

HUMAN RIGHTS IN ARMED CONFLICT: METAPHORS, MAXIMS, AND THE MOVE TO INTEROPERABILITY

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Abstract

This contribution looks at the ways in which the relationship between human rights law and the law of armed conflict has been portrayed. It references the metaphors and maxims that are said to help understand this relationship and suggests that, rather than looking for an overarching theory, the time has come to focus on particular contexts and consider the policy choices available and what is at stake.

1. A COMPLICATED RELATIONSHIP

In a journal dedicated to the analysis of discourse it seems appropriate to look at the language that has been used to explain the relationship between human rights law and the law of armed conflict. For a while, it seemed as though each faction in the debate was determined to find an expression that captured its approach. Remarkably, most managed to find the key word without leaving the c portion of the dictionary. Three approaches are well known in the discourse: convergence, conflict and complementarity.¹ But in a tongue-in-cheek paragraph for a previous study I

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¹ A. Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19(1) EJIL 161–82 (2008); L.M. Olson, *Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 Case Western Reserve Journal of International Law 437–61 (2009); C. Greenwood, *Human Rights and Humanitarian Law – Conflict of Convergence*, Case Western Reserve Journal of International Law 491–512 (2010); N.K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 International Law Studies 349–410 (2010); H. Duffy, *Harmony or conflict? The Interplay between human rights and humanitarian law in the fight against terrorism*, in: L. Van Den Herik and N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order* 482–526 (Cambridge: CUP, 2013); S. Aughey and A. Sari, *Targeting and Detention in Non-International*



concluded that attempts to find a definitive word to describe the relationship had run aground, and that most of the ‘c’ words had now been exhausted:

One might characterize the two branches as concurrent, coexisting, consistent, convergent, coterminous, congruent, confluent, corresponding, cumulative, complementary, compatible, cross-fertilizing, contradictory, competitive, or even in conflict. Our contribution to the debate is best summarized as follows: ‘It’s contextual and it’s complicated’.²

By suggesting that it is ‘complicated’ we are *inter alia* winking at the idea that certain commentators see this relationship through the metaphor of a couple that, even if they have gone through a ‘rocky patch’, are now destined, having come into such ‘close contact’, to seek to live in ‘harmony’.³

At one level, these explanations of the relationship and attendant metaphors are trying to address the questions posed by Ohlin: ‘Are the two bodies of law consistent with each other? If they pull in opposite directions, how can their basic norms be co-applied at the same time?’⁴ At another level, of course, they allude to the idea that it is not the bodies of law that have ‘grown up’ differently,⁵ but rather their practitioners or rather their protagonists.

Human rights lawyers are often mentioned in the same breath as ‘activists’.⁶ In fact it is sometimes said that those ‘human rights practitioners’ are not necessarily lawyers and may have backgrounds in advocacy organizations,⁷ while the caricature of those interested in international humanitarian law is said to be those who:

have had professional experience in the military, in government or with the ICRC. Many scholars who have had such professional experience remain closely connected to the relatively small community of IHL practitioners and scholars, often meeting at the same

Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence, 91 *International Law Studies* 60–118 (2015).

² A. Clapham, The Complex Relationship between the 1949 Geneva Conventions and International Human Rights Law, in A. Clapham, P. Gaeta, and M. Sassòli, (eds), *The 1949 Geneva Conventions: A Commentary*, 735 (Oxford: Oxford University Press, 2015) 701–35.

³ N.K. Modirzadeh, The Dark Sides of Convergence *supra* note 1 at 358–60, referencing, *inter alios*, C. Droege, Elective affinities? Human rights and humanitarian law, 90(871) *IRRC* 501–48 (2008) and N. Lubell, Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate, *Israel Law Review* 648–60 (2007).

⁴ *The Assault on International Law* 180 (Oxford: OUP, 2015).

⁵ For the historical origins of the separate drafting of the treaties and the different attitudes of state representatives in the 1940s, see R. Kolb, The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions, (324) *International Review of the Red Cross* 409–19 (1998).

⁶ Ohlin (*supra* note 4) at 170 and 173 and see *infra* at 16–17.

⁷ Modirzadeh (*supra*) at 381.



academic conferences and relatively familiar with the range of perspectives within their ranks on the key debates.⁸

While some commentators continue to argue that the lineage of the two bodies of law is so different that it makes no sense to mix up their provisions, other analysts will point out that, on the whole, each side is simply arguing either for a more expansive or for a more restrictive application of human rights law, and that neither side readily admits that they are developing their theory to fit the end goal while happily accusing the other side of doing just that. Milanovic splits the camps into enthusiasts and sceptics:

The enthusiasts accuse the sceptics of being morally inconsistent apologists for state power who only wish to facilitate the exercise of that power by making wholly arbitrary distinctions with regard to who is protected by human rights and who is not. The sceptics, on the other hand, accuse the enthusiasts of being a utopian, dovish bunch of fluffy, mushy-wushy do-gooders, who know nothing about the realities on the ground in wartime and who risk compromising both human rights and IHL with their relentless and illegitimate action.⁹

In an appeal to move beyond these differences, it has been suggested that in order to make progress, and avoid ‘chaos’ and ‘deadlock’, the relevant meetings should include specialists in IHL (‘more particularly military lawyers’), and that ‘human rights lawyers should not claim an expertise in IHL unless they are genuinely regarded as “bi-lingual” by both constituencies’.¹⁰ This author would be the first to claim that more people should study both branches of law at the postgraduate level at specialized institutions (even using more than one language), but we also have to admit that mutual suspicion between the two camps runs deeper than questioning some people’s level of understanding of and fluency in these branches of law.

Luban references a senior figure closing a conference who called for stout resistance to ‘the unpleasant phenomenon of human rights-niks who, hoisting the banner of human rights law, are attempting to bring about a hostile takeover of LOAC [the law of armed conflict]’.¹¹ Now the issue becomes one of defending a way of doing things

⁸ Ibid at 380; Compare M. Sassòli and Y. Issar, Challenges to International Humanitarian Law, in: A. von Arnould and Matz-Lück, 100 Years of Peace Through Law: Past and Future 188 (Berlin: Dunker & Humblot, 2015).

⁹ M. Milanovic, The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law, in: J.D. Ohlin (ed), Theoretical Boundaries of Armed Conflict and Human Rights 79 (New York: CUP, 2016).

¹⁰ F. Hampson, The relationship between international humanitarian law and international human rights law, in: S. Sheeran and N. Rodley, (eds), Routledge Handbook of International Human Rights Law 212 (Abingdon: Routledge, 2013).

¹¹ D. Luban, Military Necessity and the Cultures of Military Law, 26 Leiden Journal of International Law 317 (2013) referencing Y. Dinstein, Concluding Remarks: LOAC and Attempts to Abuse or Subvert It, 87 International Law Studies 488 (2012).



rather than a complaint that they have failed to understand. In fact they/we may understand very well and yet simply draw different conclusions when asked to draw the line between what is permissible and what is not.

When one drills down to the application of the proportionality rule in targeting, the fear is not always that the human rights lawyers have failed to grasp the essentials of the rule, but rather the presumption that they simply weigh different values differently. Consider this revealing passage from the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia:

It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the “reasonable military commander”.¹²

2. SOME MORE METAPHORS

A discussion of discourse should perhaps also look beyond the coupling metaphors. We can see past the references to the branches being a troubled couple, or ‘long-lost cousins who have recently become friendly’.¹³ Corn’s article ‘Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict’ starts from the premise that human rights law has been a ‘steady march’ into ‘an area formerly subject exclusively to the law of armed conflict’.¹⁴ For him the ‘momentum behind the complementarity is too powerful to reverse’.¹⁵ He then goes on to illustrate why one needs to go back to the logical limits of human rights law to see why there are limits to complementarity, not least because this would debilitate operations on the ground:

Soldiers are not police officers, and while it is certainly possible to train soldiers to operate with the type of restraint incumbent in the police function, asking them to operate under such a framework during armed conflict is inconsistent with their fundamental purpose: to be ready, willing, and able to kill on demand. Showing mercy or restraint is, as noted above, always an option available to a commander who chooses not to exercise the full scope of his or her authority against an enemy. However, once the law requires assessment

¹² At para 50, available at www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal.

¹³ Modirzadeh (*supra*) at 360.

¹⁴ G. Corn, Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict, 1 International Humanitarian Legal Studies 52-94 (2010), 53.

¹⁵ Ibid at 56.



of the *actual* threat posed by an enemy combatant, the effectiveness of combat capability will inevitably be diluted.¹⁶

The implication seems to be that human rights law and the law of armed conflict are not apples and oranges, two fruits to be distinguished, but possibly mixed into a fruit salad. Rather, they are apples and hand grenades – and such a mixture, Corn tells us, is to be ‘resisted vigorously’.¹⁷

An even more striking metaphor is found in ‘Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict’.¹⁸ Here, Major Hansen states that a gendered term was deliberately chosen and develops the idea that warfare is emasculated when humanitarian law is displaced by human rights law, ‘which is ill-equipped for the harsh realities of war’.¹⁹ Referencing the idea that society prioritizes things seen as masculine traits, the implication from Hansen is that human rights law is to be cast as inherently incapable of application to conflict. This is because, again, it is inoperable as soldiers should not be asked to cope with the vagaries of human rights law:

Expecting soldiers to understand and distill such complex rules is unrealistic. In the heat of battle, rules for using force must be simple; soldiers must make split-second decisions to kill or be killed. The convoluted nature of human rights standards would permit too much second-guessing of a soldier’s decision to use force, thereby weakening the protection of combatant immunity.²⁰

Human rights law is rejected as convoluted while humanitarian law is unambiguous and easy to follow, although one could read in the idea that asking soldiers to consider the value judgments implied by human rights law would make them less deadly. Hansen’s thesis is really that it is the legal branch of human rights law that is not up to the task:

Human rights law lacks the stomach to deal with the harsh realities of modern warfare. “War is an ugly thing ...” It accepts that lives, even innocent ones, may be lost in pursuit of a collective goal of the state. Any legal regime attempting to regulate war must have the fortitude to balance the needs of military necessity against the principle of humanity without cringing.²¹

¹⁶ Ibid at 83 (footnotes omitted) and see further at 89–90 ‘[I]t also endangers individual members of the force by producing an inevitable hesitancy to employ deadly force.’

¹⁷ Ibid at 94.

¹⁸ M.A. Hansen, 194 *Military Law Review* 1–65 (2007).

¹⁹ Ibid at 4 fn 17.

²⁰ Ibid at 55.

²¹ Ibid at 56 (footnote to John Stuart Mill omitted).

3. BEYOND MUTUAL SUSPICION: METAPHORS AND MAXIMS TOWARDS INTEROPERABILITY AND OPERATIONAL LAW

Against this background, and in the current climate with continuing tussles over the applicability of human rights being fought out in the courts, professions of ‘objectivity’, even bilingualism, are unlikely to be convincing to either side. We should, however, look at some of the more recent scholarship, which seeks to move on from the metaphors, sidestep the doctrinal debates over the maxim *lex specialis derogat legi generali*,²² systemic integration,²³ convergence and so on, and in a nod to the need for a pragmatic approach for commanders and their armed forces in the field, to focus on what is called variously ‘interoperability’²⁴ or ‘operational law’.²⁵

²² J. d’Aspremont and E. Tranchez, The quest for a non-conflictual coexistence of international human rights law and humanitarian law: which role for the *lex specialis* principle?, in: R. Kolb and G. Gaggioli, (eds), *Research Handbook on Human Rights and Humanitarian Law* 223–50 (Cheltenham: Elgar, 2013); H. Krieger, A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Study, 11(2) *JCSL* 256–91 (2006); B. Bowring, Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights, 14(3) *Journal of Conflict and Security Law* 485–98 (2009); S. Borelli, The (Mis)-Use of General Principles of Law: *Lex specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict, in: L. Pineschi (ed), *General Principles of Law: The Role of the Judiciary* 265–293 (Berlin: Springer, 2015); C. McCarthy, Legal Conclusion or Interpretative Process? *Lex Specialis* and the Applicability of International Human Rights Standards, in: R. Arnold and N. Quéniwet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* 101–32 (Leiden: Nijhoff, 2008); N. Melzer, *International Humanitarian Law: A Comprehensive Introduction* 29–31 (Geneva: ICRC, 2016); W. Boothby, *The Law of Targeting* 521–25 (Oxford: OUP, 2012); M. Milanovic, The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law, in: J.D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* 78–117 (New York: CUP, 2016); M. Sassòli, Le droit international humanitaire, une *lex specialis* par rapport aux droits humains?, in: A. Auer, A. Flückiger, and M. Hottelier (eds), *Les droits de l’homme et la constitution: études en l’honneur du Professeur Giorgio Malinverni* 375–95 (Geneva: Schulthess, 2007); A. Dworkin, Individual, Not Collective: Justifying the Resort to Force against Members of Non-State Armed Groups, 93 *International Law Studies* 476–525 (2017), who rejects the idea of *lex specialis* and suggest that a contextual application of human rights law would lead to an overlap with the rules on the conduct of hostilities. So in a situation of ‘intense hostilities’ the state could consider an individual a serious threat and target for interning in conformity with human rights law. At 498.

²³ C. Landais and L. Bass, Reconciling the rules of international humanitarian law with the rules of European human rights law, 97(900) *IRRC* 1295–311 (2015); P. Merkouris, Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave (Leiden: Brill, 2015).

²⁴ S. McCosker, The Limitations of Legal Reasoning: Negotiating the Relationships between International Humanitarian Law and Human Rights Law in Detention Situations, in: G. Rose and B. Oswald, (eds), *Detention of Non-State Actors Engaged in Hostilities* 23–64 (Leiden: Brill, 2016); McCosker in Bryne; F. Hampson, Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law, 87 *International Law Studies* 187–213 (2011).

²⁵ K. Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*, 156 (Oxford: OUP, 2016), Chapter 5 ‘The Humanitarian Law and Human Rights Interface’.



As McCosker explains:

One practical way to approach the relationship between IHL and human rights law is to understand the relationship as one of ‘interoperability’. A central concept in communications and information technology, the term ‘interoperability’ is also often used to describe the capacity of particular weapons systems to function effectively together, or the capacity of different armed forces to operate together for maximum efficiency and effectiveness. At its core, the concept refers to the ability of two complex systems to interact together in a harmonious way to achieve effective functionality, compatibility and mutual outcomes, through various processes including innovation, adaptation and partial standardisation.²⁶

The first breakthrough was to depart from the idea that this problem was all about an overlap/collision between two branches of law in competition, and that one needed a theory to determine the hierarchy or displacement between the two. Instead, it became clear that one had to focus on the relationship between particular norms or rules, and that within that relationship one would have to take account of the specificity of particular treaty rules or customary rules in particular situations.²⁷ The second move towards ‘operationalising the integration’²⁸ involved, as Hampson explains, distinguishing ‘between the applicability of IHL to a *situation* and its application to an *incident*’.²⁹

Hampson is particularly aware of the construct that the application of international humanitarian law contains within it, in some circumstances, permission for states to do things (such as kill members of the enemy armed forces and destroy things that are military objectives). But importantly, Hampson would seek to separate out those ‘Hague Law permissive rules’ from the protective Geneva rules, and only apply the permissive rules to international armed conflict or a non-international armed conflict which has reached the organization and intensity of a civil war, such as the Spanish civil war or the present conflict in Syria.³⁰ Even more importantly, Hampson reminds

²⁶ The Limitations of Legal Reasoning *supra* note 24 at 58 (footnotes omitted); see also K. Abbott, A brief overview of the legal interoperability challenges for NATO arising from the interrelationship between IHL and IHRL in light of the European Convention on Human Rights, 96(893) IRRC 107–37 (2014).

²⁷ M. Sassòli and L. Olson, The relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts, 90(871) International Review of the Red Cross 599–627 (2008).

²⁸ F. Hampson, The relationship between international humanitarian law and international human rights law, in: S. Sheeran and N. Rodley, (eds), Routledge Handbook of International Human Rights Law 212 (Abingdon: Routledge, 2013).

²⁹ *Ibid* at 209.

³⁰ *Ibid* at 211. The reluctance of human rights bodies to accept status-based targeting, or the permissive rules found in ‘Hague law’ is further explained in F. Hampson, Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law, 87 International Law Studies 187–213 (2011).



us that ‘just because the law allows a soldier to open fire does not mean that it is necessarily the right thing to do in a particular situation in which LOAC is applicable’.³¹

Interestingly when it comes to pitting the human right to life or liberty against a so-called ‘permission to kill’, or to intern,³² in the law of armed conflict, the doctrine and discourse more often speaks of the ‘laws of war’ or LOAC [the law of armed conflict] rather than humanitarian law, and sometimes it is argued or the language of the discourse encourages the presumption that this permission or licence is inherent in war itself.

Pictet, writing in 1985, stated: ‘The fact that one may kill, injure, or lock up people and destroy property is in flagrant contradiction with ordinary criminal law, which forbids and punishes all such acts. War, however, transforms these crimes into legitimate forms of conduct and suspends the application of criminal law.’³³ More recently, Ohlin complains that legal scholars, in their quest to determine what is prohibited under customary international law, ignore ‘the licensing function and the fact that the law of war serves a radically permissive function: to legally sanction the killing of other human beings’.³⁴ He later explains how he sees the motivation of ‘human rights activists and lawyers’:

³¹ ‘Direct Participation’ Ibid at 193.

³² Space does not permit a detailed discussion of the recent developments concerning human rights challenges to detention during armed conflicts; see, for example, the UK Supreme Court’s judgment in *Serdar Mohammed v. Secretary of State for Defence* [2017] UKSC 2. There is an extensive literature on this topic; see, for example, Y. Shany, A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention, 93 *International Law Studies* 102–31 (2017); L. Hill-Cawthorne, Detention in Non-International Armed Conflict (Oxford: OUP, 2016); Augey and Sari (*supra*); E. Debuf, Captured in War: Lawful Internment in Armed Conflict (Paris: Pedone, 2013); L.M. Olson, Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict, 40 *Case Western Reserve Journal of International Law* 437–61 (2009). On the particular effects of applying human rights law in the Israeli Occupied Palestinian Territories, see A. Gross, The Righting of the Law of Occupation, in: N. Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and Its Challenges* 21–54 (Oxford: OUP, 2016). Nor can we indulge in a discussion of the relationship between human rights and international humanitarian law when it comes to the obligations of non-state actors. For extensive discussion, see *inter alia* the works by K. Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford, OUP, 2017), D. Murray, *Human Rights Obligations of Non-State Armed Groups* (Oxford, Hart, 2016), T. Rodenhäuser, *Organising Rebellion* (Oxford, OUP, 2018) and N. Rodley, *Non-State Actors and Human Rights*, in S. Sheeran and N. Rodley (eds), *Routledge Handbook of International Human Rights Law* (Abingdon, Routledge, 2013). It is worth briefly noting that some of the interpretations which are said by states to limit the extraterritorial application of human rights law to them under treaty law would not apply to transnational non-state actors, and that another Latin maxim, *pacta tertiū alieni nec nocere, nec prodissi potest*, from the Roman law of contracts need play no role in understanding the international law obligations of non-state actors during armed conflict.

³³ J. Pictet, *Development and Principles of International Humanitarian Law* 85 (Dordrecht/Geneva: Nijhoff/Henry Dunant Institute, 1985). He continued: ‘We may note in passing that what is true in international conflicts is not necessarily so in cases of civil war or internal disorders.’

³⁴ J.D. Ohlin, *The Assault on International Law* 171 (Oxford: OUP, 2015).



They seek to constrain the geography of armed conflict because they view the law of war that comes along with it as morally disastrous. It changes the legal baseline regarding killing. Human rights law (and domestic criminal law), which reigns supreme during times of peace, prohibits the killing of human beings (absent exigent circumstances such as self-defence). The law of armed conflict changes the basic presumption against killing, defining most killings in armed conflict as essentially lawful. For this reason alone, according to them, the law of war should be tightly policed, limited to discrete areas of time and space so as not to radically increase the licensing function that comes along with the law of war. Essentially, every expansion of the law of war comes with a price: the contraction of human rights law.

Although Pictet was actually confining his explanation of how war transforms crimes into legitimate conduct to *inter-state wars*,³⁵ today the idea of war and the ‘fact’ of the licensing function of the law of war are applied without hesitation to fighting Al-Qaeda and other non-state groups.³⁶ Significantly, when justifying detention in Afghanistan, or targeted killing generally, the US Government resorts to the assumed licensing function contained within the laws of war rather than pointing to any particular provisions of international humanitarian law or the law of armed conflict.³⁷ Perhaps the debate about complementarity between IHL and IHRL is missing the point. The real issue is whether the appeals to the *law of war* (provisions or rules usually not specified) are compatible with contemporary human rights law and the UN Charter’s rules on the use of force. We should recall that not only were law of war permissions considered to be confined to inter-state wars, but Pictet, at least, used to confine ‘the law of war properly so called’ to the ‘law of the Hague’. For him, such law determines ‘the rights and duties of belligerents in the conduct of operations and limits the choice of the means of doing harm’.³⁸

³⁵ He continued: ‘We may note in passing that what is true in international conflicts is not necessarily so in cases of civil war or internal disorders.’ *Supra* note 33 at 85.

³⁶ See the discussion by K.J. Heller, *The Use and Abuse of Analogy in IHL*, in: J.D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* 232–85 (New York: CUP, 2016).

³⁷ Consider the *Remarks by the President at the National Defense University*, (23 May 2013), where there are references to ‘law of war detention’ in Afghanistan and there is no reference to the law of armed conflict, humanitarian law or human rights, although it said that under international law ‘the United States is at war with al Qaeda, the Taliban, and their associated forces’. US State Department Legal Advisor Brian Egan refers to their ‘war against ISIL’, the enemy, making an individual the subject of attack, and the law of armed conflict in ‘International Law, Legal Diplomacy, and the Counter-ISIL Campaign’, speech to ASIL, 1 April 2016; there is no reference to human rights. For an academic study of how the language of ‘war’, ‘enemies’, ‘frontlines’, ‘casualties’, ‘battles’, ‘winning’ etc has been preferred since 11 September 2001 to language related to law enforcement of murder, justice, trial, victims etc, see A. Hodges, *The “War on Terror” Narrative: Discourse and Intertextuality in the Construction and Contestation of Sociopolitical Reality* (New York: OUP, 2011).

³⁸ J. Pictet, *The Principles of International Humanitarian Law* 10 (Geneva: ICRC, 1967). Although at one point Pictet sought to define humanitarian law as being composed of the law of war and human rights (*ibid*), he later explained that there was no attempt to merge human rights and the law of armed conflict and ‘it would have been absurd to do so’. However, he also denied that those who had



4. OPERATIONAL LAW AS A COMBINATION RATHER THAN A CHOICE

Let us concentrate for a moment then on what seems to be a real and incontrovertible clash (not between cultures but between specific rules). The law of war in international armed conflict does not prohibit killing members of the opposing armed forces, and it protects individual members of the armed forces from being prosecuted by the other side for murder (this is also known as combatant immunity). And let us assume, for argument's sake, that human rights law, with its nuances and 'cringing' concern for human dignity, demands more than the prohibitions laid down in international humanitarian law (say that the alternative of arrest ought to have been attempted or a non-threatening cook from the armed forces is not fair game). Then we need to know how international law deals with acts which are permitted by one branch and prohibited by another. There are some recent clues as to how to approach this in a passage from the International Court of Justice:

There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it.³⁹

Although this case concerned the Genocide Convention, the implication for our topic is clear. Action may be perfectly lawful under international humanitarian law (or even the law of war) and yet still be a violation of human rights law by the state concerned.

Of course, this is a 'general rule', so room is nevertheless left for an exception and the recurrent idea that, in some circumstances, the permissions granted by international humanitarian law will affect whether or not we are in the presence of human rights law. One way to look at this problem is to separate out those acts which seem to be *merely permitted* by international humanitarian law (in the sense that they are not prohibited) from those where international humanitarian law actually *grants specific permission* to do something (such as interning prisoners of war). It is suggested here that it is really in this last category of specific permissions that human rights law

challenged him had declared 'that the law of armed conflicts was but a part of the full range of human rights, and that only through human rights would humanitarian law have a chance to reassert itself and develop'. He did not agree with this and sought to highlight the separate development of the branches and keep them distinct, 'if only for the sake of expediency', as only a neutral and non-political body had any chance of access to the hostilities and the victims, and 'likewise with the effort to develop humanitarian law: its only chance of success lies in its being carried on, as far as possible, outside the sphere of politics'. J. Pictet, *Humanitarian Law and the Protection of War Victims* 14–5 (Leyden/Geneva: Sijthoff/Henry Dunant Institute, 1975).

³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* Judgment of 2 May 2015, at para 474.



has had to find a way of accommodating international humanitarian law.⁴⁰ But when it comes to violence rather than detention, it is suggested the situation is more complex, as contrary to the oft-cited mantra that international humanitarian law grants a ‘licence to kill’, what is actually covered by combatant immunity is, in the words of Article 43(2) Additional Protocol I, ‘the right to participate directly in hostilities’.

What is now clear is that human rights law continues to apply in times of armed conflict; it is not confined to peacetime. Similarly, it is not enough simply to distinguish the battlefield from other places. The Genocide Convention may apply to acts on the battlefield that might be permitted (or rather, not prohibited) in humanitarian law. Nor is it sufficient to ask reductionist questions such as ‘is this occupied territory?’ or ‘are we dealing with soldiers or police officers?’. The issues are much more, for want of a better word, ‘granular’. We need now to consider, in Hampson’s words, the *incident* and not the *situation*.

How to do this has been answered by a number of recent contributions, usually by developing a new dichotomy: war fighting as against law enforcement. The rules for a pitched battle are different from manning a checkpoint, even though both may involve the same personnel in the same conflict on the same day. But the issues are more subtle: violence against a checkpoint could be an incident covered by the law of armed conflict (if conducted by participants in hostilities from the insurgents) or by human rights law (if a demonstration by disgruntled civilians). Watkin gives these examples and adds: ‘the default position for the use of force will normally be the human rights-based law enforcement framework.’⁴¹ He also considers the reasons why a state might choose for policy reasons to defer to the law-enforcement model even where the law of armed conflict is applicable,⁴² or, more subtly, where there is concern for ‘potential collateral effects’, then policy-directed restrictions on the use of airpower will ‘move towards creating a “human rights law like” effect’.⁴³ The point is that his ‘holistic’ operational law approach demands policy choices which are not simply choices about whether or not the threshold for the application of the law of armed conflict has been or should be achieved. Moreover, drawing on his extensive experience and contextualizing the issue for present-day challenges, he concludes:

In the battle for legitimacy, the ability of a State to manage the violence with a law enforcement response is a key indicator of success. Being able to effectively respond with a human rights-based framework controlling the use of force is a clear sign of ‘normalcy’ in

⁴⁰ See in particular *Hassan v United Kingdom*, judgment of the European Court of Human Rights, 16 September 2014.

⁴¹ K. Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* 520 (Oxford: OUP, 2016).

⁴² *Ibid* 592–5.

⁴³ *Ibid* at 603.



the context of how a State maintains order within society. The ability to shift to an exclusive law enforcement response may occur long before an armed conflict is viewed as having technically ceased. The result can be decisions taken at the highest strategic levels to privilege a law enforcement response or to apply human rights-based norms during the conduct of hostilities against non-State actors regardless of whether the conflicts occur internally or internationally.⁴⁴

The approach within the mainstream discourse in international fora is, however, still to seek to prioritize one branch over the other as a matter of law (sometimes referencing the Latin maxim *lex specialis*). Or, alternatively, to see human rights law as informed by, or accommodating, international humanitarian law as a matter of treaty interpretation (sometimes referencing the Vienna Convention).⁴⁵

5. ONGOING DISCUSSION IN THE UN HUMAN RIGHTS COMMITTEE ON THE RIGHT TO LIFE

The present draft General Comment from the UN Human Rights Committee states:

Like the rest of the Covenant, article 6 continues to apply also [to the conduct of hostilities]⁴⁶ in situations of armed conflict to which the rules of international humanitarian law are applicable. While rules of international humanitarian law may be relevant for the interpretation and application of article 6, both spheres of law are complementary, not mutually exclusive. Uses of lethal force authorized and regulated by and complying with international humanitarian law are, in principle, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and persons hors de combat, including the targeting of civilians and civilian objects, indiscriminate attacks, failure to apply adequate measures of precaution to prevent collateral death of civilians, and the use of human shields, violate article 6 of the Covenant.⁴⁷

The general thrust is to suggest that while, on the one hand, human rights continue to apply and can be used to judge the legality of action which risks the lives of civilians and those *hors de combat* where this violates international humanitarian law, on the other hand, lethal force will not in principle be arbitrary and a violation of this human rights treaty where ‘authorized and regulated by and complying with international humanitarian law’. The text therefore confirms that human rights law continues to apply even if incidents of lethal force authorized by international humanitarian law

⁴⁴ Ibid at 613 (footnotes omitted).

⁴⁵ See *Hassan* above, especially para. 100ff.

⁴⁶ At the time of writing the draft has these square brackets to signify that there is no agreement yet on whether the text in brackets should be inserted or not.

⁴⁷ At para 67, footnotes omitted; available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf.



were, in principle, not violations of human rights law. For some governments this formula remains unsatisfactory as it is said that international humanitarian law is ‘more than relevant’,⁴⁸ and should be considered the *lex specialis* for ‘the conduct of hostilities and the protection of war victims’.⁴⁹

The draft text avoids identifying the extent to which human rights law should give further protection beyond that which merely conforms with international humanitarian law.⁵⁰ One set of comments submitted to the Committee attempts, however, to take the Committee in this direction. Lubell and Murray have suggestions based on a more contextual and nuanced approach:

There may be situations during an armed conflict which take place in circumstances that are not active hostilities. In such situations, even though international humanitarian law may be applicable, international human rights law may constitute the initial reference point. In these cases, status-based targeting is prohibited, and the use of force must be approached in accordance with the law enforcement framework: lethal force may only be used as a last resort, with the objective being the protection of life.⁵¹

They later give a further example: ‘In situations of belligerent occupation, the default should be that international human rights law constitutes the initial reference point vis-à-vis the use of force. The framework should only switch on the outbreak of active hostilities.’

6. THE PRACTITIONERS’ GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT

This more operational approach is reflected and explained in the new *Practitioners’ Guide*, published in association with Chatham House,⁵² in which it becomes clearer

⁴⁸ At www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedKingdom.pdf.

⁴⁹ At www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedStatesofAmerica.docx. Compare the 2016 US Report: ‘In accordance with the doctrine of *lex specialis*, where these bodies of law conflict, the law of armed conflict would take precedence as the controlling body of law with regard to the conduct of hostilities and the protection of war victims. However, a situation of armed conflict does not automatically suspend nor does the law of armed conflict automatically displace the application of all international human rights obligations.’ US Government (The White House), *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, (December 2016) at 34 (footnote omitted). The objection seems to be to the use of human rights law to cover the conduct of hostilities rather than in situations of armed conflict generally.

⁵⁰ Beyond the suggestion that human rights law demands certain information on how targeting decisions were taken and with regard to investigations of ‘allegations of violations of article 6 in situations of armed conflict in accordance with the relevant international standards’. At para 67.

⁵¹ Available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Prof.Noam_Lubell_Dr.DaraghMurray_UniversityEssexSchoolLawHumanRightsCentre.docx.

⁵² D. Murray, with D. Akande, C. Garraway, F. Hampson, N. Lubell, and E. Wilmshurst (consultant eds), *Practitioners’ Guide to Human Rights Law in Armed Conflict* (Oxford: OUP, 2016).



that what is being suggested in this context is not just a choice of frameworks, but that the obligations are cumulative rather than simple choices switched on or off. The extra obligations that stem from human rights law, even in the context of taking precautions before an attack, are detailed,⁵³ and the alternative frameworks of ‘active hostilities’ or ‘security operations’ are explained.⁵⁴ Crucially, the rules of international human rights law remain applicable even in the ‘active hostilities framework’ and ‘may inform the overall legal framework’.⁵⁵ In this way it is admitted that, even in a case regulated by the ‘active hostilities framework’, such as an individual who can be targeted with direct lethal force without violating international humanitarian law, international human rights law may be applied by a human rights body. The human rights body would apply the ‘security operations’ framework, which would prohibit direct recourse to lethal force where that individual could have been detained without risk.⁵⁶

7. FINAL REMARKS

We have come a long way from human rights in peacetime and laws of war for wartime. It may take time for the operational law approach being suggested by Watkin, Lubell, Murray, Hampson and others to take hold. Human rights lawyers (and advocates) may fear being seen as unversed in the ways of the laws of war, or at least being accused of not having mastered the language of the law of armed conflict. Some in the military may continue to fear a creeping (invading) ‘emasculatation’ which will put their lives at risk and expose the state to human rights suits. But the discourse has now become more interesting and subtle, with the potential to offer even greater protection to the victims of war. We owe it to future victims to develop a workable set of principles and to leave behind some of the Latin maxims and unhappy marriage metaphors.

⁵³ Ibid at 128–31.

⁵⁴ For example: ‘In non-international armed conflict the ‘active hostilities’ framework regulates the use of force in (a) situations of high intensity fighting involving sustained and concerted military operations and (b) situations where a State does not exercise effective territorial control. The “security operations” framework regulates all other situations, including situations of low-intensity fighting.’ At 93–93; for more detail see esp. Chapter 5 on the conduct of hostilities and targeting, esp. MN 5.16 (occupation), MN 5.35 and 5.46 (targeting); 5.58 and 5.63 (precautions in attack) and 5.76 and 5.83 (proportionality).

⁵⁵ Ibid at 92; from a less legalistic perspective, see D. Luban, *Human Rights Thinking and the Laws of War*, in: J.D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* 74–7 (New York: CUP, 2016).

⁵⁶ Ibid at 93 MN 4.40.

