

INTRODUCTION TO FIGHTING IN THE LAW'S GAPS

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I want to start out by expressing my sincere appreciation to Professor Rachel VanLandingham and Southwestern Law School's Journal of International Law for the invitation to participate in this conference amongst so many friends and colleagues. Many of the participants are leaders in their field who have a wealth of operational or academic experience, and sometimes both. I anticipate rich discussions about the real-world challenges we face.

I am particularly honored to be opening up the conference with some introductory remarks on "legal seams." My interest in this subject reflects my immersion in the law's gaps following the horrific attacks of 9/11. It was an incredibly hectic period that highlighted the strengths, the weaknesses, and unfortunately, the significant "missing bits" of treaty law and common understandings about customary international law. Perhaps what was most evident were the limitations that the prevailing traditional orthodoxy of 20th Century interpretations of international law brought to the "fight." My experiences and ruminations on this issue culminated in my writing a book titled, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*.¹

Note, I identified the issue as one of fighting at the legal boundaries, although "legal seams" and the "law's gaps" are an integral part of any discussion about "boundaries." Figure 1.1 identifies what I view as the main bodies of law relevant to contemporary operations and their boundaries:²

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1. KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* (2016).

2. *Id.* at 14.

Figure 1.1
Applicable
Legal Regimes



I have three preliminary points to frame this discussion. First, as you can note, I do not use the terms *jus ad bellum* or *jus in bello* to describe the law governing State self-defense, or international humanitarian law, respectively. Beyond its use by what sometimes appears to be an exclusive “guild” of international lawyers, Latin has had its day as a language of communication. Of course, a guild is defined as a “medieval association of craftsmen or merchants, often having considerable power.”³ Latin is not the language of military commanders, politicians or the general public. The people we have to convince.

Secondly, the boundaries identified in this diagram are two-fold. There are the outer limits of what each body of law entails, and then the question of how the different bodies of law interface and interact, or in other words, how they work at the seams. Finally, the bodies of law that impact on everyday operations are more numerous than just State self-defense, humanitarian law, or human rights law. Consideration must be given to

3. Oxford Dictionary, <https://www.lexico.com/definition/guild> (last visited Feb. 8, 2020).

domestic law, including national human rights law and international criminal law. The United States military has called this amalgam of laws “operational law,” a term that I wholeheartedly embrace.

I say “amalgam” or mixture because practitioners do not have the luxury of applying each of these bodies of law in isolation. However, that is the approach traditionally adopted by international lawyers. This is largely driven by the desire to separate the law governing hostilities from State self-defense so that the former is equally applied to both parties independent of the “justness” or the lack of justness in their reasons for going to war. The problem is, as the renowned British academic Adam Roberts has noted, “[i]n practice that separation has never been absolute...”⁴

At a minimum these two bodies of law have a sequential relationship. This is something practitioners have known for some time. This means these bodies of law meet at the “seams.” Yet it was interesting in the aftermath of the January 3, 2020 strike against Iranian Major-General Soleimani and Abu Mahdi al-Muhandis the degree to which legal commentators were discussing, seemingly for the first time in some cases, whether there was an armed conflict in existence and what law might actually apply to control the strike.⁵ In this regard, I commend to you the commentary by Geoffrey S. Corn and Chris Jenks entitled, *Soleimani and the Tactical Execution of Strategic Self-defense*, published on January 24, 2020 on the Lawfare national security website for an accurate assessment of this issue that identifies international humanitarian law as being applicable.⁶

What is noteworthy is that the Soleimani and al-Muhandis situation actually represents the easy example. There are far more challenging threshold questions involving the response to attacks by non-State actors. In this respect, the *Tadic* criteria,⁷ developed in the 1990s appears to be

4. Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT'L REV. RED CROSS 931, 932 (2008).

5. See Agnes Callamard, *The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters*, JUST SECURITY (Jan. 8, 2020), <https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/>; Eliav Lieblich, *Targeted Killing of General Soleimani: Why the Laws of War Should Apply, and Why It Matters*, JUST SECURITY (Jan. 13, 2020), <https://www.justsecurity.org/68030/targeted-killing-of-general-soleimani-why-the-laws-of-war-should-apply-and-why-it-matters/>; Mary Ellen O'Connell, *The Killing of Soleimani and International Law*, EJIL: Talk! (Jan. 6, 2020), <https://www.ejiltalk.org/the-killing-of-soleimani-and-international-law/>; Michael J. Glennon, *The Irrelevance of Imminence*, LAWFARE (Jan. 15, 2020, 9:08 AM), <https://www.lawfareblog.com/irrelevance-imminence>.

6. Geoffrey S. Corn & Chris Jenks, *Soleimani and the Tactical Execution of Strategic Self-Defense*, LAWFARE (Jan. 24, 2020, 2:54 PM), <https://www.lawfareblog.com/soleimani-and-tactical-execution-strategic-self-defense>.

7. Prosecutor v. Tadić, Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (holding that an “armed conflict exists whenever there is a resort to armed forces between States or

woefully inadequate when States are faced with a “one off” attack by a well-armed non-State actor threatening State-like violence. The reality of transnational terrorist threats has resulted in a greater acceptance over the past twenty years of a “totality of the circumstances” approach, which looks at factors such as the organization of the non-State group, the weapons and tactics it employs, the nature of the target, and what force is required to be used by the State to respond to the threat in deciding if there is an armed conflict.⁸

Importantly, what is not addressed by applying a strict separation between the law governing the recourse to war and that controlling the conduct of hostilities, is that in situations of ongoing conflict, both bodies of law will have to be applied. One theory that I call the “overarching” theory sees the self-defense principles, such as proportionality, applying throughout an armed conflict.⁹ A more “limited” version would apply it to conflicts “short of war” and cross border action taken against non-State actors. That leaves open how and where these two bodies of law interface, which I would suggest occurs at the strategic level.¹⁰

The world, and hostilities in particular, are far more complex than the law often appears to recognize. Unfortunately, legal discussions rarely get beyond a binary analysis with suggestions that one body of law or another applies to a particular situation, while another does not. For example, the past twenty years has witnessed significant disagreement regarding the application of international human rights and humanitarian law. This often highly technical, frequently ideological, and sometimes strikingly arcane debate occurs within the “guild” of international lawyers. Not surprisingly, this debate takes place under the rubric of another Latin term, *lex specialis*, which is an odd choice of terminology when what we need is clarity.

protracted arms violence between governmental authorities and organized armed groups or between such groups within a State,” and “[i]nternational humanitarian law applies from the initiation of such armed conflict and cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.” “Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”).

8. See Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 257 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008) (referring to the “totality of circumstances”); Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANS’L. L. 693, 731-45 (2013); WATKIN, *supra* note 1, at 375-378; Geoffrey S. Corn, “Legal Classification of Military Operations”, in U.S. MILITARY OPERATIONS: LAW POLICY, AND PRACTICE 67, 77-78 (Geoffrey S. Corn, Rachel E. VanLandingham & Shane R. Reeves eds., 2016).

9. WATKIN, *supra* note 1, at 58-63.

10. *Id.* at 63-72.

The reality is much different. Of course, human rights are relevant. The American academic and International Court of Justice Judge, Richard Baxter, went so far as to note that “international humanitarian law is human rights law.”¹¹ Frequently, human rights law itself applies concurrently or on its own. If your State is an occupying power, or it is fighting an insurgency, as was the position the United States found itself in after the 2003 Iraq invasion, you could be dealing not only with organized resistance groups continuing to wage hostilities, but also simultaneously having to maintain law and order. In other words, the situation could be described as “law enforcement,” or “policing.”

However, gaps can remain. These gaps are often the result of the uncertainty regarding interpretations of international law, such as identifying the threshold for non-international armed conflict. That uncertainty can lead States to apply a policy solution to fill the “gap,” as can be seen in the United States’ approach of its forces complying “with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”¹² Thus, the law of armed conflict is applied even though there is no armed conflict. This approach works well if it results in detained persons being treated to prisoner of war standards. It is far more problematic regarding the use of force. Absent an armed conflict, it is human rights law that must be applied as a matter of law. That law trumps policy.

In my view, international law is at a crossroads. Since the turn of this century, the well-established law primarily designed to control inter-State conflict has been confronted with violence of a significantly different nature. Many of the long held legal “orthodoxies,” largely developed during the Cold War, simply do not provide the necessary answers for today’s complex post-9/11 world.

When I first became involved in operational law matters thirty years ago, it was not uncommon to hear international lawyers propose the following: (1) “war” has been outlawed, (2) there is no authority to intervene in another country to rescue your nationals, (3) a customary international law right of

11. R.R. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT’L. L. J. 1, 25 (1975).

12. U.S. Dept. of Def., Directive 2311.01E, DoD Law of War Program ¶ 4.1 at 2 (2006) (certified current as of Feb. 22, 2011), https://ogc.osd.mil/LoW/practice/DoDDirectives/dod_law_of_war_program_dodd_2311_01e.pdf; *see also* U.S. Dept. of Def., Office of General Counsel of Dept. of Def., Dept. of Def. Law of War Manual ¶ 3.1.1.2 at 71 (2015) (updated Dec. 2016), <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> (noting that “DoD practice also has been to adhere to certain standards in the law of war, even in situations that do not constitute “war” or “armed conflict,” because these law of war rules reflect standards that must be adhered to in all circumstances”).

State self-defense did not survive the creation of the U.N. Charter, (4) a non-State actor cannot carry out an “armed attack” resulting in the exercise of State self-defense since the Charter only applies to States, and (5) non-international armed conflict is limited by a State’s territorial boundaries.

Many of these traditional interpretations of the law have not stood the test of time, or importantly, the crucible of practical application. For example, some eighteen years after the attacks of 9/11, few would argue that an attack by a non-State actor must be attributable to a State in order for the victim State to be able respond with extra-territorial military action.¹³ Further during the past twenty years, States have regularly intervened in failed and failing States to rescue their nationals, with many of those kidnappings being linked to terrorist groups seeking to fund their operations. Law does not stand still, and in order to remain relevant, interpretations of the law must also reflect the realities of the security threats. This is not new. A number of States such as the United States and Israel found themselves to be “outliers” in their approaches to counterterrorism in the 1980s and 1990s, but after 9/11, their views were suddenly more mainstream.

Overly restrictive interpretations of international law can also create “legal gaps” in the contemporary security dialogue. Legal theory does not always match practical reality. One example is the debate about the gravity of an attack necessary to be considered an “armed attack” under the U.N. Charter. Similarly, returning to the Soleimani and al-Muhandis strike, much of the public debate, both by lawyers and non-lawyers alike, has centered on a traditional, very narrow interpretation of the self-defense “imminence” test based on the 1837 *Caroline* incident. Under that 19th Century test, a State must “show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹⁴ In this regard, I commend Charlie Dunlap’s piece on the Lawfire website titled, *The Killing of General Soleimani was Lawful Self-Defense, Not “Assassination,”* for a discussion of broader criteria to be applied to imminence.¹⁵

The reality is that the *Caroline* test is not the only accepted test for self-defense action. As Thomas Ruys notes in his excellent book on armed attack

13. WATKIN, *supra* note 1, at 51; *see also* David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT’L L. 235, 273 (2013).

14. *The Avalon Project - Documents in Law, History and Diplomacy: British-American Diplomacy: The Caroline Case*, in 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 80-121 (Hunter Miller ed., Annotation, Government Printing Office 1934) (1836-1846), https://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Feb. 10, 2020).

15. Charlie Dunlap, *The Killing of General Soleimani was Lawful Self-Defense, Not “Assassination,”* LAWFIRE (Jan. 3, 2020), <https://sites.duke.edu/lawfire/2020/01/03/the-killing-of-general-soleimani-was-lawful-self-defense-not-assassination/>.

and self-defense, there are two divergent interpretations of Article 51 of the U.N. Charter: one that he calls the traditional “restrictionist” approach, and one that is “counter-restrictionist.”¹⁶ The latter approach supports a broader concept of imminence based on pre-emptive action where an attack is imminent but has not been launched.¹⁷ Like many changes in the application of international law, the acceptance of a broader anticipatory self-defense has been increasing post-9/11, including from States such as the United States, the United Kingdom, and Australia.¹⁸ Proponents of anticipatory self-defense frequently rely on “the increasing speed and destructive potential of modern weaponry” in order to justify action “that is not strictly reactive in nature.”¹⁹ One merely needs to consider cyber warfare and autonomous weapons to ask whether or how the *Caroline* rationale applies to emerging security 21st Century threats.

Further, the recent legal dialogue does not appear to have addressed the “accumulation of events,” or the “needle prick” theory, which looks at consecutive attacks that take place “linked in time, source and cause.”²⁰ As Professor Ruys has identified, this theory raises three considerations. One, “the proportionality analysis of a defensive action should not focus on the immediate cause, but also entails a retrospective element” permitting a larger scale response.²¹ Two, less grave uses of force can “when forming part of a chain of events, qualitatively transform into an ‘armed attack.’”²² Finally, it increases the “likelihood that more attacks will imminently follow,” thereby justifying defensive action even if the armed attack is factually over.²³ My reading of the January 8, 2020 United States letter to the U.N. Security Council,²⁴ and the following Notice on the legal framework for that strike,²⁵ with their references to a prior series of escalating armed attacks from Iran

16. TOM RUYSS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 250-54 (2010).

17. *Id.*

18. *Id.* at 323.

19. *Id.* at 257.

20. *Id.* at 168.

21. *Id.*

22. *Id.*

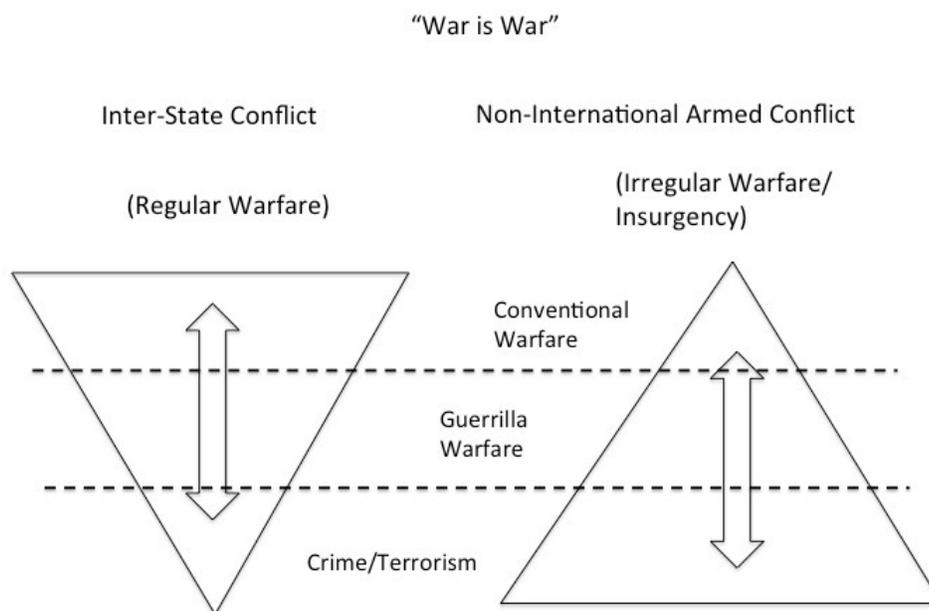
23. *Id.* at 168-69.

24. Permanent Rep. of the United States of America to the U.N., Letter dated 8 January 2020 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2020/20 (Jan. 8, 2020), <https://undocs.org/S/2020/20>.

25. Notice on the Legal and Policy Framework Guiding the United States’ Use of Military Force and Related National Security Operations, JUST SEC’Y, <https://www.justsecurity.org/wp-content/uploads/2020/02/notice-on-the-legal-and-policy-frameworks-guiding-the-united-states-use-of-military-force-and-related-national-security-operations.pdf> (last visited Feb. 15, 2020).

and Iranian supported militias, and a desire to deter further attacks, appears to rely on such an “accumulation of events” doctrine.

Finally, a fundamental challenge for international lawyers is to ensure both the law and State approaches towards conflict accurately reflect contemporary armed conflict. There is a bias amongst States and many international lawyers towards viewing armed conflict through an “international armed conflict” or State-versus-State lens. However, looking at the following diagram, there is a robust treaty regime for only the “conventional warfare” portion of inter-State conflict:



Most conflict occurs in the other realms. Notwithstanding attempts over the past decade to refocus State armed forces towards inter-State armed conflict the reality is that the prevailing form of conflict remains against non-State actors either directly or through proxies. In this reality lies significant discussions about “gaps” in the law for the most prevalent security challenges.

As Hew Strachan has noted, “war is war.”²⁶ All wars, inter-State or non-international armed conflict, have elements of conventional and guerrilla warfare, as well as the requirement to maintain public order. That said, the pull of “conventional warfare” is remarkably strong, frequently prompting the creation of doctrinal terms to deal with other than the “ideal” of State-on-State warfare. One such term that will be dealt with in this conference is “hybrid warfare.” Such warfare involves an adversary that “simultaneously and adaptively employs a fused mix of conventional weapons, irregular tactics, terrorism, and criminal behavior in the battle space to obtain their political objectives.”²⁷ The term attempts to force a broader dialogue about how wars are fought, although in many instances it is used in a binary sense of conventional operations and then something else, such as cyber activity or covert operations (e.g. the “little green men” in the Crimea).²⁸

While a helpful construct, it can also be fairly asked whether this is just another in a long line of doctrinal terms that have been developed to try to deal with the messy reality of warfare as it has always existed.²⁹ There have, of course, been other terms such as three block wars,³⁰ military operations other than war (“MOOTW”),³¹ low intensity conflict,³² mosaic wars,³³ composite warfare,³⁴ non-linear war,³⁵ gray zone conflict,³⁶ and reaching back in history, small wars.³⁷ One wonders what the shelf life will be on

26. HEW STRACHAN, *THE DIRECTION OF WAR 207-08* (2013).

27. Frank G. Hoffman, *Hybrid vs. Compound War: The Janice Choice: Defining Today's Multifaceted Conflict*, *ARMED FORCES J.* (2009), <http://armedforcesjournal.com/hybrid-vs-compound-war/>.

28. SEAN MCFATE, *THE NEW RULES OF WAR: VICTORY IN THE AGE OF DURABLE DISORDER 196-97* (2019).

29. *Id.* at 179.

30. Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, *MARINES MAG.* (Jan. 1999), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a399413.pdf>.

31. *Joint Doctrine for Military Operations Other Than War*, Joint Pub 3- 07, ¶ 2, at I-1, (Jun. 16, 1995), https://www.bits.de/NRANEU/others/jp-doctrine/jp3_07.pdf (outlining the concept of MOOTW).

32. *Military Operations in Low Intensity Conflict FM 100-20/AFP 3-20*, GLOBAL SEC'Y, <https://www.globalsecurity.org/military/library/policy/army/fm/100-20/index.html> (last visited Feb. 16, 2020).

33. DAVID PETRANEUS, *THE U.S. ARMY, MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL*, ¶ 1- 37, at 14 (2007).

34. EEBEN BARLOW, *COMPOSITE WARFARE: THE CONDUCT OF SUCCESSFUL GROUND FORCE OPERATIONS IN AFRICA 424* (2016).

35. MCFATE, *supra* note 28, at 179.

36. Gary Corn, *Punching on the Edges of the Grey Zone: Iranian Cyber Threats and State Cyber Responses*, JUST SEC'Y (Feb. 11, 2020), <https://www.justsecurity.org/68622/punching-on-the-edges-of-the-grey-zone-iranian-cyber-threats-and-state-cyber-responses/>.

37. CHARLES EDWARD CALLWELL, *SMALL WARS: THEIR PRINCIPLES AND PRACTICE 21* (3rd ed. 1996) (1906).

“hybrid warfare” as we continue to struggle with other emerging modes of warfare.

In my view, what is needed from a legal perspective is for international lawyers to address contemporary security and legal challenges by applying a broader “holistic” approach where the potential impact of all the bodies of law must be considered throughout the life of the conflict. Many of these bodies of law have to be applied sequentially, and often simultaneously. Their interaction cannot be ignored. The analysis must also critically and objectively consider the practical effects of adopting overly narrow interpretations of the law, or applying just one body of law to the exclusion of another. Those advocating a broad unitary application of the “laws of war” or “human rights” law must look more deeply at the “on the ground” or tactical effect of adopting what often appear to be rigid positions. Above all, there is the practical impact that must be considered before a particular legal approach is given any credence. To do this, practitioners need to talk to academics and vice versa.

Ultimately as lawyers, we need to ensure that “legal boundaries do not become barriers to operational success or to the protection of civilians regardless of where they live.”³⁸

38. WATKIN, *supra* note 1, at 30.