

ARTICLES**HUMAN RIGHTS APPROACH TO REGULATE ARMED CONFLICTS:
BEYOND THE *LEX GENERALIS/SPECIALIS* FRAMEWORK**

INTRODUCTORY NOTE

Shuichi Furuya* and Kyo Arai**

In the *Threat or Use of Nuclear Weapons* opinion, the International Court of Justice (ICJ) recognized the concurrent application of International Humanitarian Law (IHL) and International Human Rights Law (IHRL), while adopting a puzzling approach to distinguish the former as *lex specialis* from the latter *lex generalis*. In the *Separation Wall* opinion and the *Armed Activities in Congo* case, however, the ICJ emphasized their mutual complementarity, understanding that both laws function as part of the holistic legal framework regulating armed conflicts. Many subsequent cases and practices indicate that following this view, the call for Human Rights protection affects several aspects of armed conflict beyond the humanitarian considerations underpinning IHL. These dictate that scholars and practitioners analyze the relationship between IHL and IHRL in a more comprehensive and non-dogmatic way, departing from formalistic or misleading frameworks, such as the *lex generalis/specialis* dichotomy.

On the other hand, the undeniable fact is that some states still vigorously defend the mutually exclusive or independent application of IHL and IHRL. Also, the European Court on Human Rights (ECtHR) dismissed the European Convention's application to the 'active phase of hostilities' in the recent *Georgia v. Russia II* case. While the ECtHR followed its case law, necessitating the interpretation of the Convention in conformity with IHL, it categorically denied the 'jurisdictional link' with the respondent state for its military actions in the applicant's territory. This judgment may have signaled the insuperable difficulty of the concurrent application of the IHL and IHRL in some hard-case situations.

This special issue aims to contemplate this mixed conception of the relationship between IHL and IHRL, draw a clear picture of how the requirement of Human Rights protection (the IHRL viewpoint) engages in and regulates armed conflict situations, and offer a comprehensive understanding of this multilayered application of international norms in armed conflicts in an integrated way. In the first article, which shares the subtitle of the special issue ("Human Rights Norms

* Professor of Public International Law, Waseda Law School, Waseda University, Japan.

** Professor of Public International Law, Faculty of Law, Doshisha University, Japan.

Applicable in the Situation of Armed Conflict — Beyond the *lex generalis/specialis* framework —”), Professor Yuval Shany discusses the interplay between IHL and IHRL, specifically examining the instability of existing law and practice of the co-application of them, and the complication rooted in efforts of move beyond the *lex generalis/specialis* framework, such as the ECtHR’s recent position to seemingly returning to the pre-co-application era and ICRC’s argument for developing new hybrid norms. Shany extended his analysis of the *lex generalis/specialis* framework to the relationship between the IHRL and *jus ad bellum*. Professor William Schabas, in the second article (“The Right to Life in Armed Conflict”), addresses whether the deprivation of human life in armed conflict in conformity with IHL, such as the killing of an enemy combatant, may be a violation of IHRL. After criticizing the ICJ’s *lex generalis/specialis* approach and tracing the codification history of the right to life, he examines the combatants’ right to life and the IHRL’s additional protection. He then analyzes the possible role of IHRL in further regulating the means of warfare and wars of aggression.

Both the third article (“Gender Bias and International Humanitarian Law: Is Human Rights Law the Answer?”), co-authored by Ms. Vanessa Murphy and Dr. Lindsey Cameron, and the fourth (“Child Soldiers: Victims or Lawful Targets?”) by Professor Eriko Tamura discuss the possibility of the IHRL’s complementary or predominant function in improved protection of persons. Murphy and Cameron explored whether IHRL could address gender bias in IHL through the complementary application of substantive human rights to eliminate gender-based discrimination or other flaws in IHL. Additionally, they emphasized the need for social and cultural change beyond international law as the key to unlocking progress on gender bias in IHL, concluding that, for now, the *gendering* of IHL provisions must continue. Tamura considered the relationship between IHL and IHRL in the context of the protection of children, for which a contrary vector of influence from IHL to IHRL was noted. She first studied the special protection for children provided by both fields of international law and subsequently probed an unanswered problem: whether such special protections for children should persist when they become soldiers and pose a military threat.

Lastly, in his article (“Procedural Aspect of the Right to Life in Armed Conflict”), Professor Kyo Arai examines a relatively new issue regarding armed conflict — how, if at all, does the obligation under IHRL to investigate any deprivation of life resulting from lethal force by State agents effect the conduct and military operation of war. Using ECtHR case law, Arai explored the possible interplay between investigative obligations in the two branches of international law, in light of that the two may be more aligned with respect to investigative obligations than the substantive aspect of the right to life.