

Michael Lobban, Custom, Common Law Reasoning and the Law of Nations in the Nineteenth Century;

Gerald J. Postema, Custom in International Law: A Normative Practice Account;

John Tasioulas, Customary International Law and the Quest For Global Justice

Jörg Kammerhofer

Senior Research Fellow, University of Freiburg, Germany

Email: joerg.kammerhofer@jura.uni-freiburg.de

doi:10.1093/ejil/chs026

Orna Ben-Naftali (ed.). **International Humanitarian Law and International Human Rights Law**. Oxford: Oxford University Press. 2011. Pp. 424. £60. ISBN: 9780191001604.

The volume under review is published in the series ‘The Collected Courses of the Academy of European Law’, which draws upon the lectures given at the European University Institute in Florence within the Academy of European Law Summer School. It includes eight essays, most of which are authored by the lecturers in the session on the human rights law of the 2008 Academy of European Law Summer School. Their common denominator is the exploration, to a greater or lesser degree, of the interaction between international humanitarian law (IHL) and international human rights law (IHRL) and its functioning in practice.

The collection opens with an essay by Yuval Shany entitled ‘Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror’. The author illustrates how after the 11 September 2001 attacks there was a shift from what he calls the ‘law and order’ paradigm, which considered terrorism simply as a criminal phenomenon, to what in his words is the ‘armed conflict’ paradigm, according to which terrorism is ‘a threat equivalent in its magnitude to an inter-state war’ (at 22). This shift had dramatic consequences for the respect for human rights in the fight against terrorism. Shany, however, points out that the situation is fluid: a mixed paradigm is emerging which takes human rights into due consideration. This paradigm was implicitly endorsed by the International Court of Justice in the *Wall* advisory opinion and, more recently, by the Israeli Supreme Court in various decisions, including that in the *Targeted Killings* case. In the author’s view, however, it remains unclear whether the mixed paradigm will be able to impact on state practice.

The second essay is by Marco Sassòli and focuses on the role of IHL and IHRL in the allegedly new types of armed conflicts. Sassòli considers asymmetric conflicts, conflicts in failed states, the ‘war on terror’, and peace operations conducted or authorized by the UN. He argues that nearly all these types of conflicts, if they are armed conflicts at all, are not of an international character, because the fighting forces do not belong to different states. In the author’s opinion, both IHL and IHRL contain rules applicable to many issues arising in such conflicts. What rule is to be applied in a certain case should be determined according to the *lex specialis derogat legi generali* principle. Sassòli points out that this principle ‘does not indicate an inherent quality in one branch of law or of one of its rules. Rather, it determines which rule prevails over another in a particular situation’ (at 71). To use his own words, ‘between two applicable rules, the one which has the larger “common contact surface area” with the situation applies’ (*ibid.*). A number of examples are given.

The author observes, however, that IHL and IHRL appear to offer similar solutions on most issues arising in the new types of conflicts and, more generally, in non-international conflicts, and focuses his attention on two issues on which the solutions offered by the two branches of law seem to differ. They are the deliberate killing and the detention of a ‘fighter’, meaning

a member of an armed group with a fighting function or a member of government armed forces. On both issues the *lex specialis* principle determines which solution prevails in the concrete case, taking into account its peculiarities. As for the issue of deliberate killing, the case of a FARC leader shopping in a supermarket in government-controlled Bogotá is mentioned as an example. Under IHL he could be killed by government forces; while according to IHRL he should be arrested and graduated force should be employed by government forces. Now, according to Sassòli, government control over the place is a factor that makes the IHRL rule prevail over the IHL one. With regard to the issue of detention, the author points out that IHL treaties applicable to non-international armed conflicts do not specify procedural guarantees for 'fighters' captured or detained by the enemy; while IHRL treaties contain clear rules on procedural guarantees for whoever is arrested or detained. In Sassòli's view, these rules must be applied also to 'fighters' captured or detained by the enemy. As a result, IHRL prevails over IHL, the only exception being where 'either an agreement between the parties or a unilateral recognition of belligerency makes the full regime of POWs applicable' (at 92). The author concludes his investigation by noting that the question remains whether the solution prevailing according to the *lex specialis* principle is feasible, especially for those engaged on the ground.

Sassòli's essay is followed by a contribution by Marko Milanović focusing on the conflicts between IHL and IHRL norms and the methods of avoiding or resolving them. It is a revised version of an article already published in the *Journal of Conflict & Security Law* in 2009. Interestingly, Milanović posits that the *lex specialis* principle is only a method of norm conflict avoidance, as 'all it can do is assist in the interpretation of general terms and standards in either IHL or IHRL by reference to more specific norms from the other branch' (at 115–116).

The fourth essay is authored by the book's editor. Orna Ben-Naftali sheds light on the role that law, as interpreted and applied by the Israeli authorities, has played in legitimizing and perpetuating Israel's regime of occupation of the Palestinian territories. Her essay is divided into two parts. In the first part, the author demonstrates convincingly that the Israeli occupation of the Palestinian territories is illegal, constituting 'a conquest in disguise' (at 158). In fact, the annexation of East Jerusalem, the establishment and expansion of settlements in the West Bank, the extensive confiscation of Palestinian land, and the construction of the Wall are all evidence of Israel's intention to retain its control over the Occupied Palestinian Territory indefinitely.

In the second part, Ben-Naftali illustrates that over the years law, in particular IHL, has been interpreted and applied by the Israeli authorities, including the High Court of Justice, in such a way as to advance Israel's interests at the expense of the Palestinian people and to contribute to the creation of an environment of tolerance towards Israel Defence Forces' systematic acts of violence against Palestinian civilians. She argues that these acts constitute war crimes, but may turn out to be crimes against humanity to the extent that a state policy exists which is inadequate to investigate and punish them. Three interesting cases heard by the Israeli High Court of Justice, which corroborate the author's arguments, are examined – the *Ajuri* case, the *Targeted Killings* case, and the *Abu Rahme* case.

In the fifth essay, Andrea Gioia explores the relationship between the European Convention on Human Rights (ECHR) and IHL and analyses the case law of the European Court of Human Rights (ECtHR) relating to situations of armed conflict. He emphasizes that the ECtHR is competent to apply IHL when reviewing the exercise by states parties of their right to take measures derogating from the ECHR provisions under Article 15. More generally, it is allowed to take IHL into account when interpreting those provisions. From the analysis of the case law relating to situations amounting to armed conflicts, however, it emerges that the ECtHR has expressly referred to IHL only in a very few cases. At the same time, it appears that this case law has

generally not contradicted the relevant IHL provisions. Gioia rightly points out that the ECtHR could help to monitor compliance with IHL and clarify the relationship between IHL and IHRL so as to contribute to ‘the convergence of the two bodies of law towards a more coherent legal regulation of the conduct of states during armed conflict’ (at 247). He concludes that the ECtHR should abandon its ‘ivory tower’ attitude, stressing that in the long run this could lead to the issue of decisions contradicting IHL.

Gioia’s essay is followed by a contribution by Ana Filipa Vrdoljak, who illustrates how the protection of cultural heritage during armed conflict expanded over the 20th century and how after World War II the rationale behind this protection shifted from the importance of cultural heritage for the advancement of the arts and sciences to its importance for the enjoyment of human rights.

The seventh essay is authored by Paola Gaeta and focuses on the right of victims of war crimes to obtain compensation from the state responsible. The author correctly points out that, in the light of the development of IHRL, the rules of IHL must be interpreted as conferring rights upon individuals as a counterpart to the obligations imposed on belligerents, and argues that individuals who suffer as a result of serious violations of those rules are entitled to reparation from the belligerent state responsible. In Gaeta’s opinion, the rights of victims of war crimes to compensation may be enforced at the international level by the state of nationality or, since war crimes are violations of *erga omnes* obligations, by other states of the international community. Victims may also claim compensation from the state responsible before national tribunals. The author maintains that the doctrine of state immunity cannot be invoked to dismiss such claims. However, in its judgment in the case of the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* of 3 February 2012, the International Court of Justice rejected this view. It held that ‘under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict’ (at para. 91).

An essay by Christine Bell closes the book. It discusses the ways in which in post-conflict situations IHRL and IHL have been used to establish accountability for both those who committed atrocities during the hostilities and those who participated in international operations after their cessation and violated the rights of the local population.

In conclusion, the volume edited by Ben-Naftali is a valuable collection of essays which cover a wide range of topics relating to IHL and IHRL and consider a huge amount of state practice and case law. As is often the case for edited volumes developed from lectures, most of the contributions are not closely tied to each other. This, however, does not diminish the value of the collected contributions considered on their own. Both academics and practitioners will read them with great benefit.

Individual Contributions

Yuval Shany, Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror;

Marco Sassòli, The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts;

Marko Milanović, Norm Conflicts, International Humanitarian Law, and Human Rights Law;

Orna Ben-Naftali, PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies;

Andrea Gioia, The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict;

Ana Filipa Vrdoljak, Cultural Heritage in Human Rights and Humanitarian Law;

Paola Gaeta, Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?;

Christine Bell, Post-conflict Accountability and the Reshaping of Human Rights and Humanitarian Law.

Marina Mancini

Senior Lecturer in International Law, Mediterranean University of Reggio Calabria;

Adjunct Professor of International Criminal Law, LUISS University, Rome

Email: marina.mancini@unirc.it

doi:10.1093/ejil/chs031

Tomer Broude and Yuval Shany (eds). **Multi-Sourced Equivalent Norms in International Law**. Oxford: Hart Publishing, 2011. Pp. 344. \$120. ISBN: 9781849461450.

Many scholars have struggled to try to figure out ways to preserve a unitary perspective on international law in light of, and more frequently going beyond, the conservative guidelines formulated by Martti Koskeniemi and his ILC Working Group, collected in the 2006 Report on Fragmentation.¹

The proliferation of normative regimes arguably poses a threat to international law's very structure, in the absence of stabilizing elements such as a central legislature, judicial bodies with compulsory and general jurisdiction, and governance legitimized by democratic procedures rather than episodic state consent. It comes as no surprise, therefore, that academics have so far focused on the clash between international law sub-systems, in which norms belonging to different regimes 'point at different directions' and leave states with the unenviable choice of complying with one of them while at the same time incurring state responsibility for breach of the others.

The editors of the book under review adopt a new approach: Tomer Broude and Yuval Shany focus on equivalent norms, i.e., norms featuring a certain degree of similarity in their content. The working definition of this novel doctrinal category of Multi-Sourced Equivalent Norms (MSENs), set out in the opening chapter, is as follows:

Two or more norms which are (1) binding upon the same international legal subjects; (2) similar or identical in their normative content; and (3) have been established through different international instruments or 'legislative' procedures or are applicable in different substantive areas of the law [at 5].

Could these norms be the ideal lens for the study of international regimes' interplay? MSENs provide states and individuals with the possibility or at least the temptation to indulge in regime-shifting;² given the substantial equivalence of two norms, actors will choose to rely on the one belonging to the 'friendlier' regime (in terms of judicial and enforcement mechanisms, of the likelihood that the competent tribunal will rule in favour of the applicant, and of any other discernible 'structural bias'³) (at 10). Judges, on the other hand, must treat equivalent norms

¹ 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 Apr. 2006

² Helfer, 'Regime Shifting: the TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', 29 *Yale J Int'l L* (2004) 1.

³ M. Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument* (2005), in particular at 600–615.