

HUMAN RIGHTS AND MILITARY DECISIONS: COUNTERINSURGENCY AND TRENDS IN THE LAW OF INTERNATIONAL ARMED CONFLICT

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1. INTRODUCTION

Although the notion of “the law of war” dates back to antiquity,¹ the modern treaty framework for the Law of International Armed Conflict (“LOIAC”) finds its origins in the mid-nineteenth century.² Treaties such as the Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949 are still

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¹ See, e.g., Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 280–82 (1997) (discussing elements of the law of war dating back to the time of Xerxes).

² See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 9 (2004) (describing the origins of LOIAC).

central to LOIAC and, by extension, to determinations made on the modern battlefield.³ Warfare, however, has changed since the time those instruments were authored. Rather than large-scale clashes of military might backed by sovereign states, contemporary warfare is characterized by long-term counterinsurgency and stability operations typified by the ongoing struggles in Iraq and Afghanistan. As the U.S. Army Field Manual on Counterinsurgency notes, "large main force engagements that characterized conflict in World War II, Korea, and Operations Desert Storm and Iraqi Freedom in the Middle East have become the exceptions in American warfare."⁴ The Field Manual continues:

Following the end of the Cold War, the Army began reducing force structure while preparing to reap the benefits of a new era of peace. The benefits of this "peace dividend" were never realized. The strategic environment evolved from one characterized by the bipolar nature of the relationship between the world's dominant powers to one of shared responsibility across the international community. In the decade after the fall of the Berlin Wall, the Army led or participated in more than 15 stability operations, intervening in places such as Haiti, Liberia, Somalia, and the Balkans. Many of these efforts continued into the new century, and incursions into Afghanistan and Iraq revealed a disturbing trend throughout the world: the collapse of established governments, the rise of international criminal and terrorist networks, a seemingly endless array of humanitarian crises, and grinding poverty. The global implications of such destabilizing forces proved staggering.⁵

Over that period of time, however, legal developments in the traditional LOIAC canon did not fully match this Copernican shift in the paradigm of armed conflict.⁶ But this did not mean a

³ *Id.* at 9-11.

⁴ U.S. DEP'T OF ARMY, FIELD MANUAL (INTERIM) 3-07.22, COUNTERINSURGENCY OPERATIONS vi (Oct. 2004).

⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS, ¶ 1-9 (Oct. 2008) [hereinafter FM 3-07].

⁶ See René Provost, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 2 (2002) (noting that "[b]y the late 1960s, international humanitarian law stood at a

cessation in legal development across the international plane. To the contrary, standing out in stark relief against the backdrop of relative inactivity in LOIAC was the surfeit of activity in the field of international human rights law. Since the end of World War II, the field of human rights has rapidly developed and manifested itself as a dramatic new force in the ancient realm of international law.⁷

This rapid development is made even more significant due to vast swath of subject matter potentially impacted by human rights. Brownlie notes that “[h]uman rights is a broad area of concern and the potential subject matter ranges from the questions of torture and fair trial to the so-called third generation of rights, which includes the right to economic development and the right to health.”⁸ Accordingly, much like a tree growing in a fence line, international human rights law has become inextricably entangled with the law of armed conflict and has ramified in such a manner that—given the nature of contemporary conflict—it is no longer possible to address one without also dealing with the other.⁹

There are, to be sure, fundamental differences between LOIAC and international human rights law—principally in the types of protections given and the circumstances in which those guarantees apply.¹⁰ Likewise, Professor René Provost, in his excellent book on the subject, notes that a key feature of international human rights law is the “universality” of its application—the idea that these rights are granted to everyone regardless of nationality or allegiance.¹¹ In contrast, protections under LOIAC are conditional

standstill” while “[h]uman rights law, on the other hand, was experiencing a great boom”).

⁷ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 529 (6th ed. 2003).

⁸ *Id.*

⁹ See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 243–44 (2000) (“The current changing nature of conflicts from international to internal is closely related to the normative developments. Internal conflicts have necessitated both new norms and reinterpretation of existing norms. The change in direction toward intrastate or mixed conflicts—the context of contemporary atrocities—has drawn humanitarian law in the direction of human rights law.”).

¹⁰ DINSTEN, *supra* note 2, at 22 (“Ordinary (peacetime) human rights are frequently subject to restrictions, which can be placed on their exercise ‘in the interests of national security or public safety’. Even more significantly, the application of ordinary (peacetime) human rights—whether or not restricted—can usually be derogated from in time of international armed conflict.”).

¹¹ Provost, *supra* note 6, at 24–25 (“[R]ights are given to everyone, including nationals of states not bound by the same norm and stateless individuals.”).

based upon the status of the individual and the circumstances. Otherwise stated, the protections given under the law of armed conflict depend on largely on one's membership in a certain group or class of individuals.¹²

The difference in protections granted by these distinct legal regimes has been generally reconciled through the application of what amounts to a matrix of applicable instruments and non-applicable instruments, derogable rights and non-derogable rights.¹³ As Dinstein notes, "[w]hen derogation from ordinary (peacetime) human rights occurs, one can say that LOIAC (war-oriented) human rights fill much of the vacant space. This is of particular import if due process of law is imperiled. Peacetime judicial guarantees may be derogated from in wartime, yet LOIAC introduces other minimum guarantees in their place."¹⁴ In ordinary armed conflict, this model may have served to successfully mute the significance of international human rights law in military decision-making. The nature of contemporary stability operations and counterinsurgency, however, has broadened the scope of military operations so that commanders must now engage in a range of activities outside of those normally considered combat-related.¹⁵ Concomitant with this expanded range of military responsibility is an expanded range of legal responsibility that implicates different areas of law—some of

¹² See *id.* at 34–42 (discussing the conditionality of protections under the law of armed conflict).

¹³ DINSTEIN, *supra* note 2, at 22.

¹⁴ *Id.* at 23.

¹⁵ The Interim Field Manual on Counterinsurgency Operations states:

When supporting a counterinsurgency, the US and its multinational partners assist the [host nation] in implementing a sustainable approach. To the extent the [host nation] has its basic institutions and security forces intact, the burden upon US and multinational forces and resources is lessened. To the extent the [host nation] is lacking basic institutions and functions, the burden upon the US and multinational forces is increased. In the extreme, rather than building upon what is, the US and other nations will find themselves creating elements (such as local forces and government institutions) [sic] of the society they have been sent to assist. Military forces thus become involved in nation building while simultaneously attempting to defeat an insurgency. US forces often lead because the US military can quickly project and sustain a force. This involves them in a host of current activities regarded as nonstandard, from supervising elections to restoring power and facilitating and conducting schooling.

FM 3-07.22, *supra* note 4, ¶ 1-40.

which were not formally part of the traditional juridico-military calculus.

This Article will briefly identify the general implications of this legal trend and highlight some ongoing developments that will further impact the changing aspect of LOIAC. In so doing, this Article seeks to illuminate some notable aspects of the legal landscape that looms before military commanders and their advisors. It also seeks to shed light on events and trends in international human rights law that will have direct bearing on military operations in the coming years.

2. INTERNATIONAL HUMAN RIGHTS LAW AND EXTRATERRITORIALITY: APPLICATION OF JURISDICTION TO MILITARY OPERATIONS ABROAD

An area of rapid development in international human rights law is that of jurisdiction. Jurisdiction may be defined as the authority to affect legal interests—to prescribe rules of law, to adjudicate legal questions, and to compel, induce compliance, or take any other enforcement action. The term “jurisdiction” derives from the Latin words *juris* (law) and *dictio* (saying), meaning “the implication being an authoritative legal pronouncement.”¹⁶ Jurisdiction is the means of making law functional; it is the way that states and legal institutions make law a reality. Any definition of crime and any institution that calls for the law’s application to its subjects or objects necessarily include a jurisdictional breadth — the temporal and spatial scope of that application.¹⁷ Thus, the issue of where human rights protections apply is essential to understanding their functionality.

The issue of the extraterritorial scope of human rights protections that suppress military wrongdoing and control armed forces in foreign territory is one that has been recently before various judicial bodies across the globe. The nature of that reach necessarily implicates the relationship between LOIAC and international human rights law. While it is axiomatic that LOIAC

¹⁶ See Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in INTERNATIONAL CRIMINAL LAW at Ch. 2.1 (M. Cherif Bassiouni ed., 2008); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 38 (3d ed. 1982); Christopher L. Blakesley & Dan Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT’L L. REV. 1, 12 (2006) [hereinafter *Myopia*].

¹⁷ See Blakesley & Stigall, *Myopia*, *supra* note 16, at 1, 12 (comparing theories of jurisdiction).

obligates members of an armed force when they operate on the territory of another country,¹⁸ it is, however, currently less clear which human rights protections apply to control a military force operating in a foreign territory. To what extent does human rights law apply to protect the civilian populace and to punish those who commit violations? "In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory."¹⁹ Indeed, the rapidly evolving nature of crime, warfare, and human rights violations necessitate this conceptual shift.²⁰ Yet, various countries, regional organizations, and international organizations differ in their positions on the proper extraterritorial application or jurisdictional scope of their own and international human rights norms.²¹

¹⁸ Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78, 78 (1995).

¹⁹ *Id.* at 80.

²⁰ The United States and other national courts have expanded the traditional bases of extraterritorial jurisdiction, responding largely to a perceived burgeoning of transnational and international crime. The Congress and U.S. courts in the "war on drugs," for example, have sought to deter narcotics importation by asserting jurisdiction over thwarted extraterritorial conspiracies and, in the "war on terror," have asserted jurisdiction over alleged terrorists who have committed their violence outside U.S. territory. Cooperation among governments in investigation and extradition is of paramount importance to combating international and transnational crime. Hence, a state requesting assistance in criminal matters must conform to any and all limitations and requirements made by the requested state and those of international law. Any disparagement of a nation's sovereignty, international law, treaty formulations, or agreements to extradite or otherwise cooperate will ultimately harm the effectiveness of international crime prevention and criminal justice. *Extraterritorial Jurisdiction*, *supra* note 16, at 89. *See also* Blakesley & Stigall, *Myopia*, *supra* note 16, at 44-45 (discussing the extraterritorial application of U.S. criminal statutes, particularly cyber-based sexual exploitation laws).

²¹ *See, e.g.*, R v. Sec'y of State for Def. (Al-Skeini) [2007] UKHL 26, ¶ 13 (appeal taken from Eng.) (U.K.), available at <http://www.bailii.org/uk/cases/UKHL/2007/26.html> (constructing extraterritorial application of laws narrowly); Issa v. Turkey, 41 Eur. Ct. H.R. 567 (2004) (holding that the plaintiffs were not considered within the jurisdiction of the respondent state); Bankovic v. Belgium, 11 Eur. Ct. H.R. 435 (2001) (holding that applicants did not come within the jurisdiction of the respondent States on account of an extraterritorial act); Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) (holding "that neither statute generally prohibiting Attorney General from deporting or returning aliens to country where aliens' life or freedom would be threatened on account of race, religion, nationality, membership in particular social group, or political opinion, nor parallel article of the United Nations Convention Relating to Status of Refugees applied to actions taken by Coast Guard on high seas"); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding "that the Fourth Amendment did

An interesting case in that regard is the *Al-Skeini* decision,²² in which the British House of Lords faced the issue of jurisdiction over crimes committed by British troops in Iraq and was required to determine the proper bearing of a human rights instrument. *Al-Skeini* centered on application of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and the British Human Rights Act, which incorporated the ECHR into British law. In that case, the House of Lords held that the ECHR applied to acts of British armed forces in Iraq within their military prisons only—and not to other areas under the control of British forces.²³ Thus, their Lordships suggested that Britain lacked jurisdiction over British soldiers who killed civilians while in action abroad. In so holding, they misinterpreted decisions of the Council of Europe on the ECHR and erroneously indicated that the soldiers' conduct did not fall within ECHR jurisdiction.

Among the problems with the House of Lords decision was a failure to properly understand the impact of customary

not apply to the search by American authorities of the Mexican residence of a Mexican citizen and resident who had no voluntary attachment to the United States"); *United States v. Alvarez-Machain* 504 U.S. 655 (1992) (holding "that the District Court had jurisdiction to try Mexican national who had been forcibly kidnapped and brought to the United States").

²² *Al-Skeini*, [2007] UKHL 26. See also Tobias Thienel, *The ECHR in Iraq: The Judgment of the House of Lords in R (Al-Skeini) v. Secretary of State for Defence*, 6 J. INT'L CRIM. JUST. 115 (2008) (analyzing the *Al-Skeini* decision); Kerem Altıparmak, *Human Rights Act: Extra-territorial Application: Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL 26, 72 J. CRIM. L. 27 (2008).

²³ Ralph Wilde notes that:

[t]he case of [*Al-Skeini*], decided by the House of Lords on June 13, 2007, concerned the applicability of the United Kingdom's Human Rights Act to the United Kingdom in Iraq. Since, by a majority of four to one, the Law Lords tied the extraterritorial meaning of the Human Rights Act to that of the European Convention of Human Rights (ECHR), the case involved a detailed consideration of the extraterritorial meaning of the term "jurisdiction," the trigger for applicability, in Article 1 of that treaty—a term also used in this way in other human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR). The Court held that jurisdiction was triggered in relation to a UK-run detention facility, but not in relation to streets and private houses where UK soldiers were temporarily present

Ralph Wilde, *International Decisions: R (On the Application of Al-Skeini) v. Secretary of State for Defense: UK House of Lords opinions on whether the European Convention on Human Rights, as implemented through the 1998 Human Rights Act, has extraterritorial effect*, 102 Am. J. Int'l L. 628, 635 (2008).

international law and the acceptable and necessary theories of extraterritorial jurisdiction. Even, however, when the House of Lords got extraterritorial jurisdiction right, the underlying rationale was problematic. For instance, the House correctly held that the killing of an Iraqi in a British controlled prison was within ECHR jurisdiction.²⁴ To reach its conclusion, however, the House interpreted effective control of an area in a foreign country to include only specific pieces of territory, like a prison or an embassy.²⁵ To reach this result, it misread several European Court of Human Rights ("ECtHR") decisions and incorrectly applied the rules and presumptions it referenced.²⁶

In *Issa v. Turkey*, although the European Court held that Turkey did not exercise effective control over the area in Iraq, the rule of the decision was clear that,

[a] state may be held accountable for violation of the [ECHR] rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetuate violations of the

²⁴ See Wilde, *supra* note 23; compare *Al-Skeini*, [2007] UKHL 26, with *Issa*, 41 Eur. Ct. H.R. 567, and *Bankovic*, 11 Eur. Ct. H.R. 435 (noting in an exercise of dualism, that the House of Lords has made precedent from the Council of Europe Human Rights decisions persuasive rather than binding). See also Thienel, *supra* note 22, at 117 n.12 (arguing that, of course, judicial precedent is only persuasive authority in civil law systems and in international law) (citing *R (Alconbury Developments Ltd. v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, ¶ 26 (Lord Slynn of Hadley)).

²⁵ See Thienel, *supra* note 22 at 115.

²⁶ The House interpreted the *Issa* decision to be inconsistent with *Banković*, incorrectly reading the holdings of these decisions. See Thienel, *supra* note 22, at 119. But see *id.* at 117 (critiquing this interpretation). See also *id.* at 118-22 (analyzing *Al-Skeini*, [2007] WLR 26, and its comparing of *Bankovic*, 11 Eur. Ct. H.R. 435 with *Issa*, 41 Eur. Ct. H.R. 567). For a similar discussion, see Loizidou v. Turkey (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) (1995); Loizidou v. Turkey (Merits) No. 15318/89, 89 Eur. Ct. H.R. (1996); *Djavit v. Turkey*, 111 Eur. Ct. H.R. 231 (2003); *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179; *Cyprus v. Turkey* 2001-IV Eur. Ct. H.R. 1.

Convention on the territory of another State, which it could not perpetrate in its own territory. . . .²⁷

The rule under the European Charter is, therefore, that effective control of an area in another country by a state under the jurisdiction of the ECHR establishes the obligation to follow the protections of the ECHR and the obligation to hold those who violate them accountable. It is a strange idea, indeed, to suggest that a country's law cannot apply to criminal conduct of its nationals, to say nothing of its very agents, just because they are abroad when they violate the law.²⁸ The proper rule in situations of military occupation or control is to apply basic human rights norms extraterritorially, especially if the domestic legal system of the territory in which the conduct occurred is not able to apply.²⁹ This is simple active nationality jurisdiction.

Whether the *Al-Skeini* decision represents a legal anomaly or demonstrates a reticent trend among domestic courts is difficult to predict. One way or the other, however, the case clearly demonstrates that questions of international human rights law are now part and parcel of modern military operations—even if (for now) UK law confines the ECHR's reach to specific locales.

The holding of *Al-Skeini* notwithstanding, the extraterritorial application of *jus cogens* human rights norms is by definition universal.³⁰ The suggestion that application of these norms extraterritorially is a form of cultural imperialism is preposterous.³¹ Even if some governments torture their alleged "enemies," or have their military do the same in military operations or prisons, these very same governments consider that same conduct to be

²⁷ *Issa*, 41 Eur. Ct. H.R. 367, ¶ 71; see also Thienel, *supra* note 22, at 119 (containing similar analysis and reasoning).

²⁸ See *Al-Skeini*, [2007] UKHL 26; Thienel, *supra* note 22.

²⁹ Territories in the midst of violence rarely have functioning legal systems to enforce their own domestic laws. Many examples exist in which jurisdiction on the basis of the perpetrator's nationality was applied, because no other authority was available. See, e.g., *Jones v. United States*, 137 U.S. 202 (1890) (U.S. national prosecuted in the United States for murder committed on an uninhabited bat guano island).

³⁰ See Blakesley, *Extraterritorial Jurisdiction*, *supra* note 16, at 124; Blakesley & Stigall, *Myopia*, *supra* note 17, at 28–33 (arguing that nations with competent jurisdiction have to duty to prosecute some transgressions "condemned by virtually all domestic law.").

³¹ Yet this is what the House of Lords claimed in *Al-Skiени*, [2007] UKHL 26 ¶¶ 78, 90, 97, and discussed in Thienel, *supra* note 22, at 122.

quintessentially criminal when committed against them. Similarly, even when a military uses rape as a means to their military ends, they hold that conduct as criminal when done to their own.³² The same principle holds for insurgent groups who commit those atrocities.³³ Therefore, any human rights protection that holds a *jus cogens* nature has universal applicability, by definition.³⁴ Many other human rights norms apply extraterritorially by virtue of other bases of jurisdiction, such as the nationality principle and the effective control of an area in another country's territory. As former president and current judge of the International Criminal Tribunal for the former Yugoslavia Theodor Meron stated, "[n]arrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction."³⁵

Al-Skeini—even if based on a dubious rationale—is nonetheless illustrative of how military operations must be reconciled with international human rights norms. Even under *Al-Skeini*'s narrow logic, international human rights law still applies as a means to limit the conduct of soldiers in certain regards. A more expansive understanding of the jurisdiction of international human rights instruments (as articulated above) would necessarily lead to the consideration of human rights norms in a greater set of circumstances.

3. THE COPENHAGEN PROCESS ON HANDLING DETAINEES IN INTERNATIONAL MILITARY OPERATIONS

As demonstrated above, the treatment of detainees is a prime example of the expanded range of legal responsibility that implicates different areas of law. Continuing with that theme, Denmark's "ambition to establish a common platform for the handling of detainees" is illustrative of how intertwined strands of international human rights law and LOIAC have become.³⁶ It may

³² See Blakesley, *Extraterritorial Jurisdiction*, *supra* note 16, at 124–36; see also text accompanying note 16.

³³ *Id.*

³⁴ *Id.*

³⁵ Meron, *supra* note 19, at 82.

³⁶ Marie-Louise Overvad, Danish Ambassador, United Nations, Statement at the 30th International Conference of the Red Cross and the Red Crescent (Nov. 29, 2007), available at <http://www.missionfngeneve.um.dk/en/menu>

also represent a way, if not to cut the Gordian knot, then to move past it, with a better recognition of how both legal strands will influence future military operations.

The “Copenhagen Process” is an international legal reform initiative, launched in 2007 by the government of Denmark, in an effort to establish a common framework on handling detainees for all troop-contributing countries in a given operation.³⁷ Signaling the above-mentioned trend, the overall process seeks to “bridge the gap of understanding and practice which [is] currently [left] to troop-contributing countries to deal with challenges involved on a bilateral or an ad hoc basis.”³⁸ Denmark’s motivation for heading this effort stems from its support of various peacekeeping missions, including those in Cyprus, Bosnia, Kosovo, and Iraq.³⁹ The government of Denmark is also involved in counter-piracy operations near the Horn of Africa to protect food transports.⁴⁰ Yet it is the Danish involvement in Afghanistan which seems their primary motivation. From the Danish perspective, the conflict in Afghanistan highlights the gaps in LOIAC—gaps which they believe have lead to inconsistent handling and treatment of detainees.⁴¹

Denmark has firsthand knowledge of the broad spectrum of challenges created by the handling of detainees. In 2002, Danish troops captured thirty-four Afghanistan citizens and turned them

/STATEMENTS/30thInternationalConferenceOfTheRedCrossAndTheRedCrescent.htm.

³⁷ See Thomas Winkler, Acting Legal Advisor, Danish Ministry of Foreign Affairs, Address at the 31st Round Table on Current Issues of Humanitarian Law (Sept. 5, 2008), available at <http://en.calameo.com/read/00000837926fb084b36c9> (discussing why Denmark decided to launch the Copenhagen Process).

³⁸ *Id.* at 6.

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 3.

⁴¹ Ambassador Peter Taksøe-Jensen, Under Secretary for Legal Affairs, Danish Ministry of Foreign Affairs, Comments at the meeting: The International Legal Framework for the Fight Against Terrorism 4 (Dec. 3, 2007), available at <http://www.um.dk/NR/rdonlyres/717CA9FC-C924-4FED-B9E8-4DF3CF6F2A62/0/TalePTJterrorIHLwashingtonDEC.doc>. In the meeting, hosted by the German Marshall Fund of the United States and The Royal Danish Embassy, Ambassador Jensen explained how the handling of detainees is “[a] practical day-to-day challenge for [] soldiers in the field” as well as “[a] long-term political challenge for the countries wishing to contribute to international military efforts while at the same time respecting and implementing in good faith all our international obligations.” *Id.*

over to U.S. forces, who allegedly tortured the Afghans.⁴² A subsequent documentary film generated widespread criticism.⁴³ More recently, in 2008, Danish forces detained two individuals and transferred them to the Afghan National Directorate of Security.⁴⁴ To quote the Acting Legal Advisor for the Danish Ministry of Foreign Affairs, the individuals then “disappeared,” although they were later found in an Afghan prison serving a five year sentence.⁴⁵

The Copenhagen Process was viewed as a practical if not ideal way to identify the proper international legal basis for handling detainees. Indeed the Danish Undersecretary for Legal Affairs is on record as stating that from “a strictly legal point of view” there should be a Fourth Protocol to the Geneva Conventions to deal with the asymmetric threat posed by international terrorism.⁴⁶ Yet the Under Secretary added that “the Harvard process has already shown—we will never be able to agree and we may risk lowering the standards of protection.”⁴⁷

Denmark claims that “the Copenhagen Process seeks in no way to shortcut, devalue or in any other way undermine the already existing legal framework related to the protection of persons detained in—or outside of—an armed conflict.”⁴⁸ In more blunt terms, the Copenhagen Process is “not seeking to establish new rules of international law based on the lowest common denominator.”⁴⁹ To the contrary, the Danes claim to be seeking “an improved international common understanding and

⁴² Press Release, Committee Against Torture, Committee Against Torture Hears Response of Denmark, (May 3, 2007), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/CD751BFB67B150BDC12572D0006A980E?opendocument>.

⁴³ *Id.*

⁴⁴ Winkler, *supra* note 37, at 3.

⁴⁵ *Id.*

⁴⁶ Taksøe-Jensen, *supra* note 41, at 5–6.

⁴⁷ *Id.* The “Harvard process” refers to a 2003 meeting of experts from the International Committee of the Red Cross, government officials from several countries, and scholars held at Harvard University. The meeting was part of an unsuccessful attempt to develop an agenda for further discussion as part of a Swiss initiative to review the application of international humanitarian law to current armed conflicts. That an agreement could not be reached on even an agenda for future discussions is telling indeed about the inherent difficulties of the task, and perhaps provided a useful warning to Denmark and the Copenhagen Process.

⁴⁸ Winkler, *supra* note 37, at 6.

⁴⁹ *Id.*

acceptance of the legal considerations involved.”⁵⁰ What exactly that means remains unclear—but careful examination of the process indicates that it will involve coordination and reconciliation of LOIAC with international human rights norms.

The first Copenhagen Conference was held in October 2007. It included representatives from states and international organizations, including the United Nations and the International Committee of the Red Cross. Its purpose was “to discuss the handling of detainees in international military operations”⁵¹ According to the Danish Ambassador to the United Nations, “the discussions during the First Copenhagen Conference clearly showed that the challenge was not the elaboration of new rules, but to make the existing legal framework fully applicable in practice.”⁵² The Danish Undersecretary for Legal Affairs has echoed that view and even posited that nongovernmental organizations also believe that there are no gaps in LOIAC.⁵³ But whether or not gaps exist, the conference made clear that LOIAC and international human rights law are increasingly entangled. For example, the Undersecretary for Legal Affairs noted that while Danish soldiers were engaged in direct combat with the Taliban in the valleys of Afghanistan’s Helmand province, such action is a non-international armed conflict, with LOIAC as the *lex specialis*.⁵⁴ This, according to the Undersecretary, is in contrast with the operations of nearby Danish Soldiers “who are patrolling the more peaceful areas in the North of Helmand, and who may happen to detain a person outside the framework of the armed conflict, has to adhere to human rights law.”⁵⁵ Accordingly, whether or not gaps exist in LOIAC, it is recognized that an understanding of international

⁵⁰ *Id.*

⁵¹ Letter from the Permanent Mission of Denmark to the Secretary-General of the United Nations, Information for the Secretary-General’s Report on the Status of the Additional Protocols Relating to the Protection of Victims of Armed Conflicts and on Measures to Strengthen the Existing Body of International Humanitarian Law (July 1, 2008) (on file with authors).

⁵² Marie-Louise Overvad, Danish Ambassador to the United Nations, Statement at the Thirtieth International Conference of the Red Cross and the Red Crescent-IHL Commission (Nov. 29, 2007), available at <http://www.missionfngeneve.um.dk/en/menu/STATEMENTS/30th+International+Conference+of+the+Red+Cross+and+the+Red+Crescent+-+IHL+Commission.htm>.

⁵³ Taksøe-Jensen, *supra* note 41, at 6.

⁵⁴ *Id.* at 7.

⁵⁵ *Id.*

human rights law is critical for military commanders engaging in detainee operations.

How much momentum the Copenhagen Process still has is unclear.⁵⁶ If the momentum wanes, other options towards a similar end may include refocusing attention on Additional Protocol I to the Geneva Conventions or different initiatives such as the United Nations Peacebuilding Commission, which is a "new intergovernmental advisory body of the United Nations that supports peace efforts in countries emerging from conflict."⁵⁷ The Commission was established by both General Assembly and Security Council Resolutions and among its roles is to "bring[] together all of the relevant actors" and to "highlight[] any gaps that threaten to undermine peace."⁵⁸ Whatever the path forward, one may rest assured that international human rights instruments will form a key part of the considerations.

4. CONCLUSION

The nature of contemporary stability operations and counterinsurgency has broadened the scope of military operations so that commanders must now engage in a range of activities outside of those normally considered combat-related.⁵⁹ The

⁵⁶ Of note, in 2008 the Copenhagen Process held a roundtable in Addis Ababa, Ethiopia. While the origins of the process was to discuss European countries' detainee experiences in Afghanistan, African countries have potentially much more to contribute and to gain. As of 2006, 75% of U.N. Peacekeeping Missions were in Africa and four of the top ten troop contributing countries were from Africa. See INST. SEC. STUD., *Africa to Look at Copenhagen Process on Handling Detainees*, May 16, 2008, http://www.issafrica.org/index.php?link_id=5&slink_id=5951&link_type=12&slink_type=12&tmpl_id=3.

⁵⁷ United Nations Peacebuilding Commission, <http://www.un.org/peace/peacebuilding/> (last visited Mar. 26, 2009) (discussing the functions of the United Nations Peacebuilding Commission).

⁵⁸ *Id.*

⁵⁹ As the Field Manual on Counterinsurgency notes,

U.S. forces committed to a[n] [insurgency and counterinsurgency] effort are there to assist a [host-nation] government. The long-term goal is to leave a government able to stand by itself. In the end, the host nation has to win on its own. Achieving this requires development of viable local leaders and institutions. U.S. forces and agencies can help, but [host-nation] elements must accept responsibilities to achieve real victory. While it may be easier for U.S. military units to conduct operations themselves, it is better to work to strengthen local forces and institutions and then assist them. [Host-nation] governments have the final responsibility to solve their own problems. Eventually all foreign armies are seen as interlopers and occupiers; the sooner the main effort can

examples above only offer a limited glimpse of these responsibilities. Others include dealing with displaced civilians, responding to humanitarian catastrophes, and a host of other activities which make modern military service appreciably different than it was only a few decades ago. Concomitant with this expanded range of military responsibility is an expanded range of legal responsibility which necessarily implicates different areas of law, principally international human rights law. As demonstrated above, the most dramatic trend for LOIAC in the past decade (and one which will doubtlessly continue) is the increasing salience of international human rights law in the juridico-military calculus. The processes and developments emphasized in this Essay are only a sample of the ongoing metamorphoses. Almost a decade ago, Theodor Meron termed this phenomenon the “humanization of humanitarian law.”⁶⁰ The new shape of military operations and future legal trends portend a continued – and perhaps accelerated – process of humanization.

transition to [host-nation] institutions, without unacceptable degradation, the better.

U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY, ¶ 1-147 (Dec. 2006).

⁶⁰ Meron, *supra* note 9.

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