Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

Françoise J. Hampson*

I. Introduction

Newspaper reports in Western Europe and the publications of reputable human rights groups, such as Human Rights Watch and Amnesty International, give the impression that innocent villagers are being indiscriminately killed by coalition forces in Afghanistan. News reports also suggest that Afghans complain of the lack of physical security and of very slow progress in the development of physical and social infrastructure. The issue is not, in this context, whether such claims are well founded. The perception of the Afghans and of the human rights groups is that civilians are being killed unnecessarily and, by implication, unlawfully. The forces involved claim to be showing the most rigorous adherence to the requirements of the law of armed conflict. Part of the explanation for the gap in perceptions may be that the Afghans and the human rights groups are thinking in terms of respect for human rights law, in the context of a law and order paradigm, whereas the military forces are thinking exclusively in terms of the law of armed conflict. This raises the question of the relevance of human rights law to the conduct of military operations in Afghanistan, the subject of this article.

Before embarking on an analysis of the principal questions at issue, it is necessary to make a number of preliminary points. The first is that it will be assumed that two, legally significantly different operations are being conducted in Afghanistan.

* Professor, Department of Law & Human Rights Centre, University of Essex, UK.
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

One is the International Security Assistance Force (ISAF) operation, which has a Security Council mandate and is there to assist the government of Afghanistan. It is said to be dealing with an insurgency, led by the Taliban, and to be governed by the rules applicable in non-international armed conflict. The second is Operation Enduring Freedom, which is said to be a continuation of the conflict which started in 2001 between an ad hoc coalition, working with the Northern Alliance, and the Taliban and Al Qaeda forces. This conflict is said to be international in nature. This characterization of the conflict(s) is not without controversy but will not be further explored here.

The second preliminary point concerns the nature of human rights law. Lawyers with certain armed forces shy away from anything to do with human rights law and, by extension, with human rights more generally, perhaps at least in part owing to fear of the unknown. They claim that it has nothing to do with them and their operations, a claim that, in such broad terms, is patently untrue. This article cannot hope to provide a general introduction to human rights law; for that, readers need to seek elsewhere. It is, nevertheless, necessary to highlight certain features of this body of rules. First, there is a difference between human rights law and human rights. The former refers to legal obligations of States. The focus will be principally on treaty law, which is of course subject to ratification. The main emphasis will be on the international treaties, notably the International Covenant on Civil and Political Rights, with only occasional reference to the regional treaties. It should not be forgotten, however, that there are human rights mechanisms that, ultimately, owe their existence to the UN Charter. All States are subject to their scrutiny. The norms, respect for which they monitor, are either part of customary human rights law or part of Charter law. Human rights more generally refers to values and precepts that may (or should) be the basis of policy decisions, such as the rule of law, democracy, participation, transparency and accountability. Human rights in this sense is part of the “good governance” agenda.

Second, human rights law is civil in character, like any other area of public international law. States found to have violated human rights law may be required to amend their law and to make restitution. The failure to investigate an alleged human rights violation and, where appropriate, to institute domestic criminal proceedings may be a violation of human rights law but the enforcement of that body of law at the regional or international level does not involve criminal proceedings. The individual perpetrator is not the human rights violator. The State which is responsible for the non-investigation will be held responsible under human rights law. This points to a significant difference between human rights law and the law of armed conflict. The former only binds the State. Human rights law is not based on the bond of citizenship. The rights are said to be inherent in every human being. This
means that they do not need to be earned and are not dependent upon good behavior. Human rights law is about the relationship between those who exercise authority and those subjected to its exercise. It applies to anyone subject to the exercise of such authority or jurisdiction, a concept that will be examined further below.

Third, human rights law contains both positive and negative obligations. Not only is there the negative obligation, for example, not to torture. Only State agents can trigger responsibility for breach of the negative obligation. There is also a positive obligation to protect persons from torture, both at the hands of State agents and third parties. This is generally satisfied by having a properly functioning legal system that penalizes the behavior in question and an effective system of investigation and prosecution that ensures that wrongdoers are punished. In some circumstances, it may require more than that in the way of protection.

The fourth element represents a sweeping generalization. Provided that caveat is not forgotten, the claim may still offer useful insights. Human rights law, at least as enforced by regional human rights courts, is designed principally to be applied after the event. It provides general principles which enable a judge to determine in a precise set of circumstances whether a rule has been violated. It is capable of considerable fine-tuning, particularly with the development over time of fairly consistent case law. What permits such fine-tuning is the use of limitation clauses, which are an intrinsic part of the elaboration of many rights. For example, there is no absolute right of freedom of expression. Rather, the starting point is that such a right exists but it can be subject to restrictions imposed by law and based on one or more generally defined grounds, on condition that the limitation is both necessary and proportionate. In the case of negative obligations, responsibility often appears to be based on the result. One exception is responsibility for unlawful killings, where what the reasonable perpetrator thought would obviously be relevant. In contrast, the law of armed conflict is designed to provide guidance to armed forces at the time decisions are made and actions undertaken. The emphasis in criminal proceedings on what was known at the time should avoid the danger that determinations of responsibility after the event will be based on the twenty-twenty vision of hindsight. The fine-tuning occurs in the mind of the commander, rather than that of the judge.

The fifth issue is that the starting point of human rights law is the protected interest or right. Any limitations or exceptions have to be interpreted restrictively. In the case of the law of armed conflict, the law itself represents a balance. One side of that balance should not be interpreted restrictively in relation to the other. This is a possible explanation for the way in which certain human rights groups, on occasion, appear to interpret the law of armed conflict; they are treating the protection of civilians, for example, as the starting point and any restrictions as an exception.
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

This article will consider five issues: first, whether human rights law remains applicable when the law of armed conflict is applicable;12 second, whether human rights obligations apply extraterritorially; third, the impact of the territorial State's human rights obligations for other States assisting it; fourth, the effect of a Security Council mandate on legal obligations that would otherwise be applicable; and, finally, whether human rights notions could offer useful guidance to armed forces, whether or not human rights law is applicable de jure.

It is clear that the interplay between human rights law and the law of armed conflict is currently a source of confusion and the subject of debate. There are plausible explanations for how we have come to find ourselves in this muddle. The law of armed conflict, historically, regulated inter-State conflicts and civil wars of such intensity that they resembled inter-State conflicts. In view of the impact of the latter on, for example, trade and ports, third States had to recognize belligerency to protect their rights as neutrals.13 In 1949, there was the first attempt in treaty law to regulate every type of internal conflict, provided that it constituted an armed conflict and not merely isolated and sporadic acts of violence.14 Traditionally, such conflicts had been purely the province of domestic law, including constitutional law, criminal law and civil liberties. Domestic law determined the circumstances in which an emergency could be declared. It also dealt with the consequences of such an emergency, including civil liberties safeguards which could not be suspended. In other words, Common Article 3 of the Geneva Conventions15 made inroads, albeit very minimal ones, in the relationship between the individual and the State.16 At about the same time, domestic civil liberties rules surfaced on the international plane as human rights law.17 The shift from domestic to international law owed much to the desire to prevent what was perceived to have contributed to the causes of the Second World War and to the appalling conduct of those exercising governmental authority during the course of the war, in both national and occupied territory. The respect for human rights was seen as a way of ensuring that people did not "have recourse, as a last resort, to rebellion against tyranny and oppression."18 It was necessary to reinforce domestic provisions, designed to prevent the misuse of authority but which could be subverted, with international guarantees. The regional and international enforcement of human rights law is not an end in itself. It is designed to persuade a State to adopt the necessary measures at the domestic level.

It was recognized that States might well have to deal with emergencies, in which certain rights might be subject to unusual restrictions, but it was made clear that, even in such circumstances, certain guarantees had to be maintained. In other words, the very raison d'être for the international spine-stiffening of domestic civil liberties rules was the risk of abuse and misuse of governmental authority in
emergencies or periods of conflict. The law sought to prevent the situation from deteriorating to that level but, if it did so, the law sought to ensure that things did not get even worse. From the outset then, one could have predicted overlap between the new inroads made by the law of armed conflict into internal conflicts and the internationalization of domestic constitutional and civil liberties guarantees. Superficially, there may be an obvious solution for those who seek to keep the law of armed conflict and human rights law separate, rather than to seek an accommodation between the two bodies of rules. It would involve eliminating all law of armed conflict rules applicable in non-international armed conflict, other than perhaps those non-international conflicts which resemble international armed conflicts. Human rights law would be the only body of rules regulating affairs within a State, including armed conflict. Quite apart from the problem of eliminating a widely accepted body of rules\textsuperscript{19} and the question of the desirability of doing so, it is difficult to see how such a rigid distinction could be made. What would happen to those rules applicable within a State’s own territory during international armed conflict?\textsuperscript{20} Would States be willing to assist other States dealing with an insurgency, if they were subject to human rights law, without any law of armed conflict-inspired modification?\textsuperscript{21}

Where we are at present may appear chaotic and confused but the only solution is to find a way forward, not back. The first step is to seek to clarify the relationship between the two bodies of rules.

\textit{II. Whether Human Rights Law Remains Applicable When the Law of Armed Conflict Is Applicable}

Before addressing the principal question, it is again necessary to make two preliminary points. First, as any legal system develops, it has to address the question of the boundary between two sets of rules. An obvious example in the context of domestic law is the boundary between contract law and tort. Where a party to a contract discharges his obligation negligently, occasioning loss to the other party, should the claim be brought for breach of contract or for negligence? There is no question of arbitrarily restricting either body of rules. It is a matter of finding a suitable accommodation. The same issue has already arisen and been dealt with in international law. The law of the sea, for example, has had to find a way to accommodate the free passage rights of warships, including submarines, and the need of the coastal State to regulate and protect a range of interests and activities in the territorial sea, contiguous zone and exclusive economic zone.\textsuperscript{22} In other words, there is nothing new or unique in the potential overlap of the law of armed conflict and human rights law.
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

The second point is that the relationship between the two bodies of rules is a general question, rather than one relating to particular rules. It has never been suggested, for example, that one answer could be given for rules of international armed conflict and another for rules of non-international armed conflict. Either the applicability of the law of armed conflict has the effect of “turning off” the applicability of human rights law or it does not. This is a further reason why the solution discussed at the end of the introduction is, in fact, no solution.

Three separate questions need to be distinguished. The first is whether human rights law remains applicable at all when the law of armed conflict is applicable. If that is answered in the affirmative, two further, related questions become relevant. First, to what extent is human rights law applicable and, second, how, if at all, are the relevant human rights norms affected by the applicability of the law of armed conflict?

A. Whether Human Rights Law Is Applicable at All

There is overwhelming evidence that human rights law does remain applicable when the law of armed conflict is applicable. This is to be found in treaty law, particularly those treaties dealing with civil and political rights. The derogation clauses provide that certain rights remain applicable even during “war or other public emergency.” Such situations clearly include ones in which the law of armed conflict will also be applicable. A large majority of States are bound by one or more of such treaties. State practice confirms this initial impression. As far as political organs are concerned, the General Assembly, the Security Council and the Human Rights Council (and its predecessor, the UN Commission on Human Rights) have passed both subject and situation-specific resolutions in which reference is made to both human rights law and the law of armed conflict. In the case of judicial and quasi-judicial organs, the International Court of Justice (ICJ) stated clearly that human rights law remains applicable in all circumstances, subject only to derogation. The principal human rights treaty monitoring body at the international level, the Human Rights Committee, in its general comment on states of emergency, in its concluding observations on State reports and in determinations in individual cases, has equally made it clear that human rights law is not displaced by the applicability of the law of armed conflict. The most relevant, in this context, of the Special Procedures have also expressed concerns framed in terms of human rights law in situations in which the law of armed conflict was applicable. At the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, the former European Commission of Human Rights and the former and present European Court of Human Rights, and the African
Françoise J. Hampson

Commission on Human and Peoples’ Rights have also applied human rights law in circumstances in which the law of armed conflict was clearly applicable.

The only currently dissenting view is that of two States: Israel and the United States. Israel appears never to have disputed the applicability of the International Covenant on Civil and Political Rights in Israel itself, even though, as a party to actual and/or arguable armed conflicts, it has rights and obligations under the law of armed conflict which have an impact within Israel. Its objection has focused on the applicability of human rights law in occupied territory, which involves both the relationship with the law of armed conflict and the question of the extraterritorial applicability of human rights law. Since the overwhelming weight of evidence suggests that the applicability of the law of armed conflict does not displace that of human rights law, the question then becomes whether Israel and the United States can claim to be persistent objectors. The first difficulty for the United States is that, at the time of its ratification of the International Covenant on Civil and Political Rights, the approach of the Human Rights Committee was already clear. The failure of the United States to enter a reservation or interpretative declaration on this specific question calls into question the persistence of any alleged objection. A similar argument could be made in relation to Israel, which ratified the International Covenant only eight months earlier, on October 3, 1991. First, in assessing such a possible claim, it should be noted that the relevant treaty language is unambiguous. Presumably, the clearer the rule, the more is expected of a would-be persistent objector. Second, it is not clear whether the persistent-objector principle applies to every type of rule of international law. The rule at issue here is about the relationship between the two bodies of rules, rather than a rule of conduct. It is not clear whether that makes a difference. The third difficulty is more fundamental. In the principal ICI decision addressing the persistent-objector principle, the Anglo-Norwegian Fisheries Jurisdiction Case, it was not the persistence of Norway’s objections that was decisive but the acceptance of or acquiescence in those objections by the United Kingdom. Whose acceptance of an objection is required under human rights law? In particular, how important is the lack of acceptance by a treaty monitoring body, as opposed to other High Contracting Parties? Human rights treaties are particular, but not unique, in creating “objective” obligations. They are not simply reciprocal inter-State undertakings. Does this imply that States have delegated the power to accept or reject alleged persistent objection to the treaty monitoring body? Even if that is not the case, is the silence of other High Contracting Parties evidence of acceptance, in the face of the opposition of the treaty monitoring body? This is not the only area where the rules of international law have failed to keep pace with the development of new types of international machinery.
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

It seems clear that human rights law remains applicable even when the law of armed conflict is applicable and it seems doubtful that Israel and the United States can avoid that conclusion by seeking to rely on the persistent-objector principle.

B. To What Extent Is Human Rights Law Applicable When the Law of Armed Conflict Is Applicable?

The General Assembly and the Security Council have not addressed this specific issue. Since their resolutions confirm that both human rights law and the law of armed conflict may be simultaneously applicable but do not explain the extent to which the former is applicable, they should probably be interpreted as saying “to the extent that” human rights law is applicable.

The ICJ has been much more specific. In the Advisory Opinion The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court stated that human rights law remains applicable subject only to derogation. It then applied its statement in a contentious case, Armed Activities on the Territory of the Congo, where it found violations of both the law of armed conflict (Article 51 of Additional Protocol I) and Article 6 of the International Covenant on Civil and Political Rights (prohibition of arbitrary killings) on the basis of the same facts. The facts found were stark and involved a non-derogable right. The case therefore sheds little light on the extent to which human rights law was applicable.

On the basis of the ICJ statement in the Advisory Opinion, all non-derogable rights remain applicable in the usual way. It also implies that if a State has not chosen to derogate, the full range of human rights obligations will be applicable. At this point it is necessary to explain briefly what is meant by derogation under human rights law.

Some, but not all, human rights treaties provide a facility for States. In situations of public emergency threatening the life of the nation, they may modify some, but not all, of their human rights obligations but any such modification has to be both necessary and proportionate. States are free not to derogate, even in a situation in which they would be legally entitled to do so. There is a range of reasons why a State might fail to derogate. The first is that lawyers in the relevant government department may simply not think of it. This could either be the product of negligence or incompetence on the part of the relevant governmental authorities or they may not take their international law, or at least their human rights law, obligations sufficiently seriously to conform to the procedural requirements. Another possible explanation could be that the State does not wish to signal the existence of an emergency on its territory. While this is thought to be a common explanation for the unwillingness of States to acknowledge the applicability of Common Article 3 of the Geneva Conventions, this appears less convincing as an
Françoise J. Hampson

explanation for non-derogation. If a State wishes to take measures not normally permitted under human rights law, it is required to derogate. It is clear that a public emergency does not de jure trigger the modified applicability of human rights law. This is in contrast to the law of armed conflict, which is applicable by virtue of the facts and whether or not the State(s) in question concede(s) its applicability. It is therefore easy to envisage a situation in which a State has not derogated, and in which the full range of human rights obligations are applicable according to the ICJ, but in which the law of armed conflict is applicable. It is not clear whether a State which is assisting a territorial State in dealing with a non-international armed conflict can rely on the derogation of the latter or whether it can derogate in its own right, based on an emergency threatening the life of the nation outside its own territory.

It is up to the human rights body to determine whether the situation represents a public emergency threatening the life of the nation. The body will allow the State a “margin of appreciation” in its characterization of the situation. Under the human rights treaties, the State is required to notify a designated authority that it is invoking its power to derogate. It has to provide an indication of which obligations it is derogating from, what measures it has introduced and an explanation of the need for those measures. Certain provisions, non-derogable rights, cannot be modified in any circumstances. While the list of non-derogable rights varies from treaty to treaty, they all include the prohibition of arbitrary killings, torture and slavery and do not include the provision dealing with detention.

Just because a right is potentially derogable does not mean that the right as a whole can be suspended. As indicated above, any exceptional restriction has to be both necessary and proportionate. Furthermore, certain restrictions are going to be more difficult to justify than others. For example, while it may be possible to justify the creation of a new ground of detention, such as internment or administrative detention, it will be difficult to justify suspension of all form of review of lawfulness of detention (habeas corpus and amparo).

This brief explanation of derogation helps put in context the statement of the ICJ that human rights law remains fully applicable, subject only to derogation.

In General Comment No. 29, the Human Rights Committee has provided a much fuller analysis of the extent to which human rights law remains applicable during public emergencies. It first clarified the types of situations in which derogation is possible. It emphasized that the limitation clauses enable the Committee to address a range of troubled situations without recourse to derogation. The Committee pointed out that for a situation to be sufficiently grave as to justify derogation will generally mean that the law of armed conflict, in the form of at least Common Article 3, will also be applicable. That reduces the chance of there being
a gap, where some human rights guarantees have been withdrawn but law of armed conflict protections are not available. The Committee identifies three basic principles. First, non-derogable rights remain applicable at all times. The second and third principles concern potentially derogable rights. A requirement of human rights law which is prima facie derogable may, in effect, be non-derogable if it plays a vital role in preventing violations of a non-derogable right. An obvious example is review of lawfulness of detention, which is said to play a key role in preventing torture and other forms of proscribed ill treatment. It is not that this element of Article 9 of the International Covenant on Civil and Political Rights, dealing with detention, is added to the list of non-derogable rights. That would fly in the face of the express words of the treaty. It is rather that States are likely to find it impossible to justify the necessity of the total extinction of the right, even though they may be able to explain the necessity of changes in its usual modalities. This second principle may apply to specific elements in the context of a wider right. The third principle concerns the essence or core of the wider right itself. The Committee suggested that it would be hard to justify the suspension of the very essence of a right, even if various constituent elements could be modified. Again, an obvious example exists in the field of detention. While, in an emergency, it may be possible to create additional grounds of detention, to modify the modalities of review of lawfulness and to lengthen the period during which a person may be held before being brought before a judicial officer, it would never be possible to justify unacknowledged detention (disappearances). To hold otherwise would be to deprive the detainees of all protection of the law.

When monitoring State reports, the Human Rights Committee has not always made clear, in the Concluding Observations, the precise basis of its analysis. When the Committee raises one issue but not another, it is not clear whether its failure to raise the second is because the alleged violation would, on account of the circumstances, be covered by the operation of a limitation clause or because it would be covered by a derogation or because it did not have the time to consider the issue. All that can be said in general terms is that the practice of the Committee in its Concluding Observations appears to reflect General Comment No. 29. It is also noteworthy that no State has objected to the General Comment, even though three States reacted to General Comment No. 24 on reservations. At the very least, this suggests that the United States, the United Kingdom and France (the three States in question) had no objection to General Comment No. 29.

The Human Rights Committee has dealt fairly regularly with traditional non-international armed conflicts, that is to say an armed conflict between two groups on the territory of one State, where the State itself may be a party to the conflict. It has also dealt with situations of occupation and, less frequently, with States
Françoise J. Hampson

engaged in peace support operations outside national borders. It is less clear how it would deal with the relevance of human rights law to an international armed conflict. The ICJ’s statements are in fact contradictory. On the one hand, it has said that human rights law remains applicable in all situations, subject only to derogation, which implies that that body of law is relevant even in relation to the conduct of military operations. On the other hand, the Court has stated,

As regards the relationship between international humanitarian law and human rights law, there are thus 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.

This implies that there are situations not regulated by human rights law but, given the earlier comment, it is not clear what those might be.

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights offer a more complicated picture. They apply human rights law, taking account of any derogation, in situations of emergency. In some circumstances, however, they will take account of the law of armed conflict in interpreting human rights law. They do so proprio motu. They only make a finding of violation of human rights law, not of the law of armed conflict. What is less clear is whether they take account of the latter in all situations in which it may be relevant. If not, what criteria are they applying? Does it depend on the issue and/or whether there is a relevant and specific rule of the law of armed conflict?

The European Court of Human Rights and the former European Commission of Human Rights have not articulated a view of the relevance of the law of armed conflict, even though they have dealt with situations subject, or arguably subject, to non-international armed conflict, such as Northern Ireland, Southeast Turkey and Chechnya, and even an international armed conflict, the conflict between Turkey and Cyprus. In some cases, the applicant’s legal representative raised the relevant law of armed conflict rule, usually to reinforce the human rights law rule. In other words, it is not that the issue has not been raised before the European human rights institutions. To date, it would appear that, in all or virtually all cases of actual or possible non-international armed conflict, the act would have been in breach of both human rights law and the law of armed conflict. In those situations, the European human rights bodies have applied human rights law in the normal way, subject only to derogation where applicable. Most notably, the European Commission of Human Rights failed to apply the law of armed conflict to determine the lawfulness of the detention of prisoners of war in the conflict between Turkey and Cyprus. Turkey had not submitted notice of derogation under which it could
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

have introduced a ground of detention not normally lawful. The detention of prisoners of war was therefore found to be unlawful. One of the ways in which the Court has avoided having to face the issue is as a result of its view of the extraterritorial applicability of human rights law, which will be discussed in the next section.

C. How Are the Relevant Human Rights Norms Affected by the Applicability of the Law of Armed Conflict?

The focus in this subsection will be on the human rights norms dealing with killings and detention. It should be noted that other rights are also relevant, notably those relating to due process, freedom of speech, freedom of assembly and the right to a remedy, particularly when States are assisting another State.68

Superficially, there should be no real difficulty in reconciling human rights law and the law of armed conflict for the Human Rights Committee, and for the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In both cases, the human rights provision prohibits arbitrary killings.69 The right is non-derogable.70 What would be arbitrary in a peacetime context, in which the framework of analysis is a law and order paradigm, is not the same as what would be arbitrary in a law of armed conflict context. It would be straightforward for the human rights monitoring bodies to interpret “arbitrary” as meaning that a killing in conformity with the law of armed conflict was not arbitrary in a conflict context or at least where it occurred as part of a military operation. It should be noted that this would represent a reduction in the current level of protection in non-international armed conflicts, where the framework applied is usually the law and order paradigm.71

There is, however, a real difficulty for parties to the European Convention for Human Rights. The provision on the use of potentially lethal force lists exhaustively the only grounds on which State agents may resort to such a use of force.72 It is based on the law and order paradigm. The derogation provision expressly envisages the possibility of derogation so as to permit “lawful acts of war.”73 In order to invoke the provision, the State would have to derogate. No State has ever derogated from Article 2 of the Convention, whether involved in a non-international armed conflict or international armed conflict and whether the conflict was in national territory or extraterritorial. Since the law of armed conflict is not applicable by virtue of its being invoked but by virtue of the facts, it might be open to the European Court of Human Rights to choose to use the law of armed conflict as a frame of reference.74 It has not yet chosen to do so in relation to non-international armed conflicts in national territory.75 It has generally been able to avoid the issue in extraterritorial situations. The Court may have to confront the issue in the
Françoise J. Hampson

inter-State case introduced by Georgia against Russia and the many individual cases brought by Georgians and Russians.

In the case of detention, the International Covenant on Civil and Political Rights and the American Convention on Human Rights again prohibit arbitrary detention. The provisions are potentially derogable. There are elements to the right which may be modified but from which it is unlikely that States will be allowed to depart completely, notably the provision for review of detention. It seems clear that a State may, by derogation, introduce additional exceptional grounds of detention. It is not clear whether a State needs to derogate in order to justify internment or administrative detention. The case law makes it clear that detention has to be lawfully authorized. The law of armed conflict itself provides legal authority for detention under Geneva Conventions III and IV in international armed conflicts. There is no equivalent provision in relation to non-international armed conflicts. Additional Protocol II recognizes that people may be detained and provides guarantees for such detainees but it does not itself authorize detention. This is not surprising, since the underlying assumption is that the fighting is occurring in the territory of one State and the grounds of detention would be expected to be regulated by the domestic law of that State. This is most likely to be a problem where States are involved in an extraterritorial non-international armed conflict. That will be discussed in the following sections.

The situation is different for parties to the European Convention for Human Rights. Again, the Convention does not prohibit arbitrary detention but lists exhaustively the only legitimate grounds of detention. In order to introduce additional grounds, a State is required to derogate. If it does so, it may be able to justify the introduction of internment or administrative detention. The issue of extraterritorial detention will be examined in the next section.

It therefore appears that it may be possible for at least some human rights bodies to accommodate the law of armed conflict but that it may be necessary to derogate to make lawful exceptional grounds of detention. It was also seen that the application of the law of armed conflict would entail the reduction of existing protection in relation to arbitrary killings, at least in non-international armed conflicts. Human rights bodies can take account of the law of armed conflict but should they do so and, if so, in what circumstances?

When dealing with the inter-relationship between the law of armed conflict and human rights law, the ICJ referred to the former as the lex specialis. In some ways, this is unhelpful because lex specialis more easily applies to a vertical relationship between two areas of law. When dealing with a commercial tenancy, any special rules regarding such tenancies are the lex specialis as compared to general rules on tenancies. In this case, however, two separate legal areas are bumping into one
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

another. The relationship is horizontal, rather than vertical. Nevertheless, it is clear in general terms what the ICJ is saying. Law of armed conflict rules are best suited to conflict situations because they have been designed for that context. What is not clear is what precisely that means in practice. Does it mean that in conflict situations all human rights norms should be interpreted in the light of the law of armed conflict, so that no violation will be found if there is no violation of that body of law? That would be unworkable. There is nothing in the law of armed conflict about the right to marry. The mere fact that suspending the right to marry would not violate the law of armed conflict, which does not address the issue, is hardly sufficient ground for suspending the human rights provision. Another possibility would be that a human rights norm should only be affected by the law of armed conflict where there is a relevant law of armed conflict provision. This would lead to the bizarre result that the law of armed conflict would affect killings and detention but not the right to demonstrate. It has also been suggested that a human rights body should move backward and forward between the two areas of law, depending on the issue. On that basis, the law of armed conflict would deal with grounds of detention and review of detention in international armed conflicts but not in non-international armed conflicts. Since the law of armed conflict does not define "court" or "tribunal," the test to be applied would be a human rights law test. With regard to issues such as the right to summon witnesses, where there is again no provision in the law of armed conflict, reliance would be placed on human rights law. It is submitted that the to-ing and fro-ing between two legal regimes is unworkable in practice. It is rather as though parts of a Mercedes were fitted to a VW Beetle. Human rights law might offer useful guidance as to the issues which need to be addressed, but to suggest that human rights law due process guarantees should apply in the normal way would again lead to bizarre results. It would be more workable if a State had derogated from the usual due process guarantees, not by eliminating the guarantees but by modifying them. It is too soon to know how the lex specialis rule is going to be applied in practice. A practical way forward will be suggested in the conclusion.

It is clear that to some extent human rights law remains applicable in situations of conflict, particularly non-international armed conflict, but the precise extent of that co-applicability and the manner in which the law of armed conflict impacts upon the interpretation of human rights law is not yet clear.

III. The Extraterritorial Applicability of Human Rights

If human rights law only applies within a State's territory, this has very significant implications for the relationship between that body of law and the law of armed
conflict. It would mean that the issue of the overlap between the two would only be relevant in non-international armed conflict and in relation to the State’s acts and omissions in its own territory during an international armed conflict. If human rights law applies extraterritorially, the key question becomes to what extent and to what types of activities it is applicable.\textsuperscript{85}

The human rights community, in advocating for extraterritorial applicability of human rights law, is concerned with the risk of lack of accountability. It fears that the State would be allowed to do outside national territory what it cannot do within national territory. If this were the only basis on which the argument was constructed, it would be misconceived. The human rights community is forgetting accountability under the law of armed conflict. Its concern might be more specific. While there is theoretical accountability under the law of armed conflict, it can hardly be described as effective. In principle, subject to acceptance of the ICJ’s compulsory jurisdiction, a victim State could bring a complaint against a perpetrator State. In fact, the issue of jurisdiction poses a significant barrier. Even when such a case is possible, in practice it is very rare for States to bring alleged violations of the law of armed conflict before the ICJ.\textsuperscript{86} It is not clear whether a non-victim State could bring such a case, based on the \textit{erga omnes} character of law of armed conflict obligations.\textsuperscript{87} If that is not possible, there are very real difficulties in bringing alleged breaches of the law of armed conflict, whether committed by the territorial State or assisting States, before a court, since the victims are either the civilians in the territorial State or, possibly, members of non-State armed groups. This situation is in marked contrast with human rights law, at least in the case of those States which have accepted a right of individual petition. An individual victim can seek redress, uninhibited by the diplomatic constraints of a State. The obvious solution would be to introduce a right of petition for violations of the law of armed conflict. This will be discussed further in the conclusion.

Lawyers with armed forces should identify precisely to what they take exception. The armed forces should not object to accountability per se. It helps to keep them honest. What they should oppose is \textit{inappropriate} accountability, more accurately accountability based on inappropriate norms. The key question for the military should not be the extraterritorial applicability of human rights law, but ensuring that the solution to the co-applicability of legal regimes is appropriate. If a law and order paradigm were applied to extraterritorial activities, the armed forces would have a well-founded concern, but it would not be the result of extraterritorial applicability. If, on the other hand, the prohibition of arbitrary killings was applied consistently with the law of armed conflict in military operations and according to a law and order paradigm in other areas in the territory, to what can the armed forces legitimately object?
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

Two States have objected, in principle, to the extraterritorial applicability of human rights law, the United States and Israel. This raises the same issues as their objection to the applicability of human rights law when the law of armed conflict is applicable. In this case, other States may accept some measure of extraterritorial applicability but only in very limited circumstances.

The ICJ’s view regarding the extraterritorial applicability of human rights law is clear but it is not clear on what it is based. In the Wall Advisory Opinion, the ICJ was dealing with the applicability of human rights law in occupied territory. In DRC v. Uganda, the ICJ was dealing with both occupied Ituri and non-occupied territory in the Democratic Republic of the Congo. In both cases, the ICJ assumed the applicability of human rights law. In the contentious case, the ICJ found the same actions to be violations of both Article 51 of Additional Protocol I and Article 6 of the International Covenant on Civil and Political Rights.

The Human Rights Committee has had to deal with obligations in occupied territory but only occasionally with other forms of extraterritorial activities. In occupied territory, it has consistently held the occupying power responsible for ensuring respect of the rights of the occupied population, apparently based on its control of the territory. This position contains both theoretical and practical difficulties. Is the State bound to apply its own obligations or those applicable in the territory occupied? Given that under the law of armed conflict the occupying power is not allowed to change the law of the occupied territory unless necessary for its own security, how is it to provide for those human rights that cannot be delivered by merely executive action? Does the occupying power only have negative obligations, that it is to say that State agents are prohibited themselves from violating human rights law, or is it obliged to protect the population from the risk of violations, including at the hand of third parties? Insofar as the occupying power is in an analogous position in relation to the population as the sovereign, it might not be unreasonable to subject the occupying power to analogous obligations.

In one case, the Human Rights Committee had to deal with the extraterritorial acts of State agents who allegedly cooperated in the infliction of torture, together with agents of the territorial State. Here, there could be no argument as to control of territory. The State agents could, however, be said to have exercised control over the detainee. It was not exclusive control. The Human Rights Committee found the State responsible for a violation. It is not clear whether that was based on the control of the detainee or on the control over the infliction of the alleged violation.

In General Comment 31, the Human Rights Committee addressed the scope of the State’s obligation to implement human rights obligations. The focus was on implementation, rather than extraterritoriality. The Committee stated that
[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.\textsuperscript{95}

This is ambiguous. There are certainly some situations in peace support operations in which individuals are subject to the control of the participating State, such as detention, but that is exceptional. The General Comment, however, suggests that there may be a more generalized responsibility in such situations.

The Inter-American Court of Human Rights has not dealt with a case of extraterritorial applicability. The Inter-American Commission on Human Rights has done so, but only under the American Declaration of the Rights and Duties of Man (American Declaration) and not the American Convention on Human Rights. The former does not contain a jurisdictional limitation clause. The Commission has dealt with the shooting down of an aircraft by the Cuban air force,\textsuperscript{96} two cases arising out of the US invasion of Grenada,\textsuperscript{97} one involving the US invasion of Panama\textsuperscript{98} and currently has cases involving the responsibility of the United States for detentions in Guantanamo Bay.\textsuperscript{99}

The European Court of Human Rights is the human rights body which has most often had to address the issue. The English High Court has found that the cases cannot be reconciled.\textsuperscript{100} The earlier cases involved non-military issues, such as the issuing of passports.\textsuperscript{101} A significant development occurred in the case of \textit{Loizidou v. Turkey}, in which the European Court of Human Rights found that Turkey's occupation of northern Cyprus made it responsible for the full protection of human rights in the territory, including for the acts of Turkish Cypriot officials.\textsuperscript{102} In \textit{Ilascu v. Moldova and Russia}, the Court had to address Russia's responsibility for the acts of officials in Transnistria.\textsuperscript{103} The Court found Russia responsible for the unlawful detention of the applicants. While the Court did not use the word occupation, its analysis was strongly reminiscent of the reasoning in \textit{Loizidou}. It is not clear whether the Court is using a law of armed conflict definition of occupation. That confusion resulted in the highest English court, the House of Lords, determining that southern Iraq might be occupied for the purposes of the law of armed conflict but not for the purposes of the applicability of the European Convention for Human Rights.\textsuperscript{104} This is clearly an unsatisfactory conclusion.

The language of the European Court of Human Rights suggested that applicants detained extraterritorially would be regarded as "within the jurisdiction" of the detaining State.\textsuperscript{105} That was applied in the case of \textit{"Ocalan v. Turkey}.\textsuperscript{106}

The area of remaining uncertainty concerns situations in which people are killed outside the territory of the State responsible. \textit{Bankovic et al. v. Belgium & 16 members
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

of NATO\textsuperscript{107} suggested that such applicants would not be regarded as “within the jurisdiction” but an \textit{obiter dictum} of the Court in Issa \textit{v.} Turkey implied that a State could be in temporary occupation of territory.\textsuperscript{108} More recently, Turkey was found responsible for a killing in the buffer zone in Cyprus.\textsuperscript{109} These issues will have to be addressed again in the litigation arising out of the conflict between Georgia and Russia. Other issues which are likely to come before the Court include detention at the hands of the British in Basra in the case of \textit{Al-Jedda}, and killings of persons not in detention in southern Iraq in the case of \textit{Al Skeini}.\textsuperscript{110}

The current position leads to apparently arbitrary results. If a person is shot dead at point-blank range, he is presumably within the control of the shooter. What if he is deliberately shot at 50 yards or 500 yards? There is a danger that the approach of the European Court of Human Rights will encourage States to use air power rather than ground-based operations, with foreseeable consequences for civilian casualties. It is submitted that a better approach would be to say that a victim is “within the jurisdiction” if foreseeably affected by an act or omission. This would not be the same as the cause and effect liability of the law of armed conflict. It would leave room for mistakes of fact, weapons malfunctions, the acts of the opposing forces and, above all, it would require that the attacking forces foresaw or should have foreseen the harm to the victim.

It would appear from the case law that a State will have the full range of human rights obligations in occupied territory. It is not clear whether the obligations in question are those of the sovereign or those of the intervening State. It is also uncertain whether the definition of occupation is the same in the law of armed conflict and in human rights law.

It also seems that persons detained extraterritorially will be within the jurisdiction of the detaining State and therefore entitled to have their rights respected. It will be recalled that this issue raises problems when a State is engaged in an extraterritorial non-international armed conflict and that parties to the European Convention for Human Rights would appear to be required to derogate if wishing to detain on a ground not included in the exhaustive enumeration in Article 5 of the Convention. It is not clear to what extent human rights law is applicable extraterritorially in other situations.

\textbf{IV. The Implication of the Human Rights Obligations of the Territorial State for States Assisting It}

When, with or without a UN mandate, a State assists another State dealing with a situation in the territory of the latter, the obligations at issue are not only the extraterritorial obligations of the intervening State. The host State also has obligations
and it is not acting outside its national territory. The most likely situation would be a non-international armed conflict in the territorial State, but it could equally involve an international armed conflict. Clearly, all the parties would be bound by their law of armed conflict obligations. It is possible that these could vary, depending on ratification. Such differences would be reduced to the extent to which the treaty rules represent customary law. The issue in this context concerns rather the impact of the territorial State’s human rights obligations.

The first possibility is that the armed forces of the intervening States have the status of State agents of the territorial State for the purposes of human rights law. This would appear to be most unlikely, unless the forces came under the command and control of the territorial State. It seems more likely that the territorial State would not have direct responsibility but would only have the responsibility to ensure that the intervening States acted in conformity with its own human rights obligations. In other words, the issue would concern the positive obligation of the territorial State to protect those within its jurisdiction from the risk of violation at the hands of third parties. The obligations in question might not be the same as the human rights obligations of the assisting States. They would presumably be limited to those activities within the mandate of the intervening States. In other words, Afghanistan might be obliged to ensure that adequate steps were taken by the intervening States to protect the right to life of Afghans, but those States would not have any responsibility to deliver education, by virtue of Afghanistan’s obligations in that sphere. Where States require assistance, they are unlikely to be in a position to impose terms on the assisting States. It is more likely to be a matter of negotiation. Nevertheless, the obligations of assisting States under general international law would presumably imply that they should not require the territorial State to breach its own obligations.

This clearly has significant implications for the conduct of ISAF States in Afghanistan. The issue of extraterritoriality would cease to be relevant. The question would be the implications of Afghanistan’s human rights obligations for ISAF States. The only issue would be the relationship between the law of armed conflict and human rights law. The questions include, first, the circumstances in which ISAF forces can open fire. Does that vary in different areas, with the law and order paradigm being prevalent in the north and west of the country and the law of armed conflict paradigm being applicable at least in some circumstances in other areas? Second, in relation to detention, are the ISAF forces authorized, under Afghan law, to detain in circumstances in which Afghan forces could detain? Has a law been made to that effect? Is the detention regime in Afghan law compatible with the ISAF State’s human rights obligations? If the situation is a non-international armed conflict, there is no basis for detention in the law of armed
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

Detaining powers are entirely dependent on domestic legal provisions. Afghanistan has not derogated under the International Covenant on Civil and Political Rights. Should it do so? Could the ISAF States rely on an Afghan derogation? Does Afghan law adequately protect the rights of detainees, in the light not only of law of armed conflict requirements but also of whatever human rights obligations are applicable? Third, particular difficulties arise relating to the transfer of detainees, whether between ISAF States or between ISAF States and Afghanistan. Under human rights law, the detaining State cannot transfer a detainee to the authorities of another State if there is a real risk of torture, cruel, inhuman or degrading treatment. The right at issue is non-derogable.

The first warning of litigation arose in Canada, where the issue of transfers has been raised. It is not known whether cases are awaiting resolution before domestic courts, the Inter-American Commission on Human Rights, the Human Rights Committee or the European Court of Human Rights. In the course of exercising its general monitoring functions, the Human Rights Committee has usually focused on the responsibility of the intervening State. It did, however, request and receive a report from the United Nations Interim Administration Mission in Kosovo in the context of examining the implementation of the International Covenant on Civil and Political Rights in Serbia. NATO’s Kosovo Force (KFOR) concluded a special agreement with the European Committee on the Prevention of Torture, enabling the Committee to exercise its functions in Kosovo.

The responsibility of the territorial State to protect the rights of those within its jurisdiction appears to have implications for States assisting it but the impact of that responsibility is not yet clear.

V. The Implications of a Security Council Mandate

Where an intervening State has a mandate from a recognized authority or where the presence of foreign forces is recognized by a relevant authority, can the mandate make lawful what would otherwise be unlawful?

If the mandate was contained in a Security Council resolution adopted under Chapter VII of the UN Charter and if the mandate required conduct in breach of international law, it appears that the resolution would prevail over other legal rules. It is not clear whether that bald judgment needs to be reviewed in the light of the passage of time. In particular, one may question whether the Security Council could require a State to breach a ius cogens rule. In practice, Security Council resolutions containing mandates for military forces do not require certain activities; they merely authorize them. As a result of general principles of international law and under the principle of pacta sunt servanda, it must surely be the case that States
cannot implement an authority to act in a fashion which breaches other international law obligations, unless that is necessary to the exercise of the authority. In the case of the ISAF, this is reinforced by a provision in the preamble to Security Council Resolution 1386 of December 20, 2001, which requires “that all Afghan forces must adhere strictly to their obligations under human rights law, including respect for the rights of women, and under international humanitarian law.”

This must represent an authority to act subject to the law of armed conflict and human rights law obligations. This does not, of course, define what those obligations are. It does call into question the denial of the extraterritorial applicability of human rights law. Does the mandate subject ISAF States to the full range of human rights obligations involved in the discharge of the mandate or should it be read as referring to human rights law insofar as it is applicable?

In relation to killings, the mandate determines whether there is authority to enter a law of armed conflict context or whether the operation is required to operate in a law and order paradigm. The authority only to use force in self-defense is an example of the latter. Where a force can use “all necessary means,” this implies that it may use force other than merely in self-defense. This does not mean that it is the appropriate framework throughout the territory in question or at all times. It is an authority to enter a law of armed conflict framework when and where necessary and not a requirement to do so everywhere and at all times. Participating States will be dependent upon the application of law of armed conflict rules to determine whether they can enter a law of armed conflict framework. Provided that human rights law interprets arbitrary killing in a fashion consistent with the law of armed conflict where that is applicable, and in the “usual” way where it is not, there should be no real difficulties. Rather, if there are difficulties, it is not attributable to the law(s) applicable but to the complexity of the situation on the ground.

Detention is a more complicated matter. As already noted, there is a particular difficulty in relation to the lawful authority to detain under non-international armed conflict rules. The law of armed conflict does not itself provide that authority. Domestic law for detention in conflict situations may be non-existent and/or incompatible with human rights law. It is not clear whether States participating in a peace support operation can rely on domestic authority to detain. A further difficulty for parties to the European Convention for Human Rights is that they can only detain on specific grounds which do not include internment or administrative detention. In order to be able to detain on that ground, they are required to derogate but it is not clear whether they can derogate on account of an emergency in the territory of another State or whether they could benefit from the derogation of the territorial State. It should be noted that Afghanistan has not derogated from its obligations under the International Covenant on Civil and Political Rights. It would
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

be possible for a UN mandate to fill in the gap in a non-international armed conflict. It could provide for authority to detain and specify the grounds on which a person could be detained. In practice, UN mandates simply provide that forces may use “all necessary means” for the fulfilment of the mandate. Detaining persons who threaten security is clearly a means to give effect to the mandate but it is not clear that it is sufficiently specific to constitute a lawful authority to detain. The argument usually used against specificity is that it would require the enumeration of all the other necessary means. It is submitted that this is not the case. There are particular reasons why the authority to detain must be specific—to comply with respect for human rights law, which is required by virtue of the preambular paragraph. That does not mean that other measures need to be enumerated.

Where a mandate gives express authority to take a particular form of action, it would be difficult to challenge the lawfulness of that action under human rights law. It would, however, remain possible to challenge the manner of its execution. If, for example, a mandate gave authority to detain, a challenge as to the lawfulness of the fact of detention would appear bound to fail. A challenge as to its arbitrary application or to the lack of mechanisms of review would not, however, appear to be precluded by the mandate.

To date, the Human Rights Committee has tended to raise the conduct of forces involved in peace support operations with the sending States rather than the territorial State. It has done so in the context of the exercise of its monitoring functions. It has not dealt with an individual complaint arising out of the conduct of such forces. It has, however, had to address a domestic measure of implementation of a Security Council resolution. While the issue is slightly different, this does suggest the approach that would be taken to a case involving the implementation of a mandate in the context of peace support operations.

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights do not appear to have addressed such an issue. While cases have been submitted under the American Declaration relating to detainees in Guantanamo, it is not known whether similar cases have been submitted in relation to Iraq and Afghanistan. In Europe, the lead has been taken by the European Court of Justice, which deals with questions of European Union (EU) law in relation to EU members. The case before it was similar to the one before the Human Rights Committee, in that it dealt with a national measure of implementation of a Chapter VII Security Council resolution. It found the national measure to breach the human rights obligations of Belgium. Both the Human Rights Committee and the European Court of Justice emphasized that they were not reviewing the Security Council resolution itself but only the national measure. The same argument is presumably applicable to national implementation by the executive, in the
Françoise J. Hampson

form of the security forces of a State, of a Security Council mandate. The European Court of Human Rights has only had to address the issue twice. It avoided the issue by finding that the acts in question (alleged failure to protect the right to life as a result of failing to clear mines when the presence of mines was known to the French forces, and alleged unlawful detention by KFOR) were the responsibility of the UN, rather than of the individual member States complained against. The European Court of Human Rights is likely to get the opportunity to revisit the issue. It remains to be seen whether it will be influenced by the decisions of the Human Rights Committee and the European Court of Justice, which postdate its own admissibility decisions.

It therefore appears likely that human rights bodies will take account of a specific authority to act contained in a mandate, most notably authority to detain. This does not mean that, in the implementation of the mandate, a State will be free to disregard its human rights obligations, particularly when there is express reference to an obligation to act in conformity with such obligations. It is not clear whether the mandate modifies the operation of the normal rules on the scope of the extraterritorial applicability of human rights law and how such bodies will deal with derogation in an extraterritorial context.

**VI. How Taking Account of Human Rights Considerations Can Contribute to the Effective Conduct of Military Operations**

In this section, the focus is not on human rights law but on human rights more generally. Setting aside legal arguments about the applicability of human rights law when the law of armed conflict is applicable and about the extraterritorial applicability of human rights law, would it make sense for the military to take account of human rights considerations?

The objects of the use of military force vary, depending on the nature of the operation. In an international armed conflict, the use of military force is designed to change the status quo so as to permit the resolution of the previous dispute, either as a result of the fighting or as a result of negotiation in the context of the changed situation. Non-international armed conflicts operate in a different context, even if the actual conduct of military operations appears to be similar. The object is to create the space in which a political solution can be made. It is often the case that a successful outcome cannot be achieved by military means alone. Whereas in international armed conflicts it is probably generally assumed that the civilian population supports its own State, in non-international armed conflicts it is an independent constituency. A non-State group needs the civilian population’s active or passive support, so as to facilitate its own operations. The State needs its support in order
to isolate the non-State group. Where fighters have support from the civilian population, this gives the former a certain legitimacy. Where fighters do not have that support, it is easier to brand the fighters as criminals. Whatever the situation in international armed conflicts, in counterinsurgency (COIN) operations it is very clear that the State needs to act in such a way as to retain or to gain the support of the civilian population, usually referred to as the battle of hearts and minds.  

That view is so obvious as to be a platitude, were it not for the fact that States repeatedly play lip service to the notion while acting in a completely contrary fashion. Routinely, States dealing with an insurgency engage in arbitrary round-ups, and unnecessarily abusive and destructive searches. They turn a blind eye to allegations of ill treatment in detention and to alleged unlawful killings. New rules are introduced to deny review of the lawfulness of detention and to replace inconvenient due process guarantees, thereby making convictions much easier. Nowhere is this better illustrated than in Northern Ireland. When the British forces were first deployed, they were greeted as saviors by the Roman Catholic population, who thought the soldiers would protect them from attack by elements in the Protestant population. That view changed as a result of the conduct of the armed forces. The British armed forces behaved significantly less badly than the forces of, for example, Guatemala, El Salvador or Turkey. It is precisely because the British armed forces take the rule of law seriously that much is to be learned from their experience in Northern Ireland. While some positive changes in behavior were probably the result of an internal process, there is no doubt that some were brought about as a result of human rights litigation before the European Commission of Human Rights and the European Court of Human Rights. Either those proceedings speeded up a process that would have occurred anyway, but more slowly, or they were themselves responsible for change. Only when the forces respected restrictive rules of engagement, abandoned internment and introduced an extraordinary range of safeguards against abuse for those detained did the conduct of the armed forces generally cease to be part of the problem. The reaction to the recent bombings in Northern Ireland shows that those engaging in political violence are now seen as merely criminals by the population as a whole.

Over the past forty years, the United States has assumed that its armed forces would be engaged in international armed conflicts. More recently, it has been recognized that they may be frequently involved in COIN operations. The US armed forces have converted the COIN doctrine into practice with amazing speed. Nevertheless, it is not always yielding the results hoped for, particularly in Afghanistan. It is submitted that one of the reasons for that is a flawed implementation of the understandings underlying the COIN doctrine. In order to understand how to conduct COIN operations, forces need to ask themselves what it would feel like to
be a civilian in that situation.\textsuperscript{129} The priorities and concerns of the civilian population may not be those of the armed forces, but if the hearts and minds of the former need to be won, it is clear which must take precedence. This may mean that armed forces need to operate in ways which are likely to entail more casualties among their own ranks than if they operated in a different way. Those lives are not wasted. On the other hand, if the armed forces fight as they want to, this will entail far more casualties in the long run, including among the armed forces, and will not even achieve the purpose for which the fighting is taking place. Those lives, whether civilian or military, are wasted. There is not the space here to outline the ways in which putting yourself in the shoes of a local civilian would impact on military operations.

It is not only in the conduct of military operations that a human rights approach may help avoid problems. It also applies to both the treatment of detainees and their due process guarantees. There is no need to rehearse here the negative impact on the perception of US armed forces and also on those forces themselves of the abandonment of respect for even the prohibition of ill treatment contained in Common Article 3 of the Geneva Conventions. Instead, an illustration will be used from the due process debate. When the original proposal for military commissions attracted fierce criticism, President Bush set up a genuinely bipartisan group to advise him on how the procedures could be improved.\textsuperscript{130} Unfortunately, the members had expertise in US constitutional law and civil rights law but not in international human rights law. That meant that their only benchmark was US due process guarantees. When needing to depart from them, they had no other bottom line. Taking the specific issue of the evidence to be used, a human rights lawyer would have said that the starting point is that evidence should be made available in open court and subject to cross-examination. However, in exceptional circumstances, it may be necessary to modify the usual rules. Where, for example, the prosecution is based on the evidence of an undercover policeman, it may be necessary to protect his identity. This does not necessarily mean that he cannot give evidence at all. He may be able to give evidence in the courtroom but behind a screen. Or, if his voice needs to be distorted, he may be able to give evidence from an adjacent room, still permitting cross-examination. Provided that there is a genuine need (as opposed to it being more convenient) to modify the rule and provided that the minimum departure possible has been made from the norm and, if appropriate, other safeguards have been introduced, there may well be no violation of human rights law.\textsuperscript{131} Where significant departures are to be made from normal due process guarantees, the State might usefully consider derogating from the relevant human rights law provision. It is not, or not simply, that human rights guarantees are set at a lower threshold than US law. A human rights approach enables the
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

introduction of modifications without the abandonment of all notions of rule of law. The danger with the US approach is that it means normal due process guarantees or nothing.

It is hoped that this all too brief examination of the significance of human rights values will cause the reader to stop and think. A human rights approach is not something to be feared. It may actually enable armed forces to achieve their purposes more effectively and with fewer casualties.

VII. Conclusion

Both human rights law and the law of armed conflict may be applicable at the same time. It remains to be seen how human rights bodies will take account of the relevance of the law of armed conflict. It is submitted that two things need to be avoided. First, finding the right accommodation between the two bodies of rules should not be exclusively a matter for human rights bodies, not least because that would make it subject to the vagaries of particular cases rather than permitting a more coherent way forward to be developed. Second, it should not be approached by academics and governmental players in a top-down fashion, as a matter of legal rules which simply need to be applied. It is submitted that a more effective approach would be to identify situations on the ground that need to be addressed. Each issue should be the subject of a document which would not have any legal status but whose contents could be used as guidelines. They could be refined with the benefit of experience. Each document would address the issue in great detail and would provide alternatives for the different contexts in which the situation can arise. In order to produce these documents, there is a need for a small group composed both of lawyers and non-lawyers and whose members would have expertise in both human rights law and the law of armed conflict. It goes without saying that there should be members with military experience. Over time, the guidelines could be incorporated into military operations and into the reasoning of human rights bodies. This would increase the chances of them applying the same standards and avoiding conflicts.

It seems clear that human rights law applies extraterritorially in the case of detainees. Human rights bodies and the ICJ are of the view that it also applies to cases of military occupation but it is not clear how human rights bodies understand the concept of occupation, and the application of human rights law is not free of theoretical and practical difficulties. What is wholly unclear is the extent to which and the manner in which it applies in other extraterritorial circumstances, particularly to the conduct of military operations. The impact of the territorial State’s human rights obligations on assisting States is also uncertain. While a mandate can
provide authority for particular actions, it does not provide blanket authorization for a disregard of human rights law in its implementation. It is unclear to what extent a reference to human rights in the mandate “trumps” the usual limits on the extraterritorial applicability of human rights law. On condition that human rights law is interpreted in the light of relevant rules of the law of armed conflict, armed forces should not fear the extraterritorial applicability of the former. If all the necessary guidelines discussed above could be produced, States might be more willing to concede greater scope to the extraterritorial applicability of human rights law. That would permit the development of a more coherent approach to the question.

A more radical alternative would involve the creation of a right of individual petition in relation to alleged violations of the law of armed conflict, both in international armed conflicts and in non-international armed conflicts. In some circumstances, this would result in two bodies being available to petitioners: a human rights body and a new law of armed conflict body. It would need to be determined whether it would be up to applicants to decide which avenue to pursue or whether they could be required to petition the law of armed conflict body, where the respondent State has accepted its jurisdiction. Demarcation lines would need to be established between the human rights bodies and the new body. Until a right of individual petition exists for violations of the law of armed conflict, individuals can be expected to continue to use human rights bodies to attempt to obtain redress.

It is emphatically not being suggested that the sole explanation for the difficulties of the military operations in Afghanistan are attributable to the failure to take adequate account of human rights law and human rights values. It is being suggested, however, that those failures have contributed to the current situation. Provided that human rights law takes proper account of the context and of the relevant rules of the law of armed conflict, human rights law should be seen as a useful tool in the arsenal of a military lawyer, rather than as an alien and terrifying body of rules to be avoided at all cost.

Notes

Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?


5. See generally BASIC DOCUMENTS ON HUMAN RIGHTS (Ian Brownlie et al. eds., 5th ed. 2006); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2d ed. 2000).


9. Osman v. United Kingdom, supra note 8, para. 115; see also L.C.B. v. United Kingdom, 76 Eur. Ct. H.R. 1390 (1998); A v. United Kingdom, 90 Eur. Ct. H.R. 2692, para. 22 (1998) (stating that Articles 1 and 3 of the European Convention required “States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals”); Report on the Situation of Human Rights in the Republic of Guatemala, Inter-Am. C.H.R., OEA/Ser.L/V/II.53, doc. 21 rev. 2, para. 10 (1981) (declaring that, in the context of violent attacks, “governments must prevent and suppress acts of violence, even forcefully, whether committed by public officials or private individuals, whether their motives are political or otherwise”).

10. See, e.g., Lindon, Otechakovsky-Laurens and July v. France, App. Nos. 21279/02 & 36448/02, Eur. Ct. H.R. (2007), available at http://cmispkp.echr.coe.int/tkp197/search.asp?skin= HUDOC-EN (rejecting the applicant’s assertion that the domestic law was not “necessary in a democratic Society,” the Court held that the question was whether, in the context of the case as a whole, the reasons advanced to justify interference with the right to freedom of expression are “relevant and
sufficient” and “proportionate to the legitimate aim pursued” and that balancing the rights to reputation and free expression, “regardless of the forcefulness of political struggles,” it was appropriate to ensure a “minimum degree of moderation and propriety.” Given the “virulent content of the impugned passages” and that the statements explicitly named Le Pen and the Front National party, the Court agreed the statements were defamatory. The content of the impugned statements was “such... to stir up violence and hatred... going beyond... tolerable... political debate” even against an extremist figure such as Le Pen.

11. The danger of judgments based on hindsight is avoided in the case of individual criminal responsibility where the elements of the crime make it clear that it is necessary to establish what the defendant knew or ought to have known and that determinations are based on what was known at the time. It is not clear whether the civil obligations of the State under the law of armed conflict, as opposed to the obligations of the individual under international criminal law, are more onerous.


18. Universal Declaration of Human Rights, supra note 17, pmbl.

Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?


21. This was one of the arguments used by the respondent governments in the case of Bankovic and others v. Belgium and others, 2001-XII Eur. Ct. H.R. 333. For example, it is unlikely that the United States would be willing to assist other States dealing with an insurgency, if they were subject only to human rights law and not the law of armed conflict, given that it does not even acknowledge the applicability of human rights law during armed conflict. See John Cerone, Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context, 40 ISRAEL LAW REVIEW 72, 128 n.28 (2007) (In a letter dated Jan. 31, 2006, addressed to the Office of the High Commissioner for Human Rights, the Permanent Representative of the United States of America to the United Nations and Other International Organizations in Geneva wrote, “The United States has made clear its position that it is engaged in a continuing armed conflict against AQ [Al Qaida], that the law of war applies to the conduct of that war and related detention operations….” (emphasis added). Indeed, the United States justifies its continued detention of the Guantanamo detainees only in reference to the law of armed conflict. In replying to inquiries by UN and related human rights bodies about the legal basis for detaining the individuals at Guantanamo, the United States has consistently asserted that “[t]he law of war allows the United States—and any other countries engaged in combat—to hold enemy combatants without charges or access to counsel for the duration of hostilities.” Response of the United States of America dated Oct. 21, 2005 to Inquiry of the UNCHR Special Rapporteur dated Aug. 8, 2005 Pertaining to Detainees at Guantanamo Bay; see also Annex to Second Periodic Report of the United States to the Committee Against Torture, filed on May 6, 2005); but see Del Quentin Wilber & Peter Finn, U.S. Retires “Enemy Combatant,” Keeps Broad Right to Detain, WASHINGTON POST, Mar. 14, 2009, at A6.

22. It was often a matter of negotiating within, rather than between, national delegations. The then-Soviet naval interest had more in common with the US naval interest than either had with the interest in protecting fishing rights in the territorial sea and the exclusive economic zone.


Françoise J. Hampson

25. See, e.g., International Covenant on Civil and Political Rights, supra note 23 (signatories, 72; parties, 164); American Convention on Human Rights, supra note 23 (signatories, 25); European Convention for Human Rights, supra note 12, (ratifications/accessions, 47).


31. They include the United Nations' Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Achievable Standard of Physical and Mental Health; and the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons; and the Working Groups on Enforced or Involuntary Disappearances and on Arbitrary Detention.

32. See, e.g., sources cited supra note 29.

33. U.N. Human Rights Committee, Second Periodic Report: Israel para. 8, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001) ("Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law").

34. The United States ratified the International Covenant on June 8, 1992. The United States did make a declaration to the effect that the Constitution would remain applicable, even during
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

...

41. The Greek Case, App. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 12 Y.B. Eur. Conv. on H.R. 1, 4 (Eur. Comm’n on H.R.); General Comment 29, supra note 24, para. 10 stating that “[a]lthough it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party’s other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant”).


43. See, e.g., General Comment 29, supra note 24, para. 17, noting that “[i]n paragraph 3 of article 4 [International Covenant on Civil and Political Rights], States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures.

44. Any reference to torture should be taken as also including cruel, inhuman or degrading treatment or punishment.

45. International Covenant on Civil and Political Rights, supra note 23, art. 4(2); European Convention for Human Rights, supra note 12, arts. 12(2) & 15(2); American Convention on Human Rights, supra note 23, art. 27(2).

46. General Comment 29, supra note 24, para. 4 (the principle of proportionality includes elements of severity, duration and scope); see Lawless v. Ireland (No. 3), App. No. 332/57, Eur. H.R. Rep. 15, para. 28 (1961) (Eur. Ct. of H.R.) (confirming the determination by the European Commission of Human Rights that Article 15 of the European Convention for Human Rights should be interpreted in the light of its “natural and customary” meaning, the European Court of Human Rights defined “time of public emergency” as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”); The Greek Case, supra note 41; Handside v. United Kingdom, App. No. 5493/72, 1 Eur. H.R. Rep. 737 (1976) (Eur. Ct. of H.R.) (establishing a three-tier test: “reasonableness” (see, e.g., European Convention for Human Rights, supra note 11, arts. 5(3) & 6(1)), “necessity” (see, e.g., id., art. 10(2)) and “indispensability”); McCann and
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?


the use of the term “absolutely necessary” in Article [2(2)] indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether state action is “necessary in a democratic society” under paragraph 2 of Articles 8 to 11 . . . of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.

47. International Covenant on Civil and Political Rights, supra note 23, art. 9(4); European Convention for Human Rights, supra note 12, art. 5(4); American Convention on Human Rights, supra note 23, arts. 25(1) & 27(2); Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 8 (Jan. 30, 1987); Siracusa Principles, supra note 28, para. 70(b) (stating “[n]o person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge . . .”); General Comment 29, supra note 24, para. 16 (“In order to protect non-derogable rights, the right to proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant”); see also A(FC) and Others(FC) v. Secretary of State for the Home Department [2004] UKHL 56, available at http://www.unhchr.org/refworld/docid/42ef723c4.html; Boumediene v. Bush, 128 S.Ct. 2229 (2008) (holding that, the procedures laid out in the Detainee Treatment Act are not adequate substitutes for the habeas writ, the Military Commissions Act of 2006 operates as an unconstitutional suspension of that writ. The detainees were not barred from seeking habeas or invoking the Suspension Clause merely because they had been designated as “enemy combatants” or held at Guantanamo Bay, Cuba).

48. General Comment 29, supra note 24.

49. Id., para. 2.

50. Id., para. 5.

51. Id., para. 9.

52. Id. See also THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW (2006).

53. General Comment 29, supra note 24, para. 7.

54. Id., paras. 7 & 8.

55. Id., para. 13.

56. Id., para. 13(b).

57. See, e.g., Concluding Observations of the Human Rights Committee: United States of America, supra note 29 (covering a wide range of issues regarding the International Covenant on Civil and Political Rights in relation to detention during armed conflicts in Iraq, Afghanistan and other overseas locations, the Committee only made a passing reference in paragraph 14 to “alleged cases of suspicious death in custody” although numerous media and human rights organization reports indicate a number of suspicious deaths of those held by the United States in the Bagram Theatre Internment Facility in Iraq (see, e.g., Tim Golden, In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths, NEW YORK TIMES, May 20, 2005, at A1, available at http://www.nytimes.com/2005/05/20/international/asia/20abuse.htm?ex=1274241600&en=4579c146cb14cf68&ei=5088)).


59. This further weakens any US claim to be a persistent objector.


63. Id., para. 106.


67. Cyprus v. Turkey, supra note 40.

68. See infra Section IV.

69. International Covenant on Civil and Political Rights, supra note 23, art. 6; American Convention on Human Rights, supra note 23, art. 4.

70. International Covenant on Civil and Political Rights, supra note 23, art. 4; American Convention on Human Rights, supra note 23, art. 27; General Comment 29, supra note 24, para. 7.

71. It should be noted that this would require human rights bodies to be able to determine the often legally difficult and politically contentious question of whether the law of armed conflict was applicable and whether the conflict was an international armed conflict or a non-international armed conflict. They would also, presumably, have to decide whether they could rely on customary rules of the law of armed conflict and to determine what they are. See Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2004); David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171 (2005). See also the 2007 Special Issue of the Israel Law Review on the parallel applicability of HR and IHL. See especially the contributions by David Kretzmer, Rotem Giladi.
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?


73. *Id.*, art. 15.
74. Sperduti & Trechsel dissenting in *Cyprus v. Turkey*, *supra* note 40; contrast derogation, which is a facility available to States and therefore optional. If it is not invoked, there is no basis on which the human rights body can do so *proprio motu*.
78. General Comment 29, *supra* note 24, paras. 7–8, 13 & 16; Advisory Opinion OC-9/87, *supra* note 64; see also Advisory Opinion OC-8/87, *supra* note 47.
79. The reservation made by India to Article 9 and the derogation under Article 9 made by the United Kingdom suggest they think that administrative detention or internment requires derogation. U.N. Human Rights Committee, General Comment No. 8 of June 30, 1982, on Right to Liberty and Security of Persons, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994), does not make it clear whether administrative detention can be compatible with Article 9.
81. Lawless *v. Ireland*, *supra* note 46. It is clear from the reasoning of the Court in *Ireland v. United Kingdom*, *supra* note 42, that internment in Northern Ireland would have been unlawful but for the notice of derogation. In *Brogan & Others v. United Kingdom*, App. Nos. 11209/84, 11234/84, 11266/84 & 11386/85, 11 Eur. H.R. Rep. 117 (1988) (Eur. Ct. H.R.), the European Commission of Human Rights found a violation of Article 5 of the Convention on account of the length (rather than the ground) of detention. The United Kingdom then submitted a notice of derogation and, in *Branigan v. United Kingdom*, *supra* note 42, detention under the same legislation was subsequently found not to violate the Convention, taking account of the derogation. Perhaps the most dramatic example is the Commission decision in *Cyprus v. Turkey*, *supra* note 40, in which the Commission determined that, in the absence of a notice of derogation, detention of prisoners of war during an international armed conflict was a violation of the Convention.
82. See generally Nancie Prud'homme, *Lex specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISRAEL LAW REVIEW 355 (2007); Françoise Hampson, *Other areas of customary law in relation to the Study*, in *PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 68 (Elizabeth Wilmshurst & Susan Breau eds., 2007).
83. By virtue of the limitation clause, a State might be able to justify the necessity of unusual restrictions on the right to demonstrate during a situation of conflict. Similar considerations would apply to freedom of expression. These would be principally or exclusively relevant in non-international armed conflicts in national territory.
84. Watkin, *supra* note 71.
Françoise J. Hampson


88. Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee 2, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (Feb. 12, 2008); Israel has maintained this position consistently before the UN Human Rights Committee in relation to the International Covenant on Civil and Political Rights and before the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights. See also Dennis, supra note 85: his objection is based in part on the interpretation of the phrase “within its [the State’s] territory and subject to its jurisdiction” in Article 2 of the International Covenant on Civil and Political Rights, which the Human Rights Committee interprets as containing a disjunctive “and.” In other words, the Human Rights Committee interprets “and” as “or.”

89. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, supra note 12.

90. Armed Activities on the Territory of the Congo, supra note 27.

91. General Comment 31, supra note 30, para. 10. When examining some State reports, the Human Rights Committee has expressly referred to occupation; in other cases, it has described a form of control that amounts to occupation, e.g., areas in Lebanon over which Israel exercised effective control. See Concluding Observations of the Human Rights Committee: Israel, supra note 61, para. 10; contrast Concluding Observations of the Human Rights Committee: Lebanon, supra note 61, paras. 4–5, which refers to occupation; alleged violations in Lebanon at the hands of Syrian security forces, discussed in Concluding Observations of the Human Rights Committee: Syrian Arab Republic, supra note 61, para. 10; the issue of Moroccan control over Western Sahara has been raised principally in the context of the exercise of the right to self-determination: Concluding Observations of the Human Rights Committee: Morocco para. 9, U.N. Doc. CCPR/C/79/Add.113 (Nov. 1, 1999) and Concluding Observations of the Human Rights Committee: Morocco paras. 8 & 18, U.N. Doc. CCPR/CO/82/MAR (Dec. 1, 2004).

92. Geneva Convention IV, supra note 15, art. 64. It should be noted that one of Israel’s first acts in the Occupied Territories was to abolish the death penalty, which was, technically, a breach of the law of armed conflict. While the occupying power is in a position of authority, it does not have the claim to legitimacy of the sovereign.

94. General Comment 31, supra note 30, paras. 3 & 10.
95. Id., para. 10.
97. Disabled Peoples' International et al. v. United States, Case 9213, Inter-Am. C.H.R. 184, OEA/Ser.L/V/II.21, doc. 9 rev. 1 (1987) (concerning an attack on an asylum in Grenada by US military aircraft during the US invasion of Grenada); Coard et al. v. United States, supra note 65 (relating to persons detained by US forces during the intervention in Grenada: the Commission held that the test for "within the jurisdiction" was whether a person is subject to the authority and control of a State).
105. The treaty texts require that the victim of the alleged violation (not the perpetrator) should have been within the (ICCPR: "territory" and) jurisdiction of the respondent State. In Bankovic v. Belgium, supra note 21, para. 37, the Court referred to the fact that the respondent governments stated that "[t]he arrest and detention of the applicants outside of the territory of the respondent State in the Issa and Ocalan cases (Issa and Others v. Turkey, (dec.), no. 31821/96, 30 May 2000, unreported and Ocalan v. Turkey, (dec.), no. 46221/99, 14 Dec. 2000, unreported) constituted, according to the Governments, a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil."
109. Isaak v. Turkey, App. No. 44587/98, Eur. Ct. H.R. (June 24, 2008). The Court, in its reasoning, made no reference to the fact that the killing occurred in the buffer zone, that is to say outside Turkish territory and outside the territory over which Turkish armed forces are said to exercise control in northern Cyprus. In its admissibility decision, Isaak v. Turkey, App. No. 44587/98, Eur. Ct. H.R. (Sept. 28, 2006), the issue was discussed. The Court appears to have founded its jurisdiction on the fact that Turkish Cypriot policemen had taken an active part in the beating to death of the applicant, thereby bringing him within the jurisdiction of Turkey, id. at 21.
110. R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence [2007] UKHL 58 (but it should be noted that he was detained after the passage of UN Security Council Resolution
Françoise J. Hampson

1546, June 8, 2004, which suggested that the Security Council, at least, thought that Iraq was no longer occupied, legally speaking; Al-Skeini & Others v. Secretary of State for Defence, supra note 100; Al Skeini & Ors, R (on the application of) v. Secretary of State for Defence, supra note 104.

111. For example, States which assisted Kuwait in expelling the Iraqi occupying forces in 1990/91.

112. In other words, they may have ratified different human rights treaties.

113. This would clearly be the case where the right in question was regarded as having ius cogens status.

114. Afghanistan has ratified the International Convention on the Elimination of All Forms of Racial Discrimination; the International Convention on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention of the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child.

115. See supra note 79 and accompanying text.


117. Concluding Observations of the Human Rights Committee: Kosovo (Serbia), U.N. Doc. CCPR/C/UNK/C/1 (Aug. 14, 2006). It is not clear whether the report was requested and made by the United Nations Interim Administration Mission in Kosovo (UNMIK) in right of Serbia or UNMIK as the authority exercising effective control over the territory. The situation in Kosovo was unlike the majority of peace support operations because the UN was the government.


122. The European Convention for Human Rights is a Council of Europe treaty and has been ratified by a significantly wider group of States.


124. Behrami & Behrami v. France, App. No. 71412/01, Eur. Ct. H.R. (May 2, 2007) (admissibility decision); Saramati v. France, Germany & Norway, supra note 120. These decisions have been heavily criticized, inter alia, for failing to recognize that it is possible for two entities (the United Nations and an individual State) both to bear responsibility. See, e.g., Aurel Sari, Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases, 8 HUMAN RIGHTS LAW REVIEW 151 (2008).

523
Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?

125. This is not always the case. The United States and the United Kingdom hoped that the Iraqi population would support the invasion insofar as it resulted in the overthrow of the regime of Saddam Hussein.


127. There remained a problem with certain controversial killings. In some cases, they were controversial because forces opened fire in circumstances thought to be unjustified, often as a result of a material mistake of fact. In other cases, individuals were thought to be victims of a “shoot to kill” policy, that is they were shot rather than being detained. It was also believed that there was collusion between elements in the security forces and certain Protestant paramilitary groups in relation to certain killings.


129. The author had the great privilege of being invited to participate in a workshop at Fort Leavenworth which examined an early draft of the COIN manual. One of the boxes in the manual gave an illustration from a real situation. If the box had not been entitled El Salvador, it would not have been possible to recognize the situation from the facts given. The perspective was that whatever side the United States supports is, by definition, legitimate and any opponent illegitimate. For operational purposes, it is important to ask how a member of the local population views the question of legitimacy. If the government practices brutal policies of repression, the government may have forfeited its legitimacy in the eyes of the population. That means that the first act of assisting forces should be to require the government forces to “clean up their act” as a precondition for assistance. The fact that the United States supports a particular government has no bearing on whether the conduct of that government is such as to win the hearts and minds of the population nor bearing on the view of the local population as to legitimacy.


132. A possible model is the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, available at http://www.unhchr.ch/html/menu3/b/h_comp34.htm. The topics which would need such guidelines include opening fire, detention (both grounds for and rights relating to, including due process guarantees), treatment in detention, search and seizure, and the relationship with institutions of civil society. A secondary category of topics, where coverage would be useful but possibly not essential, could include the role and responsibilities of private military/security companies.

133. The contexts include inter-State armed conflict, assistance to a government, creation of a government where no effective government exists, occupation, UN-mandated operations, other mandated operations and operations involving UN forces.