

Defining Legal Boundaries for UK Military Operations in the 21st Century

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"Only the dead have seen the end of war."

Plato.

PREFACE

Over the last quarter-century or more, the evolving legal regulation of military conduct during conflict has seen normative conventions collide, leaving military practitioners uncertain about the legality of their rules of engagement and significantly exposed to legal risk as they prosecute their assigned missions. The essence is that high-intensity combat operations with a character of war are now being conducted in situations other than state-on-state warfare and in environments not generally viewed as warfighting arenas.

Consequently, in an osmotic process, International Human Rights Law (IHRL)¹ has blended with International Humanitarian Law (IHL)² to the point where legal complexity, rather than combat clarity, is the battlespace norm. In short, the absence of clearly defined legal boundaries means that military practitioners now struggle to distinguish between the permissiveness of IHL for warfighting and the constraints of IHRL.

This temporal reality comes into sharp focus in the conduct of Special Operations that are kinetic in nature. Joint US/UK Tier One Special Operations conducted in Afghanistan and Iraq through the post-9/11 era are a clear illustration of how such complexity feeds ambiguity around the ethical validity of delivered military outcomes. Faced with a situation where thousands of people were being killed by a combination of roadside bombings and mass beheadings perpetrated by ideological zealots, Tier One Special Forces were tasked to move

¹ Principally, but not solely, the European Convention on Human Rights (ECHR).

² Otherwise known as the Geneva Conventions.

robustly against the perpetrators of these atrocities. An intense period of operations that combined targeted arrests with necessary lethal force stabilised the situation, thus saving thousands of lives. This was, in essence, a warfighting mission, one where these Special Forces operators could reasonably have expected that the permissive thresholds of IHL would apply in the use of lethal force and detainment of the enemy. Instead, their actions are being retrospectively analysed and, in all probability, will be judged through the prism of IHRL.

Apart from being unfair, this suggests that military operations of the future – and particularly Special Operations – will be subject to constraints that reduce the chances of operational success, curtail dynamic initiative and advantage the enemy. A recent pronouncement by the UK Defence Secretary stipulating that the European Convention on Human Rights (ECHR) applies to military operations both at home and overseas confirms the conflation of IHL and IHRL.³ This is an issue that warrants urgent attention by the UK Defence establishment, not least because it positions that future military operations must be conducted under a body of laws and conventions that are often in conflict, and that when applied in combination may act to significantly constrain our Defence capabilities at a time of rising international tensions and increasing military threat.

This paper sets out how and why high-intensity operations in the Middle East through the post-9/11 era became subject to legal confusion and the displacement of norms that might reasonably have been relied upon in the conduct of operations that, temporally and tactically, had the character of war. To be clear, the paper is not intended as a definitive treatise on the detailed legal frameworks at play, or indeed the history of operations in the Middle East. More accurately, it is intended as a positional piece that aims to catalyse energetic engagement by the UK Defence establishment and those senior lawmakers charged with ensuring that our Armed Forces are supported by a clear and robust body of law for future operations, wherever they are deployed. The swiftest and most effective way

³ Hansard, Volume 765, Column 928, 22 April 2025: House of Commons. <https://hansard.parliament.uk/Commons/2025-04-22/debates/B4DC66AB-BA05-416B-882F-4F5CB171BB78/UkraineUpdate?highlight=echr#contribution-3F6B0B90-8CA5-4AEF-BFC4-083F8764A2A6>

of cohering with this prime duty of Government is to assert a clear delineation between IHL and IHRL through the instrument of sovereign law.

ETHICAL BOUNDARIES IN CONFLICT

The legal regulation of military actions during war in the latter half of the twentieth Century has, by normative convention, been predicated on coherence with International Humanitarian Law. This body of international law, stretching back to the original Geneva Convention of 1864 and substantively revised in 1929 and 1949 to incorporate lessons from the First and Second World Wars,⁴ was further expanded in 1977 to account for non-international armed conflicts (NIAC) such as wars of self-determination and internal conflicts, including civil war.⁵

Notwithstanding the clarity suggested here, normative convention has struggled since the end of the Korean War in 1953 to categorise many conflicts in strict coherence with criteria established under the Geneva Conventions. For example, the emergence of ideologically-driven terrorism that may be transnational in character and brutal in its implementation defies categorisation in a way that coheres with the tenets of IHL. This fact has been particularly self-evident during military operations conducted in Afghanistan, Iraq and elsewhere as a response to the Al Qaeda attacks of 9/11.

Just War Theory and the UN Charter

Just War theory is based upon a simple overarching principle: military aggression against a state is a crime of aggression, otherwise known as a crime against peace.⁶ Originally conceptualised for state-on-state warfare, Just War theory has been expanded and modified to account for non-state armed conflicts. It was substantively relied upon to justify the US

⁴ Geneva Internationale, *The Geneva Conventions: 160 Years of History*, <https://www.geneve-int.ch/geneva-conventions-160-years-history#:~:text=Drafted%20by%20the%20ICRC%2C%20the,treaty%20of%20international%20humanitarian%20aw>. (Accessed 21 January 2026).

⁵ J. Gardam, *Protocols Additional to the Geneva Conventions of 12 August 1949*, New York: United Nations Audiovisual Library of International Law, 2021.

⁶ Benbaji, Y. 'State Defence', in *The Cambridge Handbook of the Just War*, Cambridge: Cambridge University Press, 2018, p. 59.

and broader allied response to the attacks of 9/11, and today is being further stretched to justify extended activities such as the 'Global War on Drugs' and the 'Global War on Terror'.

Jus ad bellum

Codification of those principles attached to Just War theory, covering the ethical and legal legitimacy of going to war, is set out in the United Nations (UN) Charter, primarily in Articles 2, paragraphs 4 and 51. The essence here is that the justification for going to war is predicated upon the notion of self-defence. A military attack by a belligerent state provides a clearly justified cause for the offended party to go to war. An attack by an armed group from overseas that is neither constituted nor recognised as a state introduces ambiguity, but the nature and scale of such an attack is held to provide just cause for a military response. An attack from within by an armed group migrates the state's response substantively into the arena of domestic law, but can also provide a just cause for robust state action under IHL. These causes are known as *jus ad bellum* – the justification for going to war or engaging in conflict.

The justification for going to war then, or indeed conducting any military operation, is a political consideration. There should be no question of the individual soldier being held to account for the political decision to deploy him into the conflict, even if the justification for the conflict is unsound. Conversely, those political actors authorising military deployments should be held strictly accountable for such decisions both contemporaneously and retrospectively. It is the soldier's sole responsibility to adhere to the principles of *jus in bello*.

Jus in bello

Having initiated a war, the state must then ensure that it is conducted justly. This is known as *jus in bello* – the justly waged war. The key elements here are that civilians must not be directly targeted, and that tactics and strategies must be both proportionate and necessary to achieve a legitimate military aim.⁷ These broad principles underpinning *jus in bello* are generally known as proportionality and discrimination. Codification of those principles attached to Just War theory covering the ethical and legal legitimacy of actions in war is

⁷ May, L. *The Cambridge Handbook of the Just War*, Cambridge: Cambridge University Press, 2018, pp. 4-5.

distilled into IHL, otherwise known as the Geneva Conventions and their Additional Protocols.

The Geneva Conventions

An assumption of the Geneva Conventions of 1949, as evidenced in Article 2, was that its provisions applied to state-on-state conflicts. In recognition of the fact that conflicts during the post-World War II era have been almost exclusively between states and non-state actors, the Additional Protocols were adopted in 1977 to afford better protection for non-combatants caught up in NIACs.⁸ Transgressions of IHL may be investigated and prosecuted by national courts and by the International Criminal Court (ICC) in The Hague. It is generally held that the ICC is a "court of last resort" that seeks to complement rather than replace national courts.⁹ The ICC only acts when national authorities are unable or unwilling to conduct investigations and prosecute.

The provisions codified under the Geneva Conventions have substantial normative authenticity, as evidenced by their near-universal ratification. To date, the 1949 Conventions have 196 signatory states, sometimes known as 'high contracting parties'. 173 states are also signatory to Additional Protocol I, and 167 are signatory to Additional Protocol II.¹⁰ It is important to note that the Conventions apply to both state-on-state conflicts and NIAC. Notwithstanding this, the codified rules of IHL have struggled to account for the actions of both state and non-state actors, for example, when a state government responds to a non-state terrorist organisation whose members are situated in the territory of a third state, or indeed in multiple territories. However, as Ohlin points out, almost all legal scholars concede that most IHL rules apply "as a matter of customary international law" to NIACs as well as to international armed conflicts (IACs).¹¹

⁸ American Red Cross, *Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, USA: American Red Cross, 2011, p. 6.

⁹ See: <https://www.icc-cpi.int/about/the-court#:~:text=%E2%80%8BThe%20International%20Criminal%20Court,first%20permanent%20international%20criminal%20court>.

¹⁰ ICRC, 'States Party to the Geneva Conventions and Their Additional Protocols', *ICRC Annual Report*, Geneva: ICRC, 2013, p. 611.

¹¹ J. D. Ohlin, 'The Basic Structure of *Jus in Bello*', *The Cambridge Handbook of The Just War*, UK: Cambridge University Press, 2018, p. 237.

Necessity and proportionality

The key IHL provisions that both limit and legitimise the use of lethal military force are the broad principles of necessity and proportionality. It is important to note that IHL generally interprets the principle of necessity in a way that empowers military actors to use lethal force rather than asking whether such use is strictly necessary. The overarching assumption is that killing the enemy during the justified enactment of IAC and NIAC generally coheres with the principle of necessity. In other words, there is an acceptance that it is often necessary to kill the enemy to win the war.¹²

Set against this, and to account for the humanitarian aim of preventing or minimising collateral harm to non-combatants, such as civilians, the principle of proportionality seeks to ensure that any such harm is not "disproportionate to the anticipated value of military advantage gained from striking the primary military target".¹³ The interplay between necessity and proportionality, therefore, is centred around a subjective judgement attached to what is reasonable in terms of collateral harm to civilians set against the scale of military advantage to be gained from attacking the target in question using lethal means.

Additional Protocol I of the Geneva Conventions imposes an obligation to take all feasible measures to reduce the risk of collateral harm to civilians, property, and critical infrastructure. IHL also codifies protections for enemy combatants who are rendered *hors de combat*¹⁴ due to injury or capture. Commentators such as Walzer point out that soldiers are subject to summary killing because they are themselves effectively "agents of killing or death", a fact that renders them liable to be "attacked at any time". A further extension of this argument positions that war itself creates a 'division of labour' between soldiers and civilians, one that renders the soldier [or the combatant] unprotected unless in a condition of *hors de combat*. In contrast, civilians who are not engaged in combat should be immune from direct targeting.¹⁵

¹² D. Luban, 'Military Necessity and the Cultures of Military Law', *Leiden Journal of International Law* Vol 26, Issue 2, UK: Cambridge University Press, 2013, pp. 341-42.

¹³ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd Edition, UK: Cambridge University Press, 2016, p. 154.

¹⁴ Physically unable to engage in combat.

¹⁵ G. Blum, 'The Dispensable Lives of Soldiers', *Journal of Legal Analysis* Vol 2, Issue 1, US: Harvard Law School, 2010, pp. 115-170.

Further restrictions under *jus in bello* include prohibitions on certain tactics and methods of warfare. Some of these, such as rules governing the treatment of prisoners of war, are included in IHL,¹⁶ whilst others are codified in additional international conventions, such as the UN Convention Against Torture.¹⁷ Additional restrictions apply to the use of certain weapons and munitions, but analysis of this is beyond the scope of this paper.

It is sufficient at this point to affirm that under IHL the principles of necessity and proportionality limit but also legitimise the use of lethal force, and that collateral harm to civilians or non-combatants is conditionally acceptable. It is also accurate to affirm that under IHL, and therefore in accordance with normative convention, soldiers or enemy combatants may be subjected to deadly force at almost any time, provided they are not *hors de combat*, even if they do not represent a direct threat.¹⁸ How, then, did IHRL become insinuated into the battlespace?

Human rights

As pointed out by Zouhair Al Hassani, a highly respected Professor of International Law at the University of Baghdad, IHL *simpliciter*¹⁹ applied during the invasion of Iraq in 2003, but by June 2004 the conflict could be classified as either "international or internal, or as no armed conflict at all within the meaning of the Geneva Conventions".²⁰ This difficulty with categorising the conflict led to a situation in which IHL *simpliciter* was perceived as inadequate for accounting for humanitarian obligations in the conduct of combat.²¹ This, in turn, led to IHRL becoming an increasingly used legal framework to constrain and curtail the

¹⁶ Specifically, the Third Geneva Convention of 1949.

¹⁷ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly Resolution 39/46, 26 June 1987.

¹⁸ J. D. Ohlin, 'The Basic Structure of *Jus in Bello*, *The Cambridge Handbook of The Just War*, UK: Cambridge University Press, 2018, p. 251.

¹⁹ *Simpliciter*: solely.

²⁰ Z. Al Hassani, 'International Humanitarian Law and its Implementation in Iraq' in *International Review of the Red Cross*, Vol 90, Number 869, Geneva: ICRC, March 2008.

²¹ These humanitarian obligations include the protection of non-combatants and of enemy forces rendered *hors de combat*: that is, enemy combatants who can no longer present a threat, such as prisoners of war.

actions of combatants in accordance with the principles of *jus in bello*, the ethical component of warfighting.²²

Having deliberately characterised the US response to the 9/11 attacks as a "Global War on Terror" in his address to Congress on 20 September 2001, US President George Bush signalled his determination to prosecute military operations against al Qaida and others using the high permissibility of IHL.²³ Specifically, the US adopted the position that a process of 'ongoing self-defence' was legally permissible,²⁴ thus establishing the concept of a 'forever war' against a loosely defined enemy, to be fought across international boundaries and on a global scale.

A key element of this was the legally correct US conceptualisation that there is no obligation to capture the enemy or minimise the use of force under IHL, provided that the targeting principles of distinction and proportionality are adhered to,²⁵ and that prisoners of war can be detained until the war is concluded. This catalysed strong pushback across a broad political front, as well as from domestic and international courts, to ensure that humanitarian considerations in these 'grey zone' conflict arenas were accounted for.

Confusion caused by this push-and-pull between conflicting arenas of law has been amply illustrated by Heller, who highlights that IHRL coheres with the cardinal rule that "an individual must not be arbitrarily deprived of his right to life" whereas IHL positions that there is "no obligation to capture or minimise the use of force"; that IHRL "requires states to conduct an independent and objective inquiry whenever an individual is killed", whereas IHL "requires an investigation only when there is reason to believe a war crime has been committed"; and that under IHRL "a state may use force against a suspect ... only when he

²² *Jus in bello* is derived from Just War Theory. It refers to both the philosophical and legal constraints applicable to the actions, tactics, capabilities, and strategies involved in the conduct of military operations during conflict. These constraints are the drivers behind, for example, Rules of Engagement, which both limit and empower military actions.

²³ J. Addicott, *The Rule of Law and the War on Terror*, Phoenix: LJBC, 2006.

²⁴ J. O. Brennan, *Strengthening our Security by Adhering to our Values and Laws*, Speech at Harvard University, September 16, 2011.

²⁵ I. Henderson, 'The Contemporary Law of Targeting', *Journal of Conflict and Security Law*, Volume 16, Issue 2, July 2011, pp 411–414.

poses a threat to the lives of others", whereas IHL permits the application of lethal force against a clearly identifiable "non-civilian" based on their status as a participant in hostilities.²⁶ This conflation of IHL and IHRL introduces paradox and exposes military practitioners, and indeed the UK's Ministry of Defence (MoD), to significant legal risks.

To summarise, whilst IHL empowers and regulates military conduct during an armed conflict by defining broad principles that limit collateral harm to protect non-combatants, IHRL constrains military conduct by affording both non-combatants and the enemy universal human rights that, in some instances, are non-derogable. As succinctly and accurately pointed out by Olin, the normative conventions of IHL and IHRL therefore "intersect – indeed collide – at the commencement of armed conflict".²⁷

DEFINITIONAL BOUNDARIES

Whilst the relationship between IHL and IHRL is complicated and contested, attempts have been made to establish distinct models that facilitate understanding.²⁸ These models include:

Field pre-emption

Where IHL alone applies: 'IHL *simpliciter*'.²⁹

Rule pre-emption

Where both IHL and IHRL apply, but where IHL governs if there is a conflict between these bodies of law. This delineation is referred to as applying the principle of *lex*

²⁶ K. J. Heller, 'The Use and Abuse of Analogy in IHL', in *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge: Cambridge University Press, 2016, pp. 260-262.

²⁷ J. D. Ohlin (ed), 'Introduction: The Inescapable Collision' in *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge: Cambridge University Press, 2016, p. 4.

²⁸ J. D. Ohlin, 'The Basic Structure of *Jus in Bello*' in *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge: Cambridge University Press, 2016, pp. 235-236.

²⁹ See O. Hathaway, 'Which Law Governs During Armed Conflict?' in *Minnesota Law Review*, Vol 96, Number 6, 2012, p. 1895.

specialis.³⁰ In state-on-state warfare, IHL would be the 'special' law that takes precedence.³¹ In other forms of conflict, delineation is less certain and is contested.

Co-application

Where both IHL and IHRL apply, at all times.

Emerging from the post-9/11 era, it is clear from official inquiries and the settlements in civil litigation that the UK government intends to, and indeed is applying, the co-application model.³² A problem arising from this is that, from a military practitioner's point of view, the clarity of governing the conduct of combat under IHL *simpliciter* gives way to uncertainty, introducing both physical and legal operational risks.

Whilst robust training and education around the conflicting and often contradictory conventions of IHL and IHRL can mitigate these risks to some degree, it remains a pragmatic reality that 'co-application' trends towards confusion in the battlespace and exposes members of the armed forces to harsh and unfair retrospective judgment of their actions in combat. Moreover, it carries the potential to render concepts such as offensive action legally untenable. The model also exposes the UK state to extraordinary levels of litigative action, as witnessed by settlements – often in favour of enemy combatants or their families – extending from Iraq and Afghanistan.³³ ³⁴ This has alarming implications for freedom of military action and also empowers hostile actors to promote litigation as a means of undermining our capabilities in a process known as 'lawfare'.³⁵

³⁰ See M. Milanovic. 'The Lost Origins of *Lex Specialis*: Rethinking the Relationship Between Human Rights and International Humanitarian Law' in *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge: Cambridge University Press, 2016, pp. 78, 103.

³¹ American Red Cross, *International Humanitarian Law and International Human Rights Law*, briefing video. See: <https://www.youtube.com/watch?v=dOsNmLlv4oo&t=16s> 13 min 05 sec.

³² For example, see Case No. HQ12X03367 in the High Court of Justice, Serdar Mohammed vs Ministry of Defence and Mohammed Qasim, Mohammed Nazim and Abdullah vs Secretary of State for Defence, 2 May 2014, where the Defendants were found to be in contravention of ECHR Article 5.

³³ Case No. HQ12X03367, *op. cit.*

³⁴ Ministry of Defence Freedom of Information Response ref. FOI2025/13953 dated 4 July 2025, confirming 1,299 claims arising from Iran and Iraq, with £29 million paid in settlement for Iraq claims up to the date of the FOI response.

³⁵ For a detailed readout on lawfare in this context, see: L. Croft & T. Tugendhat, *The Fog of Law: An introduction to the legal erosion of British fighting power*, London: Policy Exchange, 2013.

As Ohlin points out, disallowing the submission of human rights norms to the primacy of IHL creates a fundamental paradox. Reconciling the human right not to be killed [under IHRL] with the "privilege [under IHL] that allows soldiers to kill each other during armed conflict"³⁶ is a puzzle that defies normative resolution.

The principle of territoriality

Recent pronouncements have made it clear that the incumbent Government is determined to press forward with the co-application model for operations overseas, leaning into dropping IHL as soon as possible by invoking the 'territoriality principle' in each conflict at the earliest possible juncture. The territoriality principle holds that overseas operations characterised as NIACs may generally be conducted in their early stages under IHL, provided certain intensity and organisational criteria are met.³⁷ However, once effective control over the territory in question has been attained, the use of force must be consistent with IHRL.

A clear example of this was the invasion of Iraq in 2003. Large-scale aerial, missile, artillery and naval gunfire barrages presaged a comprehensive armoured invasion mounted primarily from Saudi Arabia. A brief period of intense fighting led to the seizure of Baghdad, the defeat of the country's armed forces, and the removal of President Saddam Hussein's regime. These warfighting operations were initially conducted in accordance with IHL, effectively as state-on-state warfare, though without a formal declaration of war.

However, the absence of a robust post-conflict stabilisation plan, the marginalisation of senior Ba'ath Party members and the dissolution of the Iraqi Army³⁸ left a power vacuum that saw the country then spiral down into a situation of near-civil war. Violence enacted by insurgents and Islamic fundamentalists against US troops and their allies, non-Governmental aid workers and the civil population led to a situation of chronic instability and the deaths of thousands. Against a backdrop that had many characteristics of resurgent warfare,

³⁶ J. D. Ohlin, 'The Basic Structure of *Jus in Bello*' in *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge: Cambridge University Press, 2016, p. 236.

³⁷ See: International Committee of the Red Cross (ICRC) Armed Conflict Definition, *supra* note 65.

³⁸ Through the Coalition Provisional Authority (CPA) Orders, Numbers One and Two.

containment operations by the occupying powers and the newly raised Iraqi security forces became increasingly robust.

US, UK, and Australian Special Forces were tasked with being at the cutting edge of this, conducting intelligence-led operations that often required lethal force in response to situations encountered on deployment. These operations had an extraordinary intensity. They were undertaken in what was, by any measure, a kinetic warfighting environment. Notwithstanding this, the principle of territoriality now held that military operations would be subjected to IHRL. This situation left Special Forces, in particular, vulnerable to retrospective accusations of impropriety or even illegality in the conduct of their directed missions. It also left hanging the question, at what point - if at all - does the principle of territoriality concede that the current situation has regressed to one of warfighting? Is there a metric that can be reasonably applied here, or is this purely a political decision? And if such a decision is made, how is it disseminated through the chain of command - and what implications does this have for those deployed at the tip of the operational spear?

Inquiries and investigations

Retrospective inquiries such as those conducted by the Iraq Historic Allegations Team (IHAT), set up in 2010 to review allegations of abuse of Iraqi civilians by UK armed forces personnel in Iraq during the period 2003 to July 2009, sought to ensure that "allegations were investigated in compliance with the European Convention on Human Rights".³⁹ This evidences *de facto* that high-intensity military operations conducted overseas, both historically and into the future, will be subjected to scrutiny through the lens of IHRL. Notwithstanding the character of the conflict at hand, the operational realities of the battlefield or the missions directed and authorised through the military chain of command, members of the UK's Armed Forces and the MoD itself are now exposed to significant legal jeopardy when providing military support in the prosecution of national security objectives.⁴⁰

³⁹ See: <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat>

⁴⁰ Generals P. Wall, N. Parker et al., Letter to The Times, 10 November, 2025.

There have been some political attempts to mitigate the effects of this reality. The Overseas Operations (Service Personnel and Veterans) Act 2021 aims to "provide stronger protections for service personnel and veterans facing the threat of legal proceedings in relation to events which occurred on historical overseas operations" and "greater certainty to service personnel and veterans that they will not be called upon many years after operations have ended to give evidence about potentially traumatic events relevant to a [civil litigation] claim".⁴¹ ⁴² Whilst the notion of protections will be welcomed by most affected personnel, the Act empirically confirms that military personnel deployed on overseas operations will be subject to the UK Human Rights Act (1998) and, through it, to the tenets of the ECHR.⁴³

The Act, then, effectively confirms the application of IHRL to UK overseas military operations. At the same time, by attempting to establish a statute of limitations to protect personnel, it further acknowledges and confirms that military personnel, veterans, the MoD, and the UK state will always be exposed to civil litigation.⁴⁴ To claim otherwise would be nonsensical. The fact is that the Overseas Operations Act is an instrument designed to limit harm by addressing the issue symptomatically. It does nothing to tackle the root cause of the problem.

Derogation from ECHR

There have been suggestions that this conflict of norms can be substantively resolved by implementing the right to derogate from IHRL provisions, specifically from the ECHR. Article 15 of the Convention allows a state to derogate from certain of its Articles "in time of war or other public emergency threatening the life of the nation". On this basis, derogation from Article 2,⁴⁵ for example, may be invoked by formally advising the European Court of Justice (ECJ) in advance.

⁴¹ See: <https://www.gov.uk/government/publications/overseas-operations-service-personnel-and-veterans-bill/overseas-operations-service-personnel-and-veterans-act-2001-guidance>

⁴² It should be noted that the Act does not apply to military operations conducted in Northern Ireland.

⁴³ See: <https://www.equalityhumanrights.com/human-rights/human-rights-act>

⁴⁴ It should be noted that the provisions of the Overseas Operations Act have yet to be tested at law.

⁴⁵ The right to life.

At least two problems arise here. Firstly, there is an assumption that "war" means state-on-state warfare. The UK has not been formally engaged in a declared situation of war since the Korean War of 1950-53. Secondly, no clear criteria are applied to what constitutes a public emergency "threatening the life of the nation". Both reasons for derogation are therefore open to legal challenge: in the UK courts through the HRA, and in the European Court of Human Rights through ECHR, the latter court being supra-national.⁴⁶ This effectively means that the UK cannot guarantee that a derogation will be internationally valid, or that the MoD and its military practitioners will be protected from subsequent litigation.

Effectively, then, the UK can exercise only a limited degree of sovereignty over IHRL provisions in this context because formal derogation from the ECHR can only provide *conditional* protection from Articles of the Convention. This poses a significant additional risk to our Defence establishment.

EVIDENCE OF HARM

Whilst this short paper does not include a formal literature review, it should be noted that there is a significant body of publications and commentary on the issue of IHL/IHRL conflation. Of particular note is the work of Policy Exchange, where a raft of academics, King's Counsel and other commentators⁴⁷ have powerfully highlighted the negative implications of requiring military personnel to operate under what former Defence Secretary Gavin Williamson has termed "shifting rules" and "uncertainty".⁴⁸

Additionally, and alarmingly, US General Petraeus has warned that "...the very special relationship between our two militaries... could be put at risk by the current situation".⁴⁹

⁴⁶ R. Ekins, J. Morgan & G. Verdirame, *Derogation from the European Convention on Human Rights in Armed Conflict*, Submission to the Joint Committee on Human Rights 7 April 2017, London: Policy Exchange/Judicial Power Project, 2017, para. 27.

⁴⁷ L. Croft & R. Ekins, *The Fog of Law: An introduction to the legal erosion of British fighting power*, London: Policy Exchange, 2013.

R. Ekins, J. Morgan & T. Tugendhat, *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat*, London: Policy Exchange, 2015.

R. Ekins, P. Hennessey & J. Marionneau, *Protecting Those Who Serve*, London: Policy Exchange, 2019.

C. Casey, R. Ekins & S. Laws, *The Impact of the Human Rights Act 1998 in Twenty-Five Cases*, London: Policy Exchange, 2024.

⁴⁸ G. Williamson, in *Protecting Those Who Serve*, London: Policy Exchange, 2019, p. 6 (Foreword).

⁴⁹ *Ibid.*

This latter point comes into sharp focus in joint Special Operations conducted by US and UK Tier One Special Forces, who have developed unique capabilities that, in combination, are world-leading.⁵⁰ The significance of this risk to UK national security is startling, both from a military and political perspective. The only area where the UK enjoys strategic parity with the US is in the size of our Tier One Special Forces. The possibility of rendering Joint Special Operations unattainable due to differing legal frameworks would be a significant loss to the US but a strategic loss to the UK, given the vastly superior supporting assets these US units can call upon and that the UK cannot replicate.

Whilst acknowledging that human rights (HR) discourse has become a UK political priority both domestically and internationally over the past quarter-century, the tensions between IHL and IHRL raise a key question that demands serious study and political debate. Put simply, is the prime duty of the government national security, or is it the promotion of HR? In an ideal world, these duties would play in tandem, and for much of the time, they do. However, as powerfully highlighted by Judge Greenwood at the International Court of Justice, when these conventions of law come into conflict, as they do here, stretching IHRL to avoid or adjudicate such conflicts risks harming the cause of HR by rendering IHRL itself unusable, or even anti-ethical to our national interests. Recent platform commitments by the UK's two principal opposition parties to withdraw the UK from the ECHR, if or when they come to power, are a clear illustration of this reality.^{51 52}

This speaks to the unwritten social contract between citizens and the state, in which certain rights are surrendered to the sovereign authority to facilitate our security and protect our freedoms under the rule of law. Accountability for the sovereign authority in the UK model is through processes of parliamentary democracy and the maintenance of an independent judiciary. Occasionally, there is tension between individuals' rights and the state's contractarian duty to protect its citizens from external and internal threats. By traditional normative convention, if the performance of such a duty requires military personnel to use

⁵⁰ Particularly, but not exclusively, in the field of Hostage Rescue.

⁵¹ K. Badenoch, *Conservatives Announce ECHR Exit Policy*, 4 October 2025.

See: <https://www.conservatives.com/news/conservatives-announce-echr-exit-policy>

⁵² N. Farage, Sky News, 26 January 2026. See: <https://www.youtube.com/watch?v=8-XxWNkg5tg>

lethal force, such actions during domestic operations are deemed legal, provided that rules of engagement (RoE) derived from UK customary law are followed.⁵³ During overseas operations, they are lawful if the rules of IHL are followed. How, though, can conflicting criteria contained in IHL and IHRL be reconciled where they are co-applied? Given the thousands of litigations the UK Government has faced, it would appear they cannot.

Overlaying IHRL over IHL during military operations compromises national security and renders the state unable to deliver the full range of protections required against internal and external threats. Furthermore, a retrospective application of IHRL to operations conducted under the traditional normative convention of IHL *simpliciter* risks fracturing the bond of trust between military practitioners and the sovereign authority. This is profoundly important, and as of the date of this paper, numerous highly experienced military veterans have claimed that this essential bond is being eroded by ECHR Article 2-compliant⁵⁴ investigations currently underway into historical military operations conducted in Northern Ireland, Iraq, Afghanistan, and elsewhere.

The dissatisfaction, and indeed anger, evidenced here is predicated upon the reality that RoE for Northern Ireland based upon customary laws extant at the time are now being retrospectively interpreted through the prism of ECHR, whilst overseas kinetic operations in Iraq, Afghanistan and elsewhere that had the character of high intensity warfighting are being analysed on a co-application basis rather than in accordance with the principle of *lex specialis*, where IHL should dominate or indeed IHL *simpliciter*.

According to Ekins, Morgan and Tugendhat, this has resulted in "damaging confusion for commanders over which corpus of law governs their actions".⁵⁵ Tasked with delivering a military solution to counter high-intensity attacks by members of Al Qaida and ISIS against the civil population and Coalition forces, UK and US Tier One Special Forces in Iraq developed a strategy aimed at detaining or killing the enemy's leadership and attacking

⁵³ RoE such as those set out in the Yellow Card for military operations in Northern Ireland during the Troubles of 1969-1997.

⁵⁴ ECHR Article 2 is the right to life.

⁵⁵ R. Ekins, J. Morgan & T. Tugendhat, *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat*, London: Policy Exchange, 2015, p. 9.

those who were beheading civilians by the thousand. These remarkably successful operations were conducted at a very high cost, with many of our soldiers killed or injured. Despite these deployments having the character of high-intensity warfighting, years later, these soldiers are called upon to justify their actions under IHRL. This is a situation characterised by the majority who served in these theatres as a gross betrayal of trust.

As recently observed by several senior retired British officers, launching retrospective investigations into historical military operations using a body of law that did not exist in UK statute at the time such operations occurred⁵⁶ or where the temporal reality for military practitioners was that they were engaged in warfare,⁵⁷ demoralises and confuses those currently serving and infuriates our military veterans. It also causes problems in retention and recruitment for the Armed Forces more generally.⁵⁸

In parallel with this, educating our military practitioners in rule pre-emption and *lex specialis*⁵⁹ or co-application carries the almost ridiculous prospect of commanders and soldiers having to make finely balanced judgments about the precise boundaries of jurisprudence within the battlespace confronting them, perhaps on a moment-by-moment basis. From a military practitioner's point of view, this appears to be fraught with legal risk across a range of actions, from the application of lethal force to the detainment of the enemy. These complexities have been, and continue to be, contested in the courts and in ongoing inquiries into military conduct during historical operations.

Moreover, the MoD also finds itself held accountable for IHRL violations through thousands of civil litigations. These actions are not limited to operations conducted by UK Special Forces. The European Court of Human Rights (ECtHR) found in *Al-Skeini v United Kingdom* (2011) that the simple presence of British ground forces in Iraq confirmed the UK had 'jurisdiction' over this territory and was therefore vulnerable to civil litigations under

⁵⁶ As in the regeneration of such inquiries for military support to the Royal Ulster Constabulary (RUC) under Operation Banner during the Northern Ireland 'Troubles' of 1969-1997.

⁵⁷ As during high-intensity Special Operations in Afghanistan and Iraq.

⁵⁸ 'The Troubles Bill Achieved Nothing – and Ongoing Lawfare Risks Everything', *The Times*, London: The Times.

⁵⁹ Where both IHL and IHRL apply, but where IHL governs if there is a conflict between these bodies of law.

ECHR and the UK's own HRA.⁶⁰ This finding confirmed the principle of 'extraterritoriality' as a concept that effectively conflates IHL with IHRL. In an alternative interpretation, it suggests that the mere presence of UK troops on foreign soil renders the battlespace in that territory open to adjudication through co-application rather than IHL *simpliciter*, or even by applying *lex specialis*.

The implications of all this for future overseas military operations are alarming. Assuming the UK Defence establishment is intent upon, or instructed to, educate its military practitioners in co-application, commanders will become risk-averse in the application of military force. In light of the increasing threats posed by Russia's ongoing rearmament and expansionist ambitions, war in the Middle East, and the UK's ongoing participation in NIACs, continuing to allow the curtailment of operational freedoms through the co-application of IHL and IHRL seems antithetical to UK national security interests.

The extant literature makes it clear that these arenas of law and the politics surrounding them are in a state of evolution. From a realist perspective, there is even a suggestion that the normative conventions that underpin them both domestically and internationally may be fragmenting. Whatever the truth of this, a lack of clarity for our military practitioners has the potential to undermine both our capabilities in conflict and the concept of effective defence, which is the Government's prime responsibility.⁶¹ This is an issue that demands an urgent solution.

CONCLUSION

The only clarity that emerges from this brief essay is that the interplay between IHL and IHRL is uncertain, confused and conflicted. Such contestation arises principally from the nature of post-World War II conflict arenas and the changing character of war itself. There is a lack of definitional clarity regarding the boundaries between forms of conflict and the arenas in which conflicts occur.

⁶⁰ See: <https://www.asylumlawdatabase.eu/en/content/ecthr---al-skeini-and-others-v-united-kingdom-application-no-5572107-7-july-2011#>(accessed 26 February 2026).

⁶¹ R. Ekins, P. Hennessey & J. Marionneau, *Protecting Those Who Serve*, London: Policy Exchange, 2019, p. 7.

We have now had more than two decades of human rights activism and lawyering that, at least in part, has sought to constrain the behaviour of the US and others. This legal activity has sought to answer questions such as what situations can be characterised as war, and when are they more accurately portrayed as a policing exercise?⁶² Whose liberty can be deprived, and for what reason? Who can be killed, and for what reason? When is conflict international, and is there some point at which it becomes bounded by some form of singular, sovereign control?⁶³

Within this panoply of conflicting norms, perceptions and questions, we have seen many human rights activists and lawyers who began by opposing the arguments of government lawyers, then went on to either become government lawyers themselves⁶⁴ or attain high political office.⁶⁵ Such actors have succeeded in blurring the normative boundaries between IHL and IHRL to ensure that HR is privileged in conflict arenas, regardless of the character of the conflict. This ethically aspirational endeavour becomes fatally compromised when set against the Government's primary responsibility to promote the UK's national security.

In an era of rapidly growing domestic and international risks, there is an urgent strategic requirement to develop a robust framework of national law for the conduct of military operations, one that prioritises IHL *simpliciter* for all overseas operations and for those domestic operations that have the character of armed conflict. In parallel, this legal framework must reassert the sole use of UK customary law for domestic military operations that do not have the character or scale of armed conflict,⁶⁶ whilst providing adequate protection for our military personnel, both serving and retired.

It is only by doing this that we can ensure our Defence establishment can deliver its mandated outcomes free from the prospect of inappropriate and burdensome legal risks, on

⁶² For example, by establishing criteria to differentiate between 'international' and 'non-international' armed conflict.

⁶³ For example, through implementing the principle of 'territoriality'.

⁶⁴ For example, the UK's current Attorney General, The Rt Hon Lord Hermer KC.

⁶⁵ For example, the UK's current Prime Minister, Sir Keir Starmer KC.

⁶⁶ For example, assisting civil authorities in quelling riots or securing critical national infrastructure.

a sovereign basis, and with a clear view of its humanitarian obligations across the broad spectrum of its operational responsibilities. To paraphrase Modirzadeh, it is now time to sweep legal uncertainty aside by prioritising the demands of UK national security over fealty to international law.⁶⁷

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Bio:

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⁶⁷ N. K. Modirzadeh, 'Folk International Law', *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge: Cambridge University Press, 2016, p. 231.