

# The Effects of International Human Rights Law on the Legal Interoperability of Multinational Military Operations

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## I. The Complexities of a Multinational Military Operation

French General Ferdinand Foch, General-In-Charge of the Western Front in World War I, compared the duties of a commander in charge of a multinational military operation to that of a conductor: “I am the leader of an orchestra. Here are the English Bassos, here the American baritones, and there the French tenors. When I raise my baton, every man must play, or else he must not come to my concert.”<sup>1</sup>

While the North Atlantic Treaty Organization (NATO)-led International Security Assistance Force (ISAF) in Afghanistan is currently under the command of one officer, U.S. General Joseph Dunford,<sup>2</sup> getting all the ISAF “band members” to play at the proverbial raise of the baton has proven a great challenge. This challenge derives from caveats issued by each of the fifty contributing nations that limit how the ISAF commander may employ their nations’ troops.<sup>3</sup> These caveats reflect ISAF troop-contributing nations’ differing international legal obligations and national security policies, and have impacted ISAF’s ability to accomplish its mission by creating fissures among ISAF troop-contributing nations on vital issues, such as who the coalition may administratively detain and who the coalition may lethally target.

Caveats often result from disagreement among the troop-contributing nations on two rudimentary international law issues: (1) the legal classification of the military operation<sup>4</sup> and (2) the applicability of international human rights law to the military operation.

Legal classification of a military operation refers to categorizing an operation as part of an international armed conflict (IAC), a non-international armed conflict (NIAC),

or no conflict at all (such as a peacekeeping operation).<sup>5</sup> The classification of the operation determines what treaty law is applicable to the operation in addition to customary international law. An IAC is an armed conflict between two states<sup>6</sup> and requires adherence by signatory states to the four Geneva Conventions of 1949<sup>7</sup> and Additional Protocol I to the Geneva Conventions of 1977.<sup>8</sup> A NIAC is defined in Common Article 3 of the Geneva Conventions as an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” A NIAC is generally an internal conflict between a state and opponents who are “not combatants of another state’s armed force.”<sup>9</sup> The law of armed conflict applicable to NIACs is much less developed than that applicable to IACs, as only Common Article 3 of the Geneva Conventions and Additional Protocol II<sup>10</sup> potentially apply to signatory states.<sup>11</sup> International human rights law, domestic law, or a combination thereof apply to non-conflict situations such as peacekeeping operations.<sup>12</sup>

<sup>5</sup> Laurie R. Blank, *Complex Legal Frameworks and Complex Operational Challenges: Navigating the Applicable Law Across the Continuum of Military Operations*, 26 EMORY INT’L L. REV. 87, 87 (2012).

<sup>6</sup> Common Article 2 of the 1949 Geneva Conventions (“[T]he present Convention 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, even if the state of war is not recognized by one of them.”). For a list of countries who have ratified each of the Geneva Conventions, see ICRC—Treaties and State Parties to Such Treaties, [http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=475](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475) (last visited May 12, 2014).

<sup>7</sup> The four conventions are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GC III]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter GC IV].

<sup>8</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

<sup>9</sup> GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 52 (Cambridge University Press 2010).

<sup>10</sup> For a list of countries that have ratified Additional Protocol II to the Geneva Conventions, see ICRC—Treaties and State Parties to Such Treaties, [http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=475](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475) (last visited May 12, 2014).

<sup>11</sup> Ashley Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 404–05 (2009). Professor Deeks states that “detention in non-international armed conflict is governed almost exclusively by a state’s domestic law.” *Id.*

<sup>12</sup> SOLIS, *supra* note 9, at 150–53.

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<sup>1</sup> FERDINAND FOCH, *THE MEMOIRS OF MARSHAL FOCH* 270 (1st ed. 1931).

<sup>2</sup> *About ISAF*, AFGHANISTAN INTERNATIONAL SECURITY ASSISTANCE FORCE, <http://www.isaf.nato.int/leadership.html> (last visited Apr. 29, 2014).

<sup>3</sup> Ian Hope, *Unity of Command in Afghanistan: A Forsaken Principle of War* (2008), <http://www.strategicstudiesinstitute.army.mil/pdf/files/pub889.pdf> (last visited May 12, 2014).

<sup>4</sup> See Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 32 (2012) (providing a thorough analysis of the legal classification of various types of military operations).

As will be discussed in Part III, there is great debate as to whether international human rights law is displaced by the law of armed conflict or whether it applies concurrently with the law of armed conflict during IACs and NIACs. The traditional U.S. position is that the law of armed conflict displaces international human rights law, while many of its NATO allies remain bound to their international human rights obligations during armed conflict.<sup>13</sup>

Since the various troop-contributing nations operating under the ISAF unified command have different standpoints on the classification of the conflict and the applicability of international human rights law, the legal landscape in Afghanistan can be complex for military operational law attorneys.<sup>14</sup> As a result, troop-contributing nations often jointly participate in “operations under different rules of engagement . . . [leaving] those forces vulnerable to miscommunication, inaction, and even danger.”<sup>15</sup> Given this complex legal landscape, understanding the effects of international human rights law on multinational military operations is critical for military operational law attorneys responsible for advising the commanders and staffs of an allied command.

Oftentimes, especially in the NATO environment, the military operational law attorney will be a member of a legal staff comprised of attorneys from various coalition nations and will be responsible for advising commanders and staff officers who also hail from various nations.<sup>16</sup> When advising a NATO command such as ISAF, the operational law attorney may be assigned in a NATO personnel billet and considered a NATO attorney for the duration of the assignment. In the multinational environment, the attorney will often advise both the alliance—composed of several partner nations—and the attorney’s national government. Understanding the international human rights law obligations of these partner nations will allow the operational law attorney to better understand various alliance perspectives on issues such as detention operations and lethal targeting, which may contrast significantly with the policy of the attorney’s own nation.<sup>17</sup> Often, the attorney

<sup>13</sup> See, e.g., William A. 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 ISR. L. REV. no. 2, at 592 (2007).

<sup>14</sup> Blank, *supra* note 5, at 176–77.

<sup>15</sup> *Id.*

<sup>16</sup> The observations concerning the operational scheme within a North Atlantic Treaty Organization (NATO) command are based upon the author’s professional experiences as Command Judge Advocate, Operational Corps Headquarters, office of the legal advisor to the International Security Force (ISAF) Joint Command, and V Corps Office of the Staff Judge Advocate, Kabul, Afghanistan, from September 2012 to April 2013 [hereinafter Professional Experiences]. See also Colonel Brian H. Brady, *The North Atlantic Treaty Organization Legal Adviser: A Primer*, ARMY LAW., Oct. 2013, at 5.

<sup>17</sup> Commander Alan Cole, a former British legal advisor to ISAF, described “issues of State responsibility for the actions of others” as one of the most challenging legal issues an operational law attorney will face, since

advises on the application of NATO standard operating procedures and rules of engagement. Understanding the international human rights law obligations and policy perspectives of partner nations allows the operational law attorney to gain an awareness of issues that may underlie why a troop-contributing nation may not comply with the NATO standard operating procedures or rules of engagement.

Within ISAF, there are currently several legal offices composed of operational law attorneys from multiple NATO and NATO partner nations, including the offices of the legal advisor at the ISAF headquarters, the ISAF Joint Command (IJC) headquarters, and the NATO Training Mission-Afghanistan (NTM-A) headquarters.<sup>18</sup> The IJC and NTM-A are commanded by three-star generals who each report to the ISAF commanding four-star general. The offices of the legal advisor at these headquarters also provide legal guidance to each of the offices of the legal advisor at the six regional commands throughout Afghanistan.<sup>19</sup> The regional commands are U.S. division equivalents commanded by two-star Generals from four NATO nations.<sup>20</sup> The regional commands are typically comprised of subordinate units from various NATO and NATO partner nations, thus making military interoperability among these units critical for mission accomplishment.

This article aims to familiarize military operational law attorneys with issues concerning the effects of international human rights law on legal interoperability in multinational military operations by using ISAF as a case study, while also using examples from other multinational military operations.<sup>21</sup> While ISAF operations in Afghanistan are set

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operations often involve the cooperation of more than ten nations. Alan Cole, *Legal Issues in Forming the Coalition*, 85 INT’L L. STUD. 141, 148 (2009).

<sup>18</sup> As an example of the multinational legal offices, the ISAF Joint Command legal office is currently composed of a U.S. Legal Advisor who supervises six U.S. attorneys, an Italian Deputy Legal Advisor, a Chief of Operational Law from the United Kingdom, and an Operational Law Attorney from Australia. The Deputy Staff Legal Advisor position has previously been held by officers from France and Spain. Professional Experiences, *supra* note 16.

<sup>19</sup> See *About ISAF: Troop Numbers and Contributions*, AFGHANISTAN INTERNATIONAL SECURITY ASSISTANCE FORCE, <http://www.isaf.nato.int/troop-numbers-and-contributions/index.php> (last visited May 9, 2014) (listing ISAF troop-contributing nations and the six ISAF regional commands).

<sup>20</sup> Regional Command (RC)–North is currently commanded by a German officer, RC–Capital by a Turkish officer, RC–West by an Italian officer, and RCs East, South, and Southwest by U.S. officers. Professional Experiences, *supra* note 16.

<sup>21</sup> For additional information concerning judge advocate support of a multinational operation, see also Major Winston S. Williams, Jr., *Multinational Rules of Engagement: Caveats and Friction*, ARMY LAW., Jan. 2013, at 24.

to end by 1 January 2015,<sup>22</sup> legal interoperability must be focused on post-ISAF so that future coalition engagements are more efficiently pursued. Part II discusses the concepts of military and legal interoperability in a multinational military operation, where several nations operating under varying domestic and international legal obligations must attempt to resolve their disparate and at times contradicting obligations to form a unified military command operating under uniform procedures. Part III addresses the two primary sources of disagreement among ISAF troop-contributing nations concerning the law applicable to its operations: (1) the legal classification of the military operation in Afghanistan and (2) the extent to which international human rights law applies to ISAF operations. Part IV outlines practical issues concerning detention operations and lethal targeting that ISAF has faced due to disagreement among its troop-contributing nations on the law applicable to ISAF operations.

Part V concludes by noting that the experience in Afghanistan has demonstrated a need for the NATO alliance to address the current ambiguity in the application of the law of armed conflict<sup>23</sup> and international human rights law, as demonstrated by the differences among ISAF troop-contributing nations on the applicability of these bodies of law to ISAF operations in Afghanistan. Until this ambiguity is properly addressed, military operational law attorneys must understand the different troop-contributing nations' perspectives on the effects of international human rights law on multinational military operations so that they may provide informed legal advice to military commanders and staff officers from various nations to help achieve unity of effort within the command.

## II. Military and Legal Interoperability in Multinational Military Operations

### A. Military Interoperability

Unity of command and purpose is a critical element if coalition operations . . . are to succeed. With regard to the military component, there were at least two types of difficulties related to unity of command. First off, not all the national contingents operating in the area were placed under UNOSOM [United Nations Operation in Somalia] command, and this led to tragic consequences. Secondly, some contingents that were ostensibly part of UNOSOM were in fact following orders

<sup>22</sup> *NATO and Afghanistan*, NORTH ATLANTIC TREATY ORGANIZATION, [http://www.nato.int/cps/en/natolive/topics\\_8189.htm](http://www.nato.int/cps/en/natolive/topics_8189.htm) (last visited May 9, 2014).

<sup>23</sup> The term "law of armed conflict" as used in this article may be used interchangeably with the "law of war" or "international humanitarian law."

from their respective capitals; this made them unreliable in the mission area and reduced the mission's effectiveness.<sup>24</sup>

As seen from the experience in Somalia, the absence of unity of command<sup>25</sup> impedes mission accomplishment by denying the multinational force commander the power needed to coalesce troops from various nations into a synchronized force, operating under uniform standards to accomplish a unified purpose. Since "the level of command authority vested in a multinational force commander is established by agreement among the multinational partners"<sup>26</sup> who withhold certain command authorities from the multinational force commander, the commander is not limited merely by his own nation's laws and policies, but also by the laws and policies of each of the operations' troop-contributing nations.

As noted by Professor Peter Rowe, troop-contributing nations in a multinational force do not "somehow meld seamlessly into a single armed force comparable to the army of a single nation."<sup>27</sup> While there may be a single commanding officer acting as the multinational force commander, "the reality of the situation is that he will pass his orders to the national commanders who then, in turn, will command their own national contingents."<sup>28</sup> Therefore, while the ISAF commander could theoretically order all ISAF troops to conduct detention operations or lethal targeting operations in accordance with a particular body of law, the execution of this order by each troop-contributing nation is subject to that nation's domestic law, treaty obligations, and policy stances. As a result, subordinate commanders often vet orders through their nations' capitols to determine whether orders they receive can be executed in accordance with their nations' laws.<sup>29</sup> Troop-contributing nations may respond to orders by emplacing various

<sup>24</sup> THE COMPREHENSIVE REPORT ON LESSONS LEARNED FROM UNITED NATIONS OPERATION IN SOMALIA (UNOSOM) (Apr. 1992–Mar. 1995), <http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/ULibrary/UNOSOM.pdf>.

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The decisive application of full combat power requires unity of command. Unity of command results in unity of effort by coordinated action of all forces toward a common goal. Coordination may be achieved by direction or by cooperation. It is best achieved by vesting a single commander with requisite authority.

U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 25–27 (Sept. 1954). While this field manual has been rescinded, its definition of "unity of command" remains pertinent.

<sup>26</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 2-48 (27 Feb. 2008) [hereinafter FM 3-0].

<sup>27</sup> PETER ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES 226 (Cambridge University Press 2006).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

restrictions on where their nation's forces can be utilized in the area of operations, what functions their troops may perform, and by dictating the operating procedures and rules of engagement that will apply to their troops.

Since pure unity of command is unlikely to be achieved in multinational military operations, commanders focus on achieving unity of effort,<sup>30</sup> which requires consensus building among troop-contributing nations rather than "direct command authority."<sup>31</sup> Unity of effort requires each troop-contributing nation to dedicate its personnel and resources to a unified purpose. Military interoperability is the means of synchronizing the various troop-contributing nations' personnel and resources to achieve unity of effort and "focuses on developing . . . procedures with partner nations so that . . . partner forces can operate effectively and interchangeably in designated combined operations."<sup>32</sup> Achieving military interoperability in a multinational military operation poses difficulties because the varying troop-contributing nations inevitably have different weapons and communications systems, military cultures, languages, national defense policies, and legal obligations.

As coalition warfare has become the norm, "the importance of military interoperability has become almost axiomatic."<sup>33</sup> For example, emphasis on interoperability with coalition partners is prominent in the U.S. National Defense Strategy, the U.S. National Military Strategy, and joint doctrine.<sup>34</sup> To achieve interoperability, the multinational force develops common rules of engagement and standard operating procedures to standardize operating norms among the various militaries participating in the multinational operation. These rules of engagement and standard operating procedures often reflect compromises among the various troop-contributing nations so that a procedure can be achieved that complies with each of the nations' legal obligations and national security policies. Despite the effort to achieve interoperability, many nations must still issue caveats stating that they will not adhere to certain rules of engagement or standard operating procedures. By understanding the international human rights law and law of armed conflict obligations of the various troop-contributing nations, the operational law attorney can better anticipate potential interoperability issues

and advise on how to minimize the impact of these issues on operations.<sup>35</sup>

## B. Legal Interoperability as a Subset of Military Interoperability

British military legal advisor Major General (retired) A.P.V. Rogers defines legal interoperability as the ability to

[ensure] that within a military alliance or coalition, despite different levels of ratification of international treaties and different interpretation of those treaties and of customary international law, military operations can be conducted effectively and within the law. This involves identifying likely problem areas, understanding the various national positions and trying to achieve a legal practice to which all can subscribe.<sup>36</sup>

Ideally, each of the troop-contributing nations' differing legal obligations could be resolved so that each of the nations could adhere to the same rules of engagement and standard operating procedures without issuing caveats, thus achieving legal interoperability. While formal alliances such as NATO have invested considerable resources toward standardization and achieving military interoperability, "legal planning has generally lagged behind."<sup>37</sup> Difficulties in achieving legal interoperability have "been exacerbated by differences between Western states in relation to major features of international law."<sup>38</sup>

The following section discusses two of the features of international law that have caused difficulty in achieving legal interoperability within ISAF: the legal classification of an operation and the applicability of international human rights law to the operation.

<sup>30</sup> Unity of effort is defined as "[c]oordination and cooperation toward common objectives, even if the participants are not necessarily part of the same command or organization—the product of successful unified action. U.S. DEP'T OF DEF., JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2010), available at [http://ra.defense.gov/documents/rtn/jp1\\_02.pdf](http://ra.defense.gov/documents/rtn/jp1_02.pdf).

<sup>31</sup> FM 3-0, *supra* note 26, para. 2-49.

<sup>32</sup> U.S. Secretary of Defense's Guidance for Employment of the Forces, in Troy Stone, *War Is Too Important to Be Left to the Lawyers* 10–11 (Oct. 9, 2008) (unpublished thesis, Naval War Coll.), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a494360.pdf>.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.*

<sup>35</sup> For example, in the Kosovo War, NATO procedures allowed troop-contributing nations to decline to execute targeting assignments if they viewed a target as being unlawful. United States Lieutenant General Michael Short observed, "There are nations that will not attack targets that my nation will attack. There are nations that do not share with us a definition of what is a valid military target, and we need to know that up front." M. Kelly, *Legal Factors in Military Planning for Coalition Warfare and Military Interoperability: Some Implications for the Australian Defence Force*, 2 AUSTL. ARMY J. no. 2, at 161, 162 (2005).

<sup>36</sup> A.P.V. Rogers, *Command Responsibility and Legal Interoperability*, NATO LEGAL GAZ. NO. 16, Sept. 2009, at 19–20, <http://www.marshallcenter.org/mcpublicweb/MCDocs/files/College/LGE16.pdf>.

<sup>37</sup> Kelly, *supra* note 35, at 162.

<sup>38</sup> *Id.*

### III. Legal Classification of Military Operations and the Applicability of Human Rights Law During Military Operations

“Identifying the applicable law in a conflict or during a stability operation is . . . an essential first step that enables both military and civilian actors to define their engagement in any international intervention.”<sup>39</sup>

The challenge of determining the law applicable to a military operation and promoting the rule of law in armed conflict is “compounded when states involved in a conflict or military operation do not explicitly characterize it, or when coalition partners have conflicting views as to its characterization.”<sup>40</sup> The ISAF has faced both the issue of troop-contributing nations not explicitly characterizing the military operation in Afghanistan, and troop-contributing nations having conflicting views on the characterization of the operation.<sup>41</sup>

Troop-contributing nations’ characterization of a military operation, which stem from their nations’ legal obligations and strategic policy decisions, have a direct impact on the tactical issues faced by soldiers, such as determining whether or not they are allowed to conduct lethal offensive operations and whether or not they are allowed to administratively detain individuals who pose a security risk. A nation’s classification of an operation dictates what bodies of law its soldiers are obligated to follow during the operation. A military operation may be classified as an IAC, a NIAC, or as a non-conflict such as a peacekeeping operation.<sup>42</sup> However, even if a troop-contributing nation has determined that the operation should be classified as an armed conflict, there is disagreement among troop-contributing nations as to whether human rights law applies concurrently with the law of armed conflict or whether human rights law is displaced by the law of armed conflict.<sup>43</sup> This section first analyzes ISAF troop-contributing nations’ stances on the legal classification of the situation in Afghanistan, and then analyzes ISAF troop-contributing nations’ differing perspectives on the applicability of international human rights law to ISAF operations in Afghanistan.

#### A. Legal Classification of ISAF Operations in Afghanistan

The legal classification of operations in Afghanistan by individual troop-contributing nations has evolved since the

beginning of operations to the present day.<sup>44</sup> Following the attacks by Al Qaeda on the United States on 11 September 2001, United Nations (UN) Security Council Resolutions 1368 and 1373 expressly recognized the United States’ inherent right to act in self-defense in response to the attacks, and the right of its allies to act in collective self-defense.<sup>45</sup> Operation Enduring Freedom (OEF), the military effort of the United States and its coalition partners directed at the Taliban and Al Qaeda, commenced on 7 October 2001.<sup>46</sup> Early coalition participation in the military operation against the Taliban and Al Qaeda reflected the general consensus that the operation was an IAC between the United States and its allies against the Taliban-controlled Afghan government and Al Qaeda, which was governed by the law of IAC.<sup>47</sup> By November 2001, the coalition dislodged the Taliban government from Kabul and assisted the Afghans in forming a provisional government: the Afghan Interim Authority.<sup>48</sup>

After the fall of the Taliban government, some NATO nations questioned “whether the remaining operations in Afghanistan amounted to an armed conflict and, if so, whether it justified the scale of operations taken by OEF.”<sup>49</sup> Subsequently, in December 2001, UN Security Council Resolution 1386 authorized the establishment of ISAF for six months with the mission “to assist the Afghan Interim Authority in the maintenance of security in Kabul and the surrounding area.”<sup>50</sup> The ISAF was initially composed of nineteen nations under the command of a United Kingdom lieutenant general.<sup>51</sup> Some of the ISAF troop-contributing nations, including the United States, United Kingdom, Canada, and Australia, also continued contributing troops to the parallel OEF mission.<sup>52</sup> In comparison to OEF operations, which have been conducted throughout Afghanistan and the region to destroy terrorist training camps and communications and to “clear the way for sustained, comprehensive, and relentless operations to drive [terrorists] out and bring them to justice,”<sup>53</sup> the ISAF

<sup>44</sup> Cole, *supra* note 17, at 141–46.

<sup>45</sup> S.C. Res. 1368, U.N. Doc. S.RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S.RES/1373 (Sept. 26, 2001).

<sup>46</sup> U.S. President George W. Bush, Address to the Nation (Oct. 7, 2001), available at <http://www.press.uchicago.edu/Misc/Chicago/481921texts.html> [hereinafter Bush Address].

<sup>47</sup> Cole, *supra* note 17, at 143.

<sup>48</sup> *Id.* at 143–44.

<sup>49</sup> *Id.* at 145.

<sup>50</sup> S.C. Res. 1386, U.N. Doc. S.RES/1386 (Dec. 20, 2001). Fourteen UN Security Council Resolutions relate to ISAF: 1386, 1413, 1444, 1510, 1563, 1623, 1707, 1776, 1833, 1817, 1890, 1917, 1943 and 2011. *ISAF’s Mandate*, NORTH ATLANTIC TREATY ORGANIZATION, available at [http://www.nato.int/cps/en/natolive/topics\\_69366.htm](http://www.nato.int/cps/en/natolive/topics_69366.htm) (last visited May 15, 2014).

<sup>51</sup> Cole, *supra* note 17, at 144.

<sup>52</sup> *Id.* at 145.

<sup>53</sup> Bush Address, *supra* note 46.

<sup>39</sup> Blank, *supra* note 5, at 88.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 89.

<sup>42</sup> *Id.* at 87.

<sup>43</sup> See, e.g., Schabas, *supra* note 13, at 592.

mission to provide support to the Afghan government in its struggle against the Taliban and Al Qaeda has been more limited in scope.<sup>54</sup> The ISAF operations were initially limited to the Kabul area, and the ISAF mission was primarily defensive, “with only exceptional recourse to the use of offensive force under the law of armed conflict.”<sup>55</sup>

Due to the fall of the Taliban government and the formation of ISAF, coalition members such as the United Kingdom and Canada began considering the ongoing military presence in Afghanistan to have transitioned from an IAC to a NIAC between the government of Afghanistan, with the assistance of the ISAF alliance, against the Taliban and Al Qaeda.<sup>56</sup> This viewpoint is shared by the International Committee of the Red Cross (ICRC), whose official position is that the ISAF operation in Afghanistan has been a NIAC since the fall of the Taliban government in June of 2002.<sup>57</sup>

NATO took command of ISAF in August 2003 upon the request of the Afghan government and the UN.<sup>58</sup> The UN subsequently authorized ISAF to expand outside of Kabul.<sup>59</sup> “Stage One Expansion” began in northern Afghanistan in response to a request from the Afghan Minister of Foreign Affairs for security assistance “in the wider country.”<sup>60</sup> NATO member states at that time “collectively realized there was still substantial fighting to be done if the conditions for political and physical construction were to be created,” which resulted in the formation of “policy, legal, and capability constraints that have characterized ISAF operations.”<sup>61</sup>

While many of its NATO partners viewed the situation in Afghanistan as a NIAC, the position of the U.S. Bush administration at the time was that the conflict was an IAC.<sup>62</sup> However, the 2006 ruling of the U.S. Supreme Court in *Hamdan v. Rumsfeld* required the United States to apply Common Article 3 of the Geneva Conventions to individuals detained abroad, and indicated that the Court viewed the

conflict as a NIAC.<sup>63</sup> John Bellinger, the U.S. Department of State Legal Advisor at the time, argued that the law of armed conflict applicable to NIAC, as compared to the law of armed conflict applicable to IAC, failed to address basic detention issues such as whom a state could detain, what procedures applied to determining a detainee’s status, and when a detainee was required to be released.<sup>64</sup> While the ICRC, human rights advocates, and some partner nations argued that these gaps in the law of armed conflict applicable to NIAC should be filled with international human rights law that provided more precise norms for the conduct of detention, the United States maintained its stance that international human rights law was inapplicable during times of armed conflict.<sup>65</sup>

In contrast to the U.S. position at the time that ISAF operations fell solely under the purview of the law of armed conflict, Germany was an example of an ISAF troop-contributing nation who “remained reluctant . . . to characterize their involvement under the aegis of [ISAF] as an armed conflict” and, while not explicitly stating so, appeared to be applying human rights norms to its involvement in ISAF.<sup>66</sup> In 2006, the German government insisted that the use of lethal force by its troops was “prohibited unless an attack is taking place or is imminent.”<sup>67</sup> German soldiers were directed not to refer to their actions as “attacks,” but were instructed to speak in terms of the “use of appropriate force.”<sup>68</sup>

While the Germans did not specifically state at the time that the law of armed conflict did not apply to their operations in Afghanistan, this German “national clarification”<sup>69</sup> to the NATO rules of engagement is in line with the perspective that the Germans were conducting operations at that time under international human rights law rather than the more permissive law of armed conflict, which allows “use of deadly force as a measure of first resort.”<sup>70</sup> In 2009, the German news magazine *Spiegel* reported that the German government was slowly realizing that the threat posed by the Taliban in the German area of operations in Regional Command North required a more “offensive

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<sup>54</sup> Cole, *supra* note 17, at 145.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> ICRC Resource Center—International Humanitarian Law and Terrorism: *Questions and Answers*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/eng/resources/documents/publication/p0703.htm> (last visited May 12, 2014).

<sup>58</sup> North Atlantic Treaty Organization, *ISAF’s Mission in Afghanistan*, [http://www.nato.int/cps/en/natolive/topics\\_69366.htm](http://www.nato.int/cps/en/natolive/topics_69366.htm) (last visited Apr. 16, 2014).

<sup>59</sup> *Id.*

<sup>60</sup> Cole, *supra* note 17, at 146.

<sup>61</sup> *Id.*

<sup>62</sup> Stephen Pomper, *Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back Before Looking Ahead*, 85 INT’L L. STUD. 525, 526 (2009).

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<sup>63</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>64</sup> John Bellinger, *Leverhulme Programme Lecture on the Changing Character of War* (Dec. 10, 2008), available at <http://2001-2009.state.gov/s/rls/96687.htm>.

<sup>65</sup> Pomper, *supra* note 62, at 528.

<sup>66</sup> Blank, *supra* note 5, at 89.

<sup>67</sup> *Changing the Rules in Afghanistan: German Troops Beef Up Fight Against Taliban*, SPIEGEL ONLINE INT’L (July 9, 2009), <http://www.spiegel.de/international/germany/0,1518,635192,00.html> [hereinafter *Changing the Rules*].

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 85 INT’L HUMANITARIAN LEGAL STUD. (1) 52 (2010).

approach” than the “peace operations” the Germans were conducting at the time allowed.<sup>71</sup> In April of 2009, the Germans recanted their national clarification of 2006, and in 2010, the German government finally recognized its participation in ISAF military operations as being part of an armed conflict.<sup>72</sup>

While most ISAF troop-contributing nations recognize current operations in Afghanistan as part of a NIAC,<sup>73</sup> there is still much disagreement concerning how international human rights standards apply during times of NIAC and whether international human rights rules serve as “gap-fillers” when the law of NIAC does not directly or adequately address conduct during military operations.<sup>74</sup>

## B. The Applicability of International Human Rights Law to ISAF Operations in Afghanistan

The traditional viewpoint is that the law of armed conflict regulates the actions of states and individuals during armed conflict, while international human rights law and domestic law regulate the actions of states and individuals during times of peace.<sup>75</sup> Despite the traditional viewpoint, almost all ISAF troop-contributing nations now hold the position that both the law of armed conflict and international human rights law apply during times of armed conflict; however, there is disagreement among those nations as to the extent of the applicability of human rights law during armed conflict.<sup>76</sup> This section discusses the conflicting views on the application of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) during armed conflict.<sup>77</sup>

<sup>71</sup> *Id.*

<sup>72</sup> “Foreign Minister Guido Westerwelle, speaking explicitly as a representative of the government as a whole, announced before the Bundestag that Germany now considered the conflict in all of Afghanistan, and thus including the northern part of the country, an ‘armed conflict’ in terms of international humanitarian law.” Timo Noetzel, *Germany’s Small War in Afghanistan: Military Learning Amid Politico-Strategic Inertia*, 31 CONTEMP. SECURITY POL’Y 486, 487 (2010).

<sup>73</sup> *Rule of Law in Armed Conflicts Project (RULAC), Afghanistan: Applicable International Law*, GENEVA ACAD. OF INT’L HUMANITARIAN LAW & HUMAN RTS., [http://www.geneva-academy.ch/RULAC/applicable\\_international\\_law.php?id\\_state=1](http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=1) (last visited Apr. 16, 2014).

<sup>74</sup> Schabas, *supra* note 13, at 598.

<sup>75</sup> Blank, *supra* note 5, at 90–91.

<sup>76</sup> *Id.* at 91.

<sup>77</sup> Due to their pertinence to the issues of detention operations and lethal targeting within the ISAF, the international human rights treaties that are principally discussed in this article are the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (opened for signature Nov. 4, 1950) [hereinafter ECHR].

First, the section addresses the U.S. traditional stances that the ICCPR does not apply outside of its borders and that the law of armed conflict displaces international human rights law during times of armed conflict, and then contrasts this position with the international consensus that the ICCPR applies both extraterritorially and during times of armed conflict. The section then discusses the obligations under the ECHR of European NATO members and the implications of decisions by the European Court of Human Rights (ECtHR), holding that the ECHR applies both extraterritorially and during times of armed conflict.

### 1. *The ICCPR and Its Applicability Extraterritorially and During Armed Conflict*

The ICCPR is among the foremost international human rights treaties, and together with the Universal Declaration of Human Rights<sup>78</sup> and the International Covenant on Economic and Social Rights,<sup>79</sup> comprise what is informally referred to as the “International Bill of Human Rights.”<sup>80</sup> The ICCPR is of great importance in the debate of the applicability of human rights law during times of armed conflict due to its provisions potentially affecting detentions and lethal targeting.<sup>81</sup>

Specifically concerning detentions, Article 9 of the ICCPR states, “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>82</sup> Article 9 also includes rights for detainees that are not provided by the law of armed conflict, such as the detainee’s right to know the reason of his detention at the time of arrest, the right to have a court review the grounds for detention, the right to a trial, and the right to compensation for being unlawfully detained. These rights are more expansive than what are available to a detainee under the law of armed conflict. For example, in a NIAC, Common Article 3 of the Geneva Conventions provides little protection other than the guarantee of “humane treatment” and the prohibition of “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.”

<sup>78</sup> G.A. Res. 217A (III), U.N. Doc A/810, at 71 (1948).

<sup>79</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>80</sup> *International Bill of Human Rights*, UNITED FOR HUM. RTS., <http://www.humanrights.com/what-are-human-rights/international-human-rights-law-continued.html> (last visited Apr. 16, 2014).

<sup>81</sup> The ICCPR has been described as “the most comprehensive articulation of relevant human rights obligations to which the United States is a party.” Pomper, *supra* note 62, at 529.

<sup>82</sup> ICCPR, *supra* note 77, art. 9.

Article 6 of the ICCPR potentially applies to lethal targeting during armed conflict and states that an individual cannot be arbitrarily deprived of life, and that a sentence of death may only be “carried out pursuant to a final judgment rendered by a competent court.”<sup>83</sup> This prohibition on the deprivation of life stands in contrast to the law of armed conflict’s permissive lethal targeting of enemy combatants as a “measure of first resort.”<sup>84</sup>

Given the conflicting standards under the law of armed conflict and international human rights law for conducting detentions and lethal targeting, states have had differing perspectives on how to apply these competing norms during extraterritorial armed conflicts.<sup>85</sup> The United States’ traditional stance has been that its human rights obligations are not applicable “to actions arising in extraterritorial armed conflicts, both because of treaty-based limitations and because of the doctrine of *lex specialis*.”<sup>86</sup> *Lex specialis* is a legal doctrine of interpreting competing rules which requires the more specific rule to “displace the more general rule.”<sup>87</sup> There are two different interpretations as to how the concept of *lex specialis* should be applied during armed conflict. The first interpretation is that of “norm conflict avoidance,” in which the law of armed conflict as *lex specialis* displaces international human rights law in whole so that all legal issues during times of armed conflict are governed by the law of armed conflict.<sup>88</sup> The second interpretation is that of “norm conflict resolution,” in which international human rights law and the law of armed conflict are complementary during times of armed conflict and that for any given issue, the rule to be applied—whether from human rights law or law of armed conflict—according to *lex specialis* should be the one that provides the greatest level of specificity for that issue.<sup>89</sup> The United States has traditionally advanced the norm conflict avoidance interpretation: the position that its law of armed conflict obligations displace its international human rights law obligations during times of armed conflict.<sup>90</sup>

As for limitations to the ICCPR based upon the wording of the treaty, the ICCPR states, “Each State Party to the

present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant . . . .”<sup>91</sup> In 2004, the UN Commission on Human Rights, the treaty body responsible for monitoring human rights issues, interpreted this provision to apply to individuals within a state’s territory *or* subject to its jurisdiction outside of its territory.<sup>92</sup>

In contrast, the United States has often cited the italicized phrase of the ICCPR above to argue that the ICCPR’s obligations do not apply outside of its national borders. U.S. Department of State Legal Advisor John Bellinger, in his opening remarks to the UN Committee Against Torture in 2006, stated that “[t]he United States has made clear its position . . . the [ICCPR], by its express terms, applies only to ‘individuals within its territory *and* subject to its jurisdiction.’”<sup>93</sup> Additionally, in its 2007 response to the UN Commission on Human Rights’ General Comment 31,<sup>94</sup> the U.S. government cited the ICCPR’s drafting history, focusing on the ICCPR phrase “within its territory and subject to its jurisdiction” to support its argument of non-extraterritorial application.<sup>95</sup> The U.S. government argued that the U.S. negotiating party led by Eleanor Roosevelt “insisted on the reference to ‘territory’ in Article 2 because they did not believe it would be practicable to apply the guarantees of the Covenant extraterritorially.”<sup>96</sup> From the

<sup>91</sup> ICCPR, *supra* note 77, art. 2, para. 1 (emphasis added).

<sup>92</sup>

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

United Nations Comm’n on Human Rts. Gen. Comment on ICCPR Article 31 (2004), available at <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f> (last visited Apr. 16, 2014).

<sup>93</sup> John B. Bellinger, Opening Remarks, U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), <http://www.state.gov/g/drl/rls/68557.htm> (emphasis added).

<sup>94</sup> The UN Human Rights Committee is the treaty body responsible for oversight of the implementation of the ICCPR by its signatory states. See *Human Rights Committee*, UNITED NATIONS HUM. RTS., <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited May 12, 2014). In its General Comment 31, the Human Rights Committee interpreted Article 2 of the ICCPR to require signatory states to “respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.” Human Rights Committee General Comment No. 31, (May 26, 2004), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en).

<sup>95</sup> U.S. Observations on Human Rights Committee General Comment 31, U.S. DEP’T OF STATE (Dec. 27, 2007), <http://2001-2009.state.gov/s/1/2007/112674.htm>.

<sup>96</sup> Pomper, *supra* note 62, at 530.

<sup>83</sup> *Id.* art. 6.

<sup>84</sup> Corn, *supra* note 70, at 75.

<sup>85</sup> *Id.* at 56.

<sup>86</sup> Pomper, *supra* note 62, at 526.

<sup>87</sup> Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. no. 2, at 310, 338 (2007).

<sup>88</sup> Marko Milanovic, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law*, J. CONFLICT & SECURITY L. 459, 475 (2010).

<sup>89</sup> *Id.* at 473–76.

<sup>90</sup> See, e.g., J. Bellinger, Comments of John Bellinger, former U.S. State Department Legal Advisor, OPINIO JURIS (Jan. 25, 2007), available at <http://opiniojuris.org/author/john-bellinger/> (last visited Apr. 16, 2014).

drafting of the ICCPR until 2011, the U.S. government's position remained consistent that Article 2, Paragraph 1 was written in the conjunctive, which requires a person over whom the United States is exercising authority to be within U.S. territory and subject to U.S. jurisdiction for the United States to be bound by the ICCPR to respect and ensure rights under the covenant to that person.<sup>97</sup>

However, the United States' Fourth Periodic Report in 2011 to the UN Human Rights Committee concerning its obligation under the ICCPR indicated a shift of its stance on the application of its international human rights law obligations during times of armed conflict and outside of its borders.<sup>98</sup> The report first acknowledged the traditional U.S. position that it is not bound by the ICCPR for wars outside of its territory. The report then recognized that the UN Human Rights Committee, the International Court of Justice, and other State Parties have taken the position that the ICCPR applies outside of a State Party's boundaries, but failed to state the current U.S. position on extraterritorial application of the ICCPR.<sup>99</sup> Some commentators see the U.S. acknowledgement of the international community's pervasive viewpoint of extraterritoriality and omission of the current U.S. position as a subtle sign of a shifting policy toward U.S. recognition of international human rights obligations outside of its territorial boundaries.<sup>100</sup>

In contrast to the ambiguity on the U.S. position regarding extraterritoriality, the report explicitly recognized the application of the ICCPR during times of armed conflict, but did not specifically address situations of extraterritorial conflict. The report stated that "a time of war does not suspend the operation of the Covenant to matters within its scope of application," and cited the right to religious belief and the right to vote as two examples of obligations a state would be compelled to respect during a time of war.<sup>101</sup> The phrase "within its scope of application" indicates that the U.S. position may be that the ICCPR applies only to armed conflicts within its territory and not to extraterritorial armed conflicts. The report further states "that international human

rights law and the law of armed conflict are in many respects complementary and mutually reinforcing."<sup>102</sup> This statement is in stark contrast to the prior U.S. position that international human rights law does not pertain to times of armed conflict.<sup>103</sup> The report goes on to acknowledge the concurrent application of human rights law and the law of armed conflict:

Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of NIACs occurring within a State's own territory.<sup>104</sup>

Once again, this statement on the complementary of the law of armed conflict and international human rights law stands in contrast to the prior U.S. position that the law of armed conflict displaces international human rights law during times of armed conflict. Due to its explicit statement that the ICCPR applies during times of armed conflict and its previously stated position that the ICCPR does not apply extraterritorially, it appears that the United States' current position is that it must adhere to the ICCPR during times of armed conflict, but only if the armed conflict is within its own territory. In its concluding observations on the United States' Fourth Periodic Report on 26 March 2014, the Human Rights Committee stated, "The Committee regrets that the State party continues to maintain its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, despite the contrary interpretation of article 2(1) supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and state practice."<sup>105</sup> It remains to be seen if the United States' position will change to explicitly recognize the application of the ICCPR outside its boundaries.

As recognized by the United States in its Fourth Report to the Human Rights Committee and emphasized by the Human Rights Committee's concluding observations on the report, the current generally held view in the international community is that international human rights obligations do apply both extraterritorially and during times of armed

<sup>97</sup> *Id.* The U.S. government also maintained this stance in its first submission to the United Nations Human Rights Committee in 1995.

<sup>98</sup> U.S. Dep't of State, Fourth Periodic Rep. of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (Dec. 30, 2011) [hereinafter U.S. Fourth Periodic Rep.], available at <http://www.state.gov/j/drl/rls/179781.htm>.

<sup>99</sup> "The United States in its prior appearances before the Committee has articulated the position that article 2(1) would apply only to individuals who were both within the territory of a State Party and within that State Party's jurisdiction." *Id.* para. 505.

<sup>100</sup> See, e.g., Beth Van Schaack, *U.S. ICCPR Report Coy on Extraterritoriality*, INTLAWGIRLS (Jan. 21, 2012), <http://www.intlawgrrls.com/2012/01/us-icpr-report-coy-on.html>; Marko Milanovic, *U.S. Fourth ICCPR Report, IHRL and IHL*, EJIL TALK! (Jan. 19, 2012), <http://www.ejiltalk.org/us-fourth-icpr-report-ihrl-and-ihl/>.

<sup>101</sup> U.S. Fourth Periodic Rep., *supra* note 98, para. 506.

<sup>102</sup> *Id.* para. 507.

<sup>103</sup> See, e.g., Beth Van Schaack, *U.S. Adjusts View on Human Rights Law in Wartime*, INTLAWGIRLS (Jan. 23, 2012), available at <http://www.intlawgrrls.com/2012/01/us-adjusts-view-on-human-rights-law-in.html>. International Law Girls is a legal commentary website that serves as a forum for leading female judges, attorneys, professors, law students, and advocates to comment on international legal issues.

<sup>104</sup> U.S. Fourth Periodic Rep., *supra* note 98, para. 507.

<sup>105</sup> Advanced Unedited Version of UN Human Rights Committee Concluding Observations on the 4th Periodic Report of the United States' (Mar. 26, 2014), available at <http://justsecurity.org/wp-content/uploads/2014/03/UN-ICCPR-Concluding-Observations-USA.pdf>.

conflict. The following provision from the International Court of Justice's 1996 *Nuclear Weapons* advisory opinion is "one of the key sources of the position that human rights law and the law of armed conflict apply jointly in the context of IAC"<sup>106</sup>:

The Court observes that the protection of the International Covenant [on] Civil and Political Rights does not cease in times of war . . . . In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>107</sup>

The court in the *Nuclear Weapons* advisory opinion appears to adopt the norm conflict resolution interpretation of *lex specialis*, in which the law of armed conflict applies concurrently to international human rights law rather than displacing it. The court later elaborated on the complementarity of the law of armed conflict and international human rights law in its *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory* opinion, thus further cementing in international law the notion that international human rights law is applicable during times of armed conflict.<sup>108</sup>

<sup>106</sup> Pomper, *supra* note 62, at 530.

<sup>107</sup> Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, Advisory Opinion, 1996 I.C.J. 226, 240, para. 25.

<sup>108</sup>

As regards [to] 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. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178, para. 106.

## 2. *The Applicability of the ECHR to Extraterritorial Armed Conflict*

The International Court of Justice is not the only international judiciary body to hold that international human rights law is applicable during armed conflict. In the *Case of Al-Skeini and Others v. The United Kingdom*,<sup>109</sup> the ECtHR explicitly held that state parties to the ECHR are obligated to apply the ECHR during extraterritorial armed conflicts when spatial and personal jurisdiction requirements are met.<sup>110</sup> Since each of the European members of NATO are parties to the ECHR,<sup>111</sup> the decisions of the ECtHR holding that the ECHR is applicable to ECHR parties during extraterritorial armed conflict is of great significance to all NATO parties. For example, as will be discussed in the next section, many ISAF nations have chosen not to conduct administrative detentions due to obligations under the ECHR.<sup>112</sup>

In *Al-Skeini*, the ECtHR held that a state's obligation under the ECHR applies extraterritorially to an individual when a state exercises "public powers normally to be exercised by a sovereign state" in the territory of another state and has personal jurisdiction over that individual.<sup>113</sup> In this case, there were representatives for six applicants—five were Iraqi citizens who were "killed, or allegedly killed, by British troops on patrol in UK-occupied" territory in Iraq, and the sixth applicant was allegedly mistreated and then killed in a UK detention facility in Iraq.<sup>114</sup> The applicants litigated the case through the UK court system and ultimately appealed the House of Lords' decision that the ECHR was not applicable extraterritorially<sup>115</sup> to the ECtHR.

The ECtHR's holding was a "bizarre mix of the personal model [of jurisdiction] with the spatial [model of jurisdiction]."<sup>116</sup> The court tried to reconcile past decisions on which it based the extraterritoriality of the ECHR on

<sup>109</sup> *Case of Al-Skeini and Others v. The United Kingdom*, European Court of Human Rights App. No. 55721/07, 7 July 2011.

<sup>110</sup> Relevant ECHR provisions during times of armed conflict include Article 5(1), which states that "[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law. . . ." See Milanovic, *supra* note 88, at 474. The article then lists six specific instances in which an individual may be arrested or detained, none of which would allow administrative detention as conceived under the Geneva Conventions. *Id.*

<sup>111</sup> John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, EUROPEAN J. INT'L L. (2000), <http://www.ejil.org/pdfs/12/3/1528.pdf>.

<sup>112</sup> Cole, *supra* note 17, at 150.

<sup>113</sup> Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 2 EUROPEAN J. INT'L L. no. 1, at 121, 131 (2012).

<sup>114</sup> *Id.* at 125.

<sup>115</sup> *United Kingdom House of Lords, R (on the application of Al-Skeini and others) v. Sec'y of State for Defence*, (2007) UKHL 26, (2008) AC 153.

<sup>116</sup> Milanovic, *supra* note 113, at 131.

either a state's personal jurisdiction of an individual outside of its borders or on a state's spatial jurisdiction outside of its borders due to public powers the state was exercising in another state.<sup>117</sup> Article 1 of the ECHR pertains to the scope of the convention and states that "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention." Note that the ECHR simply refers to "jurisdiction" and does not include the territorial requirement that the ICCPR contains. The *Al-Skeini* decision that interprets a state to have jurisdiction when it exercises public powers in another state and has personal jurisdiction over that individual appears to be an amalgam of the ECtHR's previous decisions in *Loizidou v. Turkey*<sup>118</sup> and *Cyprus v. Turkey*.<sup>119</sup> In *Loizidou v. Turkey*, the ECtHR had set out a spatial model of jurisdiction in which "a state possesses jurisdiction whenever it has effective overall control of an area."<sup>120</sup> Whereas, in *Cyprus v. Turkey*, the ECtHR applied the personal model of jurisdiction in which "a state has jurisdiction whenever it exercises authority or control over an individual."<sup>121</sup>

In *Al-Skeini*, the ECtHR found that the UK had jurisdiction over the six deceased Iraqis, requiring application of the ECHR since the UK exercised "public powers normally to be exercised by a sovereign government" by engaging "in security operations in Basrah"<sup>122</sup> (spatial jurisdiction) and that acts of UK soldiers caused each of the six deaths (personal jurisdiction).<sup>123</sup> The ECtHR found the UK breached its obligations to the six Iraqis under the ECHR and "awarded substantial damages and costs" to the applicants. The *Al-Skeini* decision is significant for the European members of NATO because it sets a precedent that their extraterritorial military operations will likely be subject to the ECHR and that failure to adhere to the ECHR can result in pecuniary liability to potentially thousands of individuals detained or killed in violation of the ECHR.<sup>124</sup> The following section discusses how the influence of international human rights law and cases such as *Al-Skeini* have influenced NATO troop-contributing nations during ISAF operations in Afghanistan.

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<sup>117</sup> *Id.*

<sup>118</sup> *Loizidou v. Turkey*, European Court of Human Rights App. No. 15318/89, Judgment (preliminary objections), 23 Feb. 1995; *Loizidou v. Turkey*, European Court of Human Rights App. No. 15318/89, Judgment (merits), 18 Dec. 1996.

<sup>119</sup> *Cyprus v. Turkey*, European Court of Human Rights App. Nos. 6780/74 and 6950/75, 26 May 1975.

<sup>120</sup> *Id.* at 122.

<sup>121</sup> *Milanovic*, *supra* note 113, at 122.

<sup>122</sup> *Id.* at 149.

<sup>123</sup> *Id.* at 150.

<sup>124</sup> *Id.* at 139.

#### IV. Practical Legal Interoperability Issues Encountered in ISAF

The legal classification of ISAF operations and the issue of how the law of armed conflict and international human rights law interact during armed conflict are not merely theoretical debates. The differences among ISAF troop-contributing nations has had an effect on the ground in Afghanistan, especially involving the issues of lethal targeting and detention operations.

##### A. Lethal Targeting

The law of armed conflict "authorizes states to use force as a first resort against legitimate targets"; whereas, human rights law requires that force be used only as a last resort."<sup>125</sup> The law of armed conflict rules applicable to lethal targeting are "based on the presumption that *all* members of an enemy force represent a threat sufficient to justify the use of deadly force as a means to produce enemy submission."<sup>126</sup> International human rights law does not allow for such a presumption; deadly force is only allowed based upon the conduct of the individual which poses an immediate threat under "a traditional law enforcement paradigm."<sup>127</sup>

Differences in approaches to the use of deadly force have caused a fracture among ISAF members over how lethal targeting may be conducted in Afghanistan. For example, in 2008, a German special forces unit located in Kunduz under the German commanded Regional Command North attempted to capture a Taliban leader known as the Baghlan bomber, who had been suspected of emplacing roadside improvised explosive devices, sheltering suicide bombers prior to their attacks, and killing seventy-nine Afghans in the bombing of a sugar factory in Baghlan.<sup>128</sup> Upon approaching the bomber's hiding place, the German special forces unit was detected by the bomber, allowing the bomber to flee.<sup>129</sup> Under the law of armed conflict, the Germans could have killed the bomber while he was fleeing, but were prohibited from doing so by a German "national exception" that stated "[t]he use of lethal force is prohibited unless an attack is taking place or is imminent."<sup>130</sup> The Germans' failure to neutralize the Baghlan bomber caused great angst at ISAF headquarters as reflected in a British ISAF staff officer's statement that "[t]he Krauts are allowing

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<sup>125</sup> *Blank*, *supra* note 5, at 117.

<sup>126</sup> *Corn*, *supra* note 70, at 82.

<sup>127</sup> *Blank*, *supra* note 5, at 117.

<sup>128</sup> Susanne Koelbl & Alexander Szandar, *Not Licensed to Kill: German Special Forces in Afghanistan Let Taliban Commander Escape*, DER SPIEGEL (May 19, 2008), available at <http://www.spiegel.de/international/world/not-licensed-to-kill-german-special-forces-in-afghanistan-let-taliban-commander-escape-a-554033.html>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

the most dangerous people to get away and are in the process increasing the danger for the Afghans and for all foreign forces here.”<sup>131</sup>

By restricting the use of force to situations of self-defense, the German government caused its special forces unit to be impotent once it was discovered by the enemy, put the lives of those German soldiers at risk, and impeded the ISAF objective of neutralizing Taliban leaders to improve Afghanistan’s security situation. The German government justified its national exception prohibiting it from offensively targeting Taliban leaders by stating it considered its ISAF allies’ policy on offensive targeting as “not being in conformity with international law,” and that “[a] fugitive like the Baghlan bomber is not an aggressor and should not be shot unless necessary.”<sup>132</sup> While the German government did not elaborate on how its ISAF allies did not comply with international law in conducting offensive targeting, it is a fair conclusion that the German statement was premised on their characterization of the operation as a peacekeeping operation governed by international human rights law.<sup>133</sup> Accordingly, the Germans prohibited themselves from offensively targeting the Baghlan bomber in accordance with the law of armed conflict.

The German news magazine *Spiegel* reported in 2008 that the German reluctance to participate in lethal targeting was creating problems with ISAF because insurgents were “increasingly gaining influence in the nine provinces under German control.”<sup>134</sup> In 2009, *Spiegel* reported that German soldiers were subject to the rules of “peacetime operation” and that they were confused as to when they could use lethal force.<sup>135</sup> During a battle in Chahar Dara in 2009, some German “soldiers thought that they had to wait until they were shot at before they could fight back” and “essentially turned themselves into targets.”<sup>136</sup> Around this time, the German government began “allowing its forces to take a

more offensive approach”<sup>137</sup> and finally, in 2010, acknowledged ISAF military operations as an armed conflict.<sup>138</sup> However, since that time, the German military and government have still demonstrated reluctance to participate in targeting operations as robustly as many of its ISAF partners.<sup>139</sup>

It is critical for operational law attorneys in a multinational military operation to be aware of national exceptions such as the one previously in place by the Germans, which only allowed German soldiers to use lethal force if an attack was taking place or imminent. Such national exceptions limit a multinational commander’s ability to utilize all of the troops within the command for certain offensive engagements. The operational law attorney must advise the commander accordingly so that the commander can most optimally utilize his troops given the legal constraints emplaced by various troop-contributing nations.

## B. Detention Operations

In Afghanistan, disagreements concerning detention operations stem from troop-contributing nation differences on the characterization of ISAF operations and the applicability of international human rights law to those operations. These disagreements negatively impact “the operational-level commander’s ability to standardize and synchronize population control and intelligence gathering operations, two cornerstones of any successful counter-insurgency campaign.”<sup>140</sup> The classification of the operation as an IAC, a NIAC, or as a non-conflict “impacts the parameters and term of the detention, the relevant international humanitarian law and human rights norms applicable upon transfer, procedures for review and prosecution . . . .”<sup>141</sup>

Disagreements among troop-contributing nations on the legal characterization of ISAF operations in Afghanistan and the applicability of international human rights law have created varying standards among the troop-contributing nations on the conduct of detention operations.<sup>142</sup> While some states authorize their “forces to detain under the ISAF aegis, another refuses to detain at all.”<sup>143</sup> The varying stances reflect the ambiguity and contrasting viewpoints concerning what law should be applied to ISAF operations.

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> For another instance of how the German approach to ISAF operations varied from its ISAF partners, see James D. Bindenagel, *Afghanistan: The German Factor*, PRISM 1, no. 4, Sept. 4, 2010, at 95, 107.

U.S. forces conduct practical training for the Afghan army in real combat situations, but such training fell outside the German mandate. In contrast, German forces at first applied police training methods relevant to domestic law enforcement activities. Although both types of training were useful and important, the clash in perspectives reduced the ability to engage in joint operations and joint decision-making on these issues.

*Id.* at 107.

<sup>134</sup> Koelbl & Szandar, *supra* note 128.

<sup>135</sup> *Changing the Rules*, *supra* note 67, at note 65.

<sup>136</sup> *Id.*

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<sup>137</sup> *Id.*

<sup>138</sup> Noetzel, *supra* note 72, at 487.

<sup>139</sup> *Id.*

<sup>140</sup> Stone, *supra* note 32, at 8.

<sup>141</sup> Blank, *supra* note 5, at 96.

<sup>142</sup> *Id.* at 109.

<sup>143</sup> *Id.*

The law of armed conflict in an IAC allows states to administratively detain enemy combatants on purely preventive grounds to prevent them from returning to combat<sup>144</sup> and to intern civilians “if the security of the Detaining Power makes it absolutely necessary.”<sup>145</sup> The law of armed conflict in a NIAC allows for states to “detain individuals engaged in hostile acts against it, such as armed rebels and individuals that the state deems a serious threat to security.”<sup>146</sup> Whereas, under the ECHR (the international human rights treaty pertinent to detentions most often followed by NATO states), states may only detain individuals in six specific instances which comport with a traditional criminal justice paradigm as compared to the more permissive detention standards of the law of armed conflict.<sup>147</sup>

NATO troop-contributing nations are thus required to choose between the standards under either the law of armed conflict or international human rights law in determining who their soldiers may detain during ISAF operations. While ISAF policy provides guidance for conducting administrative detention, NATO countries such as Canada, the Netherlands, and the United Kingdom have refused to participate in ISAF detention operations in Afghanistan, and have each reached bilateral agreements with the Afghan government that captured enemy combatants will be transferred to Afghan authorities rather than detained by the alliance.<sup>148</sup> Soldiers from these nations do not administratively detain captured enemies themselves, but

allow the Afghan troops they operate with to take custody of the prisoners whenever possible or hold the prisoners for a short time until they may be transferred to Afghan authorities.<sup>149</sup>

While, in theory, transfer of captured enemy fighters to Afghan authorities is a step toward building the rule of law in Afghanistan, many problems have resulted from the failure of all ISAF troop-contributing nations to conduct administrative detention. By immediately transferring prisoners to Afghan authorities, ISAF has at times failed to obtain the prisoners’ actual identities, subsequently lost oversight of the prisoners’ status, and also lost opportunities to question the prisoners to gain intelligence about enemy activity.<sup>150</sup> Losing accountability of enemy prisoners has allowed some insurgents to return to the battlefield, setting back ISAF’s objective “to enable the Afghan authorities to provide effective security across the country and ensure that the country can never again be a safe haven for terrorists.”<sup>151</sup>

Furthermore, troop-contributing nations that have chosen to transfer captured combatants to Afghan authorities instead of administratively detain enemy combatants have come under attack for failing to meet their obligations under the Convention Against Torture.<sup>152</sup> The Convention Against Torture’s provision on non-refoulement prohibits transferring “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>153</sup> Since detainees in Afghan detention facilities have persistently made claims of being tortured by Afghan detention officials,<sup>154</sup> NATO states have often found themselves in the catch-22 of not being able to administratively detain certain enemy combatants themselves due to their obligations under the ECHR, but being unable to transfer them to Afghan authorities under the Convention Against Torture. As a result, many NATO nations have “been reluctant to take part in detention

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<sup>144</sup> GC III, *supra* note 7, art. 21.

<sup>145</sup> GC IV, *supra* note 7, arts. 41–43.

<sup>146</sup> Deeks, *supra* note 11, at 404.

<sup>147</sup> ECHR, *supra* note 77, art. 5(1) states

(a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

*Id.*

<sup>148</sup> David Bosco, *A Duty NATO Is Dodging in Afghanistan*, WASH. POST, Nov. 5, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/03/AR2006110301397>.

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *NATO and Afghanistan*, NORTH ATLANTIC TREATY ORGANIZATION, [http://www.nato.int/cps/en/natolive/topics\\_8189.htm](http://www.nato.int/cps/en/natolive/topics_8189.htm)? (last visited Apr. 16, 2014). To achieve this objective, ISAF has shifted “progressively from a combat-centric role to a more enabling role focusing on training, advising and assisting the Afghan National Security Forces to ensure that they are able to assume their full security responsibilities by the end of transition.” *Id.*

<sup>152</sup> See, e.g., *Amnesty International Canada v. Canada* (Chief of the Defence Staff) (F.C.), 2008 FC 336, [2008] 4 F.C.R. 546, Canada: Federal Court, 12 Mar. 2008, available at <http://www.unhcr.org/refworld/docid/49cb8cff2.html>. Amnesty International sued the Canadian government for violating the Convention Against Torture by transferring detainees to Afghan authorities. *Id.*

<sup>153</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>154</sup> See, e.g., United Nations Assistance Mission Afghanistan, *Treatment of Conflict-Related Detainees in Afghan Custody: One Year On* (2013), available at <http://unama.unmissions.org/LinkClick.aspx?fileticket=VsBL0S5b37o%3D&tabid=12323&language=en-US>.

operations.”<sup>155</sup> This reluctance has resulted in disparate detention practices among ISAF troop-contributing nations and hindered unity of effort within ISAF. While ISAF troop-contributing nations may choose to derogate from their international human rights law obligations in times of emergency<sup>156</sup> and choose to follow the law of armed conflict, states rarely declare they are derogating from their human rights treaty obligations because to do so “would be interpreted as a concession that the IHRL treaty, in principle, applies extraterritorially to a given situation, and would thus open the State’s actions to judicial scrutiny, even if a curtailed one.”<sup>157</sup>

Therefore, as with lethal targeting, it is important for military operational law attorneys to know what body of law a NATO troop-contributing nation will follow so that the operational law attorney may anticipate military interoperability issues and advise the multinational military commander and staff how best to proceed in operations involving the potential detention of enemy combatants.

## V. Conclusion

Efforts to improve legal interoperability are necessary because the law ultimately affects the actions of soldiers on the battlefield. These soldiers must receive clear instructions on how to conduct themselves because, as Professor Geoffrey Corn stated, “In an area of an already complex and often confused battle space, there can be little tolerance for adding complexity and confusion to the rules that war-fighters must apply in the execution of their missions. Instead, clarity is essential to aid them in navigating this complexity.”<sup>158</sup>

Furthermore, the necessity to understand the implications of international human rights law during armed conflict is only likely to increase, as NIACs and multinational military operations have increasingly become the norm in the past seventy years.<sup>159</sup>

As demonstrated by the difficulties of ISAF in achieving military interoperability in the areas of lethal targeting and detention operations, the experience in Afghanistan has shown a need for the NATO alliance to address the current ambiguity within NATO as to how to reach a consensus on the applicable law during multinational military operations, and what standards from the law of armed conflict and international human rights law are to be applied during multinational military operations. Until this ambiguity is properly addressed,<sup>160</sup> military operational law attorneys must understand the effects of international human rights law on legal interoperability in multinational military operations so that they may provide informed legal advice to military commanders and staff from various nations to help the multinational military operation best achieve unity of effort within the confines of international law.

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<sup>155</sup> Cole, *supra* note 17, at 150.

<sup>156</sup> See, e.g., ICCPR, *supra* note 77, art. 4; ECHR, *supra* note 77, art. 15 (derogation clauses).

<sup>157</sup> Milanovic, *supra* note 88, at 467.

<sup>158</sup> Corn, *supra* note 70, at 54.

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<sup>159</sup> Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000) (“The change in direction toward intrastate or mixed conflicts—the context of contemporary atrocities—has drawn humanitarian law in the direction of human rights law.”).

<sup>160</sup> For an example of efforts by some NATO member states to address the deficiencies in legal interoperability, see Jacques Hartman, *The Copenhagen Process: Principles and Guidelines* (Dec. 25, 2012), available at <http://www.ejiltalk.org/the-copenhagen-process-principles-and-guide-lines>. The Government of Denmark initiated the Copenhagen Process on the Handling of Detainees in International Military Operations (The Copenhagen Process) on October 11, 2007 to address “uncertainties surrounding the legal basis for detention and the treatment of detainees during military operations in non-international armed conflicts, such as . . . operations in Afghanistan or Iraq.” *Id.*