The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?

SASSÒLI, Marco


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THE INTERNATIONAL LEGAL FRAMEWORK
FOR STABILITY OPERATIONS:
WHEN MAY INTERNATIONAL FORCES ATTACK OR DETAIN
SOMEONE IN AFGHANISTAN?

By Marco Sassòli*

I. INTRODUCTION.

Whether we call the involvement of international forces in Afghanistan assistance to the Afghan government, or a peace operation, a stability operation, part of the “war on terror”, an armed conflict, a foreign occupation or a love affair, and whatever the legal basis of such involvement may be, two of the most important tactical and humanitarian issues confronting international forces are when they may attack or detain an “enemy”. Concerning detention, the key issues are on what legal basis and according to what procedure the decision to arrest and detain may be taken. Two branches of international law govern attack and detention: International Humanitarian Law (IHL), or the law of armed conflict and International Human Rights Law (IHRL). For both branches, first, a question of applicability arises: IHRL applies in every circumstance and to everyone, but are the armed forces of States bound by IHRL at all when acting outside their territory? As for IHL, it certainly applies to armed forces acting extraterritorially, but it applies only to armed conflicts and its rules on precisely our two issues are probably different in international and non-international armed conflicts. Second, when applicable, for both IHL and IHRL the question arises as to when they allow (or rather: do not prohibit) international forces to deprive enemies of their life or their liberty. Third, if both branches apply and lead to differing results on our two issues, we must determine which of the two prevails.

In this article, I will try to discuss these three questions, putting the emphasis on the substance of the rules, as others in this volume have

* Professor of International Law at the University of Geneva (Switzerland), and Associate Professor at the Universities of Quebec in Montreal and of Laval (Canada).
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extensively discussed the classification of the conflict(s) in Afghanistan under IHL.

When I refer to the “enemies” who may or may not be attacked or detained under the rules to be discussed, I will call them “fighters.” Who may be attacked or detained for what reasons is obviously one of the questions the legal framework has to deal with; even if the answer to that legal question were clear, one of the greatest practical difficulties would remain: to identify whether someone belongs to those categories. However, this article does not deal with thieves, with harmless civilians who may become incidental victims of attacks or are mistakenly targeted, or with civilians who oppose the government or the international presence without using force. These people are obviously covered by the rules to be explored, but they are not the hard cases and IHL and IHRL do not prescribe differing rules on them. The same is true for attacks directed against people who actually attack international forces while they are engaged in such attacks. The hard cases, with regard to the legality of attacks and the legal basis for their detention, are persons international forces believe to be members of armed groups such as Al Qaeda and the Taliban. I will explain below why I consider that mere membership in such groups is not sufficient, but that the person must also have a fighting function to be a legitimate target of attack.

II. APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW IN AFGHANISTAN

It is uncontroversial that still in 2008 the level of violence and the degree of organization of the Taliban and, at least in Afghanistan, of Al Qaeda are unfortunately sufficiently high to make IHL applicable, even if the higher requirements of intensity and organization of the parties of IHL of non-international armed conflicts are applied. The United States agrees, indeed, that the conflict between the Taliban and the Afghan government is not of an international character and that this characterization is not altered by the fact that the latter is heavily supported (if not kept alive) by international forces. The only construction under which the entire conflict in Afghanistan could be claimed to be of an international character still today, in 2008, would be to recall that the conflict was indeed international in 2001 because it was fought between the United States and the Taliban (who constituted the de facto government of Afghanistan) and to consider that this conflict continues until the defeat of the Taliban. Most, including the ICRC, consider that the

1 See infra, text accompanying note 59.
conflict turned into a conflict not of an international character in 2002, when the Karzai government was first appointed by the Loya Jirga\(^3\) and then elected (since this new government of Afghanistan agreed to and requested the foreign forces to support its continuing fighting against the Taliban). Formally, one could however consider that until the Taliban are completely defeated, the conflict between the United States and them maintains its international character and the United States (or the UN Security Council) could not have altered this classification by establishing, recognizing or concluding agreements with a new local government in the territory they occupied following their invasion.\(^4\) However, this is certainly not the thesis of the United States and it encounters different legal problems: inter alia, that it is difficult to consider free elections as a change introduced by the occupying power, that the UN Security Council has given its blessing to the new arrangements and that such UN Security Council resolutions prevail over any other international obligation under Article 103 of the UN Charter.

The United States argues, however, that beside the non-international armed conflict against the Taliban, a separate international armed conflict exists: the “war on terror” against Al Qaeda and its associates.

As far as treaty law is concerned, international armed conflicts are mainly governed by the four 1949 Geneva Conventions\(^5\) and Additional Protocol I.\(^6\) Neither the United States nor Afghanistan are parties to Protocol I, but they are bound by the many rules of the latter that correspond to customary international law. The Geneva Conventions apply to international armed conflicts. Common Article 2 to the four Conventions states that they “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”. Only States can be parties to the Conventions. Al Qaeda is not a State. Therefore, the Conventions do not apply to a conflict between the United States and its allies, on the one hand, and this non-State actor, on the other hand. As for

\(^3\) Thus the ICRC position according to A. Roberts, “The Laws of War in the War on Terror”, 32 Israel Y.B. Hum. Rs. 193 (2002).


customary international law, there is no indication confirming what seems to be the view of the US administration, i.e., that the concept of international armed conflict under customary international law is broader. State practice and *opinio juris* do not apply the law of international armed conflict to conflicts between States and certain non-State actors. On the contrary, and in conformity with the tenets of the Westphalian system, States have always distinguished between conflicts against one another, to which the whole of IHL applied, and other armed conflicts, to which they were never prepared to apply those same rules, but only more limited humanitarian rules.

III. APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW IN AFGHANISTAN

A. Does International Human Rights Law Apply Extraterritorially?

International forces in Afghanistan do not act on their own territory. They are therefore bound by IHRL only if its obligations bind a State even when acting beyond that State's territory. Article 1 of both the 1969 American Convention on Human Rights [ACHR] and the 1950 European Convention on Human Rights [ECHR] clearly state that the States parties must secure the rights listed in those conventions to everyone within their jurisdiction. Under the jurisprudence of the European Court of Human Rights [ECHR] this includes an occupied territory.

On the universal level, under the 1966 International Covenant on Civil and Political Rights [ICCPR or Covenant] a party undertakes “to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized…” (my emphasis). This wording and the negotiating history lean towards understanding territory and jurisdiction as

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cumulative conditions. The United States and Israel therefore deny that the Covenant is applicable extraterritorially. The International Court of Justice, the UN Human Rights Committee and other States are however of the opinion that the Covenant equally applies in an occupied territory. From a teleological point of view it would indeed be astonishing that persons whose rights can neither be violated nor protected by the territorial State lose any protection of their fundamental rights against the State which can actually violate and protect their rights.

B. How Much Control is Necessary to be Under the Jurisdiction of a Foreign State?

If IHRL applies extraterritorially, the next question that arises is when a person can be considered to be under the jurisdiction of a State. Analysis of this issue – the level of control a State must exercise in order to be bound by its international human rights obligations – has often been divided according to treaty. However, there has been a certain amount of convergence in the

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interpretation of jurisdiction in recent cases. The Inter-American Court and Commission for Human Rights have tended to adopt broad views of what may give rise to a State having extraterritorial jurisdiction. The widely-cited case of *Alejandre v. Cuba* illustrates that physical control over territory exercised through having “boots on the ground” is not necessary for jurisdiction to arise in the Inter-American system. In that case, the Commission held that the applicants came within Cuban jurisdiction when Cuba’s airplanes fired on another airplane flying in international airspace.

As for the European Court of Human Rights, from its strictest test articulated in *Bankovic* – that a State must exercise effective control over territory by being physically present on that territory in order to have jurisdiction – the ECtHR has moved, over the past decade, to applying a standard that does not always require “boots on the ground”. In *Issa*, the ECtHR looked for effective territorial control. It found, on the facts, that Turkish forces in northern Iraq did not exhibit that level of control and therefore, in its decision on the merits, held that in fact the Iraqi applicants’ claim was inadmissible. In a very recent case, however, the ECtHR has held that jurisdiction can flow from facts not unlike those in *Alejandre v. Cuba* (or indeed, in *Bankovic*). *Pad v. Turkey* involved a skirmish on the Turkish-Iranian border in which seven Iranians were killed by Turkish helicopter gunships. The Court held that:

> ... it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants’ relatives .... Accordingly, the Court finds that the victims of the impugned events were within the jurisdiction of Turkey at the material time.

This conclusion is clearly at variance with *Bankovic*, where, as one commentator put it, “the Court found that jurisdiction could not arise by the

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mere fact of dropping bombs on individuals”. It would be specious if, in future, the Court were to distinguish Pad exclusively on the grounds that Turkey had not formally contested that it had jurisdiction over the applicants' relatives.

Conceivably, for all treaties, jurisdiction could arise through a State’s extra-territorial exercise of control over persons. However, it seems likely that courts will at times also look for effective control over territory. The factors identified by the ECtHR in Issa as indicators of such control were 1) the number of soldiers on the ground; 2) the size of the area controlled; 3) the degree of control exercised (i.e., whether checkpoints, etc. were established); and 4) the duration of the exercise of control. The first and third factors are valid indicators to measure something as nebulous as “control”; however, with all due respect to the Court, the second and fourth factors bring little to the analysis. All other things being equal, it is difficult to imagine why it would make a difference whether foreign forces controlled a vast area or only a village. The fourth factor, the duration of control, may be helpful for a Court reviewing actions long after the fact, but it fails to provide States and their forces or agents with a clear indication of when they begin to be responsible for respecting (and possibly even protecting) the human rights of the people in their care.

In my view, a solution could be found through a functional approach, distinguishing the degree of control necessary according to the right to be protected. Such an approach would reconcile the object and purpose of human rights to protect everyone with the need not to bind States by guarantees they cannot deliver outside their territory and the protection of the sovereignty of the territorial State (which may be encroached upon by international forces protecting human rights against anyone other than themselves). For our two issues, this functional approach would mean that international forces have to respect the right to life of a person simply by omitting to attack that person as soon as those forces could affect that right by their attack, while they would have to respect the procedural guarantees inherent in the right to personal freedom only as long as they physically detain the person. The applicability of IHRL obviously does not yet determine whether its guarantees or those of IHL prevail in a given situation.

24 Issa, supra note 21, at para. 75. In this the Court was drawing on its prior case-law regarding Cyprus.
25 Cerone, supra note 18, at 1494-1507, frames the discussion in terms of a “range” of applicable rights and in terms of the “level of obligation” binding States acting extra-territorially.
All on the contrary, the *lex specialis* issue only arises if both branches apply to a certain situation.

**C. What if Jurisdiction is Shared by Different Coalition Partners and a Host Government?**

If IHRL applies extraterritorially, even if we knew exactly what degree of control is necessary to put someone under the jurisdiction of a State, in case of coalition operations such as those in Afghanistan additional questions arise. Can the degree of control necessary to exercise jurisdiction result from cumulative contributions by different States, including the host State? In such a case, does every contributing State have jurisdiction? These questions have been raised but not exhaustively examined before the ECHR. In *Hussein v. Albania et al.*, the Court held that the applicant Saddam Hussein had failed to furnish sufficient proof that the respondent States had control over Iraq or over him at the time of his detention (or arrest) from which jurisdiction would flow. The Court seemed to suggest that jurisdiction would not automatically exist for States participating in a “coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US”. Given the last-mentioned specificities, there is no *prima facie* reason to exclude that collective control could suffice to establish jurisdiction. A case that provides more guidance on this issue is *Hess v. United Kingdom*, which dealt with an application by Rudolph Hess’ wife for his release from Spandau Prison. At the relevant time, the prison was under the control of the four Allied powers in Germany following the Second World War. The Commission, in determining whether the prison came within the UK’s jurisdiction, accepted *a priori* the premise that the ECHR could apply to the activities of British forces in Berlin. However, it took into account the fact that decision-making powers regarding the prison was by unanimous agreement between all four Allied powers. As such, it held that:

... the United Kingdom acts only as a partner in the joint responsibility which it shares with the three other Powers. The Commission is of the opinion that the joint authority cannot be divided into four separate jurisdictions and that therefore the United Kingdom’s participation in the exercise of the joint authority and consequently in the administration and

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supervision of Spandau Prison is not a matter “within the jurisdiction” of the United Kingdom, within the meaning of Art. 1 of the Convention.28

This holding would seem to exclude the possibility of jurisdiction flowing from collective control during a multi-lateral operation. However, as one author has observed, the Commission was particularly troubled by the lack of executive decision-making power of the UK in regard to the prison.29 Logically, if a State participating in a multi-lateral operation nevertheless retains executive decision-making power over its forces and personnel, there is no reason to deny jurisdiction.

Moreover, any agreement between States participating in a multi-lateral operation affecting that kind of decision-making power could fall afoul of a State’s obligations. In Hess, the Commission wrote:

The conclusion by the respondent Government of an agreement concerning Spandau prison of the kind in question in this case could raise an issue under the Convention if it were entered into when the Convention was already in force for the respondent Government. The agreement concerning the prison, however, came into force in 1945.30

On the two issues dealt with in this article, I conclude as follows. No contributing State may make a deliberate causal contribution to a violation of the right to life of any person. However, a contributing State that is not an occupying power does not exercise the level of jurisdiction over a person that would oblige it to protect that person’s right to life against other coalition partners or the host State.31 Applying this reasoning to Afghanistan, the coalition and the Afghan authorities collectively exercise effective control, but, for the international coalition partners, this does not give rise to the positive obligations associated with the right to life (i.e., to protect it against third parties). The responsibility for ensuring the respect of that aspect of the right to life remains with the Afghan government, which, to give effect to it, may have a due diligence obligation regarding the conduct of coalition forces. As for detainees, even a State which is not an

30 Hess, supra note 28, at 176 (my emphasis).
31 A State that is an Occupying Power, however, has the positive obligation to protect the right to life of persons within its jurisdiction against third parties. The ICIJ held that Uganda, as an occupying power in Congo, had an obligation “to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party”. See Armed Activities on the Territory of the Congo, supra note 14, at paras. 178-79.
of coalition forces. As for detainees, even a State which is not an occupying power must offer any person it actually detains, independently of whether it also arrested that person or not,\textsuperscript{32} the rights that detainee has during that phase of detention; however, such rights may also be respected by measures actually taken by another coalition partner or the host State.

In my view, the same analysis must be made when different coalition partners and a host State are bound by differing treaty obligations. Every State has to comply with its own obligations concerning its own contribution. In addition, a State actually detaining a person must protect the rights of that person even against States not bound to grant such rights.

\textit{D. Who Could Proceed to Admissible Derogations?}

Under normal circumstances, a State’s ability to derogate from its obligations under human rights treaties is limited to situations in which the security of the State itself is in jeopardy.\textsuperscript{33} Can this requirement be met when a State’s forces are involved in a multi-lateral operation abroad? Lord Bingham of Cornhill wrote in \textit{Al Jedda} that the power to derogate:

\begin{quote}
... may only be exercised in time of war or other public emergency threatening the life of the nation seeking to derogate, and only then to the extent strictly required by the exigencies of the situation. \ldots It is hard to think that these conditions could ever be met when a State had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw.\textsuperscript{34}
\end{quote}


\textsuperscript{33} Art. 15 of the ECHR (\textit{supra} note 9) refers to “time of war or other public emergency threatening the life of the nation \ldots”; Art. 4 of the ICCPR (\textit{supra} note 11) refers to “time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed \ldots”; Art. 27 of the ACHR (\textit{supra} note 8) refers to “time of war, public danger, or other emergency that threatens the independence or security of a State Party \ldots”.

Lord Bingham went on to add: “The Secretary of State does not contend that the UK could exercise its power to derogate in Iraq (although he does not accept that it could not”).

In my view, one cannot simultaneously hold a State accountable because it has a certain level of control abroad and deny it the possibility to derogate because there is no emergency on that State’s own territory. An emergency on the territory where the State has a certain limited control must be sufficient.

E. What is the Impact of a UN Mandate?

Normally, the legality or illegality of an exercise of jurisdiction does not matter for the applicability of IHRL. No one denies that human rights most typically apply to the most lawful exercise of jurisdiction: territorial jurisdiction. The ECtHR held that the responsibility of a State also arose “when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory”.

Theoretically, UN Security Council resolutions could, under Article 103 of the UN Charter, prevail over IHRL obligations of States (however, the extent to which they may do so is controversial). In my view, any derogation from IHRL by the UN Security Council must however be explicit. In Al Jedda, the UK House of Lords considered that UN Security Council Resolution 1546, authorizing “interment where ... necessary for imperative reasons of security” qualified the UK’s obligations under Article 5 of the ECHR. In my view, the wording of this Resolution is not explicit enough to be considered to mandate UN Member States not to provide such internees with the procedural guarantees they are obliged to offer under IHRL. In any case,

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35 Id.

36 Nonetheless, it may well be that the illegality of the exercise also means it violates IHRL, as IHRL, contrary to IHL, knows no distinction between jus ad bellum and jus in bello. See W. Schabas, “Lex specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict and the Conundrum of Jus ad Bellum”, 40 Israel L. Rev. 592, at 593, 607-10 (2007).

37 Loizidou v. Turkey, supra note 10, at 2235-36, para. 52 (my emphasis).

38 Al Jedda, supra note 34, at paras. 26-39 (per Lord Bingham), 125-29 (per Baroness Hale), paras. 130-35 (per Lord Carswell) and para. 151 (per Lord Brown). Lord Rodger agrees in principle in obiter at para. 118. The Law Lords held that Art. 5 rights may be “displaced” or “qualified” by UN S.C. Res. 1546 but insisted that the infringement be limited. Lord Bingham held that they must “ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention” (para. 39). Lord Carswell proposed specific “safeguards” to be implemented during such detention “so far as is practicable and consistent with the needs of national security and the safety of other persons” (para. 130).
the UN Security Council resolutions concerning Afghanistan contain no language similar to that of Resolution 1546 which could be claimed to govern the admissible reasons of detention.

In my view, UN Security Council resolutions must be interpreted whenever possible in a manner compatible with the rest of international law. The mandate of the Security Council to maintain international peace and security includes the authorization of the use of force. How such force may be used is however governed by other branches of international law, including IHRL. No one would claim that a UN Security Council resolution urging States to prevent acts of terrorism implicitly authorizes torture or summary executions. Beyond that, it is often argued that even the Security Council must comply \textit{with \textit{jus cogens}} \footnote{See Separate Opinion of Lauterpacht J. in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, [1993] I.C.J. Rep. 325, at 440-41, paras. 100-102.} and the human rights discussed here belong to \textit{jus cogens}.

A distinct question relates to situations where foreign forces are participating in a peace operation in a way that their acts can be attributed only to the United Nations. A much-criticized recent judgment suggests that in such a case the sending State will not have jurisdiction for the purposes of its obligations under human rights treaties. \footnote{See Behrami \textit{et al. v. France et al.}, Admissibility, App. Nos. 71412/01 \& 78166/01, [2007] Eur. Ct. H.R. In this case, the question of attribution was not clearly distinguished from the abovementioned question whether a Security Council resolution overrides the substantive human rights obligations of a State, but in its global reasoning the ECHR suggested that such resolutions have precisely that effect (ibid., para. 149). The two questions were distinguished in the \textit{Al Jedda} case by the UK House of Lords, which rejected on the facts the claims of the government under the first question but answered the second question affirmatively (\textit{Al Jedda}, supra note 34, per Lord Bingham, paras. 22-24 (attribution), and para. 39 (human rights); Lord Rodger dissenting on the question of attribution, see esp. para. 99).} Indeed, this judgment runs counter to explicit statements by States and to practice. \footnote{See \textit{Germany}, UN Doc. CCPR/CO/80/DEU/Add.1 (Jan. 5, 2005) (Follow-up response by State Party to the Human Rights Committee); \textit{Poland}, UN Doc. CCPR/CO/82/POL, para. 3 (HRC’s concluding observations) (Dec. 2, 2004); other States Parties have answered questions regarding the actions of their national forces in peacekeeping missions without contending that the ICCPR does not apply beyond their State borders or in that context (\textit{Italy}, UN Doc. CCPR/C/SR.1707, para. 22; \textit{Belgium}, UN Doc. CCPR/C/SR.1680, para. 22; \textit{Canada}, UN Doc. CCPR/C/SR.1738, paras. 29, 32).} In my view, here as elsewhere everything depends on the facts. It may well be that a State contributes troops to a peace operation in such a way that it no longer has control over what those troops do and that the exclusive command and
control is with the UN, with another international organization or with a third State. In fact, this is the situation the drafters envisaged in Articles 43-47 of the UN Charter, which have remained a dead letter. In reality, contributing States retain a very large degree of control over their forces. Everyone familiar with ISAF in Afghanistan knows of the national caveats discussed in other contributions to this volume. If UN Security Council resolutions and NATO rules allow a contributing State to opt out of a certain kind of operation, out of any given operation, or out of certain methods to implement them, that State has enough control over the acts of its own troops to be responsible for their conformity with its human rights obligations. The case of joint control by a State and an international organization can be dealt with similarly to that of joint control by several States. However, a member State of an organization has a continuing responsibility to ensure that an organization to which it delegates conduct that may have implications in terms of human rights complies with the corresponding standards.

IV. THE SUBSTANTIVE RULES OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN AFGHANISTAN

A. On attacks

1) The traditional answer of international humanitarian law of international armed conflicts

In international armed conflicts, members of armed forces belonging to a party to the conflict are combatants. Combatants may be attacked at any time until they surrender or are otherwise “hors de combat” and not only while actually threatening the enemy. Combatants are part of the military potential of the enemy and it is therefore always lawful to attack them for the purpose of weakening that potential. Beside combatants, civilians, too, may exceptionally be attacked, but only for such time as they directly participate in hostilities.

The traditional understanding is that no rule restricts the use of force against combatants to only those circumstances when they cannot be captured. Within IHL, this view has been challenged based on the principle

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44 Art. 51(3) of Protocol I (supra note 6) which reflects customary law, but the exact meaning of which is controversial and presently subject to an ICRC-led process of research and reflection on and clarification of the notion of direct participation in hostilities (see infra note 51).
of military necessity as a restriction on all violence\textsuperscript{45} and the prohibition of treacherous killings.\textsuperscript{46} However, neither of these understandings has been translated into actual battlefield instructions, and even less into actual battlefield behaviour.\textsuperscript{47}

Even attacks directed at combatants are subject to the proportionality principle, but in IHL this principle protects only civilians incidentally affected\textsuperscript{48} and does not require a proportionality evaluation between the harm inflicted on the combatant and the military advantage drawn from the attack. The same is true for precautionary measures in attack, which must only be taken for the benefit of the civilian population.

2) The uncertain answer of the treaty rules of international humanitarian law of non-international armed conflicts

In contradistinction to international armed conflicts, it is not clear under the treaty law of non-international armed conflicts when an enemy fighter may be attacked. Indeed, neither Article 3 common to the 1949 Geneva Conventions nor Additional Protocol II\textsuperscript{49} refers to “combatants” because States did not want to confer on anyone in non-international armed conflicts the right to participate in hostilities and the corresponding combatant immunity. Those provisions prohibit “violence to life and person, in particular murder” directed against “persons taking no active part in hostilities,” including those who have ceased to take part in hostilities.\textsuperscript{50}

Specifically addressing the conduct of hostilities, Article 13 of Additional Protocol II prohibits attacks against civilians “unless and for such time as they take a direct part in hostilities”.\textsuperscript{51}

\textsuperscript{45} J.S. Pictet, Development and Principles of International Humanitarian Law 75-76 (1985).


\textsuperscript{48} Art. 51(5)(b) of Protocol I, supra note 6.


\textsuperscript{50} See Art. 3 common to Geneva Conventions I-IV (supra note 5), and Art. 4 of Protocol II (supra note 49).

\textsuperscript{51} Recently, the ICRC was engaged, in consultation with experts, in a process of research and reflection on and clarification of the notion of “direct participation in hostilities” under IHL. This process has not yet shown definitive results but it clearly demonstrated
One may deduce from these rules and from the absence of any mention of "combatants" that everyone is a civilian in a non-international armed conflict and that no one may be attacked unless he or she directly participates in hostilities. However, first, it would then be astonishing that Article 13 uses the term "civilian" instead of a broader term such as "person". Second, if everyone is a civilian, the principle of distinction, which is a fundamental principle of IHL, becomes meaningless and impossible to apply. Third, common Article 3 confers its protection on "persons taking no active part in hostilities, including members of armed forces who have laid down their arms or are otherwise hors de combat". The latter part of the phrase suggests that for such members of armed forces it is not sufficient to no longer take an active part in hostilities to be immune from attack. They must take additional steps and actively disengage. Fourth, on a more practical level, to prohibit government forces to attack clearly identified fighters unless the latter engage government forces is militarily unrealistic as it would oblige them to act purely reactively while facilitating hit-and-run operations by the rebel group. These arguments may therefore lead to the conclusion of the ICRC Commentary to Protocol II that "[t]hose belonging to armed forces or armed groups may be attacked at any time".  

This conclusion that fighters may be attacked, as in international armed conflicts, at any time, until they disengage from the armed group, may be reconciled with the text of the treaty provisions in two ways. First, "direct participation in hostilities" can be understood to encompass the simple fact

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54 Under common Art. 3, the term "armed forces" includes rebel armed groups; see M. Sassoli, "Terrorism and War", 4 J. Int'l Crim. Just. 959, at 977 (2006).

of remaining a member of the group\textsuperscript{56} or of keeping a fighting function.\textsuperscript{57} Second, fighters can be considered not to be “civilians” (benefiting from the protection against attacks, unless and for such time as they directly participate in hostilities).\textsuperscript{58}

However, this conclusion raises difficult questions in practice. How do government forces determine membership in an armed group while the individual in question does not commit hostile acts? How can membership in the armed group be distinguished from simple affiliation with a party to the conflict for which the group is fighting — in other words, membership in the political, educational or humanitarian wing of a rebel movement? In my view, one of the most convincing avenues is to allow attacks only against a person who either actually directly participates in hostilities or has a function within the armed group to commit acts that constitute direct participation in the hostilities.\textsuperscript{59}

3) No answer is provided to the question by customary international humanitarian law

According to the ICRC Study on Customary International Humanitarian Law [ICRC Customary Law Study], in both international and non-international armed conflicts, “[a]ttacks may only be directed against combatants”.\textsuperscript{60} However, the definition of the term combatant offered for non-international armed conflicts makes this rule rather circular, if it simply “indicat[es] persons who do not enjoy the protection against attacks accorded to civilians”.\textsuperscript{61} Other rules of that Study indicate that “[c]ivilians are protected against attack unless and for such time as they take a direct part in hostilities”\textsuperscript{62} and civilians are defined as “persons who are not members of the armed forces”.\textsuperscript{63} The commentary to the rules must however admit that while “State armed forces may be considered combatants...practice is not clear as to the situation of members of armed opposition groups”,\textsuperscript{64} but rather “ambiguous as to whether ... [they] are considered members of armed

\textsuperscript{56} DPH 2005 Report, supra note 51, at 48-49.
\textsuperscript{57} H.C. (High Court of Justice) 769/02, Public Committee against Torture in Israel et al. v. Government of Israel et al., HCJ 769/02, Dec. 11, 2005, para. 39 (a full translation is available in 46 I.L.M. 375 (2007)); [hereinafter: Targeted Killings Case].
\textsuperscript{58} DPH 2005 Report, supra note 51, at 43-44.
\textsuperscript{59} Ibid., at 64; Kretzmer, supra note 53, at 198-99, goes in a similar direction.
\textsuperscript{61} Ibid., at 3.
\textsuperscript{62} Ibid., Rule 6, at 19.
\textsuperscript{63} Ibid., Rule 5, at 17.
\textsuperscript{64} Ibid., at 12.
forces or civilians". If they are the latter, an imbalance between such groups and governmental armed forces could be avoided by considering them to take a direct part in hostilities continuously. Customary law is therefore as ambiguous as the treaty provisions on the crucial question whether fighters in non-international armed conflicts may be attacked in the same way as combatants in international armed conflicts.

4) Apply the rule governing international armed conflicts by analogy? The general tendency is to bring the law of non-international armed conflicts closer to that of international armed conflicts, which has also the positive side effect of rendering largely moot controversies on whether a given conflict, such as the conflict against Al Qaeda in Afghanistan, is international or non-international and on what law to apply in conflicts of a mixed nature. In the last twenty years, the jurisprudence of international criminal tribunals, the influence of human rights law and even some treaty rules adopted by States have brought the law of non-international armed conflicts closer to the law of international armed conflicts. In the many fields where the treaty rules still differ, this convergence has been rationalized by claiming that under customary international law, the differences between the two categories of conflicts have gradually disappeared. This development has reached its provisional acme with the publication of the ICRC Customary Law Study, which claims, after ten years of research on “State practice” (in the form of official declarations rather than actual behaviour), that 136 (and arguably even 141) out of 161 rules of customary humanitarian law - many of which parallel rules of Protocol I, applicable as a treaty to international armed conflicts - apply equally to non-international armed conflicts. Even those who remain sceptical whether State practice has truly eliminated the difference to the extent claimed suggest that questions not answered by the law of non-international armed conflicts must be dealt with by analogy to the law of international armed conflicts, except if the very nature of non-international armed conflicts does not allow for such an analogy (e.g., concerning combatant immunity from prosecution and the concept of occupied territories). There is, in addition, no real difference between the non-international armed conflict between the US and the Taliban today and the international armed conflict between those same two parties in 2001. To require soldiers in the former conflicts to capture enemies whenever this is feasible (but not in the latter) is unrealistic on the

65 Ibid., at 17.
66 Ibid., at 21.
67 Id.
battlefield. In addition, the decision when an enemy may be shot at must be taken by every soldier on the ground in a split second and cannot be left to commanders and courts (as can the decision to intern a person discussed later). Clear instructions must exist. Whenever possible, the training of soldiers must be the same in view of international and non-international armed conflicts in order to create automatisms which work under the stress of the battle.

On the other hand, strong arguments call into question the appropriateness of applying the same rules as in international armed conflicts. Many non-international armed conflicts are fought against or between groups that are not well structured. It is much more difficult to determine who belongs to an armed group than who belongs to governmental armed forces. Persons join and quit armed groups in an informal way, while members in governmental armed forces are incorporated and formally dismissed. As armed groups are inevitably illegal, they will do their best not to appear as such. Claiming that fighters may be shot at on sight may therefore put many civilians in danger, whether they are sympathizers of the group, members of the “political wing”, belong to the same ethnic group or simply happen to be in the wrong place at the wrong time. In addition, while in international armed conflicts a clear distinction exists between law enforcement by the police against civilians and conduct of hostilities by combatants against combatants, there is no equivalent clear distinction in non-international armed conflicts.

In conclusion, neither the rules nor the context of IHL of non-international armed conflicts provides a clear answer to the question when an enemy fighter may be attacked.

B. On Detention

1) The traditional answer of international humanitarian law of international armed conflicts

In peacetime as during armed conflict, persons may be detained in view of a trial for a crime or based upon conviction for a crime. What is more specific to armed conflicts is that enemies may also be interned without criminal charge as a preventative security measure. In international armed conflicts this is the essence of prisoner-of-war status. Prisoners of war may be interned without any further procedure until the end of active hostilities.


70 Art. 21 of Geneva Convention III, supra note 5.
IHL equally allows for internment of a civilian “if the security of the Detaining Power makes it absolutely necessary” or “for imperatives reasons of security”; however, it requires an assessment to determine if a civilian poses a threat to security. Thus, Geneva Convention IV mandates procedures to be followed for reviewing the internment of civilians, whether they are aliens in the territory of a party to the conflict or interned in occupied territory, designating the type of review body – either an administrative board or court – and providing for appeal and periodic review. Finally, it should be noted that unlawful confinement is a grave breach of Convention IV.

2) The uncertain answer of the treaty rules of international humanitarian law of non-international armed conflicts

Conventional IHL applicable to non-international armed conflict prescribes how persons deprived of liberty for reasons related to the armed conflict must be treated and it prescribes judicial guarantees for those who are prosecuted for offenses relating to the conflict (such as individual non-State actor participation in the conflict, which always constitutes a crime under the domestic law of the State affected by the conflict), but it does not clarify for which reasons and by which procedures a person may be interned for security reasons. Yet the drafters of Additional Protocol II recognized the possibility of internment taking place in non-international armed conflicts, as demonstrated by the specific reference to internment in Articles 5 and 6.

3) Customary international humanitarian law

According to the ICRC Customary Law Study, based upon State practice which obviously cannot be divided into practice under IHL and practice under IHRL, customary IHL prohibits the arbitrary deprivation of liberty in both international and non-international armed conflicts. This rule is interpreted through significant reference to IHRL. Applying the two prongs of the principle of legality, the Study states that the basis for internment must

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71 Geneva Convention IV (supra note 4), Art. 42 (for an alien on the territory of a party).
72 Ibid., Art. 78(1) (in occupied territory).
73 Ibid., Arts. 43 and 78(2).
75 Arts. 5 and 6(5) of Protocol II, supra note 49.
76 ICRC Customary Law Study, supra note 60, at 344-52.
be previously established by law and stipulates two procedural requirements: (1) an “obligation to inform a person who is arrested of the reasons for arrest” and (2) an “obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention”, described as the “so-called writ of habeas corpus”. When trying, as I am attempting to do in this contribution, to determine whether IHL or IHRL regulates a certain issue, a “customary IHL rule” based on IHRL obviously does not provide a useful starting point for determining the lex specialis.

4) Apply the rule governing international armed conflicts by analogy?
IHL of non-international armed conflicts indicates that internment occurs in non-international armed conflict, but it contains no indication of how it is to be regulated. Such regulation is necessary so that internment can practically take place. One could therefore apply on this issue IHL of international armed conflict to non-international armed conflicts by way of analogy. For members of an armed group with a fighting function captured by international forces in Afghanistan, the closest possible analogy with the regulation of international armed conflicts appears to be with prisoners of war (POWs), who may be detained without any legal procedure until the end of active hostilities. The ICRC Customary Law Study indicates the appropriateness of applying by analogy the standards of Geneva Convention

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77 Ibid., at 348-51.
78 Arts. 5 and 6 of Protocol II, supra note 49.
80 See, for a position rejecting such an analogy UN Commission on Human Rights, Situation of Detainees at Guantanamo Bay, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Special Rapporteur on Freedom of Religion or Belief, Asima Jahangir; and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, P. Hunt; UN Doc. E/CN.4/2006/120. para. 24 (Feb. 27, 2006).
III to those designated as "combatants" in non-international armed conflict. Most arguments in favour and against such an analogy are similar to those mentioned above in relation with the admissibility to attack fighters. Some arguments are however specific to the detention issue. In favour of POW treatment, it must be mentioned that Article 3 of Geneva Convention III encourages parties to non-international armed conflicts "to bring into force by special agreements, all or part of the other provisions of the present Convention". If the parties so agree, they could therefore apply the rules of Convention III to fighters, which do not require any individual procedure to decide upon the internment. As special agreements to the detriment of war victims are void under IHL, application of POW status is therefore not considered as detrimental to fighters. Even without an agreement, a government could obtain the same result, i.e., POW status of fighters, by resuscitating the concept of recognition of the belligerency of an armed group, which has fallen into disuse.

Arguments against this analogy are first that upon arrest, as at the moment of an attack, it is more difficult to identify fighters than soldiers of armed forces of another State. After an attack, an erroneous decision cannot be corrected, because either the member of international forces who erroneously did not attack is dead or the person who was erroneously attacked is dead. After an arrest, however, the correct classification can be made by a tribunal, which will only have its say if the arrested person is not classified as a POW. Second, while in international armed conflicts POWs must be released and repatriated at the end of active hostilities, that moment in time is more difficult to determine in a non-international armed conflict and repatriation is logically impossible in non-international armed conflicts. Even when the end of active hostilities is determined, no obligation for a government to release rebels at that moment exists in IHL.

It has been suggested elsewhere that even for enemy fighters, the analogy should be made with the regime established for civilians to be interned for

81 ICRC Customary Law Study, supra note 60, at 352.
82 Art. 6 of Geneva Convention III, supra note 5.
84 Art. 5 of Geneva Convention III (supra note 5) prescribes status determination tribunals only for persons a detaining power wants to deny POW status.
85 When are active hostilities against the Taliban over? Only once the last Taliban hidden in a mountain cave is arrested?
86 Art. 6(5) of Protocol II (supra note 49) simply encourages the widest possible amnesty.
imperative security reasons rather than with the regime of POWs. Indeed, the rules applicable to international armed conflict generally apply only to protected person categories, such as prisoners of war or civilians, while no such categories exist in non-international armed conflict and what counts is each individual's conduct. The precise nature of that conduct can only be established through a procedure. We had to admit that "the practicality of this approach, however, does not make it legally binding".

V. THE SUBSTANTIVE RULES OF INTERNATIONAL HUMAN RIGHTS LAW APPLICABLE IN AFGHANISTAN

A. On Attacks

Human rights treaties prohibit arbitrary deprivation of life. Most of them do not specify when a killing is arbitrary. Only the ECHR specifies that not to be arbitrary, the killing must be "absolutely necessary:"

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection".

In its case-law outside armed conflicts, the ECtHR has admitted the lawfulness of killing a person who authorities genuinely thought was about to detonate a bomb, but found the insufficient planning of the operation to violate the right to life. By and large, other human rights bodies take the same approach. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide an authoritative interpretation of the principles authorities must respect when using force in order not to infringe the right to life. Those principles limit the use of firearms to cases of:


88 Id.

89 ECHR (supra note 9), Art. 2(2).


91 See, for example, Las Palermas Case, Inter-Am. Ct. H.R. (Ser. C) No. 96, Judgment (2002).
... self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

The intentional lethal use of firearms is only admissible “when strictly unavoidable in order to protect life”. In addition, law enforcement officials:

... shall ... give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident. 92

It must however be stressed that the Basic Principles are addressed to officers “who exercise police powers, especially the powers of arrest or detention”. Military authorities are included, but only if they exercise police powers, 93 which could be interpreted as meaning e contrario that the rules do not bind military authorities engaged in the conduct of hostilities.

Theoretically, IHRL is the same in international, in non-international and outside of armed conflicts. The right to life is in addition not subject to derogations, except, under the ECHR, in case of “lawful acts of war”. 94 The classic case in which a human rights body has assessed the right to life in the context of an armed conflict is the Tablada case. In that case, a group of fighters attacked an army base in Argentina. The Inter-American Commission on Human Rights held that “civilians ... who attacked the Tablada base ... whether singly or as a member of a group thereby ... are subject to direct individualized attack to the same extent as combatants” and lose the benefit of the proportionality principle and of precautionary

93 In the Basic Principles (ibid.) a footnote added to the term “law enforcement officials” clarifies this by referring to the commentary to Art. 1 of the Code of Conduct for Law Enforcement Officials.
94 ECHR (supra note 9), Art. 15(2). It has been argued that this only refers to international armed conflicts (see Doswald-Beck, supra note 47, at 883). In any case, no State has ever tried to derogate based on this exception.
measures. It then exclusively applied IHL (of international armed conflicts) to those attackers. Only civilian bystanders and attackers who surrendered were considered to benefit from the right to life. The Commission did not raise the issue whether the fighters should have been arrested rather than killed whenever possible.

In the Guerrero case, the Human Rights Committee found Colombia to have arbitrarily deprived persons who were suspected – but even by the subsequent enquiry not proven – to be kidnappers and members of a “guerrilla organization”, of their right to life. The police waited for the suspected kidnappers in the house where they had believed the victim of a kidnapping to be held, but which they found empty. When the suspected kidnappers arrived, they were shot without warning, without being given an opportunity to surrender and despite the fact that none of the kidnappers had fired a shot, but simply tried to flee.

The jurisprudence of the ECtHR in cases involving the right to life in the non-international armed conflict in Chechnya includes statements which appear to require that in the planning and execution of even a lawful action against fighters, any risk to life and the use of lethal force must be minimized. These statements were not limited to the protection of the life of civilians, but the actual victims in the case were civilians. In all other cases in which human rights bodies and the International Court of Justice (ICJ) applied the right to life in armed conflicts not of an international character, the persons killed were either hors de combat or not alleged to have been fighters. However, fighters are very often killed, e.g., bombed, while they are not hors de combat. Nevertheless, no such case has been brought before an international human rights monitoring body. Some observers have deduced from the absence of any such case-law that such killings do not violate the right to life, a case being brought before the Inter-American system by a surviving relative of a FARC member being “unthinkable”.

The limited body of case law is thus not really conclusive on the question as to what IHRL requires from government authorities using force against

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99 UCIHL Report, supra note 52, at 36.
fighters, but there is no clear indication that the principles applicable in peacetime do not apply.

B. On Detention

Human rights provisions regulating deprivation of liberty can be found in a variety of different treaties that stipulate that a person may only be deprived of liberty “on such grounds and in accordance with such procedures as are established by law”. All treaties prohibit arbitrary arrest or detention, but only Article 5 of the ECHR specifically and exhaustively enumerates the admissible reasons for depriving a person of his/her liberty. Besides conviction, education of minors, mental illness, drug addiction, vagrancy and immigration control, these include (in Article 5(1)(c)) not only detention on remand, but also, as an alternative, instances “when [the detention] is reasonably considered necessary to prevent his committing an offence ....”. Under the jurisprudence of the ECtHR, the latter alternative could be seen as implicitly allowing for internment, i.e., administrative detention, to hinder an individual from committing a concrete and specific offence. In that situation, however, the person must also be brought (under Article 5(3)) “promptly before a judge or other officer authorized to exercise judicial power and shall be entitled to trial within a reasonable period or to releases pending trial” (emphasis added). Therefore, a majority of writers conclude that Article 5(1)(c) covers only detention in the framework of criminal proceedings and therefore does not allow internment (except in a state of emergency). The jurisprudence of the ECtHR is however not clear on this issue and certain obiter dicta seem to indicate the contrary.

The ICCPR does not mention specific reasons justifying internment, but requires in Article 9(1) that, even when all other conditions are fulfilled, the internment not be arbitrary. The Human Rights Committee underlines that “[t]he drafting history ... confirms that ‘arbitrariness’, is not [simply] to be

100 Art. 9(1) ICCPR (supra note 11). See also Art. 5(1) ECHR (supra note 9), Art. 7 ACHR (supra note 8); and Art. 6 of the African Charter on Human and Peoples’ Rights, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter: ACHPR].

101 Art. 9(1) ICCPR (supra note 11), Art. 5 ECHR (supra note 9), Art. 7(3) ACHR (supra note 8), and Art. 6 ACHPR (supra note 100).


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equated with ‘against the law’, but must be interpreted more broadly to include inappropriateness, injustice, lack of predictability and due process of law’.\textsuperscript{105} The arrest and detention must be reasonable and necessary.\textsuperscript{106}

Internment of enemy fighters would therefore certainly be admissible even without a trial under the ICCPR, while the jury is still out for the ECHR. Under both instruments, however, two procedures must be complied with for a person to be lawfully deprived of his/her liberty. First, an arrested person must be promptly informed of the reasons for arrest.\textsuperscript{107} Second, any person deprived of liberty “shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.\textsuperscript{108}

As such, the right to personal freedom is subject to possible derogations in case of a situation threatening the life of the nation, if such derogation is necessary to face the situation, is proportionate to the threat, and is not incompatible with other international obligations of the derogating State (such as, in case of armed conflict, obligations stemming from IHL). Furthermore, the derogation must be officially declared and communicated to the other States parties to the treaty from which a State wishes to derogate. In addition, under the ICCPR, the derogation may not lead to or consist of discrimination on inadmissible grounds. Under the American Convention on Human Rights, judicial guarantees essential for the protection of non-derogable rights may not be subject to derogations. The Inter-American Court of Human Rights has therefore found that the access to \textit{habeas corpus} and \textit{amparo} proceedings are non-derogable rights.\textsuperscript{109} Similarly, the Human Rights Committee considers that the right to have any arrest be controlled by a judicial body may never be derogated from because it constitutes a necessary mechanism of enforcement for such non-derogable rights as the prohibition of inhumane and degrading treatment and the right to life.\textsuperscript{110} The ECtHR accepted in the past that certain violations of the right to a judicial

\textsuperscript{107} Art. 9(2) ICCPR (\textit{supra note 11}), Art. 5(2) ECHR (\textit{supra note 9}). \textit{See also Art. 7(4) ACHR (\textit{supra note 8}).}
\textsuperscript{108} Art. 9(4) ICCPR (\textit{supra note 11}), Art. 5(4) ECHR (\textit{supra note 9}). \textit{See also Art. 7(6) ACHR (\textit{supra note 8}), and Art. 7(1)(a) ACHR (\textit{supra note 100}).}
\textsuperscript{110} \textit{See Hum. Rts. Comm., General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11 on Art. 4 ICCPR, para. 16 (2001).}
remedy provided for in Article 5(4) ECHR were covered by the right to
derogation under Article 15 ECHR.\textsuperscript{111} It is however submitted that the Court
would not necessarily decide so today, as international practice shown above
has in the meantime developed towards recognizing the non-derogable
nature of \textit{habeas corpus}. As a possible first step in this direction, the Court
held that a period of fourteen days before being brought before a judicial
authority, together with lack of access to a lawyer and of a possibility to
communicate with family and friends, was contrary to the Convention
despite a derogation by State concerned.\textsuperscript{112} As for customary IHRL, it is
widely claimed that the right to \textit{habeas corpus} is non-derogable.\textsuperscript{113}

\section*{VI. WHAT PREVAILS IF BOTH INTERNATIONAL HUMANITARIAN
LAW AND INTERNATIONAL HUMAN RIGHTS LAW APPLY?}

If both IHL and IHRL apply and provide differing answers in a given
situation, the \textit{lex specialis} principle determines which of the two prevails.\textsuperscript{114}
It must however be stressed that if (for whatever reason) one of the two
branches does not apply to certain conduct, no \textit{lex specialis} issue arises.
Thus, if the US is correct in considering that IHRL does not apply
extraterritorially or if IHRL does not create obligations for armed groups, as
the prevailing opinion goes,\textsuperscript{115} their conduct is governed exclusively by IHL.

\begin{itemize}
\item \textsuperscript{112} Aksoy v. Turkey, [1996-VI] Eur. Ct. H.R. 2260, paras. 78, 83 and 84.
\item \textsuperscript{113} For a list of practice pointing to the non-derogability of \textit{habeas corpus}, see ICRC
Customary Law Study, supra note 60, at 350-51 and accompanying footnotes (including
General Comment 29, para. 16, supra note 110). \textit{See also} D. Cassel, \textit{"Security Detention
Criminology, ICRC Guidelines, supra note 79, at 387. Although that decision was purely
based upon the US Constitution, one could also mention the decision of the US Supreme
Court in \textit{Boumediene et al. v. Bush et al.}, 128 S.Ct. 2229 (June 12, 2008), Nos. 06-1195
and 06-1196, that States consider \textit{habeas corpus} to cover even persons they consider
enemy fighters in what they consider an armed conflict.
\item \textsuperscript{114} ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, [1996]
\item \textsuperscript{115} See N.S. Rodley, \textit{"Can Armed Opposition Groups Violate Human Rights Standards?"}, in
\textit{Human Rights in the Twenty-First Century} 297 (K.E. Mahoney & P. Mahoney, eds.,
1993); and para. 47 of the \textit{Report of the Consultative Meeting on the Draft Basic
Principles and Guidelines on the Right to a Remedy and Reparation for Victims of
Violations of International Human Rights and Humanitarian Law, UN ESCOR, 59th
Clapham, \textit{Human Rights Obligations of Non-State Actors} 271-99 (2006).}
I have tried elsewhere to explore what the principle "lex specialis derogat legi generali" means in general and in particular concerning IHL and IHRL. The principle does not indicate an inherent quality in one branch of law or of one of its rules. Rather, it determines which rule prevails over another in a particular situation. Each case must be analyzed individually.

Several factors must be weighed to determine which rule, in relation to a certain problem, is special. Speciality in the sense of logic implies that the norm that applies to certain facts must give way to the norm that applies to those same facts as well as to an additional fact present in the given situation. Between two applicable rules, the one which has the larger "common contact surface area" with the situation applies. The norm with the scope of application that enters completely into that of the other norm must prevail, otherwise it would never apply. It is the norm with the more precise or narrower material and/or personal scope of application that prevails. Precision requires that the norm addressing explicitly a problem prevails over the one that treats it implicitly, the one providing the advantage


119 These terms were first used by M.-E. Walker, LL.M. Student at the Geneva Academy of International Humanitarian Law and Human Rights in my 2008 IHL course.


of detail over the other's generality,\textsuperscript{122} and the more restrictive norm over the one covering the entire problem but in a less exacting manner.\textsuperscript{123}

A less formal factor — and equally less objective — that permits determination of which of two rules apply is the conformity of the solution to the systemic objectives of the law.\textsuperscript{124} Characterizing this solution as "lex specialis" perhaps constitutes misuse of language. The systemic order of international law is a normative postulate founded upon value judgments.\textsuperscript{125} In particular when formal standards do not indicate a clear result, this teleological criterion must weigh in, even though it allows for personal preferences.\textsuperscript{126}

The principle traditionally deals with antinomies between conventional rules. Whether it also applies to the relationship between two customary rules is less clear. Theoretically, this is not the case, if one adopts a traditional understanding of customary law. The customary rule applicable to a certain problem derives from the practice and \textit{opinio juris} of States in relation to that problem. In relation to the same problem, there cannot be a customary "IHRL" and another customary "IHL" rule. One always focuses on the practice and the \textit{opinio juris} manifested in relation to problems as similar as possible to the one to be resolved. This appears to be the approach of the ICRC, which refers, in its \textit{Customary Law Study}, to a vast array of practice in human rights including outside of armed conflicts.\textsuperscript{127} In practice, however, when one looks for a customary rule, one often refers to a text, whether a treaty or another instrument codifying customary law or one that instigated the development of a customary rule,\textsuperscript{128} or even a doctrinal text. Then, one specific problem could be covered by two contradictory texts, both deduced from State practice. The choice between these two texts is, in my opinion, governed by the same principles as the choice between two treaty rules. If the State practice clarifying which of the two rules prevails in the given situation is not sufficiently dense, one must discover by the usual

\textsuperscript{122} See for examples S.A. Sadat-Akha, \textit{Methods of Resolving Conflicts Between Treaties} 124 (2003).

\textsuperscript{123} See, e.g. the ECtHR concerning the relationship between Arts. 13 and 5(4) of the ECHR. Brannigan and McBride v. UK, Judgment, 258 Eur. Ct. H.R. (Ser. A) at 57, para. 76 (1993).

\textsuperscript{124} Koskenniemi, \textit{supra} note 117, at para. 107.

\textsuperscript{125} Krieger, \textit{supra} note 117, at 280.


\textsuperscript{127} ICRC \textit{Customary Law Study}, \textit{supra} note 60, at 299-383.

methods which of the two rules, derived from the practice analyzed from different perspectives, constitutes the lex specialis.

B. On Attacks

First, it must be emphasised that there is a good deal of common ground between IHL and IHRL. In a "battlefield-like" situation, arrest is virtually always impossible without putting the government forces into disproportionate danger. A fighter presents a great threat to life even if that threat consists of attacks against armed forces. The immediacy of that threat might be based not only on what the targeted fighter is expected to do, but also on his or her previous behaviour.\(^{129}\) Therefore, even under IHRL, in such situations, lethal force could be used. On the other hand, the life of a fighter who is hors de combat is equally protected by both branches.

It is where the solutions of the two branches actually contradict each other that the applicable rule must be determined under the lex specialis principle. The quintessential example of such a contradiction is the Taliban or Al Qaeda leader attending a secret meeting in Kabul. Many interpret IHL as permitting international forces to shoot to kill since he is a fighter, but this is controversial. IHRL would clearly say he must be arrested and a graduated use of force must be employed, but this conclusion is based upon precedents which arose in peacetime and IHRL is always more flexible according to the situation.

In my view, some situations contain more specificities of the situation for which the IHL rule was made and some situations more facts for which human rights were typically made. There is a sliding scale\(^{130}\) between the lone Taliban leader in Kabul and the Taliban fighter engaged in a nearly conventional battle with international forces in the mountains around Khost. It is impossible to provide a "one size fits all" answer; as shown above, the lex specialis principle does not determine priorities between two rules in the abstract, but offers a solution to a concrete case in which competing rules lead to different results. The famous dictum by the ICJ that "[t]he test of what constitutes an arbitrary deprivation of life ... must be determined by the applicable lex specialis, namely the law applicable in armed conflicts"\(^{131}\) should not be misunderstood. It has to be read in the context of the opinion,\(^{132}\) in which the ICJ had to determine the legality in abstracto of the use of a certain weapon.

\(^{129}\) DPH 2005 Report, supra note 51, at 52.

\(^{130}\) UCIHL Report, supra note 52, at 38; Several experts in DPH 2005 Report, ibid., at 51-52.

\(^{131}\) Legality of the Threat or Use of Nuclear Weapons, supra note 114, at para. 25.

\(^{132}\) Alston, supra note 117, at 183-209, 192-93.
Such a flexible solution, which makes the actual required behaviour depend upon the situation at hand, is dangerous, in particular regarding attacks, where it literally deals with a question of death and life and where it has to be applied by every soldier and leads to irreversible results. It is therefore indispensable to determine factors which make either the IHL of international armed conflicts rule or the IHRL rule prevail.

The existence and extent of control by governmental and international forces over the place\(^\text{133}\) where the attack occurs points towards IHRL as \textit{lex specialis}.\(^\text{134}\) Even if IHRL obligations under the right to life existed, for a given State, beyond territory that is under the control of that State, control over the place where the attack occurs is a factor making IHRL prevail over IHL. The latter was made for hostilities against forces on or beyond the frontline, \textit{i.e.}, in a place that is not under the control of those who attack them, while law enforcement concerns persons who are under the jurisdiction of those who act. In traditional conflict situations this corresponds to the question of how remote the situation is from the battlefield,\(^\text{135}\) although fewer and fewer contemporary conflicts are characterized by frontlines and battlefields. What then constitutes sufficient control to warrant IHRL predominating as the \textit{lex specialis}? International forces could not simply argue that the presence of a solitary rebel or even a group of rebels indicates that in fact they are not fully in control of the place and therefore act under IHL as \textit{lex specialis}. The question is rather one of degree. If the international forces could effect an arrest (of a Taliban) without being overly concerned about interference by other Taliban in that operation, then it has sufficient control over the place to make human rights prevail as \textit{lex specialis}.

This criterion of control leaves the solution a little more open in an area which is under firm control of neither side (such as many places in Afghanistan). Even where the strict requirements of necessity of IHRL are not fulfilled (if they are, both branches lead to the same result), the impossibility to arrest the fighter,\(^\text{136}\) the danger inherent in an attempt to arrest the fighter\(^\text{137}\) and the danger represented by the fighter for government

\(^{133}\) If the very person targeted is under control, both branches prohibit any summary execution.


\(^{135}\) Id.

\(^{136}\) Targeted Killings Case, supra note 57, at para. 40; Doswald-Beck, supra note 47, at 891.

\(^{137}\) Targeted Killings Case, supra note 57, id.
and international forces and civilians as well as the immediacy of this danger may lead to the conclusion that IHL is the *lex specialis* in that situation. These factors are interlinked with the elements of control described above. In addition, where neither party has clear geographical control, in my view, the higher the degree of certainty that the target is actually a fighter, the easier the IHL approach appears as *lex specialis*. Attacks are lawful against persons who are actually fighters, while law enforcement is by definition directed against suspects.

The main weakness of such a flexible approach is its practicability. If the answer depends on the specific situation, how can a soldier know what to apply? This problem can only be solved by precise instructions and orders for every operation and every sortie. In addition, on the international level, guidelines might be developed in discussions between IHL and IHRL experts, law enforcement practitioners and representatives of the military. Logically, (former) fighters should also be involved, in particular if the guidelines equally cover conduct of such 

to ensure that they can be applied in practice.

**C. On Detention**

When comparing the rules of IHL of non-international armed conflicts on procedural guarantees for persons arrested with those of IHRL, the former do not exist while, except for the admissible extent of derogations, the latter are clear and well developed by jurisprudence. The latter must therefore prevail. They are more precise and more restrictive. The *ICRC Customary Law Study* appears to adopt this approach when it interprets the alleged IHL rule prohibiting the arbitrary deprivation of liberty through the lens of

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140 In relation with armed groups, it is not sure that the *lex specialis* is the same as for government soldiers. Both parties must be equal as far as the applicable IHL is concerned, but they are not equal as far as IHRL is concerned. Even if the latter is addressed to non-State actors, it can only require from them certain conduct towards persons who are in an area under their control. In addition, a State has the alternative of law enforcement, and therefore to plan an operation in such a way so as to maximize the possibility of being able to arrest persons, while the question whether armed groups may legislate to make their enemies’ conduct illegal or whether they may enforce existing legislation is controversial.
Unlike a person to be targeted, for whom a flexible approach was advocated above, a detainee is moreover clearly under control of those who detain him or her. It may be added that the result is not so different from that of an application by analogy of the guarantees foreseen by Convention IV for civilians in international armed conflicts, the only difference being that under IHRL a court must decide, while under IHL an administrative body is sufficient. Under IHRL too, however, the court does not necessarily have to be a fully independent and impartial tribunal that could try a person, but it must have a judicial character and it may only take decisions after judicial, adversarial proceedings providing the individual guarantees appropriate to the reasons of the internment in question.

The only exception where IHL must prevail, as it was specifically made for armed conflicts and foresees a rule, exists when either an agreement between the parties or a unilateral recognition of belligerency makes the full regime of POWs applicable. In that case detained fighters have the disadvantage of a lack of access to habeas corpus (although there must inevitably exist a procedure to determine whether an arrested person is or is not an enemy fighter benefiting from POW status), but they have the advantage of a detailed regime governing their detention, of immunity against prosecution and of a right to be released at the end of active hostilities. In relation to Afghanistan, the question arises whether the agreements concluded by certain coalition partners such as Canada with the Afghan government in which both parties undertake to “treat detainees in accordance with the standards set out in the Third Geneva Convention” can be considered as a unilateral granting of the protection of Convention III, which would make IHL prevail over the IHRL procedural guarantees. According to the letter of those agreements, this is the case, at least for persons who are actually detained by the Afghan authorities. In reality, however, it would be very astonishing if, through those agreements, the Afghan government waived the right to prosecute those arrested for acts of hostility against their forces, which is part of POW status. NGO reports rather indicate that even the treatment of those persons is far from what

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141 See ICRC Customary Law Study, supra note 60, at 344-52.
Convention III would require.\textsuperscript{144} In my view, only full POW status may offer a \textit{lex specialis} compared with the detailed procedural guarantees of IHRL.

The main difficulty with this approach too is whether it is realistic to expect States and non-State actors, interning possibly thousands, to bring all internees before a court without delay during armed conflict. If it is not, such an obligation risks making it extremely difficult to conduct war effectively and, thus, could lead to less compliance with the rules in the long-term, \textit{e.g.,} summary executions disguised as battlefield killings.

A second concern derives from the differences between State and non-State actors, which have equal obligations under IHL but not under IHRL. The question of whether a non-State actor may establish a court remains controversial.\textsuperscript{145} The requirements that there be a legal basis and procedures established by law for internment raise the same concern. While human rights themselves stipulate at least two procedural requirements, neither they nor IHL applicable to non-international armed conflict provide a specific legal basis for internment. While a State can so provide in its domestic law, how is the non-State actor to establish this basis in law? Could then a non-State actor also derogate from IHRL? Application of IHRL seems to make it impossible for one party to the armed conflict – the non-State actor – to intern legally. Parties to armed conflicts intern persons, hindering them from continuing to bear arms, so as to gain the military advantage. If the non-State actor cannot legally intern persons – recalling that it is a serious violation of IHL to deny quarter\textsuperscript{146} – the non-State actor is left with little option but to release the captured enemy fighters. If rules applicable to armed conflict make efficient fighting impossible, they will not be respected, thus undermining any protection the law provides. These may be reasons for not applying the same \textit{lex specialis} reasoning to armed groups even if IHRL were considered to bind non-State armed groups.

VII. CONCLUSION

In an ideal world, armed forces could apply one set of rules when abroad; they would always know who a person they are confronted with is; they would deal under IHL with enemy fighters, while the Afghan police would

\textsuperscript{146} Art. 8(2)(c)(x) of the Rome Statute of the International Criminal Court, supra note 74. \textit{See also} ICRC Customary Law Study, supra note 60, at 161.
deal in full respect of IHRL with everyone else. This ideal world does not exist, and even less so in Afghanistan. It is the very essence of stability operations that they take place in an environment which offers the full spectrum of situations. It is therefore not astonishing but in fact normal that the full spectrum of laws apply: IHL, made for armed conflicts but leaving some questions open, in particular in non-international armed conflicts; IHRL, made for the relations between a State and its citizen, but also applicable to (or at least containing values that must protect) foreigners and people confronted with agents of a State abroad; and the domestic law of the territorial State and of the home State. It is also normal that there is no general answer on how those laws interrelate and which prevails. Everything depends on where on the spectrum a certain encounter with local people is situated. Most often, in addition, the soldier acting in the field, and even the commander responsible for a detention, does not know where on the spectrum he or she is standing. Therefore, the relationship between IHL and IHRL for international forces in Afghanistan depends on many variables, and the identity and weight of those variables is in addition controversial among lawyers. The approach suggested here as to when and whether an Afghan may be attacked and detained like a soldier of the German Wehrmacht in World War II and when he or she must benefit from the guarantees benefiting in peacetime even the most suspect person lurking in a dodgy neighborhood is based upon the fundamental ideas and the typical situations for which the two branches were made. Moreover, it takes into account the practical difficulties of decision-making and the risks, consequences and reversibility of mistakes in that decision-making, for both the target and the member of the international forces. If the security of the international forces was the overriding consideration, they would not be sent by their governments to such a dangerous place as Afghanistan. Victory does not mainly depend upon their military superiority, but on the impression they leave with the Afghan population, compared with what their enemies have to offer.

Many will consider the very nuanced line suggested in this article, which in addition on some important issues is unable to provide solutions and only lists arguments, as unrealistic. In my view, full spectrum operations require soldiers at an increasingly lower level to apply, simultaneously, complicated and controversial rules. However, they are not and they should not be left alone. They need the best possible training and clear instructions for every sortie. In addition, international lawyers and practitioners should meet, not to reaffirm the theory or to conclude that the old rules are not adequate for the new situation, but to operationalize the interplay between the existing rules agreed upon by States, including to explain the few issues on which there are
genuine divergences of view, the (often rather limited) practical impact of those divergences and the possible solutions.