Chapter 1
Introduction

Abstract Armed forces operating in particular in a non-international armed conflict are often confronted with the problem that they cannot classify a targeted group as one that is or is not party to the conflict. This doubt can be called a gray area. It leads to a legal uncertainty in which it is unclear whether an operation is governed by international humanitarian law or the international law of human rights. The problem is relevant when lethal force is resorted to: is killing legal under international humanitarian law or human rights standards?

In this thesis, two aspects are taken into account in order to resolve this problem. First, whether international law itself provides a ruling, according to which it is clearly defined which branch regulates the operation, is analyzed. Second, the requirements of the use of lethal force are compared. This comparison is first realized on an abstract level – the ruling of killing is analyzed in international humanitarian law and in human rights standards – and on a concrete level – various operations carried out by the National Police of Colombia are assessed. In the assessment, it is questioned which particularities and elements the police operation must have in order to meet the requirements of killing in each branch of law. The aim of the illustration is to find concrete conclusions about the differences between IHL and human rights, but also about their similarities. If they are rather similar, it would not matter if a certain branch of law regulates the Colombian police operation, for the requirements would be similar under the other branch.

A. Content and Questions Addressed

I. Killing: A General Problem in International Law and Its Relevance to the Colombian Case

In 2000, the Israeli government officially admitted to following a policy of killing terrorists as a means of preventing acts of terrorism. The US Government has not
admitted to such a policy, although it has been willing, at times, to kill in order to prevent acts of terrorism that targeted its citizens. Since then, the question of lawful killing in international law has become a major issue, particularly for human rights defenders, the legal doctrine, and various international organizations’ human rights bodies, such as the United Nations and the Organization of American States. Moreover, on 13 December 2006, the Israeli Supreme Court ruled on the Israel Defence Force’s praxis of targeted killing.

The discussion of lawful killing is related mostly to Israel and the USA in their fight against terrorism. Legitimate killing is not often discussed in other contexts. However, it is important to do so. For example, in 2007, the military and police forces in Colombia officially killed 2,703 members of different “guerrilla groups,” “self-defence groups,” and “criminal bands.” In 2008, another 1,564 members of these groups were officially killed by the military and police. These figures are high and should be of grave concern.

II. Legal Framework

Different branches of international law can be applied when analyzing the legality of killing. International humanitarian law (IHL) applies to special situations, namely that of armed conflict. In cases that are not considered armed conflict, only international law of human rights applies.

III. The Gray Area Between IHL and Human Rights in Cases of Armed Conflict

In the case of armed conflict, both branches of international law might be applicable, and therefore, the question arises of which to apply. This can lead to considerable difficulties since the branches differ. One fundamental difference is that humanitarian law requires that humanitarian concerns and military necessity be balanced. The primary goal of military necessity is to achieve the submission of the enemy at the earliest moment possible, with the least possible expenditure of personnel and resources. Military necessity justifies all force that is not prohibited by international law. Thus, killing can be considered to be such a necessity. Conversely, the use of

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1 For example, on 3 November 2002, an unmanned aerial vehicle, operated by the US Central Intelligence Agency, launched a missile at a car of suspected terrorists that was travelling through the Marib province of Yemen, killing six people.


deadly force is strictly limited under human rights law. It is required that a person not be “arbitrarily” deprived of his/her life.4

Since the ruling seems to be very different, it is necessary to clarify which branch of law regulates a concrete situation, namely in cases of armed conflict, when both branches might be applicable. Moreover, if one finds a theoretical solution, it does not automatically satisfy concerns for the praxis. For example, one might hold that IHL regulates hostilities while human rights regulate operations of law enforcement outside hostilities. In practice however, there might be a situation in which it is unclear whether an operation takes place in or outside hostilities. On the contrary, it is often stated that in the context of armed conflict, it is of considerable difficulty to classify operations within these two categories.5 An operation can be designated, as one either inside or outside hostilities, but the situation remains too unclear for a correct classification. This leads to a gray area where both branches of law may be applicable. It is obvious that these gray areas lead to legal uncertainty.

B. Justification of the Research Topic

Despite the known problematic nature of the practice – that state forces cannot always precisely classify their operations – no attempts have been made to discuss this topic further. Hence, it is more than appropriate to come up with further guidance on which branch of law – IHL or human rights law – is applicable in situations that fall into this gray area. The purpose of this thesis is therefore to provide a resource for the practice so that it can overcome the problem.

It is adequate to relate the problem of the gray area to the right to life and lawful killing, since the differences between IHL and human rights are obvious with regard to this right. But which approach can contribute to resolving this problem?

In this thesis, two aspects of the problem are taken into account. First, it is analyzed whether international law itself provides a ruling, according to which one branch regulates the operation and not the other. Second, the requirements of the use of lethal force are compared. This comparison is first realized on an abstract level, i.e. the ruling of killing legally is analyzed in each branch of law. Once the requirements are defined, they are also compared on a concrete level. In order to do so, different operations are assessed. The conduct of these operations is described and assessed in terms of both branches of law. Thus, the particularities and elements that a case must have in order to meet the requirements of killing in each branch of law are illustrated. It is assumed that a comparison of the rules on an abstract level can help to reach some conclusions. However, assessing these rules in concrete examples can also result in further findings. Thus, the aim of this illustration is to

4Watkin, Use of Force, p. 9 f.
find further conclusions about the differences between IHL and human rights, but also about their similarities. If they were rather similar, it would not matter if a certain branch of law regulates the operation, for the requirements would be similar under the other branch. Accordingly, the differentiation between the two branches would be less important. Conversely, if the requirements were rather different, it would be important to differentiate between the two branches of law.

In addition to the aforementioned problem, further questions are worth analyzing in detail.

In IHL governing non-international armed conflict, two aspects are of particular interest. First, how does one qualify the members of a non-state organized armed group? Are its members to be considered civilians or non-civilians? Moreover, the meaning of “direct participation in hostilities” must be clarified. These elements were analyzed by a group of experts. The results apparently do not provide a definition of the term “direct participation in hostilities.” The group’s findings are taken into account, evaluated, and a definition of the term is proposed.

Second, attempts are made to prove that, in situations where IHL is applicable, killing is not an unlimited right when it is used against an adversary, but there are restrictions on it. In legal doctrine, it can be observed that many scholars refer to human rights to rule on the restriction. This is already questionable since it causes an intermingling of the two branches of law. Recently, a further opinion has emerged that restricts the use of lethal force by referring to IHL, namely the principle of military necessity. A specific rule in IHL, however, has not been taken into account. Therefore, it seems to be necessary to assess whether IHL itself provides a specific restriction on the use of lethal force that is applied against an adversary.

With regard to the human rights framework, it has to be noted that the conventions pertinent to Colombia are the International Covenant on Civil and Political Rights and the American Convention on Human Rights, both of which have ruled, “no one shall be arbitrarily deprived of his life.” The wording of the two rulings is identical. Does this lead to an identical ruling in both treaties? The comparison of both provisions has been only marginally discussed by the legal doctrine. Hence, the origins and interpretation of both are analyzed in order to provide an answer to this question.

It is appropriate to relate the whole subject to the Colombian context. As stated before, the number of people killed by military and police forces is high, indicating the need to relate this subject to the country context. In the following chapters, it is shown that a legal gray area has resulted within the Colombian case from various military operations conducted by state forces. Moreover, the Colombian Ministry of National Defence has recently identified the problematic nature of the gray area in which its military and police forces operate. With the purpose of

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6ICRC, Direct Participation in Hostilities – Summary Report III.
7Melzer, Targeted Killing, p. 278 ff.
overcoming the resulting legal uncertainty, the ministry started developing a study called “operational law,” in order to provide guidance on this subject.

It is worth mentioning that the various scenarios of operations that are subject of an assessment under IHL and human rights are conducted by the National Police of Colombia. Like the armed forces, the National Police are involved in operations against both guerrilla groups and bands of organized criminals. Thus, there is a risk of conducting operations in legal gray areas. It has been decided that scenarios in which the police, and not the armed forces, are involved should be analyzed, since the role of the police in Colombia has increased in recent years. This is a result of the current government’s policy of democratic security and defence (Política de Defensa y Seguridad Democrática); in 2002, police units were present in 940 of the 1,098 municipalities; in 2003, their presence increased to 1,077 municipalities; and since 2004, the police have been present in all municipalities. From 2002 to December 2008, the number of police officers increased from 104,420 to 145,871. New structures have been developed, e.g. mobile squadrons (Escuadrones Móviles de Carabineros), which consisted of 8,400 agents in March 2007. These units are intended to assure the presence of police in remote areas where they are fighting guerrilla groups inter alia.

As the subject is related to the Colombian case, its national jurisdiction, in particular the Colombian Constitutional Court, and part of the legal doctrine are taken into account and discussed. This is also done with regard to international jurisdiction and quasi-jurisdiction that Colombia is subject to, in particular, the Inter-American Court and Commission on Human Rights, as well as the United Nations Human Rights Committee.

C. Questions That Are not Addressed

This thesis does not analyze the Colombian case in depth. The roots and causes of violence in Colombia are diverse and complex, and include social and economic dimensions. Moreover, the history of violence goes back not only to the country’s independence and the declaration of Gran Colombia in 1819, but also to Spanish colonial times. Instead of giving an exhaustive description of the conflict, this thesis aims to paint a basic picture of the context in which these legal questions arise in order to demonstrate why these questions need to be answered. Thus, it is important to discuss the present situation in Colombia; in particular, if an armed conflict is taking place, and who is a party to the conflict. The author is aware that certain aspects of the Colombian case may be simplified in this thesis.

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8Colombian Ministry of Defence, Logros de la seguridad democratic – Cifras preliminares 2008, p. 73.
The lawful use of lethal force is not analyzed under domestic law, but under international law. Therefore, Colombian law is only discussed when it is necessary to assess the requirements in international law.

Moreover, there are restrictions on legal killing in both branches of international law. This could be related to the recent development of non-lethal weapons. Despite its important significance, this will not be discussed in this thesis due to the topic’s complexity and because it requires profound technical know-how.

Finally, whether the current legal framework of IHL and human rights law is adequate and satisfactory for the international community’s fight against international terrorism will not be discussed. In the aftermath of the attacks on 11 September 2001 in New York and Washington DC, a discussion was launched, in particular by the US Government, which claimed that the current legal framework was too restrictive on the use of force, hindering an effective fight against terrorists. This discussion is dealt with elsewhere, and will not be repeated in this thesis. Hence, the question is only related to currently existing international law.

D. Outline

As the thesis relates to the situation in Colombia, it is necessary to analyze whether there is an armed conflict in Colombia and if IHL is applicable. This is the content of Chapter 2, “The Situation in Colombia.” In this chapter, the question of whether there is an armed conflict in Colombia is dealt with, and the role of the National Police of Colombia is outlined. In Chapter 3, “Legal Requirements for the Use of Lethal Force,” the relationship between IHL and human rights law is clarified, and the requirements that need to be met in order to kill lawfully under each of the two branches are analyzed. In Chapter 4, “Use of Lethal Force in Various Operations of the National Police of Colombia,” practical scenarios are illustrated, and the question of whether the requirements under IHL and human rights law differ more than they overlap is assessed. This analysis will help the author to draw further conclusions about the problem of conducting operations in gray areas, and provide approaches to overcome legal uncertainties. Finally, the thesis’ main findings are presented in Chapter 5, “Main Findings and Thesis Statement.”
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