Injustice and Betrayal

Legal frameworks — a collision of norms

I. Introduction

The legal exposure of United Kingdom security force personnel to retrospective criminal and civil liability cannot be understood without engaging seriously with the structural relationship between two bodies of international law that govern, in different and often irreconcilable ways, the conduct of armed force by states. International Humanitarian Law (IHL) and International Human Rights Law (IHRL) are not merely different legal regimes; they are regimes built upon different premises, designed for different contexts, and oriented towards different normative ends. IHL was constructed to regulate armed conflict between organised belligerents, accepting that lethal force is a legitimate instrument of state policy in defined circumstances. IHRL was constructed to protect individuals from the coercive power of the state in conditions of peace, imposing obligations of restraint, procedural rigour, and accountability that presuppose precisely the stability that armed conflict destroys.

The collision of these two regimes in the context of United Kingdom military operations represents one of the most consequential and under-resolved problems in contemporary international law. This essay argues that the failure to resolve that collision — or, more precisely, the resolution of it in ways that consistently privilege IHRL standards over IHL frameworks — has produced a legal environment that systematically disadvantages British forces operating in armed conflict and creates the conditions for the institutional injustices documented in this series of essays.

II. The character and purpose of International Humanitarian Law

IHL, sometimes termed the law of armed conflict (LOAC), is among the oldest bodies of systematised international law.[1] Its contemporary form derives principally from the four Geneva Conventions of 1949 and their Additional Protocols of 1977, supplemented by a substantial body of customary international law.[2] It is predicated upon a fundamental accommodation: that states will engage in armed conflict, that armed conflict requires the use of lethal force, and that the purpose of international law in this domain is not to prohibit that force but to regulate it — to distinguish between lawful and unlawful combatants, between legitimate targets and protected persons, and between proportionate and disproportionate uses of force.

The critical features of the IHL framework for present purposes are three. First, it permits the deliberate use of lethal force against lawful targets without individual criminal liability, provided the rules of distinction, proportionality, and precaution are observed. A soldier who kills an enemy combatant in accordance with IHL commits no offence under international law; the killing is, in the language of the framework, a lawful act of war. Second, IHL imposes collective rather than individual accountability in most circumstances, operating through the command responsibility doctrine and the mechanisms of international criminal law rather than through the individual criminal liability of the soldier in the field. Third, IHL is operationally calibrated: its rules are designed to function in conditions of uncertainty, fear, and limited information, and

[1] Jean Pictet, Development and Principles of International Humanitarian Law (Dordrecht: Martinus Nijhoff, 1985), p. 3. Pictet traces the roots of IHL to the ancient laws of war and the codification impulse of the nineteenth century.

[2] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

its standards are assessed against the knowledge and circumstances of the person making the decision at the time it was made.

III. The character and purpose of International Human Rights Law

IHRL proceeds from fundamentally different premises. The European Convention on Human Rights, as the regime most directly applicable to United Kingdom forces through the mechanism of the Human Rights Act 1998, is an instrument of peacetime governance.[3] Its rights are conceived as universal and — with limited exceptions — absolute: the right to life protected by Article 2 is not a right to be balanced against military necessity but a constraint upon state power that requires, inter alia, that lethal force be used only when 'absolutely necessary' and that any death caused by state agents be subject to an effective official investigation.

The procedural obligations imposed by Article 2 are particularly significant. The European Court of Human Rights has developed, through an extensive body of jurisprudence, a set of requirements for the investigation of deaths caused by state agents that presuppose institutional conditions — documentary records, independent investigators, accessible witnesses, preserved forensic evidence — that are routinely unattainable in active theatres of armed conflict. The application of these standards to military operations conducted years or decades previously, in environments characterised by the deliberate destruction of records, the death or dispersal of witnesses, and the operational imperative of continued engagement with a live enemy, produces a form of accountability that is structurally incapable of being satisfied, yet whose failure to be satisfied is treated as evidence of inadequate investigation rather than as a consequence of the environment in which the relevant events occurred.

IV. The 'co-application' thesis and its limitations

The orthodox position in international law, as articulated by the International Court of Justice in its Nuclear Weapons Advisory Opinion (1996) and reaffirmed in the Wall Opinion (2004), is that IHL and IHRL coexist in armed conflict, with IHL operating as *lex specialis* to determine the content of rights — most importantly the right to life — in circumstances of armed conflict.[4][5] The *lex specialis* doctrine holds that where two legal norms govern the same subject matter and are in conflict, the more specific norm prevails. In the context of the right to life in armed conflict, this should mean that a killing that complies with IHL — the targeting of a lawful combatant in accordance with the rules of distinction and proportionality — does not constitute an arbitrary deprivation of life for the purposes of IHRL.[6]

The difficulty, as the jurisprudence of the European Court of Human Rights reveals, is that the co-application thesis has not been applied consistently or, in the view of many scholars, correctly. The Court's decisions in *Al-Skeini* (2011) and *Al-Jedda* (2011) extended the territorial reach of the ECHR to British operations in Iraq without engaging adequately with the

[3] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Art. 1. The Convention's territorial scope has been the subject of extensive jurisprudential development.

[4] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Rep 226, para. 25. The Court confirmed that IHRL does not cease in times of armed conflict and that the two regimes coexist, with IHL as lex specialis governing what constitutes an arbitrary deprivation of life in armed conflict.

[5] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Rep 136, para. 106. The Court reaffirmed that IHRL applies extraterritorially and that the two bodies of law are mutually reinforcing rather than mutually exclusive.

[6] Marco Sassoli and Laura Olson, 'The Relationship between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts', International Review of the Red Cross, 90:871 (2008), pp. 599–627, at 601.

IHL framework that governed the relevant conduct.[7,8] The effect was to subject military decisions made in an armed conflict governed by IHL to human rights scrutiny calibrated for peacetime conditions, without the mediating filter that the *lex specialis* doctrine should, in theory, have provided.

V. Hassan and the limits of judicial accommodation

The Grand Chamber's judgment in *Hassan v United Kingdom* (2014) represented the Court's most sustained attempt to address the IHL/IHRL interface directly.[9] Confronted with a case concerning the detention of an Iraqi national by British forces during the international armed conflict phase of the Iraq War, the Court held that Article 5 ECHR — the right to liberty — could be interpreted in a manner consistent with the detention powers conferred by the Third and Fourth Geneva Conventions, effectively accommodating the IHL framework within the ECHR rather than permitting the former to displace the latter.

The significance of *Hassan* is considerable but limited. The Court expressly declined to engage with the derogation mechanism provided by Article 15 ECHR — the provision that permits states to derogate from Convention obligations 'in time of war or other public emergency threatening the life of the nation' — choosing instead an interpretive route that, while practically convenient, avoided the question of principle.[10] Critics have argued persuasively that this approach, far from resolving the normative collision, merely displaces it: by declining to rule definitively on the relationship between the two regimes, the Court preserved its own jurisdiction while leaving the substantive question of which legal standard governs unanswered.[11]

The Article 15 derogation route, which would have provided a structurally cleaner resolution, was available to the United Kingdom but was not utilised in relation to the operations in Iraq and Afghanistan.[12] The decision not to derogate was a political choice, made against legal advice and reflecting a government preference for the appearance of full Convention compliance over the juridical clarity that derogation would have provided. It is a choice whose costs have been borne exclusively by those who served.

VI. The domestic dimension: Smith and the Human Rights Act

The domestic legal framework compounds the difficulties created by Strasbourg's jurisprudence. The Supreme Court's decision in *R (Smith) v Secretary of State for Defence* (2010) extended the reach of the Human Rights Act 1998 to British forces serving overseas,

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[7] Al-Skeini and Others v United Kingdom (2011) 53 EHRR 18 [Grand Chamber]. The Court identified five circumstances in which a state may exercise jurisdiction extraterritorially under Art. 1 ECHR, of which 'effective control' over an area was the most significant for the purposes of the Iraq litigation.

[8] Al-Jedda v United Kingdom (2011) 53 EHRR 23 [Grand Chamber], para. 102. The Court held that the United Kingdom's internment of Mr Al-Jedda in Iraq violated Art. 5 ECHR, notwithstanding that the detention was authorised by UN Security Council Resolution 1546 (2004).

[9] Hassan v United Kingdom (2014) 38 BHRC 358 [Grand Chamber], para. 104. The Grand Chamber held, by a majority of sixteen to one, that Art. 5 ECHR could be interpreted in a manner consistent with the Third and Fourth Geneva Conventions in international armed conflicts, effectively accommodating IHL detention powers within the ECHR framework.

[10] Ibid., para. 107. The Court expressly declined to find that the United Kingdom had derogated under Art. 15 ECHR, instead adopting an interpretive accommodation that critics have described as jurisprudentially inconsistent with the Court's earlier approach in Al-Jedda.

[11] Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg', European Journal of International Law, 23:1 (2012), pp. 121–139, at 136. Milanovic characterises the Al-Jedda judgment as 'a solution in search of a legal principle', noting the Court's failure to engage adequately with the IHL framework.

[12] ECHR, Art. 15(1). Derogation is permissible 'in time of war or other public emergency threatening the life of the nation' and 'to the extent strictly required by the exigencies of the situation'. The United Kingdom has invoked Art. 15 on several occasions, including during the Northern Ireland emergency.

holding that soldiers within the ‘authority and control’ of the state fell within the UK’s Article 1 ECHR jurisdiction.[13] The consequence was that the Ministry of Defence became a public authority under section 6 of the Human Rights Act, subject to obligations to act compatibly with Convention rights in respect of its own personnel.[14]

The significance of this for present purposes is that it created a closed legal system in which the standards governing military decision-making were determined primarily by a human rights framework that contained no internal mechanism to engage with IHL. British forces operating in armed conflict were simultaneously governed by IHL as a matter of international law and by the Human Rights Act as a matter of domestic law, with no legislative provision for resolving conflicts between the two. The courts have been left to manage this tension through the imperfect instrument of the *lex specialis* doctrine, which — as the case law demonstrates — has been applied inconsistently and, in critical respects, inadequately.[15]

VII. The investigative obligation and Its operational impossibility

The elaboration of Article 2 ECHR’s procedural obligations in the context of military operations represents perhaps the most practically damaging consequence of the normative collision. The Grand Chamber’s judgment in *Hanan v Germany* (2021), which found the German investigation into an airstrike in Kunduz admissible before the Court, significantly extended the extraterritorial scope of ECHR investigative obligations to encompass lethal military action in active combat operations.[16] The implications for British operations are direct: any use of lethal force by British forces in circumstances where the Convention applies may trigger an obligation to conduct an investigation meeting the procedural standards developed by the Court for the quite different context of peacetime policing.

Those standards — independence, adequacy, promptness, transparency, and the involvement of next of kin — were designed for environments in which records are preserved, crime scenes are accessible, witnesses can be compelled, and investigations can proceed without operational interference. They bear no relationship to the realities of armed conflict, in which forensic evidence is routinely destroyed by the exigencies of battle, witnesses are combatants with obvious interests in the outcome, records are classified for national security reasons, and the operational environment may preclude investigation for months or years.[17]

The IHL framework addresses the question of proportionality in lethal targeting through the proportionality principle itself, which requires the commander to assess whether the anticipated incidental harm to protected persons is excessive in relation to the expected military advantage of the attack.[18] This assessment is contextual, prospective, and operationally grounded. The ECHR’s Article 2 test, as applied by the courts, is retrospective,

[13] R (Smith) v Secretary of State for Defence [2010] UKSC 29, [2011] 1 AC 1. The Supreme Court held, by a six to three majority, that Art. 1 ECHR jurisdiction could extend to British military personnel serving overseas, a conclusion that extended ECHR protections to those within the 'authority and control' of British forces.

[14] Human Rights Act 1998, s. 6. All public authorities, including the Ministry of Defence and individual officers acting in their official capacity, are required to act compatibly with Convention rights.

[15] Francoise Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', International Review of the Red Cross, 90:871 (2008), pp. 549–572, at 553.

[16] Hanan v Germany (App. No. 4871/16), ECtHR [Grand Chamber], 16 February 2021. The Court found Germany's investigation into an airstrike in Kunduz, Afghanistan, admissible, significantly extending the extraterritorial reach of ECHR investigative obligations to lethal use of force in active combat operations.

[17] Michael N. Schmitt, 'Deconstructing the Prohibition on Targeting Civilians in International Humanitarian Law', New York University Journal of International Law and Politics, 42:1 (2009), pp. 1–37, at 9.

[18] Protocol I, Art. 51(5)(b). The proportionality rule prohibits attacks expected to cause incidental civilian loss excessive in relation to the concrete and direct military advantage anticipated. This test is operationally contextual and admits of no simple peacetime equivalent.

individualised, and judicially determined by reference to standards that make no allowance for the conditions in which the relevant decision was made. The two frameworks do not merely differ in their requirements; they proceed from incommensurable premises about the nature of state accountability for lethal force.

VIII. The failure of legislative response

The United Kingdom government's legislative response to the problems created by the IHL/IHRL collision has been halting, partial, and, in critical respects, inadequate. The Joint Service Manual of the Law of Armed Conflict acknowledges the primacy of IHL as the governing framework for the conduct of hostilities, but because it is operational guidance rather than domestic law, it cannot displace the obligations imposed by the Human Rights Act in domestic proceedings.[19]

The Overseas Operations (Service Personnel and Veterans) Act 2021, discussed in Essay I, addresses symptoms rather than causes. Its longstop provision — a presumption against prosecution after five years — does not alter the legal standards against which conduct is assessed, nor does it preclude civil claims or public inquiries.[20] What is required, and what has not been provided, is a substantive legislative intervention that addresses the normative collision at its root: a statutory provision that expressly recognises IHL as the governing legal regime for the conduct of hostilities and displaces the application of ECHR standards to decisions made in circumstances of armed conflict.

Such an intervention would not require the United Kingdom to abandon its commitment to human rights, nor would it place British forces beyond the reach of legal accountability. IHL is itself a sophisticated system of accountability: it prohibits war crimes, imposes command responsibility, and provides mechanisms for prosecuting grave breaches under both domestic and international criminal law. The argument is not for impunity; it is for the application of a legal framework that is commensurate with the environment in which British forces operate.[21]

IX. Conclusion: a structural problem requiring a structural solution

The collision of IHL and IHRL in the context of United Kingdom military operations is not a technical legal problem admitting of marginal adjustment. It is a structural incoherence in the legal framework within which British forces must operate, and it has produced, with a consistency that demands explanation, outcomes systematically disadvantageous to those forces and systematically advantageous to those who oppose them. The application of peacetime accountability standards to wartime conduct, through the medium of an ECHR framework that was neither designed nor adapted for the conditions of armed conflict, is the juridical mechanism through which the broader political and institutional failures documented in this series of essays have been given legal form.

The resolution of this structural incoherence requires action at multiple levels: legislative, to provide domestic legal recognition of IHL as the governing framework for the conduct of hostilities; diplomatic, to engage with the Council of Europe and the European Court of Human Rights on the development of a jurisprudence that takes the *lex specialis* doctrine seriously

[19] UK Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict (JSP 383, 2004), para. 2.2. The Manual acknowledges that IHL represents the primary legal regime for the conduct of hostilities, while noting that IHRL obligations continue in parallel.

[20] Overseas Operations (Service Personnel and Veterans) Act 2021, s. 1(2). The longstop provision establishes a presumption against prosecution after five years, subject to the Attorney General's consent and a list of excluded offences in Schedule 1.

[21] Geoffrey Corn, 'Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict', Journal of International Humanitarian Legal Studies, 1:1 (2010), pp. 52–94, at 57.

rather than treating it as a rhetorical concession to be qualified in application; and political, to establish the principle that those who serve in the United Kingdom's armed forces in conditions of armed conflict will be judged by standards appropriate to those conditions and not by standards derived from a peacetime framework that their adversaries are under no obligation to observe.[22] All these requirements could, with political will, be encapsulated within and legislated for, in something like a new Military Operations Act that reasserts the prime, sovereign duty of Government as being the UK's National Security.

Until that resolution is achieved, the legal framework governing British military operations will continue to function, in effect, as an instrument of strategic disadvantage — one that imposes upon the United Kingdom's forces obligations to which no other party to a conflict is subject and that creates, by structural design rather than by malicious intent, the conditions for the injustice and betrayal that this series of essays seeks to document and to address.

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[22] David Turns, 'The Law of Armed Conflict (International Humanitarian Law)', in Malcolm Evans (ed.), International Law, 5th edn (Oxford: Oxford University Press, 2018), pp. 821–860, at 834.