Human rights protection during armed conflict: what, when and for whom?

Citation for published version (APA):

Published in:
Convergence and conflicts of human rights and international humanitarian law in military operations

Citing this paper
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Chapter 1

HUMAN RIGHTS PROTECTION DURING ARMED CONFLICT: WHAT, WHEN AND FOR WHOM?

Iain Scobbie*

It is now commonplace to affirm that during hostilities the law of armed conflict and international human rights law lie in some sort of relationship, but the substantive contours of this remain unclear. Some might wish that this question no longer be discussed, on the assumption that both apply in tandem, perhaps basing them on an over-generous reading of the Human Rights Committee’s General Comment 31 which affirms that the International Covenant on Civil and Political Rights applies in situations of armed conflict, and continues:

While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.1

Mapping the relationship between these branches of international law cannot be avoided. To ignore this issue is simply not an option as to do so would disregard too many questions, such as the extent to which this relationship is determined by the nature or classification of the conflict and the type of human rights that might be relevant to both the situation and the actors involved. At root, the difficulties inherent in mapping this substantive relationship appear to lie in the axiologies of these areas of law which are fundamentally incompatible, and also in the diversity of the legitimate expectations that may be directed at the state by its citizens, by those subject to its jurisdiction or effective control, and by those it places at risk.

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This essay seeks to examine some of the under-discussed questions in the debate regarding human rights and the law of armed conflict. What are the implications of the classification of a conflict in mapping this relationship? This is principally a technical matter. More incisively, and more conceptually, to what extent does the state bear responsibility to protect the human rights of its combatants? Could this question be a test case, or a breaking point, in this debate?

As Professor Koskenniemi has argued, specialisation is a characteristic of contemporary international legal practice. Discrete sets of substantive issues are parcelled into categories such as trade law or environmental law or human rights law and so on. These specialisations ‘cater for special audiences with special interests and special ethos’. Each contains structural biases in the form of dominant expectations about the values, actors and solutions appropriate to that specialisation, which thus affect practical outcomes. The actors in these different fields conceptualise issues in ways which pull upon these preconceptions to reach solutions which are thought suitable for the specialisation. In discussing the relationship between the law of armed conflict and human rights, Professor Garraway has underlined the importance of the analyst’s own perspective and presuppositions:

For human rights lawyers, human rights principles are those that provide the greatest protection to all by introducing a high threshold for any use of force and even if that threshold is crossed, a graduated use of force thereafter. On the other hand, international humanitarian lawyers see this as idealistic and impracticable. As they see it, it would become almost impossible to conduct hostilities legally to which many human rights lawyers would reply that that would be no bad thing! The difficulty is that such an attitude will not abolish armed conflict.

Similarly, Professor Kretzmer notes that the post-WWII development of the law of non-international armed conflict and international human rights law ‘advanced on parallel tracks’ but that ‘different personalities were involved … [who] represented different State interests’ and, when the various conventions were drafted, ‘no serious consideration was given to the relationship between the two branches of law’.

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At the 1974-1977 Diplomatic Conference which drafted Additional Protocols I (international armed conflict) and II (non-international armed conflict) to the Geneva Conventions, the majority of participating states emphasised that, in order to maintain the unity of international law, the law of armed conflict, or international humanitarian law, could not be isolated and self-contained but had to take into account the rules of general international law. In this connection, emphasis was placed on the need to adapt the law of armed conflict to conform with the principles expounded by the International Court of Justice in paragraph 53 of the Namibia advisory opinion, namely that ‘an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation’. One of the implications of this approach is the increasing insistence that international human rights law is relevant in times of armed conflict.

This was a trend which was already apparent before the 1974-1977 Diplomatic Conference. As early as the late 1960s, United Nations bodies had affirmed that some substantive human rights remained relevant during an international armed conflict. Thus, for instance, in resolution 237 (14 June 1967) on the situation in the Middle East, the Security Council noted that ‘essential and inalienable human rights should be respected even during the vicissitudes of war’ and in operative paragraph 1 of resolution 2675 (XXV) of 9 December 1970, Basic principles for the protection of civilian populations in armed conflicts, the General Assembly affirmed:

Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

By the mid-1990s, although it was generally accepted that both human rights instruments and the law of armed conflict were relevant in the regulation of non-international armed conflict, the idea that both could also be applicable during an international armed conflict was only emerging towards doctrinal consolidation. The first authoritative ruling on the nature of the relationship between international humanitarian and human rights law in an international armed conflict was enunciated by the International Court of Justice in the Legality of the threat or use of nuclear weapons advisory opinion in 1996. It had to consider whether or not the International Covenant on Civil and Political Rights was applicable during an international armed conflict. The Court ruled:

The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.10

In the Legal consequences of the construction of a wall in occupied Palestinian territory advisory opinion, the Court reaffirmed this ruling in slightly different terms stating that it had to ‘take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law’.11 Some commentators see this as marking a subtle change in the Court’s view, indicating that the lex specialis maxim should not be used to displace the application of human rights law, but rather that human rights norms should be interpreted in the

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10 Legality of the threat or use of nuclear weapons advisory opinion ICJ Rep, 1996 (1), 210, para 25. The earlier ruling by the European Court of Human Rights which addressed aspects of the applicability of human rights norms in an international armed conflict, delivered in Loizidou v Turkey: preliminary objections judgment (23 March 1995), Series A, No 310 23-24, paras 62-64, is more restricted than that of the International Court in the Nuclear weapons advisory opinion. In Loizidou, the European Court addressed only the extra-territorial applicability of the European Convention on Human Rights where a state party exercises effective control over foreign territory. It ruled (24, para 62): ‘Bearing in mind the object and purpose of the Convention, the responsibilities of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful ? it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set forth in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration.’

light of the law of armed conflict. Professor Schabas comments that in this ruling the Court 'seemed to withdraw from what may have been taken as a rather absolute statement in Nuclear Weapons'.

In the Armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda) case, the Court recalled its ruling in the Nuclear weapons advisory opinion and quoted the one delivered in the Legal consequences of the construction of a wall advisory opinion, but it omitted the reference to lex specialis which some have taken to mean that the Court has abandoned this approach. One would have wished, having dealt with the issue repeatedly, that the International Court might have been more candid and more specific. It has not provided a transparent account of the relationship between the law of armed conflict and human rights law in armed conflict. In fact, in the Legal consequences of the construction of a wall advisory opinion, the Court made the trite and essentially vacuous observation that:

As regards the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

The nature of the relationship between the law of armed conflict and international human rights law is complex, and its contours contested in academic literature. It must be acknowledged that there is a degree of substantive overlap between the two disciplines – for instance, both prohibit torture and inhuman treatment – but there are also some clear differences. The law of international armed conflict expressly contemplates that states may intern individuals without trial (for instance, as prisoners of war, or inhabitants of occupied territory for security reasons) while this would be prohibited under human rights instruments unless the detaining state had made a derogation to the relevant treaty.

15 Legal consequences of the construction of a wall in occupied Palestinian territory (n 11 above) 178, para 106.
16 For a discussion of the different detention regimes under the law of armed conflict and international human rights law, see J Pejic ‘Conflict classification and the law applicable to detention and the use of force’ in E Wilmshurst (ed) International law and the classification of conflict (2012) 84.
Indeed, the European Court of Human Rights has indicated that a state party which is involved in an international armed conflict must derogate from its obligations under the European Convention if it wishes to detain civilians using its power to do so under the Fourth Geneva Convention.\(^\text{17}\) This is perhaps an example of the many broad, or over-broad, claims that have been made as to the extent that human rights law applies during an armed conflict, and has caused one commentator to argue that the Al–Jedda judgment ‘will have a chilling effect on the ability of Council of Europe States to take part in multinational operations abroad that involve deprivation of liberty’.\(^\text{18}\)

The debate tends to focus on human rights treaties, without adequately taking into account that some core rights, such as the right to life, are defined differently in different conventions, or that these contain different provisions which determine their applicability. States forming a coalition could easily bear different human rights obligations simply because they adhere to different treaties, posing a challenge to the inter-operability and cohesion of the force as a whole. The debate also often tends to ignore customary international law. My view is that there are no general axiological principles that can determine this relationship, and that the extent to which human rights apply during an armed conflict essentially depends on context and circumstances.\(^\text{19}\) Nevertheless the rulings by the International Court of Justice have legally entrenched the idea that there is some normative relationship between these two branches of law.

## 1 The importance of the classification of a conflict

In the *Nuclear weapons* advisory opinion, the International Court focused on the right to life and the parameters of a state’s legitimate use of deadly force in an international armed conflict. It has been argued that of all the matters regulated by both the law of armed conflict and international human rights law, the greatest differences are found in the rules which govern the use of force.\(^\text{20}\) This focus perhaps gave an unduly narrow cast to the initial debate on the inter-relationship of the law of armed conflict and international human rights law during hostilities, with much relying on the textual exegesis of the Court’s repeated rulings. But these rulings dealt with the position in an international armed conflict. The discussion

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17 See *Al-Jedda v United Kingdom* [2011] ECHR 1092 (App No 27021/08, decided 7 July 2011) paras 99 and 107. For commentary, see J Pejic ‘The European Court of Human Rights’ *Al-Jedda* judgment: The oversight of international humanitarian law’ (2011) 93 *International Review of the Red Cross* 837, who notes that the *lex specialis* argument was not raised by the UK in this case (at 850).

18 Pejic (n 16 above) 92.


20 Pejic (n 16 above) 110.
must take into account that the operative rules of the law of armed conflict differ depending on whether the situation is classified as an international or non-international armed conflict. Further, within the latter category, it might be relevant to determine whether a given conflict should be classified as one which attracts the application of common article 3 of the 1949 Geneva Conventions alone, or whether it is of greater intensity and fulfils the requirements of article 1(1) concerning the application of 1977 Additional Protocol II to the Geneva Conventions.

It must be acknowledged that there is evidence of a degree of assimilation of the customary rules governing international and non-international armed conflicts, to the extent that the ICRC customary international humanitarian law study felt able to proclaim:

This study provides evidence that many rules of customary international law apply in both international and non–international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non–international armed conflicts. In particular, the gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non–international conflicts.

It has been claimed that some of the rules, originating in the law governing international armed conflict, which the study alleges now also regulate non-international armed conflict, lack evidentiary support. Further, this assimilation, like the ICRC study itself, is not comprehensive. In

21 Common article 3 simply provides that it applies ‘[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’.
22 Art 1(1) provides that the provisions of Additional Protocol II supplement and develop common art 3 and applies during armed conflicts ‘which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.
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particular, rules regarding belligerent occupation, combatant status and entitlement to prisoner of war status on capture, simply do not exist in non-international armed conflict. Despite proposals to the contrary, the distinction between the two types of conflict and the legal consequences of this distinction remain relevant.

The substantive interplay between the law of armed conflict and international human rights law depends, to some extent, on the classification of the conflict, and thus the identification of the armed conflict rules applicable. For example, in an international armed conflict, the treatment of captured combatants entitled to prisoner of war status would, obviously, principally be regulated by the provisions of the Third Geneva Convention. In contrast, in a non-international conflict, the treatment by the belligerent state of captured fighters belonging to a non-state armed group would be regulated by domestic law which, one hopes, would be compliant with that state’s obligations arising principally under international human rights law and, where relevant, articles 5 and 6 of Additional Protocol II.

This substantive interplay also depends on the specific situation in which the actors find themselves. For example, in the Legal consequences of the construction of a wall advisory opinion, the International Court ruled that a range of human rights treaties – the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child – supplements the occupier’s application of the Fourth Geneva Convention during a belligerent occupation. In the Armed activities on the territory of the Congo case, the Court found that Uganda was the belligerent occupant of the bordering Ituri region of Congo during the time relevant to the proceedings. Accordingly, it ruled that Uganda was the belligerent occupant of the bordering Ituri region of Congo during the time relevant to the proceedings.


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The occupant was duty-bound to apply the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples’ Rights, the Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict in Ituri. It is doubtful, to say the least, that human rights treaties such as these should be seen to apply to the extra-territorial armed activities of a belligerent state during the invasion of its opponent’s territory.

The identification of the substantive law of armed conflict norms which are applicable in a given situation presupposes that it may be clearly classified. This is generally not difficult in an international armed conflict which, in principle, is a conflict between states. The problem of classification can, however, be acute when one is faced with a situation of conflict within a state. When is the threshold reached, that turns the violence into a non-international armed conflict? Common article 3 of the Geneva Conventions is silent on the matter, simply stating that “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, the parties to the conflict must respect specified minimum humanitarian standards. Article 1(2) of Additional Protocol II is slightly more forthcoming and states that the Protocol:

[S]hall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

This notion is reflected in the test set out by the International Criminal Tribunal for the former Yugoslavia in its jurisdiction decision in the Tadić case (1995) that ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such

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29 Armed activities on the territory of the Congo (n 28 above) 243-244, para 217.
30 For parties to Additional Protocol I, by virtue of Article 1(4), international armed conflicts include those ‘in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’. The ‘internationalisation’ of a non-international armed conflict may also occur if a state recognises the belligerency of the non-state armed group which is fighting against it: see, eg, the Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War (1939) 33 American Journal of International Law: Supplement 209-211; H Lauterpacht Recognition in international law (1947) 103-199; YM Lootsteen ‘The concept of belligerency in international law’ (1999) 166 Military Law Review 109; and I Scobie ‘Gaza’ in Wilmshurst (n 16 above) 2008-2014 http://opil.ouplaw.com/page/israel-gaza-debate-map (accessed 13 October 2014). It must be acknowledged that some commentators argue that the doctrine of recognition of belligerency is an obsolete doctrine, see, eg, A Paulus & M Vashakmadze ‘Asymmetrical war and the notion of armed conflict – A tentative conceptualization’ (2009) 91 International Review of the Red Cross 95.
groups within a State’. On the Tadić test, Professor Sivakumaran comments:

"Even though the precise Tadić formulation was set out in 1995, its component elements are steeped in history. What the ICTY managed to do was to encapsulate in a brief sentence the core elements of a definition that had been recognized decades and centuries earlier."

Any situation which falls beneath this threshold is not an armed conflict, and thus is regulated by domestic law which should conform with the state’s obligations under international human rights law. It is, however, evident that there have been numerous situations of protracted internal violence which were not classified as non-international armed conflicts. One need only think of the ‘Troubles’ in Northern Ireland which lasted from the late 1960s until the ‘ceasefire’ reached between Republican and Loyalist armed groups in 1994. The United Kingdom never conceded that this amounted to a non-international armed conflict, although it is arguable that this threshold was surpassed for a period in the early 1970s.

The nub of the problem is that the classification of internal violence is principally determined by the state concerned, which is generally loathe to admit that it is harbouring a non-international armed conflict on its territory, often for fear of giving legitimacy and status to an armed opposition group. In this it is aided by the abstract nature of the thresholds for the existence of a non-international armed conflict set out in Additional Protocol II and the Tadić ruling which leaves both open to interpretation. This discretionary power, however, cuts both ways. As Professor Kretzmer demonstrates, it might be in a state’s interest to classify a situation as a non-international armed conflict in order to dislodge, at least to some extent, its obligations under human rights law in favour of the provisions of the law of armed conflict. The move is effectively one from a law-enforcement paradigm, in which the right to life is enshrined and thus severe restraints are placed upon the state’s ability to employ force against criminals, to a conflict paradigm which countenances the use of deadly force by the state against its adversaries. Classifying a situation as a non-international armed conflict quite simply loosens the normative shackles on state behaviour regarding the use of force.

Further, Professor Kretzmer points out that the doctrine of proportionality employed by the law of armed conflict differs from that employed by human rights law. Proportionality in the law of armed conflict concerns collateral damage, and thus permits civilian death and

31 Prosecutor v Tadić, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) 2 October 1995, para 70.
32 Sivakumaran (n 23 above) 166.
33 For a thorough analysis of this situation, see S Haines ‘Northern Ireland 1968-1998’ in Wilmshurst (n 16 above) 117, specifically 130-136.
34 See Kretzmer (n 5 above) 15-19.
injury, an advance calculation which is an anathema to human rights law. He observes that Additional Protocol II makes no reference to proportionality, but that the International Committee of the Red Cross’ customary international law study claims it is a principle which applies in non-international, as well as in international, conflicts. Professor Kretzmer comments that this appears to assume that in an internal armed conflict proportionality protects potential victims, but its introduction could instead weaken the protection they might otherwise enjoy under a human rights regime because the armed conflict test of proportionality entrenches as a legitimate expectation that civilians, individuals taking no part in the hostilities, may be killed and injured. To put it bluntly, on this issue the law of armed conflict and human rights law have antithetical aims. Once an armed conflict exists, the use of lethal force by a state against members of the adversary’s armed forces is legitimate and any incidental civilian death and injury which is not excessive in relation to the military advantage anticipated is justified, but where there is no armed conflict, any lethal use of force by the state must be justified and investigated.

The principal practical problem raised by the classification of conflicts in delineating the relationship between the law of armed conflict and international human rights law is the malleability of standards involved in determining if a given situation reaches the threshold to qualify as a non-international armed conflict, and the discretion of the decision-maker in making that determination. The conceptual problem, the antithetical approaches of these branches of law to the use of deadly force, is, as Dr Pejic argues, an issue which they both regulate but where their rules differ. On other issues, there can be a degree of overlap or complementarity, but the problem of classification may impinge to make the substantive parameters of their relationship unstable or shifting, and dependent on the attitude adopted by the state concerned.

2 Whose human rights?

International human rights law offers protection to individuals who are under the jurisdiction or effective control of a state. In Smith v The Ministry of Defence the United Kingdom Supreme Court unanimously held that members of the United Kingdom’s armed forces serving outside its territory were within its jurisdiction for the purposes of article 1 of the

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35 See Henckaerts &Doswald-Beck (n 24 above) 46-50. This is also available at www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14 (accessed 13 October 2014).
36 See Kretzmer (n 5 above) 17-22.
38 Art 1 provides: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention’. 
European Convention on Human Rights.\footnote{The leading judgment of the Court was delivered by Lord Hope: For his exposition of this point, in which the other Justices concurred, see paras 17-55 of his opinion.} In part this case concerned claims brought by the representatives of two soldiers killed in Iraq by improvised explosive devices when they were on patrol. They claimed that the United Kingdom was in breach of its obligation under article 2 of the European Convention (the right to life) as the Ministry of Defence had failed to take reasonable measures to safeguard soldiers on patrol given the real and immediate risks this entailed. The claim revolved around the adequacy of the equipment provided to the soldiers concerned.\footnote{See the opinion of Lord Hope, paras 10-13 for a succinct statement of the relevant claims. For a brief indication of the operational dilemma this set of claims could raise, see C Garraway ‘Direct participation and the principle of distinction: squaring the circle’ in C Harvey et al (eds) \textit{Contemporary challenges to the laws of war: Essays in honour of Professor Peter Rowe} (2014) 5-186.}

The Supreme Court’s decision in relation to these claims dealt only with the jurisdictional point and did not deal with the merits. It noted that this issue was not directly answered by the Grand Chamber’s judgment in \textit{Al–Skeini v United Kingdom},\footnote{Opinion of Lord Hope, para 48} but latched onto its ruling that where jurisdiction is exercised extra-territorially the package of rights contained in the European Convention can be divided and tailored to the particular circumstances of the act in question. Lord Hope commented that if the rights were indivisible then:

\begin{quote}
\textit{It was always going to be difficult to see how, if that was to be the guiding principle, it could be possible to accept that a state’s armed forces abroad in whatever circumstances were within [its] jurisdiction for the purposes of article 1 as its ability to guarantee the entire range of the Convention rights would in many cases be severely limited.}
\end{quote}

He also relied on recommendation 1742 (2006) of the Council of Europe’s Parliamentary Assembly, \textit{Human rights of members of the armed forces}, which stated in paragraph 2 that:

\begin{quote}
[M]embers of the armed forces are citizens in uniform who must enjoy the same fundamental freedoms ... and the same protection of their rights and dignity as any other citizen, within the limits imposed by the specific exigencies of military duties.
\end{quote}

This recommendation was endorsed by the Committee of Ministers in February 2010 which stated that these principles should be applied in all circumstances, including in time of armed conflict.\footnote{Opinion of Lord Hope, para 54. The text of recommendation 1742 is available at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1742.htm (accessed 13 October 2014).}
Consequently, there exists some authority to hold that states should actively protect the human rights of members of their armed forces during an armed conflict, even if this does not extend to the entirety of rights enjoyed by civilians during peace time. All depends on ‘the specific exigencies of military duties’. But the question is, how far should this protection extend?

Consider the Kasher-Yadlin doctrine, which was ‘developed by a team we have headed at the Israel Defense Force (IDF) College of National Defense’. This doctrine starts from the eminently contestable proposition that fighting terror is a relatively new phenomenon:

[T]he fight against terror has to be new because it cannot be carried out in a pure, proper and effective way, within any of the traditional paradigms of a state fighting familiar sources of public danger, first and foremost the paradigms of warfare and of law–enforcement.

Relying essentially on social contract theory, Kasher and Yadlin argue that a democratic state ought to respect and protect human rights in a two-tier system. In the first place, it should respect and protect its citizens in their capacity as both citizens and human beings. In the second it should respect non-citizens in their capacity as human beings. In fighting terror using military force, Kasher and Yadlin claim that the state’s priorities should be that minimum injury should be caused to non-combatant individuals who are its citizens, and then to individuals who are outside its territory but under its effective control who are not involved in terrorism. Essentially, this latter category contemplates individuals in territory occupied by the state. The state’s third priority should be to cause minimum injury to members of its armed forces involved in combat operations, and only after this category should attention be paid to the lives of those, outside its territory, who are not involved in terrorism, but who are not under the effective control of the state. They claim:


45 Kasher & Yadlin ‘Military ethics’ (n 44 above) 6-7.

46 Kasher & Yadlin ‘Military ethics’ (n 44 above) 9.
A state is responsible for the protection of human life and well-being of its citizens and of any other person who resides under its effective control. A state does not shoulder responsibility for regular effective protection of persons who are neither its citizens nor under its effective control.47

They simply reject ‘the common conception of noncombatants having a preference over combatants’ because a ‘combatant is a citizen in uniform’.48 They continue by noting that there are:

situations in which persons directly involved in terror are pursued or targeted by combatants in the vicinity of persons not involved in terror. Where the state does not have effective control over the vicinity, it does not have to shoulder responsibility for the fact that persons who are involved in terror operate in the vicinity of persons who are not. Injury to bystanders is not intended. On the contrary, jeopardizing combatants rather than bystanders during a military act against a terrorist would mean shouldering responsibility for the mixed nature of the vicinity for no reason at all.49

Note that according to Kasher and Yadlin, the state should privilege the human rights and lives of its citizen-soldiers over those of foreign non-combatants in a conflict zone over which, by definition, it does not exercise effective control because it does not bear the moral responsibility for distinguishing between terrorists and non-combatants, between dangerous individuals and harmless ones.

Margalit and Walzer reject this position, arguing that soldiers:

must reflect respect for innocent lives, whatever the political identity of those lives, and even when they are not under ‘our’ control. What risks we impose, and what risks we decide to accept, are always under our control … States, democratic states most obviously, have special obligations to defend the lives of their citizens. Therefore they can decide to put soldiers at risk for that purpose, as Israel did in its Entebbe raid, without committing themselves to do the same for citizens of other states. But when soldiers are on the attack, when they are imposing risks on civilians, the citizenship of those civilians is morally irrelevant. Soldiers must do their best not to kill them, and their ‘best’ will sometimes involve some ‘cost’ to themselves.50

They continue that the risks imposed on combatants should be reflected at the strategy and tactics employed in the battle. Further, as Khalidi argues, at the operational level combatants intentionally undertake acts of violence and seek to endanger others and thus forfeit their right to security.

47 Kasher & Yadlin, ‘Military ethics’ (n 44 above) 16.
48 Kasher & Yadlin ‘Military ethics’ (n 44 above) 17; compare Garraway (n 40 above) 183-186.
50 Margalit & Walzer (n 44 above); for commentary on Margalit & Walzer’s views, see Bohrer & Osiel (n 44 above) 756-761. See also M Walzer ‘Two kinds of military responsibility’ in M Walzer Arguing about war (2004) 23.
Moreover, they are armed and capable of defending themselves which is ‘why combatants are in a different moral category than noncombatants according to prevailing conceptions of just war theory and international law’. Under the law of armed conflict, unlike civilians, combatants and those taking a direct part in hostilities are legitimate targets who have forfeited their immunity from attack, and if the question resolves to one of moral agency, even in a conscript army there is ultimately a choice not to serve.

It has been claimed that Israel implemented the Kasher-Yadlin doctrine during Operation Cast Lead, the war in Gaza in December 2008-January 2009. It is difficult to conceive how this could be classified as anything other than an armed conflict. Indeed, during Operation Cast Lead, a majority of states in debates before both the Security Council and General Assembly called upon Israel to apply the Fourth Geneva Convention in its dealings with Gaza. This indicates that they did not see the situation as a novel one involving the use of armed force to suppress terror rather than the established category of armed conflict. Indeed, this view was shared by Israel itself which stated:

At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflict.

This is not the place to debate the merits or demerits of the Kasher-Yadlin doctrine exhaustively, but to what extent is its emphasis on the moral responsibility of the state towards its combatants germane to the debate regarding the relationship between the law of armed conflict and human rights law? The Kasher-Yadlin doctrine is based on a social contract theory, but is this relevant when one is dealing with an external projection of armed force by a state? The law of international armed conflict, in broad terms, sets out what non-nationals may demand from a belligerent, not the treatment to be meted out to its own nationals. By denying any responsibility for foreign civilians in a combat area, the doctrine enunciated by Kasher and Yadlin arguably effaces a fundamental tenet of the law of armed conflict, namely the principle of distinction between those who take part in hostilities and those who do not. If so, it runs
counter to the broad requirement that ‘The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations’. Should a doctrine rooted in a doctrine of political philosophy which concerns the relationship between the citizen and the state over-ride an established norm which is at the core of the law of armed conflict? Quite simply, is it legitimate to argue that force protection, minimising injuries to one’s own combatants, should take priority over the protection of foreign civilians in a combat area? Could it be argued that to do so is to prejudice civilians because of the actions of their government, in the precise terms of Kasher and Yadlin’s doctrine, for the actions of terrorists embedded within a civilian population? If so, does this mean that the situation should be seen as one where moral blame somehow attaches to a whole population? The notion of punishing whole populations dates back to classic publicists of international law such as Vitoria:

> [T]he whole commonwealth may lawfully be punished for the sin of its monarch. If a sovereign wages an unjust war against another prince, the injured party may plunder and pursue all the other rights of war against the sovereign’s subjects, even if they are innocent of offence. The reason is that once the sovereign has been duly constituted by the commonwealth, if he permits any injustice in the exercise of his office the blame lies with the commonwealth, since the commonwealth is held responsible for entrusting its power only to a man who will justly exercise any authority or executive power he may be given; in other words, it delegates power at its own risk. In the same way, anyone may lawfully be condemned for the wrongdoings of his appointed agent.

Although hardly a democrat – ‘the best form of government is monarchy, just as the universe is controlled by a single Lord and Ruler’ – Vitoria is clear that moral blame should only devolve upon a population that has chosen, or allows itself to be led, by a prince who acts wrongfully. Ascribing moral blame surely postulates a failure to live up to defined standards of behaviour. Consequently, attributing moral blame to a population only constitutes the judgement that a causal connection exists between that failure and the population’s actions in terms of its abilities and opportunities to prevent that failure. What would constitute this causal connection – would it be enough that the population acquiesced in the delicts of the government, whether or not that government was unrepresentative and perhaps repressive, or need there be evidence of the population validating or participating in the government’s policies? Or when one is dealing not with the actions of government but those of a

56 1977 Additional Protocol I, art 51(1).
57 Vitoria On civil power (De potestate ciuilli) (1528), Question 1, Article 9 in A Pagden & J Lawrance (eds) Francisco de Vitoria: Political writings (1991) editorial footnote omitted.
58 Question 1, Article 8 (n 57 above) 18-21: quotation at 20.
terrorist group, can civilians be blamed and consequently put at risk for the actions of others whom they might not support and cannot control?

The function of this discussion of the Kasher-Yadlin doctrine is simply to throw into relief the question of whose rights should take priority in an armed conflict. Combatants, apart from when they fall into protected categories such as prisoners of war, or the wounded, sick or shipwrecked – namely, soldiers who are hors de combat – do not feature much in the debate about the inter-relationship between the law of armed conflict and international human rights law. If it is now accepted that states owe human rights obligations to members of their armed forces even during an armed conflict, then can they legitimately privilege their soldiers’ rights over those of non-combatants who find themselves mixed in or somehow associated with the opposing party? In particular, concerning combatants’ right to life, does the state exhaust its duties by ensuring that they are properly equipped or by issuing rules of engagement which prejudices the interests of non-combatants? If the former, does this make a soldier’s putative right to life dependent on economic considerations, namely, the extent to which the state can afford to equip its forces, which in turn would seem to make that right incapable of consistent application. At root here is an apparent clash not simply between rights but between disciplines. Apart from the protections afforded to soldiers who are hors de combat, if combatants have rights under human rights law in a conflict zone, where the attacking state does not exercise effective control, and the protection afforded to the non-combatant population arises under the law of armed conflict, then can these be reconciled or must we inevitably favour one over the other?