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Counter-Insurgency, Human Rights, and the Law of Armed Conflict

by Federico Sperotto*

INTRODUCTION

Counter-insurgency is the dominant aspect in the United States-led Operation Enduring Freedom (OEF) in Afghanistan, and, since the NATO-led International Security Assistance Force (ISAF) has assumed growing responsibility throughout insurgents' sanctuaries, also a mission for Europeans.

According to the U.S. military, insurgency represents an intermediate step in the spectrum of conflict, which ranges from stable peace to general war.¹ The frame in which military operations are conducted is known as *irregular warfare*, a violent struggle among state and non-state actors for legitimacy and influence over a population.² This form of conflict is characterized by three principle activities: insurgency, counter-insurgency, and unconventional warfare, referring to the avoidance of direct military confrontation and use instead of indirect methods such as terrorism to subvert and exhaust opponents.³ Irregular military forces are normally active in these conflicts, although conventional forces may also be heavily involved, particularly in counter-insurgency efforts.⁴

Counter-insurgency operations differ from conventional operations because of three main factors.⁵ First, operations are often conducted among civilians and troops are mostly lodged in urban areas while military outposts are close to agricultural activities in rural areas.⁶ Second, forces opposing Western intervention generally avoid direct military confrontation, instead using unconventional methods like terrorist attacks.⁷ Finally, opponents are sometimes difficult to distinguish from peaceable civilians until combat erupts.

These circumstances require a degree of caution in the conduct of counter-insurgency operations higher than that provided for by international humanitarian law (IHL), the law of armed conflict.⁸ Despite the considerable number of issues covered by that body of law, its rules — when compared to the complexity of modern warfare — are insufficient.

IHL is the *lex specialis* which applies in armed conflicts. When there is a gap (*lacuna*) in IHL, it should be supplemented by human rights law.⁹ Under the *lex specialis* doctrine, the more specific rule should be understood as the application of a general rule to a particular context. The general rule then remains relevant in interpreting the specific.¹⁰ Assuming that IHL is *lex specialis* and human rights law is the *lex generalis*, it is evident



Three wounded children in Jalalabad, Afghanistan, after a U.S. bombardment in 2001.

Courtesy of the Revolutionary Association of the Women of Afghanistan.

that ambiguities in the law of war should be resolved by reference to human rights law.¹¹

Regional human rights treaties and the jurisprudence developed there under in regional human rights courts should serve as persuasive authority when applying and interpreting IHL, in particular as evidence of international custom.¹² This argument has been made by authoritative scholars. For example, according to Professor Abresch, “with rules that treat armed conflicts as law enforcement operations against terrorists, the ECtHR [the European Court of Human Rights] has begun to develop an approach that may prove both more protective of victims and more politically viable than that of humanitarian law.”¹³ Peter Rowe writes, “[W]hat human rights law can do is to simplify what may appear to be a confusing situation.”¹⁴

This paper develops this argument by illustrating how recent evolutions in human rights norms, particularly in the jurisprudence of the ECtHR, may serve to fill gaps in IHL as applied to counter-insurgency operations such as those conducted in Afghanistan. First, the paper looks at recent trends in ECtHR jurisprudence relating to military or quasi-military situations. Second, it looks at the various laws and policies that govern troops fighting in Afghanistan. Finally, it compares the applicable IHL and human rights rules on a number of sensitive issues regarding the use of lethal force and protection of civilians. These examples illustrate that broader human rights rules may be more applicable to the counter-insurgency context, when IHL rules prove insufficient for the complexities of such irregular warfare.

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ECTHR: HUMAN RIGHTS PRINCIPLES APPLIED TO MILITARY OPERATIONS

The ECtHR, a regional court that adjudicates questions of state compliance with the rights set forth in the 1950 European Convention on Human Rights, has no competence on law of war issues. Nevertheless, the Court has developed a comprehensive analysis of constraints on the use of force by a State Party to the Convention, even when it is fighting a war, within or outside of its borders.

Beginning with the decision in a case concerning an anti-terrorism operation in Gibraltar,¹⁵ and culminating with judgments related to the second war in Chechnya,¹⁶ the Court has produced relevant case law on the conduct of military operations. In each judgment, the lawfulness of a killing has been tested considering the two aspects of the conduct of the operation — the actions of the soldiers and the operational responsibility of the chain of command — in order to determine whether, under the circumstances, soldiers used disproportionate and excessive force and whether the state's authorities failed to plan and control the operation — whether deliberately, recklessly, or carelessly — thereby failing to minimize casualties. The Court has considered various facets of the incidents, but has found that operations were not planned and executed with the requisite care, emphasizing the use of extreme firepower unleashed in congested civilian areas, which amounted to the collective targeting of the civilian population without credible efforts to distinguish between combatants and civilians.

In this analysis, the Court has applied the 1950 Convention, treating large battles as law-enforcement episodes.¹⁷ Its reasoning, however, has touched on the humanitarian law concepts of distinction, proportionality, and the prohibition against indiscriminate attacks.¹⁸ The Court's right-to-life standards resemble international norms on the use of force in an armed conflict, but the Court required more stringent precautions.¹⁹ It stated that only certain circumstances render the use of lethal force inevitable, and the so-called collateral damage theory²⁰ may be argued only if victims were mistakenly but reasonably believed to be combatants or were unintentionally killed by nearby fighting, notwithstanding all feasible precautions to avoid or minimize incidental loss of civilian life.

OVERVIEW OF LAW AND POLICIES GOVERNING THE CONDUCT OF MILITARY OPERATIONS IN AFGHANISTAN

Constraints on the use of force during military operations, including counter-insurgency, depend on international laws and policies, as well as on internal laws of troop-contributing states, directives issued by their governments, and local laws. In Afghanistan, the normative system which applies to the mission is complex. Soldiers have to respect local laws and traditions, *insofar as they are compatible* with accomplishing the UN mandate.²¹ The Military Technical Agreement between ISAF and the Interim Administration for Afghanistan states, "All ISAF and supporting personnel, including associated liaison personnel, enjoying privileges and immunities under this Arrangement will respect the laws of Afghanistan, insofar as it is compatible with the UNSCR (1386) and will refrain from activities not compatible with the nature of the Mission."²² Deployed personnel are, however, subject to the exclusive jurisdiction of the sending



By Staff Sgt. William Cresson.

U.S. Navy Hospital Corpsman evacuate an Afghanistan National Army soldier after he was hit with an IED explosion.

state.²³ Even in the event that they violate local laws, the sending state retains the power to judge violators.

Troops deployed in Afghanistan can use all necessary means to implement the UN mandate.²⁴ Although not explicit, this authorization includes the use of lethal force (1) in self-defense or (2) during offensive operations necessary to disrupt insurgents' resistance.

Self-defense is the right to react to an imminent threat, which is instant, manifest, and overwhelming.²⁵ The reaction must be necessary and proportional. The imminence requirement ensures that deadly force will be used only where it is necessary, as a last resort, in the exercise of the inherent right of self-preservation. Necessity refers to the need to use force *at all*, while proportionality refers to the degree of force, once it has been established that some force is necessary to avoid an attack. Finally, self-defense is used to justify the use of lethal force in actions which can be defined as anticipatory self-defense, for example during "troops-in-contact" interventions.²⁶

Offensive operations are also integral to counter-insurgency operations.²⁷ The OEF coalition and ISAF have to cooperate in order to attain security throughout the country. As the security situation potentially justifies the offensive use of force, troops are obliged to conduct attacks within the limits of (1) the law of armed conflict and (2) rules of engagement (ROE) issued by the military authorities. The general legal framework is based on customary international law rules regulating the conduct of hostilities,²⁸ under which use of force is premised on the conditions of necessity and proportionality. ROE — directives issued by competent military authority which delineate the circumstances and limitations under which forces will initiate and continue combat engagement — explicate in operational terms the international rules on the conduct of hostilities. ROE represent a synthesis of a background resulting from international law and case studies.

IHL VERSUS HUMAN RIGHTS ON THE USE OF LETHAL FORCE AND CIVILIAN PROTECTION

In Afghanistan, civilians have been repeatedly hit by aircraft in troops-in-contact interventions or caught in armed clashes between coalition forces and insurgents.²⁹ Casualties occurred predominantly during rapid-reaction strikes, carried out in support of ground troops after they came under insurgents' attacks.

The point of departure in the analysis of proportionality should be the innocent civilians' right to life. The deprivation of civilian life would only be acceptable as an unintended outcome of a use of force no more than *absolutely necessary* for defending threatened human lives, even during armed conflicts.

Unplanned airstrike responses to insurgent attacks are the most known incidents of civilian loss of life.³⁰ But NATO has relied heavily on air power, which has taken a serious toll on civilian lives.³¹

Loss of innocent lives during military operations is not a *per se* violation of the law. Rather, IHL prohibits attacks which may be expected to cause *incidental* loss of life and injury to civilians, which would be *excessive* in relation to the concrete and direct military advantage anticipated.³² Such a disproportionate attack is considered indiscriminate. The entire matter is regulated by the 1977 Additional Protocol I, which supplements the Geneva Conventions of 12 August 1949 and provides for the protection of war victims. Part IV deals with the conduct of hostilities in detail.³³

Under IHL, proportionality is based on the balancing of military necessity and humanitarian considerations.³⁴ Article 51 of Protocol I entails the duty to refrain from exaggerated harm to civilians.³⁵ It is based upon a balancing between conflicting values and interests, whereas collateral damage to the civilian population should be *per se* so severe that even a military objective with very substantial benefit could not justify it.³⁶

In human rights instruments, the level of probability that hostilities will threaten life is taken into account differently, as the use of force must be strictly proportionate to the aim of protecting persons against unlawful violence. No military opportunity could justify disregard for the lives of civilians. This concept should be the overall concept accepted in the law of modern warfare.

The point of departure in the analysis of proportionality should be the innocent civilians' right to life. The deprivation of civilian life would only be acceptable as an unintended outcome of a use of force no more than *absolutely necessary* for defending threatened human lives, even during armed conflicts. Furthermore, as the ECtHR stated in *McCann*, "The use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk."³⁷ The European Court applied this rule to all cases involving operations of security forces, putting on the same level law enforcement, counter-terrorism operations, and large battles.³⁸ As observed by David

Kennedy, "The idea of a boundary between law enforcement, limited by human rights law, and military action, limited by the laws of armed conflict, seems ever less tenable."³⁹

The translation of general principles of the law of armed conflict into concrete norms for troops takes place by means of ROE. ROE synthesize international law and case studies. Including a retrospective review of commanders' decisions as well as the analysis of inquiries and judgments on the use of lethal force may help to increase implementation of precautions required by normative instruments. This review should also draw on regional human rights jurisprudence such as ECtHR.

For example, whereas Article 51(2) prescribes that "the civilian population as such, as well as individual civilians, shall not be the object of attack," this general rule is insufficient without further specification. It should specify the absolute prohibition to target armed combatants located among civilians except when those combatants pose an immediate danger to life. Such a rule considers the operational environment in a place like Afghanistan, where irregular combatants do not differentiate themselves from the civilian population, but conceal themselves within it, and thus measures to protect civilians from being caught up in the conflict are difficult to implement. These rules also give due consideration to the fact that, in an asymmetrical confrontation, insurgents could respond with no restraint.⁴⁰

A second issue concerns warnings. Article 57(2)(c) of Additional Protocol I requires that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit." The striking of a village or in a compound whose residents have been warned cannot be considered legally justified if there is a reasonable possibility that civilians are *de facto* hostages of the insurgents. The assumption that once a warning is issued, a strike against combatants who are among the civilians can be validated is fallacious. As stated in Protocol I Article 51(3), civilians can be attacked only when they participate directly in hostilities and for such time they participate. When non-combatant civilians appear to ignore a warning, it does not turn them into voluntary human shields and thus legitimate targets. Here, again, the jurisprudence of the ECtHR provides a broader rule on the obligations of the military in such a situation. In *Isayeva v. Russia* (2005), the Court held that when troops warn civilians to leave

before an attack, they must also ensure that civilians have a safe exit and somewhere to go.⁴¹

Protocol I Article 57(2)(ii) requires all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life. This ought to require precisely delivered weapons. In *Isayeva v. Russia*, the ECtHR held on this issue that when the military considered the deployment of aircraft equipped with heavy combat weapons within the boundaries of a populated area or residential compounds, they also should have considered the dangers that such methods invariably entail.⁴²

CONCLUDING REMARKS

Provisions regarding the use of force in combat situations should seek to create mechanisms that minimize mistakes and verify legitimate targets, fulfilling the obligation to refrain from harming civilians and the obligation to ensure that civilians are

not harmed by opposing forces. This goal is more easily accomplished when IHL rules are supplemented by jurisprudence based on the application of broader human rights principles.

Counter-insurgency operations are conducted amidst civilians and in populated areas. Insurgents use perfidious tactics and terrorist means. Nevertheless, loosening the ROE because of the uncertainty of a risky environment means externalizing risks onto civilians.

ROE consistent with international human rights principles, rather, are necessary to save innocent lives and spread the rule of law. From a utilitarian point of view, they disrupt consensus towards insurgents, win hearts and minds of battered populations, and facilitate soldiers in returning home safely. After Operation Cast Lead in Israel, Colonel Daniel Reisner told *Haaretz* that international law progresses through violations.⁴³ Law, however, progresses through restraint. **HRB**

ENDNOTES: Counter-Insurgency, Human Rights, and the Law of Armed Conflict

¹ U.S. ARMY, FIELD MANUAL FM-3.0 (OPERATIONS) (2008) at 2-1.

² *Id.* at 2-45.

³ *Id.* at 2-46.

⁴ *Id.* at 2-10.

⁵ U.S. ARMY, *supra* note 1, at 2-1.

⁶ *Id.* at 2-59.

⁷ *Id.* at 2-45.

⁸ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, arts. 35-42, 48-58, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

⁹ See HCJ 769/02, *Pub. Comm. against Torture in Israel v. Gov't of Israel* [2006] IsrSC 57(6) 285, ¶18.

¹⁰ MARK OSIEL, THE END OF RECIPROCITY 124 (2009).

¹¹ *Id.* at 127.

¹² *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, <http://www.echr.coe.int/echr/>, Appeals Chamber Judgment at 38-40 (using regional human rights jurisprudence as persuasive authority for the right of the accused to be present for trial).

¹³ William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L. 741, 767.

¹⁴ Peter Rowe, Professor of Law, Lancaster University, Fourth Ruth Steinkraus-Cohen International Law Lecture: Do Soldiers Really Have to Apply Human Rights Law in Military Operations? (May 16, 2006) 11, available at http://www.unawestminster.org.uk/pdf/peter_rowe_lecture_2006.pdf (last visited Nov. 16, 2009).

¹⁵ See *McCann and others v. UK*, 324 Eur. Ct. H.R. (Series A.) at 213 (1995).

¹⁶ See, e.g., *Akhmadov and Others v. Russia*, (No. 21586/02) Eur. Ct. H.R. (2008).

¹⁷ See *id.* at 97. The expression used in precedent cases was “illegal armed insurgency.”

¹⁸ Protocol I, *supra* note 8, arts. 48, 51.

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, Europ. T.S. No. 5.

²⁰ The U.S. Department of Defense defines “collateral damage” as the “[u]ntentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time. Such damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack.” U.S. DEPARTMENT OF DEFENSE, DICTIONARY OF MILITARY TERMS 95 (2009).

²¹ See S. C. Res. 1890, U.N. Doc. S/RES/1890 (Oct. 8, 2009).

²² Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Annex A, §1(2), Jan. 4, 2002.

²³ See, e.g., *id.*

²⁴ S.C. Res. 1890, *supra* note 21.

²⁵ See Louis-Philippe Rouillard, *The Caroline Case: Anticipatory Self-Defence in Contemporary International Law*, 1 MISKOLC J. INT'L L. 1, 104 (2004) (quoting U.S. Secretary of State Daniel Webster who defined the necessity of anticipatory self-defense as “instant, overwhelming, leaving no choice of means and no moment for deliberation.”); see also Judgement and Opinion, Int'l Military Tribunal, Nuremberg at 171 (Oct. 1, 1946) (“[I]t is clear that as early as October, 1939, the question of invading Norway was under consideration. The defense that has been made here is that Germany was compelled to attack Norway to forestall an Allied invasion, and her action was therefore preventive. It must be remembered that preventive action in foreign territory is justified only in case of “an instant and overwhelming necessity for self-defense leaving no choice of means, and no moment of deliberation.”).

²⁶ According to Human Rights Watch, “troops in contact” refer to “unplanned . . . [air]strikes in support of ground troops that have made contact with enemy forces.” HUMAN RIGHTS WATCH, TROOPS IN CONTACT: AIR-STRIKES AND CIVILIAN DEATHS IN AFGHANISTAN 34 (2008).

²⁷ U.S. ARMY, *supra* note 1, at 1-20.

²⁸ See, e.g., *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgement and Opinion, ¶¶ 27-28 (Dec. 5, 2003) (“The jurisprudence of the Tribunal has already established that the principle of protection of civilians has evolved into a principle of customary international law applicable to all armed conflicts. Accordingly, the prohibition of attack on civilians embodied in the above-mentioned provisions reflects customary international law.”).

²⁹ See HUMAN RIGHTS WATCH, *supra* note 26.

³⁰ *Id.* at 24.

³¹ Carlotta Gall & David E. Sanger, *Civilian Deaths Undermine Allies’ War on Taliban*, N.Y. TIMES, May 13, 2009, available at <http://www.nytimes.com/2007/05/13/world/asia/13AFGHAN.html> (last visited Nov. 16, 2009).

³² See Protocol I, *supra* note 8 at art. 51 (“Civilians shall enjoy the protection afforded by this section unless and for such time as they take a direct part in hostilities.”). For rules relating to internal armed conflicts, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 13, June 8, 1977, 1125 U.N.T.S. 609; 26 I.L.M. 568 (1987).

³³ See Protocol I, *supra* note 8 at arts. 35-42, 48-58.

³⁴ JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 3 (Cambridge 2004), available at http://assets.cambridge.org/97805218/37521/excerpt/9780521837521_excerpt.pdf (last visited Nov. 16, 2009).

³⁵ Protocol I, *supra* note 8, art. 51(5)(b).

³⁶ Beyond the respect of human dignity, there are also considerations of opportunity, as inappropriate use of force can erode popular support.

³⁷ See *McCann and others v. UK*, 324 Eur. Ct. H.R. (Series A.) at 91 (1995).

³⁸ See Abresch, *supra* note 11.

³⁹ DAVID KENNEDY, ON LAW AND WAR 113 PRINCETON UNIVERSITY PRESS (2006).

⁴⁰ These principles stem from judgments questioning the use of force by Turkish security forces against PKK operatives and Russian forces against Wahabi rebels in Chechnya. See, e.g., *Ocalan v. Turkey*, 37 Eur. H.R. 238 (2003); *Isayeva v. Russia*, No. 57950/00, Eur. Ct. H.R. (2005).

⁴¹ In *Isayeva v. Russia*, the applicant and her relatives were attacked when trying to leave the village of Katyr-Yurt through what they perceived to be a safe exit. There was no evidence that at the planning stage of the operation any serious calculations were made about the evacuation of civilians, such as ensuring that they were informed of the attack beforehand, how long such an evacuation would take, what routes evacuees were supposed to take, what kind of precautions were in place to ensure safety. No. 57950/00, Eur. Ct. H.R. (2005) at 189.

⁴² *Id.*

⁴³ Yotam Feldman & Uri Blau, *Consent and Advice*, HAARETZ, Feb. 05, 2009.