note 70, para. 107.

91 J. Pejic, above note 87, p. 851.

The ECtHR's interpretation of Chapter VII UN Security Council resolutions

There is however, an even more profound and fundamentally worrisome issue arising from the *Al-Jedda* decision: the way in which the ECtHR approached a UN Security Council resolution issued under Chapter VII. The implications of the Court's approach go well beyond IHL/ECHR interrelationship and interoperability issues and include core issues on the scope and parameters of using military force to restore international peace and security within the UN's, and consequently NATO's, collective security structure.

As noted above, the key issue in *Al-Jedda* was framed as whether UN Security Council Resolution 1546 placed the UK under an obligation to hold the applicant in internment.

At paragraph 102, the ECtHR noted:

the Court considers that, in *interpreting* its resolutions, there must be a *presumption* that the Security Council does *not intend to impose any obligation* on Member States to breach fundamental principles of human rights. *In the event of any ambiguity* in terms of a Security Council resolution, the Court must therefore *choose the interpretation which is most in harmony with the requirements of the Convention* and which avoids any conflict of obligations ... it is to be expected that clear and explicit language would be used were the Security Council to intend to take particular measures which would conflict with their obligations under international human rights law.⁹²

At paragraph 105, it concluded:

The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. Internment is not explicitly referred to in the Resolution.⁹³

By employing this interpretative presumption,⁹⁴ the Court addressed the pivotal issue of whether a UN Security Council resolution authorization creates an obligation in a way that is very different from that found in State practice and the commentary of leading practitioners.⁹⁵ By doing so it avoided the "Article 103

⁹² ECtHR, *Al-Jedda*, above note 70, para. 102 (emphasis added).

⁹³ *Ibid.*, para. 105.

⁹⁴ A technique of interpretative presumption was road-mapped out, and tailored to *Al-Jedda*, for the ECtHR after the House of Lords' decision: see M. Milanovic, "Norm Conflict in International Law", above note 8, p. 98.

⁹⁵ In the absence of UN Charter Article 43 agreements, the UN Security Council developed a practice of implementing the collective security structure through the authorization of military action. For

question” and injected uncertainty (*if* States follow the decision) into a line of State practice relating to Security Council resolution authorizations that dated back to the First Gulf War. No NATO State has ever approached OPLAN, ROE or targeting framework development using the approach adopted by the Court.

Presumably, the ECtHR’s reasoning would equally apply to other ECHR rights, including Article 2’s right to life, and to other rights relating to privacy, freedom of expression, assembly, etc. The logical effect of this would be that NATO operations within the context of an armed conflict, seeking to restore international peace and security as authorized by a Chapter VII resolution, would be restricted to the law enforcement paradigm as framed by the ECHR. Not only would each UN Security Council resolution to conduct administrative detention without criminal charge and trial require “clear and explicit language”, but so too would any use of force going beyond the framework of Article 2 or any other military activity that would engage an ECHR right. The only *possible* exception to this would be derogations from the ECHR.

The logic of this interpretation would lead to an encroachment on the UN Security Council’s authority to define collective security frameworks in peace enforcement operations for European States. Should European Member States within NATO adopt this new approach to UN Security Council resolutions, it would be a break with their historical practice, creating transatlantic divisions as NATO Member States consider the scope and parameters of future missions based on a UN Security Council resolution and define OPLANs, ROE and targeting frameworks.

NATO challenges for future legal interoperability

If legal interoperability is to be understood as the sharing of a common body of rules, the issues identified above arising from the IHL/IHRL and IHL/ECHR interface will continue to challenge NATO. This should surprise no one. Essential for NATO’s ability to function is the central relevance of consensus.

perspectives on the legal relevance of authorizations and its legal effect on Articles 25 and 103 which do not support the approach taken by the Court and which equate authorizations with obligations, the UK government had relied on; Bruno Simma, “NATO, the UN and the Use of Force: Legal Aspects”, *European Journal of International Law*, Vol. 10, 1999, p. 1; Vera Gowlland-Debbas, “The Limits of Unilateral Enforcement in Community Objectives in the Framework of UN Peace Maintenance”, *European Journal of International Law*, Vol. 11, 2000, p. 361; Danesh Sarooshi, *The United Nations and the Development of International Security: The Delegation by the UN Security Council of Its Chapter VII Powers*, Clarendon Press, Oxford, 1999, pp. 150–151; Robert Kolb, “Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorisations Adopted by the Security Council?”, *ZaöRV*, Vol. 64, 1983–1984, p. 21; ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)*, *Provisional Measures*, *ICJ Reports 1993*, p. 3; Richard Lauwaars, “The Interrelationship between United Nations Law and the Law of Other International Organizations”, *Michigan Law Review*, Vol. 82, 1983–1984, p. 1604; Rudolf Bernhardt, “Article 103”, in B. Simma (ed.), *The Charter of the United Nations – A Commentary*, 2nd ed., Oxford University Press, Oxford, 2002, p. 1302.

Consequently, each sovereign State will participate in each NATO mission in accordance with its own national legal framework. Within this context, the ECHR, as a regional IHRL treaty, has the potential to widen, perhaps drastically, the transatlantic divide on legal interoperability, and reduce the ability to have a generally shared legal paradigm regulating the use of force. This, too, should not surprise anyone.

One former US government lawyer wrote in 2011, after reviewing divergent litigation outcomes between North America and Europe, that:

something remarkable—and surprisingly unremarked upon—has been happening since 2001 that is both widening and securing the permanence of this transatlantic divide. Courts on both sides of the Atlantic are deciding cases brought by individuals who are contesting the way States have been fighting armed conflicts with non-State actors Decisions from the ECtHR ... are a critical ... factor affecting the rules by which Europeans have fought—and will fight—conflicts. If European historical and political concerns about armed conflict serve as a “pushing” mechanism away from conflict, the ECHR serves as a “pulling” mechanism toward the increasing application of human rights rules to war fighting.⁹⁶

Two issues will be worth monitoring while tracking the above-noted trend. First will be the way in which European NATO States are, or are not, influenced by ECtHR jurisprudence when creating key NATO use of force frameworks through a consensus process. If the ECtHR continues to disregard IHL, or misapplies it, will European NATO Member States treat those decisions as binding on how they fight—or will they isolate them as decisions that are not applicable to operations occurring within the context of armed conflict regulated primarily by IHL? Secondly, as demonstrated in Afghanistan, NATO’s ISAF mission could have implemented a broader use of force framework based on IHL, but for operational and policy reasons related to securing the support of the local population, chose in many instances to restrict the use of force.⁹⁷ The point here is that any tracking of the “transatlantic divergence” will have to consider the policy and operational factors that shape use of force frameworks when assessing interoperability generally.

As the “humanization of humanitarian law” continues to be driven by the engine of human rights, and IHRL institutional encroachment continues in its quest to be an enforcement mechanism of IHL, future legal challenges to NATO Member States on how it fights are “inevitable”.⁹⁸ NATO should not acquiesce in the comfort of its legal immunity, provided for by its Status of Forces Agreement, as it watches domestic and ECtHR litigation unfold. The ECtHR may someday be the catalyst that pierces NATO’s immunity. As yet another way in which the ECHR may influence

96 Ashley Deeks, “Litigating How We Fight”, *International Law Studies*, Vol. 87, 2011, p. 450; see also S. Pomper, above note 21, p. 535.

97 Richard Gross in ICRC, above note 1, Appendix 5, p. 85.

98 See Charles Garraway, “Allegations, Denials and Investigations – Preparing For The Inevitable”, *NATO Legal Gazette*, Vol. 30, May 2013, p. 11.

the Alliance, the Court of Cassation of Belgium has been willing to set aside the immunity of international organizations on the ground that it contradicted an ECHR right.⁹⁹ The consequences of NATO losing its immunity would be profound and in many ways would have a bigger effect upon the Organization and its operations than what is currently being felt from ECtHR litigation on use of force. A piercing of immunity could lead to litigation strategies that would seek to have NATO identified as a party responsible for acts occurring within the context of an armed conflict, such as disproportionate strikes, and could possibly compel NATO, for the first time, to identify the Member States involved in particular operational incidents, thus opening the door to domestically based ECHR-driven litigation.

99 See Jan Wouters, Cedric Ryngaert and Pierre Schmitt, “Western European Union v. Siedler; General Secretariat of the ACP v. Lutchmaya; General Secretariat of the ACP Group v. B.D.”, *American Journal of International Law*, Vol. 105, No. 3, 2011, p. 560.