

**LAW OF ARMED CONFLICT
VS
HUMAN RIGHTS LAW**

War vs Peace

The protection of human beings

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**IMPERIAL DECREE OF CYRUS
KING OF PERSIA (550 B.C.)**

When I entered Babylon,

- I did not allow to terrorize the land
- I kept in view the needs of Babylon and all its sanctuaries to promote their well-being
- I freed the citizens from their unbecoming yoke
- I restored their dwellings
- I put an end to their misfortunes

Human Rights in occupation

TO MY BELOVED WIFE CHARLOTTE, LINGUIST AND CRITIC

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INSIDE FRONT COVER: HUMAN RIGHTS LAW IN OCCUPATION, 550
B.C.

INSIDE BACK COVER: CONCL FROM UN FACTS SHEET NO 13, 1991

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CONTENTS AND LIMITATIONS

The chapter **The Problem** points at the division between Human Rights Law (HRL) and Law of Armed Conflict (LOAC).

The chapter **Introduction**, in different ways, shows the similarities between the two sets of rules and that, due to modern warfare, there is a gap between the applicability of HRL and LOAC. The chapter also carries a note on terminology.

The need of both sets of rules is particularly emphasized in the chapter **Strategic situations and the decision-making process**.

The short chapter **The problem** points out there is a hole in the middle!

The chapter **Scholars and others' view on modern progress of LOAC and HRL** deals with weaknesses and strengths of LOAC and HRL. A search of the literature shows that the subject, by no means, is new. It is also a topical issue in TV- and radio-channel discussions on everything ranging from one of the current internal genocides to small oppositions. The eminent scholars and debaters are presented fairly in order according to the time when their viewpoint were presented.

Illustrative warning examples on what happens when the intention to reform has failed in attempts on modernising , simplifying or adapting LOAC and HRL are given an account for in chapter **Destructive and constructive attempts to bridge the gap**. Certainly, capable forces have devoted their strength to making syntheses. Those syntheses have not reached the acknowledgement they very likely deserve. The attempts and the reasons why they failed are also discussed in the chapter

The **Investigation**, is found on an enclosed floppy disc, but the **Explanation of the Investigation** is presented here. A person familiar with LOAC and HRL does not need to go through this disc to be convinced. I suppose the tutor, despite his knowledge has to run through it. For persons less acquainted with LOAC and HRL it might be better to read the not mutilated texts. Indolent and uninformed readers will hopefully be convinced after skimming through the disc.

The outcome of the analysis of HRL in LOAC makes up a chapter of its own.

In order not to get caught in a spiders web I have limited the investigation of human rights in LOAC to the UN Universal Declaration of Human Rights and LOAC listed in the ICRC CD-Rom, International Humanitarian Law.

The chapter **Conclusion** primarily discusses what needs to be done, Utopia for those who fought for the Geneva Conventions and the UN Declaration of Human Rights and a necessity for present and future generations.

This paper does not consider the administrative parts of LOAC, even if getting paid for work done as a prisoner of war, can appear as a human right.

THE PROBLEM

Two clusters of rules both written to protect people in distress and well fit for use independently, have been paralysed since it can not be decided when the one or the other should be used – and this in a time when internal wars and ethnical conflicts are seen in many places all over the world.

Instead of being willing to cooperate the people responsible for the advancement of the laws have chosen to protect their own domains. Organisations with necessary instruction experience have been hard up for money while those lacking experience have been well supplied with means.

It is essential to the laws as well as the people to cooperate. This paper will review the present position of the two laws.

INTRODUCTION

From the preface of one of the foundations of the Hague Convention, The Laws of War on Land, Oxford, 9. September 1880 comes the following quotation:

“War holds a great place in history, it is not to be supposed that men will soon give it up. In spite of the protests which it arouses and the horror which it inspires – because it appears to be the only possible issue of disputes which threaten the existence of States, their liberty, their vital interests. But the gradual improvement in customs should be reflected in the method of conducting war. It is worthy of civilized nations to seek, as has been well said (Baron Jomini), “to restrain the destructive force of war, while recognizing its inexorable necessities”...

W.J.Fenrick in Int Hum Law and Criminal Trials, a paper the origin of which unknown to me, has written the following:

“Although international humanitarian law applies to both international and internal armed conflicts, the states which have participated in the development of international humanitarian law have agreed to treaties which rigidly differentiate between international and internal conflicts. The whole of the Geneva Conventions and of Additional Protocol I (API) apply to international armed conflicts while the only treaty provision which apply to internal conflicts are common article 3 of the Geneva Conventions of 1949 and Additional Protocol II (APII) of 1977”.

It is obvious that the Conventions up to the Additional Protocols are written by Europeans for European wars. For a former teacher of how to adopt LOAC in Rules of Engagement and in wartime, this is an embarrassing fact, having the privilege to work with high ranking students from other continents. It is also true that the conventions and protocols are very rigid when it comes to deciding the type of hostility. However, there are loopholes, which make the rules fit for use even in borderline cases. Dr Cornelio Sommaruga, the President of the ICRC said during a lecture at the National Defence College in Stockholm 24 Mars 1999:

“Common Article 3 should be called the “Mini-Convention” and is the leading Star for all humanitarian legitimate claims on Governments...”. It is important not to depreciate a rule just for being short and isolated. Common Article 3 contains the essence of human rights. The Human Rights declaration, on the other hand is built upon the UN Charter that forbids wars and does not consider the fact that wars are going on and on, in spite

of the ban.. The attitude of the preface from The Laws of War on Land, Oxford 1880 is perhaps more matter-of-fact.

International humanitarian law, and Hague law in particular, has been criticized as a device for legitimising violence. In the words of Chris Jochnik and Roger Normand: **” ... despite noble rhetoric to the contrary, the laws of war have been formulated deliberately to privilege military necessity at the cost of humanitarian values. As a result the laws of war have facilitated rather than restrained wartime violence”**.¹

Of course this is not true. In the first place, without the exceptions for military necessity, there would not have been any Conventions or Protocols. The delegates who draw the text knew that their work would have been useless if they had tried to forbid war by composing articles without exclusion clauses. Secondly, the military necessity is nothing the belligerent Party can use as an excuse for diverging from the rules, if there is not a very serious reason for it. To cite General Eisenhower from 1944: **“I don’t want the expression “military necessity” to hide laxity or indifference – it is often used in situations in which it would be more correct to speak of “military convenience” or even “personal convenience”**”.

In 1985 the teaching team in San Remo at The International Institute for Humanitarian Law took the following resolution:

“Military necessity authorises only such destruction / violence / force / means as is necessary, relevant and proportionate to accomplish the military mission and is not otherwise prohibited by the laws of war”.

“The notion of human rights has slowly developed in the course of history and at the will of civilizations, until the decisive year 1948, which saw the adoption of the Universal Declaration of Human Rights, one of the main elements in the edifice of the United Nations Organisation”.²

The document also defines the bonds between LOAC and HRL:

“Relationship between International Humanitarian Law and Human Rights

International humanitarian law and human rights are two branches of provisions which have taken different paths to reach the same objectives, protection of the human being and respect of human dignity.

During the Sixties and Seventies various factors combined to bring human rights and international humanitarian law closer together.

The UN showed growing interest in “human rights in time of armed conflict”. This emanates from the International Conference on Human Rights in time of armed conflict in Teheran in 1968 . The organization also examined ways of ensuring better application of humanitarian rules in armed conflicts and of improving such rules. This included even banning or limiting the use of certain weapons.

International humanitarian law also made a break through by introducing the common Article 3 to the Geneva Conventions thus widening the range of protected persons. Widening from victims of International armed conflicts on land and at sea, the protection of prisoners of war and of foreign civilians in a territory of a Party to the conflict and the protection of the civilian population in occupied territory”.

¹ Jochnik, C & Normand, R., The Legitimation of Violence: A Critical History of the Law of War, Harw Int 1994, 49-50

² The Red Cross and Human Rights. Council of delegates, Geneva 13-14 October 1983. Summary of the Working document CD/7/1/1.

The Geneva Protocols from 1977 extended the protection by:

- * Making the entire humanitarian law applicable in certain armed conflicts which were previously considered as not being international in character e.g. national liberation wars.
- * A whole additional Protocol II related to the protection of victims of non-international armed conflicts, supplementing the provisions of common Article 3, GI -IV.
- * Introducing, into the Protocols, certain fundamental guarantees to be respected at all times – GPI art 75, GPII art 4, influenced by the terminology used in the United Nations instruments on human rights.
- * The growing number of links between human rights and international humanitarian law display three fundamental principles:

The principles of inviolability of the individual – respect for each person’s life and physical and mental integrity

The principle of non-discrimination – each person treated without any distinction based on race, sex, nationality, language, social standing etc

The principle of security – everyone is entitled to individual security, especially to legal guarantees, and can never waive the rights recognized by the humanitarian law conventions.

Applicability of LOAC and HRL

The applicability of LOAC should not create a problem. Involved governments must come to an agreement if there is a war and if it is international or internal. This agreement is of vital importance and often causes problems. This will be further discussed in chapter Strategic situations and the decision-making process.

The applicability problem of HRL is so to speak built in. In principle HRL are applicable at all times, some with many derogations allowed in time of “**unusual public emergency threatening the life of the nation**”. Such emergencies can occur in a (forbidden) war or during internal disturbances. Derogations do not come automatically. They must be decided and officially proclaimed from time to time.

Four rights can not be subject to derogation:

The right to life

The prohibition of torture and of inhuman or degrading treatment or punishment

The prohibition of slavery and servitude

The principle of legality and non-retroactivity

These rights are applicable in peace, during internal disturbances and war.

In wartime the three last ones are only reinforced by LOAC, no clashes can be seen. In wartime the right to life can be seen as a mockery of the Human Rights. A derision pronounced by those who on lawful occasions decided to forbid war. On the other hand it can be seen as an ambition to create a better world and directions for development of

LOAC. It is a pity though, from the juridical and trustworthiness point of view that breaking this rule is unavoidable in war.

LOAC put up certain restrictions in order to reduce the death toll in the war and “military necessity” put restrictions (see above) to killings.³

Dissemination of LOAC and HRL

The ICRC and the National Red Cross Federations play very important roles in the dissemination of LOAC and HRL.⁴

The International Institute of Human Rights in Strasbourg, in which the Henry Dunant Institute plays a major role, is broadening its work in the field of human rights and has set up a documentation centre on LOAC and HRL in accordance with the recommendation of a working group of the Nordic Red Cross Societies on Human Rights.⁵

UN on the other hand seems not to feel free to emphasize LOAC.

³ Foundation form The Red Cross and Human Rights, Council of Delegates, Provisional agenda, Geneva 13-14 October 1983.

⁴ For a report on this see: Contribution of the International Red Cross and Red Crescent Movement to respect for HR. Final report at XXVI session, April 1989, CD/6/1C, Resolutions and Decisions Annex

⁵ Copenhagen, 25- August 1983

The International Institute of Humanitarian Law, San Remo, and its international military courses on LOAC has the most important role to play. The Institute concentrates on students who have a possibility to influence military and political circles to bring about permanent improvements. The Institute is not too well-known and needs a better presentation.

The main objective for the Institute is the teaching of LOAC incorporated in the operation planning with field applicability as opposed to a legal skill. Human rights law and standards are incorporated in this training.

“There are few institutions in the world that are able to assemble officers from all the countries of the globe. They wear their own uniforms and live and work together for two weeks. One of these is the International Institute of Humanitarian Law in San Remo, Italy.

This non-governmental organization was set up in 1970 for the purpose of promoting the dissemination and development of international humanitarian law. The choice of the Italian seaside resort of San Remo was not accidental. Alfred Nobel spent the last years of his life here, and he left all his property to the humanitarian cause. The villa where he lived until his death became the headquarters of the International Institute of Humanitarian Law.

Over a period of 18 years, 44 courses were given under the direction of a high-ranking Swiss officer, put at the Institute’s disposal by the ICRC. He devoted his time to the courses, helped by a number of qualified officers, all acting on a voluntary basis as instructors or class leaders. The number of courses organized each year increased, as did the number of languages used. The courses, initially given only in French, started being offered in French, English, Spanish and Italian (though the last was soon dropped). International attendance became more and more significant. In 1980 the duration of the courses was extended from one week to two. The teaching programme was changed from a series of lectures and a few exercises to a veritable military education programme offering the relevant information, many staff exercises and some lectures on the main conceptual aspects of the subject.

After the retirement of the first director a Directorate of Military Studies was set up to organize the courses and to study developments in teaching methods. In parallel, the Institute formalized its ties with the ICRC and a cooperation agreement on the organization of military courses was signed. The number of courses was increased to seven a year. Course directors, appointed from amongst the best officers on the teaching staff, change every time”.⁶

Courses are particularly designed for:

- Commanders and General / Joint Staff Officers
- Officers responsible for training and instructors from Staff Colleges
- Officers involved in operational planning
- Legal advisors, as per Art 82 of Protocol Additional 1 to Geneva Conventions
- Officers of military police and officers with similar responsibilities
- Military doctors, military chaplains, civil defence officers

Teaching

During the course, participants act, under supervision of their instructors, as if they were part of a staff, in order to solve the assigned problems, always taking into account the rules of the law of armed conflict. The programme is approached with the aim of giving the participants a clear understanding of the basic principles and international rules regulating armed conflict. The program also includes the appropriate references to the

⁶ Blais, G. Major-General in the Italian Army, Director of Military Studies of the International Institute of humanitarian Law, San Remo, Italy, in the International Review of the Red Cross, July-August 1997, pp 451-2.

international system of protection of fundamental human rights, as Armed Forces can be requested to act in peace support operations or in situations of civil war or internal disorder.

The aim of this paper is to show the possibility and necessity to combine two good intentions into one simple, book of provisions, easy to understand

Definitions

Human Rights Law

Settle the fundamental human rights on governmental level.

Right to life and property.
Associated with democratic rights.

Intend to guarantee certain values and main interest as rights.

Law of armed conflict

Settle the individuals right to be spared from unnecessary suffering.

Associated with traditional war.

Intend to mitigate suffering through achieving a balance between military necessity and humanitarian consideration.

moulded into

Fundamental human rights and basic humanitarian obligations – International Humanitarian Standards. Associated with present-day people and life.

Intend to meet the evil of life.

“The future calls for an evolution of the law of armed conflict. 34 of 35 major conflicts today are internal conflicts”.⁷

⁷ von Sydow, B. Swedish Minister of Defence, Statement in the seminary A Changing Defence, Katarinastiftelsen Stockholm 22 Feb. 1999. Translation

A SHORT NOTICE ON TERMINOLOGY USED IN THE PAPER

	Abbreviation
The Law of Armed Conflict	LOAC
The Hague Law	
The Hague Conventions	HC
The Hague Culture Convention	H, CP
Geneva Law	
First to Fourth Geneva Conventions	GC I – IV
Protocol I and II Additional to Geneva Conventions	AP I – II
"New York Laws"	
The UN Universal Declaration of Human Rights Law	HRL
International Humanitarian Law from which the Hague Law and Geneva Law are parts	IHL

In the investigation – of course – the full detailed designation is used.

STRATEGIC SITUATIONS AND THE DECISION-MAKING PROCESS

The applicability of LOAC and HRL depends on the strategic situation in which they are applied. The following table of situations shows that in most cases applicable law is not disputable.

Factual situation	LOAC reference	HRL applicable	Applicable law
PEACE	GC		
Full peace	GCI, Art 47 Dissemination	Yes	Exclusively Domestic
Peace, Internal disturbances and tensions	APII, Art 1	Yes	Exclusively domestic, criminal
INTERNAL ARMED CONFLICT			
Dissident armed forces with no control over territory	GCI-GCIII, Art 3 H. CP, Art 19 GCI-II, Art 1	Yes	Domestic, GCI-GCIII, Art 3 H. CP, Art 4
Dissident armed forces with control over territory for sustained and concerted ops	APII, Art 1-	Yes with derogations	Domestic, APII, Art 1-
INTERNATIONAL ARMED CONFLICT	HC GC AP	At least the 4 main ("Derogations")	LOAC
Occupation	HC GC AP	Yes, probably with derogations	Domestic law LOAC
Neutrality	HC GC AP	Yes	Domestic law LOAC
After war situations	GCI, Art 47 (LOAC)	Yes	Domestic law

Internal disturbances can for example consist of isolated and sporadic acts of violence as riots, kidnapping, armed attacks on persons and objects, hold-ups, murders. Internal armed conflict is a fact when organized armed groups not connected to the governmental troops control part of the country and are under responsible command, making sustained, concerted operations against political and military targets or defend areas against governmental armed forces. They often put restrictions upon population of the country.⁸

⁸ Before published in the teaching file for the military courses at the International Institute of Humanitarian Law, co-author Group Captain C Hornstrand

Which law to use depends on another classification – the intensity in the conflict – mostly to the low intensity conflict (LIC)

Low intensity conflict manifests itself in:

1. Disruptive actions against the constituted government committed by individuals and/or small and possibly loosely organized groups. Actions as encouraged discontentment through propaganda, protest demonstrations, engagement in subversive activities, acts of sabotage, terrorism.

Such actions are counted among non-war criteria and domestic law inclusive Human Rights should be the applicable law. GPII, Article 1, para 2 particularly points out that GP is not applicable.

2. Insurgency, organized military operations against the constituted government. The insurgents may exercise de facto control over a portion of the territory and/or population and may engage in all forms of activities mentioned above.

Domestic law inclusive Human Rights, Common Article 3 in 1949 Geneva Conventions, G P II, Article 1, H CP, Art 19, par 4 should be applicable law.

3. Belligerency, insurgents have installed their own government and military organization. They conduct military operations in accordance with LOAC. Insurgents have a determinate percentage of territory and population under effective control. Law of war is the applicable law.

The strategic situation is often more complicated than the summary presentation above. Israel is associated with most of the conventions. The Hisbollah is the responsibility of Lebanon which is an associated state. Thus the conventions apply. If Hisbollah is considered a resistance movement, - which conventions are applicable, if any?. For terrorists the criminal law of Lebanon should be applied.

The most intricate problem is – who determines the level of the conflict? All parties concerned have time after time shown that they are reluctant to make that decision. With reference to internal matters the affected country tends to diminish the trouble. This pattern is found in for example Afghanistan, the Falkland Island, Sri Lanka and in Israel.

The International Court takes too much time for its decisions as we can see in the Nicaraguan affair. The Security Council blocks any decision, for right or wrong reasons.⁹

Is there a positive development in HR prohibition of violence? It can not be correct that the existence of a nationality should depend on whether a member of the Security Council delivers a veto or not.

A new alternative doctrine will be good for the UN – allowing the organisations to act locally in “humanitarian interventions” without UN support. Then maybe the Security Council will focus attention on discussing the problem without any irrelevant hitches.

So is, for example, Chinese demands on Taiwan being made a Chinese province irrelevant when discussing Macedonian matters.

Kofi Annan has said that he believes in a turnaround and consent to NATO actions.¹⁰

⁹ Idea from Teaching file for military courses at the International Institute of Humanitarian Law and Professor Göran Melander, Seminary at The Agency for Civil Emergency Planning 18 October 1995.

¹⁰ Bring, O. Professor. In a seminary at SIDA, arranged by the Swedish Red Cross and the Agency for Civil Emergency Planning, Stockholm 1 October 1999. Translation.

“If a group of states join together to make an effort when the Security Council is blocked the customary law might change to acceptance.

If a separate state does the same it is seen as an end in itself.¹¹

The UN have a large responsibility in deciding the level of the conflict (and take measures accordingly)

¹¹ Österdahl, I. Dr. Seminary on Kosovo arranged by SFHIR at The National Defence College, Stockholm. 11 May 1999. Translation

SCHOLARS' AND OTHERS' VIEW ON MODERN PROGRESS OF LOAC AND HRL

Draper, G.I.A.D. LL. M. University of Sussex. UK
Human Rights and the Law of War. Virginia Journal of International Law. Vol XII April 1972, pp 326-342.

Draper devotes this article to describe " **the contemporary relationship between a body of considerable antiquity, the Law of War(LOW), and a relatively modern regime of fast growing importance, that of Human Rights.**"

"The general theme is that the two bodies of law have met and are fusing together at some speed. In a number of practical instances the regime of Human Rights is setting the general direction, as well as providing the main impetus, for the revision of the LOW".

How can this be done?

Draper is of the opinion that humanitarian restraints and prohibitions were added late in the long history of LOW. This can be called in question. In the 18th century the LOW began to pay some attention to humanitarian considerations. Rousseau, in Contract Social, gave expression to the new ideas. **"War is not any relation between man and man but a relation between states in which individuals are enemies only accidentally, not as men or even as citizens, but as soldiers"**.

The Geneva Convention of 1864 was the direct outcome of the appalling suffering on the battlefield of Solferino. After the powerful Martens preamble to The Hague Convention IV of 1907 Human Rights became important in modernising the former Law of Arms and the LOW was strengthened.

This basic formula was repeated in each of the four Geneva Conventions of 1949. (GC I art 63, GC II art 62, GC III art 142, GC IV art 158).

"The humanitarian standards of treatment to war victims such as prisoners of war, civilians in occupied territories, the sick and wounded in the armed forces is not the same thing as conferring rights to such treatment directly upon individuals, flowing from the Law of Nations." The contemporary Law of Human Rights will hopefully influence LOAC of tomorrow.

Draper considers HRL development to be a parallel to the development of LOW. Of course this is to shut ones eyes to the fact that it is the same government that works with the problem and when it comes to how to treat human beings. The difference between peace and war is only a matter of external circumstances. But as long as the collaboration is not closer today than it ever was even on the highest level the ICRC and UN, maybe Draper still is right.

Post War developments
Human Rights

"In the League of Nations era the direct nexus between the idea of HR and the existing LOW was not envisaged . The Geneva Convention of 1929 and Geneva Gas Protocol of 1929 furthered the humitarian endeavour. The frightful experiences of WW 2 brought HR and LOW closer to each other."

And, I would say, they can never go separate ways again.

The traditional dichotomy between the International Law of Peace and of War can never be revived. Already in 1972 Draper reports from a Conference of 40 States in Geneva that it was a **"strong move to obtain acceptance of the idea that the law of Human Rights should operate full boom in time of war as in time of peace"**.

The report of the Secretary General of the U.N. entitled “Respect for Human Rights in Armed Conflicts”,¹² shows how close the approach has been between LOAC and the regimes of Human Rights.

For quite a time after 1945 the LOW and HRL pursued their own paths. Obviously, there were overlaps but in the main they kept to their separate tasks, LOAC mostly retrospective.

LOAC tries to balance between military needs and the requirements of humanity. HRL deals with the same problem but HRL as “military needs” is changed into the possibility to derogate from economic, social rules”.

Suter, Keith D. British Commonwealth Research Fellow, University of Sydney, formerly Human Rights Secretary, British United Nations Association.

An enquiry into the meaning of the phrase “Human rights in armed conflicts”

Rev de Droit Penal Militaire et de Droit de la Guerre, 1976, Vol XV, Pt 3-4, pp 393 – 430.

Suter devotes this paper to proving that those who use the phrase “Human rights in Armed Conflicts” do it

- as a political tactic
- not understanding that human rights is a peacetime concept
- incorrectly, when they state that LOAC constitutes human rights in armed conflicts under another name
- possibly right if they limit themselves to deal with collective human right, the right of self-determination, when they talk about human rights in armed conflicts. But, the author establishes, they do not.

Suter is of the opinion that the political tactics were used by a number of NGOs who took the opportunity, in the Human Rights year 1968, to use the interest created around human rights to try to get support for the updating of LOAC. The main reason for this was that the NGOs had found that the impact of the Geneva Conventions on ongoing conflicts was insignificant. They also wanted to expand LOAC to cover internal conflicts. The driving force behind this was the International Commission of Jurists and even if this is against Mr Suter’s opinion of mixing “peacetime” Universal Declaration of Human Rights with wartime laws, we can now enjoy the result, the Additional Protocols to the Geneva Conventions.

Suter turns towards what he calls vagueness in the expression Human rights in armed conflicts. Nobody has tried to explain which human rights exist in armed conflicts. Many people just consider human rights equal to humanitarian international law of armed conflicts.

Suter then tries to examine the meaning of human rights in armed conflicts. He points out that the ideas and inspirations behind the Resolution for Human Rights are very old and can be found in the UK Bill of Rights of 1688, the French Declaration of the Rights of Man and of the Citizens of 1789 and the US Bill of Rights of 1791. A common theme in those documents and other sources is that human rights is a peacetime concept.

There is nothing whatsoever to prove this. Suter does not take up the 3 –400 year older “law of wars” aiming only at saving those not direct involved in the fighting. At that time human rights were the only consideration many big army leaders took. Armies, their

¹² A 8052 of 18 September 1970.

own as well as the enemy's were dispensable and no mercy was given or taken for soldiers.

As reason for the idea that human rights are a peacetime concept Suter states that peace has been the normal state and that it is only during this century that the civilian population with accelerating speed has been affected by a war.

Of course this is not true. When the Huns had conquered a country, they left it devastated and the people starving to death.

Many people today have been or are more or less directly suffering from the consequences of war.

Suter's proofs for human rights as a peacetime concept look more and more like a vicious circle.

Suter points out that the Conventions do not cover the non-international conflicts and that it takes several years to ratify new Conventions. He takes up the common Article 3 containing a few principles to be followed in non-international conflicts.

Article 3 is rather extensive and is a good work of diplomacy. Most countries have accepted this article even if they were very reluctant to everything concerning domestic affairs. Certainly there is a problem that many years go by between the diplomatic conference and the ratification. Today many conventions are considered international law long before all ratifications are delivered. But the problems put forward by Suter only show the importance of human rights being a part of the wartime guiding documents. Saying that wartime makes human rights not fully applicable because of "military/civilian necessity" does not make them impossible to use. In wartime the derogation from peacetime rules may be less than the differences in opinion on the application of the rules between two nations, two religions or two different political systems in peacetime.

Suter emphasises that using the human rights rules in wartime is against the fundamental idea behind the rules. They were originally created as a protection for an individual from his own Government. Be that as it may, this was the fundamental idea but no one has put forward any evidence in the preparatory work on the rules, that they could not be used to protect an individual from the opposition party in the country or a belligerent enemy inside or outside the border.

Suter also says that most conflicts are of such a low-intensity nature that speaking of armed conflicts does not apply. Today is not the world Suter lived in. Today it is very important that we can state that human rights rules can and shall be used at all time. In the interval between internal disturbances and war, when LOAC is not applicable, it is very important to maintain the protecting rules of HRL.

Suter quotes Frits Karlshoven: **"It may be safely stated that the idea of human rights, though perhaps not under that name, lies at the root of all the conscious attempts at codifying the law of war, undertaken since the Conference of Brussels of 1874".**¹³ Suter argues that this is not true. What Karlshoven (and most other International lawyers) calls human rights are humanitarian considerations and self-interest. Suter dismisses the Laws of the Hague as outdated and says that at least the Law of Geneva is updated now and then. His attempts to "prove" that the Conventions still have nothing to do with Human Rights fails, it ends with only repeating the following "message": **"Instead of human rights being a motivation of the law of armed conflicts, one source of motivation were humanitarian considerations."** This shows, shocking thought, that Suter never has pulled the

¹³ Human Rights, the Law of Armed Conflicts and Reprisals. International Review of the Red Cross, April 1971, p 23.

Conventions apart paragraph by paragraph. Suter also calls attention to the point that ICRC tactics concentrate on the humanitarian considerations and do not emphasise the human rights part as which is politically very controversial.

Self-interest, the other part of Karlhoven's "human rights", due to Suter, is good only for trying not to increase the violence, to aim at peace and to keep mass media at bay.

Almost every state and some national liberation movements display enormous interest in the updating of the Conventions and the Protocols. This fact reinforces the argument that conventions and protocols have nothing to do with human rights, only "humanitarian considerations and self-interest!" Suter also exemplifies his remarkable arguments with the banning of napalm as nothing else than "self-interest" from the governments. After Viet Nam, where the use of napalm terrified most people, it would be unwise for governments to use napalm, and it could just as good be banned. This view on mankind from especially NGOs like the ICRC, diplomats and politicians is indeed very dark if it was true.

Suter's conclusion is "that wars negate human rights and so there is no point in referring to human rights in armed conflicts because the rights do not exist".

This paper will try to prove him wrong.

Schindler, D. Professor. University of Zurich. Hon. member of the ICRC.

The separate evolution of international humanitarian law and of human rights, The International Committee of the Red Cross and Human Rights, Int rev Feb. 1979.

Schindler thinks that after the Second World War, LOAC and earlier national HRL gradually have been drawn nearer to each other and more or less overlap. Both documents have the same purpose: the protection of human beings. Schindler stresses that they deal with different situations and have evolved differently.

LOAC are restricted to protect individuals in wartime, and as far as possible humanize the war,

Schindler points out that even if LOAC and HRL have evolved along different and separate lines it is possible to trace "their spiritual roots" in the eighteenth century. He calls attention to the North American State Virginia's Bill of Rights of 1776.

This paper has, in a subsequent chapter, an example from 1621, a decree by Gustavus II Adolphus of Sweden.

Schindler continues:

"At all times, human rights guarantees have primarily been concerned with the relations between States and their own nationals in time of peace. On the other hand, the treatment of enemy persons in wartime has always remained outside their scope. The cleavage between human rights and the law of war continued even when, after the Second World War, international conventions on human rights were concluded. They, too, govern in the first place relations between States and their own nationals."

Schindler explains that the very fact that the law of war might be discussed in the United Nations would shake the world's confidence in the ability of their organisations to maintain peace. The United Nations International Law Commission decided in 1949, not to make any decisions on the law of war.

“The Universal Declaration of 1948 does not refer in any of its provisions to the question of respect for human rights in armed conflicts. Conversely, the 1949 Geneva Conventions, which were drafted at more or less the same time, made no mention of human rights.”

Anyhow, as Schindler says “unintentionally”, **“a tendency may be detected in the Geneva Conventions of 1949 for their provisions to be considered not only as obligations to be discharged by the High Contracting Parties but as individual rights of the protected persons. An article in each of the four Conventions provides that protected persons may not renounce the rights secured to them by the Conventions (GI, GII, GIII Art 7 and GIV Art 8).”**

He thinks that the common Article 3 is infinitesimal humanitarian rule in an internal armed conflict. This **“encroaches upon the traditional sphere of human rights”**

It was not until the International Conference on Human Rights in Teheran in 1968 (convened by United Nations!) that the relationship between LOAC and HRL became more evident. Many internal conflicts had, at that time, proved the insufficiency of both LOAC and HRL.

The resolution “Respect for human rights in armed conflicts” initiated United Nations’ interest in international humanitarian law. This can be followed up in the Secretary General's annual reports and the resolutions adopted every year by the General Assembly.

“It was the impulse given at Teheran which led the States to consider in a favourable light the development of the Geneva Conventions, whereas the “Draft rules for the limitation of the dangers incurred by the civilian population in time of war” presented by the International Committee of the Red Cross in 1956 had failed to elicit any comparable response.”

“The convergence of international humanitarian law and human rights shows that war and peace, civil wars and international conflicts, international law and internal law, all have increasingly overlapping areas. It follows that the law of war and the law of peace, international law and internal law, the scopes of which were at first clearly distinct, are today often applicable at the same time side by side. Thus, the Geneva Conventions and the human rights conventions may often be applied in cumulative fashion.”

Greenwood, Christopher, Magdalene College, Dean and Joint Director of Studies in Law at the University of Cambridge, UK.

The relationship between jus ad bellum and jus in bello

Review of International Studies, Vol 9 Number 4, October 1983, Butterworths

“The rules of international law governing the legality of the use of force by states, jus ad bellum, and the rules by which international law regulates the actual conduct of hostilities once the use of force has begun, jus in bello, have seldom sat happily together.”

After the Second World War some international lawyers stated that the unlawfulness of war according to the Charter of the United Nations had made LOAC superfluous. The development of many small and medium scale wars showed the necessity of documents like the Geneva Conventions of 1949, the Protocols of 1977 to those Conventions and many other treaties regulating warfare..

In his article Greenwood examines the relationship between the legality of use of force by states and LOAC, **“to consider the way in which they work together”**. In those days international law and the accomplishment of war contained a sharp distinction between peace and war as well as a sharp distinction between peacetime international laws and LOAC. The development in this century has been no or at least a less sharp borderline between peace and war and new laws must adjust to and also have adjusted to this fact. (See, however, Suter)

Even the UN Charter which in Article 2 says that “**All Members shall refrain from the threat or use of force ...**” goes back on its word somewhat in Article 51, talking about the “**inherent right of individual or collective self-defence if an armed attack occurs ...**”. A number of other reasons for justifying the use of force under the umbrella of self-defence are debated, all of them however only using “**such force as is reasonably necessary for the attainment of limited objectives**”. Greenwood proceeds with an example from the Falklands conflict. Neither party considered itself to be at war. Even if they had done so there is nothing in the UN Charter provisions “**to suggest that they cease to apply once a state of war has come into existence**”. He refers to debates on this war and other battles around the world and concludes that the international laws governing peacetime behaviour continue to be applicable during a conflict even if both parties have characterised the hostilities as a war.

As the peacetime laws are still valid in wartime what is the advantage, asks Greenwood, of special laws of war?, As states frequently resort to force in violation of peacetime laws there are, “**pragmatic reasons for retaining the rules governing the manner in which force is used**”. The efforts of many years to codify and develop LOAC and the many good examples of its good use in conflicts are too important to be discarded. The essence of LOAC is the principle of equal application. Without such laws, generally, humanitarian in character, Sir Hersch Lauterpacht, already in the 1950s, meant that warfare was to become even more primitive than it already was. Greenwood also draws attention to the fact that a violation of LOAC, for example using weapons that cause unnecessary suffering, at the same time is a violation against the UN Charter as such actions cannot be regarded as reasonable measures of self-defence. Greenwood states: “**The purpose of the humanitarian rules which comprise the bulk of LOAC is not to confer benefits upon the parties to a conflict but to protect individuals and to give expression to concepts of international public policy.**” He also points out the importance of Article 3 of the Hague Convention IV(Penalty) as very much being a product of its time even when its main purpose was to point out the rights and duties of belligerents in relation to each other. He also remarks that there is no such Article in the Geneva Conventions of 1949, said to have been “**inspired solely by humanitarian aims**”.

Greenwood also declares that peacetime laws are in many ways not sufficient in wartime and that the internationally recognised LOAC fills an essential gap.

One example from his article: The rules for acquisition of property by a belligerent occupant have an important humanitarian function in protecting the livelihood of the inhabitants of the occupied territory. It is therefore essential that LOAC makes clear the circumstances in which an occupant may seize property.

Greenwood very firmly ascertains that the lawfulness of a state’s conduct during an international conflict must take account of respect both the peacetime international laws and LOAC. He finds that the peacetime laws of the UN Charter are addressed to the leaders of states and their policy makers. The application of LOAC is far wider. It imposes obligations not only on the senior officers of a state’s armed forces and the members of its government but on all servicemen irrelevant of rank and on the entire civilian population.

Greenwood ends his article with the statement: “**To regard them (UN Charter, HR and LOAC) as being in competition is nonsense**”.

Hampson, Françoise J. Senior Lecturer, University of Essex, UK
Using International Human Rights machinery to enforce the International Law of Armed Conflicts. *The Military Law and Law of War Review* 1992, Vol XXXI, pp 117-147.

“It must be obvious to any observer of the world scene since 1949 that the rules of the international law of armed conflicts, which seek to protect certain groups from the worst effects of armed conflicts, have been more honoured in the breach than in the observance. The conflict in 1982 in the South Atlantic is an exception. This may be explained by the factors such as the limited number of civilians, a defined battleground and the need for both parties to gain the support of international public opinion”.

The author discusses the problem of enforcement of the law of armed conflicts and suggests that the key element is a lack of political will.

The concern in Hampson’s article is to investigate how the necessary political determination can be created.

Hampson is looking for a forum for examination of breaches of LOAC and tries to **“examine whether the human right machinery could be used indirectly to expose violations of and to seek to enforce the international law of armed conflicts. The question of substance is – can acts in violation of the law of armed conflicts be brought within the terms used to define acts prohibited under human rights law?”** In order to answer this question Hampson investigates if it is possible to modify the prohibition of arbitrary killings and ill-treatment in HRL in a war. She establishes that no way is open for derogation in this particular case, even if many other provisions permit derogations. **“The rights continue to be applicable as a matter of law”.**

Can killing and injuries violating LOAC be included in the formulations of the relevant human rights prohibitions?

“Little attention has been paid to the application of LOAC by HR supervisory mechanisms themselves. That depends on that the majority of emergency situations are internal and would only involve Art 3 of G and GPII, if ratified” The lawyer has to translate the crime from LOAC to HRL.

Hampson, Françoise J.

Human rights and humanitarian law in internal conflicts, paper, kindly placed to the authors disposal.

Hampson exemplifies by isolating HRL to apply only in peacetime and LOAC only in conflicts between two or more states. In such circumstances, she says, **“there would be a legal vacuum with regard to internal armed conflicts”.** This can not be the case. Human Right Treaties apply in peacetime and in all armed conflicts.

Clearly two of the non-derogable rights are of fundamental importance in internal armed conflicts: the protection of the right to life and not becoming subject to torture or inhuman or degrading treatment. This wording will inhibit or restrict measures which a State can take.

The State party is obliged never to violate non-derogable rights.

The conclusion of Hampson’s two articles must be that HRL machinery could be used to enforce LOAC but first every state involved must recognize that some Human Rights continue to be valid in wartime.

Przetacznik, Franciszek, Dr, Adm Law Judge in New York City, US
 Protection of human rights in time of armed conflict. Rev de Droit Penal Militaire et de Droit de la Guerre, 1974, Vol XIII, Pt 2, pp 315-355.

“The best and most effective way of protecting human rights would be to eliminate wars completely from the life of mankind and the possibility of their occurring”. Przetacznik however points out that armed conflicts remain an ever-present phenomenon, not only on the international scene, but also among fractions or regimes within States themselves. A big problem is that, international law has failed to offer protection for the victims in small-scale, internal wars.

In such conflicts the basic human rights have not been recognised. Inhuman treatment, especially of people detained and captured by the opposing forces, is opposed to humanitarian conduct and is a violation of human rights.

Przetacznik wants to identify the weaknesses in the existing laws on the protection of victims of war in armed conflicts. He also wants to see improvements of these laws.. In his article he tries to analyse **“the basic rules of international law on the protection of human rights in time of armed conflict”**. He stresses that this is not only a legal but also a political matter .

Przetacznik confirms from the start that the human rights of the Universal Declaration derives from the rules of the Geneva Conventions and other humanitarian instruments which were **“designated to apply exclusively to situations of armed conflicts”**. The human rights provisions like the Conventions were a strong reaction to the horrors of the Second World War.

“The human rights provisions of the Charter make no distinction with regard to their application as between times of peace and times of war”. Nobody has said this as straightforward as Dr P. He finds it impossible to draw a line through the range of armed conflicts from where human rights should not be applicable. On the other hand he says **“certain right set forth .. in Article 29 .. may be derogated temporarily in specified circumstances”**. ...” **all these instruments / Human Rights Conventions/ proceed from the fundamental rule that their provisions must be respected likewise in emergency situations.**” He also establish the fact that the derogations allowed are of limited nature. The regional instruments for Human Rights are more explicit, mentioning war as one of the conditions for derogation. On the other hand they exclude several rights from possible derogations in a public emergency situation. The Human Rights issued by the United Nations **“provide a basic and substantial minimum of guarantees of the respect for human rights in emergency situations including situations of armed conflict”**. This is very important since Human Rights instruments are applicable on every individual or group, but the Geneva Conventions mostly apply to the protection of people directly involved in the ongoing war or are in the hands of a Party to the conflict.

Dr Przetacznik conclusion is that **“Every armed conflict either international or internal involves violation of human rights”**.

Patrnoic, J., President, Institute of International Humanitarian Law, San Remo Commentary to Rights and Humanitarian Law – Confluence or conflict. Australian Year Book of International Law, pp 109-112.

“A close connection undoubtedly exists between the international humanitarian law applicable in armed conflicts and human rights. The question of respect for human rights in armed conflicts has been widely discussed in international bodies including at the Diplomatic Conference on Humanitarian Law in Geneva.”

Patrnoic points out that this connection can be found in provisions of the GP I –II. The Preamble of Protocol II protects victims of non-international armed conflicts relating to the fact that human rights offer a basic protection to the human being. **“This is the best example of this natural and logical rapprochement between human rights and humanitarian law.”**

Article 1, item 2 of GP I provides that provisions of the Protocol are additional to the rules concerning humanitarian protection of civilians in the power of a Party to the conflict. On the other hand human rights instruments contain provisions relating to concepts in LOAC. The concept of proportionality is for example to be found in human rights law.

It should be observed, says Patrnoic, that several authoritative commentators have emphasized that there are also some important differences between the two bodies of law. Among others he mentions Draper, see Draper in this chapter.

“There is a kind of complementarity and interdependence between international humanitarian law and international human rights. Some basic humanitarian rules are applicable in human rights situations while some basic human rights are also applicable in armed conflict situations.”

“Modern international law is now involved with a great number of international problems arising from the inter-related and inter-dependent interests of States and nations, including broad global problems of the environment, population resources and new forms of armed conflict situations. International law can intervene and act as a force for change based on co-operation in the face of world problems. If humanitarian law and human rights are to develop in response to the much wider range of situations of human distress which now face the community of nations their role must be in essence to promote international co-operation and solidarity. The development of humanitarian law based on international co-operation would therefore also make a contribution to the objectives of general international law. Humanitarian law has always possessed a special universal unifying character transcending national boundaries, derived from the blend of realistic and idealistic factors which it contains. Full account should be taken of this feature in its further development and its very natural “rapprochement” to human rights.”

Skarstedt, Carl-Ivar, Head of Court of Appeal Northern Sweden, deputy President of the Swedish Red Cross Society in 7th seminary on humanitarian issues in the contemporary world in East and West Berlin, 6-9 June 1990.

Respect for International Humanitarian Law in a contemporary world
The need for implementation – in theory and in practice. Intervention.

“International humanitarian law and human rights law have the same fundamental objective: to give human beings, irrespective of where and when, a basic protection from arbitrary treatment. This protection is afforded exactly because we are all human beings. Despite difficult circumstances, despite the acts of the individual: he or she is always a human being, with a face and a name, and a right to be treated without discrimination as a human being.

In the armed conflicts of today, it is clear that the greatest problems, concerning the protection of human beings from arbitrary treatment, exists in the areas of internal conflicts, or non-yet-internal conflicts, the areas of so called internal tension and unrest.

Here the law of protection is not so well or not well enough developed. States have been unwilling to give their internal enemies even the most basic protection. Or, should we say, give them the basic status of human beings?

The nature of these internal conflicts is such that the protection of those who are not participating, is seldom respected.”

Pope John Paul II,

at a visit to the International Institute of Humanitarian Law in San Remo 18th of May 1982

“It is because international humanitarian law has as its basis the rights of which the human person is the original and autonomous subject that that law is universal in its applications. It applies everywhere and in every circumstance, in peace and in war, in normal times and in emergencies due to internal political disturbances and tensions or caused by normal disasters.”

Maybe not a juridical point of view but certainly an important statement made by one of the greatest advocates of humanity.

The Pope continues:

“In spite of the efforts made in modern times on the juridical level to rule out the use of war as a legitimate means of dealing with international disputes, armed conflicts of various kinds continue to be stirred up in one area or another. International humanitarian law must be imposed in the conflicts. There are recognized rules limiting the violence of war and protecting its victims, rules that have now been universally accepted by the common conscience of the peoples of the world, and these rules must be observed.”

Eide, Asbjörn, Director, Norwegian Institute of Human Rights, Oslo

Folkeretten i endring, Hvor hender det? Utenrikspolitisk Institutt.Nr 3, Sept 1991, Translation from Norwegian.

The transformation of LOAC in the latest fifty years has mainly shown itself in the cultivation of international organizations, regionally and globally. Most important for this development is the UN, but many other organizations have signed up. These organizations show the strong increase of cooperation between states and the likewise strong mutual dependence. This involvement intervenes in many areas which, up till now, have been regarded as internal affairs of the sovereign state.

The advance of humanitarian law and especially LOAC and HRL started off at the founding of the UN in 1945. WW 2 became an important foundation/basis which affirmed the humanitarian law had to be integrated into the international community.

At the end of the Second World War Human Rights became a matter of international responsibility, a central part of the planned new legal system that was to be ratified by the UN Charter. Anyhow, the Charter became ambiguous because it tries to balance between international cooperation in order to support HRL and the traditional consideration of respect to state sovereignty. This ambiguity is evident in the UN Charter ban on intervention in a states internal affairs.

Doswald-Beck, Louise and Vité, Sylvain,

D-B is a barrister, Legal advisor at the ICRC.

V is a lawyer, Geneva University and of the ICRC Legal Div.

International Humanitarian Law and Human Rights Law, Int Rev of the Red Cross, March–April 1993

Human Rights treaties consist of a number of rights given to all individuals.

”The law concentrates on the value of the persons themselves who have the right to expect the benefit of certain freedoms and forms of protection”.

There are essential differences between LOAC and HRL. LOAC defines how a party to a conflict is to act in relation to people involved in a war. HRL on the other hand concentrates on a person’s right to special treatment.

Another difference is the wealth of details found in LOAC compared to the, perhaps too concise HRL. LOAC multiplicity should gain on more of HRL simplicity.

A third difference acknowledged by the authors, is that LOAC is universal and HRL contains both universal and regional treaties . Furthermore HRL is divided into civil and political rights on one hand and economical, social and cultural rights on the other hand. The first part requires instant respect but the latter needs measures in the direction of realization of the rights.

The authors also examine the present method of interpretation and implementation.

LOAC has developed from how to regulate a war, code-of- honour, to **“a means of sparing non-combatants as much as possible the horrors of war”**

Even if the purist opinion that the use of force in itself is a violation of human rights expressed at the 1968 Human Rights Conference in Teheran, the conference recommended further developments of LOAC to ensure better protection of war victims. LOAC was acknowledged as **“an effective mechanism for the protection of people in armed conflicts”**.

Doswald-Beck and Vité are convinced that HRL will continue to be applicable in wartime. The difficulty is the so called “hard-core” rights, the not derogable provisions: The right to life, the prohibition of torture and other inhuman treatment, the prohibition of retroactive criminal legislation or punishment. Those and the other rights must be respected as far as possible in the circumstances.

“Recent jurisprudence and the practice adopted by human rights implementation mechanisms have stressed the importance of this...”. It is essential that HRL institutions interpret the manner in which the rights may be applied in practice, Some general statements have been made by the UN Human Rights Committee but normally interpretations have been based on certain restricted incidents. . Of course such a procedure is unacceptable in wartime.

”What is needed is a code of action applicable in advance.”

The authors point out Human Rights lawyers consequently have turned to humanitarian law because **”compliance with it has result of protecting the most essential human rights ...”**

The difference between **“series of rights”** and **“series of duties”** makes a case easier to handle in court.

Capio Ralph . J., Colonel, USAF in a letter to Major General APV **Rogers**, OBE, Chairman, Military Committee International Institute of Humanitarian Law, San Remo, 1994. A letter on the development of the training at the International Institute for Humanitarian Law, San Remo

“The International law of war seeks to regulate the conduct of hostilities and military occupation by establishing internationally recognized and binding standards dealing with, inter alia, the treatment of prisoners of war, the civilian noncombattant populations of belligerent nations, sick and wounded personnel, prohibited methods of warfare and, finally, fundamental human rights in such situations.”

“Within this overall context of law of armed conflict, we must now address the question of just where does the concept of human rights fit. Are the two fields of study compatible? Do they share a common ground or are they entirely separate? In essence, should the proper study of the laws of armed conflict also include a study of the field of human rights as well? And, if so, to what degree?”

Capio then indicates that HRL law developed out of the Law of Armed Conflict and that this was understood by the Nuremberg war crime trials.

“The Charter of the International Tribunal listed a new category of crimes under international law, termed “crimes against humanity”. Not only had international law not recognized such an offence, but the trials of accused violators represented ex post facto punishment – an indication of just how strongly the world viewed this matter.”

Capio points out the basic human rights sources – The Charter of the UN, The Universal Declaration of Human Rights, The Geneva and the Hague Conventions Many of which are universally recognized, at least as customary law.

Many of the Human Rights instruments would be appropriate for a law of armed conflict training program at the San Remo Institute and **“would significantly enhance and reinforce the learning experience”**.

Nowadays of course the Law of the Hague, the Law of Geneva and the Law of New York are of equal significance at the Institute. For the teachers the addition of HRL has not felt like a new dimension but as an additional argument, to teach the students to consider the Rules of Engagement, when they as intermediaries teach military people and civilians. It is another argument in favour for the role the Institute has to perform .

Kirolowa-Eriksson, Maja, professor, International Law, Uppsala University, Sweden. In a seminary at Storkyrkokretsen, Red Cross International Law Association, Stockholm, 24 February 1998.

One of the most important ambitions for the UN organisation is to secure the operation of the Human Rights Declaration.

Most people think that the Declaration nowadays is customary law, others point out different parts as such.

Argumentation for customary law due to Kirolowa – Eriksson:

- The UN Charter is interpreted by HRL Declaration
- Many countries have incorporated HRL into their national law
- Many national courts apply HRL Declaration on legal cases: Germany, France, Africa

The Human Rights Declaration thereby acquires a stronger position – equivalent to LOAC.

Roberts, Adam, Professor at Oxford University, Oxford, UK

The Role of humanitarian issues in international politics in the 1990s.
International Revue of the Red Cross, March 1999, pp 29-43.

“The events of the 1990s have challenged simple assumptions that the world is in the process of creating a more advanced international order. If there is, as some assert, an "International humanitarian order", it is one in which States and institutions have repeatedly adopted the language of humanitarianism only to abandon victims of armed conflict, as in Bosnia and Rwanda, to a dreadful fate.”

“All this is a plea, not for a single new approach by humanitarian bodies, but for complementing their technical and legal expertise with a heightened level of political and historical expertise, and a stronger culture of accountability. There have been too many elements of self-righteousness, self-delusion and ethnocentrism in some approaches to humanitarian advocacy and action. There is a need for more analysis of crises, drawing on political, strategic and area studies. There is also a need for a strong "institutional memory" and a culture of serious research in the humanitarian field. This is both because some of the dilemmas and opportunities that are faced are historically new, and because some of them are timeless. Ignorance is no excuse for repeating old mistakes or making new ones.”

An important contribution which demonstrates the necessity of invigorations adjusted to the time and with possibility and intention to reinforce the treaties.

Forsythe, David, Professor of Political Science at the University of Nebraska-Lincoln,
1949 and 1999: Making the Geneva Conventions relevant after the Cold War, Int Revue of the Red Cross, June 1999, pp 265-276.

“After the Second World War, two documents symbolized the moral aspirations of the international community: the 1948 Universal Declaration of Human Rights, and the 1949 Geneva Conventions for the protection of war victims. The Declaration promised universal human rights in peacetime, the Conventions established the basic rules for humanitarian behaviour in war.”

“The Universal Declaration and the Geneva Conventions exhibit differences, but the similarities remain striking. The Declaration was originally a non-binding United Nations General Assembly resolution, “a statement of aspirations”, in the words of one of its champions, Eleanor Roosevelt. The four interlocking Geneva Conventions were detailed treaty law produced by a diplomatic conference. It may be that parts of the Declaration have passed into customary law, just as much of the 1949 Conventions may have done. The larger point is that each set of norms carries significant moral weight in the world, far beyond the relatively few court cases that have made reference to them.

Both of them exercise considerable influence through extrajudicial processes such as foreign policy and military training, through private action and through UN field operations. The international instruments remain fundamental reference points for correct conduct in peace and war. They exercise more influence through the “ soft law “ of extrajudicial policymaking than through the “ hard law “ of court pronouncements.”

Another scholar who does not reject this or that law but thinks that they complement each other and that we should watch over the goodwill of them both. Nevertheless, the question remains, if restored vitality can also include this goodwill.

Kolb, Robert, Doctor Int Relations, Geneva

The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions, , Int Revue of the Red Cross, September 1998, pp 409-420.

“Today there can no longer be an doubt; international humanitarian law and international human rights law are near relations. This oft-repeated observation must now be accepted by all. Many believe that the close relationship between these two areas existed and was perceived "from the outset". That is not at all the case. Formerly assigned to separate legal categories, it was only under the persistent scrutiny of modern analysts that they revealed the common attributes which would seem to promise many fruitful exchanges in the future.”

Kolb has chosen to forget a considerable part of history.

“There are two kinds of reasons for the almost total independence of international humanitarian law from human rights law immediately after the Second World War. The first relate to the genesis and development of the branches concerned. The law of war has its roots in Antiquity. It evolved mainly during wars between European States, and became progressively consolidated from the Middle Ages. This is one of the oldest areas of public international law; it occupies a distinguished place in the writings of the classical authors of this branch. Its international aspect is also emphasized by the contributions of Christianity and the rules of chivalry and of jus armorum”.

“Human rights are concerned with the organization of State power vis- the individual. They are the product of the theories of the Age of Enlightenment and found their natural expression in domestic constitutional law. In regard to England, mention may be made of the 1628 Petition of Rights the 1679 Habeas Corpus Act and the 1689 Bill of Rights; for the United States of America, the 1776 Virginia Bill of Rights; for France, the 1789 Declaration of the Rights of Man and of the Citizen. It was only after the Second World War, as a reaction against the excesses of the Axis forces, that human rights law became part of the body of public international law. The end of the 1940s was when human rights law was first placed beside what was still called the law of war. The question of their mutual relationship within the body of international law can be considered only from that moment. But human rights law was still too young and undeveloped to be the subject of analyses, which require a better-established sphere of application and a more advanced stage of technical development”.

Kolb is reproducing a false picture of the development of HRL and LOAC

He is forgiven because he is brave enough to bring up one of the greatest mistakes made after the Second World War.

“The other reasons are institutional in nature. The most important one relates to the fact that United Nations bodies decided to exclude all discussion of the law of war from their work, because they believed that by considering that branch of law they might undermine the force of jus contra bellum, as proclaimed in the Charter, and would shake confidence in the ability of the world body to maintain peace.’ In 1949, for example, the United Nations International Law Commission decided not to include the law of war among the subjects it would consider for codification.”

This essential point is also stressed in the concluding chapter

24th Round table on Current Problems of Humanitarian law,

50th Anniversary of the Geneva Conventions, Summary report, Conclusions-recommendations, The IIHL San Remo, 2-4 September, 1999

From the protocol

Referring to the discrepancy between the progress made in the area of International humanitarian law (IHL) and the setbacks of unspeakable acts of inhumanity committed in particular against civilian populations in recent armed conflicts, the Secretary-General mentioned his intention to draw the attention in his Annual Report to the humanitarian challenges we are likely to face in the coming years. In a separate report to be submitted to the Security Council, Mr. Kofi Annan wishes to outline what needs to be done to enforce the implementation of the IHL.

Mr. Kofi Annan is the first General Secretary who has had the guts to take up LOAC on the agenda in the UN. This step is maybe the first step towards improvement and something new.

The UN Under Secretary Mr. Vladimir **Petrovsky** noted the increasing convergence between the IHL and human rights. We must still not overlook the truth that although we are moving forward conceptually, in practice we are marching steadily backwards. In reality, armed conflicts, especially internal conflicts, are becoming more cruel and brutal than ever before. The primary victims and even primary targets are civilians. Therefore, we must remain idealistic in our minds and pragmatic in our deeds.

Prof Dr. Fausto **Pocar** representative of the Italian Ministry of International Affairs affirmed that some interesting proposals in this direction were elaborated by the International Law Institute, in a Resolution on the application of the IHL and fundamental human rights "**in armed conflicts in which non-state entities are parties**", adopted on the 24 August during the Berlin session.

Prof Dr. Jovan **Patrnogic**, President of the International Institute of Humanitarian Law mentioned the adoption by the Sub-Commission for the Promotion and Protection of Human Rights, of a resolution (20.08.1999) - entitled "The Question of the Violation of Human Rights and Fundamental Freedom in all countries" which aimed at remembering that the fundamental principles and rules of the IHL should be applied to all armed conflicts without any discrimination.

The main subject for the Round Table was
Fundamental Human Rights and the Geneva Conventions

Prof Dietrich Schindler's introductory report on the "Significance of the Geneva Conventions for the Contemporary World" was devoted to the problem of two contradictory trends characterising the development of the IHL in the past fifty years. On the one hand we have all seen an enormous progress in the IHL in this half of the century. On the other hand, however, we were also frequently confronted with gross violations of the Geneva Conventions and the frightening increase of inhumanity and cruelty committed in armed conflicts especially in recent years.

As to the progress of the IHL Prof. Schindler distinguished three periods of development.

The first period covers the time between the end of World War II and the early 1960s. In this period the four Geneva Conventions were adopted. Although the UN, for good reasons, were not involved in the revision of the law of war, there can be no doubt about the considerable influence exercised by the Organisation on the Geneva Conventions. During the second period, between the 1960s and the 1980s, a number of great wars broke out, notably the Vietnam War, the civil war in Nigeria/Biafra, the wars between the Arab states and Israel and the wars of national liberation in Africa. Mainly, the latter type of conflicts induced the increasing interest of the UN. The General Assembly adopted numerous resolutions claiming that wars of national liberation be regarded as international armed conflicts and freedom fighters be treated as prisoners of war.

The 1968 International Conference on Human Rights in Teheran and the UN General Assembly adopted resolutions introducing the new term "**human rights in armed conflict**". The UN also gave the impetus for adoption of new instruments of the IHL and for the gradual amalgamation of what was called the Geneva, the Hague and the New York law.

The third period started in 1989 and has brought about a very intensive progression of the IHL. The Security Council's decision that large-scale violations of human rights and humanitarian law constitute a threat to international peace and security. The creation of international tribunals, the gradual disappearance of the distinction between international and non-international armed conflict, the growing importance of customary law, the influence of human rights law on the IHL were all together milestones of the progress in this period.

Prof. Schindler comes to the conclusion that the present day non-observance of the IHL is caused by the fact that most armed conflicts are conducted mainly by groups of people lacking clear command structures, being untrained in the conduct of hostilities and unfamiliar with the principles and rules of the IHL. Another reason for the non-observance of the IHL must be seen in the fact that reciprocity has lost its relevance.

Author's comment

The fact that there are more young uneducated killers than trained soldiers in the crowds of most ongoing wars, accentuate the fact that HRL and LOAC must be kept simple and distinct.

Espiell, Héctor Gros, Ambassador, former Foreign Minister of Uruguay

Through a comparative analysis of the IHL Conventions and the Human Rights instruments Espiell demonstrated the interdependence between Human Rights and the IHL. They have common principles and common aims: protection and defence of the human being. The Resolution of August 1999 adopted by the Institute of International Law in Berlin shows this interdependence, that is, if human rights have an influence on the development of the IHL, so do the IHL principles on human rights. As proof of the narrowing gap between these two branches of law it is necessary to consider common Art. 3 of the four Geneva Conventions.

Specific differences also exist between the IHL and human rights. The IHL remains a very

specific branch of law applying to war situations. Also the structure of protection is different depending whether it forms part of the IHL or of human rights.

Yet, it is high time to create common spaces where Humanitarian law and Human Rights can meet.

Ambassador Gros Espiell considered that only the humanitarian aspect, common to both branches of international law, should prevail.

Jacobsson, Marie, Dr Int Law, Ministry of Foreign Affairs, Sweden.

A Swedish opinion about the future HRL, Seminary arranged by the Swedish Red Cross and The Agency for Civil Emergency Planning, 1 October 1999. Translation.

Sweden is aiming towards "International Humanitarian Standards" simply to dispense with discussions of what should be used, peace or war, international or internal.

DESTRUCTIVE AND CONSTRUCTIVE ATTEMPTS TO BRIDGE THE GAP

Human Rights have not developed or achieved its desired effects.

The progress of LOAC has failed to appear apart from some weapons prohibition.

Representatives of HRL and LOAC have met but no session has produced any useful results.

Many people realized early that the international humanitarian law had to be simplified and brought up to date – find a new standard. The main operators, the ICRC and the UN Human Rights Commission have been passive too long.

Suddenly there is a pressing need of adjustment of the rules or their applicability. The stress factor may be mad warlords from Serbia, Somalia or any other country. That is not a favourable time, to take prompt action on something as important as the IHL.

Knowledge is a prerequisite for people who are to compose a minimum standard package. This package should not be formulated in each specific case.

To just extract parts of conventions or protocols is not a good enough method. This is common knowledge and still there are a number of destructive examples of which a couple will be noted

Certainly the common article 3 in the Geneva Conventions says that **“the parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the ... convention”**. The intention can definitely not have been that single articles should be chosen while war is raging at its height.

The Balkan crisis

As early as six days after the war started, the ICRC tried to control the use of LOAC in the war in Slovenia and Croatia in 1991. Yugoslavia declared that the war was internal and did not meet the ICRC demands.

8 November 1991 the new countries were declared sovereign states and the war became an international war.

The belligerent parties said that they accepted LOAC but they never signed the document. However, they agreed that “international law” would be observed.

This was not enough for the ICRC and attempts were made to make the states accept applicable laws.

The ICRC started negotiations to persuade the belligerent parties to accept at least certain articles of the Conventions, Protocols and the Weapons Convention. In brief, bad judgment in a difficult situation. Many, important parts were not included. 27 November, 1991 a four-page memorandum of understanding was signed in Geneva by representatives for the Yugoslav Peoples Army, the Republic of Croatia and the Republic of Serbia.¹⁴

The memorandum with 14 articles is a substitute for the serious work of many diplomats, ICRC members and governments all over the world. It replaces the Geneva Conventions which is considered customary law!

Below one example of absurdities in the memorandum. The first article in the document contains “Treatment of sick and wounded” (and shipwrecked) The mere wording must be a nightmare for a lawyer. Does it promise plaster or does it mean in full accordance with the convention?

¹⁴ Appendix 1 in this chapter

Sick and wounded are mentioned only in very few paragraphs in the Convention, everything else is built up around how to make it possible to take care of the sick and wounded. There is nothing about this in the memorandum. Nothing about

Protecting Powers

Red Cross activities

Protected persons

Search for casualties

Recording information

Prescription regarding the dead

Graves, registration, service

Protection of medical personnel. units and transports but the emblem

Hospital zones

And – above all – nothing about grave breaches responsibilities but for demands for appropriate instruction even to “**paramilitary or irregular units not under their command, control or political influence**”. What a task!

Similar critical remarks can be made on most of the articles. A few of them, however, are very brief and could do as a model for rewriting the Conventions for example Tracing of missing persons and Red Cross emblem.

it was a relief when, 23 May 1992, the Federal Republic of Yugoslavia and the Republic of Croatia, in Geneva, signed an addendum to this memorandum, undertaking to respect ... the Four Geneva Conventions and Protocol I.

A victory for those affected and for the ICRC. ¹⁵

BUT then Bosnia preferred to repudiate LOAC.

The memorandum was followed by, at least on two occasions, agreements, as the situation in the Balkan changed.

One agreement was signed 22 May 1992 and another one day later, in Geneva and the signing parties were the Republic of Bosnia-Herzegovina, the Serbian Democratic Party, Party of Democratic Action and the Croatian Democratic Community.

The signed document has the same weaknesses described above but the text is more elaborate. The incorporation of the common article 3, slightly changed, must be seen as a notable improvement An implementation part is also added with the intention to make it easier or possible for the ICRC to operate in the area - an important article if it had been followed. The document was met with international approval as a legal document, but did not make the war more humane. This document should perhaps never have been written, it was probably forced by the UN. An astonishing ICRC performance.

The third agreement ¹⁶ is more matter-of-fact document allowing the ICRC to do their job, routes, food rations and so on. It contains “articles” from the Conventions, intermixed: evacuations, access to prisoners, information campaign. It is a clever piece of work as long as the Parties do not think that fulfilling this document is enough as regards humanitarian law.

There is nothing what-so-ever in the agreements about Human Rights Law, the protection of the individual. Common article 3, has to play a very significant role to protect the individual human being.

¹⁵ Appendix 2 in this chapter.

¹⁶ Appendix 3 in this chapter.

In order to observe agreements, even poor ones, people, on every level, have to be sensible - and they were few on the Balkan war scene.

Not minimizing the ICRC's problem, it would have been of advantage to the agreements, if the ICRC expertise had had confidence in the grand penetrative power a condemnation of not signing the Conventions and Protocols - both I and II - would have had on the belligerent Parties.

In an article Professor Rowe¹⁷ asks if those who ignore agreements are liable under international law for evident disregard of the Convention or of the Protocol. The answer must be negative since the provisions for evident disregard are not agreed upon. If they had been defined in the agreement it is still doubtful if they could have been the base for prosecution.

Professor Rowe explains:

"First, since the conflict is of a non-international kind there is no precedent for individual liability for war crimes under international law. Secondly, as the agreements have been made by the various parties to the conflict no other state has any *locus standi* in respect of them. Thirdly, the objective of a common Article 3 special agreement, to offer greater protection to individuals, may be defeated if states, by entering into them, make those who act on their behalf liable for war crimes, when this would not be the case were they not to enter into such agreements."

Professor Rowe's conclusion is that a liability for war-crimes in non-international armed conflicts, like the one used in international armed conflicts, would be an advantage.

Another example

Observance by United Nations forces of international humanitarian law

The Secretary-General's Bulletin, The Secretariat, 6 August 1999.¹⁸

This "Mini-Convention" leaves a great deal to be desired. Some remarks-

Field of application

"UN forces when in situations in armed conflict ... as combatants ...actively engaged ... for the duration of their engagement. Does not effect their protected status as non-combatants".

LOAC can not be written for one side in a conflict. Furthermore, it is not possible to change from combatant to not-combatant status by shouting "PAX", crossing his fingers and thereby turn back into a protected status. Once a combatant, stays a combatant throughout the crisis.

Application of national law

"The present provisions do not constitute an exhaustive list of principles and rules of IHL... ... they do not replace the national laws by which military personnel remain bound ..."

One problem with the Observance is that it picks excerpts here and there in the jungle of LOAC. That method should be analysed.

In some countries a soldier is responsible for not making his own decision in a delicate situation. In another country he can be brought to court if he does.

Such lack of conformity has not been changed in the long history of UN military engagements.

¹⁷ Rowe, Peter, Professor of Law, University of Liverpool, UK.
Liability for "War Crimes" during a non-international armed conflict.
The Military Law and Law of War Review, 1995, pp 149-168.

¹⁸ Appendix 4 in this chapter.

Status-of forces agreement

“... shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel.”

If LOAC is alluded to, why don't say so?

Violations of international humanitarian law

“...national court.”

Protection of the civilian population (and objectives)

Clearly, the text is a summary of LOAC provisions on the matter. From juridical point of view it might have been better to point out which provisions. The national court would have been happier if they could use “grave breaches”-provisions. Military necessity is expressed “**would be excessive in relation to the concrete and direct military advantage anticipated**” which really is a choice of vague language.

Means and methods of combat

The Hague and the Weapon conventions are compacted into nine short articles! It shows that it is possible to modernize and shorten LOAC, maybe not to the extent shown here. The mixed enumeration makes it hard to understand.

Treatment of civilians and persons hors de combat

G IV in four articles!

Treatment of detained persons

In this section G III is referred to. Seven articles are chosen as more important than the others.

Protection of the wounded, the sick, and medical and relief personnel

A summary of every Convention concerning the parts related to the headline. This is a real compact article, a dream for a teacher on LOAC, but many important articles are missing.

The Observance is an entirely not necessary paper, that only can give rise to misunderstandings.

With his signature Mr Annan has shown, that in his opinion The Hague, The Geneva Conventions and the Protocols should be the law for the UN troops.

If the people in the countries where the Blue Berets are deployed know that LOAC is the law, hopefully they chose the same law, if they have not already done so.

It is strange that the scope between peace and war is not even mentioned. That is the situation in which the UN forces most often work, not peace, not war.

HRL and the cooperation between LOAC and HRL is another topic not even mentioned.

There are also constructive attempts

Humanitarian Law in Armed Conflicts – Manual, edited by the Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English Edition.

The manual will serve soldiers and civilian personnel of all command levels. There is also an abridged version of the manual with the addendum – Principles.

From what the UN Secretariat in the Observance had reduced into unrecognizability on three pages the Federal Ministry of Defence has made a 154 pages handbook of, concentrated facts about LOAC.

This manual masters a great difficulty in the application of LOAC. To best use the Conventions and Protocols texts calls for reasonable knowledge, acquaintance and experience of reading legal text. It is not possible to use the “latest” paragraph on a subject, one must go back to The Hague, add the Geneva Conventions and use what is in the Protocols. Together, these documents make up the answer. The manual collects every legal view on a subject, gives the legal references and examples to enlighten the text.

The manual fulfils a great need in the teaching of LOAC

However, it is astonishing that it is possible to issue such a manual in 1992 without even mentioning the words human rights or talk about borderline cases peace – war.

Due to the manual, Martens Clause and Common article 3, and where they are ratified, GP II, are the last resort for non-international conflicts. **Not one word on Human Rights!**

Minimum Humanitarian standards, International Symposium, Institute for Human Rights, Åbo Akademi University, Turku/Åbo 30 November 1990.

The symposium, visited by many of the most first-rate scholars in the field of the IHL, added further to the Oslo Statement on norms and procedures in times of public emergency or internal violence.¹⁹

The workshop emphasized “**the urgency of securing universal observance**” notably the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Geneva Conventions and Protocols on Humanitarian Law applicable in Armed Conflict.

The workshop also called for “**full respect for human rights and humanitarian law during situations of public emergency of internal violence and insist on the strict observance of Article 4 of the International Covenant on Civil and Political Rights and Common Article 3 of the Geneva Conventions**”.

The Symposium in Finland ended with the so called “Oslo and Åbo declaration of Minimum Humanitarian Standards of 2 December 1990”.

In the introduction Asbjörn Eide and Allan Rosas²⁰ established that in situations of internal violence and public emergency “**the normative framework is rather weak**”.

“**If the situation falls short of an armed conflict, humanitarian law does not apply. And if the situation at the same time involves internal violence, states may be able to proclaim a public**

¹⁹ Workshop in Oslo, Norwegian Institute of Human Rights, Norway, 15 –17 June 1987.

²⁰ Rosas, Allan, Director, Åbo Akademi University, Inst for Human Rights, Turku/Åbo, Finland

emergency and consequently derogate from many, if not all, of the provisions of human rights conventions to which they have adhered.

Furthermore, in this “grey zone” between humanitarian law and human rights law, national system of democratic and legal controls may often break down or be considerably flawed.”

The participants in the symposium wanted to point out some major features of the Declaration.

- The Declaration contains *substantive standards* rather than procedural rules.
- It is of a *general* character and is not linked to any particular existing legal instrument
- The declaration combines elements of both *humanitarian law* and *human rights law*
- It is, in principle, applicable *in all situations*, during peacetime as well as wartime, and thus does not contain any threshold of applicability
- The standards affirmed in the Declaration *cannot be derogated* from under any circumstances and must be respected, whether or not a state of emergency has been proclaimed
- The standards shall be respected by, and applied to, *all persons, groups and authorities*, thus including both governments and their possible opponents
- The Declaration is fairly elaborate and may include elements not only of the *reaffirmation* of existing treaty and customary law but also of *progressive development*

The “Preamble” establishes that every phase from a state of calm, normality to war is covered. Where existing laws are not enough established, customs and the dictates of public conscience should cover the rest. The preamble is the most important part of the declaration as it covers the “black hole”. The articles are a development of Human Rights with some parts added from LOAC. After some rework the elaborated articles are more detailed and easier to apply than HRL. The text is short, easy to understand and covers the main problems. The combat in itself is not included, probably because that situation is so well covered by LOAC and easy to apply.

It is a mystery that this declaration has not been recognized and generally known and why it has not been accepted as a complement to HRL.

The question is if the idealists, and foremost idealists working with HRL, have been given too much power at the scientists’ and academics’ expense. It is counterproductive to disregard reality.

Rules that are directed at their intended aim are better than rules not regarding reality. That goes without saying – doesn’t it?

Other initiatives comparable to the Åbo Declaration have been taken.

Examples are

Gasser, Hans-Peter, “Code of Conduct in the event of internal disturbances and tensions”,²¹

Meron, Theodor, “Draft Model Declaration on Internal Strife”.²²

By way of conclusion it seems appropriate to quote an old truth this time expressed by the late Court of appeal Judge Carl-Ivar Skarstedt²³:

“To be able to perform their task of protection, the rules have to be implemented before the extraordinary situation in which they are needed ever arises.”

²¹ International Review of the Red Cross, No 262, January-February 1988, pp 51-53.

²² International Review of the Red Cross, No 262, January-February 1988, pp 59-76.

²³ Skarstedt, Carl-Ivar, Head of the Court of Appeal, Northern Sweden, Deputy President of the Swedish Red Cross Society in 7th seminary on Humanitarian issues in the contemporary world in East and West Berlin, 6-9 June, 1990.

Law of Armed Conflict versus Human Rights Law

EXPLANATIONS OF THE INVESTIGATION

The ICRC CD "International Humanitarian Law, version 4 – 311296 has been used as foundation for the investigation of LOAC.

Articles of the conventions connected to HRL articles are presented together with HRL article number added in the right-hand column. The titles of conventions without connections to HRL are included on account of the general picture.

Two methods have been used in the investigation.

1. A search for differences in HRL connections in
 - Before The Hague 1907
 - The Hague 1907 to Protection of Civilian Populations Against New Engines of War, Amsterdam, 1938, Draft
 - The London Tribunal 1945 to Laser Weapons Protocol 1995.

2. A presentation of groups covered by the displayed articles seeing that the articles often deal with define groups of people. The subdivisions are:
 - LOAC article is entirely generally applicable as well as the corresponding HRL article.
 - LOAC article refers to a limited group "restricted" like fishing vessels, means of transportation, cultural buildings, town people etc
 - LOAC article refers to an extremely limited group "small-scale" like sutlers, reporters, contractors, officers POW, partisans, ambulance personnel, quarter-master staff, medical, chaplains, spies, internees, women, wounded etc

Of course, the generally applicable articles are very important when it comes to show the relations between LOAC and HRL. Yet it is interesting to demonstrate that HRL also contains small-scale everyday problems of war.

HRL articles in brackets indicate a more remote relation i.e. that cultural buildings should be saved, is, no doubt, connected to the articles 18, 20 and 27 of HRL Declaration

LOAC articles are often complex allowing several HRL articles to match. Only the most important and obvious have been chosen.

Conventions in the Hague 1907

Period 1

HRL		LOAC		
		General	Restrictions	Small-scale
	Preamble	16		2
1	Free, equal in dignity and rights. Brotherhood	2		
2	Without distinction to race, colour, sex, language,	3	1	5
3	Right to life, liberty and security of person	20	5	18
4	No one held in slavery or servitude, the trade prohibited	9		5
5	No one subject to torture or to cruel, inhuman or degrad	17	1	11
6	Right to recognition as a person before the law	1		
7	Equal before the law	3		1
8	Right to an effective remedy for acts violating the funda			
9	No one subject to arbitrary arrest, detention or exile	1		7
10	Entitled to a fair and public hearing			
11	Presumed innocent until proved guilty	3		4
12	No interference with privacy, family, home or correspon	2		
13	Right to freedom of movement and residence within the	1		4
14	Right to seek and enjoy asylum from prosecution			1
15	Right to a nationality and to change nationality	1		
16	Right to marry and found a family	2		
17	Right to own property	23	2	4
18	Freedom of thought, conscience and religion	3	2	2
19	Freedom of opinion and expression	4		
20	Right to peaceful assembly and association			
21	Right to take part in the government of his country	1		
22	Right to social security		1	3
23	Right to work, free choice of employment		2	3
24	Right to rest and leisure			
25	Right to a standard of living	2		18
26	Right to education			
27	Right to participate in the cultural life, protection of pro		2	
28	Entitled to a social and international order	2		

Conventions from The Hague 1907 to Civilian Populations Against ..., 1938
 Period 2

HRL		LOAC		
		General	Restrictions	Small-scale
	Preamble	1		1
1	Free, equal in dignity and rights. Brotherhood			
2	Without distinction to race, colour, sex, language,	2		2
3	Right to life, liberty and security of person	8	5	8
4	No one held in slavery or servitude, the trade prohibited		1	1
5	No one subject to torture or to cruel, inhuman or degrad	8	6	16
6	Right to recognition as a person before the law			1
7	Equal before the law			3
8	Right to an effective remedy for acts violating the funda			
9	No one subject to arbitrary arrest, detention or exile		2	1
10	Entitled to a fair and public hearing			3
11	Presumed innocent until proved guilty			4
12	No interference with privacy, family, home or correspon		3	9
13	Right to freedom of movement and residence within the		1	2
14	Right to seek and enjoy asylum from prosecution			
15	Right to a nationality and to change nationality			
16	Right to marry and found a family			
17	Right to own property	3	1	5
18	Freedom of thought, conscience and religion	2		2
19	Freedom of opinion and expression	1		2
20	Right to peaceful assembly and association			
21	Right to take part in the government of his country			1
22	Right to social security		1	6
23	Right to work, free choice of employment		1	5
24	Right to rest and leisure			3
25	Right to a standard of living		4	22
26	Right to education			
27	Right to participate in the cultural life, protection of pro	1		4
28	Entitled to a social and international order			

Conventions from London Tribunal 1945 to Laser Weapon 1995

Period 3

HRL		LOAC		
		General	Restrictions	Small-scale
	Preamble	16		
1	Free, equal in dignity and rights. Brotherhood	1		
2	Without distinction to race, colour, sex, language,	7	4	1
3	Right to life, liberty and security of person	31	34	2
4	No one held in slavery or servitude, the trade prohibited	1	4	
5	No one subject to torture or to cruel, inhuman or degrad	22	20	2
6	Right to recognition as a person before the law	2	6	
7	Equal before the law	5	3	1
8	Right to an effective remedy for acts violating the funda			
9	No one subject to arbitrary arrest, detention or exile	6	5	
10	Entitled to a fair and public hearing	1		
11	Presumed innocent until proved guilty	4	1	1
12	No interference with privacy, family, home or correspon	2	6	
13	Right to freedom of movement and residence within the		5	
14	Right to seek and enjoy asylum from prosecution	1		
15	Right to a nationality and to change nationality	1	1	
16	Right to marry and found a family	2		
17	Right to own property	4	13	
18	Freedom of thought, conscience and religion	3	6	
19	Freedom of opinion and expression			
20	Right to peaceful assembly and association			
21	Right to take part in the government of his country			
22	Right to social security	2	9	1
23	Right to work, free choice of employment	1	7	1
24	Right to rest and leisure		2	
25	Right to a standard of living	8	24	1
26	Right to education	3	2	
27	Right to participate in the cultural life, protection of pro	1	6	
28	Entitled to a social and international order			

THE OUTCOME OF THE ANALYSIS OF HRL IN LOAC

The motto for this paper testifies that HRL was relevant for warlords in the dim and distant past. Probably not for Attila, the Hun, but for many of the more civilized warlords thereafter.

A more immediate example is "Humanitarian Law in the articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden"²⁴, about whom there still is a saying in Germany: Bet Kind, bet Kind, Morgen kommt der Schwede. "Pray child, pray child, the Swede is coming tomorrow".

Law of 1621

Article 88

He that forces any Woman to abuse her; and the matter be proved, he shall ye for it.

Article 89

No Whore shall be suffered in the leaguer; but if any will have his owne wife with him, he may. If any unmarried woman be found, he hat keepes her may have leave lawfully to marry her, or els be forced to put her away.

Article 90

No man shall presume to set fire on any Towne or Village in our land: If any does, he shall be punished according to the importancy of the matter, so as the Judges shall sentence him.

Article 91

No Soldiour shall set fire upon any Towne or Village in the enemies land; without he be commanded by his Capatine. Neither shall any Captaine give any such command, unlesse bee bath first received it form Us, or our Generall: who so does the contrary, he shall answer it in the generals counsaile of Warre, according to the importance of the matter. And if it be proved to be prejudiciall unto us, and advantageous for the enemy; he shall suffer death for it.

Article 99

No man shall presume to pillage any Church of Hospitall the strength be taken by assault, except hee bee first commands the soldiers and Burgers be fled thereinto and doe harme from Who does the contrary, shall be punished as aforesaid.

Article 100

No man shall set fire upon any Church, Hospitall, Schoole, or spoyle them any way, except hee bee commanded. Neyther tyrannize over any Churchman, or aged people, men of Women, or Children, unlesse they first take Armes against them, under punishment at the discretion of the Judges.

Ögren: **"Although the humanitarian rules contained in the Articles of War are of a very rudimentary nature they nevertheless point to the ever-present need for a measure of humanity in the midst of warfare"**

With reference to penalties laid down in them, these articles constituted a major improvement.

This concern for human beings is found to a great extent in the old conventions up to the Hague 1907.

²⁴ Ögren, Kenneth, Master of Law. Upsala University, Sweden. Int Rev July-August 96, p 438- Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden.

The old rules from the first period have an astonishing great number of rules covering HRL both on general and small-scale terms.

Most agreements concern HRL Art 3 – Right to life, liberty and security. Here LOAC has a concentration on the security section.

Almost the same congruity is found for Art 5 – No one subject to torture or to cruel inhuman ... In the small-scale part LOAC usually points out that the victims, for which the whole convention or parts of it should be applied, should be taken good care of and given a “standard of living” – Article 25 in HRL.

LOAC rules often repeat that pillage is prohibited. This agrees with HRL Art 17 – Right to own property.

The most distinctive feature of the rules of the second period from The Hague 1907 to the Second World War is their limited outlook, the small-scale perspectives. Only Art 3 – Right to life ... and Art 5 – No one subject to torture ... apply a wider outlook. The small-scale sections mostly deal with POW issues.

The conventions from this period, specially the Hague 1907, are often described as mostly dealing with hostilities as such, with conduct of operation and with neutrality. On the whole this is correct, but the investigation shows that the protection of humans is conspicuous also here.

The conventions and protocols of the third period – after the Second World War – in the first place are said to aim at protection or assistance to victims of armed conflicts. This is obvious in this investigation. The general protection has grown into something more substantial and developed in comparison with conventions from the pre-Hague 1907.

Protection with restrictions – applicable to large, clearly defined groups is abundantly found in this group. Small-scale i.e. a selection of separate “objects” is practically absent. In such cases the Hague 1907 or even better, the earlier conventions have to be used.

In figures the investigation illustrates the fact that LOAC teachers have repeated over and over – the whole system of rules has to be used. The latest article is not enough.

Articles in accordance with HRL are numerous and readily seen. The general view, found in the HRL preamble, is as typical here as in the pre-Hague 1907 conventions.

Right to life, liberty, security is the pervading characteristic of the modern conventions as is the treatment of people (HRL Art 5 and 25).

Limitations in comparison to HRL are that freedom of opinion and expression and right to peaceful assembly and association are missing. Also the right to take part in the government of the country is poorly exemplified in LOAC, a not surprising fact.

The Council of Delegates²⁵, ICRC have drawn attention to these limitations. The same document notes that the: **“LOAC contains rules for the protection of the human being in armed conflict which are much more detailed and adapted to the circumstances than are certain human rights clauses”**

²⁵ The Red Cross and Human Rights, Council of delegates, Geneva 13-14 October 1983, Provisional agenda, Item 7, Working document CD/7/1 and summary of Working document CD/7/1/1.
Relationship between International Humanitarian Law and Human Rights.

It also says that HRL is **“applicable at all times, although they may have a greater chance to be fully implemented in peacetime”**.

One distinction is, it is said, that LOAC has more limited objectives than human rights. This is not quite right, the distinction should be expressed that LOAC has general but also limited objectives in the HRL field.

“As far as the protection of life during hostilities is concerned, it is obvious that the lives of combatants cannot be protected whilst they are still fighting. However, humanitarian law is not totally silent even here. For the rule that prohibits the use of weapons of a nature that causes unnecessary suffering is partly aimed at outlawing those weapons that cause an excessively high death rate among soldiers”.²⁶

The protection of civilians during hostilities was easier during the eighteenth and nineteenth centuries as the military tactics at this time made it possible.

It is obvious that many LOAC articles deal with the possibilities for non-combatants to survive. Starvation of non-combatants is prohibited. Special protected zones should be set up and many detailed articles about medical care of wounded can be found. These articles are directly linked to, inter alia, HRL article “Right to standard of living”, but here more detailed and more clearly expressed – which is characteristic for LOAC.

In retrospect most wars have had a strong element of religious antagonism. Therefore it is not surprising that the HRL article dealing with Freedom of ... religions is powerfully expanded in LOAC.

It is also interesting to note that genuine weapon prohibitions like ENMOD can be regarded as purely focused on the saving of mankind, which is altogether a development of parts of HRL. The culture convention as well as the Washington Pact –35 can also be seen as completely in accordance with HRL - in general as it is difficult to denote any special HRL article.

Doswald-Bech and Vité show that LOAC like HRL **“is based on premise that the protection accorded to victims of war must be without any discrimination”**.

Large parts of LOAC are devoted to the protection of life and this has “a direct beneficial effect on the Right to life”.

Even if the life of combatants not always can be saved, LOAC restricts weapons which cause an excessively high death rate among soldiers.

Doswald-Bech and Vité also discuss the protection given civilians by erecting special protected zones.

Several other examples are discussed and show good correspondence between LOAC and HRL. Their opinions are in line with the results of the investigation.

Professor Schindler too, notes that the agreement between LOAC and HRL exists to a large extent, but that a more specific definition often is needed in armed conflicts. One

²⁶ Young, Ilboto, DAVA Washington DC, ICRC Publ., February 1996.

illustrative example is the right to life, **"since the killing of enemy military personnel is considered to be a legitimate act"**.

Professor Przetacznik presents similar opinions but points out that even if LOAC is verbose it still lacks definitions for "espionage and sabotage and the seriousness level is very vaguely defined". This might imply that the Right to life is not as well protected by LOAC as by HRL, which is supplementary to the criminal laws.

In addition to the hard core rights of HRL professor Przetacznik displays and illustrates similarities between HRL and LOAC, like for example Right to fair trial, Recognition of civil capacity, prohibition of retroactive penal legislation and arbitrary arrest.

He also points out the realities of war, like forced or compulsory labour, where the possibility to use POWs for labour are restricted down to a correspondence to a majority of HRL articles.

CONCLUSION

The ongoing discussion in international humanitarian law circles about the need of changes of the protection of human beings has been related earlier in this paper

People not associated to these circles have seen major changes as impossible. People who have participated as experts in the creation of the conventions, have seen how difficult it is to formulate rules and then get them ratified. It has been such a hard fight to establish the rules that the rules themselves became kind of sacred during the work.

The ICRC looks after “its” rules with tender affection. The UN has resided on a theoretical level and the two have never met with the purpose to further develop the rules.

However, the ICRC has strength – the UN has power – together they can improve both the rules and the obedience to them.

When an influential organisation like the ICRC develops LOAC and implements it in its fieldwork, it gets immense respect and attention. For a long time HRL was not specially known in the field and therefore it existed only in the background.

Kolb²⁷ writes about the ICRC’s fear of coming too close to the political UN. Still the ICRC has to disregard politics in order to be able to be in commission.

“LOAC was not written for political purposes – e.g. bombing of TV station to stop the political propaganda.”²⁸

If the two parties could have cooperated, the UN could have got skilled help in disseminating HRL. Now, the UN either chose to or had to do this lengthy work and with an organisation that probably was not competent for this purpose.

More active-service spirit would have brought about better results. Gradually – after about 35 years – the ICRC resumes the work with HRL and with good results. Lately the UN has shown some cautious interest in LOAC. Kolb comments this:

“UN INT Law Commission decided to exclude LOAC among the subjects it would consider for codification. This attitude can be understood only in a post-war context; it had already existed in the 1930s. In addition to this there was a certain dichotomy between the ICRC and the UN, which was only partly due to the latter’s elimination of the law of war from its discussions. A more profound reason was the ICRC’s determination to preserve its independence, a determination which was strengthened by the political nature of the UN. HR, which were seen as being within the purview of the UN and bodies specifically set up to promote and develop those rights, were thus distanced from the concerns of the ICRC, which continued to work solely in the area of law and war. These institutional factors affected the development of the rules and the result was a clear separation of the two branches”.

²⁷ Kolb, Robert, Dr in International Relations, International Revue of the Red Cross, September, 1998

²⁸ Sandoz, Yves, Director ICRC during the seminary at National Defence College in Stockholm, 19 November 1999. After Kosovo: The Heritage of the Geneva Conventions and the future of Humanitarian Law.

Kolb omits to mention the background. Before there were any rules for the treatment of combatants in a war, there were rules for how civilians should be taken care of. With time these rules influenced the Rules of Engagements of that time and then LOAC expanded strongly.

HRL on the other hand did not expand to the same extent. During the Second World War an (allied) Jewish POW in Germany was treated according to LOAC of that time, while a civilian Jew of the same nationality disappeared in an extermination camp.

For some reason Kolb thinks that HRL did fail by not, at an early stage, getting the same international status as LOAC.

It can not have been to any disadvantage that HRL developed in different areas and was swiftly integrated into the national laws.

Remarkably enough few delegates from LOAC conferences participated in the HRL work. Those who did, have according to statements, done their best to associate the two rule groups. Some but still few signs of improvement can be seen.

Prof Dieter Schindler ²⁹ says:

„It is likewise desirable that the supervision of the application of the human rights conventions should not be entrusted to the same bodies which supervise the humanitarian conventions. The mediation of Protecting Powers or of the ICRC, the visits to places of detention and the communication of confidential reports produce, in time of armed conflict, better results than formal access to national and international authorities competent and able to enquire into allegations, institute conciliation procedure and issue judgements based on law.. When the procedures specified by one or the other type of agreement can function simultaneously, that is not a disadvantage. It can but strengthen the protection of the persons concerned.

There is a further reason why separate rules are desirable for human rights, on the one hand, and the law of armed conflicts, on the other; namely that the humanitarian conventions are more widely accepted than the human rights conventions. The law of armed conflicts concerns questions which have for a long time been dealt with by international law. The parties have generally a reciprocal interest in its application. On the other hand, human rights were until recently – and indeed to a large extent are still – considered as forming a part of the domestic law of States. Much more than the law of armed conflicts, human rights are affected by the diversity of the concepts of the State and by ideological antagonisms. The adoption of the two 1977 Protocols additional to the Geneva Conventions is a proof that a separate set of rules for armed conflicts is in fact what States want”.

With due respect to professor Schindler I think there is more to see.

The World community supported by the NGO's Council of Delegates ³⁰, that have presented many wise thoughts about reinforced protection of human beings, simply declares **”The procedure for application of these two branches of law are different, as are the institutions responsible for developing and promoting them, as well as controlling their implementation”.** No improvement of the cooperation between LOAC and HRL is suggested.

²⁹ Schindler, Dietrich, Professor at the Faculty of Law, Zurich University, Member of the ICRC Commission.

³⁰ The Red Cross and Human Rights, Council of delegates, Geneva 13-14 October 1983, Provisional agenda, Item 7, Working document CD/7/1 and summary of Working document CD/7/1/1.

In 1983 too, an association between the two seemed to be too difficult. Still there are powerful bodies crying out: "Don't touch my baby" which is demonstrated by S. Jeannet ³¹ "The mixture of LOAC and HR is not good – but it is already there".

Suggestions for Revision

Draper says ³²:

"LOAC is not alien to that of HR but complementary to it. We must seek the establishment of more and better defined human rights, more securely enforced, and more humanitarian LOAC, more regularly and effectively supervised and enforced".

Professor Bring says ³³ :

"What speaks in favour of development of LOAC and HR towards a union? Pressures from NGO people towards a common goal". Translation

And ³⁴

"The ongoing change of interpretation of international law promotes the movement towards a common goal"

The viewpoint of the judge: ³⁵

"There will always be talk of the need for new and better rules in the international humanitarian law field. But an important fact is that the ones we have are good. Some of them are in fact excellent. The problem is the violation, the non-respect of the rules. We are in no need of new rules, until the existing ones are better respected than they are now" Translation

The viewpoint of the scientist ³⁶

"Modern law of armed conflict is developed on the basis of the gaps that appeared in new conflicts, thus demonstrating the need for revision of existing treaties or completely new ones". Translation.

The viewpoint of the practitioner/teacher:

LOAC must be simplified and put together, summed up. Today it is a necessity to be an expert in all conventions and their interdependency. Understanding law is a complicated thing, knowing how 100 (1000!) years of LOAC must be interpreted is an interesting intellectual stimuli, for among others the experts at IIHL, San Remo, who teach the effect the rules have in operative planning, but it does not make the instruction less complicated.

HR and LOAC must be integrated, there shall be no situation where discussion arises of the applicability.

³¹ Jeannet, S. ICRC. 18 October 1997.

³² Draper, G.I.A.D., Human Rights and the Law of War, Virginia Journal of International Law, Vol 12:3, 1972

³³ Bring, O., professor at the seminary on Kosovo 18 November 1999

³⁴ Bring, O. , professor at a seminary at SIDA arranged by the Swedish Red Cross and the Agency for Civil Emergency Planning, 1 October 1999.

³⁵ Skarstedt, C-I. Head of the Court of Appeal, Northern Sweden, The Seminary on humanitarian Issues in the Contemporary World in East and West Berlin, 6-9 June 1990

³⁶ Bring, O. and Mahmoudi, S. Sverige och folkrätten, Norstedts Juridik AB, 1998. Translation.

The future

How does the evolution in the society affect the defence forces today and onwards? Lieutenant General Johan Kihl,³⁷ “IT-general” of the Swedish Defence Forces, brought the problem up in a discussion. Is the task of the defence forces only fighting or is it also protecting society from other types of aggressions?

“An IT attack might be supplemented by sabotage. Some saboteurs might use violence. In which phase does the situation change from being a police duty into a task for the defence forces. There are other scenarios like for example: smugglers in stolen gunboats firing against customs officers. Should the Customs Department be allotted corvettes or should the Navy be called in? There are no good answers to these questions. In Sweden we have a tradition not to use military violence in peacetime. Certainly this has been a correct decision, but is it valid today? And tomorrow”?

It is interesting to observe that the Swedish unions of Defence, Police, Custom and Border Control have formed an alliance. Are the unions far-seeing or does the combined unions only mean an efficiency improvement?

The strategic situation is changing rapidly. The attacks will probably change too. The aggressor will be more indistinct and the “defenders” include a growing number of “non-combatants”.

It is important that Humanitarian Law Standards are developed with patience, skill, determination and is kept in time with the development of society.

³⁷ Kihl, J. Translation from FOA-tidningen med FHS och FFA, No 3, June 12 July 2000.

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