The Relationship between International Humanitarian Law and International Human Rights Law and its Perceptibility in Case Law

By Professor Peter Rowe[1]

The use of force during the course of military operations, particularly by the armed forces of a State within its own territory, has occurred relatively frequently within States, members of the Council of Europe. This paper will look at two broad questions. First, which bodies of law will govern the soldier's actions and secondly, why military misconduct occurs in a disciplined army. These two issues are related to each other since if the legal norms applicable to a soldier during military operations are unclear it may be expected that misconduct will occur more frequently than otherwise might be the case.

Which body of law? The relationship between international humanitarian law, human rights and national/military law

Whether international humanitarian law applies or not will depend upon whether there is an armed conflict in existence to which the State concerned, through its armed forces, is a party or which exists within the State. There may be some doubt as to whether an armed conflict exists within a State since the government may deny its existence. On the other hand, the human rights obligations of the State apply at all times, subject to any permitted derogations.[2]

The boundaries between international humanitarian law and international human rights law are not self-limiting. Despite their separate development the underlying purposes of each branch of international law lead us to conclude that there is considerable overlap between them.[3] It is, however, the nature of their enforcement procedures which might appear to establish differences. Before considering their relationship in detail, however, it is necessary to consider the angle from which the issue is approached.

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[2] See, for example, A and others v United Kingdom, Application No. 3455/05, Grand Chamber Judgment, 19 February 2009. No derogation is permitted from Art.3. Definitions of torture, inhuman or degrading treatment respectively are given in ibid, para. 127 . For a finding of torture within Art.3 see Elci and others v Turkey, Application Nos. 23145/93; 25091/94, Judgment, 13 November 2003, para. 646. For a permitted derogation from Art.2, see Art.15(2). Quaere whether 'war' includes a non-international armed conflict. It cannot cover any situation short of an armed conflict.

[3] See common Art.3 to the Geneva Conventions 1949; Art.75 of Additional Protocol I; the preamble to, and Art.4 of, Additional Protocol II, 1977; Geneva Convention III, 1949, Art.121 (investigation into death of a prisoner of war) and see Varnava v Turkey, Application No. 16064/90, Grand Chamber Judgment, 18 September 2009, para. 174 and for the role of the international Committee of the Red Cross, ibid., paras. 167, 208. A number of UN Security Council resolutions treat international humanitarian law and international human rights law as virtually interchangeable terms. See, for example, UN Security Council Resolution 1814 (2008), paras. 16, 17. In some cases, such as the prohibition on the recruitment of children under the age of 15 years to take part in an armed conflict, there may be disagreement as to whether the source of this prohibition is international humanitarian law or international human rights law.

This relationship can be observed from at least five levels. The first is the analytical, concerned principally with the lex specialis where, in the relatively rare case, each branch may produce a different norm to govern a particular situation.[4] The second is the liability of the State to a private individual (or another State) for the acts of its armed forces.[5] Thirdly, this relationship can be seen from the standpoint of the individual soldier. Fourthly, it can be considered in relation to rebels who have taken up arms against the government of their State.[6] Finally, the relationship of these two branches of international law needs to be considered in relation to national law.

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[4] See Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) ICJ Rep 226, para.25; Legal Consequences of the Construction of a Wall in the Occupied Territory (2004) ICJ Rep 136, para.106; Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda), ICJ, 2005, para.215. The clearest examples of IHL being the lex specialis would be the right of combatants to attack other combatants (by means which are not prohibited) and military objectives, requisitions of property from private individuals (although compensation is to be paid) and the detention of prisoners of war until the cessation of active hostilities. In addition, a UN Security Council resolution may take precedence over a State's human rights obligations, R (Al-Jedda) v Secretary of State for Defence [2007] UKHL 58 and the effect of UN Security Council Resolution 1546 (2004).

[5] See Hague Convention (IV) 1907, Art 3; Additional Protocol I, 1977, Art 91. See also N.Jorgensen, The Responsibility of States for International Crimes (Oxford University Press, 2000), p.195. The European Court of Human Rights (ECtHR) has set its face against the award of punitive damages, see Varnava v Turkey (note 2 above) para.214. The United Kingdom Ministry of Defence was held vicariously liable for the torts of British soldiers who killed two civilians in Kosovo in 1999 while taking part in a United Nations peacekeeping operation, Bici and another v Ministry of Defence [2004] EWHC 786 (QB).

[6] The applicability of Common Art. 3 to the Geneva Conventions 1949 to 'each Party' to a non-international armed conflict is of considerable significance. This article has been described as a 'Convention in miniature' in J.Pictet (ed), Commentary to Geneva Convention I (ICRC,) p.48. Rebels may agree voluntarily to apply certain weapons control treaties. See Geneva Call <http://www.genevacall.org/home.htm> The position in relation to international human rights law is not so clear. The norms established by Common Art 3 are virtually identical to the fundamental principles to be found in human rights treaties. If Common Art.3 is applicable (in the case of an armed conflict) it would seem otiose, in practical terms, to determine whether, in addition, fundamental human rights obligations are also owed by rebels. Where the rebels are in breach of Common Art.3 it is likely that they will also be in breach of the national law (in some form or other) of their State and thus be liable accordingly. The importance of holding them liable principally to international humanitarian law is that they may more easily be prosecuted by another State exercising extra-territorial jurisdiction or by the International Criminal Court under the Rome Statute 1998. Very few States are likely to possess criminal jurisdiction over 'fundamental human rights' breaches (as such and distinguished from torture or international humanitarian law) committed outside their territory. Other sanctions might involve travel bans or deporting suspects. See S.Ratner, J.Abrams, J.Bischoff, Accountability for Human Rights Atrocities in International Law (Oxford University press, 3rd edn, 2009) p281; J.Crook (ed) 'US Efforts to Identify and Deport Human Rights Abusers' (2008) 102 American Journal of International Law 179. Compare A.Clapham, Human Rights Obligations of Non-State Actors (OUP, 2006), p.280. Andrew Clapham also argues that 'the added value of the human rights framework allows for a wider range of accountability mechanisms, including monitoring by the Special Rapporteurs of the UN Commission of Human Rights,' ibid., p.285. This is, no doubt so, but such monitoring of rebel activity is unlikely to lead, in itself, to a greater respect by those rebels of the human rights of those who may be their potential victims. Further, he quotes with approval the statement by Dieter Fleck that 'if non-state actors have human rights, it appears logical that they must also have responsibilities, no different from the obligations insurgents have under international humanitarian law,' p.284. I do not think this conclusion follows logically. There can be no doubt that individual rebels are owed human rights, like any other individual within the jurisdiction of the State concerned. But it does not follow that all recipients of human rights also have responsibilities to the extent that a particular group of individuals (the rebels, even though they may be have the attributes of an organised armed group) owes these responsibilities in the same way as a State. In discussing the Turku/Abo Declaration of Minimum Humanitarian Standards, Martin Scheinin < http://www.ichrp.org/files/papers/91/120B_-_Turku-Abo_Declaration_of_Minimum_Humanitarian_Standards_Scheinin__Martin__2005.pdf > is much more cautious. He refers to the 'challenge' of 'legality: what is the authority of states to use the medium of international treaties or other instruments adopted by themselves to impose obligations on other actors?' It is a fallacy to argue that if rebels do not have human right obligations they can do as they please unchecked. For other sanctions against organised armed groups se J.Kleffner, 'The Collective Accountability of Organised Armed Groups for Systems Crimes' in H.van der Wilt & A.Nollkaemper, (eds), System Criminality in International Law (CUP, 2009) p.238, 253.

I want to concentrate on the impact of this law on the individual soldier and to consider why breaches of it occur from time to time. In particular, I want to stress how important it is for the law to be as clear as possible to the soldier and to his commanders so that the limits of any use of force can be understood by young men who have not been trained as lawyers.[7] It is the law with which I am concerned and not with military policy since if the two are in conflict the law must prevail.

In relation to an international armed conflict it is much more likely that soldiers will be trained in depth on the basic principles of international humanitarian law than on international human rights law, since the principal focus of a State's armed forces in the Council of Europe area will be to train for an international armed conflict. Should they be engaged in a non-international armed conflict, or in occupation of territory,[8] the role of human rights law will, perhaps, be thought of as being of greater significance, principally where civilians are detained by soldiers.

In terms of preventing breaches of human rights law terms it is, however, likely to be the national law of the soldier which will be most relevant to the legal issues surrounding a use of force in military operations. This statement needs, however, to be qualified. The national law concerned, whether in the form of the criminal, military or civil[9] law, should be compatible with the European Convention on Human Rights 1950 (ECHR).[10] Where it is the liability of the

[7] See generally, A.Carswell, 'Classifying the Conflict: a Soldier's Dilemma,' (2009) 873 International Review of the Red Cross 143.

[8] See generally, Y.Dinstein, The International Law of Belligerent Occupation (Cambridge University press, 2009) pp.81-88.

[9] Once a person is 'within the jurisdiction' of a State party to the European Convention on Human Rights obligations will also arise under the civil (non-criminal) law. Thus, a State is likely to owe obligations to a prisoner of war (other than under Art.5 or any other Article of that Convention inconsistent with Geneva Convention III, 1949) such as to protect his right to life from the unlawful activities of other prisoners of war in certain circumstances or even to prevent suicide by a prisoner of war. See, for example, Osman v United Kingdom (2000) 29 EHRR 245; Secretary of State for Defence v The Queen on the Application of Mrs Catherine Smith [2009] EWCA Civ 441; Van Cole and Another v Chief Constable of the Hertfordshire Police et al [2008] UKHL 50, [2009] 1 AC 225. It is likely also that a tribunal established by Art 5 of Geneva Convention III, 1949 or Art.45 of Additional Protocol I, 1977 would need to comply with Art.6 of the European Convention on Human Rights (although this is not dissimilar to Art.75 of Additional Protocol I, 1977). In the discussion above it is assumed that the detaining State has not issued any derogation from Art.6 of the European Convention on Human Rights.

[10] In McCann v United Kingdom (1996) 21 EHRR 97 the Court stated that 'the Convention does not oblige contracting parties to incorporate its provisions into national law. Furthermore, it is not the role of the Convention Institutions to examine in abstracto the compatibility of national legislation or constitutional provisions with the requirements of the Convention,' para.153. See, however, the Court's assessment of the relevant national law with Art.2 of the Convention, at para.156. Whilst the relevant national law is set out in Ramshai v Netherlands (2008) 46 EHRR 43, para.334 there is no direct attempt to compare it against Art.2.

individual soldier will match the human rights obligations of the State.[11] This is the real value of human rights law in relation to State actors. Through its implementation in national law soldiers can be held accountable for their actions.[12]

The scenario posed[13] of soldiers coming across a rebel leader in the supermarket can be resolved by applying national law, with which the soldier is familiar. To shoot the rebel leader there and then would involve issues (which I express in terms of Article 2 of the ECHR[14]) of whether it was 'absolutely necessary' for one of the purposes set out in that Article (which would included self-defence of the soldier concerned). This is unlikely to be the case unless a serious threat is actually perceived when the soldiers attempt to arrest the rebel leader.[15] If there is no threat to the soldier or to anyone else in the vicinity[16] and he, nevertheless, kills the rebel leader in the supermarket he will have committed a serious criminal offence. The risk of being held personally to account is likely to deter the soldier from committing a breach of the

[11] Compare Makaratzis v Greece (2005) 41 EHRR 49, para.55 and Nachova v Bulgaria (2006) 42 EHRR 43, paras.99-100, 104, 150 with McCann United Kingdom (1996) 21 EHRR. 97, para.156, Ramashai v Netherlands (2008) 46 EHRR 43, para.355 and Giuliani & Gaggio v Italy, Application No 23458/02, Judgment, 25 August 2009, para.244. In theory, a derogation from Art. 2 permitted for lawful acts of war, under Art. 15(2) may, or may not result in a divergence between human rights law and national law. There has, to date, been no such derogation. A further divergence might occur where human rights would hold the State responsible for the acts of those who planned a military operation but the national criminal law does not encompass this behaviour as a criminal offence. See McCann v United Kingdom, paras. 202-213, where those who planned the operation in Gibraltar caused the United Kingdom to be in breach of Art.2. See also Ergi v Turkey (2001) 32 EHRR 18, para. 79, 81; Isayeva, Yusopova and Bazayeva v Russia (2005) 41 EHRR 39, paras 170-171; Isayeva v Russia (2005) 41 EHRR 38, para. 176; Makaratzis v Greece (2005) 41 EHRR 49, para.68 (which shows the need for 'clear chain of command' to prevent police 'officers shooting erratically'); Erol v Turkey (2009) 49 EHRR 27, para.26 and compare Bubbins v United Kingdom (2005) 41 EHRR 24, para.150. There may be no criminal liability on the part of an individual but the State may be held to be in breach of Art.2 where it does not comply with the procedural aspects of that Art (or of Art. 3), where it fails to protect human life, Erol v Turkey (2009) 49 EHRR 27 or where the mental element for criminal liability is not present on the part of a State agent.

[12] So can the rebels, if caught. As to the enforcement of minimum standards of humanity on non-State actors through implementation in national law of internationally initiated statements or codes, see Martin Scheinin (note 5 above). This is the underlying reason for the obligation to conduct an independent investigation where a possible breach of Art 2 or 3 is apparent. The accountability of soldiers might, in some circumstances be based on military law which, by its nature, applies only to military personnel and not to all citizens.

[13] C. Droege, 'Effective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501, 529. See also M.Sassoli and L.Olson, 'The Relationship Between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts' ibid., at p.599, 613.

[14] The ECtHr has also applied the UN Basic principles on the Use of Force and Firearms by Law Enforcement Officials in Panayi v Turkey, Application no.45388/99, Judgment, 27 October 2009, para.22.

[15] See Gul v Turkey (2002) 34 EHRR 28, para.80; Juozaitien and Bikulcius v Lithuania (2008) 47 EHRR 55, para.83; Panayi v Turkey, Application No.45388/99, Judgment, 27 October 2009, para.61. Compare McCann v United Kingdom (1996) 21 EHRR 97, para.200 where the soldiers concerned honestly believed that the three IRA suspects possessed a detonation device to explode a bomb in a place where there were a number of civilians. See also Bubbins v United Kingdom (2005) 41 EHRR 24, paras. 138-140; Makaratzis v Greece (2005) 41 EHRR 49, para.66; Akkum v Turkey (2006) 43 EHRR 26, para. 238; Ramsahai v Netherlands (2008) 46 EHRR 43, para. 382. See, however, the reasoning of Mr L Loucaides in his dissent from the decision of the European Commission on Human Rights in McCann v United Kingdom (1996) 21 EHRR 97 to the effect that the criminal liability of individuals must be distinguished from the liability of the State. Compare the position where soldiers are stressed because of a difficult situation they face, Kakoulli v Turkey (2007) 47 EHRR 12, para. 113.

[16] Compare the situation where bystanders are injured in an exchange of fire. In Ozkan and others v Turkey, Application No.21689/93, Judgment, 6 April 2004 the Court concluded that 'the callous disregard displayed by the security forces as to the possible presence of civilian casualties amounted to a breach of the Turkish authorities' obligation to protect life under Article 2 of the Convention,' para.307.

national law and, thereby, from causing his State to be responsible before the European Court of Human Rights (ECtHR) for his actions. The relevant human rights of potential victims are thereby protected not directly, but indirectly, by human rights law.

The same issue arises in the same form in relation to international humanitarian law since the obligations contained therein are, like national law, directed primarily towards actors rather than States. Where norms of IHL are fully implemented into national law (by whatever means) the same deterrent effect will occur as described above.[17] International humanitarian law may, however, provide a different answer in the case of the rebel leader found by soldiers shopping in a supermarket where it is clear that he 'participates directly in hostilities' by way of a 'continuous combat function.'[18] It appears that he can be attacked merely because of this status.[19] In the absence, however, of common Article 3 of the Geneva Conventions 1949 or Article 4 of Additional Protocol II, in national law the justifications for taking life will be those set out in the 'normal' national law as discussed above. An alternative view, would be to say that, in this circumstance, national law must be understood in the light of IHL and, in this sense be the lex specialis[20] or, should this be the case, that the order of a superior (which might be in the form of rules of engagement or RoE[21]) to shoot in these circumstances is a lawful order (it being consistent with IHL).

The view that the national law enforcement arrangements continue to apply, in spite of the application of international humanitarian law to a particular armed conflict, can be

[17] In some States the crimes set out in the Rome Statute 1998 of the International Criminal Court have been implemented directly into national law. In exercising their complementary national jurisdiction States are also acting 'on behalf of the international community as a whole,' J.Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (OUP, 2008) p.1.

[18] 'Interpretive Guidance on the Notion of on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 IRRC 991, 1007.

[19] International humanitarian law would permit his killing since the protection given to a civilian not taking a direct part in hostilities does not apply, ibid., p.1036. Quaere whether this is sound guidance where there is no risk to the soldier. It would justify a 'shoot to kill policy' on behalf of the State. The imbalance with soldiers is recognised but this will always be the case under national law. Upholding the rule of law is an obligation on States (and not on rebels) and the frequently used political statement that rebels will be 'brought to justice' should not mean killing them on sight. It would also seem to be contrary to the reasoning underlying para. 4789 in Y. Sandoz et al, Commentary on the Additional Protocols (ICRC, Nijhoff, 1987). For a warning that the statement, in para. 25 of the Legality of the Threat or Use of Nuclear Weapons Advisory Opinion (1996) ICJ Rep. 226 that 'the test of what constitutes an arbitrary deprivation of life…must be determined by the applicable lex specialis, namely, the law applicable in armed conflicts', should be read in the context of the 'legality in abstracto of the use of a certain weapon', see M.Sassoli and L.Olson, op cit, p.613. It is unlikely that the International Court of Justice had in mind, when considering an arbitrary deprivation of life, a non-international, as opposed to an international armed conflict. The Court may, in fact, have set a hare running since it need not have referred to the lex specialis at all in an international armed conflict. During such an armed conflict, and considering the International Covenant on Civil and Political Rights, 1966, Art.2, enemy soldiers would be unlikely to be within the jurisdiction of the State whose soldiers killed them. This approach would have produced the same result under the ECHR Art 2 where the word 'arbitrary' does not appear but the jurisdictional limits are not dissimilar. A better example, with respect, of the principle of lex specialis (IHL) would be the provisions in IHL relating to the detention of prisoners of war, where the issue of 'within jurisdiction' would be unlikely to arise.

[20] See generally, P.Rowe, 'Murder and the Law of War' (1991) 42 Northern Ireland legal Quarterly 216.

[21] See, for example, The Queen (on the Application of Al-Skeini and others) v Secretary of State for Defence [2005] EWCA Civ 1609, Brooke, LJ, paras. 23-28. The decision was upheld by the House of Lords, [2007] UKHL 26, without referring directly to this issue.

seen where a sustained breakdown of law and order occurs within a State member of the Council of Europe. In these circumstances the ECtHR may even be faced with a case involving the use of aerial bombardment and artillery by the State in an attempt to restore the rule of the ordinary law. The Court has shown itself reluctant to go beyond the European Convention on Human Rights and consider international humanitarian law.[22] Thus, when faced with an instance by the Russian armed forces in Chechnya of aerial bombardment 'in a populated area, outside wartime and without prior evacuation of the civilians' the Court relied on the European Convention model of law enforcement by stating that it was 'impossible to reconcile [this activity] with the degree of caution expected from a law enforcement body in a democratic society.'[23]

Should the national law reflect the human rights obligations of the State and any appropriate norms of international humanitarian law[24] this will enable commanders to draw up RoE which reflect this law.[25] In so doing soldiers (including, where appropriate their commanders) can be held accountable for any breach of their rules of engagement committed during the course of military operations.[26] Individual soldiers can be trained to avoid crossing the limits of permissible action. Any transgression which leads to disciplinary proceedings is likely to be very visible to all soldiers within the same unit and thus contribute significantly to a deterrent effect.[27]

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[22] Korbely v Hungary, Application No. 9174/02, Judgment, 19 September 2008, paras 86-94, might suggest the contrary but the detailed consideration of common Art 3 to the Geneva Conventions 1949 related to the applicant's trial by a court in Hungary. The ECtHR was considering the nature of national law in Hungary. It is also difficult to accept the comment made by A. Orakhelashivili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence' (2008) 19 EJIL 161, 174 that 'the legitimacy of the Court's findings in the cases involving armed conflicts will always be conditional upon the compliance of these findings with the standards of international humanitarian law.' Any use of force must be 'strictly appropriate to the achievement of the permitted aims' of Art.2, see Akkum v Turkey (2006) 43 EHRR 26, para. 237. These 'permitted aims' are not identical, for instance, with those in Additional Protocol I (1977) Art. 51(5)(b) and see Isayeva v Russia (2005) 41 EHRR 38, para. 176; Isayeva, Yusopova and Bazayeva v Russia (2008) 41 EHRR 39, para. 170-171. Moreover, international human rights law and IHL are performing different functions. The latter is, most commonly, interpreted when it is the governing body of law during the prosecution of an individual. In these circumstances it must be stated as clearly, and provide as much certainty, as would any national criminal law. The applicants in Isayeva, Yusupova, Bazayeva v Russia (2005) 41 EHHR 39 referred to common Art.3 to the Geneva Conventions, at para.157. Compare the position taken by the Inter-American Commission on Human Rights in 'the Tablada case,' Inter-American Commission on Human Rights report No.55/97, Case no.11.137, Argentina, 30 October 1997; L. Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: a Comment on the Tablada Case' (1998) 324 International review of the Red Cross 505..

[23] Isayeva v Russia (2005) 41 EHRR 38, para.191. For the scale of the loss of life in the 'serious disturbances between the security forces and the [PKK in Turkey]' see Akdivar v Turkey (1997) 23 EHRR 143, para.13.

[24] All such norms may not be fully incorporated into national law but breaches could be prosecuted under some other head, eg failing to obey lawful orders, or failing to report breaches of military law.

[25] It is clear that instructions should be given to soldiers as to when they are permitted to use firearms, Kakoulli v Turkey (2007) 47 EHRR 12, para. 113 and that they should be trained to assess whether their use would be 'absolutely necessary', ibid, para. 110. See also McCann v United Kingdom (1996) 21 EHRR 97, para.156.

[26] Should the RoE not be based upon national or international law they may possess no more than the status of policy directives which a soldier may be bound to comply with as a lawful order providing he or she does not thereby act in conflict with national or international law. A factor which may be of some significance on some occasions is that the RoE may be a classified document. An alleged breach of Art 2 or 3 will also give rise to an obligation on the State to ensure that an independent investigation takes place.

[27] Even if the soldier is acquitted or no charges are eventually brought. See The Aitken Report, An Investigation into Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004, 25 January 2008, United Kingdom Ministry of Defence, pp.2, 17.

So far I have discussed one way of enforcing the law applicable during an armed conflict, namely through the liability of the individual soldier for his actions. Any legal or disciplinary proceedings against him or her will be brought by military or State prosecutors. For one reason or another no actual prosecution may be brought. On the other hand, and quite unconnected with any State authority, a victim of a claimed violation of a Convention right by a soldier during a military operation may make an application to the European Court of Human Rights (ECtHR). In this situation the Court is likely to look at the relevant national law.[28]

An actual or a potential application to the ECtHR is not unconnected to national law. Where that national law enables Convention rights to be enforced directly under it, with the object of securing an appropriate remedy, this may be the chosen avenue for redress. Unlike the ECtHR, a national court will need to take into account all relevant parts of its law. This may include the law giving effect to the 1950 Convention, international humanitarian law, criminal and military law. It may need to determine criminal law/military discipline liability of the soldier prior to determining any claim by the victim for an effective remedy.[29]

Any use of force by a soldier which might fall within Article 2 or 3 of the 1950 Convention requires the State to conduct an independent investigation into the circumstances, with the object if necessary, of bringing a prosecution against one or more individuals. Whilst this is unlikely to cause any particular problems where the alleged use of unlawful force was committed within the territory of the State a different range of issues will arise where the incident has occurred abroad but within the jurisdiction of that State.[30] Will, for instance, an investigation by the armed forces in relation to its own members be sufficiently independent for the purposes of the 1950 Convention?[31]

It is likely, however, that in all States Party to the ECHR a soldier engaged on a military operation outside his own country will remain subject to his national and/or his military law. Whether this will give the military authorities of his own State the power to hold courts-martial or other disciplinary proceedings abroad will depend upon that law (and upon a Status of Forces Agreement with the receiving State). In some States there will be a power to do so, in others there will not. In the latter group soldiers will have to be repatriated should a trial or disciplinary proceedings be contemplated.

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[28] This includes procedural issues, to determine whether an applicant has exhausted domestic remedies or, indeed, whether national courts have accepted jurisdiction in a particular case, see Marcovic v Italy (2007) 44 EHRR 52.

[29] R (Al-Skeini and others) v Secretary of State for Defence [2007] UKHL 26. At a British court-martial in 2007 one of six soldiers pleaded guilty to causing inhumane treatment to one of the appellants. See N.Rasiah, 'The Court-Martial of Corporal Payne and the Future Landscape of International Criminal Justice' (2009) 7 Journal of International Criminal Justice 177.

[30] R (Al-Skeini and others) v Secretary of State for Defence (note 28). In Secretary of State for Defence v The Queen on the application of Mrs Catherine Smith [2009] EWCA Civ 441 the Court of Appeal held that a British soldier was within the jurisdiction of the UK when serving abroad in Iraq and when he died. The subsequent coroner's investigation in England into his death had to take account of this finding and apply Art.2 of the ECHR. The issue of whether a military board of inquiry would constitute an independent investigation for the purposes of Art.2 was not therefore necessary to decide.

[31] In Ramsahai v Netherlands (2008) 46 EHRR 43, para. 407 the investigation into the death of the applicant was carried out by 'direct colleagues of the persons alleged to have been involved' resulted in the investigation not being independent.

I will assume that the criminal and the military law of the soldier's State continue to govern his actions wherever he is deployed, whether at home or abroad. The national legal system will also determine the criminal or military procedure adopted should the soldier face criminal or disciplinary procedures in respect of his use of force. I will also concentrate on military operations falling short of war fighting.

Military misconduct: why does it occur within the context of the ECHR?

The ECtHR has dealt with a significant number of cases involving applications in which the alleged breach of a Convention right has been caused by the use of military force.[32] Whilst these cases have turned on the liability of the State concerned there is, underlying each decision, an issue as to why individual soldiers acted in the way they did. This is a matter calling for further analysis.[33]

It should be said that, despite the large numbers of soldiers who have taken part in military operations of the type under consideration, the actual instances of misconduct against civilians brought before the ECtHR are relatively small. This is hardly surprising since the armed forces of a democratic State should be a disciplined force. Military discipline is most frequently considered to be at the pinnacle of the level of discipline required of any profession or organisation. It has to be taught and enforced, directly or indirectly, on a daily basis.

Why then does misconduct occur at all? It is, in my view, too superficial to say that those who use any degree of unlawful force are 'bad apples' whose removal will prevent such action occurring again. Whilst there is likely to be a small number of bad apples in any organisation the circumstances facing soldiers at the time, their training, the general military structure of the particular unit involved and their own personality will all have their part to play in their conduct, whether good or bad, during military operations.

(a) The circumstances facing soldiers at the time

These can vary enormously. Soldiers may be deployed in full 'battle kit' with war-fighting weapons or merely wearing informal military uniform carrying no weapons or, indeed, somewhere along this spectrum. There may be some risk to their own lives from fighters who are indistinguishable from peaceful civilians or there may be no risk at all. They may be faced with guarding humanitarian supplies, such as food and medicines which are at risk from local thieves or guarding civilians prior to handing them over to the local police, or releasing them. They may be operating abroad or within a State where local public services are working well or not at all. The armed forces of which they form part may have been present in that locality for some time, during which they will have acquired considerable local knowledge, or only for a short period.

[32] The Court has taken the view that, in principle, there is no distinction between the use of force by soldiers or by police officers. The reason for this is that it has seen the use of any force by State agents as a means of law enforcement, in which the particular role of the agent concerned is irrelevant.

[33] This issue is explored more fully in P.Rowe, 'Military Misconduct During International Armed operations: "Bad apples" or "Systemic Failure"' (2008) 13 Journal of Conflict & Security Law 165.

Some soldiers will be highly motivated to progress within their military careers whilst others will not. In some armed forces a unit may be comprised of a mix of professional soldiers and conscripts or only of the former.

Soldiers themselves may consider, with good cause or otherwise, that their normal high standards of military discipline have been relaxed by their commanders, especially if they are serving abroad as a small national contingent in multinational operations. For young men, in particular, the availability of alcohol (especially if not limited in terms of quantity) and the opportunities to buy sexual favours from the local population are relevant factors in determining the degree of military discipline shown when they are subsequently engaged in military operations.[34]

It can therefore be seen that the risk of military misconduct committed against a civilian will, to some extent, depend upon the circumstances of the military operation concerned. In some the risk is much greater than in others and the detailed planning for the operation should be able to take this into account. The risks of death or serious injury to soldiers engaged in the conflicts in Chechnya, south-eastern Turkey, Northern Ireland,[35] Iraq or Afghanistan are (or were) of a much greater magnitude than to those involved on peace support operations abroad.

I will concentrate on military operations in which it is not envisaged that the use of force by soldiers will be a common occurrence. These are likely to include deployments within a State or abroad authorised by NATO or through the European Defence and Security Policy.

(b) Training for the military operation

The opportunities for training within the armed forces are often much greater than in many civilian organisations. Soldiers will, of course, be taught the basic war-fighting skills along with those parts of the law of armed conflict /international humanitarian law considered to be most relevant. In a sense, this is relatively easy since to the soldier the uncertainties involved in an international armed conflict are much less than those in a military operation where he may be attacked by someone who does not distinguish himself from other members of the civilian population.

Again, on a military mission the soldier is likely to have to interact with civilians much as a police officer would. A significant difference is that the soldier, unlike the police officer, will be unlikely to have a sound knowledge of the civilian population and the particular tensions faced by them.

Effective training will have to take into account the particular circumstances faced by the soldiers concerned. Training, for instance, on the treatment of prisoners of war is likely to be of little value when any person detained, even briefly, will be a civilian. Rules of engagement (RoE) will need to take into account the actual circumstances faced by the soldiers and on which they will need to be trained.[36]

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[34] For the 'zero tolerance' of misconduct by UN peacekeeping forces see, for example, UN Security Council Resolution 1820 (2008), para.7.

[35] This was not considered to be an armed conflict by the government of the United Kingdom at the time.

[36] See Kakoulli v Turkey (2007) 47 EHRR 12, para.113; Acar and others v Turkey, Application No.30742/03, Judgment, 6 October 2009, para.34; Andreou v Turkey, Application No.45653/99, Judgment, 27 October 2009, para.56.

(c) The general military structure of the unit concerned

The importance of military discipline as a means of trying to prevent misconduct has been referred to above. The role of the commander is often pivotal to the actions of those under his command. He can give direct and clear orders or leave the task, to be performed by those subject to his command, vague. He will generally set the scene in which the degree of force (if any) to be used is determined. In doing so he may, or may not, provide any alternative to the use of force.

The commander may have a strong commitment to military discipline and to the accountability of himself and his subordinates for his and their actions. Alternatively, he might take the view that he can act with relative impunity and justify this to himself through the risks perceived to the lives of his soldiers and the need to restore order, where this task has been entrusted to the armed forces.[37] This attitude is likely to be transmitted easily to the soldiers under his command.

Under the ECHR the actions of the commander can be considered separately from those of his subordinates. Through the planning and preparation for a particular military operation the commander may cause his State to breach a Convention right even though the soldiers who carry out his orders do not, by themselves, do so.[38] This is similar to the position under IHL where the State is 'responsible for all acts committed by persons forming part of its armed forces.'[39]

(d) Personalities of soldiers

Loyalty to a particular unit is a strong feature of military life. In battle conditions its importance can hardly be exaggerated as soldiers act as a group and not merely as individuals. Where misconduct during military operations occurs it is uncommon for soldiers to act in isolation from other members of their unit.[40] Recent incidents show this. They also show the prevalence of 'trophy photographs'. It is, perhaps, even more difficult for soldiers of the same rank in the unit to challenge the wrongful conduct. Some will, but others will not.

Conclusion

Within the Council of Europe, with its emphasis upon the nature of a democratic State, the armed forces are expected to be a highly disciplined force. All members of those armed forces, at whatever level of the chain of command they occupy, are required to comply with the law. In the course of an international armed conflict this will generally be IHL. It will be the lex specialis and will displace IHRL (should the State's obligations apply outside its jurisdiction) if any of its norms are contradictory to IHL. National law must be understood in the light of it.

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[37] See, for example, Guygova v Russia (2009) 49 EHRR 22, para.95 (inability to determine which units were involved); Shemilova and Shemilov v Russia, Application No.42439/02, Judgment, 8 October 2009, para.8.
[38] McCann v United Kingdom (1996) 21 EHRR 97.
[39] Additional Protocol I, 1977, art.91. see also the Hague Convention IV, 1907, Art.3 and for discussion, F.Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 International and Comparative Legal Quarterly 827 and note 4 above.
[40] For examples see McCann v United Kingdom (note 37 above); Andreou v Turkey, Application No.45653/99, Judgment, 29 October 2009, para.42; Bici and another v Ministry of Defence [2004] EWHC 786 (QB).

In a non-international armed conflict IHL, IHRL and national law will continue to apply. Soldiers cannot be expected to weigh up which set of norms will govern their actions when faced with a situation in which the use of armed force is an option. They can expect their commanders to do so in drawing up the RoE, the principal component of which will be national law, in which is included the soldier's military law.

Once the source of the soldier's obligations are made clear the issue of why they are disregarded through military misconduct is a separate issue. Military discipline is built primarily upon national (including military) law. The importance of national law has been increased through the complementarity provisions of the Rome Statute of the International Court.[41] It is not difficult to show a causal connection between lapses of discipline and a breach of this national law. In order to prevent misconduct of this nature occurring during military operations it is essential to study the causes of it.

[41] The Rome Statute 1998, Art. 17.