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I decided to write my thesis on legal matters in Afghanistan following my experience of working there. On 23 February 2008, I landed at the Bagram Air Field, sixty kilometres from Kabul. Bearing in mind popular films with scenes of planes spectacularly shot down from surrounding hills, I was looking around with more than just curiosity. My job in Afghanistan was a once in a lifetime experience.

Afghanistan is a unique place in many respects. The beauty of this landlocked country has been faced with protracted armed conflict for more than thirty years. The terrorist attacks on the World Trade Centre made Afghan soil a world superpower playground yet again. This country, located at the crossroads of Asia neighbours “difficult” partners. China and Pakistan are nuclear powers as well as Russia and India. All these countries have their own particular interest in Afghanistan and have supported different factions of the conflict for years. The USA, UK and France are other nuclear states which were located there and still influence the situation there. It creates a puzzle situation with nearly all the nuclear powers engaged in the conflict on the dusty plains and mountains of Afghanistan. This complex, political environment is one aspect of the challenge. The second one is the character of the conflict. Asymmetric in nature, the conflict locates the civilian population as the centre of gravity. This conflict featured the largest NATO military involvement in history. Massive illegal substance production, smuggling drugs and weapon etc., fuel the insurgents’ struggle. Furthermore, created by the insurgents’ war economy, this seems to be a *modus operandi* of modern and future conflicts.

Last year’s conflict in Afghanistan was commonly referred to as a “task or test” for NATO and the international community. This is because NATO countries could not fail the task of bringing stabilization to Afghanistan. It was also the biggest test of NATO as a military alliance. However, the ongoing war in Afghanistan was a challenge for contemporary lawyers as well. Many contemporary lawyers believed if a reasonable compromise between military necessity and human rights could be found, then there would be a future for stabilization missions. On the other hand, if Afghanistan turned out to present a scene of extreme violation of humanitarian law committed by NATO allied forces, no one would then

vote for politicians who support any military engagement. As a result, there would be no future military operation on the scale of that in Afghanistan. The same situation would occur if NATO allied troops suffer excessive casualties due to, for example, unreasonable legal constraints and national caveats.

The main discussion of my thesis addresses legal issues arising out of military operations in Afghanistan. The reason being that there is no existing comprehensive analysis of the mission in Afghanistan. However, it is an extremely broad issue. Since much has been written on *ius ad bello* aspects of foreign engagement in Afghanistan and there are a lot of publications on the political dimension of NATO presence there, I decided to limit my thesis to *ius bello* practical aspects of NATO's operation. This thesis will present not one or two issues, but provide an overall portrait of the legal challenges. To be more precise, I comparatively examine the case of Polish and British engagement. Such a comparative approach helps to reach a *de lege ferenda* conclusion. This is possible as I can draw on both practical knowledge based on my engagement in the Polish Military Forces and theoretical knowledge based on my affiliation to academic institutions in both Great Britain and Poland. It is especially interesting because both countries operate within a similar legal regime and under similar US influence. A comparative approach also enables me to reach a general conclusion based on detailed analysis of the two countries' legal systems.

My development of my thesis was influenced by several factors. The main factor is simple; when I was writing it, the situation in Afghanistan changed many times, as did my initial plan of the direction of this thesis. To explain why this is, I would like to state the reasons why I decided to write such a thesis.

In Afghanistan I was working on behalf of the Polish Military Contingent located in Eastern Provinces of Afghanistan, i.e., Paktika and Ghazni Provinces. I completed nearly two full tours working as a civilian legal adviser. My job was to provide not only regular day by day legal counsel on contracts, torts and public auctions but I was also responsible for implementation of humanitarian law amongst Polish troops. Very soon I realized that the Polish contingent suffered a lot from legal uncertainty. When I returned, I was offered a scholarship at the University of Wales in Aberystwyth. I decided to write a thesis for my PhD having formed a structured plan and having some good academic questions to address. However, since I started writing things have changed. Before I finished this thesis the operation of NATO ISAF in Afghanistan was coming to an end. My initial presumptions changed and, not surprisingly, the presumptions of the world changed. This actually made me

uncertain about direction of my thesis as most of the processes I analysed were under constant change.

This greatly affected my thesis. To make it more comprehensible, I tried to structure the first chapter by providing a basic legal and political framework of the situation in Afghanistan. This reasoning is clear. It is nearly impossible to understand the nuanced world of modern counterinsurgency operation without basic knowledge of who is who in Afghanistan. Such presentation also gave me a chance to provide basic legal concepts regulating non-international armed conflicts. Qualification of the conflict significantly affects the type of legal rules applicable in the conflict. It also affects the status of participants which, in more detail, I discuss in the second chapter. Clarity at this stage not only helps to understand further discussions but also allows deriving *de lege ferenda* conclusions.

The second chapter is dedicated to the overall legal situation of detainees in modern conflicts. During my stay in Bagram, I was accommodated in the proximity of the infamous Bagram Prison. It is a notorious place. Several reports had confirmed that unacceptable practices took place there. My living container was less than 300 meters from that place. Despite the fact that I was allied troop legal adviser, in practice, it was impossible to visit. A similar situation occurred in the Afghan-owned detention centres. It raised serious issues for European members of NATO troops in Afghanistan – should we or should we not transfer detainees. It occurred in Iraq and Afghanistan when soldiers from different European countries were obliged to transfer captured belligerents to the local or American-owned detaining facilities. It happened often without any prior written agreement or Memorandum of Understanding. There is no doubt that such an activity may be in breach of European legal obligations such as the European Convention on Human Rights. I decided to address issues related to the transfer and treatment of detainees which is an important question arising out of contemporary non-international armed conflicts in multinational military operations.

The uncertainty mentioned above also applied to Polish soldiers during operation in Afghanistan. Often, some very basic questions were asked such as when and how they can legally use their weapons. These issues are regulated by Rules of Engagement which I address in the third chapter. The legal nature of ROE is debatable. In that chapter, I address the legal challenges related to Rules of Engagement. To gain a broader perspective, I evaluated the British law system as well. It is useful to compare these two systems. Although governed by similar international treaties, they have a completely different legal background. The Polish legal system is highly influenced by French and German law, whereas the British system gave

birth to Common Law. Additionally, British Forces were engaged in military operations far more often than Polish forces. In this chapter, I also address how they affect the practical application of humanitarian law and what is ROE status in domestic and international law.

The concept of Rules of Engagement has nowadays become very important. In a multinational military operation they constitute a compass to participants from different countries and legal regimes. However, difficulty lies in the lack of access to, for example, NATO ROE in Afghanistan. For many reasons they are classified. So, a full analysis is impeded and, in some respect, limited. What affects my discussion, i.e. the lack of published ROE analysis in English or Polish, has made this thesis interesting yet complicated. The lack of access to ROE makes it difficult for other authors to write about them. As a result, I was lacking in an intellectual discussion with other academics on my understanding of ROE which has made my conclusion far from comprehensive.

In the fourth chapter I address another issue of great interest – the relation between counterinsurgency and humanitarian law. A new approach toward insurgents was fully operational during my service. During that year, chief ISAF commanders were changed several times. At the beginning of 2008, General Dan K. McNeill replaced British General David Richards. Later on in June 2008, General David D. McKiernan then replaced him. This commander was replaced in 2009 with General Stanley McChrystal and finally he was replaced with General David H. Petraeus. This brought changes not only with the leadership but foremost with a new vision of counterinsurgency and a new strategy to fight the enemy. As counterinsurgency is the most commonly applied doctrine of modern warfare, I have asked myself how such changes affect the applicability of International Humanitarian Law. This has particular importance in NATO countries. In 2006, General Petraeus issued a new Manual on Counterinsurgency. His ideas were followed not only by General McChrystal but also other top US military commanders. Taking into consideration how influential the US doctrine is on other NATO states, it must be carefully scrutinized. Especially since this Manual will affect compliance with humanitarian law more than any recently published document or treaty. This is simply because most conflicts nowadays, being non-international, have an asymmetric, counterinsurgency component.

In this section I will try to analyse the legal questions related to modern counterinsurgency operations and their observance to humanitarian law. It is particularly interesting as I will try to prove that general principles of international humanitarian law are not always fully applicable to modern military operations.

What greatly affected my writing, as mentioned above, was the nature of the changes during my research and the process of writing this thesis. NATO's New Strategic Concept adopted in Lisbon in November 2010 introduced a significant change to contemporary military operations. With a new motto, *active engagement modern defence*, it clearly indicated the role of foreign military operations. The strategy has been commonly taken from Article 5 area operations. Those operations are/were meant to be conducted beyond NATO countries territories. Their aim is/was to prevent a future crisis, stabilize post-conflict situations and support reconstruction. This strategy was the most powerful military alliance and statement of will. It clearly shows that NATO will be actively engaged in preventive measures and responsible to protect these types of missions. This Concept was made on some reasonable assumptions. The character of an armed conflict has changed over the years. Contemporary conflicts are fought mostly in distant countries and have made western countries vulnerable to side effects such as terrorist threats.¹ The nature of modern conflicts has evolved in recent years. First, the end of the Cold War era erupted with a number of local conflicts. Fuelled with cheap weapons from abandoned military depots of the USSR, Europe and the United States had a destructive effect on failed or collapsing states. During the Cold War there were constraints for armed conflicts due to the balance of power of policy of both superpowers. After the fall of the Berlin Wall, such constraints ceased to exist. This brought about new types of armed conflicts. Nowadays, not independence nor ideas are important during armed conflicts. The lack of state authority ensures conflicts only have to be based on money. Drugs, diamonds and gold are good reasons to fight. It creates a new kind of war economy. These new types of low-intensity conflict bring a new kind of responsibility. Local conflicts cannot be left alone nor can the societies affected by them. The tragedy of the people of Srebrenica or Rwanda clearly shows this. It is disturbing to think that the lack of a pro-active, preventive stand may lead to a local or worldwide crisis. Such a preventive approach is accepted by NATO countries in its new strategy concept. The same approach, but on a tactical level, can be derived from the new approach to counterinsurgency. This was also my assumption, but when writing this thesis, many things changed.

The NATO New Strategic Concept was optimistic. I thought that since 2010 NATO and European Union would take a more robust approach toward warlords, rouge states and grey area of lawlessness. Libya was a prime example. The international community quickly

¹ Apart from the fact whether terrorist threat really exist in Europe.

and efficiently reacted and supported democratic opposition against the notorious dictator, Gaddafi. But it turned out that the results of the Libya bombing were very questionable. The opposition proved to be, diplomatically speaking, less democratic than anticipated. The lack of engagement of Western ground troops left Libya torn to pieces with two governments responsible for acts considered to be war crimes. The direct effect of West intervention was devastation and failure of the Libyan state and an unprecedented mass influx of migrants to Europe from its soil. In the case of Syria, no one even dared to react. The same applies to other prolonged contemporary armed conflicts. My optimism was unfounded. The Western world attitude was considered pro-active to new conflicts with their compliance with IHL through a nuanced tailored counterinsurgency strategy.

The above-mentioned counterinsurgency became a very popular phrase under General Petraeus when US forces forged a new approach to insurgency. The COIN manual brought a new understanding of several military, political and legal concepts. That is why I decided to devote a whole chapter to this phenomenon. Since both COIN and IHL place the civilian population as the centre of gravity, I found it tempting to compare both of them. This comparative approach to COIN, which is method of warfare and humanitarian law, is based on the presumption that both systems place emphasis to the limitation of collateral damages by constrains of the use of aerial bombardment, as an example. What is a true challenge for both IHL and COIN is that fighters often merge with the local population. This is why in this thesis I refer to the use of modern counterinsurgency warfare means such as non-lethal weapons. During modern operations, so-called non-kinetic methods may affect basic International Humanitarian Law principles. NATO's countries' Provincial Reconstruction Teams provide humanitarian assistance on a large scale. They are responsible for building schools, hospitals, roads and mentoring local public servicemen. This often happens at the expense of NGOs present. PRT activities may affect the basic principle of distinction. These actions blur the line between military and civilian objectives and that is why I analyse this phenomenon thoroughly in chapter four.

From my perspective, the new COIN strategy was similar to the New NATO Concept signed in Lisbon in that it is a very interesting concept which makes my PhD universal and applicable in the future. Yet again, I found myself during the writing of this thesis too optimistic or at least not realistic enough. My initial approach was that the Western world would again and again conduct Afghan-type operations with a strong COIN element. The

situation in Libya, the rise of Islamic State with no Western feet on the ground and the presence in Iraq and Syria is a prime example of how wrong I was.

So, the more I was writing the more I realized that my thesis is not an analysis of the Afghanistan case study as a model of new wars because it simply would not be repeated. I have lost my faith in the large-scale operation run by the West to improve or stabilize some far-away lands. I think that is partially because of an obvious reason; the modern world is not prepared to send fifty-seventy thousand troops to save people in distant countries.

So what is my thesis about now? I think that most of all it constitutes an element of a very broad discussion on interoperability. Interoperability of human rights and humanitarian law. Interoperability of European and US forces. Interoperability of domestic and international law. Interoperability of western forces and their local counterparts. I think that this element constitutes legal challenges resulting from contemporary military operations. It is true to say that, in some respects, this rather chaotic thesis illustrates how difficult modern military operations are. I am saying this as this is a thesis which only barely approaches other challenging issues such as international politics and *ius ad bello* issues related to modern conflicts.

In writing my paper I decided to use comparative approach methodology. Applying this method has some particular value to a legal researcher. I have access to both Polish and English language sources. Additionally, I am engaged in several humanitarian law initiatives in Poland. I am a visiting lecturer at the National Defence Academy and Deblin Air Force Academy. While being constantly verified by the military audience, I am able to provide some general observations. So it is beyond doubt that it may have a practical outcome. But this would be of limited value if I were to approach the subject only from a Polish perspective. In writing about the subject from a Polish and British perspective, I have the chance to address the issue in question in more advanced way.

I also used methodology which is related to different disciplines such as participation observation. My stay in Afghanistan, aside from my regular duties, was in fact observatory in nature. I think that most questions and issues I found challenging in my thesis are a result of my job as a legal adviser on behalf of Polish Military Forces.

Since my thesis is legal in nature, I also used a doctrinal approach as well as relevant data analysis.

Most of the work was carried out at the University of Aberystwyth and the Welsh National Library in Aberystwyth. However, my work would not be possible without research

carried out in Poland at the National Defence Academy, Jagiellonian University Humanitarian Law and Human Rights Centre, Jagiellonian University Library, the support of the Polish Military Prosecution Office in Warsaw and the Polish Red Cross. Last but not least, I received a lot of support and hospitality from the International Institute of Humanitarian Law in Sanremo in Italy when I was granted the opportunity to conduct research there. Additionally, I still receive access to unclassified, but not public, documents from Afghanistan.

It is hoped that this thesis presents due analysis of the issue in question. It is also hoped that it might be useful in the future, for both civilian and military lawyers to clarify their position on legal issues related to military presence abroad.

INTRODUCTION

In this chapter I will attempt to present the political, legal and historical background of my thesis. As it is devoted to the legal challenges resulting from the NATO operation in Afghanistan, a thorough analysis of background information will help to better understand some of the issues presented in my work.

The chapter is divided into two major parts. In the first section I am going to present the historical and political environment of the current situation in Afghanistan. This section is particularly important for the later analysis of the complexity of the status of participants in the conflict.

In the second part of the chapter I will attempt to provide a detailed analysis of law applicable to the conflict in Afghanistan. This will help not only to provide an accurate legal qualification of the conflict in Afghanistan but also to analyse the legal status of the participants. I will present the rights and obligations applicable to participants of a non-international armed conflict. This will provide grounds for further consideration regarding the possible violation of the international humanitarian law applicable in Afghanistan.

1.1. HISTORICAL AND POLITICAL ENVIRONMENT OF THE CURRENT SITUATION IN AFGHANISTAN

Afghanistan is often referred to as “the crossroads of Asia”. It is a unique place with a complex history. Territories belonging to modern Afghanistan were conquered several times in its history. First by the Persian ruler Darius I in 500 BC, then by Alexander the Great in 329-327 BC. Later, in 1220, by the Mongolian Emperor Genghis Khan and then by Turko-Mongol Timure Lung called Tamerlane in the 14th century. The “Great Game” between imperial European powers took place from 1826 to 1919 when Britain and Russia tried to control Afghanistan as part of their efforts to gain control over India.² As a result, the First Anglo–Afghan War broke out in 1838 and lasted until 1842. The occupation of Kabul by the

² R. Skaine, *The Women of Afghanistan under the Taliban*, McFarland & Company, North Carolina, 2002, p. 3.

British forces ended bitterly. In January 1842, the British army was forced to retreat to India through Jalalabad. As they returned, the British contingent was annihilated through constant attacks. From the garrison contingent, totalling approximately 16,000 people, only Dr William Brydon reached Jalalabad to tell the tale.³

The Second Anglo-Afghan War took place in 1878 – 1879. The successful war led to capturing Kabul and Kandahar and gaining control of the south of Afghanistan. The person responsible for the policy in Afghanistan was the Viceroy of India, Lord Lytton. As a result of British supremacy in the region, the Durand Line⁴ (named after Sir Mortimer Durand) was established between Afghanistan and what was then British India (now provinces of Pakistan, the North-West Frontier Province (NWFP), Federally Administered Tribal Areas (FATA) and Balochistan). The existence of the Durand Line dividing Pashtu's lands is still one of the most crucial, historical events affecting the current situation in Afghanistan.

Under the rule of King Amir Habibulach Khan, Afghanistan won its independence from Britain. It was followed by the Third Anglo-Afghan War which took place between May and August of 1919. It may be seen as a paradox that during that war the British forces closed the Khyber Pass to block the Afghan forces⁵. The same tactic was repeated years later by several war-waging parties in the 1980s and more recently by the Taliban forces.⁶

The Third War brought full independence to Afghanistan and the right to implement an independent foreign policy. For the British crown, it brought consolidation of the Durand Line as a boundary between the sides (Afghanistan and British India (currently Pakistan)) which was an issue of utmost importance. Afghanistan became a fully-independent state in 1919 and Amir Amanullah became its King in 1926 when he established a monarchy. The period from 1919 to 1973 was the most peaceful in recent history of Afghanistan. Those peaceful years led to the adoption of the first liberal constitution under King Zahir in 1964, following which, King Zahir's cousin, Sardar Mohammad Daoud, with the support of the army, seized power in a military *coup d'état* in 1973. He was then killed in a subsequent *coup* by communists of the People's Democratic Party of Afghanistan (PDPA) on 27 April 1978. Communists were

³ W.K. Fraser-Tytler, *Afghanistan, A Study of Political Developments in Central and Southern Asia*, Oxford University Press, London, 1950, p.118

⁴ J. C. Griffiths, *Afghanistan – Key to a Continent*, Andre Deutsch Limited, London, 1981, p.43

⁵ L. W. Adamec, *Afghanistan's Foreign Affairs to the Mid-Twentieth Century*, The University of Arizona Press, 1974, p.48

⁶ T. Donnelly, T. Sullivan & Raphael Cohen, *The Not-So-Great Game; Obama goes AWOL on Afghanistan*, March 16, 2009 Monday, The Weekly Standard, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/253xhpci.asp> (10.10.2015)

attempting to impose reforms which contradicted deep-rooted Afghan traditions and Islam. The reforms initiated a revolt which began in eastern Afghanistan during the summer of 1978 and spread across the country. Formally united, the PDPA, under the rule of General Secretary Taraki, was unable to face the increasing violence and requested assistance from the Soviet military.⁷ A factor which destabilized the political situation was the fact that the government was under the sole control of the Khalq⁸ party dominated by Hafizullah Amin. He was trying to execute a revolutionary transformation of the Afghan society, predominantly through the use of terror.⁹ The refusal of Amin to moderate his policy alienated his Soviet backers who considered this a threat to their security. The sponsored-Soviet plan to replace Amin with Taraki failed. Amin killed Taraki and directed his interest toward the USA and Pakistan. The Soviets made a final proposal to Amin to peacefully hand over power. When this plan failed, the KGB and GRU Special Forces, namely Alpha Group and the Spetznaz unit, executed Operation Storm 333 on 27 December 1979. During this operation, Amin was killed and the Soviets installed the more moderate Babrak Karmal from another communist party faction, Parcham, as President of the Revolutionary Council, General Secretary of the PDPA and the Prime Minister.¹⁰

1.2 WAR WITH THE SOVIET UNION

In December 1979, Soviet presence evolved into a full-scale intervention. Soviet military forces invaded Afghanistan, generating a brutal, quasi-civil war that involved not only neighbouring countries i.e. Pakistan, Iran and China but also Saudi Arabia and primarily the United States. These countries backed the Afghan mujahidin movement by supporting it both financially and militarily through two major contraband channels located in Quetta and Spin Boldak in Pakistan.

The Soviets were operating mostly through its 40th Army, the so-called Limited Contingent of Soviet Forces (OKSV – *Ogranichennyi Kontingent Sovetskikh Voisk*) in Afghanistan. According to highest-figured estimates, the overall number of Soviet troops

⁷ E. Peterson, *Two sides of the same coin: the link between illicit opium production and security in Afghanistan*, vol. 37, Washington University Journal of Law and Policy 2007, p. 215

⁸ Communist movement in Afghanistan at that time was divided into the moderate Parcham (Banner) and the revolutionary Khalq (Masses).

⁹ B. R. Rubin, *The fragmentation of Afghanistan- State formation and collapse in the international system*, Yale University Press, New Haven and London, 2002, p.111.

¹⁰ *Ibidem*, p.122.

remained between 80,000 and 104,000.¹¹ They were also operating the army of the Democratic Republic of Afghanistan (DRA) and the KGB was facilitated by the Afghan secret police, the KhAD.¹² During their occupation, the Soviets were conducting operations against insurgents, both in rural and urban areas. They used tactical air assault mostly by using Mi - 24 gunships¹³ as well as certain forms of unconventional warfare.¹⁴ However, the war in Afghanistan conducted by the Soviets was mostly brutal, conventional, and based on scorched-earth tactics, indiscriminate air bombing, mining and chemical weapons with blood and nerve agents. Soviet tactics even led to armed clashes between Soviet troops and DRA soldiers who were, in general terms, unreliable as a result of mass desertions and clandestine collaboration with the insurgents.¹⁵ Although the insurgents did not pose a military or economic threat to the existence of the government, they were controlling rural areas and were able to almost completely, if not completely, cut off road communication.¹⁶ From an estimated pool, mujahidin had a few thousand active fighters in the field when the rest, approximately around 80,000-100,000 thousand fighters were resting or hiding in the mountains or at bases in Pakistan.¹⁷ Reforms in the Soviet Union, especially those conducted by Mikhail Gorbachev's *glasnost* and *perestroika* led to a negative perception of the Afghan war in the USSR. Under the command of General Boris Gromov, the Soviets prepared and executed a withdrawal strategy, followed by peace with the Geneva Accords.¹⁸

When the Soviets finally withdrew in February 1989¹⁹, the country was devastated. Approximately 1.5 million Afghans had been killed and more than five million fled abroad mostly to Pakistan and Iran. As many as three million people were internally displaced. Nearly 15,000 Soviet soldiers had died and 35,000 wounded.²⁰ The Soviet invasion devastated Afghanistan's infrastructure and irrigation channel system which was significant to the

¹¹ M. Galeotti, *Afghanistan, The Soviet's Union Last War*, Frank Cass, London, 2001, p.15.

¹² B. R. Rubin, *op. cit.* p.122.

¹³ Interestingly Polish military forces in Afghanistan were using the same type Mi-24 gunship. More information at http://www.isaf.wp.mil.pl/plik/file/uzbrojenie_pkw/mi24.pdf

¹⁴ L. W. Grau/Frunze Academic Press, *The Bear Went Over the Mountain – Soviet Combat Tactics in Afghanistan*, Frank Cass Publishers, 1998

¹⁵ M. Hauner, *The Soviet War in Afghanistan – Patterns of Russian Imperialism*, University Press of America – Foreign Policy Research Institute, 1991, p.100.

¹⁶ B. R. Rubin, *op. cit.* p.122.

¹⁷ M.Hauner, *op.cit.*, p.104.

¹⁸ More information available at <http://www.un.org/en/peacekeeping/missions/past/ungomap/background.html>

¹⁹ The Soviets originally planned to withdraw their troops after six months.

²⁰ A. Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia*, New Haven, Conn, Yale University Press, 2000, p. 13

country's existence. The country was ruled by an unpopular former KhAD director, Najibullah, and in the process of their withdrawal, the Soviets left thousands of dangerous remnants of war such as mines, weapons and tanks. This fuelled the subsequent civil war.

1.3. DISSOLUTION OF THE COUNTRY AND THE RISE OF THE TALIBAN

After the Soviet occupation, the country was torn apart by a bloody internal conflict. Due to the fact that mujahidin factions were backed by different countries with a different agenda toward Afghanistan (for example Shia Harkat –e- Isalmi Afghanistan by Iran or Burhanadin Rabbani's Jamait Isalmi and Gulabidin Hekamtyar Herzb – e –Isalmi by Pakistan²¹), it was difficult to establish an interim government within and outside the country. As a result of the lack of cooperation and coordination between mujahidin, the weak Najibullah government was able to continue its existence for another four years of the war.²² Former communist ruling was also possible thanks to the military operations executed on behalf of Najibullah by the Uzbek General, Dostum. His Uzbek forces, known for their barbarity, were able to play against the divided mujahidin forces. Decreasing monetary support from Russia made Najibullah unable to conduct sustained and concerted military operations, especially in light of the fact that General Rashid Dostum betrayed them. He not only supported some of the communist factions in opposition to the Najibullah government but also collaborated with the famous mujahidin commander Ahmed Shah Massoud and helped him to seize Kabul on 26 April 1992.²³ After the arrival of the rest of the opposition leaders to Kabul, the Islamic State of Afghanistan was established. With the commanders' arrival, their armed militia groups entered the city. Each of these groups held an area of Kabul and established their checkpoints. After the failure to bring one of the influential commanders, Hakmatyar, to government, street fighting in Kabul erupted between Ahmad Shah Massod, with Rabbani representing the government, and Gulibudin Hekmatyar with General Dostum (who had also betrayed Massod), as the opposition forces. Hekmatyar savagely bombarded the city with rockets, mortars, and artillery and continues encirclement of Kabul for several months.

²¹ N. Nojumi, *The Rise of the Taliban in Afghanistan, Mass Mobilization, Civil War and the Future of the Region*, Palgrave, New York, 2002, p. 101.

²² N. Nojumi, *Ibidem*, p. 95.

²³ N. Nojumi, *Ibidem*, p. 96.

On 7 March 1993, the Saudi King Fahd sponsored a peace accord between the warring factions. All participants agreed with a new proposal that appointed Rabbani as President and Hekmatyar as Prime Minister. This agreement was never effectively implemented. Although being nominated as Prime Minister, Hekmatyar further continued fighting.²⁴ The situation in the country was even more complicated due to the fact that the rest of the country was controlled by the local warlords. It turned into anarchy.

In 1994, the Taliban movement emerged from the chaos of civil war in southern Afghanistan. The Taliban, under the command of Mullah Omar, maintains that it helped rescue village girls who were abducted by the local warlord. Mullah Omar caught the commander of these villains, hanged him and took control over his soldiers. Initially the Taliban *modus operandi* was to help resolve local disputes and carry out military operations against the brutalities of the local armed groups. The Taliban movement was comprised mostly of former Afghan refugees; many of whom were indoctrinated with extremely conservative values in the religious school *madrassas* in Pakistan. Bringing such values and virtues and representing them as decency and religion, they easily gained an advantage over the corrupt local warlords. It made Talibs popular amongst local villagers and businesses not only because they promised to establish order and justice, but because they were able to deliver it as well. Within the first few months of their existence, they seized the massive military depot in Spin Boldak belonging to Gulbudin Hekamtyar and took control over Qandahar city. Very soon the Taliban were supported by Pakistan's Inter-Services Intelligence Agency (ISI) playing its own role in establishing a pro-Pakistan government in Kabul. The Taliban movement was also welcomed by the majority of the Afghan population who believed in strict but righteous clerical movements. During the Afghan-type *blitzkrieg*, Talibs, who initially in 1994, were estimated to number around 200 men, took control over Kabul and most of the country on 27 September 1996. However, an armed opposition, namely the Northern Alliance, still existed in the country. The legendary Ahmed Shah Massod maintain control over Panjshir valley, whereas General Dostum, after his initial alliance with the Taliban, betrayed them as well and forged an alliance with Massod, exercising control over the Northern provinces.²⁵

The Taliban's close ties with the ISI and the terrorists of Al Qaeda, as well as their strict

²⁴ N. Nojumi, *op. cit.*, p. 114.

²⁵ W. Jagielski, *Praying for Rain, Modlitwa o deszcz*, W.A.B., Warszawa 2002, p. 50

interpretation of *Sharia* law, adversely affected the civilian population and has made their international recognition complex.²⁶ Their lack of international recognition led them into increasing production of opium as opium had become the most stable cash crop for farmers and a source of income for the state.²⁷

The Taliban also committed serious atrocities against minority populations, particularly the Shi'a Hazara ethnic group, and killed non-combatants in several well-documented instances.²⁸ The coexistence of the Taliban movement and Al Qaeda was based on the general permission that was granted to Al Qaeda to have a fully-operational sanctuary in which they trained and indoctrinated fighters and terrorists, imported weapons, forged ties with other jihadist groups and leaders, and plotted and staffed terrorist schemes. As a result, between 10,000 and 20,000 fighters were trained there.²⁹

1.4 US INTERVENTION AND OPERATION ENDURING FREEDOM (OEF)

After the September 11 attacks, the US forces launched a military operation, Operation Enduring Freedom, against Taliban military targets and suspected Al Qaeda camps in Afghanistan. The United States and Great Britain notified the UN Security Council that the mission was an exercise of individual and collective self-defence in compliance with the terms of Article 51 of the UN Charter.³⁰

At 9:00 p.m. local time on 7 October 2001, US warships and submarines fired approximately fifty cruise missiles at targets near Kabul and Taliban facilities, and forces in Kandahar, Jalalabad, Mazar-i-Sharif and Kabul.³¹ Soon after, the Northern Alliance (NA)³², heavily supported by the US Special Operation Forces (SOF), led a campaign against Taliban and Al Qaeda fighters. With an overwhelming air force superiority, the NA quickly took control over main cities such as Jalalabad, Herat, Kabul and Mazar-i-Sharif. With the fall of Kandahar, US forces shifted to tracking Osama bin Laden in the Tora Bora cave complex where many Taliban and Al Qaeda fighters were believed to have fled. Despite the successes

²⁶ N. Nojumi, *op.cit.* p. 177.

²⁷ N.Nojumi, *Ibidem*, p. 177.

²⁸ E.Peterson, *Ibidem*, p. 219

²⁹ E. Peterson, *Ibidem.*, p. 220.

³⁰ C. Hynes, Carie Newton Lyons, Andrew Weber, *National Security*, International Lawyer, vol. 41 no 2, 2007, p.685.

³¹ G. K. Walker, *op.cit.*,p. 509.

³² It is general name of anti Taliban forces and they were recruited mostly of general Massod (he was killed two days before attack on United States i.e. 7/11/2011) and Dostum forces. Additionally Hazara population were pro Northern Alliance

of US forces, hundreds of Taliban and Al Qaeda fugitives managed to escape across the border into Pakistan.³³ Soon after, the NA excessively exploited its dominance by committing crimes of war by executing hundreds of foreign volunteers and Al Qaeda members serving with the Taliban after the fall of Kunduz.³⁴

With the fall of the Taliban in 2001, an opportunity to sign a peace agreement emerged. The Bonn talks helped to define a road to peace. However, since the very beginning of the Bonn talks, there was one significant flaw: the Taliban movement was not a party to talk and abide by agreements. The exclusion of the Taliban who could have become involved in the process³⁵ is now considered a crucial mistake of that time. Instead, the Bonn Agreement was a multilateral agreement between factions in Afghanistan mostly revolving around the non-Pashtun Northern Alliance and several powerful warlords.³⁶ Many participants of the Bonn negotiations had little commitment to democracy and conformity to the law. Some of them, instead of cooperating, were simply attempting to monopolize their power.³⁷ In reality, the loyalty of the signatories of the agreement was not to be trusted and the Taliban quickly re-emerged as an armed resistance.³⁸ It is possible to say that, since the warlords did not share their power with the government, turning Afghanistan into a kind of narco-state with private armies and corrupted administration was a very similar situation to the one before the rise of Taliban.

At the same time, US ground troops faced their fiercest test of Enduring Freedom, what is known as Operation Anaconda. It was the first large-scale conventional operation of US troops in Afghanistan. In March 2002, US forces and local militias started the operation in the Shahi-Kot Valley and Arma Mountains of Zormat near Gardez. It was originally planned as a three day operation. It took much longer due to several factors: an unexpected, fierce fight that broke out at the beginning of the operation, lack of intelligence, lack of close air strike support and an inaccurate estimation of the number of the enemy troops.³⁹

³³ B. S. Lambeth, *Air power against terror – America’s conduct of Operation Enduring Freedom*, Rand Institute – national Defence Research Institute, 2005, p.xx

³⁴ G. K. Walker, *op.cit.*, p. 513.

³⁵ L. Brahmimi, *Law and Ethics, Afghanistan prospects for the future*, Georgetown Journal of International Affairs, vol. 75, 2003, p. 75.

³⁶ Such as Abdul Rasul Sayyaf whose militants were responsible for atrocities in Kabul before Taliban took city. After his name was called Abu Sayyaf Islamic terrorist group operating in Philippines

³⁷ L. Brahmimi, *op.cit.*, p. 76

³⁸ Ch. Ahlund, *Major obstacles to building the rule of law in a post-conflict environment*, New England Law Review vol. 39, Fall 2004, p.42

³⁹ B. S. Lambeth, *op.cit.*, p.xxii

The US operation in Afghanistan is to be divided into two stages. The first stage was unconventional where only Special Operation Forces were deployed (prior to Operation Anaconda) and the second stage was when conventional forces commenced operations on the ground. Since there was little action of US forces providing troops on the ground, soon after, in September 2002, Taliban forces began recruiting in the Pashtunland area to launch a renewed holy war against unbelievers and the Afghan government.⁴⁰ Very soon, mobile training camps were established in areas along the border between Afghanistan and Pakistan, i.e. in Waziristan and Beluchistan. Most recruits were drawn from the *madrassas*, as had taken place in the 90s. Crossing the Afghan border was easy as the efforts of Pakistani forces stationed at border crossings to prevent such infiltration was questionable. Additionally, the Pakistani military proved to be of little support at the beginning of military operations in Afghanistan.⁴¹ The Taliban reorganized and replenished their forces over winter, preparing for a summer offensive. They established a new mode of insurgent activity. They were operating in groups of up to fifty men when launching attacks, and subsequently breaking up into smaller groups of five to ten men to evade counter-attacks, especially those with close air-strike support. With this strategy, US forces were mostly indirectly attacked through rocket or mortar attacks on military bases and by planting improvised explosive devices (IED). In the summer of 2003, these attacks continued, especially in the eastern part of Afghanistan. As a result, coalition forces began preparing several offensives. Situations worsened when US forces became engaged in fighting in Iraq, paying most of their attention to that operation. Until 2006, most of the fighting occurred in southern Afghanistan against US forces. From January 2006, NATO started to replace the US troops with allied forces. For example, the British 16th Air Assault Brigade formed the core of the force in southern Afghanistan⁴² along with troops and helicopters from Australia, Canada and the Netherlands. From 2006, the Taliban became a fully-operational insurgent force. In 2006, the south of Afghanistan faced the deadliest outbreak of violence in the country since 2001.

⁴⁰ Article, *Leaflet War Rages in Afghan Countryside*, *Associated Press*, available at: www.intellnet.org/news/2003/02/14/16788-1.html. (10.05.2015)

⁴¹ O. Tohid, Scott Baldauf, *Taliban appears to be regrouped and well-funded*. *Christian Science Monitor*. available at <http://www.csmonitor.com/2003/0508/p01s02-wosc.html>. (10.10.2015)

⁴² Information available at www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInAfghanistanBritishForces.htm (8.05.2015)

Operation Enduring Freedom (OEF) was not the sole military mission in Afghanistan. In fact, there are currently two major active operations in Afghanistan. The first, as already discussed, the USA-led OEF-A and the second is the NATO-led International Security Assistance Force (ISAF). These operations shared number of similarities in terms of their objectives: counterterrorism and enforcing stabilization. Apart from these similarities, OEF-A and ISAF were initiated under different legal bases, with different mission mandates and rules of engagement (ROE).⁴³

On 14 November 2001, the Security Council voted for Resolution 1378, calling upon NATO as a multinational peacekeeping force for the country. The 5500-member force, the International Security Assistance Force (ISAF) was established in Afghanistan. After the initial period when ISAF was operating mostly in Kabul, the ISAF mission mandate was expanded. On 13 October 2003, the Security Council voted unanimously to expand the ISAF mission beyond Kabul (Resolution 1510). In February 2005, NATO decided to expand the ISAF to the west of Afghanistan, and subsequently on 1 July 2006, the ISAF expanded its area of operation to six additional provinces in the south of Afghanistan.⁴⁴

The main role of the ISAF was to assist the Afghan government in the establishment of a secure and stable environment.⁴⁵ ISAF forces conducted security and stability operations throughout the country together with the Afghan National Security Forces and were directly involved in the development of the Afghan National Army through mentoring, training and equipping.⁴⁶ This does not imply that NATO only supported central authorities in the struggle with the opposition fighters, but it foremost supports the creation of state-orientated structures: intelligence and counterintelligence, and police and infrastructure focused on the civilian population (schools, hospitals and roads). ISAF countries were conducting humanitarian relief as well. One of the leading ISAF humanitarian projects in Afghanistan was Provincial Reconstruction Teams (PRTs) which were then under the sole command of the ISAF. PRTs are joint, integrated military-civilian organizations, staffed and supported by ISAF member countries and operated at provincial level within Afghanistan. PRT's in

⁴³ C. Hynes, *op. cit.*, p.684

⁴⁴ <http://www.nato.int/isaf/topics/chronology/index.html>

⁴⁵ The ISAF mission will end on 31 December 2014 available http://www.nato.int/cps/en/natolive/news_107519.htm (10.10.2015)

⁴⁶ More information available at: <http://www.nato.int/issues/afghanistan/index.html#missions> (10.10.2014)

Afghanistan were generally responsible for covering the needs of one province. Due to the fact that the Afghani government had limited outreach to the provinces, a PRT activity was focused on improving its capacity to govern the country on both a central and local level. The existence of PRTs occupied the vacuum caused by a weak government presence.⁴⁷ PRTs seek to establish an environment that is stable enough for local NGOs and international governmental and non-governmental agencies, the local authorities and civil society to engage in reconstruction, political transition and social and economic development. PRTs act in accordance with the objectives of the Afghan National Development Strategy (ANDS). The role of PRTs was to ensure international and internal efforts following the development aims of Afghanistan and, in doing so, assess and act upon the constraints of economic development.⁴⁸ According to NATO data, twenty-seven Provincial Reconstruction Teams from various NATO countries were operating in Afghanistan.⁴⁹

Despite many pro-nation development projects, the ISAF faced some of the heaviest combat in NATO history. Several military operations had to be conducted to gain a certain amount of control over the south of Afghanistan. Operations such as Operation Mountain Thrust (mostly in the Helmand area), Mountain Fury, Operation Medusa (mostly in the Kandahar area) and Operation Falcon Summit. Regardless of ISAF efforts, the Taliban and other armed organizations were difficult to defeat which made the ISAF very much alike to the Soviet forces. Frequently, despite tactical victories, the Soviets were not able to remove mujahedin from the area of operation nor obtain operational or strategic victories. The number of military operations rose in 2007. For example, British forces conducted Operation Volcano to clear insurgents from firing points in the village of Barikju, close to Kajaki in Helmand Province.⁵⁰ This operation was followed by Operation Achilles and Operation Silicon.⁵¹ The next important operation in 2007 was Lastay Kulang. It was conducted in the Musa Qala region mostly by British and Afghan forces. In December 2007, more fighting took place in the Musa Qala region. Afghan forces, supported by the British, dislocated Taliban forces from

⁴⁷ ISAF PRT Handbook, Edition 3, Kabul, February 2007, p. 3

⁴⁸ ISAF PRT Handbook, *Ibidem*, p. 3

⁴⁹ Available at <http://www.nato.int/isaf/topics/prt/> (9/10/11)

⁵⁰ Available at www.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/MarinesClearTalibanFromKeyAfghanDamvideo.htm (9/10/11)

⁵¹ Available at www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInAfghanistanBritishForces.htm (9/10/11)

Musa Qala.⁵² Fights continued throughout 2008 when American forces suffered their greatest loss in a single operation. In Kunar Province, one of their bases, Wanat, was directly attacked from the nearby village. Nine US soldiers lost their lives during a few hours of fire.⁵³ Equally harsh losses were suffered by the French Paratroopers in the Surobi district, sixty kilometres from Kabul. During a Taliban ambush, ten French soldiers were killed and twenty-one others were wounded.⁵⁴ Despite the surge operation and the increased numbers of ISAF and OEF soldiers (their numbers reached nearly 150,000 troops at the peak of the surge operation), heavy combat continued to the end of ISAF operations in 2014.

What affected ISAF operations is the fact that both the ISAF and the OEF significantly adapted their activities since they were established. This led to an increasingly blurred distinction between the two missions, which were both predominantly focused on combating insurgents. The ISAF also absorbed several thousand soldiers from the former Operation Enduring Freedom, British and Canadian troops in particular, and during ISAF operations it was nearly impossible to differentiate between these two military operations.⁵⁵

ISAF opposition consisted of Taliban forces of approximately 10,000 fighters. Of that number, only up to 3,000 were considered to be highly motivated, full-time insurgents.⁵⁶ The rest are so-called part-time insurgents fighting due to monetary incentives. In fact, throughout the whole ISAF-OEF operation, it was difficult, according to Brigadier General Carr, Chief Intelligence of the International Security Assistance Force, to estimate the number of insurgents.⁵⁷ Especially taking into consideration other networks of military groups such as Haqqani and the Gulbudin Hekmatyar organization. The map below shows the area of operations of insurgent groups in 2010.⁵⁸

⁵² Available at ww.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/timeIsNowRightForRetakingMusaQalehBrowne.htm (1/10/11)

⁵³ Available at *Al Jazeera English - Taliban Fighters Storm US Base*, <http://english.aljazeera.net/news/asia/2008/07/200871463317512597.html> (9/10/12)

⁵⁴ Available at BBC, *Afghan Ambush Kills French Troops, 2008*, http://news.bbc.co.uk/1/hi/world/south_asia/7569942.stm (9/10/12)

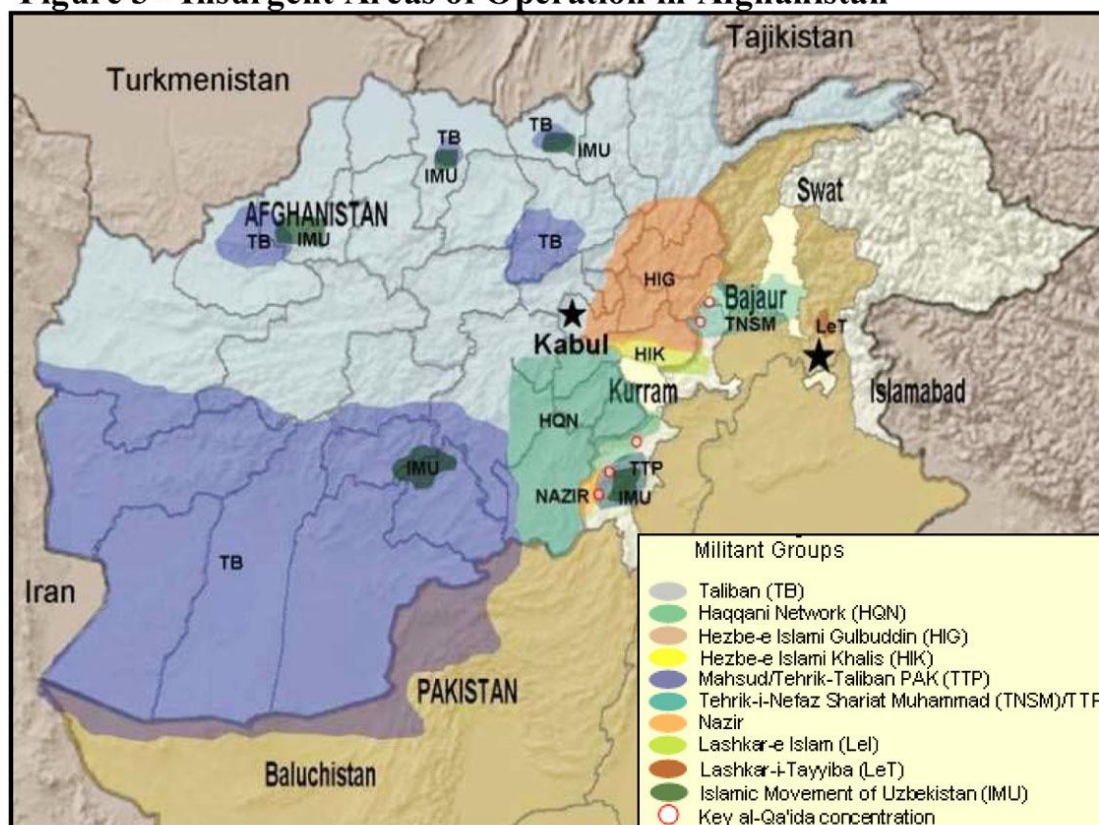
⁵⁵ C. Hynes, *op. cit.*, p.684

⁵⁶ D. Rodhde, *Foreign Fighters of Harsher Bent Bolster Taliban*, available at, www.nytimes.com/2007/10/30/world/asia/30afghan.html?n=Top/News/World/Countries%20and%20Territories/Pakistan (9/10/11)

⁵⁷ Available at http://www.dvidshub.net/?script=video/video_show.php&id=59869 (9/10/11)

⁵⁸ Available at http://www.lib.utexas.edu/maps/middle_east_and_asia/afghanistan-insurgent_areas-2010.jpg (9/10/13)

Figure 3 - Insurgent Areas of Operation in Afghanistan



1.6 CURRENT SITUATION

Despite the optimism expressed by Hamid Karzai in January 2002, “(...) Interim Administration has been in place for only one month (...). Our vision is of a prosperous, secure Afghanistan”⁵⁹, it was not that his hopes were unfounded. Due to the political and military mistakes of US forces at the beginning of the operation, the country erupted yet again in violence. Mass implementation of Special Operations Forces without ground troops and an Al Qaida/Taliban hunting agenda instead of country development quickly took its toll. In addition to criminal activity, more than a half of the country is surrounded by insurgency. The Taliban, Gulbuddin Hekmatyar’s Hezb-i-Islami, Jalaluddin Haqqani’s network, Al Qaida, and other groups mostly from Pakistan were involved in a sustained effort to overthrow the government and coerce ISAF and OEF troops to leave the country. The current feeling of

⁵⁹ Statement of H.E. Hamid Karzai Chairman of the Interim Administration of Afghanistan, "A Vision for Afghanistan", January 21, 2002 quoted by in Seth G. Jones *Afghanistan's Growing Security Challenge* p. 27 (in:) *State Building, Security and Social Change in Afghanistan. Reflections on a Survey on the Afghan People*, 2008, Asia foundation, p. 22, available at www.asiafoundation.org (9/10/12)

security of the average Afghani citizen was low and the country suffered food shortages which left Afghanistan as one of the poorest countries in the world.

The situation in Afghanistan is defined mostly by the security of the following provinces of Ghazni, Logar, Wardak, Nangahar, Helmand, Kunar, Pakitka, Kabul, Uruzgun and Kandahar. The fiercest fights took place in these provinces and security there has a great impact on the rest of the country. These provinces are located in the eastern and southern parts of Afghanistan. How difficult was it to introduce stability to these provinces? Let's take the Polish case as an example. In 2008, Poland took responsibility for the safety and security of Ghazni Province.⁶⁰ Despite the strengthening of Polish, American and Afghan forces, the security of Ghazni Province under Polish command declined from medium security to the third less-secure province in Afghanistan.⁶¹ This occurred despite the deployment of additional US forces (3,500 soldiers) to the neighbouring strategic provinces of Logar and Wardak.⁶²

From the beginning of the surge operation run by General Petraeus in 2009, the situation was similar to the situation of the Soviet-Afghan war i.e. the significant number of foreign troops (up to 150,000 foreign troops), a lack of properly functioning land-road communication and a lack of sufficient numbers of local military and security forces. What could have changed the situation in Afghanistan was prolonged engagement of NATO and western countries for the development of Afghan police and military forces for another decade. However, the lack of such engagement in Afghanistan may lead to a similar situation as in Iraq after US withdrawal.

Currently, NATO runs a non-combat operation in Afghanistan called Resolute Support with a limited number of personnel on the ground. The withdrawal of ISAF forces led to the escalation of insurgent violence. More than 5,000 Afghan soldiers and policemen have lost their lives from insurgent attacks in the first eight months of 2015.⁶³ Additionally, more than

⁶⁰ J. Hemming, *Polish Troops Take Charge of Tough Afghan Province*, <http://in.reuters.com/article/southAsia/News/idINIndia-36232820081030> (9/10/12)

⁶¹ International Crisis Group, *The Insurgency in Afghanistan's Heartland*, Asia Report, nr 207, 27 June 2011, p. 8, available at [www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/207%20The%20Insurgency%20in%20Afghanistans%20Heartland.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/207%20The%20Insurgency%20in%20Afghanistans%20Heartland.pdf) (3.08.2013).

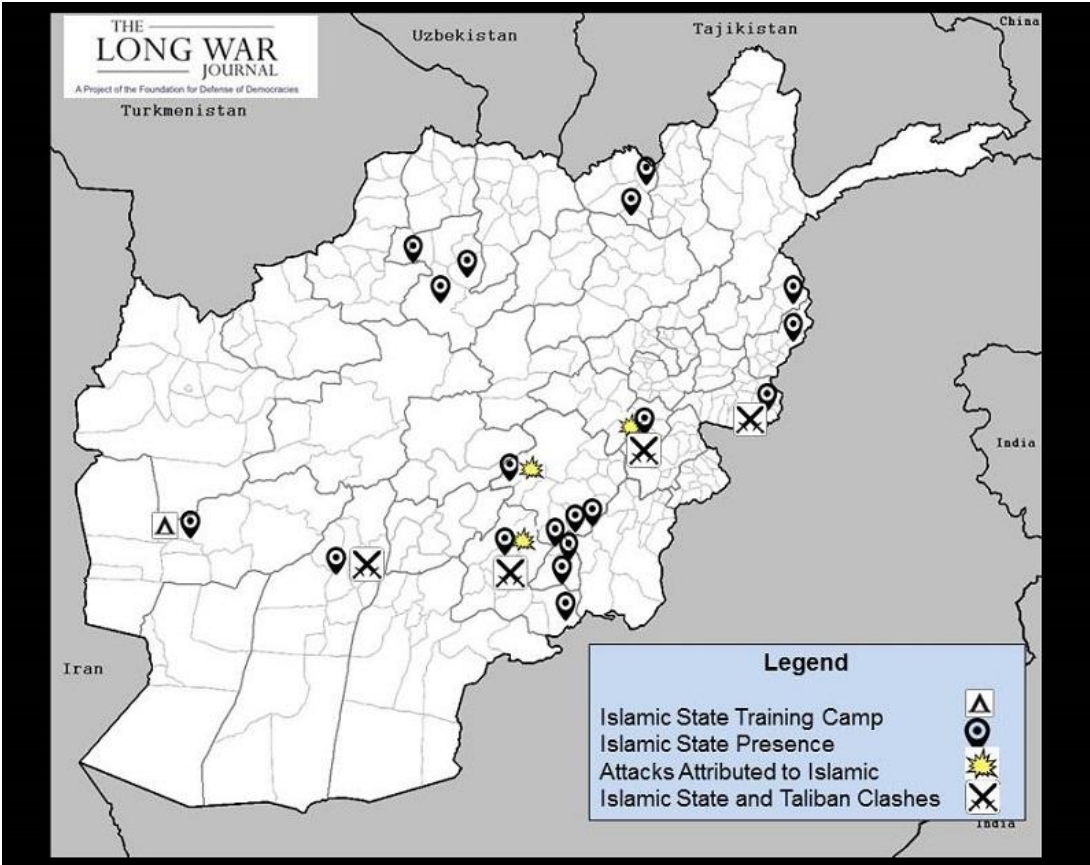
⁶² More on the subject Anna Mulrine, *Guarding the Gates to Kabul*, U.S. News & World Report, Section: Nation & World; Afghanistan, pg. 38, Vol. 145, No. 13.

⁶³ More information in Sune Engle, *Afghan Forces Retake Musa Qala from Taliban*, Guardian, 30 August 2015, available at <http://www.theguardian.com/world/2015/aug/30/afghan-forces-retake-musa-qala-from-taliban> (3.09.2013).

5,000 civilians were killed or wounded in the first 6 months of 2015, making 2015 the deadliest year of the Afghan conflict from the beginning of the NATO operation in 2001.⁶⁴

Furthermore, Islamic State is becoming increasingly more influential in Afghanistan. This new phenomenon, fuelled by the traditional conflict between angry young commanders and elders, may have consequences which are difficult to predict.

The map below shows the number of Islamic State incidents in Afghanistan.⁶⁵



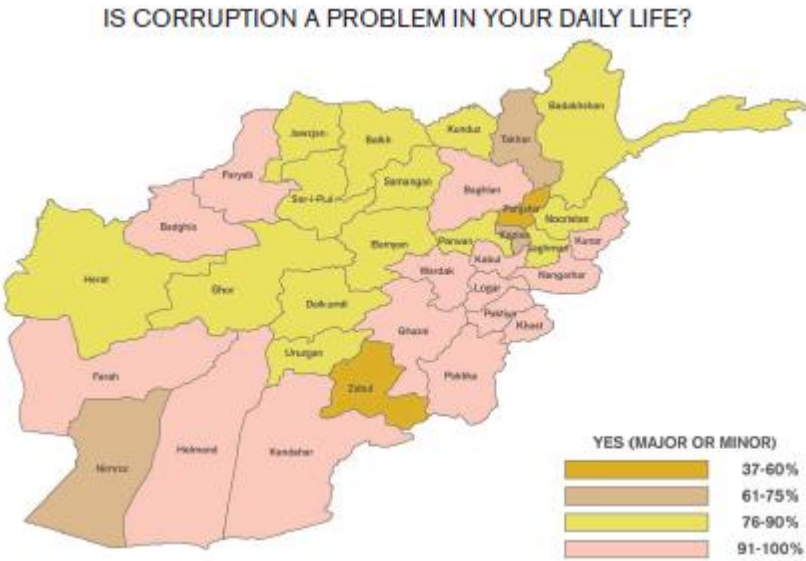
1.7 LEGAL SYSTEM IN AFGHANISTAN

The lack of a properly functioning legal system affects military efforts and fuels insurgency. The matter of justice in Afghanistan also affects issues related to the obligations laid upon international forces operating in Afghanistan. Referring to the idea of the ill-

⁶⁴ More information in Sune Engle Kabul: *Death Toll Rises in Deadliest 24 hours Afghan Capital Has Seen in Years*, 8 August 2015, <http://www.theguardian.com/world/2015/aug/08/afghanistan-35-killed-in-deadliest-24-hours-capital-kabul-has-seen-in-years> (3.09.2013).

⁶⁵ More information available at <http://www.longwarjournal.org/archives/2015/03/mapping-the-emergence-of-the-islamic-state-in-afghanistan.php> (3.09.2013).

functioning legal system in Afghanistan, I will attempt to provide background for further discussion on counterinsurgency in the chapter, particularly within the parameters of the concept of *ius post bellum*. The results of the ISAF mission are debatable. The government does not receive a vote of confidence from public institutions. The perception of widespread corruption is good example of this.⁶⁶

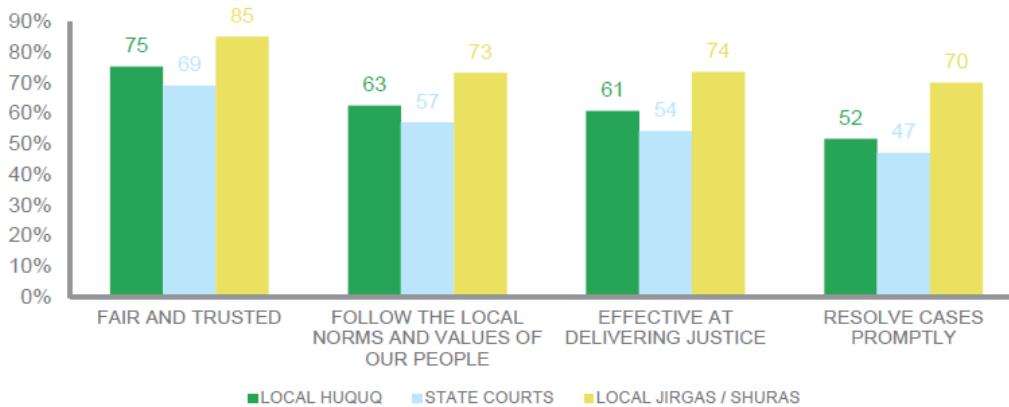


Such a result has strong implications for the Afghan situation. People turn to informal structures when they have little trust in state entities. For example, they most decisively identified the local *jirga* or *shura* as an institution for dispute resolution. The map below clearly indicates this.⁶⁷

⁶⁶ 2014 Asia Foundation survey available at <http://asiafoundation.org/publications/pdf/1425> .p. 93 (3.08.2015).

⁶⁷ 2014 Asia Foundation survey, *ibidem*, p. 97

PERCEPTIONS OF DISPUTE RESOLUTION INSTITUTIONS



This destabilizes the already fragile situation and leads to a general feeling of a lack of confidence in public institutions which were, and still are, strongly supported by western governments.

As previously discussed, the result of the Bonn agreement for international forces was to provide security, governance and participation as well as humanitarian assistance, social well-being, economic stabilization and infrastructure, and justice and reconciliation.⁶⁸ All this cannot be achieved without a functioning legal system.

An important factor is that justice in non-urban areas is controlled by local warlords and politicians as well as by the local informal justice system. As a result, justice or delivering justice is a part of insurgency. The organizations which control justice simply control all other aspects of life. Consequently, even in greater cities, the local population does not put much trust in the governmental system of justice. In many parts of rural Afghanistan, the situation is sliding back into general lawlessness, which resulted in the increased production of poppies and drug-related criminality.⁶⁹

One of the fundamental elements of a properly functioning state is the monopoly over the legitimate use of force to ensure security of its citizens. In order to do so, the state needs to be able to disarm and neutralize those who use violence illegally and commit crime. This is the main task for law enforcement and security forces (Afghan National Police and National Directorate of Security). Once captured by state agents, they must be held responsible for

⁶⁸ Lieutenant Commander Vasilios Tasikas, *Developing The Rule of Law in Afghanistan, The Need for a New Strategic Paradigm*, Army Lawyer, July 2007, p. 51

⁶⁹ Ch. Ahlund, *Major Obstacles to Building the Rule of Law in a Post-Conflict Environment*, New England Law Review vol. 39, Fall 2004, p.42

their actions. In Afghanistan, however, unlike in other countries which generally have one dominant system of justice, two systems exist – the formal state system and the informal traditional system, both allowing people to escape from justice. This dual system affects the implementation of rule of law traditionally understood and creates additional challenges for international forces.

Traditional, non-governmental mechanisms of justice in Afghanistan operate through two key informal institutions: *jirga* and *shura*. The *jirga* is an institution unique to the Pashto community. It is a tribe, village-based process for collective decision making and is often used as a mechanism of settling disputes, including imposing agreed sanctions and using tribal forces to enforce its decisions. The term *shura* refers to a group of elders or recognized local leaders who make decisions on behalf of the community they represent.

One of the many results of prolonged war in Afghanistan is that the formal justice system has been weakened. This has pushed people to rely more on the informal justice system to resolve their disputes. A kind of local “customary law” has been created which embraces historical traditions, local understandings of Islam and Sharia and the spiritual role of the Sufi leaders.⁷⁰ It has led to the creation of several local or tribal sets of rules such as Pashtunwali for Pashtun. An informal system may be considered as an option, however it is often under pressure from local warlords and those with great influence. Despite that, with regards to the perception of the coexisting legal systems, both are recognized by the Afghan population, the informal system seems to be more popular and effective.

The ISAF task was to improve the quality of the legal system in Afghanistan. It is a *sine qua non* condition for development of the country. As a starting point, a local system of justice may be introduced into the governmental system. *Gacaca* in Rwanda could be viewed as an example. *Gacaca* constitutes a local justice system which has been designed to adjudicate more than 100,000 Genocidaires. It serves as a judicial body and as a part of the process of reconciliation. Trials are held in public where survivors and victims may confront the accused person. Each village court has nine judges (with basic legal training) and the total number of judges is approximately 250,000. It shows reach of *gacaca* and possible impact it

⁷⁰ N.N. Mazurana D. & Stities, E., *Afghanistan's Systems of Justice: Formal, Traditional and Customary*, (Tufts University, 2004) (in:) Sudhindra Sharma and Pawan Kumar Sen *Institutionalization of the Justice System, Reflections on a Survey on the Afghan People*, 2008, Asia foundation p. 45 available at www.asiafoundation.org (3.08.2015).

can have on post-war society, especially taking into consideration that *gacaca* is strongly rooted in local traditions of adjudicating disputes.

Adopting a local justice system may help to win the hearts and minds of the Afghan people and constitute the foundation of a well-operating system of justice which can promote security and national reconciliation. A system based on local Jirgas/Shuras may significantly improve reconciliation between ‘willing’ insurgents and the local population. The system should cover basic legal training and be a creative element at the core of Afghan citizenship. It should not contradict the existing Afghan legal system but be compatible with values shared by the local population and reflect local tribal structures.⁷¹ Such a system, when incorporated into the official state judicial system, may, in the future, lead to the creation of an internationalized⁷² institution in Kabul which could be responsible for training local judges or become a source of support for the appellate⁷³ court in Kabul.

The problem for the ISAF was that the law which is acceptable in Afghanistan is not always compatible with European-centric understanding of fundamental rights and guarantees. Imposing Euro-centric laws on Afghans is risky and may fuel insurgency. On the other hand, accepting laws which are not tolerated from the European perspective contradicts the aim of the ISAF operation. Additionally, it is difficult under the law of occupation to understand what is and what is not allowed when it comes to the transformation of a country. I will discuss this issue in the section devoted to the concept of *ius post bellum* in the chapter on counterinsurgency.

1.8 PRIVATE MILITARY COMPANIES

Military contractors and their corporate employers, private military firms (PMFs), play an essential role in military efforts of NATO in countries such as Afghanistan. According to Zmarai Bashiri, a spokesman for the Interior Ministry, there were 60 local private security companies in Afghanistan employing between 18,000 and 25,000 men in 2008.⁷⁴ It is difficult to estimate, however, the total number of private military contractors in Afghanistan now. It is enough to say that the USA Department of Defence alone had more contractor personnel

⁷¹ Such as the Pashtun system of tribal values called the Pashtunwali or Sharia system.

⁷² Similar to internationalized panels in Kosovo.

⁷³ For judgments delivered by the first instance local courts.

⁷⁴ S. Y. Ibrahim, *Private Security Firms Flooding Afghanistan*, Institute for War & Peace Reporting <http://www.vindy.com/news/2008/jan/08/private-security-firms-flooding-afghanistan/> (3.08.2015).

working both in Iraq and Afghanistan than troops deployed.⁷⁵ The majority of these companies are based in Kabul. Through years of conflict, many of them started performing functions traditionally implemented by the government, whereas their precise legal status has yet to be determined.⁷⁶

PMFs also play key roles in western military operations. Those companies are comprised of three types of firms: military support firms, military consultant firms, and military provider firms. The first type, military support firms, offers a wide range of support services traditionally handled by military forces, from driving convoys to cooking meals and maintaining war planes or armoured vehicles such as the HUMMVEE or MRAP. The second type, military consultant firms, provides strategic advice and military training.⁷⁷ The American military consultant firm, Military Professional Resources, Inc. (MPRI), is known for training the Croat militia and enabling it to defeat the Serbian army in 1995.⁷⁸ The third category, military provider firms, provides “security services” such Academi, previously known as XE (formerly Blackwater) in Afghanistan and Iraq. Both the Geneva Conventions and Additional Protocol I essentially outlaw mercenary activities. However, the extent of the widespread use of private companies nowadays makes it impossible to obtain military goals without such firms. The United States even hired forty private gunmen from the American-based DynCorp⁷⁹ Company to protect President Hamid Karzai of Afghanistan in 2002. It did in fact pay off, because despite several attacks on his life, he was the head of the Afghanistan Government until 2014.

The use of private military companies as a reliable resource is undisputable. Such companies always provided the tools required, especially during an armed conflict, be it for a good cause or bad. It is one of the tasks of the ISAF to utilize such companies in a way which is not contradictory to international law.

⁷⁵ T. Taylor, Private Military Companies and Beyond, review article, International affairs, http://www.chathamhouse.org/sites/files/chathamhouse/public/International%20Affairs/2011/87_2taylor.pdf, p.2

⁷⁶ K. L. Rakowsky, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, Stanford Journal of Civil Rights & Civil Liberties, vol.2, 2006, p.365

⁷⁷ More information at http://www.privateforces.com/index.php?option=com_content&task=view&id=18&Itemid=47 (3.08.2015).

⁷⁸ K. L. Rakowsky, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, Stanford Journal of Civil Rights & Civil Liberties, vol.2, 2006, p.366

⁷⁹ K. L. Rakowsky, *op.cit.*, p.370

1.9 OPIUM PRODUCTION

Another problem related to the NATO operation in Afghanistan is the production of opium. Since the Soviet intervention in Afghanistan in 1979, the production of opium has increased. Illicit opium trade became one of the main financial sources for fighting mujahidin. The situation did not change during the civil war in the 90s nor under the Taliban ruling. The production of opium has risen to an extremely high level, making Afghanistan the main global supplier of opium and heroin. The opium situation has been particularly bad in Afghanistan's southern provinces.

In 2006, Afghanistan produced 92% of the global supply of illicit opium. It not only fuelled the Taliban insurgency but had a direct international effect too. Heroin produced in Afghanistan kills approximately 100,000 people worldwide each year. Significant changes have occurred within the production process. Previously, Afghanistan mainly produced raw opium or a morphine base, which was refined into heroin in Pakistan, South-East Turkey or the Balkans. Today, the overwhelming majority of heroin processing takes place inside Afghanistan.⁸⁰ In 2006, 165,000 hectares of land in Afghanistan were used to cultivate the opium poppy. It had a direct impact on the fiercest fight of Taliban forces with the ISAF in the following years, especially in the south and east of Afghanistan. It is easy to earn a living through poppy cultivation: the average opium-producing family cultivated 0.37 hectares of opium poppy and generated approximately \$4625 per hectare which is nine times greater a figure than what a family could have earned growing wheat.⁸¹

Another negative side effect of the mass drug production is nationwide drug addiction in Pakistan, Afghanistan, Iran and former Soviet republics. Opium cultivation also has implications for regional security. Drug traffickers benefit from terrorists' military skills, weapons supply, and the access to clandestine organizations. Terrorists gain a source of income and expertise in illicit transfer and laundering of money for their operations. It creates a self-sufficient war economy independent from external sources of financing. Even more dangerous is that entities involved in the drug-trade economy are not interested in termination of the conflict as it is this situation of instability which allows them to operate. Additionally, traffickers often are not interested in any political goal except financial.⁸²

⁸⁰ E. Peterson, *op.cit.*, p. 225.

⁸¹ E. Peterson, *ibidem.*, p. 225.

⁸² As for example (...) 16.5 tons of drugs were seized and 34 militants killed during a three-day operation against a key insurgent stronghold in southern Afghanistan(...)The narcotics were taken following an operation in the

Minimizing trafficking is one of the major challenges for Afghanistan and its international allies. Ideally, the state would have a monopoly on the use of force to eradicate poppy fields.⁸³ But the issue is more complex: eradicating fields would leave families in economic distress, trigger humanitarian disaster and increase the temptation to join the insurgency. Therefore, eradication must be implemented alongside alternative livelihood programs in order to be effective.⁸⁴ Creating legal alternatives to drug trafficking in Afghanistan will require continued domestic reform and international outreach efforts directed towards farmers. Without external assistance, namely provided by the ISAF, the OEF and neighbouring countries, results will be limited.

Effective counter-narcotic activity is one of the basic tasks for international forces in Afghanistan. Without eliminating narcotics in Afghanistan, it is impossible to provide local people with the security needed for normal life activities. The obligation to provide substantial support in terms of manpower, training of local police and eventually combating the narcotic situation is placed upon NATO forces. Eradication also needs to be executed within the internationally accepted legal framework.

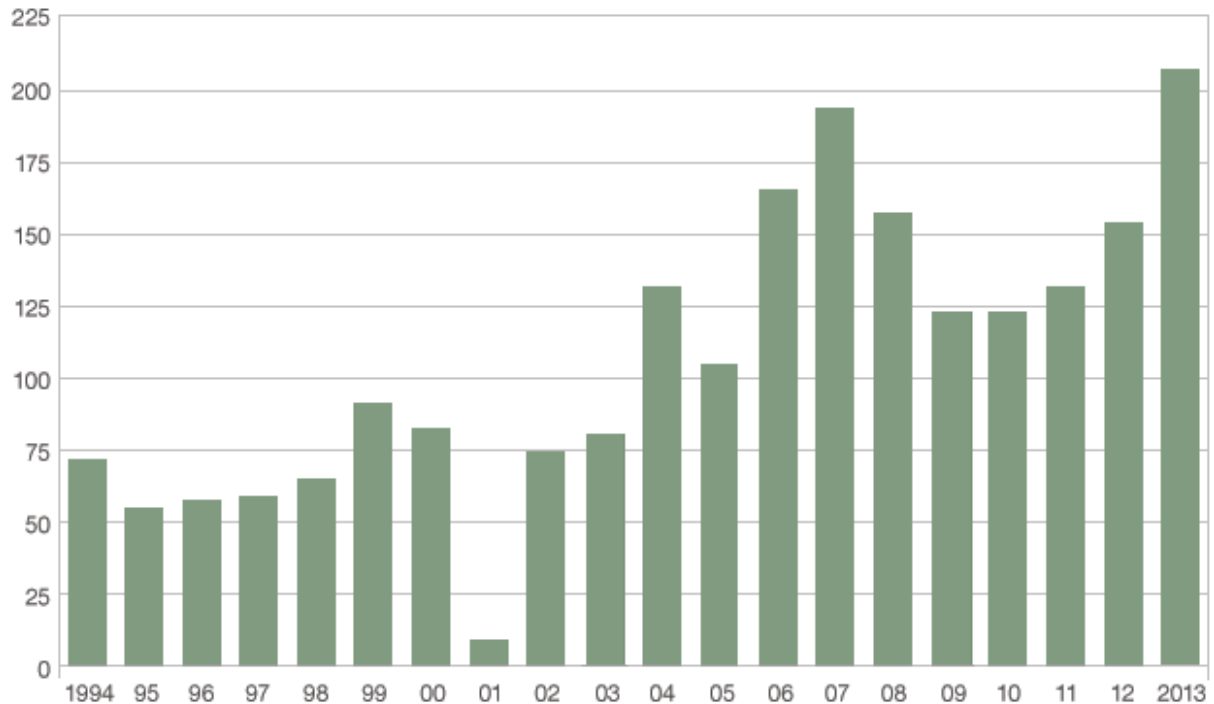
village of Marjah, a major drug-processing hub in Helmand Province, which is the world's largest opium poppy producing region. (...) During the operation, which started Tuesday, the troops also discovered 45 tons of ammonium nitrate, ammonium chloride and other materials for homemade explosives (...) For years, US and other western officials have said the booming drug production in southern provinces, where insurgency is strongest and the government weakest, is funding the Taliban's war. Available at: *Newsday, Tons of Afghan drugs seized*, New York, May 22, 2009 Friday, provided by the Associated Press on www.lexisnexis.com (9/10/11)

⁸³ E. Peterson, *op.cit.*, p. 232.

⁸⁴ E. Peterson, *ibidem.*, p. 234.

Opium cultivation in Afghanistan, 1994-2013

Hectares (thousands)



Source: UNODC Afghanistan Opium Survey 2013

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1.10 THE POSITION OF WOMEN IN AFGHANISTAN

The position of women under the Taliban ruling was extremely difficult. They suffered targeted, often violent adversity, including denial of basic human rights, veiling, seclusion and segregation.⁸⁶ Rights of women and girls were systematically marginalized.

Women and girls had restricted access to education, health care facilities and employment. During the Taliban's rule, only around 3 percent of girls received some form of education. On the other hand, the ban on women's employment also affected education of males, as the majority of teachers were women. Poor health conditions and malnutrition made pregnancy and childbirth exceptionally dangerous for Afghan women. The Taliban also limited the freedom of movement of women. Women could travel only when accompanied by a male relative, wearing the traditional full-body burqa. It put single, female-headed households and widows in an extremely difficult position. In fact, these women were even

⁸⁵ UNDOC - The Afghanistan Opium Survey 2014, p. 12 available at <https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghan-opium-survey-2014.pdf> (3.08.2015).

⁸⁶ R. Skaine, *op.cit* p. 7

forbidden to beg on the streets. In May 2001, a decree was issued by the Taliban, banning women from driving cars, which further limited their activities. Women were harassed and beaten by the Taliban if their public appearance was perceived to contradict Taliban regulations.⁸⁷ Women were literally removed from public space, becoming an invisible, ghost-like part of society.

Changes implemented after the fall of the Taliban increased the influence of women in political decision-making, and helped them to be more influential in terms of political representation. In fact, 68 women sit in the lower house of the National Assembly, or Wolesi Jirga (Parliament of Afghanistan), which is 25 percent of the total of 249 members. It is the highest percentage in the Arab world. However, they still face restrictive social norms and violent intimidation along their path to equality.⁸⁸ Contemporary Afghan legislation does not completely follow international standards. For example, President Karzai's legislation introduced proposal. The law regulates marriage, divorce, and inheritance for the country's Shia population (mostly Hazara). It includes provisions that require a woman to ask permission to leave the house except on urgent business, a duty to "make herself up" or "dress up" for her husband upon demand, and a duty not to refuse sex when her husband wants it. This new law contradicts Article 22 of the Afghan Constitution which states that men and women "have equal rights and duties before the law."⁸⁹ This new law also violates the Convention on the Elimination of All Forms of Discrimination against Women, of which Afghanistan is a state party. Although the provisions of the Shia Personal Status Law directly contradict the Afghan Constitution⁹⁰, which bans any kind of discrimination and distinction between citizens of Afghanistan, it is seen as an element of the political campaign orientated to reserve a conservative side of society.

1.2 INTERNATIONAL HUMANITARIAN LAW AND TYPES OF ARMED CONFLICTS

Most articles of the Geneva Convention are applicable to an international armed conflict. NATO intervention in Afghanistan constitutes a non-international armed conflict. As a result, the law which is applicable differs from this type of law during a traditional war. In

⁸⁷ UN report available at <http://www.un.org/events/women/2002/sit.htm> (3.09.2015).

⁸⁸ <http://www.ndi.org/node/63> (3.03.2015).

⁸⁹ Available *inter alia* at <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf> (3.09.2015).

⁹⁰ Report prepared by the Human Rights Watch a available at <http://www.unhcr.org/refworld/country,,HRW,,AFG,4562d8cf2,49e6e853c,0.html> (3.09.2015).

an international conflict, war is a reciprocated, and thus is classified as an armed conflict between two or more state entities. It implies the relevance of the whole body of international humanitarian law to the warring parties. During a non-international armed conflict (NIAC), applicable humanitarian law is limited to general Article 3 of the Geneva Convention or the Additional Protocol II. The relevance of the above-mentioned regimes depends on the intensity of the conflict. Treaty law applied during a NIAC is supplemented by customary rules.

An in-depth classification of the conflict is very important. Firstly it affects the status of participants. Secondly, it affects other aspects of international humanitarian law such as the principle of distinction and eventual targeting. With regard to an international armed conflict, at least in terms of legitimate human targets, the law is clear. Negative definition stipulates that civilians are protected while combatants are not. In a non-international armed conflict, the situation is more complex. Civilians may constitute a legitimate target under some circumstances. This criterion implies direct participation in hostilities.⁹¹

Treaty law says little on the notion of a military objective during a conflict regulated by the Additional Protocol II. Furthermore, rules on targeting stipulated in articles 48-67 AP I are not followed by the AP II. Classification of the conflict also affects the issue of the cultural property protection.⁹²

In this section of the opening chapter, I will explore legal characteristics of a NIAC. Furthermore, I will analyse the legal status of the military operation in Afghanistan from the point of the US military reaction of the 9/11 attacks until present. The above-mentioned analysis will contribute further to my discussion. Establishing a legal framework within an armed conflict allows to properly and appropriately consider the legal status of the participants of the conflict. It also brings a legal framework of possible violations of law within an armed conflict. Discussions and conclusions from this chapter will constitute a basis for further consideration developed in the chapter which is dedicated to the legal framework of the ISAF mission in Afghanistan. You will see this in the chapter dealing with the legal status of participants and the chapter dedicated to the Rules of Engagement.

⁹¹ This issue is more broadly analyzed in chapter 4 on counterinsurgency and IHL

⁹² W. Boothby, *op. cit.* p. 49

1.3. COMMON ARTICLE 3 - SCOPE OF APPLICATION

Four Geneva Conventions adopted in 1949 deal mostly with international armed conflicts. However, they contain Common Article 3 called “Treaty in Miniature”, which states a minimal set of rules protecting victims of an armed conflict that is not international in nature.⁹³ It is applicable “in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply”.⁹⁴ It obliges all conflict participants, state and non-state agents to obey at least these minimal requirements. Article 3 is not based on reciprocity.

The application of Common Article 3 depends on the notion of the armed conflict. If the situation is below the armed conflict threshold, then international humanitarian law does not apply.

The contemporary definition of an armed conflict is based on the International Criminal Tribunal for the former Yugoslavia judgment delivered in the so-called Tadic case, “...an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there”.⁹⁵

Contrary to the AP II limitation, armed forces of the relevant state may not necessarily be involved in the conflict.⁹⁶ Additionally, it is not necessary to prove that the insurgents or dissenting forces exercise some degree of territorial control.⁹⁷ Rebel forces need not, similarly to AP II, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations.

⁹³ For example in 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

⁹⁴ Geneva Conventions I-IV art. 3

⁹⁵ Tadic, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70

⁹⁶ W. Boothby, *Conflict Law - The Influence of New Weapons Technology, Human Rights and Emerging Actors*, 2014, Asser, p.32

⁹⁷ W. Boothby, *ibidem*. p.32

As to the definition or criteria indicating what an “organized group” means, Boothby refers to the Haradinaj case which provided a list of criteria. They are as follow: existence of a command structure, existence of headquarters, control of certain territory, access to weapons, recruits and military training, the ability to plan, coordinate and execute military operations, the ability to define a unified military strategy and use tactics, to speak one voice to negotiate agreements such as, for example, ceasefire or peace accords.⁹⁸

1.3.1 PERSONAL SCOPE – RATIONE PERSONAE

Common Article 3 protects following groups:

- Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms,
- and those placed ‘*hors de combat*’ by sickness, wounds, detention, or any other cause.

Protection under Common Article 3 is limited. For example, there are no *expressis verbis* constraints of illegal actions toward active and not *hors de combat* hostile participants. A person captured during an international armed conflict is entitled to prisoner-of-war status. On the contrary, participants in a NIAC are not. When captured, they may be prosecuted for hostile activities even when such activities are conducted according to the rules of law of armed conflicts.⁹⁹

1.3.2 HUMANE TREATMENT

Humane treatment is of universal character and is a cornerstone for all four Geneva Conventions. It obliges parties to treat all captured persons in a way which does not constitute a breach of their physical and mental needs. Article 3 states that humane treatment applies to “all persons in enemy hands, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”.¹⁰⁰ The following acts contradict Article 3: murder, mutilation, torture, cruelty, humiliating and degrading treatment, taking hostages, unfair trial. The list above does not, in all sense of the word, have a closed

⁹⁸ Prosecutor v. Ramush Haradinaj, case No. IT-04-84-T, 3 April 2008, p. 33, par. 60 available at <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf> (9/10/13)

⁹⁹ R. Bierzanek, *Wojna a prawo międzynarodowe, War and international law*, Warszawa 1982, p. 327.

¹⁰⁰ Geneva Convention I-IV, art. 3

enumeration character. It would be dangerous to try to enumerate things with which a human being must be provided so that they are distinguished from an animal, or to lay down in detail the manner in which one must behave towards them in order to show that one is treating them "humanely", that is to say as a fellow human being and not as a beast or an item.¹⁰¹

We must further consider that under Article 3, all participants of the conflict, including Talibs and members of other insurgent organizations, are entitled to fair trial, and torture, cruelty, and humiliating and degrading treatment is forbidden.

1.3.3. THE SICK AND WOUNDED

The sick and wounded, according to Article 3.2, must be retrieved and cared for. To fulfil these obligations, Article 3 states that “an impartial humanitarian body, such as the International Red Cross Committee, may offer its services to the Parties of the conflict”. It constitutes the activity of the Red Cross, in the midst of internal conflict, as a treaty based humanitarian activity rather than purely charitable service, often considered previously as an unfriendly or hostile act.¹⁰²

In Afghanistan, the International Red Cross Committee also provided first aid training and kits to the Taliban¹⁰³

1.3.4 MEDICAL PERSONNEL

Under Article 3, medical personnel should be respected and protected in all circumstances. However, when engaged in hostile activities they lose their protected status.¹⁰⁴

1.4 ADDITIONAL PROTOCOL II

The division between Common Article 3 and the AP II is of particular importance for the ISAF operation in Afghanistan. This is because most European NATO members and Afghanistan are parties of the AP II whereas the most influential country, the USA, is not. This also affects the situation where European states are under the US command.¹⁰⁵

¹⁰¹ J. Pictet, *I Geneva Convention Commentary*, International Committee of the Red Cross, 1960, p.54.

¹⁰² J. Pictet, GC I, *ibidem.*, p.57.

¹⁰³ BBC news, *Red Cross in Afghanistan gives Taliban first aid help* <http://www.bbc.co.uk/news/10161136> (12.10.2014)

¹⁰⁴ Rule no. 25 Jean-Marie Henckaerts, Louis Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, 2005, p.79-80.

¹⁰⁵ List of countries available at <http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp> (9/10/14)

1.4.1 SCOPE OF APPLICATION

Additional Protocol II shall not be applied during international armed conflicts and those conflicts covered by Article 1(4) of AP I.¹⁰⁶ It is also not applicable during disturbances¹⁰⁷ and tensions – such as riots, isolated and sporadic acts of violence and other acts of a similar nature, which are not classed as armed conflicts.¹⁰⁸

The concept of a non-international armed conflict contained in Additional Protocol II, sets a higher threshold of application than Common Article 3. While Article 3 applies to all situations of a non-international armed conflict, Article 1(1) of Additional Protocol II states that it applies only to the armed conflicts:

- *which take place in the territory of a High Contracting Party (HCP) between its armed forces (AF) and dissident armed forces or other organized armed groups.*¹⁰⁹ This means that there must be national armed forces on one side and either dissident armed forces or an organized armed group on the other. As to the term, armed forces; not only armed forces should be considered but also law enforcement and similar agencies. Such an agency needs to be armed.¹¹⁰ AP II importantly limits the international dimension of non-international conflicts. Since it is applied to an armed conflict in the territory of a HCP between its AF and dissident AF, it excludes non-international armed conflict abroad,¹¹¹

- which is under responsible command,
- and exercises such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol (Art.1 *AP II*)- for example by taking care of the wounded and sick and providing decent treatment to prisoners.¹¹²

¹⁰⁶ Additional Protocol I, art. 1. 4

¹⁰⁷ According to definition given by the Professor Bierzanek tensions are taking place when governmental forces are in control of territory in question however governmental authorities execute mass arrests of individuals considered as dangerous to government and sporadic acts of violence occurs. Disturbances are taking place when sporadic acts of riots or not organized fights against governmental authorities occurs (In:) *Międzynarodowe prawo humanitarne- International Humanitarian Law*, ed. T. Jasudowicz, Toruń 1997, p. 46.

¹⁰⁸ Art. 1.2 Additional Protocol II

¹⁰⁹ Territory for these purpose will include not only terrestrial surface but also sea and national airspace (in:)W. Boothby, *Conflict Law - The Influence of New Weapons Technology, Human Rights and Emerging Actors*, 2014, Asser, p.29

¹¹⁰ W. Boothby, *op. cit.* p.29

¹¹¹ M. Sassoli, *Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Naftali, Oxford University Press, 2011 p.55

¹¹² W. Boothby, *op. cit.* p.30

As auxiliary conditions, those proposed by Professor Dietrich Schindler may be listed:

- the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against insurgents instead of mere police forces.

- the hostilities are meant to be of a collective character, that is, they must be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation.

Their (the insurgents') armed forces should be under responsible command and be capable of meeting humanitarian requirements. According to Dietrich Schindler, the conflict must show certain similarities to a war without fulfilling all conditions necessary for the recognition of belligerency.¹¹³

In fact, the definition of a non-international armed conflict under AP II has such a high threshold that it would only be applicable in rare circumstances, usually only when rebels are well established and have set up some form of *de facto* government.¹¹⁴ As such, the AP II could be, under some circumstances, applicable to the current conflict in Ukraine i.e. pro-Russian separatist forces .

1.4.2 PERSONAL SCOPE

Additional Protocol II, differently to Common Article 3, states that it is “applicable without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as "adverse distinction") to all persons affected by an armed conflict as defined in Article 1”.¹¹⁵

Additional Protocol II does not change the status of the armed conflict participants. They still may be considered as criminals, responsible before the court of law for conducting military operations. The only change in the legal situation of the participants of the armed conflict was introduced by Article 6.5 stating that “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have

¹¹³ D. Schindler, *The different types of armed conflicts according to the Geneva Conventions and protocols*, vol. 163, *Recueil des cours* (1979), p. 117-164.

¹¹⁴ W. Boothby, *op. cit.* p.30

¹¹⁵ Additional Protocol II, art. 2

participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.¹¹⁶

1.4.3 HUMANE TREATMENT

Additional Protocol II, similarly to Article 3, “obliges states to provide basic humane treatment. Being continuation of, forbade following acts: violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any or the foregoing acts.”¹¹⁷ This list is particularly important since it forbids torture and acts of terrorism. Both types of activities were conducted by parties of the conflict in Afghanistan.

Additional Protocol II consists of special protection towards children. According to Article 4.3 “children shall be provided with the care and aid they require ...”. This part is of particular importance from the perspective of the later analysis of PRT’s activities in the chapter dedicated to counterinsurgency.

1.4.5 MEDICAL PERSONNEL

Protection of medical and religious personnel is guaranteed by Article 9 of AP II. “Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission. In the performance of their duties, medical personnel may not be required to give priority to any person except on medical grounds”. Protection provided by Additional Protocol II to medical personnel is similar to the protection provided to medical personnel during an international armed conflict.

The activities of medical personnel are protected equally. According to the literal meaning of Article 10, “the professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their

¹¹⁶ Additional Protocol II, Art. 6.5

¹¹⁷ Additional Protocol II 4.2

care shall, subject to national law, be respected”. No one should be penalized for the care they provide to the sick and wounded.

The protection provided to medical personnel in Afghanistan faces two obstacles. From the perspective of insurgents, medical personnel and regular troops are very difficult to differentiate. They usually use the same type of armoured vehicles and helicopters as regular troops. From a NATO perspective, it is even more complicated. In rural areas, medical care is administered by local healers rather than medical staff whom we would understand to be part of a medical team. The obvious question is: do they deserve equal protection as educated, licensed medical personnel?

1.4.6 PROTECTION OF MEDICAL UNITS AND TRANSPORTS

To accomplish the principle of humane treatment, Article 11 states the protection of medical units and transport. As mentioned above, often in the midst of the battlefield, the distinction of what is and what is not a medical unit creates a problem.

1.4.7 RELIEF SOCIETIES AND RELIEF ACTIONS

Additional Protocol confirms that “relief societies (...), such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict”.

This principle, upon first glance, is not debatable. It is a fact that in Afghanistan, the Red Cross and other organizations provide relief to the victims of the conflict. However, there has been a fierce debate related to the concept of relief or humanitarian actions since Provincial Reconstruction Teams appeared on the modern battlefield in Iraq and Afghanistan. The differences and legal qualification of actions conducted by PRTs will be discussed in the chapter dedicated to counterinsurgency.

1.4.8 CUSTOMARY LAW

Nowadays, not only the rules of treaty law are applicable during armed conflicts. The whole body of customary law developed *inter alia* by the judgment of tribunals are equally valid. These rules are applicable in both types of non-international armed conflicts; those regulated by Common Article 3 and those regulated by Additional Protocol II.

Customary regulations have been introduced to military manuals and rules of engagement. They govern the conduct of NATO military personnel in Afghanistan. The most important principles are:

1. Principle of distinction – by the parties of the conflict in order to distinguish the civilian population from military targets. It forbids the civilian population being a target¹¹⁸. The same principle is applied toward civilian objects and installations;¹¹⁹

2. Indiscriminate attack¹²⁰- this principle obliges warring parties to conduct military operations only against military objectives. The use of means and methods of warfare which may inflict suffering upon the civilian population is prohibited;

3. Protection of medical personnel - this principle, included in Additional Protocol II, also covers the situation of a non-international armed conflict governed solely by Common Article 3. It says “that medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy”;¹²¹

4. Personnel and Objects Involved in a Peacekeeping Mission – both Article 3 and Additional Protocol II do not state any protection toward peacekeeping forces. Under customary regulations, “directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited”.¹²²

The same situation applies to protected zones; directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited.¹²³

5. Individual responsibility for war crimes – this is a new concept developed following the judgments of international criminal tribunals.¹²⁴ This approach was confirmed by the statutes of international bodies such as the Sierra Leone Special Court or the Rome Statue. It

¹¹⁸ Jean-Marie Henckaerts, Louis Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross, 2005, rule nr 1-6, p. 3-24.

¹¹⁹ *Ibidem*, rule 7-10, p. 25-36.

¹²⁰ *Ibidem*, rule 11-13, p. 37-46.

¹²¹ Jean-Marie Henckaerts, Louis Doswald-Beck, *op. cit.*, rules 25-30, p. 79 – 104.

¹²² *Ibidem*, rule 33, p. 112.

¹²³ *Ibidem*, rule 35-37, p. 119.

¹²⁴ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadic, Case. No. IT-94-1-AR72).

makes individuals equally responsible for war crimes committed during a NIAC as in an IAC. Customary principles often are incorporated into Rules of Engagement or national caveats what directly affects actions or omissions of the troops on the ground.

1.5. LEGAL STATUS OF THE MILITARY OPERATION IN AFGHANISTAN AFTER 9/11 ATTACKS.

In this section, I will provide a legal framework for the international operation in Afghanistan. It has a particular meaning in terms of the status of participants of the conflict, an analysis of which, I will discuss in the next part of my thesis.

Nowadays, the doctrine, even only within boundaries of Common Article 3 (not AP II), provides several scenarios which are included within the typology of a non-international armed conflict. They are as follows: government forces fighting organized armed groups, organized groups fighting each other within a state, a situation where the government forces are fighting organized armed groups and the conflict spills over into neighbouring countries, multinational armed forces fighting alongside the host state armed forces in its territory against organized armed groups, UN or regional organization forces fighting alongside the host state armed forces in its territory against organized armed groups, a non-international armed conflict which exists alongside an international armed conflict, and conflicts between terrorist organizations such as al Qaida and the United states.¹²⁵ Most of these doctrinal criteria were met in Afghanistan. To closer examine the relationship between the parties, I will attempt to analyse the conflicts which took place on the territory of Afghanistan from 2001 when Operation Enduring Freedom was conducted by the US forces:

- What is the legal qualification of the conflict between the US forces and the Taliban?
- What is the legal qualification of the conflict between the US forces and al Qaida ?
- What is the legal qualification of the conflict between the Northern Alliance and the Taliban?
- What is the legal qualification of the conflict between the Northern Alliance and al Qaida?

¹²⁵ Typology proposed by Jelena Pejic (In:) W. Boothby, *op. cit.* p. 34

1.5.1 WHAT IS THE LEGAL QUALIFICATION OF THE CONFLICT BETWEEN THE US FORCES AND THE TALIBAN?

An armed conflict may be conducted between states or non-state entities. The fact that a conflict is conducted between states implies it is international in character. During such conflicts, persons affected by them are protected by relevant regulations of international humanitarian law and, in particular, the Geneva Convention III. Since the United States is a legitimate state, there is no problem with the identification of one party of the conflict. However, the problem arises with the second participant of the conflict i.e. Afghanistan under the Taliban ruling. There was even a problem with giving a name to the country. After the fall of the communist regime of Najibulah, the country was named the Islamic State of Afghanistan with Burhanuddin Rabbani as the head of state.¹²⁶ However, since 1996, under the Taliban ruling, it was named the Islamic Emirate of Afghanistan. Both names were used by both parties of the internal conflict until 2001 when an interim administration was established during the Bonn peace talks and the name of country was changed to the Islamic Republic of Afghanistan.

In the case of the Taliban, the question here is whether Afghanistan under Taliban ruling was a party of the international conflict and whether Taliban forces could be considered agents of the state. Or if rather Afghanistan was a failed state with no *de facto* or *de jure* authority which would indicate that the conflict between US forces and the Taliban was not governed by the GC III.

To address this question, a basic issue needs to be questioned: what was the status of the Taliban before US intervention? Was the Taliban a *de jure* or *de facto* government?

The Taliban came to power in the mid 90's when they took control over Kabul in 1996.¹²⁷ From that moment, they exercised control over more than 90 percent of the country.¹²⁸ During their ruling, they established an effective system of authority of governing provinces through Shuras and governors. They also established a system of law based on strict interpretation of Sharia law. Human rights violations did not gain international public-opinion support and the Taliban government was only officially recognized by Pakistan, Saudi Arabia,

¹²⁶ More information on Islamic State of Afghanistan available on CIA world Factbook at <http://www.umsl.edu/services/govdocs/wofact2001/geos/af.html#Govt> (9/10/10)

¹²⁷ R. Wolfrum, Ch. E. Philipp, *op. cit.* p. 588.

¹²⁸ N. Ghufuran *The Taliban and the civil war entanglement in Afghanistan*, Asian Survey 2001, p. 474

the United Arab Emirates and the unrecognized state of Chechnya.¹²⁹ The lack of official recognition was confirmed by Security Council resolutions.¹³⁰ As a result, before the beginning of the Enduring Freedom Operation, the Taliban government was not considered *de jure*. Interestingly, the same resolution does not state that the Taliban was not in *de facto* control over Afghanistan. Furthermore, the Security Council Resolution S/RES/1214 (1998) of 8 December 1998 acknowledged *de facto* control of Afghanistan by Taliban forces.¹³¹ This may be taken from the literal meaning of the Council resolution which stated that the Taliban should enforce measures against terrorism and not provide safe havens for terrorist activities.¹³² This enables us to conclude that the Taliban government was able to or, in other words, was, in fact, controlling Afghanistan to the extent that they were able to suppress terrorism.¹³³ Similarly, an interpretation of S/RES/1267¹³⁴ indicates that it would be pointless to expect the Taliban to take action against terrorists operating on their territory if they were not, in fact, exercising control over a significant part of Afghanistan.¹³⁵ To summarize, before Operation Enduring Freedom there were two governments. One run by former mujahedins with President Rabbani which had very limited control over the country but had a United Nations representative, Dr. Ravan Farhadi,¹³⁶ and a second government, run by the Taliban which had *de facto* control over Afghanistan with an armed wing but without any international recognition.¹³⁷ Of course the lack of international recognition of the government is important but it is not crucial in terms of the capability of the state. According to the doctrine of international public law, the lack of international recognition of the government

¹²⁹ Both internationally unrecognized states mutually recognized themselves.

¹³⁰ S/RES/1214 (1998) of 8 December 1998 para. 1 available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Afgh%20SRES1214.pdf> (9/10/10)

¹³¹ This interpretation of the Security Council Resolution was provided *inter alia* by the R. Wolfrum, Ch. E. Philipp in *The Status of the Taliban: Their Obligations and Rights under International Law*, Max Planck Yearbook of United Nations, Volume 6, 2002

¹³² S/RES/1214 (1998) says on page 2 “Deeply disturbed by the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts, and reiterating that the suppression of international terrorism is essential for the maintenance of international peace and security”

¹³³ S/RES/1214 (1998) of 8 December 1998 para. 13 available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Afgh%20SRES1214.pdf> (9/10/13)

¹³⁴ Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement>

¹³⁵ R. Wolfrum, Ch. E. Philipp, *op. cit.* p. 582

¹³⁶ Information available at <http://www.afghanistan-un.org/whos-who/former-permanent-representatives/>

¹³⁷ S. Ojeda, *US detention of Taliban fighters, some legal considerations*, International Law Studies vol. 85, (in: *The War in Afghanistan: A legal analysis*, ed. M. N. Schmitt, US Naval War College, 2009, p. 358-359 available at <http://www.usnwc.edu/Research---Gaming/International-Law/New-International-Law-Studies-%28Blue-Book%29-Series/International-Law-Blue-Book-Articles.aspx?Volume=85> (30/09/10)

does not eradicate the international personality of the state.¹³⁸ Especially that, *post factum*, some official sources confirm that the Taliban constituted some form of government. For example, the message from the British House of Commons, which explains the legal basis for the invasion of Afghanistan (SN/IA/5340), refers to the Taliban as the government of Afghanistan.¹³⁹ The importance of recognition of the *de jure* or *de facto* character of the Taliban government, is directly related to the status of the Taliban fighters before the Bonn agreement.

When the terrorist attacks of 2001 occurred, the US government claimed that they had the inherent right of individual and collective self-defence.¹⁴⁰ The United States government referred to Article 51 of the UN Charter which says “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”. The principle of self-defence was reiterated by Security Council Resolutions 1368 and 1373.¹⁴¹ Importantly, there was no UN SC authorisation to conduct the military invasion of Afghanistan.¹⁴²

The above mentioned facts had the following impact on the legal status of the armed conflict which broke out. US forces attacked the Afghan state ruled by an unrecognized government, the Taliban. The armed conflict before the Bonn Agreement was international in nature.¹⁴³ The conflict in question, was governed by humanitarian law applicable during international armed conflicts especially by the GC I-IV. Lack of an internationally recognized government does not affect the status of the Taliban fighters, particularly under Article 4 A. Paragraph 2 or 3 of Geneva Convention III.¹⁴⁴ This position was not supported by the United States which refused to grant the captured Taliban members POW status in 2001 on the basis that, amongst others, they did not fulfil the four conditions of Article 4 A(2) of GC III.¹⁴⁵

¹³⁸ R. Wolfrum, Ch. E. Philipp, *The Status of the Taliban: Their Obligations and Rights under International law*, Max Planck Yearbook of United Nations, Volume 6, 2002, p. 570.

¹³⁹ B. Smith and A. Thorp, House of Commons note, *The legal basis for the invasion of Afghanistan*, Standard Note: SN/IA/5340, 26 February 2010, Section International Affairs and Defence Section, p. 2 available at <http://www.parliament.uk/briefing-papers/sn05340.pdf%E2%80%8E> (9/10/10)

¹⁴⁰ J. Negroponte letter to the president of the Security Council S/2001/946 of October 2001

¹⁴¹ S/RES/1368 (2001) of 12 September 2001 and S/RES/ (2001) of 28 September 2001.

¹⁴² B. Smith and A. Thorp, House of Commons note, *op. cit.* 3

¹⁴³ Under which Karzai's government was established.

¹⁴⁴ Also Marco Sassoli support the view that Taliban was Afghanistan's *de facto* government in: *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Naftali, Oxford University Press, 2011 p.39

¹⁴⁵ A. Bianchi, Y.Naqvi, *International Humanitarian law and terrorism*, Studies in International Law, 2011, Hart Publishing, Oxford, p.290.

After establishing the Karzai's government, the initially international conflict turned non-international.

1.5.2 WHAT IS THE LEGAL QUALIFICATION OF THE CONFLICT BETWEEN US FORCES AND THE AL QAIDA ORGANIZATION?

Initially, the main reason behind the US intervention in Afghanistan was to hunt down Al Qaida operatives responsible for the terrorist attacks on the World Trade Centre in 2001. The organization took refuge in Afghanistan due to the prolonged cooperation between the Taliban and Al Qaida.

Al Qaida al – Sulbah (the solid base) was conceptualized and established around 1987 by Abdullah Azzam and Osama bin Laden.¹⁴⁶ It was a continuation of the Maktab Khadamat al-Mujahidin al-Arab organization which was primarily orientated to help to finance, recruit and train fighters, usually from Islamic countries, to be part of the Afghan resistance movement against the Soviet Union.¹⁴⁷ Later, it became orientated against the Western World, mostly the USA and Israel.¹⁴⁸ In the beginning, the Al Qaida headquarters was located in Pakistan (Peshawar), then in Sudan and finally, since 1996, in Afghanistan.¹⁴⁹ Due to Taliban policy, Al Qaida established an advanced infrastructure in Afghanistan such as bunkers, military units and organizational features.¹⁵⁰ At the same time, bin Laden created the International Islamic Front for Jihad against Jews and Crusaders, (Al-Jabhah al-Islamiyyah al-'Alamiyyah li-Qital al-Yahud wal-Salibiyyin). It led to the formation of an independent organization well-rooted within Taliban controlled areas. As a result of these activities, the attacks on the World Trade Centre were planned and executed.¹⁵¹

Al Qaida did not exercise any *de facto* or *de jure control* over any part of Afghan territory and nor was it controlled by the Taliban. For a better understanding of the nature of the conflict between Al Qaida and the USA, the Tadic provides interpretative information. In the event Al Qaida activity was attributed to the Taliban, then the conflict before the Bonn Agreement would have had a similar character as the one between the Taliban and the USA. If it did not, it should not then be considered non-international.

The primary issue which should be dealt with is whether al Qaida activity can be

¹⁴⁶ R. Gunaratana, *Inside Al Qaida – Global Network of terror*, Berkley Books, New York, 2003, p. 4-5

¹⁴⁷ R. Gunaratana, *op. cit.*, p. 5-7

¹⁴⁸ R. Gunaratana, *op. cit.*, p. 7

¹⁴⁹ Special Forces Soldiers Handbook, Unclassified materials, Lubliniec 2003, p. 23

¹⁵⁰ Special Forces Soldiers Handbook, Unclassified materials, Lubliniec 2003, p. 24

¹⁵¹ http://news.bbc.co.uk/2/hi/south_asia/3128802.stm (9/10/13)

attributed to the Taliban. Or if Al Qaida should be considered as an agent of the Taliban state. In Tadic, the court on the case said that the control required by international law may be deemed to exist when a State plays a role in “organizing, coordinating or planning military actions of the military group. ... (then) acts performed by the group or members of the group may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning of each of those acts”.¹⁵² The Taliban, as a *de facto* government, was not in a position to effectively control Al Qaida activity.¹⁵³ Its actions were loosely affiliated with the Taliban, mostly in providing safe havens, for financial support in return. In conclusion, Al Qaida’s activity is difficult to consider as a state-related activity and therefore it constitutes purely non-state, but criminal, activity.

To conclude the above argumentations, the conflict between US forces and Al Qaida on the territory of Afghanistan was non-international in nature. To that conflict, Common Article 3 and customary law was applicable due to the fact that the US had not ratified Additional Protocol II.

1.5.3 WHAT IS THE LEGAL QUALIFICATION OF THE CONFLICT BETWEEN THE NORTHERN ALLIANCE AND THE TALIBAN?

The Northern Alliance was one of the factions struggling over control in Afghanistan. The movement consisted of mujahedeen fighters who had previously defeated the communist government. After the victory over the Soviets, the movement was unable to create a stable government. It was despite the fact that the leading mujahedeen commander, Ahmed Shah Massoud, seized Kabul on 26 April 1992.¹⁵⁴ After the arrival to Kabul of the rest of the leaders, the Islamic State of Afghanistan was established. Each commander held an area of Kabul and established their checkpoints. After failure to bring one of the influential commanders, Gulibudin Hekmatyar, to government, street fighting in Kabul erupted between Ahmad Shah Massoud with the newly-appointed President Burhanuddin Rabbani, representing the government and Gulibudin Hekmatyar with Tajik General Dostum, as the opposition forces. Hekmatyar savagely bombarded the city with rockets, mortars, and artillery, continuing encirclement of Kabul for several months. On 7 March 1993, Saudi King Fahd

¹⁵² ICTY, Prosecutor v. Tadić (IT-94-1) Judgment of 15 July 1999, para. 137

¹⁵³ B. Dreyfuss, *The Taliban is not al Qaeda*, May 16, The Nation <http://www.thenation.com/blog/160681/taliban-not-al-qaeda#> (9/11/13)

¹⁵⁴ N. Nojumi, *op. cit.*, p. 96.

sponsored a peace accord between warring factions.¹⁵⁵ All the participants agreed with a new proposal that appointed Rabbani as President and Hekmatyar as Prime Minister. This agreement never entered into force. Although nominated as Prime Minister, Hekmatyar further continued fighting.¹⁵⁶ The situation in the country was even more complicated due to the fact that the rest of the country was controlled by local warlords and turned into anarchy¹⁵⁷. After the full-scale civil war of 1996, the Taliban took Kabul.

Although recognised by most foreign nations as a legal government, the Northern Alliance only controlled approximately 10 - 30% of the country.¹⁵⁸

The above-mentioned situation may be summarized as an armed conflict between the recognized NA government controlling some territory of Afghanistan and an unrecognized Taliban government controlling the rest of the country.

There is no doubt that the scale of the conflict reached the level of an armed conflict as outlined by Common Article 3.¹⁵⁹ The question is whether the situation can be classified as an armed conflict before and during US operations under Additional Protocol II.

Despite the fact that both warring parties were fulfilling the conditions of AP II,¹⁶⁰ AP II cannot apply to the relations between the Northern Alliance and the Taliban. This is due to the

¹⁵⁵ UN Press Release SC/6203, 9 April 1996, available at <http://www.un.org/News/Press/docs/1996/19960409.sc6203.html> (9/10/14)

¹⁵⁶ Neamatollah Nojumi, *The rise of the Taliban in Afghanistan, mass mobilization, civil war and the future of the region*, Palgrave, New York, 2002, p. 114.

¹⁵⁷ W. Jagielski, *Modlitwa o deszcz, Prayer for a rain*, W.A.B., Warszawa 2002, p. 50

¹⁵⁸ Country Profile: Afghanistan, Library of Congress – Federal Research Division, p. 3 available at <http://international.loc.gov/frd/cs/profiles/Afghanistan.pdf>

¹⁵⁹ Protracted armed conflict between the Northern Alliance and the Taliban was confirmed by numerous sources for example, <http://usgovinfo.about.com/library/weekly/aa092801a.htm>

¹⁶⁰ The first condition stated by Article 1 of AP II says that a conflict needs to take place (...) in the territory of a High Contracting Party. This may not be discussed despite the international dimension the armed struggle between the Northern Alliance and the Taliban which took place within the territory of Afghanistan.

The second condition is that an armed conflict between the governmental armed forces and dissident armed forces or other organized armed groups must also be fulfilled. As presented earlier, the Taliban were not recognized as a government in contrary to mujahidin's of President Rabbani. In this particular case, the Northern Alliance government may be recognized as a legitimate one. It leads to the conclusion that the Northern Alliance military forces may be qualified as armed forces within the parameters of Article 1 AP II. The Taliban movement in this case, should be considered as dissident armed forces.

The third condition means that both warring parties' armed forces were under responsible command. Since the very beginning, Mullah Omar was controlling Taliban military operations. On behalf of the Northern Alliance, that same attribute may be attached to General Dostum and Ahmed Shah Massod.

The fourth condition, which is control over a part of its territory so as to enable the parties to carry out sustained and concerted military operations, is also fulfilled. Taliban seizure of Herat, Kandahar, Mazaar i Sharif and Kabul in 1996 is an example of it. The same applies to Northern Alliance operations especially within the undefeatable Panjshir Valley was ruled by the Ahmad Shah Massod until his death two days before the 9/11 attacks.

fact that Afghanistan became an AP II state party only in 2009.¹⁶¹ Therefore, the conflict between the NA and the Taliban before and after the Boon Agreement was governed only by Common Article 3.

1.5.4 WHAT IS THE LEGAL QUALIFICATION OF THE CONFLICT BETWEEN THE NORTHERN ALLIANCE AND AL QAIDA

Taking the above discussions into consideration, the conflict between the NA and Al Qaida may only be considered to be governed by Common Article 3.

CONCLUSION

When discussing assignments of International Security and Assistance Forces in Afghanistan, we cannot forget the aforementioned facts. On the other hand, we need to remember that the ISAF – NATO mission in Afghanistan was the most important combat mission. Is it not only an attempt to settle the situation in this part of Asia, but also an ultimate test of military and organizational skills of the most powerful military pact in the world. The NATO/ ISAF and Resolute Support failure in Afghanistan will undermine the *raison d'être* of NATO, and also will contribute to the further destabilisation of the region, where two rivalling nuclear-weapon states are located dangerously close, namely India and Pakistan. NATO is responsible for Afghanistan and must make all efforts to bring safety and security to this country. This is an extremely complex task. State institutions such as police forces, the army and administration needs to be improved. Both the legal system and the legislation process must be developed and stabilised. On the other hand, activities such as opium cultivation and insurgency must be eradicated. All these issues of the country's development are placed unto NATO. In many respects, it is a new form of humanitarian intervention.

The last condition, observance of humanitarian law, is always debatable, especially that it wasn't verified by independent and impartial findings.

¹⁶¹ <http://www.cicr.org/eng/resources/documents/news-release/2009-and-earlier/afganistan-news-240609.htm>

INTRODUCTION

One of the most important aspects of modern conflict, as well a legal challenge, is the status of combatants and the treatment of detained participants.

The US response to the World Trade Centre attacks lead to an unprecedented global struggle with terrorism. The common denominator of the US response was the military character of its operations, particularly in Afghanistan, and the lack of clearly identified combatants or persons considered to be legitimate targets.

The Bush administration has often referred to the so-called global war on terror, which is a politically-motivated concept and has no legal meaning. Modern conflicts, however, particularly those in Iraq and Afghanistan, are highly influenced by such ideas. The Bush administration created a military and political infrastructure that allowed for the conduct of war (on terror) which had no legal meaning, against opponents who were not clearly defined. This politicized approach leads to further complication in understanding the already vague concept of a ‘combatant’ in modern conflicts. This lack of clarity has particularly affected the treatment of persons captured during non-international armed conflicts.

One must not forget that Bush’s ‘bull in a china shop’ approach was an attempt to address current challenges. The World Trade Centre attacks gave the international community new aspects of terrorism to combat and the very nature of this conflict became transnational on an unprecedented scale. Terrorism of the 1970s and 1980s was deep-rooted in particular countries or territories. By this, I mean that organizations such as the IRA or RAF were, despite their international dimension and cooperation with other terrorist organizations, very much local. As a result, most anti-terrorism operations conducted against them were more internal-law enforcement in nature, conducted by governments within their own territories.

In contrast, the response to the threat of Al Qaida was, and ought to be, an international one. Nowadays, a number of antiterrorist campaigns are being conducted

through military means and across various borders.¹⁶² This brings its own new challenges in terms of proper handling and detention of persons engaged in worldwide terrorism or related armed conflicts.

In the midst of the so-called war on terror, the status of participants in armed conflicts has become a focal point. Only those who are combatants, are immune to prosecution for war-like acts that comply with the laws and customs of war.¹⁶³ Additionally, when in captivity, combatants are treated as prisoners of war.¹⁶⁴

Historically, the protection of prisoners of war dates back to the 19th century, with the issue in 1863 of the Instructions for the Government of Armies of the United States in the Field, General Order No. 100, the so-called Lieber Code. Article 56 of the Code introduced protection of prisoners of war, stating that “a prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity”.¹⁶⁵ But the Lieber Code did not provide a definition of ‘combatant’. This was developed over the decades to follow, resulting in the definition being provided by the Geneva Conventions.¹⁶⁶ Combatant status is fully regulated by the 1949 Geneva Conventions and the 1977 Additional Protocols.¹⁶⁷

Humanitarian law identifies only two categories of participant in an international armed conflict: civilians and combatants¹⁶⁸, whereas in a non-international armed conflict, there is only a civilian population category. This leaves no room for defining civilians or combatants as currently provided for by the concepts of the Bush administration, such as the unlawful combatant, the unprivileged belligerent, or illegal combatants (i.e. persons considered by the US administration to be legitimate targets ineligible for protection). This

¹⁶² S. Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”*, International Review of the Red Cross, vol. 87 (2005), no. 857, p. 40

¹⁶³ M. Maxwel, M. Watts, *Unlawful Enemy Combatant’: Status, Theory of Culpability, or Neither?* “Journal of International Criminal Justice”, Oxford, vol. 5 (2007), p. 21.

¹⁶⁴ Art. 5 Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 (GC III)

¹⁶⁵ Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863, available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> also available at the Yale Avalon project http://avalon.law.yale.edu/19th_century/lieber.asp where it says “A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity”.

¹⁶⁶ Art. 4 GC III

¹⁶⁷ M. Flemming, *Jeńcy wojenni. Studium prawnohistoryczne, Prisoners of war. Historic and Legal Study*, Warszawa 2000, p. 25.

¹⁶⁸ M. Maxwel, M. Watts, *op. cit.*, p. 20.

chapter presents an in-depth analysis of the legal status of participants in the Afghanistan conflict. It is a point of departure on the discussion of the status of combatants in modern armed conflicts, leading to *de lege ferenda* conclusions.

One of the issues analysed is inevitably linked to combatant status – the treatment of those granted and those not granted prisoner-of-war status, as well as related issues such as the transfer of detainees. I shall refer to places known as “black sites”, such as the American-run Bagram Prison in Afghanistan, where alleged violations of detainees’ rights have occurred.¹⁶⁹ Unfortunately, similar violations have also taken place at Afghan-operated detention centres. These examples raise the issue of compliance with the legal obligation of NATO’s European members, resulting from their cooperation with US and Afghan troops. The question of the treatment and transfer of detainees is particularly important, taking into consideration the nature and aim of modern military operations, such as country stabilization and implementation of the rules of law and good governance, etc. Situations that contradict this took place in both Iraq and Afghanistan, where soldiers from European countries have been formally and informally obliged to transfer captured belligerents to local or American-run detention facilities.¹⁷⁰ In these situations, Europeans not only violated the European Convention of Human Rights, but also became accomplices to torture, cruelty and degrading treatment. In many cases, such transfers remain in violation of the law, based not only on the Soering case¹⁷¹, but also taking into consideration the fact that both the US and Afghan forces provide lower legal protection standards than their European counterparts. For example, the US is not a party of Additional Protocol I and II.

The ‘war on terror’ and ‘Guantanamo Bay’ issues brought the question of detention into the contemporary legal dispute. The unclear situation of detainees may also affect soldiers’ performance during military operations, with the possible violation of humanitarian law and the question of state responsibility (under both humanitarian law and international human rights law). It may also adversely affect the results of the overall mission (country

¹⁶⁹ For example ICRC report available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (10/05/2011)

¹⁷⁰ There were several such cases. My knowledge is based on practical experience and is supported by the press information. For example D. Casciani, UK 'must help release detainee' in Afghanistan, High Court told, available at <http://www.bbc.co.uk/news/uk-13893181>

¹⁷¹ Case of Soering v. the United Kingdom, (Application no. 14038/88), 07 July 1998, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619> (9/10/14)

stabilization and implementation of the rule of law, etc). The issue of detention brings a new challenge for stabilization and peace-enforcement operations.

2. TREATMENT OF COMBATANT AND DETAINEES IN AN INTERNATIONAL ARMED CONFLICT

2.1.1 DISTINCTION BETWEEN COMBATANTS AND NON-COMBATANTS

At the beginning of this analysis, the current legal regime applicable to combatants will be discussed. This descriptive section will help to clarify the concept of a combatant and lead to further considerations.

In general, combatants are persons who may directly participate in hostilities.¹⁷² International law makes a fundamental distinction between combatants and civilians. This distinction determines their international legal status. The distinction between a civilian and a combatant, being of primary character, also indicates who acquires secondary status i.e. a prisoner of war during a conflict which is regulated by law applicable during international armed conflicts. Obtaining secondary prisoner-of-war status is connected to the situation when a combatant falls into the power of an enemy. Primary combatant status determines the protection afforded to a person under international humanitarian law. As a result, it is crucial to establish a combatant status (primary status) what allows us to determine the secondary status, i.e. prisoner-of-war status.¹⁷³

Combatant authorization to conduct hostilities is not a personal right afforded by an individual or a group of individuals, but it results from affiliation of the combatant to a state body of a party of conflict, which is a subject of international law.¹⁷⁴ The only exception of this principle is the situation covered by Article 1 paragraph 4 of AP I “in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”.¹⁷⁵ In such a situation, a combatant may

¹⁷² Art. 3 Hague regulation, art. 43 par. AP I

¹⁷³ D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford Press 1999, p. 66.

¹⁷⁴ D. Fleck, *Ibidem* p. 67.

¹⁷⁵ Art. 1 par 4. - Protocol additional to the Geneva Conventions of. 12 August 1949, and relating to the protection of victims of international armed conflicts , 8 June 1977, 1125 UNTS 3, (AP I)

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

represent a government which is not a recognized subject of international law, but merely a non-state body exercising its right of self-determination.

Humanitarian law states that combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or during preparation of a military operation to attack.¹⁷⁶ To do this, a member of regular armed forces, for example, should wear a uniform. The *ratio legis* of this principle is to protect the civilian population from being a target by maintaining a clear distinction between military and civilian targets. Article 48 of AP I says “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.¹⁷⁷ This principle also features a customary character. As presented in a customary law study prepared by the ICRC, (...) parties of the conflict must at all times distinguish between civilians and combatants (...).¹⁷⁸ Wearing a uniform is one of the most simple and effective ways of distinguishing civilians from combatants. However, there are situations where combatants are not obliged to distinguish themselves from the civilian population at all times. Such a situation is envisaged, for example, by AP I which says that “during armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”¹⁷⁹, “they keep their combatant status when they carry arms openly being engaged in an attack or in a military operation preparatory to an attack”.¹⁸⁰ Similar situations occur during occupation when an organized-resistant movement struggles with occupiers. This principle should be narrowly interpreted. It is applicable only during the above-mentioned situation and it should not affect the general principle of wearing uniforms by the member of military forces.¹⁸¹

If a combatant, who is a member of regular armed forces, is captured whilst participating directly in hostilities and is not wearing the appropriate uniform, or if such a person is a member of a militia, voluntary corps, or an organized-resistance movement and

¹⁷⁶ Art. 44 par. 3 AP I

¹⁷⁷ Art. 48 AP I.

¹⁷⁸ ICRC Customary law study, rule 1, State practice regarding principle of distinction may be discovered in number on manuals and handbooks dedicated toward military forces for example look at the information provided by the http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter1_rule1

¹⁷⁹ Art. 1 par 4 AP I

¹⁸⁰ Art. 44 ust. 3 AP I.

¹⁸¹ D. Fleck, *op.cit.* p 79 .

does not wear a distinctive sign, then this person should be liable of a general breach of the duty of distinction. Such a person should be charged with the crime of perfidy and his or her combatant status may be forfeit¹⁸² unless an exception under Article 44 paragraph 3 (a) and (b) is applicable.

To define combatant status in an international armed conflict, it is necessary to refer to Article 4 of the III Geneva Convention. It says that persons belonging to one of the following categories, combatants and non-combatants, who have fallen into the power of the enemy, are entitled to prisoner-of-war status or they should be treated as prisoners of war:

- (1) Members of the armed forces.
- (2) Members of other militias and members of other volunteer corps,
 - (a) who are commanded by a person responsible for his subordinates;
 - (b) who have a fixed, distinctive sign recognisable from a distance;
 - (c) who openly carry weapons;
 - (d) who conduct their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany armed forces without actually being members thereof.
- (5) Members of crews, including masters, pilots and apprentices of a merchant marine.
- (6) Inhabitants of a non-occupied territory, levée en masse.

2.1. 2 MEMBERS OF THE ARMED FORCES OF A PARTY O THE CONFLICT, AS WELL AS MEMBERS OF MILITIAS OR VOLUNTEER CORPS FORMING PART OF SUCH ARMED FORCES

According to AP I, Article 43 Paragraph 1, “the armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict”.

According to Article 4 of the III Geneva Convention, the concept of armed forces encompasses all kinds of militias or volunteer corps forming part of such armed forces. They

¹⁸² D. Fleck, *Ibidem*. p. 80

should be subject to an internal disciplinary system.¹⁸³ What distinguishes them from regular armed forces is the necessity of notification of their existence. Some states have militias or armed law enforcement agencies.¹⁸⁴ For example, the Federal Border Guard Commands of the Federal Republic of Germany is an independent institution from the Ministry of Defence. In the event of an armed conflict, they shall become a part of the armed forces.¹⁸⁵ In Poland, a special unit called the Nadwislan Military Unit (Nadwiślańskie Jednostki Wojskowe (NJW)) was established. Similar to the situation of the FBG in Germany, the NJW was not subordinated to the MoD but it was under the command of the Minister of Internal and Administration Affairs.¹⁸⁶ Such a unit (despite the fact that the NJW no longer exists) may effectively obtain a combatant status only through notification to other parties of the conflict.¹⁸⁷

2.1.3 MEMBERS OF OTHER MILITIAS AND MEMBERS OF OTHER VOLUNTEER CORPS

The concept of a combatant also encompasses, according to Article 4 Paragraph 2 of GC III, “members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements”.¹⁸⁸ This concept was created after the Second World War. During Nazi occupation, German forces often did not grant any protection toward captured members of the resistance movement. The Geneva Conventions, in order to fill this legal gap, provided protection of this category of combatants. To gain protection under GC III, members of the resistance movement must fulfil the following conditions:

- (a) “that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;

¹⁸³ Art. 43 AP I

¹⁸⁴ J.S. Pictet, Commentary, III Geneva Convention relative to the Treatment of Prisoners of War, first reprint, ICRC, Geneva 1994, p. 52.

¹⁸⁵ J.S. Pictet, *Ibidem*, p. 74

¹⁸⁶ More on this issue – E. Wejner: *Army and politicians without retouch, Wojsko i politycy bez retuszu*. Toruń: Adam Marszałek, 2006.

¹⁸⁷ Art. 43 AP I par 3

¹⁸⁸ Art. 4 par 2 GC III

(d) that of conducting their operations in accordance with the laws and customs of war”.¹⁸⁹

Some aspects of the above-mentioned definition need to be addressed. The first one is the issue of “a fixed distinctive sign”. The need to wear a distinctive sign results from the fundamental obligation of combatants to distinguish themselves from the civilian population. They do not have to wear uniform, but they need to wear a distinctive sign recognizable from a distance. In the case of a resistance movement, a distinctive sign may be, for example, an element deeply rooted in the cultural background such as a long beard, Pakol hat, and military jacket, as it was the case for the Afghan Mujahadins.¹⁹⁰

The second element constituting a combatant according to Article 4.2 of the GC III definition, is the requirement to “carry arms openly”. Taking into consideration the nature of guerrilla warfare, it is difficult to permanently fulfil this condition. According to Additional Protocol, this condition needs to be fulfilled:

- a) during each military engagement,
- b) during such a time as he or she is visible to the adversary while he or she is engaged in a military deployment preceding the launching of an attack in which he or she is to participate.¹⁹¹

The term military deployment refers to any movement towards the point from which an attack is launched.¹⁹² The difference between militias mentioned in this paragraph is such that members of regular militias are to be considered combatants by other parties of a conflict only by the fact of notification, whereas members of other militias need to fulfil the above mentioned conditions.

2.1.4. MEMBERS OF REGULAR ARMED FORCES WHO PROFESS ALLEGIANCE TO AN AUTHORITY NOT RECOGNIZED BY THE DETAINING POWER

During the Second World War, some countries refused to recognize combatant units as belligerents that professed allegiance to a government or an authority which these states did not recognize. This was the case of the Free French - General de Gaulle followers. The Franco-German armistice of 1940 stipulated that French nationals who continued to bear arms against Germany would not enjoy the protection of the laws of war.¹⁹³

¹⁸⁹ Art. 4 par 2 GC III

¹⁹⁰ For example look at <http://www.afghanx.com/pakol.html>

¹⁹¹ GC III Art. 44 par 3

¹⁹² D. Fleck *op. cit* p. 77

¹⁹³ J.S. Pictet, *op. cit* p. 64.

To prevent this, GC III introduced protection provided to members of regular armed forces who profess allegiance to an authority not recognized by the detaining power. In such a situation, the expression "members of regular armed forces" denotes armed forces which differ from those referred to in sub-paragraph (1) in one respect only: the authority to which they profess allegiance is not recognized by the adversary as a Party of the conflict. These "regular armed forces" have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1), for example: they wear uniform, they have an organized hierarchy and they understand and respect the laws and customs of war¹⁹⁴.

The distinguishing feature of such armed forces is the fact that, in the view of their adversary, they are not operating or are no longer operating under the direct authority of a Party of the conflict in accordance with Article 2 of the Geneva Convention.¹⁹⁵

2. 1.5. PERSONS WHO ACCOMPANY ARMED FORCES WITHOUT ACTUALLY BEING MEMBERS THEREOF

According to GC III, Article 4, "persons who accompany armed forces such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model"¹⁹⁶ are not combatants, however they are granted protection when captured. Military forces authorize some groups to serve a supplementary role toward armed forces. Usually authorization is given through a system of identity cards issued following established procedure.¹⁹⁷ These persons ought to be granted prisoners of war status.

The presence of persons who accompany the armed forces has become an important aspect of modern conflicts. Currently, a large number of people support army efforts on the battlefield, from civilian personnel of Provincial Reconstruction Teams to maintenance personnel. All of them are authorized by the military forces.

An important issue is the question of military contractors. Private military contractors are often loosely aligned to the governments i.e. they are paid by them but are not authorized through a system of identity cards envisaged by GC III.

¹⁹⁴ J.S. Pictet, *Ibidem* p. 65.

¹⁹⁵ J.S. Pictet, *Ibidem*, p. 66.

¹⁹⁶ GC III Art. 4 par 4

¹⁹⁷ . M. Flemming, *op. cit* , p. 52.

2. 1.6. MEMBERS OF CREWS, INCLUDING MASTERS, PILOTS AND APPRENTICES OF THE MERCHANT MARINE

Persons such as crews of civil aircrafts of the Parties of the conflict, who do not benefit by more favourable treatment under any other provisions of international law¹⁹⁸, are not combatants. However they are still protected under the Geneva Law. This historical regulation reflects the problems related to naval warfare. Merchant ship crews were so valuable that warring parties decided to treat them equally to members of the armed forces and to grant them prisoner-of-war status.

To summarize, in an armed conflict regulated by the law applicable to international armed conflicts, crews of civil aircrafts and merchant marines are not combatants but they are protected under the Geneva Law in the same way as members of armed forces party to the conflict.

This particular category is interesting from another perspective. The modern battlefield is fuelled by advanced electronics. Many flight support personnel or drone operators are not only far away from the battlefield but also are not members of armed forces. In this situation, despite fulfilling this category, they also fulfil the criteria of the previous category, i.e. persons accompanying armed forces.

2. 1.7. LEVÉE EN MASSE

According to Article 4 A 6 of GC III, “Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war”.¹⁹⁹

The notion of *levée en masse* was created during the French Revolution. The first *levée en masse* of modern times was the announcement by the French government in August 1793 of the conscription of the entire male population (of military age) to resist counter-revolutionary European kingdom forces.²⁰⁰

In general, as stated above, combatant status depends on the states’ authorization. Armed forces, as the state agents, may act in a way recognized only through states. In the case of

¹⁹⁸ GC III Art. 4 par 5

¹⁹⁹ Art. 4 par 6 GC III

²⁰⁰ More on <http://www.answers.com/topic/lev-e-en-masse-3> or Modern History Sourcebook: The Levée en Masse, August 23, 1793, available at <http://www.fordham.edu/halsall/mod/1793levee.html> (9/10/14)

levée en masse, the situation is different. Authorization is not given by the state and the status of combatants is granted to *levée en masse* participants by international law. Since *levée en masse* participants are not authorized by the state to be combatants, they need to fulfil several conditions provided by the III Geneva Convention:

a) Spontaneous armed resistance is permitted by international law only in territory which is not occupied.

b) The population of this territory must take up arms spontaneously on the approach of the enemy.

c) The civilian involved in armed resistance may not have had the time to organize themselves as militia or volunteer corps.

d) They must respect the laws and customs of war.²⁰¹

If *levée en masse* participants fulfil these conditions, they have the primary status of combatants and in the event of being captured by the enemy, they are granted secondary status of prisoner of war.²⁰²

2. 1.8 WOMEN AND CHILDREN AS COMBATANTS

The position of women on the modern battlefield is still considered a debatable issue. As a result, despite international humanitarian law lacking the division between the combatant ability of men and women, many countries introduced regulations limiting their direct participation in hostilities. For example in the UK, there are limitations in this regards and women are excluded from service which involves face-to-face enemy killing.²⁰³

In terms of children, there are several restrictions regarding their participation in hostilities. According to the Geneva Law, warring parties should undertake all feasible measures to exclude children under the age of 15 to participate in hostilities.²⁰⁴ Article 77 of AP I states that “(...) Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the

²⁰¹ Art. 4 par 6 GC III

²⁰² Art. 4 par 5 GC III

²⁰³ R. Norton-Taylor, Women still banned from combat roles after Ministry of Defence review, MoD finds that mixed-gender combat groups could have 'grave consequences' available at <http://www.theguardian.com/uk/2010/nov/29/women-combat-ban-remains>

²⁰⁴ Art.77 par. 2 AP I and art. 38 of the United Nations Convention on the Rights of the Child,1989.

age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are the oldest”.

This age limitation is confirmed by Article 38, 2, of the Convention on the Rights of the Child²⁰⁵ which states that State Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. Article 38, paragraph 3 says that State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, State Parties shall endeavour to give priority to those who are oldest. Article 2 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, says that State Parties shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces.

2. 1.9. NON-COMBATANT MEMBERS OF THE ARMED FORCES

Armed forces may be staffed by non-combatants. Such situations are regulated not only by Article 3 of the Hague Regulation but even by the 1874 Brussels Declaration.²⁰⁶ Under the legislation of several countries, there is a particular group of people who are considered non-combatant members of the armed forces.²⁰⁷ Governmental officials, judges or police officers are a good example of such groups.²⁰⁸ Should they fall into the power of the adversary, they will be considered under some conditions as prisoners of war.

Members of armed forces are, in a situation of an armed conflict, entitled to harm opponents. There is, however, a particular group of so called non-combatants, members of the armed forces. This group of members of armed forces is not legitimized to inflict any, based on direct participation in combat, harm to the enemy. On the other hand, they may be considered as a legitimate target of military operation. As a consequence, these non-

²⁰⁵ Convention on the Rights of the Child, New York, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, p. 3, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en

²⁰⁶ Available at <http://www.cprinst.org/Home/cultural-property-laws/1874-brussels-declaration> and <http://www.icrc.org/ihl/INTRO/135> (9/10/13)

²⁰⁷ Dieter Fleck, *op. cit.* pt. 83.

²⁰⁸ Dieter Fleck, *op. cit.* p. 84.

combatants are not as equally protected as the civilian population.²⁰⁹ These persons are excluded from collateral-damage risk assessment during a military operation.²¹⁰

Members of non-combatant armed forces are obliged to wear (...) the uniform (...) of the regular, uniformed armed units of a Party of the conflict.²¹¹

Medical personnel and chaplains are treated differently. Although they may be considered as non-combatant members of the armed forces, they may not be subject of military operations.²¹²

Particularly interesting is the position of military chaplains on the modern battlefield. In the 19th century, persons serving as chaplains often worked not only as priests but also as persons providing other services such as administrating field hospitals, serving as unit postmasters, organizing shipboard libraries or fighting parsons.²¹³ Their status changed significantly in 1864 when the first Geneva Convention was signed. Article 2 states that, "Persons employed in hospitals and ambulances, comprising (...) chaplains, shall participate in the benefit of neutrality, whilst so employed, and so long as there remain any wounded to bring in or assisted".²¹⁴ This convention was the first international document which introduced the neutrality of military chaplains.

Nowadays, the role of military chaplains has changed. Chaplains on the modern battlefield not only provide a spiritual service but also provide expert knowledge on issues related to culture and religion.²¹⁵ It means something in practice when NATO forces, who are predominantly Christian, need to operate in an Islamic environment often without basic knowledge on how to behave in a way which does not offend the local population. They also may serve in providing their good service to those in internment or detention belonging to Taliban or other opposing forces.

²⁰⁹ Art. 50 par. 1 AP I. As civilian will be consider person do not covered by the art. 4 par. A 1), 2), 3) i 6) GC III and art. 43 AP I..

²¹⁰ Dieter Fleck, *op. cit.* p. 84.

²¹¹ art. 44 par 7 AP I

²¹² GC I art. 28

²¹³ J. G. Odom, *Beyond arm bands and arms banned; chaplains, armed conflict, and the law*, *Naval Law Review*, 1/2002, p. 7.

²¹⁴ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864 available at <http://www.icrc.org/ihl/INTRO/120?OpenDocument>

²¹⁵ J. G. Odom, *op. cit.* p.12.

2. 1.10 CONDUCT IN ACCORDANCE WITH THE LAWS AND CUSTOMS OF WAR

All the aforementioned categories of military personnel are obliged to conduct military operations in accordance with the laws and customs of war during an armed conflict.²¹⁶ Violation of the laws and customs of war shall not deprive a combatant of his or her right to be considered a combatant or, if he or she falls into the power of an adverse Party, of his or her right to be a prisoner of war.²¹⁷ The only exception to this principle is provided by Article 44, paragraph 4 of AP I when a combatant forfeits his or her right to be a prisoner of war.²¹⁸

According to Article 45 of AP I, “when (...) any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal”²¹⁹. This provision follows the principle stated by Article 5 of GC III, which says that “if any doubt arises as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” Although the clear meaning of both articles should not raise any doubts, in practice, this might be the contrary. More detailed discussions on the concept of a competent tribunal are given in the section devoted to the situation of detainees during a non-international armed conflict.

2. 1.11 THE CONCEPT OF UNLAWFUL COMBATANTS

The concept of an “unlawful combatant” was coined by the US Supreme Court during the *ex-parte* Quirin case of 1942. This case was related to eight Nazi saboteurs who entered

²¹⁶ J. G. Odom, *op. cit.*, p.13.

²¹⁷ Art. 44 par. 2 AP I

²¹⁸ 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c). A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

²¹⁹ Art. 45 AP I

the United States during the World War II. During their trial, they challenged their detention and denial of prisoners-of-war protection. The Court held that: “by universal agreement and practice, the law of war draws a distinction between lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful”.²²⁰ Although Quirin relied on the notion of ‘unlawful combatant[cy]’ as the basis of criminal liability, the meaning of the term is not clear enough both in the positive law of war existing at the time of the case, as well as in the current, treaty-based law of war.²²¹

Nowadays, the situation by no mean clearer. As mentioned at the beginning of this chapter, humanitarian law foresees only two categories of participants in an armed conflict: civilians and combatants. As a result, killing an opponent in an international armed conflict by a combatant is not a crime or violation of the law of war. Such a killing may be an unjustified violation of applicable domestic law during non-international armed conflict, but certainly is not a war crime.²²² Consequently, the concept of an unlawful combatant blurs the line between a concept of status and culpability. The lack of lawful combatant in non-international armed conflict is not a crime. It only may expose the individual to domestic criminal sanction for the acts or omissions in which he or she was engaged during the armed conflict.²²³

This consideration indicates that, under current positive and treaty law, it is difficult to establish the existence of any other category of participants in an armed conflict, both international and non-international, other than civilians and combatants. As such, Taliban fighters or other organized groups are to be considered within the scope of only these two notions, combatant or civilian. Consequently, in both case scenarios, they deserve the protection envisaged under International Humanitarian Law. The term of an unlawful combatant, enemy combatant²²⁴, unprivileged combatant, although used in some military manuals or handbooks, do not constitute any legal definition.²²⁵

²²⁰ Ex Parte Quirin, 317 U.S. 1 (1942), par. 30-31

²²¹ M. Maxwel, M. Watts, *Unlawful Enemy Combatant’: Status, Theory of Culpability, or Neither?*, “Journal of International Criminal Justice”, Oxford, vol. 5 (2007), p. 20.

²²² M. Maxwel, M. Watts, *ibidem*. p. 25

²²³ M. Maxwel, M. Watts, *ibidem*. p. 24

²²⁴ It is another phrase which has no legal meaning except the meaning given by the US Joint Doctrine for Detainee, 23 March 2005 operations which says “Enemy Combatant (EC) - Although they do not fall under the provisions of the Geneva Convention, they are still entitled to be treated humanely, subject to military necessity, consistent with the principles of GC, and without any adverse distinction based on race, color, religion, gender,

2. 1.12 AL QAIDA AND TALIBAN FIGHTER STATUS

This evaluation raises the question regarding legal regime applicable toward Al Qaida detainees. As discussed above, only Article 3 and customary law are applicable toward Al Qaida operatives. In such a situation, it is well founded to exclude applicability of III Geneva Convention with respect to the status of both POW and combatants.²²⁶

The Taliban fighters captured prior to the Bohn Agreement belonged to the category outlined in GC III Article 4(A) 3 which says “members of regular armed forces who profess allegiance to a government or an authority [are] not recognised by the Detaining Power”. As a result, Taliban fighters were fully entitled to be considered as combatants and, consequently, to prisoner-of-war status during the period before the Bonn Agreement. In case of any doubt, their status should be determined by the competent tribunal. After the establishment of Karzai’s government, they were protected by Common Article 3 and Additional Protocol II.

In terms of the US (before and after Bonn agreement), it clearly shows practices contrary to that distinguished by the legal situation. On 7 February 2002, the US declared that members of the Taliban taken prisoner in Afghanistan would not be considered prisoners of war under the Third Geneva Convention as they were “unlawful combatants” and they did not satisfy the requirements under GC III Article 4.²²⁷

2. 1.13. PRISONERS OF WAR (POW) TREATMENT – FUNDAMENTAL GUARANTEES

When in captivity, combatants-prisoners of war should receive protection guaranteed by the Geneva Conventions which provide a minimal standard of personal security. This discussion is of particular importance from the perspective of the policy regarding treatment of detainees in a modern conflict such as in Afghanistan. Such a conflict is a good example of how it is complicated to apply a certain legal regime towards participants. At the beginning,

birth, wealth, or any similar criteria, and afforded adequate food, drinking water, shelter, clothing, and medical treatment; allowed the free exercise of religion consistent with the requirements of such detention. There is a comprehensive list of terrorists and terrorist groups identified under Executive Order 13224, located at <http://www.treas.gov/ofac/>. Anyone detained that is affiliated with these organizations will be classified as EC. Furthermore, there are individuals that may not be affiliated with the listed organizations that may be classified as an EC” available at <http://www.hrw.org/legacy/campaigns/torture/jointdoctrine/jointdoctrine040705.pdf>

²²⁵D. Moeckli, *The US Supreme Court's 'Enemy Combatant' Decisions: A 'Major Victory For the Rule of Law'?*, *Journal of Conflict and Security Law*, vol. 10 no. 1, 2005, p. 77.

²²⁶ D. Moeckli, *op.cit.*, p. 78.

²²⁷ George W. Bush, Memorandum on „Humane Treatment of Taliban and al-Qaeda Detainees”, 7 February 2002, para. 2(b); available at http://pegc.no-ip.info/archive/White_House/bush_memo_20020207_ed.pdf (9/10/14)

the conflict in Afghanistan was international and later it evolved into a non-international armed conflict. Such evolution clearly affects the status of participants and their treatment. This discussion on fundamental guarantees will constitute a point of departure before engaging in discussion regarding the treatment of captives in both types of conflicts. A clear stipulation of prisoners-of-war rights also enables us to compare these rights to the legal framework governing the treatment of detainees in non-international armed conflicts. It also allows, in some cases, to point out examples violations of humanitarian law by parties of the conflict.

2. 1.14. EVACUATION FROM THE BATTLEFIELD

Every combatant during an international armed conflict when captured becomes a prisoner of war. It means that combatants from the time they fall into the power of the enemy²²⁸ should be treated humanely in accordance to regulations envisaged in GC III. This convention shall apply to such persons “from the time they fall into the power of the enemy and until their final release and repatriation”.²²⁹

According to Article 19 of the GC III, “prisoners of war shall be evacuated, as soon as possible, after their capture to camps situated in an area far enough from the combat zone for them to be out of danger”.²³⁰ It is one of the basic principles securing rights of the prisoners of war. Without efficient hors de combat evacuation from the battlefield, it is difficult to ensure due treatment of the prisoners of war.

In the event the POW is sick or wounded, which may affect the mobility of the unit operating in the enemy rear area, general principles of humane treatment are applicable.²³¹ The principle stating that prisoners of war should be evacuated as soon as possible does not apply to those prisoners “who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone”.²³² While awaiting evacuation from a fighting zone POW “shall not be unnecessarily exposed to danger”.²³³

²²⁸ Art. 5 GC III

²²⁹ Art. 5 GC III

²³⁰ Art. 19 GC III

²³¹ Art. 13 GC III

²³² Art. 19 GC III

²³³ Art. 19 GC III

2. 1.15. INTERNMENT OF PRISONERS OF WAR

When combatants fall into the hands of the Detaining Power, the “Detaining Power may subject prisoners of war to internment”²³⁴, and prisoners of war “may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness”. With the exception, in particular cases, which are justified by the interest of the prisoners themselves, that they shall not be interned in penitentiaries. Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate. The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.”²³⁵ The location of the prisoners of war shall be indicated by the letters PW or PG, placed so as to be clearly visible from the sky.²³⁶ Additionally, prisoners of war “shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population (...).”²³⁷

2. 1.17 INTERROGATION

Prisoners of war, when in captivity, may be questioned. In such a situation, they are “bound to give only their surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information”.²³⁸ The prisoner of war may be questioned on other issues, however under no circumstances “physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information”.²³⁹ Additionally, “prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind”.²⁴⁰

The protection of prisoners of war against forceful extraction of information is not a recent development. The Lieber Code of 1863 forbade the “use of any violence against prisoners in order to extort the desired information”.²⁴¹ Surprisingly, similar protection was

²³⁴ Art. 21 GC III

²³⁵ Art. 22 GC III.

²³⁶ Art. 23 GC III

²³⁷ Art. 23 GC III.

²³⁸ Art. 17 GC III

²³⁹ Art. 17 GC III par 4

²⁴⁰ Art. 17 GC III par 4

²⁴¹ Lieber code, *op cit.*, art. 80

not provided by the Regulations as an appendix to the Second Hague Convention of 1899 as well as the Fourth Hague Convention of 1907. Both were imposing obligations to give name and rank only of prisoners of war, but none of these regulations obliged the detaining power to follow this principle²⁴². This omission was rectified by the 1929 Geneva Convention. Protection of prisoners of war in this respect was confirmed by the 1949 Geneva Conventions.

It must be borne in mind that the Geneva Conventions do not prohibit interrogation of prisoners of war. Every attempt to obtain information of a military value is not contrary to the III Geneva Convention. States always try to obtain military information from prisoners and such efforts are not forbidden.²⁴³ This is also true for using trickery or similar methods.²⁴⁴ However, there is a thin line between the situation where prisoners of war may “be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind”²⁴⁵ and non-violent multiple interrogation techniques.

Currently, there are many widely available books, manuals and demonstration videos which provide guidance on interrogation techniques. What is particularly concerning is the fact of continuity in disregarding the letter of the Geneva Conventions by some governments. It is not difficult to find materials from the 50’s and the 60’s of the XX century which are disputable under IHL methods. For example, a Interrogation Techniques training film provided by the US Army TF 30/3986 refers not only to trickery but also to threat and rescue or monotony and repetition methods.²⁴⁶ This system was developed into the so-called enhanced interrogation techniques such as water boarding, sleep deprivation, isolation and exposure to extreme temperatures, enclosure in tiny spaces, bombardment with agonizing sounds at extremely damaging decibel levels, and religious and sexual humiliation so commonly used against several individuals.²⁴⁷ These enhanced methods were primarily intended to interrogate participants of non-international armed conflict, terrorist or persons whom the United States government did not consider as protected under the regulations of POW status. What constitutes a legal and moral dilemma is the issue of acceptance of an

²⁴² Howard Levie, *Prisoners of War in International Armed Conflict*, Naval War College, Newport, Rhode Island, 1978, p. 107

²⁴³ Pictet Commentary p. 163-164 <http://www.icrc.org/ihl.nsf/COM/375-590022?OpenDocument>

²⁴⁴ Howard Levie, *op.cit.* p. 108

²⁴⁵ Art. 17 GC III par 4

²⁴⁶ Interrogation Techniques: Part I - National Archives and Records Administration 1969 - ARC Identifier 4523800 / Local Identifier 330-DVIC-28917 http://www.youtube.com/watch?v=_W7jIUP2vU&feature=related

²⁴⁷ International Committee of the Red Cross Report on Fourteen High Value Detainees in CIA Custody <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (9/10/14)

unlawful, under international law, approach by the government of the one of the most recognized democracies. It is rather unlikely that such methods of interrogation, so commonly used against non-prisoners of war, were not being used against lawful POWs in international armed conflicts.

2. 1.18 LIFE CONDITIONS

The obligation to provide decent living conditions has been considered a customary principle since the beginning of the twentieth century. During the Boer War, the actions of the British Government in transporting Boer prisoners to unhealthy climate locations were highly criticized both in Britain and by the international community.²⁴⁸ Lack of acceptance of such unfavourable treatment was confirmed in 1929 and 1949 Geneva Conventions. As a result, Article 25 of GC III states *expressis verbis* that prisoners of war shall be quartered under conditions as favourable as those for the forces of the detaining power stationed in the same area.²⁴⁹ It means that prisoners should be located in suitable hygienic conditions that are heated and lighted. Of course, it may raise the question of assimilation to the diverse living conditions to which armed forces are accustomed. According to Pictet commentary, “allowance must be made for the habits and customs of the prisoners”.²⁵⁰ However, it is unreasonable to expect that soldiers from a country located in a moderate climate and transported by their government to fight on the territory of an equatorial nation may require the detaining power to remove them from that area so that they are interned in climate to which they are accustomed.²⁵¹

The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health.²⁵² What is important is that the habitual diet of the prisoners should be taken into account.²⁵³ It would contradict the Geneva Law regulations to feed prisoners in a way which is offensive to them. Providing pork to a Muslim or Jewish prisoners may be given as an example. Interestingly, “the use of tobacco shall be permitted”.²⁵⁴

²⁴⁸ Howard Levie, *Prisoners of War in International Armed Conflict*, Naval War College, Newport, Rhode Island, 1978, p. 121

²⁴⁹ Art. 25 GC III

²⁵⁰ J. Pictet Commentary, *op.cit.* p. 193

²⁵¹ H. Levie, *op. cit.* p. 122.

²⁵² Art. 26 GC III

²⁵³ Art. 26 GC III

²⁵⁴ Art. 26 GC III

2. 1.19 HYGIENE AND MEDICAL ATTENTION

During internment, prisoners are entitled to stay in clean and sanitary facilities. According to Article 29 of GC III, all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics should be imposed. Among these measures, which the Detaining Power should take in regard to prisoners of war, are examination upon entry into the camp thorough disinfection and inoculation with all necessary vaccinations.²⁵⁵

Prisoners in detention should receive medical treatment during internment. Every camp should be facilitated with an adequate infirmary where prisoners may receive the attention they require.²⁵⁶ If necessary, isolation wards shall be set aside for cases of contagious disease or mental illness.²⁵⁷

The situation of Taliban prisoners after their fall into hands of General Dostum in late 2001 is an example of a brutal violation of the above-mentioned principles. More than 2000 prisoners were killed inside closed metal shipping containers after surrendering to Dostum's militia. Prisoners were kept in containers and were reportedly not given any food or water for up to three days. Witnesses say that many of the men suffocated and that others were killed when guards fired shots into the containers.²⁵⁸

2. 1.20 OBSERVANCE OF RELIGION

Observance of religion by prisoners of war is secured by two factors. The first one is the right to enjoy religion in prisoner-of-war camps. During internment, according to Article 34 of III GC, prisoners shall “enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities”.²⁵⁹ The principle of liberty in the exercise of religion was provided by Article 18 of the 1907 Hague Regulation for the first time. The same principle was again proclaimed by Article 16 of the 1929 Convention.

The second factor is by chaplains who may provide a spiritual service for prisoners. According to Article 35, “chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to

²⁵⁵ Pictet Commentary p. 206

²⁵⁶ Art. 30 GC III

²⁵⁷ Art. 30 GC III

²⁵⁸ R. Synovitz, *Obama Calls For Facts on Mass Killing of Taliban at Sheberghan* at <http://www.unhcr.org/refworld/topic,45865eec2,4654665d2,4a82b6f5c,0.html> (9/10/14)

²⁵⁹ Art. 34 GC III

them and to exercise freely their ministry amongst prisoners of war of the same religion”.²⁶⁰ A question may be raised with regard to the status of the Taliban mullah captured during an international phase of the armed conflict during Operation Enduring Freedom in Afghanistan in 2001 and 2002.²⁶¹ Particularly when taking into consideration the political and military nature of their activity.

2. 1.21. DISCIPLINARY REGULATIONS

Prisoners are obliged to follow disciplinary regulations. For example, “prisoners of war, with the exception of officers, must salute and show all officers of the Detaining Power external marks of respect provided by regulations relevant to their own forces”.²⁶²

The use of weapons against prisoners who are escaping or attempting to escape “shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances”.²⁶³

2. 1.21. MEDICAL PERSONNEL STATUS

The status of medical personnel is different to that of combatant-prisoners of war. While combatants who fall into the hands of adverse party are considered captured, medical personnel and chaplains are considered retained.²⁶⁴ Medical personnel, who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require.²⁶⁵ If the detaining state provides appropriate medical care and enough medical personnel then, according to Article 30 GC I and 37 of GC II, such medical staff “shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit”.²⁶⁶

2. 1.22 RELATIONS OF PRISONERS OF WAR WITH THE EXTERIOR

Prisoners are entitled to contact with the outside world. They shall be allowed to inform and contact their relatives. According to Article 70 of GC III, “within not more than

²⁶⁰ Art. 35 GC III

²⁶¹ More available at <http://www.nytimes.com/2010/03/25/world/asia/25afghan.html> (9/10/14)

²⁶² Art. 39 par 2 GC III

²⁶³ Art. 42 GC III

²⁶⁴ Art. 28 GC III.

²⁶⁵ Art. 28 GC III.

²⁶⁶ Art. 30 GC I

one week after arrival at a camp, or detention location, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency on the other hand (...) The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner. On the other hand prisoners are allowed to receive cards".²⁶⁷ The possibility of sending and receiving messages from relatives in custody is a matter of utmost importance, especially during non-international armed conflicts.²⁶⁸

2. 1.23 RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE CLOSE OF HOSTILITIES

When the war is over, prisoners shall be released and repatriated. According to Article 118 of GC, it should take place without delay after cessation of active hostilities.²⁶⁹ Strict adherence to this principle may lead to some difficulties. For example, masses of prisoners of war, as so happened after the First World War, were logistically difficult to transport. After some conflicts, prisoners of war were unwilling to go back to their country of origin. Such a situation took place after the Second World War when pro-German, Ukrainian Units were forced to return to USSR where most soldiers were killed or sent to Gulag camps.²⁷⁰

This situation is more complex when the conflict evolves from an international to a non-international one. For example, Taliban fighters were kept in custody long after cessation of major hostilities in Afghanistan. Unfortunately, these hostilities, after a period of several years of relative peace, broke out with double the force in 2005 when some of them were still in custody. A similar, unclear situation took place in Iraq. On 1 May 2003, President Bush delivered a televised address where he stated that it was the end of major combat operations in Iraq. Shortly after this speech, fierce insurgency broke out across Iraq and lasted until 2009.

The treatment of prisoners of war constitutes a point of departure for the discussion regarding the treatment of persons engaged in an international and non-international armed conflict who do not possess combatant status. Additionally, the lack of equality of treatment between combatants and belligerents without combatant status raises a question regarding the observance of IHL by the latter category.

²⁶⁷ Art. 71 GC III

²⁶⁸ Examples may be found on the ICRC website <http://www.icrc.org/web/eng/siteeng0.nsf/html/afghanistan-feature-230908>

²⁶⁹ Art. 118 GC III.

²⁷⁰ <http://www.dpcamps.org/repatriation.html> (9/10/12)

2.2. TREATMENT OF DETAINEES IN A NON-INTERNATIONAL ARMED CONFLICT

The manner in which participants of the armed conflict in Afghanistan are detained by NATO armed forces presents a significant legal challenge for political decision-makers and military commanders on the ground. Detention policy constitutes not only a legal but also a practical challenge during non-international armed conflicts such as the one in Afghanistan. In non-international armed conflicts, protection of those who fall into the hands of opponents is even more difficult than in an international conflict due to the domestic and emotionalized nature of the conflict.²⁷¹

The aim of modern military operations, as presented in Chapter 4 on the relations between counterinsurgency and humanitarian law, is not to kill as many insurgents as possible but to create a secure environment where a governmental structure may become functional. So, the paradigm of modern military operations has switched from killing to capturing. Detention became one of the key elements of counterinsurgency and of a stabilization operation. In Afghanistan, detention operations are conducted by a multi-national coalition.²⁷² European NATO members are bound by a different set of legal norms than their US counterparts. Additionally, the local, Afghan forces do not guarantee observance of fundamental rights towards detainees. This raises the question of interoperability with the local justice system, which often is far from perfection.

In this section, the legal framework applicable to detention operations will be examined and the relation between human rights and humanitarian law applicable to the conflict in Afghanistan will also be discussed. Practical issues related to the detention operation will also be addressed, such as collecting intelligence data as an important element of military operations and as a source of possible violations of IHL. Furthermore, I shall consider the existing case law related to detention operations. In the summary of this section, some suggestions will be provided how NATO member countries should handle detainees as well the conclusions of *de lege ferenda* character in terms of existing humanitarian law.²⁷³

²⁷¹ W.Boothby,*op.cit.*, p.296

²⁷² M. Greig, *Detention operations in a counterinsurgency: pitfalls and the inevitable transition*, Army Lawyer, December, 2009, p. 25

²⁷³ S.E. Hendin, *Detainees in Afghanistan: The Balance between Human Rights Law and International Humanitarian law for Foreign Military Forces*, Tilburg Law Review, vol. 14. 2007-2008 , p. 249.

2.2.1 APPLICATION OF INTERNATIONAL HUMANITARIAN LAW – DETENTION UNDER COMMON ARTICLE 3 AND ADDITIONAL PROTOCOL II

During a non-international armed conflict, parties are particularly tempted not to grant any protected status toward detainees. The detained individuals recognized as POWs in an international armed conflict should not be compelled to provide any other information than their rank, date of birth and ID number. They also should be released and repatriated without delay after cessation of hostilities. During a non-international armed conflict, detainees have no similar protection. For some participants in the conflict, it creates a situation for possible violation of extracting information from detainees.²⁷⁴ Additionally, there is no obligation to release and repatriate them after cessation of hostilities. This is not only related to the nature of the conflict, often one with low intensity, without a clear beginning and indication of the end of the conflict, but also to the geographical aspect of the conflict.

Under Common Article 3, a status of neither prisoner of war nor combatant is granted to participants of a non-international armed conflict. According to Common Article 3, only two groups of participants exist, i.e. protected civilians and civilians who lose their protection if they directly participate in hostilities.²⁷⁵ Under Common Article 3, “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely”.²⁷⁶

Article 3 is silent not only on a legal basis for detention, but also provides little on the minimum treatment of detainees. It provides only an open category which says that all those who do not take part in hostilities should be treated humanely. There are no regulations on the right to challenge or review detention.²⁷⁷ Common Article 3 is also silent on question of the transfer of detainees.²⁷⁸ Some scholars claim that requirements for humane treatment no

²⁷⁴ Despite Common Article 3, the issue of obligations for humane treatment is not that straightforward. Common Article 3 states that only “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention”. The Article does not mention persons taking an active part in hostilities. Often, some enhanced interrogation techniques are carried out on persons taking part in armed activities and they, in such a situation, are not covered by both Article 3 and AP II.

²⁷⁵ R. Goodman, *The detention of civilians in armed conflict*, American Journal of International Law, vol. 103, January, 2009, p. 51

²⁷⁶ Art. 3 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, 75 U.N.T.S. 31, entered into force Oct. 21, 1950

²⁷⁷ C. Brannagan., *The Copenhagen process on the handling of detainees in international military operations: a Canadian perspective on the challenges and goals of humane warfare*, Journal of Conflict & Security Law, 2010, p. 517

²⁷⁸ C. Brannagan, *op.cit.*, p. 517

longer satisfy humanitarian needs emerging from practice of IHL during a NIAC. They conclude the need to draw upon human rights law when devising procedural principles and safeguards to regulate interment during a NIAC or the need to refer to the applicable law during international armed conflicts.²⁷⁹

Additional Protocol II, which expands upon Common Article 3, in Article 4 states that, “all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction”.²⁸⁰

Additional Protocol II, as stipulated by Common Article 3, ensures neither the status of the combatant nor the prisoner of war. However, unlike Article 3, AP II provides several fundamental guarantees particularly related toward detainees and internees. According to AP II Article 5, “Persons whose liberty has been restricted (...) interned or detained; (a) (...) shall be treated in accordance with Article 7 i.e. humanely (b) (...) shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict; (c) (...) shall be allowed to receive individual or collective relief;

(d) (...) shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions; (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population”.

To summarize, a person when interned during a NIAC, must be at least informed in a language he or she understands of the reason for which measures were taken. He or she should be subject to effective control of an independent and impartial judicial body before which he or she may challenge such interment and obtain release.²⁸¹

²⁷⁹ W. Boothby, *op.cit.* p.296

²⁸⁰ Art. 4 APII

²⁸¹ J. Pejic, “*Unlawful/enemy combatant*”: *Interpretations and consequences*, (in:) *International Law and armed conflict: exploring the faultiness, Essays in Honour Yoram Dinstein*, ed. M.Schmitt and J.Pejic, Martinus Nijhoff, p.350

2.2. 2 LIFE CONDITIONS

Article 5(2) of AP II also defines life conditions. It says that “those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons: (a) except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women; (b) they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary; (c) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety; (d) they shall have the benefit of medical examinations; (e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances. 3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (a), (c) and (d), and 2 (b) of this Article”. As such, AP II provides minimal standards regarding the safeguard of detained persons.

2.2. 3. DISCIPLINARY REGULATIONS AND THE LEGAL BASIS FOR DETENTION

According to Article 6 of AP II, basic guarantees are provided toward detainees who may face criminal responsibility related to the armed conflict. It states that “no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular: (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; (c)

no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt.” This article duplicates some provisions of Article 75 of AP I. These guarantees are applicable to a conflict regulated by Common Article 3 and AP II as they are considered customary law.²⁸²

Article 5 of AP II deals with persons whose liberty has been limited. According to Article 5(3) of AP II, “a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised. 4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children. 5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” What is important is that Article 5 of AP II does not address the grounds on which a person may be detained during a non-international armed conflict and does not address the issue of review of such interment.²⁸³

2.2. 4. INTERNATIONAL HUMAN RIGHTS APPLICATION DURING AN ARMED CONFLICT

An interesting issue is how and to what extent these two branches of law interconnect with each other during armed conflicts. Particularly when we take into consideration the words of humanitarian law and human rights. Humanitarian law applies to all parties of the conflict, whereas human rights applies mostly to the relation between the state and citizens. Even when we adopt a horizontal approach to human rights, it is difficult to find armed

²⁸² W. Boothby, *op.cit.* p.297

²⁸³ W. Boothby, *op.cit.* p.297

groups who address the whole system of human rights.²⁸⁴ This is so even when part of the organization allows them to exercise government authority regarding obligations under human rights. On the other hand, it does not exempt agents of the state following human rights even during times of armed conflict.

Historically, these two branches of law share different backgrounds. Humanitarian law was developed within the sphere of international public law, often customary in nature, whereas human rights were more of a constitutional, domestic character.²⁸⁵ Human rights entered the field of public international law only after the Second World War. However, at this early stage, the relationship between IHL and IHRL was not examined. Gross violations of human rights and humanitarian law during armed conflicts in the 1960s led to more holistic approach. The 1968 Tehran Human Rights Convention raised the issue of how both legal regimes remain interrelated.²⁸⁶ According to Doswald-Beck and Vite, it was the turning point from which humanitarian law and human rights began to draw closer.²⁸⁷ The development of Additional Protocol also paid tribute to human rights.²⁸⁸

The most general explanation of the relation between human rights and humanitarian law is resolved by the Latin maxim “*lex specialis derogat legi generali*”. This universal legal principle states that humanitarian law as *lex specialis* derogate human rights. As a result of this approach, human rights may, under some circumstances, apply both during a time of peace and a time of armed conflict. This position was confirmed in several opinions and judgments of international bodies. For example, the International Court of Justice in the Nuclear Weapons Advisory Opinion of 1996 said, “The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”.²⁸⁹ The *lex specialis* character of humanitarian law was confirmed by the Inter-American Commission on Human Rights in the case of Coard vs.

²⁸⁴ M. Sassoli, *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Naftali, Oxford University Press, 2011 p.56

²⁸⁵ N. Quenivet, *The history of the relationship between international humanitarian law and human rights law*, (in:) *International Humanitarian law and human rights*, ed. Roberta Arnold, Noelle Quenivet, Martinus Nijhoff, 2008, Leiden, p.2

²⁸⁶ N. Quenivet, *Ibidem.* p.4

²⁸⁷ N. Quenivet, *op.cit.* p.5

²⁸⁸ N. Quenivet, *op.cit.* p.6

²⁸⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 240, para. 25.

United States²⁹⁰ and by the International Court of Justice in the Legal Consequences of the Construction of a Wall Opinion, where the Court said, “the protection offered by human rights conventions does not cease in case of armed conflict”.²⁹¹

The primary issue related to the relationship between humanitarian law and human rights was, and is, to what extent these two systems supplement each other. Especially as some states, for example the United States and Israel, support the radical view that humanitarian law replaces human rights during armed conflict.²⁹² The International Court of Justice addressed this saying that that these two systems may, under some conditions, influence and supplement each other. The Court also stated that in “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.”²⁹³ Marco Sassoli elaborated upon this with a proposal of following types of relationship between International Humanitarian Law and International Human Rights Law namely in the situation where: IHL deals with questions not covered by IHRL, IHRL prevails over an applicable rule of IHL, IHL more precisely specifies a rule of IHRL, IHRL specifies or interprets a rule of IHL, IHRL has revised a rule of IHL, IHRL deals, even in armed conflict, exclusively with questions not covered by IHL.²⁹⁴ As to the first situation, Sassoli suggests the issue of who has the right to directly participate in hostilities, and that what constitutes such participation is an exclusive matter for IHL.²⁹⁵ In the second situation, he rightly points out that application of POW detention without judicial supervision under GC III, based merely on the fact of being a member of enemy armed forces, does not contradict Article 5 of the ECHR. He also rightly indicates that detention which occurs during non-international armed conflicts does not deprive a person fundamental rights secured by Article

²⁹⁰ *Coard et Al. v. United States*, Report N. 109/99 - Case 10.951, Inter-American Commission on Human Rights (IACHR), 29 September 1999, available at: <http://www.refworld.org/docid/502a39642.html> [accessed 16 September 2014] cited in Marco Sassoli: *op.cit.* p. 70

²⁹¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 106.

²⁹² A. Gioia, *The role of the European human rights in monitoring compliance with humanitarian law in armed conflict*, (in:) *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Naftali, Oxford University Press, 2011 p.212

²⁹³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *op.cit.* , para. 106.

²⁹⁴ M. Sassoli: *op.cit.* p. 72

²⁹⁵ M. Sassoli: *op.cit.* p. 72-77

5 of ECHR and Article 9 of ICCPR.²⁹⁶ The third case applies to the situation where IHL is more specific than IHRL. It occurs when, for example, both IHL and IHRL refers to the situation of arbitrary deprivation of life, but only IHL specifies what is arbitrary.²⁹⁷ Another situation occurs when IHRL helps to specify or interpret a rule of IHL. For example, Common Article 3 requires a “judgment ... affording all the judicial guarantees which are recognized as indispensable by civilized peoples”. Aside from the fact that the wording of civilized peoples is outdated, IHL says little on what constitute such guarantees. In this respect, human rights provide, as *lex specilis* established, an interpretation of the concept of fair trial.²⁹⁸ Similarly, it is human rights that provide a rich jurisprudence on what constitutes torture and inhumane treatment.²⁹⁹ In the fifth situation, Sassoli discusses the event of when human rights law revises IHL. For example, Article 118 of Convention III obliges states to repatriate POWs without delay at the end of active hostilities. Nowadays, the principle of *non-refoulement as ius cogens* prevails over IHL.³⁰⁰ In the sixth situation, Sassoli addresses the issue of human rights dealing exclusively with questions that are not covered by humanitarian law. For example, he refers to the situation of admissible degree of use of force against civilians who do not directly participate in hostilities. Article 27 of Geneva Convention IV and the law of NIAC prohibits attacks against such persons. The question is then how to react in the event of ordinary crimes or public disturbances. This is of particular importance since modern conflicts, such as the conflict in Afghanistan, have both a military and policing aspect. During police-type operations, a greater number of restrictions should be imposed, for example, regulating the use of firearms.³⁰¹ This should apply despite the fact that, according to Tadic, the case of the principle of non-international armed conflict applies to the whole territory of a state. It is a matter of fact that within the realm of NIAC not only military, but also police means and methods, must be applied.

²⁹⁶ International Covenant on Civil and Political Rights, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967) available https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en (09/11/2012)

²⁹⁷ M. Sassoli: *op.cit.* p. 73

²⁹⁸ M. Sassoli: *op.cit.* p. 74

²⁹⁹ M. Sassoli: *op.cit.* p. 74

³⁰⁰ M. Sassoli: *op.cit.* p. 76

³⁰¹ M. Sassoli: *op.cit.* p. 77

Melzer simplifies this detailed reasoning saying that human rights applicability during an armed conflict is justified when humanitarian law does not provide any rule at all, and where there is no sufficient guidance which can be derived from the general principles of IHL.³⁰²

One must remember that human rights treaties contain provisions that allow states to derogate from some of the guarantees thereby contained.³⁰³ It may take place in situations which are strictly necessary to counter threats to the existence of the state during a national emergency or an armed conflict.³⁰⁴ For example, Article 15 of the ECHR says that “in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”³⁰⁵ Article 15 refers to two situations of war referring to an international armed conflict and an emergency which is wide enough to cover tensions, disturbance and armed conflict. However, there are several rights from which can never be derogated. Although it depends which treaty is in question, usually the group of non-derivable rights are: the right not to be arbitrarily deprived of life, the right to respect for physical integrity and the right not to be subjected to torture or cruelty, inhuman or degrading treatment.³⁰⁶ Article 7 of the European Convention also prohibits punishment without law.

International humanitarian law as *lex specialis* does not replace or otherwise supplant international human rights law and the obligations that come therefore, but rather only replaces certain derivable provisions of human rights law that may be inconsistent with international humanitarian law.³⁰⁷ During modern armed conflicts, human rights and humanitarian law often overlaps.³⁰⁸ However, as Sassoli rightly points out, reference to the human rights by implementing institutions should take into account the limitations resulting from military conflict and adapt their requirements to the situation. Simply for example, the

³⁰² N. Melzer, *Targeted killing in international law (Oxford Monographs in international law)*, 2008 p. 81.

³⁰³ Derogation clauses are provided for in Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the European Convention on Human Rights and Article 27 of the American Convention of Human Rights.

³⁰⁴ Borelli S., *op.cit.*, p. 54

³⁰⁵ Art. 15(1) ECHR

³⁰⁶ Borelli S., *op.cit.*, p. 54

³⁰⁷ Hendin S,E, *Detainees in Afghanistan: The Balance between Human Rights Law and International Humanitarian law for Foreign Military Forces*, Tilburg Law Review, vol. 14. 2007-2008 , p. 262

³⁰⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion of 9 July 2004, para. 106

case law defining the maximum lengths of detention without being presented to the court in a non-conflict situation is difficult to apply during armed conflict.³⁰⁹

2.2. 5. EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS

This important issue arises from duality of the law applied by the members of the NATO coalition. The USA, as a major player in Afghanistan, is not bound by the European Convention on Human Rights and the jurisprudence rendered by the European Tribunal of Human Rights, whereas, for example, the UK and Poland are. This leads to the situation where violation of the law during military operations can occur. For the sake of clarity, in this chapter I will attempt to address the concept of extraterritorial application of human rights. I will also address the issue of how the applicability of human rights affects the treatment of fighters and participants of a conflict such the one in Afghanistan.

Many human rights documents, such as the American Convention on Human Rights and the European Convention on Human Rights, Article 1, state that the state parties must secure the rights to everyone within their jurisdiction. The question is, what does it mean to be within their jurisdiction?

The European Court of Human Rights, over the years, developed its position on the concept of extraterritorial application of human rights. One of the first cases which referred to the concept of extraterritorial applicability of the ECHR was brought by the Court in the 1992 decision of *W. v. Denmark*.³¹⁰ In this case, the Court stated that a State may be held accountable for a violation of rights guaranteed under the European Convention of Human Rights (European Convention) of individuals who are in the territory of another State but who are under the authority or control of a signatory.³¹¹ In this case, the applicant was trying to escape from East Germany (German Democratic Republic) and to move to the Federal Republic of Germany. He entered the premises of the Danish Embassy in (East) Berlin in 1988. At the request of the Danish ambassador, the East German police not only entered the Embassy, but also took the applicant away. Ultimately, he was sentenced to conditional imprisonment after spending 33 days in detention. He complained that his right to liberty and

³⁰⁹ M. Sassoli: *op.cit.* p. 75

³¹⁰ Application No. 17392/90 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1390> (09/11/2012)

³¹¹ Hendin, *op. cit.*, 72

security was violated when he was handed over to the East German police.³¹² According to the European Commission of Human Rights, authorised agents of states activities affected the applicant who was under the jurisdiction of the Danish authorities.³¹³

This decision was followed by *Loizidou v. Turkey*³¹⁴, where the applicant complained that her property rights had been breached as a result of the continued occupation and control of the northern part of Cyprus by Turkish armed forces which had prevented her from gaining access to her home and other properties there. The applicant claimed that it represented a continuing violation of her rights protected under the Convention, i.e. Article 1 of Protocol No. 1 to the Convention, as well as Article 8. The Court said that the State's responsibility might also arise when as a consequence of military action - whether lawful or unlawful - the state exercised an effective control over an area outside its national territory. The States' obligation to secure in such areas the Convention rights and freedoms derive from the fact that the states exercise an effective control there, whether it is done directly, through the State's armed forces, or through a subordinate local administration.³¹⁵

Extraterritorial aspects of the European Convention on Human rights was considered in some other cases. In the *Bankovic* case, the European Court presented its strictest approach.³¹⁶ It said that a state must exercise effective control over territory by being physically present there in order to have jurisdiction.³¹⁷ This strict approach has changed over the years and the court has provided different standard. In 2004, the Court rendered a judgment in the *Issa and others v Turkey* case, where, according to the applicants, Iraqi nationals, a group of their relatives, shepherds from an Iraqi province near the Turkish border, were killed and severely mutilated by Turkish soldiers.³¹⁸ In this case, the ECHR recalled that the concept of "jurisdiction" under the Convention and said that it was not restricted to the national territory of the Contracting Parties. "In exceptional circumstances the acts of

³¹² Case summary available http://www.echr.coe.int/NR/ronlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/FICHES_Jurisdiction_extraterritoriale_EN.pdf (09/11/2014)

³¹³ Case summary available http://www.echr.coe.int/NR/ronlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/FICHES_Jurisdiction_extraterritoriale_EN.pdf p.1(09/11/2014)

³¹⁴ *Loizidou v Turkey* (no. 15318/89) (09/11/2014)

³¹⁵ Case summary available http://www.echr.coe.int/NR/ronlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/FICHES_Jurisdiction_extraterritoriale_EN.pdf p.2 (09/11/2014)

³¹⁶ Marco Sassoli, *op.cit.* p.64

³¹⁷ *Banković and Others v. Belgium and 16 Other Contracting States* (no. 52207/99) Case summary available at http://www.echr.coe.int/NR/ronlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/FICHES_Jurisdiction_extraterritoriale_EN.pdf par. 70-71 (09/11/2014)

³¹⁸ Case summary available http://www.echr.coe.int/NR/ronlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/FICHES_Jurisdiction_extraterritoriale_EN.pdf p.2 (09/11/2014)

Contracting States performed outside their territory, or which produce effects there, may amount to exercise by them, their jurisdiction within the meaning of Article 1 of the Convention”.³¹⁹ This case confirmed that the ECHR was rather referring to the concept of so-called effective territorial control³²⁰ than previous physical control. According to the Court, the following indicators of effective control were 1) the number of soldiers on the ground, 2) the size of the area controlled, 3) the degree of control exercised, and 4) duration of the exercise of control.

Further development of this line of reasoning by the ECHR was provided in the judgment *Pad v Turkey*, where seven Iranians were killed by a Turkish gunship.³²¹ According to the Court, the mere fact that victims were in the range of fire discharged from the helicopter means that they were within the jurisdiction of Turkey.³²² The conclusion of the *Pad Case* contradicts the *Bankovic Case* where the court found that jurisdiction could not arise by the simple fact of dropping bombs on individuals.³²³

The issue of effective control and extraterritorial application of the Convention was also brought before the European Court of Human Rights in *Ilaşcu and Others v. Moldova and Russia*. The Court observed that, although in *Banković and Others*, it emphasised the preponderance of the territorial principle in the application of the Convention and it also acknowledged that the concept of “jurisdiction”, within the meaning of Article 1 of the Convention, is not necessarily restricted to the national territory of the High Contracting Parties”.³²⁴

Finally, the issue of extraterritoriality of human rights was brought before the European Court in *Al-Skeini*. As the Court stated, “UK forces were operating in Iraq with the consent of the Iraqi government, and there was a presumption that a domestic (UK) statute connecting international human rights treaty obligations would be applicable to UK forces’ operations in Iraq (...) What this decision implied was that members of the military forces were responsible for the protection of human rights of individuals under their control even

³¹⁹ *Issa and others v. Turkey*, (no. 31821/96) ECtHR, Judgment, para. 68, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460> (09/11/2014)

³²⁰ Marco Sassoli, *op.cit.* p.65

³²¹ *Pad and Others v. Turkey* (no. 60167/00) ECtHR Judgment, para. 54, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-2605> (09/11/2014)

³²² *Pad v Turkey*, ECHR, *Ibidem.*, para. 48 – 55 (09/11/2014)

³²³ Marco Sassoli, *op.cit.* p.65

³²⁴ *Ilaşcu v. Moldova and Russia*, 2004-VII Eur. Ct. of H.R., para. 314 available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886>

outside the domestic territory of these armed forces, and that this duty or obligation cannot be abrogated by the execution of any agreement as between the operating military forces and the State in which they operate”.³²⁵

The Al- Skeini judgment confirms the situation in which the level of control exercised by a State may be sufficient to render its human rights obligations, related to the treatment of detainees, extraterritorially.

Accountability in such situations stemmed from the fact that Article 1 of the Convention could not be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State which it could not perpetrate on its own territory.³²⁶ The Court found that as a result of the military incursion by Turkish military forces into Iraq, the Turkish military forces had established, albeit briefly, control over a portion of Iraq, and as a result, incurred obligations for the abuse of human rights that may have taken place during that timeframe.³²⁷

The provided case law clearly indicated two aspects of the applicability of the ECHR. Firstly, it is applicable during an armed conflict and, secondly, it is applicable extraterritorially. Under the European Court of Human Rights jurisprudence, it also applies to an occupied territory.³²⁸

In this context, it is important to bear in mind that not only the European Convention of Human Rights may be applicable extraterritorially but also the International Covenant on Civil and Political Rights (ICCPR)³²⁹, which applies both in times of peace and in times of armed conflict³³⁰. In its General Comment No. 31 of 29 March 2004, the Human Rights Committee says, “The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect to certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of the Covenant rights, both spheres of law are complementary,

³²⁵ Hendin, *Detainees in Afghanistan*, *op.cit.*, p. 264

³²⁶ Judgment available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460> (09/11/2014)

³²⁷ Issa and others v. Turkey, (no. 31821/96) ECtHR, Judgment of 16 November 2004. (09/11/2014)

³²⁸ Marco Sassoli, *The role of human rights and international humanitarian law in new types of armed conflict* (in:) *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Naftali, Oxford University Press, 2011 p.63

³²⁹ UNTS, Vol. 999, p. 171, 16 December 1966

³³⁰ Zays A., *Human rights and indefinite detention*, ICRC Review, vol. 87 no. 857, 2005, p. 17

not mutually exclusive.”³³¹ The Human Rights Committee on several other occasions called upon to apply the ICCPR to situations of military occupation, for example, it urged Israel toward Palestinian territory and Iraq toward Kuwait territory.³³² This approach is confirmed in the International Court of Justice advisory opinion on the Palestinian Wall.³³³

The application of human rights and the ICCPR may not be evaded by transferring detainees outside the national borders of the State concerned (for example, to Guantanamo naval base on leased Cuban territory).³³⁴ According to the General Comment on ICCPR “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”.³³⁵ And, also as said in the Committee’s General Comment No. 15, “the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.”³³⁶

Another situation where a human rights regime is applicable is when a state deploys its armed forces in a foreign country in response to a “friendship invitation”, i.e. the Soviet’s invitation to Czechoslovakia in 1968 or to Afghanistan in 1979. This would appear to be an appropriate characterization of the situation of the Coalition forces in both Afghanistan and Iraq after the restoration of power to the local authorities. It results in their human rights obligations being fully applicable in relation to individuals detained by them (the invited country) in those States (host states).³³⁷

The Inter-American Court and Commission for Human Rights have adopted a broad view of what gave ground for a state to execute extraterritorial jurisdiction. By providing a

³³¹ General Comment No. 8 concerning Article 9 of the International Covenant on Civil and Political Rights, the Committee UN Doc. HRI/GEN/1/Rev.7 (2004).

³³² Vide UN Doc. A/53/40 (1998) and UN Doc. A/46/40 (1991)

³³³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory opinion of 9 July 2004, para. 111

³³⁴ Zays A., *Human rights and indefinite detention*, ICRC Review, vol. 87 no. 857, 2005, p. 19

³³⁵ General Comment No. 8

³³⁶ General Comment No. 15 on “The position of aliens under the Covenant”, UN Doc. HRI/GEN/1/Rev.7 (2004), p. 140 ff.

³³⁷ S. Borelli, *op.cit.*, p. 57

negative definition, it stated that it is not necessary to have troops on the ground or to exercise physical control to reach a required level of jurisdiction over the territory.³³⁸

This is because most human rights treaties oblige the State Parties to guarantee to all persons under their jurisdiction that rights and freedoms provided by these treaties will be freely and fully exercised.³³⁹ This notion means that States are bound to secure rights and freedoms of all persons, not only within their own territory, but also abroad. It means that during proceedings against a presumed accused or a party, the nationality or the presence within some particular area is not as important as whether the State observes the rights of a person due to its authority and control over a particular individual.³⁴⁰

To summarize, human rights are applicable during armed conflict. They are also applicable extraterritorially. This means that both European countries which are bound by the ECHR and ICCPR and non-European countries, such as the United States, which are bound by ICCPR and regional documents, have to follow it. There little doubt that law in Europe provides the highest standard in terms of observance of human rights. It is particularly important to be aware of these differences in a multinational military environment.

2.2. 6 INTERNATIONAL HUMAN RIGHTS LAW APPLICABLE TO DETENTION

The situation of persons who have been deprived of their liberty is not only regulated by humanitarian law but is also by human rights law. The right to liberty is the cornerstone of modern democracies. During an armed conflict, deprivation of liberty is one of the most common violation of human rights. Detention during international armed conflict is fairly well-regulated. The issues arise from a detention situation during non-international armed conflicts. As we have discussed the application of extraterritorial human rights above, it is important to refer to how a detention situation is regulated under international and regional human rights instruments.

The situation of detainees is regulated by both international human rights instruments and regional treaties. The Universal Declaration of Human Rights (UDHR), Article 9, stipulates, “no one shall be subjected to arbitrary arrest, detention or exile”. Although the Universal Declaration has no legal binding force, many provisions have acquired the status of

³³⁸ M. Sassoli, *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Naftali, Oxford University Press, 2011 p.64

³³⁹ S. Borelli, *op.cit.*, p. 55

³⁴⁰ S. Borelli, *op.cit.*, p. 56

customary rules.³⁴¹ For example, the prohibition of torture has obtained universal, *ius cogens* character.³⁴² Additionally, the International Covenant on Civil and Political Rights (ICCPR) is Article 9, paragraph 1, which stipulates, “Everyone has the right to liberty and security of person. 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 procedures as are established by law.” Article 9, paragraph 3 of the ICCPR stipulates, “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.” Prolonged pre-trial detention without bail is thus incompatible with Article 9 and requires specific justification and periodic review. With regard to the regional documents from the perspective of Polish and British engagement, the CHR, Article 5, plays an important role. It provides basic guarantees such as, “Everyone 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”. It also provides guarantees which may apply during military non-international armed conflicts such as, “1) the lawful detention of a person after conviction by a competent court; 2) 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; 3) Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. 4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. 5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”

This basic reference clearly indicates the existence of legal norms regulating the situation of detainees during an international armed conflict. The problem is that modern

³⁴¹ A. Kaczorowska, *International Public Law*, 4th Ed. Routledge, 2010, p. 507 - 508

³⁴² J Barcik., *Prawo międzynarodowe publiczne – International Public Law*, Beck, Warszawa, 2007, pt 451, p. 268.

conflicts are fought in a non-international environment or in situations when armed forces of the detaining power are operating on foreign soil.

2.2. 7. APPLICABILITY OF HUMAN RIGHTS IN AFGHANISTAN – PRACTICAL ISSUES

The issue which became a focal point during multinational military operations lies in cooperation with states which do not follow European legal standards regarding human rights. In the case of Afghanistan, this is the cooperation of US forces within ISAF and the host nation forces i.e. Afghan military forces and police.

General concerns regarding US forces lies with the declared approach of the US government. The Bush administration stated that so-called enemy combatants are not covered by human rights, but exclusively by the law of war. This means that only very limited protection for them is available since, as stated above, an unlawful combatant is not a legally-binding concept and defies a person of protection of being a combatant or civilian under IHL.³⁴³

The Afghanistan National Directorate of Security (NDS) is one of the intelligence institutions responsible for both civil and military intelligence. It operates in relative secrecy, often without adequate judicial supervision. With regard to NDS activities, there have been reports of prolonged detention without trial, extortion, torture and systematic due-process violations. Complaints of serious human rights violations committed by the NDS representatives, including arbitrary arrest, illegal detention and torture, are common.³⁴⁴ NDS activity is only one of many examples of violation of human rights in Afghanistan conducted by the local Afghan forces.

Although this thesis is focused solely on legal challenges resulting from military operation in Afghanistan, I will refer in this part to the procedure and situation of detainees in Iraq, Afghanistan and the detainees in US custody. These examples will clearly show the practical challenges related to detention operations during modern armed conflicts.

³⁴³ M. Sassoli, *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Naftali, Oxford University Press, 2011 p.40 and 41.

³⁴⁴ Report Of the High Commission for Human Rights on the situation of Human Rights in Afghanistan, UN Commission on Human Rights, U.N. Doc. E/CN.4/2006/108 of 3 March 2006.

2.2. 8. SITUATION OF DETAINEES IN US CUSTODY OUTSIDE IRAQ AND AFGHANISTAN – QUESTION OF COMPETENT TRIBUNAL UNDER ARTICLE 5 OF GCIII

According to Article 5(2) of GC III, “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal”.

The concept of a competent tribunal is not defined in Article 5(2) of the GC III or Article 45 of the API. A draft of Article 5 indicates that it should be a formal judicial tribunal-like forum, though not necessarily a military forum, ideally composed of more than one person.³⁴⁵

The status of Al Qaida operatives were rarely, particularly in places such as Guantanamo, determined by a competent tribunal. Often the reasoning behind the prolonged detention of Al Qaida members, without access to an impartial tribunal, would seem to be that the evidence collected against these individuals was not strong enough for criminal prosecutions.³⁴⁶ The lack of access toward an independent court was reviewed by the US Supreme Court in the *Rasul v Bush* case. According to the court, the detainees, held in Guantanamo bay, were entitled to impartial judicial review of their status. As a consequence, all held by the United States as “enemy combatants” whether they are or are not American citizens are entitled to challenge their detention in the US courts.³⁴⁷ To address this judgment, the US government established a quasi-court. Currently, the Combatant Status Review Tribunal is in operation, which is supposed to serve as an impartial judicial body. However, some experts suggest that this tribunal operates on the basis of a presumption in favour of the evidence provided by the government.³⁴⁸ Moreover, there are other issues related to the quality of judgments or decisions rendered by the Combatant Status. Firstly, the Tribunal is composed of military personnel, i.e. of three military officers, one of whom must be a judge advocate. The detainees are not allowed to refer their case to a lawyer of their own choice but instead they may refer to an assigned military officer as personal representative.³⁴⁹ The tribunals in question, are not bound by the rules of procedure applicable in regular courts.

³⁴⁵ A. Bianchi, Y.Naqvi, *International Humanitarian law and terrorism*, Studies in International Law, 2011, Hart Publishing, Oxford, p.296

³⁴⁶ D. Moeckli, *op.cit.*, p. 79.

³⁴⁷ D. Moeckli, *op.cit.*, p. 92.

³⁴⁸ D Moeckli., *op.cit.*, p. 92.

³⁴⁹ D. Moeckli, *op.cit.*, p. 94.

They deem to consider any relevant or helpful information including hearsay evidence.³⁵⁰ An important element which excludes the Review Tribunal from the scope of Article 5, exists in the Order which set up the Tribunal. Its aim was to establish whether the person falls within the category of the so-called “enemy combatant”, whereas Article 5 says that the aim of the Tribunal is to establish whether they fulfil the requirements of being considered as a combatant under Article 4 of GCIII. As such, these tribunals are clearly not the equivalent of impartial and independent courts.

Helpful in establishing whether the Combatant Status Review Tribunal fulfils the conditions envisaged by the Geneva Conventions and Additional Protocols, is Article 45 of Additional Protocol I which says that “a person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, (...) as his status has been determined by a competent tribunal”. Interestingly, the second paragraph of this Article says that “If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated”. Therefore, in this situation two types of tribunals may be distinguished: one provided by Article 45(1), i.e. a competent tribunal, and the second provided in Article 45(2), i.e. a judicial tribunal. The latter must adjudicate the prisoner-of-war status where the person is charged with an offence arising from hostilities and is not being held as a prisoner of war. The first one may be administrative in nature, including military commissions.³⁵¹

Important in determining doubtful POW status is a literal interpretation of Article 5(2) GC III, which states, “Should any doubt arise as to whether persons...”. In terms of Al Qaida operatives, there are two challenges: the first is of an objective character and the second of a procedural one. It is convincing that terrorist network participants, even during a military armed operation in Afghanistan, are not considered as doubtful POW. So, in their case, there is no “any doubt arises” premise fulfilled. The second observation of procedural character refers to the United Kingdom Privy Council consideration of Article 5 during the military

³⁵⁰ D. Moeckli, *op.cit.*, p. 95.

³⁵¹ ICRC Commentary to Protocol I, p. 551, para. 1745.

confrontation between Malaysia and Indonesia. The Privy Council held that where the accused did not raise a doubt, no question of mistrial arises.³⁵²

2.2. 9 SITUATION OF DETAINEES IN US CUSTODY IN IRAQ AND AFGHANISTAN

According to Greig, US policy regarding the treatment of detainees is to be divided into two different groups: one called a “security detainee” group and another called “criminal detainee.” The initial determination of the detainee category relies on Judge Advocates working at lower-level internment facilities.³⁵³ After this initial stage, if it is necessary to continue holding the individual and not release them, he or she is to be transferred to a major base such as Camp Cropper in Iraq, in order to be in-processed into one of the three internment facilities.³⁵⁴ Further, a so-called magistrate's cell³⁵⁵ (in the given case, in Camp Cropper) performs a second due-process review of the individual's case to again determine, if sufficient evidence exists, to hold the individual for security or criminal reasons.³⁵⁶ If no sufficient evidence exists, the magistrate's cell (MaiCell) could recommend the person be released.³⁵⁷ Upon the MaiCell decision, the individual would either be immediately released, forwarded to the Central Criminal Court of Iraq Liaison Office for prosecution (for a criminal detainee), or forwarded to the Combined Review and Release Board review section for continued internment for security reasons (for a security detainee).³⁵⁸

This quite complex procedure poses a few challenges, particularly in terms of interoperability between the US forces and the European counterparts. European NATO members are part of the European Convention on Human Rights (ECHR). The Convention for example:

- forbids prolonged confinement³⁵⁹,
- introduces a right to a speedy and fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time³⁶⁰,

³⁵²Prosecutor v. Oie Hee Koi, Judicial Committee of the Privy Council (U.K.), 4 December 1967 [1968], p. 834

³⁵³ M. Greig, *Detention operations in a counterinsurgency: pitfalls and the inevitable transition*, Army Lawyer, December, 2009, p. 26

³⁵⁴ M. Greig, *Ibidem*. p. 26

³⁵⁵ In every base there is a position of magistrate cell i.e. person responsible for overall administrative and security duties.

³⁵⁶ M. Greig, *op. cit.*, p. 26

³⁵⁷ M. Greig, *Ibidem*, p. 26

³⁵⁸ M. Greig, *Ibidem* p. 26

³⁵⁹ Art. 5 ECHR

³⁶⁰ Art. 6 ECHR

- prohibits torture.³⁶¹

Further complications arise when transferring detainees to host nation custody, i.e. when the detainee's rights under the ECHR might be violated by the receiving state. In such a situation, Convention members are prohibited from transferring the detainees.³⁶² For instance, Iraq provides for and executes the death penalty. European countries, signatories to the ECHR which have ratified a protocol to the Convention prohibiting the death penalty in all circumstances, are prohibited by treaty from transferring detainees to Iraqi custody.³⁶³ Alleged violations of the ECHR can be brought to the European Court of Human Rights, and the Convention grants the right of compensation to anyone whose rights have been violated by a member state.³⁶⁴

Additionally, some European countries introduced law which affects their detention policy. For example, in 1998, the United Kingdom passed the Human Rights Act (HRA), which was intended “to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights (ECHR). Essentially, it is domestic law reinforcement to the UK's obligations under the Convention.” The introduction of the HRA made it unlawful for any “public authority,” including the armed forces, to act in a way which is incompatible with the rights under the ECHR.³⁶⁵

A possible defence presented by the public authority was based on the fact that the armed forces had acted in pursuit of a mandatory obligation imposed by parliament. In the case of Iraq, the UK House of Lords decided the HRA, in relation to the ECHR (an international obligation), was pre-empted by the UNSCR 1546 (another international obligation) through Article 103 of the UN Charter.³⁶⁶ As a result of such an approach, the UK's detention operations in Iraq did not fall under the jurisdiction of the ECHR nor the

³⁶¹ Art. 3 ECHR

³⁶² Fordham M., *Legal opinion on detainee handovers by UK forces: in the matter of the all-party parliamentary group on extraordinary rendition and in the matter of the human rights responsibility arising from military detainee handovers in Iraq [and Afghanistan]* (all party parliamentary group on extraordinary rendition 2008).

³⁶³ Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 3, 2002, Europe. T.S. No. 187

³⁶⁴ M. Greig, *op. cit.*, p. 26

³⁶⁵ *Al-Skeini v. Secretary of State for Defence*, [2008] 1 A.C. 153 (U.K.H.L 2007) (appeal taken from E.W.C.A.) (holding the HRA applies extraterritorially to the acts or omissions of British Soldiers in Iraq and interpreting the phrase “within the jurisdiction of the United Kingdom” to mean “within the effective control” of the United Kingdom); HRA, *supra* note 14, § 6(1).

³⁶⁶ “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”

HRA.³⁶⁷ The House of Lords' ruling does not seem to be the final word in this case. The European Court of Human Rights continues to issue rulings on British detainees and recently maintained that the transfer of British detainees to Iraqi custody was unlawful.³⁶⁸

In Afghanistan, Poland and the UK do not conduct long-term detention operations as part of the ISAF mission. To avoid accusations, UK forces do not transfer captured detainees to US detention facilities. In terms of relations with Afghanistan, the host nation security forces, they have agreed that UK forces will detain individuals only in limited circumstances and all detainees must be transferred to Afghan authorities “at the earliest opportunity.”³⁶⁹ The safety of detainees is governed by the Memorandum of Understanding which allows visiting detention facilities not only by the ICRC but also by agents of UK forces.³⁷⁰

2.2. 10 SITUATION OF DETAINEES HELD BY BRITISH AND POLISH FORCES - QUESTION OF MOU³⁷¹

To prevent such violations, the so-called Memorandum of Understanding (MoU) was concluded by several states such as the UK, Canada and Netherlands. On 23 April 2006, the MoU was entered into between the UK and the Government of Afghanistan. It concerned the transfer of persons detained in Afghanistan from UK armed forces to Afghan authorities³⁷². There are three relevant NDS facilities, namely those in Kabul (a facility often referred to as “Department 17”, which is the investigating branch of the NDS in Kabul), in Kandahar (the capital of Kandahar province) and in Lashkar Gah³⁷³. In September 2007, an allegation was made by a UK transferee at NDS Lashkar Gah that he had been ill-treated while in detention there. The allegation was investigated by UK personnel, who reached the conclusion that it was unsubstantiated³⁷⁴.

In November 2007, the UK rejected a call for a moratorium on transfers following the suspension of transfers by Canada (as a result of allegations of ill-treatment of Canadian

³⁶⁷ M. Greig, *op.cit.*, p. 27

³⁶⁸ M. Greig, *op.cit.*, p. 27

³⁶⁹ Greig M., *op.cit.*, p. 28

³⁷⁰ Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan Concerning Transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan, U.K.-Afg., Apr. 23, 2005, available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaaff/44/4412.htm>.

³⁷¹ More available at <https://zoek.officielebekendmakingen.nl/kst-27925-205-b3.pdf> *Netherlands* (09/11/2014)

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaaff/44/4412.htm> UK (09/11/2014)

³⁷² The Queen (on the application of Maya Evans) v. Secretary of State for Defence [2010] EWHC 1445, par. 26

³⁷³ Par 28

³⁷⁴ Par 30

transferees) and the publication of a report by Amnesty International recording allegations of torture and ill-treatment of detainees by the NDS and recommending a moratorium.³⁷⁵

In March 2009 and subsequent months, in the course of visits by UK personnel to Poli-Charki prison (carried out in order to check on UK transferees who had been transferred on by the NDS without prior notification to the UK), allegations were made by a number of transferees that they had been ill-treated while in detention at NDS facilities in the period of 2007-2008. Most of the complaints were related to Kabul, but there were also complaints about Kandahar and Lashkar Gah. The circumstances in which these complaints were made, the investigation of them and the conclusions drawn are important features of the case. The allegations led to the imposition of an immediate moratorium on UK transfers to Kandahar (a moratorium on transfers to Kabul was already in place). Transfers to Lashkar Gah continued. The moratorium on transfers to Kandahar was lifted in February 2010 but no further transfers have, in fact, been made to that facility³⁷⁶.

Polish forces are operating within RC EAST area of responsibility as the Task Force White Eagle and they are accountable for safety and security of Ghazni province. Since the beginning of the Polish engagement into ISAF operation (Poland has been a part of ISAF since 2007 and before it was part of US Operation Enduring Freedom from 2002), the Memorandum of Understanding regarding treatment of detainees was not even discussed at any political or military level. In this legal environment, cooperation with Afghan and US forces may constitute a clear violation of the ECHR and lead to the possible international responsibility of Poland before the ECHR.

CONCLUSION

International Security and Assistance Forces in Afghanistan assignments were to secure peace and stability. Fundamental was to provide a proper treatment to detained insurgents. Continuous violations of IHL by some parties of NATO operation on one hand and disregard to IHL by some insurgent group on the other clearly illustrate how difficult is to comply with IHL in NIAC. As a result may be it is time to ask whether participants in NIAC should be granted similar protection as in IAC.

³⁷⁵ Par 31

³⁷⁶ Maya Evans *op.cit.* par 35

CHAPTER 3 LAW APPLICABLE TO POLISH AND BRITISH MILITARY FORCES IN AFGHANISTAN – THE QUESTION OF RULES OF ENGAGEMENT

INTRODUCTION

Modern military operations are governed not only by humanitarian law of armed conflicts but also by human rights. The application of both systems of law on a battlefield gives a different perspective on the issue of soldier's responsibility. During armed conflicts regulated by Common Article 2 of the Geneva Convention³⁷⁷ and Additional Protocol I, soldiers are protected by the doctrine of combatant immunity, which allows soldiers, when performing their duties, to kill the enemy without any sanction. The situation is more complex when it occurs during non-international armed conflicts. In internal conflicts, soldiers often need to apply a mix of legal regulations where the self-defence doctrine plays a primary role. The list of legal regimes applicable on the modern battlefield is extensive. For example, in Afghanistan, soldiers from NATO member states had to follow international humanitarian and human rights law, contributing state domestic regulations, host nation laws and NATO internal regulations. It often creates a situation of possible contradictions. Particularly, when in a multinational environment, soldiers need to follow not only directives or orders of NATO or other countries but also act in a way which does not contradict their internal, domestic laws. To clarify this legal chaos, soldiers are provided with special documents which simplify all the norms into an easy-to-use compilation. The norms which provide information on how and when to use lethal force are of particular importance.

These simplified norms are called Rules of Engagement. They constitute a set of norms which are the result of combining all the above-mentioned legal systems.

Rules of Engagement or ROE are based on three pillars: political, military and legal. The political pillar is to assure that military operations meet political objectives. The military element is essential to guarantee that ROE provide the possibility to ensure force protection

³⁷⁷ Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 75 U.N.T.S. 135

and accomplish a mission. The legal pillar covers domestic and international legal obligations of member states.³⁷⁸

It is difficult to hold a discussion over the legal status of ROE for several reasons. One of the most vital is the fact that ROE are classified. Therefore, their localization in the British, Polish or any other legal system is like walking blindfold. The only known source of a formerly-valid, dependable in a public debate, full list of recent Rules of Engagement is Wikileaks. Other ROE elements need to be taken from legal documents, for example, court judgments, NATO or EU documents and some relevant articles.

A second important aspect of the unclear legal character of ROE is that they constitute a final end; this is the final information which soldiers receive on the battlefield. ROE create a system of quasi-legal directives which may, and probably do, affect the soldiers' situation on a battlefield. So, particularly in a situation of possible contradiction between domestic law and ROE, it may be important to address their legal character.

ROE often overlaps with international humanitarian law (IHL), but there are also significant differences. Firstly, humanitarian law forms an international, legal regime accepted as binding by the majority in the international community as such norms of IHL are mutually applicable by signatories. Contrary to this, ROE are rules of a specific force, bilateral in nature, mixed with political-military concerns regarding how the mission is to be conducted.³⁷⁹ Secondly, IHL, despite the rapid development of customary law which is rather a consistent set of rules, ROE are different for each operation.³⁸⁰ Finally, with regard to observance of the law, the violation of humanitarian law is the violation of the state's international obligations which eventually may lead to criminal prosecution. However, a breach in ROE does not necessarily constitute a violation of IHL. Often a violation of ROE may lead to disciplinary measures only as envisaged by the domestic legal system.

In this chapter I will analyse the legal regimes which apply to soldiers on the battlefield. I will particularly address Rules of Engagement. Their issue is important despite the end of ISAF NATO operation. Their importance lays in their universality. Nowadays

³⁷⁸ S. Fournier, *NATO military interventions abroad: how ROE are adopted and jurisdictional rights negotiated* Paper presented at the XVth International Congress of Social Defence, „Criminal Law between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions”, Toledo, Spain, September 2007, p.116

³⁷⁹ A.F. Varga, Rules of engagement vis-à-vis, AARMS, Vol. 11, No. 1 (2012) p.1–11 available <http://www.zmka.hu/docs/Volume11/Issue1/pdf/01.pdf> (10/11/2013)

³⁸⁰ A.F. Varga, *op.cit* p.1–11

average military operation, as mentioned above, are flooded with number of legal international and domestic documents. There is a need to provide some kind of a simple to use set of instructions which allows following the law in time of war. Modern conflicts are in fact a primary example of raising importance of ROE.

In this chapter I will refer firstly to the Status of Forces agreement. This document set ground for norms applicable by soldiers. I will try to provide a legal analysis of law applicable to the Polish and British military forces in Afghanistan. In this part I will not only provide a legal ground for their presence but foremost the legal basis foreseen by national legislations. Finally I will try to address issues related to Rules of Engagement application. After providing definition of ROE I will refer to the normative character of the ROE. I will also try to locate ROE within the international and domestic law and address the character of relation between international and domestic regulations. Analysis of ROE status in Polish and British legal systems will be made. The important element of the following analysis is the question of the interoperability between law and ROE. Finally I will try to reach to other issues related to ROE such as Standard Operating Procedures. The last part of this chapter will refer to practical aspects of using ROE on the battlefield.

3.1. LAW APPLICABLE TO POLISH AND BRITISH MILITARY FORCES IN AFGHANISTAN

On 14 November 2001, the Security Council voted Resolution 1378 calling the international community for multinational support for Afghanistan.³⁸¹ More detailed shape of this presence was established during the Bonn conference which was held in Germany in November of the same year. In the appendix to the Bonn Agreement, the participants of the UN talks requested that the UN Security Council consider authorising early deployment to Afghanistan of the UN mandated force. According to the Agreement, a light foot of the presence of international forces around Kabul was to be established. The Security Council consequently confirmed this settlement by Resolution 1386 which, acting under Chapter VII of the Charter of the United Nations, established the International Security Assistance Force

³⁸¹ UN Security Resolution/RES/1378 (2001), 14'th November 2001 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/638/57/PDF/N0163857.pdf?OpenElement> (10/11/2013)

in Afghanistan (ISAF).³⁸² The Security Council extended the ISAF's mandate in successive resolutions in recognition of the fact that the situation in Afghanistan continued to constitute a threat to international peace and security. Since August 2003, the ISAF has operated under the command of NATO.³⁸³

On 13 October 2003, the Security Council voted unanimously to expand the ISAF mission beyond Kabul (Resolution 1510). In February of 2005, NATO decided to expand the ISAF to the west of Afghanistan, whereas, on 1 July 2006, ISAF had expanded its area of operation to six additional provinces in the south of Afghanistan.³⁸⁴ In Afghanistan, in its peak, soldiers from more than 50 countries were deployed, of which a major part was played by NATO countries. As a result, approximately 87,000 troops were on the ground.³⁸⁵ In Afghanistan, apart from ISAF operation which was NATO led, there was also the US-led Operation Enduring Freedom (OEF – A) which consisted of approximately 60,000 troops.

In this section, I will present the legal framework of the presence of British and Polish troops within the ISAF operation. Not to disregard the matter entirely, the engagement of Polish and British troops within the US-led Operation Enduring Freedom, although present, will not be discussed within this thesis for the purpose of my analysis.

3.2. STATUS OF MILITARY FORCES IN AFGHANISTAN

Afghanistan is a recognised sovereign state and, as UN Security Council Resolutions clearly indicate, the international community has pledged to support Afghan sovereignty. As a principle, Afghanistan has jurisdiction over all persons within its territory. However, to the extent that it has been expressly agreed, the ISAF and supporting personnel is subject to exclusive national jurisdiction as stated in the Status of Force Agreement.³⁸⁶ This is due to the fact that most contributing states are unwilling to deliver its own forces before the local system of justice which has several flaws as mentioned in chapter one of this thesis. Additionally, the ISAF soldiers are obliged to conduct military operations under the law of

³⁸² UN Security Resolution /RES/1386 (2001) 20th December 2001 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/708/55/PDF/N0170855.pdf?OpenElement>

³⁸³ Par. 15 The Queen (on the application of Maya Evans) v Secretary of State for Defence Case No: CO/11949/2008 High Court of Justice Queen's Bench Division Divisional Court 25 June 2010 [2010] EWHC 1445 (Admin)2010 WL 2516377 Before: Lord Justice Richards and Mr Justice Cranston Date: 25/06/2010

³⁸⁴ More available at <http://www.nato.int/isaf/topics/chronology/index.html> (10.12.2014)

³⁸⁵ More available at <http://www.isaf.nato.int/images/stories/File/Placemats/2013-08-01%20ISAF%20Placemat-final.pdf> (10.12.2014)

³⁸⁶ Maya Evans *op. cit.*, par 16.

armed conflict applicable in the contributing states, and they are subject to compliance with NATO regulations and sources disciplinary measures for armed forces operating in Afghanistan. Under these regulations, they are authorised to take action against insurgents.³⁸⁷

3.3.1 STATUS OF FORCES AGREEMENT

The presence of foreign troops during an armed conflict which takes place on the territory of a third country usually constitutes a legal challenge. Their status is governed by international law and the law of the contributing state, and their actions should not contradict the laws of the host nation. Additionally, soldiers and armies need to adapt to a different kind of situation. They must adapt from a situation of peace, where armed forces are subject to domestic law, to a situation where they ought to act and fight on foreign soil.

To regulate such situations, a special type of agreement is concluded: the Status of Forces Agreement (SOFA). This document is a point of departure of many documents which affect the status of ISAF soldiers in Afghanistan.

SOFAs are bilateral or multilateral treaties that define the legal position of military forces and civilian personnel by one or more states or by an international organization in the territory of another state with the latter's consent.³⁸⁸ They deal with issues such as entry and departure of foreign personnel, settlement of claims, jurisdictional issues and similar such matters.³⁸⁹

With regards to the status of forces agreement of NATO troops in Afghanistan, the basic document is the NATO SOFA. It was signed on 4 April 1949 and provides fundamental regulations related to the status of forces on the territory of other countries. It is a multilateral agreement that is applicable to all member countries of NATO.³⁹⁰ Some other states are subject to the NATO SOFA through the Partnership for Peace program.³⁹¹

Article II of the Agreement states that "it is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the

³⁸⁷ Maya Evans Par, *Ibidem*. par 17

³⁸⁸ A. Sari, *Status of Forces and Status of Mission Agreements under the ESDP: the EU's evolving practice*, European Journal of International Law, vol. 19, 2008. p. 68

³⁸⁹ A. Sari, *op. cit.* p. 69

³⁹⁰ R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* March 15, 2012, Congressional Research Service, RL34531, p. 2 available at <http://www.fas.org/sgp/crs/natsec/RL34531.pdf>

³⁹¹ R. Chuck Mason, *ibidem* p. 2

receiving State”.³⁹² This article places obligation on members of forces of the contributing state. However, Article VII outlines that “the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdictions conferred on them by the law of the sending State over all persons subject to the military law of that State”.

The issue most commonly addressed in a SOFA is legal protection from prosecution. Accordingly, it means that for military and civilian personnel in a foreign country such as Afghanistan, NATO will afford legal protection from prosecution while present in Afghanistan.³⁹³ Article VII (1)(a) states that “the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State”.³⁹⁴ Additionally, Article VII (2)(a) also stipulates the kind of law that is applicable to troops. It says that “the military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State”.

ISAF contributing states concluded a general agreement between NATO and the Islamic Republic of Afghanistan. There are no bilateral agreements between, for example, Great Britain and Afghanistan. Currently, the legal situation for the NATO Resolute Support mission is provided by the SOFA, which was ratified by the Afghan Parliament on 27 November 2014.³⁹⁵

The SOFA, which was concluded between NATO and Afghanistan, took the form of a so-called Military Technical Agreement (MTA). It was signed on 2 January 2001 between International Security Assistance Forces and the Interim Administration of Afghanistan.³⁹⁶ It referred generally to the ‘Agreement on Provisional Arrangements in Afghanistan pending the

³⁹² Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 Jun, 1951, available at http://www.nato.int/cps/en/natolive/official_texts_17265.htm (10.12.2014) later NATO SOFA

³⁹³ R. Chuck Mason, *op.cit.*, p. 3

³⁹⁴ NATO SOFA

³⁹⁵ More information available at http://www.nato.int/cps/en/natohq/topics_113694.htm (10.10.2014)

³⁹⁶ Look at the letter from permanent representative of the United Kingdom of the Great Britain and Ireland Mr. Jeremy Greenstock addressed to the President of Security Council S/2002/117 available at <http://reliefweb.int/sites/reliefweb.int/files/resources/9B11C79DE13BB700C1256B5300381E4F-unsc-afg-25jan.pdf> (10.10.2014)

Re-establishment of Permanent Government Institutions’, signed in Bonn on 5 December 2001 (the Bonn Agreement).

The MTA regulated, inter alia, the presence of foreign troops in Afghanistan. It also stated the general privilege to use force. According to Article III (2), The Interim Administration “understands and agrees that the ISAF Commander will have the authority, without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission.”

As an appendix to the MTA arrangements regarding the status of the International Security Assistance Force, section 1, entitled “Jurisdiction”, states that “the provisions of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 concerning experts on mission will apply mutatis mutandis to the ISAF and supporting personnel, including associated liaison personnel”. Article 2 states that all personnel “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”.³⁹⁷ However, Article 3 excluded them from local jurisdiction by saying that the ISAF and supporting personnel, including associated liaison personnel, will, under all circumstances and at all times, be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan. Article 4 states that the ISAF and supporting personnel, including associated liaison personnel, will be immune from personal arrest or detention. Additionally, the Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity.³⁹⁸

Taking into consideration the above-mentioned information, there is no doubt to the existence of a regime of law applicable to troops in this area. NATO forces are bound by their domestic systems of law as well as international law. Additionally, they are bound by norms outlined in the Rules of Engagement.

Remarkably, the MTA (or SOFA), which *expressis verbis* allowed ISAF the use of force, applies only to ISAF forces. A similar agreement which would expressly authorize the United States forces to carry out military operations was not concluded between the second

³⁹⁷ NATO SOFA

³⁹⁸ NATO SOFA

stage of US engagement in Afghanistan i.e. Operation Enduring Freedom and the government of Afghanistan.³⁹⁹

The current situation of the NATO forces status is regulated by the Status of Forces Agreement (SOFA), which was signed in Kabul on 30 September 2014 by the newly inaugurated Afghan President and NATO's Senior Civilian Representative to Afghanistan.⁴⁰⁰

3.3. 2 HIERARCHY OF POLISH LAW APPLICABLE TO POLISH TROOPS IN AFGHANISTAN

There are two concepts governing relations between international and domestic legal systems. The first one is referred to as dualistic. Presented by H. Triepel, between internal and international provisions there cannot exist any kind of conflicts since these provisions do not have the same object – internal provisions are applied exclusively between the state's borders and cannot intervene in the international legal system.⁴⁰¹ To be applied in a contracting state, it is necessary for that state to adopt legal measures from a treaty into a national provision or to introduce it through a legal plan that facilitates the introduction of law.⁴⁰² In this situation, international law provisions are introduced to internal law by an internal provision recognizing, naturalizing and introducing it through an internal measure and applied as such.⁴⁰³

The second concept is referred to as monism. According to Hans Kelsen, international law applies directly upon the state's legal order. Thus, international law applies directly without being admitted or transformed within the legal system of the member system. In the event of application of international public law to internal law, there is no need to nationalize the international stipulation.⁴⁰⁴

The Polish Constitution provides for a monistic system. Article 91 states that “after promulgation thereof in the Journal of Laws (Dziennik Ustaw) of the Republic of Poland, a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if

³⁹⁹ R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* op.cit 8

⁴⁰⁰ More available at http://www.nato.int/cps/en/natohq/topics_113694.htm (10.10.2015)

⁴⁰¹ B. Marin, *The dualist and monist theories. International law's comprehension...*, Curentul Juridic, http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf, p.2

⁴⁰² B. Marin, *op. cit.*, p.2

⁴⁰³ B. Marin, *op. cit.*, p.3

⁴⁰⁴ B. Marin, *op. cit.*, p.4

such an agreement cannot be reconciled with the provisions of such statutes. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".⁴⁰⁵

This monistic approach has advantages and disadvantages. It is clearly easier to introduce a new law of international origin directly into the domestic legal system. However, it often creates incoherence with already existing laws. Such is the case not only with European Union law but also with purely international law such as the ICC statute.⁴⁰⁶ The latter is critical, especially taking under consideration that the ICC statute, in some respect, may modify law which applies to Polish troops abroad, *inter alia*, in Afghanistan.

As to documents which primarily regulate the situation of international troops in Afghanistan, there is the Military Technical Agreement (MTA). According to the MTA the foreign status is governed by the law of a contributing state. Consequently, there is no doubt that the body of domestic law must be applied to soldiers both at home and during foreign missions.

The question is whether it is possible to establish a set of rules which equally regulate the actions of military forces at home, usually during peace time, as well as on foreign soil, usually during an armed conflict. Or rather the question is how to create a system of military regulations which are applicable to both situations. It is a fact that soldiers act differently in time of peace and in time of war. Nowadays, the military forces of European countries face several constraints. They are based on one assumption: despite the war or armed conflict, *inter arma non silent leges*.

Constraints applicable to Polish forces are based on codified law, international law and Rules of Engagement. Poland belongs to a group of countries governed by the continental system of law. It means that it is based on law which is codified and hierarchical in nature. Precedents and court judgment may only have legal meaning when it comes to interpretation of law.⁴⁰⁷ Accordingly, Polish sources of law are divided into two groups: universally-binding law and internally-binding law. The sources of universally-binding law constitute a closed

⁴⁰⁵ The Constitution of the Republic of Poland of 2nd April, 1997 As published in *Dziennik Ustaw* No. 78, item 483 available at the Polish Parliament website <http://sejm.gov.pl/prawo/konst/angielski/kon1.htm> (11.10.2014) later The Constitution of the Republic of Poland, 2 April 1997 or CRP.

⁴⁰⁶ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002 As published in *Journal of Laws (Dziennik Ustaw)* of 2003 no 78 item 708.

⁴⁰⁷ This principle doesn't apply to the judgments of European Court of Justice.

system. The Constitution names, such sources of law which, apart from the Constitution itself, comprise of statutes, international agreements and regulations.⁴⁰⁸ The Constitution provides, in Article 91 (3), the hierarchy of normative acts.⁴⁰⁹ It says, “An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes”.⁴¹⁰ Under this Article, the relation between statutes and international agreement is established. Moreover, it defines the position of international agreements within the domestic legal system. Ratified international agreements, upon consent of the Parliament, should conform with the Constitution yet they have precedence over statutes, while international agreements, ratified without such consent, are ranked below statutes.

An interesting modification of this principle took place during the period after the accession of Poland to the EU. Article 55 of the Constitution forbade extradition of a Polish citizen to another country. This constitutional principle was in breach of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States. As a result, the Polish Constitutional Tribunal issued a judgment of 5 April 2005 No. P1/05 in which was stated that Polish criminal procedure needs to be modified. As a result of this judgement, the Polish Constitution also had to be revised.⁴¹¹ It is a particularly interesting case as Polish law was affected, not by the supranational community method which is quite common, but was amended as a result of the decision brought within the former III Pillar which was intergovernmental in nature. This is an example where international law may, under particular circumstances, supersede all sources of law, even the constitution.

Last in the hierarchy are regulations. According to Article 92 of the Constitution, “regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act”.⁴¹² To summarize,

⁴⁰⁸ Art. 87 of The Constitution of the Republic of Poland of 2 nd April 1997. As published in Journal of Laws (Dziennik Ustaw) of 1997, No. 78, item 483 and as amended by Dziennik Ustaw of 2006, No. 200, item 1471

⁴⁰⁹ CRP *ibidem*

⁴¹⁰ CRP *ibidem*.

⁴¹¹ CRP *ibidem*

⁴¹² CRP *ibidem*.

there is the following hierarchy of universally-binding normative acts in Poland: the Constitution, international agreements, statutes and then regulations.

The second group of source of law is internally-binding legal norms. This category of law is specific in nature. As Article 93 of the Constitution states: “resolutions of the Council of Ministers and orders/instructions of the Prime Minister and ministers shall be of an internal character and shall bind only those organizational units subordinate to the organ which issues such act. 2. Orders/instructions shall only be issued on the basis of a statute. They shall not serve as the basis for decisions taken in respect of citizens, legal persons and other subjects. 3. Resolutions and orders shall be subject to scrutiny regarding their compliance with universally binding law”.⁴¹³ In this respect, internal acts are namely resolutions and instructions. This, above all, means that internally-binding acts may not be addressed to citizens in their private capacity.⁴¹⁴ To summarize, Polish soldiers are agents of the state and so their situation is regulated by both externally and internally-binding law.

According to the Polish Constitution,⁴¹⁵ Article 26 states, “the Armed Forces of the Republic of Poland shall safeguard the independence and territorial integrity of the State, and shall ensure the security and inviolability of its borders”.⁴¹⁶ Polish armed forces are under command of the President of the Republic of Poland. The President exercises command over the Armed Forces through the Minister of National Defence (Article 134 (2) of the Constitution). When Polish Armed forces are to be sent abroad, the President issues a decision on the use of the armed forces abroad. For example, Polish troops may be deployed abroad to, *inter alia*, prevent acts of terror or to prevent their consequences.⁴¹⁷ The decision is based on the motion of the Prime Minister.⁴¹⁸

There is no doubt that there are legal grounds for the presence of Polish troops in Afghanistan. On one hand, there is a Military Technical Agreement concluded between NATO ISAF and the Afghan government.⁴¹⁹ On the other hand, there are relevant decisions issued by the President of the Republic of Poland. Decisions are issued every six month in

⁴¹³ The Constitution of the Republic of Poland, 2 April 1997.

⁴¹⁴ Ewelina Gierach, Piotr Chybalski, Polish Constitutional Law, Chancellery of the Sejm Warsaw 2009, p. 13

⁴¹⁵ CRP *ibidem*,

⁴¹⁶ CRP *ibidem*.

⁴¹⁷ Art. 2.1 (c) Law on use Polish Military Forces abroad as Publisher in Dziennik Ustaw of 1998, 17th December No 162 item 1117,

⁴¹⁸ Art. 3 pt 2 Law on use Polish Military Forces abroad

⁴¹⁹ More available at <http://www.nato.int/isaf/topics/mandate/index.html> (10.12.2014)

order to extend Polish presence in Afghanistan.⁴²⁰ Such a decision states that Polish Armed forces are acting within the ISAF structure in Afghanistan,⁴²¹ and what is particularly important, from the perspective of further consideration, are under ISAF operational command in Afghanistan.⁴²²

During their service, armed forces abroad are under the same body of law as during their service in Poland. Both soldier and civilian employees of military forces are obliged to conduct operations in accordance with Polish international obligations and the law of host country.⁴²³

As the whole body of Polish law is applicable in Afghanistan to Polish Forces, few acts need to be brought accordingly.

3.3.4 POLISH CRIMINAL CODE - BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW

Amongst the laws applicable to soldiers, particularly important is the Polish Criminal Code (PCC), adopted on 6 July 1997. It is an act of law which gathers all regulations relevant to the criminal responsibility of Polish citizens.⁴²⁴ Its importance lies in the fact that disobedience to PCC results in committing a crime punishable under Polish law. So as far as soldiers are concerned, it is a document of utmost importance.

The Polish Criminal Code is divided into two parts: the so-called General Part, which deals with issues common to all crimes such as the mental element of the crime, forms of committing a crime, rules regarding application of punishment and matters similar in nature. Importantly, Article 5 of the Criminal Code states that Polish Criminal Code is applicable to all crimes committed on the territory of Poland. However, the SOFA or in this case, the Military Technical Agreement, modified its ruling and make it applicable also within the territory of the foreign state i.e. Afghanistan.

⁴²⁰ Decision of the President of Republic of Poland on extending the period of service of the Polish Military Contingent in the Islam Republic of Afghanistan (Postanowienia Prezydenta Rzeczypospolitej Polskiej z dnia 12 kwietnia 2013 r. o przedłużeniu okresu użycia Polskiego Kontyngentu Wojskowego w Islamskim Państwie Afganistanu (M.P. 2013 nr 0 poz. 225) available at <http://isap.sejm.gov.pl/DetailsServlet?id=WMP20130000225>

⁴²¹ § 2

⁴²² § 3

⁴²³ Art. 7 Law on Use Polish Military Forces Abroad as Published in Official Journal Ustaw of 1998, 17th Decemeber No 162 item 1117,

⁴²⁴ Polish Criminal Code, as Published in Official Journal of 2 August 1997 no 88 item 553 available at <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>

The second part of the Code deals with particular crimes such as murder, burglary as well as military crimes. The Polish legal system has no separate law specific to military crimes or a military code despite having a separate military prosecution office⁴²⁵ and military courts.⁴²⁶ Military crimes were introduced to the 1997 Criminal Code under Chapter XVI. This chapter introduced relevant regulations applicable to persons who committed crimes during war or in a course of warfare. For example, Chapter XVI, “Crimes against peace, humanity and war crimes”, Article 121.§1 stipulates: “Whoever, in contrary to the international law or domestic law, manufactures, amasses, purchases, trades, stores, carries or dispatches the means of mass destruction or means of warfare, or undertakes research aimed at the production or usage of such means, shall be subject of the penalty of imprisonment between 1 to 10 years.”⁴²⁷

Similarly, Article 122.§1 states, “Whoever, in the course of warfare, attacks an undefended locality or a facility, hospital zone or uses prohibited by the international law method of warfare, shall be subject of the penalty of imprisonment for a minimum period of 5 years, or shall be imprisoned for 25 years. § 2. The same punishment shall be imposed on person who, in the course of warfare, uses a means of warfare prohibited by international law”.⁴²⁸

Chapter XVI also provides for the punishment of persons convicted for crimes of aggression, crimes against humanity and war crimes. Acts covered by the provisions of this Chapter include the use of weapons of mass destruction, unlawful production, stockpiling, acquisition, transport or sale of weapons, the use of prohibited means of warfare, the killing of protected persons, the unlawful destruction of cultural property and the misuse of recognized emblems, neutral or enemy flags, and military emblems.

The above quotations from the Criminal Code serve to illustrate some problematic issues, such as, for example, of the law applicable on the territory of Afghanistan according to SOFA and Polish law. Two problems can be identified. Rules of Engagement are not correlated to the Polish Criminal Code. This means that the application of ROE does not exclude soldiers from liability under the Criminal Code. The relation between these two systems will be analysed below.

⁴²⁵ Law on the Prosecutor’s Office 20 June 1985 (Ustawa z dnia 20 czerwca 1985 r. o prokuraturze Dz. U. z 1985 r. Nr 31, poz. 138)

⁴²⁶ Law on Military Courts 21 September 1997, Ustawa z dnia 21 sierpnia 1997 r. Prawo o ustroju sądów wojskowych (Dz.U. z 2012 poz. 952)

⁴²⁷ Polish Criminal Code, Chapter XVI

⁴²⁸ Polish Criminal Code, Chapter XVI

The second issue is the implementation of international law within the Polish legal system. It is particularly important in terms of the relation between a ratified treaty such as the Statute of International Criminal Court⁴²⁹ and the Criminal Code. The latter introduced legal concepts which are not fully compatible with the Polish Criminal Code. For example, the ICC statute refers to the mental element of a wrongdoer in Article 30 as follows:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2 For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly⁴³⁰.

Article 9 of the Polish Criminal Code states this issue slightly differently. It says: "A prohibited act is committed with intent when the perpetrator has the will to commit it, that is when he/she is willing to commit or foreseeing the possibility of perpetrating it, he/she accepts it. § 2. A prohibited act is committed without intent when the perpetrator not having the intent to commit it, nevertheless does so because he is not careful in the manner required under the circumstances, although he should or could have foreseen the possibility of committing the prohibited act. And § 3 says "the perpetrator shall be liable to a more severe liability which the law makes contingent on a certain consequence of a prohibited act, if he has and could have foreseen such a consequence".⁴³¹

In this respect, the Polish Criminal Code provides a broader basis for responsibility based on a mental element than the ICC Statute. This may cause possible confusion between applicable laws. This might particularly be the case when, for example, a prosecutor decides to apply a pick-and-choose policy: to use the concept regarding the mental element from the Polish Criminal Code whereas, in terms of other elements of crime, refer to the ICC statute.

⁴³⁰ Art 30 of the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002 (later ICC Statute)

⁴³¹ Art 9 of the Polish Criminal Code

This particular problem may not be resolved by traditional way of interpreting the law such as principle *lex specialis derogat legi generali*.

Another important unresolved issue related to direct application of ICC regulations arises in the relation between Article 28 of the ICC Statute on “Responsibility of commanders and other superiors”⁴³² and Article 318 of the Polish Criminal Code on the same issue. Article 318 says, “...does not perpetrate a crime soldier who commits a prohibited act as a result of order execution unless he or she is executing the order knowingly that he commits a crime”.⁴³³ This norm is intended to affect the situation resulting from a military superior order whereas Article 28 of the ICC introduces a concept of “effective command” which shall not be military but may be civilian in nature. Article 318 of the PCC is also inconsistent with Article 33 of the ICC which says that “The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful”. Article 318 must be interpreted with Article 319 of the PCC which exempts from responsibility a soldier or officer who, in the case of disobedience or resistance, applies measures necessary to enforce obedience to orders. In fact, this follows a logical order: first the order of obedience, then the analysis as to whether the order was lawful or not.

Another issue related to the implementation of the ICC statute arose during the ratification process of the amendments to the ICC statute signed in Kampala during the Review Conference from 31 May to 11 June 2010. The aim of the Conference was to provide a definition of the crime of aggression. Article 8 of the ICC says that a “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁴³⁴ Article 117 §1 of the PCC provides a prohibition of waging aggressive war⁴³⁵ which is a term far less broad. For example, Article 8 (c) forbids “the

⁴³² ICC Statute

⁴³³ Art. 318 of the Polish Criminal Code,

⁴³⁴ C.N.651.2010.Treaties-8 Rome Statute of the International Criminal Court Rome, 17 July 1998, Amendments to the Rome Statute of the International Criminal Court Kampala, 11 June 2010, available http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf (10.12.2014)

⁴³⁵ Art 117 of the Polish Criminal Code

blockade of the ports” which is by all means difficult to qualify as waging aggressive war as envisaged by Article 117 §1 of the PCC. As such, the Polish Criminal Code should be modified according to reasoned opinion RM -10-116-13 notified by Prime Minister Donald Tusk to the Marshal of the Sejm on 17 December 2013.⁴³⁶

The above examples give grounds to the following conclusions. Despite the introduction of international treaties such as the ICC statute into the Polish legal system, they are not fully compatible with each other. As a result, when it comes to the criminal responsibility of international humanitarian law, a crime, under Polish law, faces a certain amount of ambiguity. This is reinforced by the concept of Rules of Engagement whose binding character is debatable but their performance is a *sine qua non* condition of modern military operations, and as such, strictly affects the position of soldiers on the battlefield.

3.3. RULES OF ENGAGEMENT (ROE)

3.3.1 ROE BASIS

Rules of Engagement are based on three assumptions. Those assumptions are of a political, military and legal character. ROE are flexible and can be changed during the course of an operation.⁴³⁷ What is more, ROE can be different even during one operation. As a result, military forces may operate under two sets of ROE. For example, during the operation in Lebanon, US forces developed the so-called "Blue Card" and "White Card" systems. The blue card contained directives for personnel which allowed them to engage in combat and the white card contained ROE for non-lethal activity.⁴³⁸

Likewise during military operations, forces may refer to different regimes of ROE. For example, different rules may be issued by an organization such as the UN and different ones by the country which provides its forces. American forces, being a part of NATO operations, are governed by “restrictive” NATO ROE, and “permissive” US SROE.⁴³⁹

⁴³⁶ Law amendments proposal available at <http://bip.kprm.gov.pl/kpr/bip-rady-ministrow/projekty-ustaw-przeslan/296,Projekty-ustaw-przeslane-do-Sejmu-RP.html> p.2-6.

⁴³⁷ <https://rdl.train.army.mil/soldierPortal/atia/adlsc/view/public/9422-1/fm/27-100/chap8.htm#8.2>

⁴³⁸ Maj. C. Broadstone, *Rules of Engagement in Military Operations Other Than War, From Beirut to Bosnia*, CSC 1996, p 4

⁴³⁹ Lt. Col Stephen M. Womack, *Rules of Engagement in Multinational Operations*, Marine Corps Gazette, February 1996, p. 1

3.3.2. ROE DEFINITION

ROE are issued by competent authorities and assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives⁴⁴⁰. According to the NATO document MC 362/1, a definition issued on 30 June 2003 states that ROE are “Directives to military forces (including individuals) that define the circumstances, conditions, degree and manner in which force, or actions which might be construed as provocative, may be applied. ROE are not used to assign tasks or give tactical instructions. With the exception of self-defence during peacetime ad operations prior to commencement of an armed conflict, which may include declarations of counter surprise or counter aggression, ROE provide the sole authority to NATO/ NATO-led forces to use force”.⁴⁴¹

According to the United Nations Peacekeeping Operations Handbook, ROE for a peacekeeping operation “clarify the different levels of force that can be used in various circumstances, how each level of force should be used and any authorizations that may need to be obtained from commanders”.⁴⁴²

ROE appear in a variety of forms in national military doctrines, including execute orders, deployment orders, operational plans, or standing directives. Whatever their form is, they provide authorisation for and/or limits on, among other things, the use of force, the positioning and posturing of forces, and the employment of certain specific capabilities. In some nations, ROE have the status of guidelines for military forces; in other nations, ROE are lawful commands.⁴⁴³ ROE in particular define:

- when force may be used during the mission,
- where force may be used during the mission,
- against whom force may be used during the mission,
- how force may be used to accomplish military targets.

⁴⁴⁰ J. A. Roach, *Rules of Engagement*, „Naval War College Review” 1983, p. 46.

⁴⁴¹ NATO Rules of Engagement, MC 362/1 (23 July 2003), p. 2.

⁴⁴² Handbook on United Nations Multidimensional Peacekeeping Operations, Peacekeeping Best Practices Unit, Department of Peacekeeping Operations, United Nations (December 2003) available at <http://www.peacekeepingbestpractices.unlb.org/Pbps/library/Handbook%20on%20UN%20PKOs.pdf>

⁴⁴³ *Rules of Engagement Handbook*, San Remo, November, 2009, p.1

ROE are divided into those which may be used with and without superior commander's authorization. The first and foremost basic principle is the right to self-defence.⁴⁴⁴

ROE are not used to assign missions or tasks nor are they used to give tactical instructions. Missions and tasks are assigned through operation orders and other similar instruments of command and control.⁴⁴⁵

3.3. 3. SOURCES OF ROE

3.3.3.1. NATO ROE

Rules of Engagement which are directives issued to military forces often derive from the decisions or resolutions of international organizations such as NATO, the European Union or the United Nations. The status of these decisions is vital in regard to the evaluation of the legal status of ROE within domestic systems of law.

In this section I will try to follow the procedure of issuing UN, UE and NATO ROE, which should help to better understand their legal meaning within a domestic system of law.

Firstly, I would like to analyse how ROE are issued by NATO.

The North Atlantic Treaty Organisation is an alliance of 28 countries from North America and Europe.⁴⁴⁶ The role of NATO is to provide security of its member states by political and military means. Major NATO treaty principle lies in Article 5 of the Washington Treaty, which says that "Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area".⁴⁴⁷ This article was invoked for the first time in history the day after the 11 September 2001 terrorist attacks in the United States.⁴⁴⁸ In

⁴⁴⁴ Maj.C. Broadstone, *op.cit.*, p. 4

⁴⁴⁵ 2009 Sanremo Handbook on ROE, available at <http://www.iihl.org/Media/Default/PDF/Publications/RoE/ROE%20HANDBOOK%20ENGLISH%2009.05.2011%20PRINT%20RUN.pdf> p. 1 (10.12.2014)

⁴⁴⁶ http://www.nato.int/cps/en/natolive/news_52342.htm

⁴⁴⁷ Art. 5 of The North Atlantic Treaty signed in Washington D.C. - 4 April 1949 available at NATO official website http://www.nato.int/nato_static/assets/pdf/stock_publications/20120822_nato_treaty_en_light_2009.pdf

⁴⁴⁸ S. Fournier, Nato military interventions abroad: how RoE are adopted and jurisdictional rights negotiated Paper presented at the XVth International Congress of Social Defence „Criminal Law between War and Peace:

NATO, unlike in the European Union, all decisions are taken jointly on the basis of consensus. NATO's most important decision-making body is the North Atlantic Council which brings together ambassadors, ministers or even heads of states and governments representing the alliance.⁴⁴⁹ During the process of planning of a military operation, such as one in Afghanistan, the North Atlantic Council (NAC) consults its position with the UN and NATO members states. The NAC under Article 9 of the NATO treaty is a statutory organ responsible for the "implementation of the treaty".⁴⁵⁰ The Council is the most important political body entitled to issuing decisions. The NAC authorises one of the NATO commanding bodies i.e. Supreme Headquarters Allied Powers Europe (SHAPE), located in Mons, Belgium, or Allied Command Transformation (ACT) located in Norfolk, USA, to issue an operational plan, the so-called OPLAN. One of these two provides the operational plan, which is the basis for the preparation of ROE. At this stage, the works of a chosen commanding body are consulted with the member states and with the Defence Planning Committee.⁴⁵¹ OPLAN and ROE proposals are consequently delivered for acceptance by the NATO Military Committee. Eventually, ROE becomes appendix E to the OPLAN and is transferred to the NAC.⁴⁵² When a NAC OPLAN decision is issued with appendix E, the ROE become the so-called ROEAUTH (ROE authorization) which enable the transfer to the major NATO institutions such as SHAPE for implementation.⁴⁵³ If a ROE document is amended, the whole procedure is repeated.

Once ROE are adopted, member states become individually responsible to ensure they are applied by their forces.⁴⁵⁴ However states may introduce some legal restrictions or national caveats to adjust the ROE to the domestic system of law.

NATO ROE are based on NATO MC 362/21. It is a general document that provides a list a possible ROE during NATO-led military operations. The status of the document is

Justice and Cooperation in Criminal Matters in International Military Interventions", Toledo, Spain, September 2007, p.114

⁴⁴⁹ S. Fournier, p. 114.

⁴⁵⁰ Art 9 of the NATO treaty

⁴⁵¹ The Defence Planning Committee was dissolved in June 2010 and its responsibilities absorbed by the North Atlantic Council according to NATO official website http://www.nato.int/cps/en/natolive/topics_49201.htm

⁴⁵² M. Szuniewicz, *Legal aspects of NATO RoE — MC 362/1 (with special regard to the maritime component)*, International Humanitarian Law vol. III rules of engagement, Polish Naval Academy Command & Naval Operations Faculty Gdynia 2012,

⁴⁵³ P.Dreist, Rules of engagement in NATO operations – application in Germany's legal system, (in:) B. Janusz-Pawletta Rules of Engagement – selected legal issues, Warsaw 2011, ISSN 0209-0031, p.119

⁴⁵⁴ S. Fournier, p. 116.

unclear and due to this fact I will not analyse it in depth.⁴⁵⁵ In Europe, this is a NATO unclassified document though it should not be publicly released, whereas, for example, in the United States military college, students may not have access to it.⁴⁵⁶ NATO ROE are a series of prohibitions and permissions divided into separate groups, for example, detention and seizure, designation of targets, use of riot control agents and such similar concepts.

The idea behind the NATO ROE is similar to the Sanremo ROE Manual. It provides a list of possible ROE. From this general list, ROE are extracted and adapted for the purpose of a particular mission.

3.3.3.2 UN ROE

The Charter of the United Nations introduces general prohibition of *ius ad bello* character on the use of force and the threat of the use of force (Article 2 (4) UNC). There are two exemptions from this prohibition. One is based on Article 51 which provides the right to self-defence. The second one is based on the actions of the Security Council authorization. The decisions of the Security Council are based on Article 42 and Article 48 of the Charter and their aim is to keep peace and stability. The Security Council may establish military operations to achieve the above-mentioned goals. Such resolutions, according to Article 25 of the Charter are binding to state members. Military operations run by the United Nations since its establishment are called “Peace Operations”. It is the umbrella term which applies to all UN missions involving military personnel, whether they are otherwise described as peace keeping, traditional peacekeeping, expanded peacekeeping, humanitarian missions or peace enforcement missions.⁴⁵⁷ In fact, there are two general types of United Nations operations. The first type is regulated by Chapter VI of the Charter. These operations are called peacekeeping operations. The second type of operations is regulated by Chapter VII of the Charter and is called peace enforcement. During such operations, the UN issues the relevant ROE.

The role of the United Nations may differ depending on the nature of the operation. In general, the United Nations’ approach to military operations in terms of command and control is twofold. For large scale enforcement operations, the Security Council ‘contracts out’ the command and control of the operations either to a single member state or to a ‘coalition of the

⁴⁵⁵ It is unclear to the author to what extent he may reproduce excerpts of the NATO MC 362/21.

⁴⁵⁶ According to CAPT. Dennis Mandsager during Sanremo IIHL workshop of ROE, Sept. 2014

⁴⁵⁷ T. Findlay, *The use of force in UN peace operations*, SIPRI Yearbook, Oxford Press, 2002, p.3

willing'.⁴⁵⁸ For example, the operation in Korea in the early 1950s was conducted under the UN flag but was under US command. A similar peace enforcement operation in Somalia, "United Task Force" (UNITAF), was contracted out to an individual member state i.e. the United States. These operations were beyond UN organizational structure.⁴⁵⁹ Such missions are under general political influence of the Security Council, executive command belongs to the Secretary General and operational command to the mission chief commander⁴⁶⁰. During such missions "acts of the states or organizations will be attributed only to those countries or organizations itself". So these actions cannot be implicated to the United Nations".⁴⁶¹ Contributing states issue ROE which may not be contrary to the UN resolutions which enable a particular mission. However, specific ROE are issued by the troops of sending state or sending organization. Both the state's and the organization's actions are to be approved by the UN Resolution.

The second type of UN operations is the UN peace operations *per se*. They began in 1950s and have the UN Security Council organ subsidiary status. They are based on Article 22 and 29 of the Charter of the UN.⁴⁶² Since they constitute a part of the UN structure, they are under direct UN command.⁴⁶³ Rules of Engagement are an element of the UN peace operation legal environment. A broad understanding of the UN ROE embraces not only military but also civilian and police personnel. The scope of the use of force follows a particular UN resolution and is crafted to each individual operation.

During peace operations, the UN is responsible for the acts and omission of military contingents at their disposal.⁴⁶⁴ There are three conditions for these operations and they need

⁴⁵⁸ T. Findlay, *The use of force in UN peace operations*, SIPRI Yearbook, Oxford Press, 2002, p.10

⁴⁵⁹ Security Council Resolution nr 929/1994 on establishment of a temporary multinational operation for humanitarian purposes in Rwanda until the deployment of the expanded UN Assistance Mission for Rwanda; SCR nr 940 (1994) on authorization to form a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti; SCR nr 1031 (1995) on implementation of the Peace Agreement for Bosnia and Herzegovina and transfer of authority from the UN Protection Force to the multinational Implementation Force (IFOR); SCR nr 1101 (1997) The situation in Albania; SCR nr 1244 (1999) on the situation relating Kosovo.

⁴⁶⁰ B.Boutros-Ghali, Program for Peace (*Program dla Pokoju oraz Załącznik do Programu dla pokoju*, Polish Institute of International Affairs, Polski Instytut Spraw Międzynarodowych, Warsaw 1995, p. 22-23, par. 38 i 42

⁴⁶¹ Second report on responsibility of international organizations, A/CN.4/541, pkt . 50

⁴⁶² I. Popiuk-Ryśińska, J. Zając, *Operacje pokojowe Narodów Zjednoczonych, UN peace operations [in:] Organizacja Narodów Zjednoczonych. Bilans i perspektywy UN, Achievements and perspectives*, J. Symonides (red.), Warszawa 2006, p. 102-103.

⁴⁶³ Por. SC Resolution nr: 619: Iraq-Islamic Republic of Iran (9 August); SCR nr 1037 (1996) The situation in Croatia; SCR nr 1410 (2002) The situation in East Timor; SCR nr 1181 (1998) on the situation in Sierra Leone.

⁴⁶⁴ W. Czapliński, *Odpowiedzialność międzynarodowa organizacji międzynarodowych, International organizations international responsibility [in:] A. Łazowski, R. Ostrihansy., Kraków 2005, p. 595.*

to be satisfied accumulatively. The conditions are: acceptance of the parties of the conflict, impartiality and use of force only in self-defence. The last condition affects the applicability of ROE. Each of UN operations issues their own ROE within their command structure. However those ROE are based on the UN resolution authorizing the use of force. The notion of the UN ROE was defined in the Project on UN ROE directives and says that “*ROE provide the parameters within which armed military, gendarmerie/civilian police personnel assigned to a United Nations Peacekeeping Operations may use force.*”⁴⁶⁵

The UN ROE for a particular mission result from joint effort of the Security Council, the UN Secretary General and a particular force commander. Before the UNSC definitively authorizes the deployment of a mission, the Secretary General issues a report which includes his proposal on the use of force.⁴⁶⁶ The guidelines for the use of force based on a broad concept contained in the Secretary-General’s proposal may be reiterated in a Status of Forces Agreement (SOFA) or the so-called Status of Mission Agreement (SOMA) concluded between the UN and the hosting state.⁴⁶⁷ These documents are often very general in nature.⁴⁶⁸

There are situations where the UN ROE are modified. This takes a form of so-called Standard Operating Procedures. To provide more detailed guidelines on the use of force, standing (or standard) operating procedures (SOP) are issued to the UN force by the force commander. The SOP are meant to explain in detail the circumstances in which force may be used and establish the level of responsibility for taking the decision to use it. The SOP should also include instructions on the manner in which weapons are to be used, for example, in regard to the use of warning shots, the controlling of fire, prohibitions on the use of automatic weapons and/or high explosives, and the action to be taken after firing. According to Findlay, SOP and ROE are equivalent documents formulated by the force commander.⁴⁶⁹ This point is debatable since there is a different level of authorization needed for ROE compared to SOP. However, Findlay may have access to documents and materials not available to the author. To summarize, the UN ROE are derived from UNSC resolution’s authorization. They are issued and modified by the force commander of a particular mission.⁴⁷⁰ The UN ROE are

⁴⁶⁵ , MPS/981, P. Dreist, *Rules...*, . 108.

⁴⁶⁶ T. Findlay, *The use of force in UN peace operations*, SIPRI Yearbook, Oxford Press, 2002, p.14

⁴⁶⁷ T. Findlay, *op.cit*, p.15

⁴⁶⁸ T. Findlay, *op.cit*, p.13

⁴⁶⁹ T. Findlay, *op.cit*, 2002, p.13-14

⁴⁷⁰ R. Murphy, *United Nations peacekeeping in Lebanon and Somalia, and the use of force*, Journal of Conflict and Security Law, 2002, vol. 8(1), p. 76

issued under general UNSC authorization under Chapter VII which entitles the UNSC to restore or maintain, international peace and security. The maintenance of international peace and security should be understood from both *ius in bello* and *ius ad bellum* perspective.⁴⁷¹

3.3.3.3 EUROPEAN UNION ROE

The European Union civilian and military foreign missions are regulated under the Lisbon treaty. According to Article 42 of the Treaty, “The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States”.⁴⁷²

The European Union, similarly to the UN and NATO, has established an autonomous capacity to make decisions to launch and conduct EU-led military operations within the range of tasks defined in the Treaty of the European Union (EU) and in the European Security Strategy (ESS).⁴⁷³ Those operations shall be conducted to provide peace, to strength peace or prevent conflicts.

For the above-mentioned purposes, Rules of Engagement are issued. In general, EU military operations are decided by the Council.⁴⁷⁴ Ultimately, it is also up to the Council to approve OPLAN and ROE. Initially, both are created by the European Union Military Staff (EUMS). EUMS prepares recommendations for the Political Committee. When civilian operations are in question, then the Committee for Civilian Crisis Management – CIVCOM prepares recommendations. Similarly, as with the EUMS, the Political and Security Committee of the European Union receives recommendations. Then OPLAN and ROE, by the Political Committee acceptance documentation, are transferred to the Council. The European Council is a body responsible for the final decision and shape of ROE.

⁴⁷¹ McLaughlin R., *The legal regime applicable to use of lethal force when operating under a United Nations Security Council Chapter VII mandate authorising "all necessary means"*, Journal of Conflict and Security Law, 2007, vol. 12(1), p. 412

⁴⁷² TEU consolidated version, 2010, ISBN 978-92-824-2577-0, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF> (10.12.2014)

⁴⁷³ Council of the European Union document, Brussels, 24 September 2012 10688/5/08, REV 5 COSDP 540, p.6

⁴⁷⁴ Council of the European Union document, Brussels, 24 September 2012 10688/5/08, REV 5 COSDP 540, p.9

To summarize, three major international organizations may conduct operations of a military character. All of them have the capacity and capability to run both offensive and defensive actions. To clarify the use of force on the battlefield, ROE are issued by these organizations. Generally, as to the legal character of ROE, according to Fournier, ROE are neither the law nor a subset of the law.⁴⁷⁵ However, US and Canadian examples show that the issue is debatable. According to Stafford, “in the United States forces even though ROE may be based in the law they are still directives merely providing policy, authority, mission definition and responsibility”.⁴⁷⁶ According to Canadian Forces Manual, “In Canada ROE are defined as «orders» that are intended to ensure that commanders and their subordinates do not use force or other measures beyond that authorized by higher command. ROE also provide confirmation as to the level of force that commanders or individuals are legitimately authorized to employ in support of their mission”.⁴⁷⁷

Despite the popularity of ROE during military operations, there is no clarity regarding to what extent they are binding within a domestic system of laws. To address this issue, I will attempt to uncover the exact location of ROE within a domestic system of law and then the relation between ROE and international law.

3.3.4 IS A RESOLUTION A SOURCE OF INTERNATIONAL PUBLIC LAW?

Since the nature of ROE under Polish law is unclear and it seems that they are not binding under the law of England and Wales, I will turn my attention to the international aspect of ROE, or rather to examine the international dimension of Rules of Engagement. Since their origins are to be derived out of international law, it is worth considering their applicability at all? This issue has two practical aspects. The first is the possibility of applying ROE over domestic legislation as a part of international law. The second is the possibility to apply ROE to all parties of a conflict when ROE are published.

In most cases, Rules of Engagement are issued by international organizations as resolutions. As such, they may under some circumstances affect domestic systems. To understand better the notion of Rules of Engagement within a domestic system of law it may be necessary to address a more general question: what is the international legal status of

⁴⁷⁵ S. Fournier, p. 116.

⁴⁷⁶ W.A. Stafford, *How to keep military personnel from going to jail for doing the right thing: Jurisdiction, ROE & the Rules of deadly forces*, (2000) *The Army Lawyer* 1 at p. 3

⁴⁷⁷ Use of Force Manual, Canadian Forces Publication (B-GG-005-004/AF-005) (2001), p. 2/16, pt 0241 available http://publications.gc.ca/collections/collection_2010/forces/D2-252-2009-eng.pdf (10.12.2013)

resolutions creating the rules of engagement. Are there any? As I stated earlier, ROE are not clear sources of law but rather they are to be considered as military, political and legal directives. This, under some circumstances, may potentially make them a source of binding law. If so, they may create *erga omnes* obligations and overrule other laws such as criminal law. To clarify the legal status of ROE, some general questions need to be answered i.e. is a resolution a source of international public law?

There is a disagreement as to whether acts of secondary nature adopted by international organizations constitute a source of law.⁴⁷⁸ In this doctrinal dispute regarding the competence of international organizations to issue acts which create legally binding obligations, it is important to make a distinction between primary and secondary law of international organizations.⁴⁷⁹

Sources of international law can be derived from Article 38 of the Statute of the International Court of Justice (ICJ). According to this article, “a Court decides in accordance with international law i.e.; a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations (for example. *lex specialis derogat legi generali, lex posteriori derogat legi priori*);d . (...) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Principles (...) *ex aequo et bono*, if the parties agree thereto”.⁴⁸⁰ International conventions are treaties. According to Article 2 of the Vienna Convention on the law of treaties, “*treaty means an international agreement concluded between States in written form and governed by international law.*”⁴⁸¹ While it is possible that non-state entities may conclude an international agreement, it is not envisaged by the Vienna Convention and is not considered to be international law. The effect of a treaty on international and domestic law depends upon the nature of the treaty. A distinction is sometimes made between treaty contracts and law-making treaties. Despite the fact that often the same treaty may perform contractual and normative functions, there are some general differences. Law making treaties lay down rules of universal application and are intended for future and continuing observance. Whereas

⁴⁷⁸ A. Kaczorowska, *op.cit.* p. 62

⁴⁷⁹ A. Kaczorowska *op. cit.* p. 62

⁴⁸⁰ <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

⁴⁸¹ Vienna Convention on the Law of Treaties 1969, United Nations, Treaty Series, vol. 1155, p. 331

treaty contracts are concluded to perform contractual functions, for example, selling goods. Such treaties expire once state parties perform their obligations.⁴⁸²

Another source of internationally recognized legal norms foreseen by Article 38 of the Statute of ICJ is an international custom. A custom refers to objective and subjective elements. The notion of customary law was presented in several judgments provided by the ICJ. According to its judgment in the North Sea Continental Shelf Case,⁴⁸³ ICJ stated that a custom needs to “(...)be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a subjective element of the rule of law requiring it. The need for such belief, i.e. the existence of subjective element is implicit in the very notion of the opinion *juris sive necceistas*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation”.⁴⁸⁴

Rules of engagement may be derived from both types of the above-mentioned sources of law. Some of them are treaty, positive-law based. Other ROE may refer to international custom or customary international humanitarian law. Based on court judgment development of customary international humanitarian law over the past two decades, several customary rules have been brought into Rules of Engagement. However, the fact that they are derived from international law does not automatically make them a source of international law. Rules of engagement of NATO, the UN and the EU are issued through resolutions and due to this it is important to answer the question of whether a ROE resolution is or isn't a source of public international law.

Traditional sources of law are based on Article 38 of the ICJ statute. Its literal interpretation does not recognize resolutions as a source of law. However, there is a backdoor to legitimization of resolutions. Contrary to the domestic systems of law, international law has no official hierarchy amongst international regulations. The UN Charter introduced a regulation on how to avoid clashes between UN resolutions and other sources of law.⁴⁸⁵ According to Article 103 of the United Nations Charter, “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present

⁴⁸² A. Kaczorowska, *op.cit.* p. 34

⁴⁸³ ICJ Report 4, para 77

⁴⁸⁴ ICJ Report 4, para 77

⁴⁸⁵ A. Kaczorowska, *op.cit* p. 44

Charter shall prevail”.⁴⁸⁶ This means that when a conflict between an international treaty and an act of the UN occurs, the UN act will prevail. This legal construction allows us to conclude that UN resolutions, under some circumstances, might be considered as the source of universally-recognized law. There are no similar regulations regarding NATO and EU resolutions. This confirms that only UN resolutions, under some circumstances, might be considered as a source of international law. There are, however, strong arguments against resolutions being considered as an independent source of international law. They are simply derived from the founding treaties and they produce a legal effect only in respect to member states and the relevant international organizations. Positive law position is that secondary acts, resolutions, are not to be a source of international law due to a literal interpretation of the above-mentioned Article 38 of the Statute of the ICJ.

The other point of view states the opposite. International organizations, within their competence, can efficiently deal with new challenges; it is quicker than using a traditional treaty.⁴⁸⁷ What is more, the acts of international organizations can have a direct effect on both state members and countries which are not members of a particular organization as well as on individuals. There are several cases when such a situation has occurred, for example, as Kaczorowska provides, the adoption by the International Seabed Authority (ISA), Part XI of the UN Convention on the Law of Sea⁴⁸⁸ and the agreement relating to the implementation of Part XI concerning resource exploitation of the seabed and subsoil beyond the limits of national jurisdiction. According to this, ISA acts on behalf of “mankind as a whole”.

To consider a resolution as a source of law, another condition need to be fulfilled. This condition is proper structure of a resolution. It has *inter alia* to be considered as a so-called law-making resolution.⁴⁸⁹ Such a resolution can use already existing norms of international law or it may create a new one.⁴⁹⁰ As mentioned above, those acts should differentiate from internal acts of the organization. Binding resolutions should consist of norms of a general

⁴⁸⁶ The Charter of the United Nations available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>

⁴⁸⁷ A. Kaczorowska, *op.cit.* p. 62

⁴⁸⁸ The 1982 Law of the Sea Convention 1833 UNTS 396

⁴⁸⁹ W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe, International public law*, wyd. 2, Warszawa 2004, p. 129.

⁴⁹⁰ R. Sonnefeld, *Uchwały Rady Bezpieczeństwa ONZ. Zagadnienia prawne, UNSC Resolutions- legal issues*, Polski Instytut Spraw Międzynarodowych, Warszawa, 1979, p. 13 i 31.

character, as they define the subject of the norm, and they should consists of norms of abstract character, as they define how and when the subject of the norm should act.⁴⁹¹ .

It often happens that resolutions adopted, for example, by the United Nation's Security Council under Chapter VII of the UN Charter, are binding to all member states. As a result, the resolutions create a legal obligation for them.⁴⁹² This was the case when, after the terrorist attack on the World Trade Centre, UNSC adopted Resolution 1373 requiring its members states "to freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist act or participate in or facilitate the commission of terrorist acts".⁴⁹³ This resolution imposed on the states, not only clear obligations, but also established a committee known as the Counter Terrorism Committee which assesses whether the member states took appropriate steps to comply with the resolution and whether they adopted the required executive legislation on a national level to comply with Resolution 1373.⁴⁹⁴

In fact, currently we are faced with a variety of types of resolutions. They may be or may not be of binding character. A resolution may also have a recommendatory character. It is also possible that a resolution may authorize an organization to issue a binding legal act on all member states. In such a situation, a resolution is needed to be referred to the statute of the particular organization. The lack of such referral to the alleged competence of the international organization would be a violation of both the state sovereignty and the statue of the organization.

To summarize, resolutions, under some circumstances, may become a law applicable to states and as such affect the legal situation of states' agents such as soldiers.

3.4. LEGAL CHARACTER OF ROE UNDER POLISH LAW

Previous discussion focuses on the law applicable to ISAF forces in Afghanistan. This then leads onto the concept of ROE. In this part I will address the question of the status of ROE under Polish law and how they are compatible with the Polish Criminal Code.

⁴⁹¹ S. Wronkowska, Z. Ziemiński, *Zarys teorii państwa i prawa, Theory of the law and the state*, Poznań 2001, p 25.

⁴⁹² Kaczorowska *op.cit.*, p.63

⁴⁹³ UNSC Resolution 1373 (2001) p.1.c.

⁴⁹⁴ Kaczorowska *op.cit.*, p.63

3.4. 1. NEW LAW ON RULES OF USE OF MILITARY FORCES ABROAD – IS ROE A STATUTE?

An analysis of the nature of ROE within the Polish legal system has to begin from the top of the legal hierarchy i.e. a statute. On December 2010, the President of the Republic of Poland signed the “Law on the change of law on the rules of use of Polish armed forces abroad”, which modified the rules of use of military forces abroad.⁴⁹⁵ According to Article 7(c) of this Statute, the Minister of Defence issues a classified minister’s order which regulates the Rules of Engagement. Firstly, I will consider the nature of Article 7(a) and 7(b) and follow with an analysis. Article 7(a) states that “Soldiers serving (...) abroad⁴⁹⁶ may refer to coercion, use of weapons which is permissible under ratified international treaties and customary law, in a way and within the limits which are determined by the organs of international organizations which are superior toward the Polish soldiers during the operation. The aim of the mission and national caveats issued by the competent national authorities should be taken into account.”⁴⁹⁷

Additionally, Article 7(b) says, “Soldiers which are mentioned in the above article, despite coercion measures, conditions of use of weapons derived from the rules established by the organs of international organizations (...) are entitled to apply coercive measures and use weapons: in self defence against any unlawful attack against life and freedom or to prevent activity which leads to such an attack., 2) against persons not complying with a disarmament call 3) against persons who, unlawfully, by force, takes a weapon from the soldier or other persons who are entitled to possess a weapon, 4) to prevent a violent, direct and unlawful attack against a Polish or allied military unit, 5) to prevent a violent, direct and unlawful attack against objects and facilities which are important to the Polish Military Forces, 6) to prevent a violent, direct and unlawful attack against a person’s life, health and freedom, to prevent a violent, direct and unlawful attack on the Polish or allied military base, 7) in direct pursuit against persons covered by sections 1-5, 8) to apprehend persons mentioned in

⁴⁹⁵ Law on rules of use of the Polish armed forces abroad 17 December 1998, Ustawa z dnia 17 grudnia 1998 r.o zasadach użycia lub pobytu Sił Zbrojnych Rzeczypospolitej Polskiej poza granicami państwa (Dz. U. z dnia 21 grudnia 2010 r.)

⁴⁹⁶ art. 2 of the law stipulates closed categories of missions where Polish troops may be deployed

⁴⁹⁷ Art 7 a) *Żołnierze pełniący służbę w jednostce wojskowej, o której mowa w art. 2 pkt 1, użytej poza granicami państwa mają prawo stosowania środków przymusu bezpośredniego, użycia broni i innego uzbrojenia dozwolonego na mocy wiążących Rzeczpospolitą Polską ratyfikowanych umów międzynarodowych oraz międzynarodowego prawa zwyczajowego, w sposób oraz w granicach zasad określonych przez organ organizacji międzynarodowej, któremu jednostka została podporządkowana na czas operacji, z uwzględnieniem celu jej użycia poza granicami państwa oraz zastrzeżeń zgłoszonych przez upoważniony organ państwowy.* (author’s own translation)

sections 1-6, when the person in question has found a refugee in a place which is not easily accessible and based on the circumstances he or she is a threat against a person's life, health and freedom (...) 9) to apprehend or to prevent escape if; a) there is a well-founded suspicion that the person in question may use a weapon, explosive or dangerous object, b) (...)Weapon must not be used against a woman who is visibly pregnant, a person who looks younger than 13 years old, elders, persons with a visible disability unless circumstances compel to do so. Soldiers described in Article 7(a), may preventively refer to the use coercive measures, the use of weapons or any other means of war accepted by international law to provide security for gear/ equipment and quarters”.

This appears to constitute statutory Rules of Engagement; publicly available and introduced in a proper, envisaged by constitutional law, form. The idea of the law was to clarify the legal position of Polish soldiers serving abroad. However, a detailed analysis brings a few issues to the fore.

Firstly, the new law lacks any reference to the Criminal Code. The Polish Criminal Code provides a list of so-called *contra types*. These are, in general, prohibited acts which in some circumstances may be not punishable, for example, self-defence or a *vis maior* concept. As a result, a person who commits a prohibited act, for example, kills a man due to special circumstances (*contra type*) may not be punished.⁴⁹⁸ ROE directives in descriptive way outline what should be done. However they do not state what is to be done in the event things go wrong.

Secondly, the new law refers to customary law. In a continental system of law (except European Union law) it is a questionable idea to refer to sources of law which are not considered as sources of law by the Constitution.

Thirdly, the notion of national caveats is problematic. Polish Armed Forces in Afghanistan, contrary to other European NATO members, did not provide any national caveats despite the fact that some aspects of Polish forces were under the direct command of the US.

Despite this criticism, these simplified, publicly available ROE are a good example of law which should be applicable on the modern battlefield. They may constitute a point of departure of military forces training.

⁴⁹⁸ Article 25 and 26 of the PCC

To summarize, the legal basis of ROE were issued in the form of a Statute. However, the ROE themselves do not constitute a Statute itself.

3.4. 2 ARE ROE REGULATIONS?

Since the Statute did not provide a proper method of implementing ROE into the legal system the question is whether this regulation shall be considered a proper vehicle to implement them. Regulations are the lowest acts in the hierarchy of universally-binding norms although regulations as international obligations may be implemented within the Polish legal system. According to Article 92 of the Constitution, “regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act”. Regulations may be used to implement resolutions and other acts of law issued by international organizations such as ROE. The question is however whether it is possible to consider ROE as regulations.

The first condition regarding regulations is that they have to be based on specific authorization provided by a statute. This necessary element was introduced to the Statue on the use of Polish Military Forces abroad.⁴⁹⁹

The most important point against the use regulations as a means to implement ROE lies in Article 88 of the Constitution which says, “the condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof”. Public promulgation in the Journal of Laws of the Republic of Poland is a breach of the confidential nature of ROE. As such, regulations cannot be used to implement ROE.

3.4. 3 ARE ROE AN INTERNAL ACT?

Since Rules of Engagement may not be considered a regulation (because they should not be publicized), they do not belong to the universally-binding law category. The question is whether they belong to an internal category of law?

As mentioned above, there are two types of acts in the Polish legal system: a) first group i.e. the constitution, international agreements, statutes and regulations are universally-binding normative acts, b) the second group i.e. internally binding norms are orders (for

⁴⁹⁹ Dz. U. z 1998 r. Nr 162, poz. 1117

example a minister's) and instructions. These acts shall bind only those organizational units or state agents which are subordinate to the organ which issues such an act. Amongst the authorised organs are the Council of Ministers, the Parliament, the President, the Prime Minister and Ministers. The authority to issue orders and instructions may be transferred to other organs under statutory authorization. Taking into consideration the above-mentioned issues, the question needs to be raised of whether Rules of Engagement are internal acts, namely an order or instruction?

Initially, ROE for a particular mission were issued by the Mission Commander. Currently under the new law, according to Article 7(c), ROE are issued by the Minister of Defence in the form of an internal act.⁵⁰⁰

This internal act is based on a statute. This condition is fulfilled. However, according to the statutory definition, internal acts such as instruction or a minister's orders may affect only subordinate organs and institutions. On the contrary, according to Article 93.2 of the Constitution, "[minister's] "orders shall only be issued on the basis of statute. They shall not serve as the basis for decisions taken in respect of citizens, legal persons and other subjects".⁵⁰¹

As a result, a minister's order outlined in Article 93.2 of the Constitution which provides instructions for subordinate organs and institutions shall not affect an unrelated group of people. In the case of ROE, this unrelated group of people may be the civilian population of Afghanistan as well as targeted insurgents.

The implementation ROE through an internal act raises serious doubts. According to constitutional law, a ROE act does not satisfy all necessary conditions. Despite the fact that there is an act on a statute level which provides grounds for an internal act, it seems that such an order may affect the situation of an unrelated group of people. This goes beyond what an internal act may provide.

⁵⁰⁰ Law on rules of use and of Military forces abroad z dnia 17' December 1998, Ustawa z dnia 17 grudnia 1998 r.o zasadach użycia lub pobytu Sił Zbrojnych Rzeczypospolitej Polskiej poza granicami państwa (Dz. U. z dnia 21 grudnia 2010 r.)

⁵⁰¹ The Constitution of Republic of Poland

3.4. 5 ARE ROE A MILITARY ORDER?

Since ROE do not qualify as a statute or a regulation and may not be considered an internal order of administrative nature issued by the Minister of Defence in the way envisaged by Article 92.3 of the Polish Constitution, the question is how to assess ROE at all.

The last attempt to find a legal qualification of ROE is to consider whether they are military orders. According to Article 115 § 18 of the Polish Criminal Code, an “order is a command to undertake or refrain from taking a specified action issued officially to a soldier by the superior authority or authorized soldier of a superior rank”.⁵⁰² An order is a particular unilateral act of will based on the legal relationship of superiority and subordination based on law. It creates an obligation to act for an addressee and the addressee needs to fulfil his or her obligations under penal sanction and/or coercive measures.⁵⁰³ An order is a legal structure which is commonly used to impose a will on other soldiers. According to Article 115 § 8 of the PCC, it is a concrete and individualised act.⁵⁰⁴ By this I mean that an order should be issued to an identifiable group of addressees. An order should be issued in regard to a particular activity. To fully analyse the concrete and individualised character of ROE, I need to refer to existing ones. For example, the following which are available due to the Wikileaks publications issued in regard to US forces in Iraq. Appendix E to OPROD (07-04), E 8 provides in point (ii) S/Rel DTOs. “The following groups are terrorist organizations that have been designated by CDRUSCENTCOM as proper objects of attack and commanders may process members of these organizations as Deliberate Targets and Time Sensitive Targets. This is an additional authority and does not supersede the ability of US forces to use deadly force in self-defence.

a(S/REL) Al qaida and related organizations

b (S/REL) Ansar Islam

c(S/REL) Taliban

d(S/REL) Asbat al Ansar

e(S/REL) Egyptian Islamic Group

f(S/REL) Hamas

g(S/REL) Al Aqsa Martyrs Brigade

⁵⁰² Criminal Code Act 6th June 1997 r. Kodeks karny,

⁵⁰³ M. van Voorden, *Rozkaz jako szczególna instytucja wojskowego prawa karnego- Superior order as specific component of military criminal law*, (in:) Międzynarodowe Prawo Humanitarne- International Humanitarian Law, vol. 4 Targeted Killing and Superior Order, Gdynia 2013 r., p.223

⁵⁰⁴ Criminal Code Act 6th June 1997 r. Kodeks karny

(...)

n(S/REL) The Islamic Movement of Uzbekistan.”⁵⁰⁵

Individualisation of an order makes it difficult to qualify ROE in this category. The above mentioned ROE are not individual in nature. It provides a group of targets without necessary details. For example, if a commander on the battlefield was required to detail when he faced a situation of the use of force against part-time Taliban members or when the Taliban was forced to provide munitions to a particular group of Taliban fighters. Additionally, ROE are not individualised because they are issued to an unidentifiable group of soldiers and commanders operating in the conflict area. As a result, the subject of ROE may be a commander of a logistic unit or a commander of Special Forces.

The second issue which possibly excludes ROE from being categorised as an order is the concretization of the order. According to the decision of the Supreme Court, an order is a statement of will expressed by a superior in relation to a concrete task.⁵⁰⁶ Additionally, the Supreme Court stated “that violation by the soldier: staff regulation, instruction, ordinance or any other general rule is not to be considered as a punishable order of disobedience, even if implemented by order”⁵⁰⁷. In another judgment, the Supreme Military Court said that “training book and directives are merely instructions and not orders.”⁵⁰⁸ The Supreme Court also delivered a judgment where it said that “instructions which organize work time may not be equated with the order even if implemented by order”⁵⁰⁹. The Rules of Engagement quoted above leaves a significant gap in regard to its concrete character. A particular commander is left with several possibilities to address in a particular situation. Such an approach leaves to the commander the interpretation of law on the battlefield. These ROE contain only possible scenarios and the final decision is always left to a particular commander. Taking the above into consideration, a court interpretation and the fact that ROE definition says that they constitute directives are convincing arguments not to consider ROE as a military order. They are too descriptive in nature and too general to be found as a military order.

⁵⁰⁵ USRulesofEngagementforIraq,Aug2007 WikiLeaks release: April 5, 2010 Available at http://wlstorage.net/file/rules_of_engagement.pdf (10.12.2014)

⁵⁰⁶ Supreme Court Judgement., sygn. Rw1311/71.

⁵⁰⁷ J. Ziewiński, Rozkaz..., p. 66.

⁵⁰⁸ Supreme Court Judgement. sygn. Rw 431/58.

⁵⁰⁹ Supreme Court Judgement. sygn. N 24/86, OSNKW 1987/5-6/50.

This analysis of the legal structure of ROE leads to the conclusion that they do not constitute a law. This would locate them within realm of political and disciplinary measures not related to the law. If ROE are not military orders or any other source of law then what is the relation between ROE and the law? What is the relation between obedience and disobedience to ROE from the perspective of criminal responsibility? These issues will be addressed below.

3.4. 6 CRIMINAL RESPONSIBILITY FOR THE VIOLATION OF ROE? - NANGAR KHEL CASE STUDY

ROE are neither an order nor a law. However, under some circumstances they may become law. Let's imagine the following situation: a battlefield commander receives ROE from HQ. It is a lengthy document which is intended to support the decision process. The commander issues a particular, individual order based on the ROE which becomes law. It is based on ROE and on the operational situation. As such, the elements of the ROE become an order and eventually a law. However, even when introduced in the form of an order, ROE do not become more coherent with Polish Criminal Law. It is still a document which is alien to the domestic legal system and therefore is of debatable character.

In this section I would like to refer to the Nangar Khel case which is an example of a possible issue related to the violation of ROE.

This case is pending before various military courts and is the first war crime trial since World War II aftermath in Poland. The incident took place on 16 August 2007. An insurgent-improvised explosive device injured two Polish soldiers near the village of Nangar Khel, Paktika Province. Following the incident, the Polish patrol consisting of soldiers of the 18th Airborne Battalion carried out a mortar attack, firing 26 mortar grenades and rounds with heavy machine guns. Six persons were killed in the village where a wedding was taking place. Some other villagers were seriously injured.⁵¹⁰ The soldiers were arrested and some of them are still on trial, of which most are charged with unlawful killing of civilians and attacking unprotected civilian property.⁵¹¹ The case is still pending.⁵¹² The prolonged imprisonment of the soldiers at the initial stage of the trial⁵¹³, as well the mass media cry around the case, had a

⁵¹⁰ Gen B. Pacek, *Polish new rules of engagement – soldiers' legal security* (in:) B. Janusz-Pawletta *Rules of Engagement – selected legal issues*, Warsaw 2011, ISSN 0209-0031, p.45

⁵¹¹ <http://www2.polskieradio.pl/eo/print.aspx?iid=82223> (10.12.2014)

⁵¹² <http://www.polska-zbrojna.pl/home/articleshow/11058?t=Pieniadze-za-areszt-ws-Nangar-Khel> (10.12.2014)

⁵¹³ <http://www.rp.pl/artykul/234308.html?print=tak> (10.12.2014)

negative impact on many soldiers. It resulted with, claimed by many soldiers, the existence of the so-called post-Nangar Khel syndrome – a lack of knowledge of what is and what is not allowed on the battlefield and the fear to use weapons in combat situation.

This case, although not fully adjudicated yet, brings about an interesting legal question of how ROE may affect soldiers' responsibility from the perspective of coexistence with Polish Criminal Law. This is also interesting to analyse from the perspective of the concept of a mistake outlined by Article 32 of ICC which says, "A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime". Is following ROE a mistake under some circumstances?

As stated above, criminal law is applicable mostly during the time of peace. However, it is a ground for soldiers' responsibility before a court in the time of peace and in the time of an armed conflict.⁵¹⁴ During an armed conflict, soldiers do, what under peace circumstances, is not allowed, for example, killing people not in self-defence, bombarding insurgents instead arresting them and similar.

The applicability of humanitarian law means that soldiers' actions in conjunction with the Criminal Code are mostly affected by the principle of proportionality as stated in Article 51 and 57 of Additional Protocol I to the Geneva Conventions.⁵¹⁵ As such, the principle of proportionality helps to clarify whether the soldier's deed was or was not a violation of Criminal Code. The logic is as follows: soldiers on the battlefield do what is generally prohibited by criminal law, however these actions are conducted under IHL. When they kill in combat and violate the principle of proportionality that automatically becomes a violation of the Criminal Code.

However, another question may be raised of how to treat a soldier who follows ROE and may contradict the Criminal Code. An interesting opinion was delivered by the Appellate Court in Katowice which stated that "when a culprit who is not a lawyer, consults his actions with attributed to the particular organ body of legal advisers and then follows what he was told (although the opinion was wrongly crafted), his actions are considered a mistake of law".⁵¹⁶

⁵¹⁴ Vide article 122 of Polish Criminal Code

⁵¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, available at: <http://www.refworld.org/docid/3ae6b36b4.html> (10.12.2014)

⁵¹⁶ II Aka 96/06, Krakow Court Journal 2007, vol.5, no.. 53

A similar situation refers to soldiers on the battlefield. When they receive a ROE-based order, they are in position to put their full trust in it. However, when ROE are poorly translated⁵¹⁷, the government has not included national caveats, when ROE are incoherent with Polish legal system or international obligations than it may and should be considered a mistake of law. This interpretation follows Article 318 of the PCC presented above. However, as mentioned earlier, the Polish Criminal Code is strict about obeying orders. The norm provided by Article 319 of the PCC introduces the right to punish a soldier who does not follow orders. By the right to punish, the Polish Criminal Code is meant to impose all necessary measures to enforce obedience. In a combat situation it may take the form of using a firearm against opposing soldier.⁵¹⁸ Of course the interpretation of Article 318 of the PCC does not support the interpretation that imposing unlawful order is protected by the law. Only lawful order gets this protection. However, one must remember that, particularly in an international environment, it is difficult to fully grasp what is and what is not legal.

Similar problems are related to the application of ICC norms. Article 32. 2 of the ICC Statute provides, “A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided by Article 33”.⁵¹⁹ This regulation may be particularly important during operations such as in Afghanistan when Polish or British military forces may be under less strict (in terms of the applicable law) US command. It is not difficult to imagine such a hypothetical case where Polish or British troops call a close air strike support. It is executed by an American pilot. As result of the bombardment, civilians are killed. Polish or British forces may operate under different ROE. Who is responsible for the IHL violation? The party which called the CAS and provided the target or the party which executed the order according to its own ROE? Another similar, reverse situation may occur where a US officer gives the command to destroy an object and the fire mission is executed by Polish or British forces. Who is then responsible?

⁵¹⁷ For some military operations RoE are simply sent from the operation’s headquarter and then translated on the ground. It is done often by lawyers who are not an expert in IHL.

⁵¹⁸ This interpretation is result of position presented in the Comentary to the Criminal Code (in:) *Komentarz do ustawy z dnia 6 czerwca 1997 r. Kodeks karny (Dz.U.97.88.553)*, G. Bogdan, Z. Cwiakalski, P. Kardas, J. Majewski, J. Raglewski, M. Szewczyk, W. Wróbel, A. Zoll, *Kodeks karny. Część szczegółowa*, art 319, point 12.

⁵¹⁹ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90

We also need to remember that modern military operations are executed in a multinational environment. The above-mentioned situations may be even more complex when Polish and French soldiers enter into the chain of command and Turkish and Scottish officers are under Italian command within US regional command. All of them speak English, however, very often they can hardly understand each other.

3.5. ROE STATUS IN THE BRITISH LEGAL SYSTEM

The situation of ROE under British law is only a slightly clearer. To address the problem of the status of Rules of Engagement in the British legal system (England and Wales only), I shall briefly describe some relevant legal regulations. Later, I shall outline basic information regarding the status of the British forces in Afghanistan. The following section will be devoted to the legal basis of ROE in the British legal system as well as the relation between ROE and British law.

3.5. 1 BRITISH LEGAL SYSTEM – RELEVANT REGULATIONS

In order to comparatively discuss the nature of Rules of Engagement I will refer to the character of ROE in the British legal system. British law, contrary to continental law, is of a common law character. Compared to Poland, British law provides a broader spectrum of specialized legislation regulating military matters. The legal situation of a person joining the army is regulated by a system of military regulations - separate from general law - such as the *Army Act 1955*, *Air Force Act 1955* or *Naval Discipline Act 1957*. It does not exclude military personnel from universally-binding law. It means that the status of military personnel is partially modified when compared with civilians. Their rights and obligations are limited. It is due to compliance with military readiness and disciplinary requirements. For example, a civilian employee who abandons his or her workplace may not be criminally prosecuted. In the same situation, when military personnel is concerned, prosecution may be initiated.⁵²⁰

Interestingly, military personnel when faced with the charge of a serious offence may be tried by a court other than a martial court. Section 133 of the *Army Act 1955* gives the civilian court the right to initiate and conduct proceedings.⁵²¹ This is limited to the situation

⁵²⁰ Research Paper 01/038, January 2001, The Armed Forces Bill 4 of 2000-2001 <http://www.parliament.uk/documents/commons/lib/research/rp2001/rp01-003.pdf>, p.7 (10.12.2014)

⁵²¹ <http://www.legislation.gov.uk/ukpga/Eliz2/3-4/18/section/133> (10.12.2014)

when military courts do not take the case further.⁵²² Such a situation took place in 2005 in the case of *R v Trooper Williams*. When the case was dropped by the military prosecution, it was brought before the court by the Crown Prosecution Service which is a civilian institution.⁵²³

Additionally, it must be mentioned that some crimes are not codified. The legal system in England and Wales has no one unified criminal code. Work on the criminal code is ongoing.⁵²⁴ Currently, some crimes are considered common law crimes and some are regulated by written law such as the Homicide Act of 1957.

What makes the ROE discussion even more complex is the concept of the Queen's Peace (or during a King's ruling, the King's Peace). This concept excludes from criminal responsibility a person killed during an armed conflict.⁵²⁵ As stated in *R. v Clegg (Lee William)* House of Lords, 19 January 1995, one does not commit a homicide that killed the enemy abroad.⁵²⁶

Supplementary to regulations related to ROE is the implementation of the Rome Statute to the British legal system. Before the implementation of the International Criminal Court Act, domestic law partially regulated those issues as it was during Pinochet extradition case.⁵²⁷ To avoid issuing an indictment, act only in reference to customary law, Great Britain incorporated an ICC statute. The fifth part of the International Criminal Court Act 2001 says that crimes such as genocide, war crimes, crimes against humanity, as defined in the ICC, constitute crimes in the domestic system of law.⁵²⁸ Thanks to this, grave crimes of international law have become sanctioned by British law.⁵²⁹ The above-mentioned regulations apply to both civilians and military personnel. The ICC Statute incorporation to the British legal system was, in fact, better executed in comparison to the similar situation with the Polish legal system. The existence of the Polish Criminal Code creates an issue of interoperability whereas, in the UK, the lack of criminal code allowed the full, coherent implantation of the

⁵²²K. Laue, A. Lang, UK Army in Iraq- Time to come clean on civilian torture report, p.11, available at www.redress.org/downloads/publications/UK_ARMY_IN_IRAQ_-_TIME_TO_COME_CLEAN_ON_CIVILIAN_TORTURE_Oct%2007.pdf (10.12.2012)

⁵²³ http://www.cps.gov.uk/news/latest_news/120_05/ (10.12.2015)

⁵²⁴ http://www.lawcom.gov.uk/docs/newsletter_spring_2009.pdf (10.11.2014)

⁵²⁵ Archbold, *Criminal Pleading Evidence & Practice*,. Chapter 19 - Offences Against the Person Section I. – Homicide, Section A. – Murder. Sekcja 19-19, ed. 2010.

⁵²⁶ [1995] 1 All ER 334

⁵²⁷ Against Augusto Pinochet was brought case based on the Universal Jurisdiction

⁵²⁸ <http://www.legislation.gov.uk/ukpga/2001/17/part/5> (10.12.2014)

⁵²⁹ R. Cryer, *Implementation of the International Criminal Court Statute in England and Wales*, International & Comparative Law Quarterly, 2002 p. 740.

ICC Statute. Proper implementation of the Statute lead to the first conviction based on the International Criminal Court Act of Corporal Donald Payne.⁵³⁰

Another important factor which influences the position of ROE in the legal system is customary law. According to the *Geneva Conventions Act 1957* and the *Geneva Convention (Amendment) Act 1995*, Conventions and Additional Protocols were incorporated to the British legal system. Additionally, humanitarian law development and judgments of international tribunals create questions related to the direct use of customary law before courts of England and Wales. As Lord Denning in the Trendex case⁵³¹ said, “seeing that the rules of international law have changed, and do change, and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law”.⁵³²

3.5.2 ROE AND BRITISH LAW

In order to define the position of ROE in a legal system it is easier to refer to existing case law. To begin with I will try to exclude ROE from the British legal system. As an example to support this statement, I shall refer to the engagement of British forces in Bosnia and Herzegovina. During the operation in the early nineties, the UK participated in an international effort to stabilize the situation on the territory of the former Yugoslavia. British forces were part of the United Nations operation. During this operation, there was no document which would have implemented ROE into the legal system of England and Wales, which was a consequence of the *United Nations Act 1946*.⁵³³ The Act did not provide a legal ground for issuing ROE which could have been considered a part of the British legal system. Even when ROE were reissued by the Ministry of Defence, they did not, thereby, become part of English law. According to Lord Lowry, “there was, of course, at the same time in existence what is called the yellow card; something the contents of which, it seems are largely dictated by policy and are intended to lay down guidelines for the security forces but which do not define the legal rights and obligations of members of the forces under statute or common

⁵³⁰ R v Payne, General Court Martial Charge Sheet, Case number: H DEP 2007/411, 30 April 2007, available at http://www.army.mod.uk/apa/courts_martial_trials (10.12.2014)

⁵³¹ Trendtex Trading Corporation v. Central Bank of Nigeria [1977] 1 Q.B. 529

⁵³² S. Powles, Richard May, *Command responsibility - a new basis of criminal liability in English law?*, Criminal Law Review, 2002, p. 375

⁵³³ P. Rowe, *The United Nations rules of engagement and the British soldier in Bosnia*, International & Comparative Law Quarterly Publication, 1994, p. 951

law”.⁵³⁴ As a consequence, in Bosnia, soldiers during open fire would have been liable only for a breach of British criminal or military law.⁵³⁵

Similarly, the situation is regulated in the US system of law. Violations of ROE directives do not give grounds for criminal liability. The only ground for criminal liability may be a violation of domestic regulations such as the *Uniform Code of Military Justice*. The Corporal McGhee case may be provided as an example. During his duty in Vietnam, he killed a civilian in a village. As a result, he was tried and sentenced under UCMJ but not under violation of the ROE.⁵³⁶

Confirmation that Rules of Engagement are not considered a source of law may also be found in the statement provided by the US Department of Defence.⁵³⁷

3.5.3 ROE VIOLATION IN THE UK

In the discussion regarding ROE, the responsibility for ROE violation is a problematic issue. The basic assumption is that a soldier will be responsible for his or her act according to the law of the country in which a crime is committed. However, such a situation is purely hypothetical. Foreign troops are always secured by the Status of Force Agreement (SOFA). SOFA excludes troops from the possibility of being prosecuted in the host country. Such an agreement was concluded between the government of Bosnia and Great Britain on 15 May 1993 before deployment of the British troops there.⁵³⁸

The above-mentioned principle may be modified by external factors. Such a situation took place in Bosnia. Despite the fact that the UK government concluded SOFA with the Bosnian government, part of the country remained under the influence of other parties, namely the Serbs and the Croats. In such a situation, if a self-proclaimed state (for example the Serbian Republic in Bosnia) captures a UN soldier, they might have found themselves on trial under the criminal law of one of these entities.⁵³⁹ Hypothetically, in the case of Afghanistan by analogy, one might say that British soldiers, thanks to SOFA, are excluded

⁵³⁴ *Ibidem.*, p. 951

⁵³⁵ P. Rowe, *The United Nations, op.cit.*, p. 951

⁵³⁶ Lt Col Anthony Wolusky, *Combat Crime: Rules of Engagement in Military courts-martial*, United States Air Force, Osan Air Base, Republic of Korea, *Military Law. & Law of War Review*, p. 99,

⁵³⁷ Lt Col W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, *The Army Lawyer*, 2000 r. In this article author explains RoE as military directive <http://web7.whp.osd.mil/general.htm> (10.12.2013)

⁵³⁸ Peter Rowe, *The United Nations rules of engagement and the British soldier in Bosnia*, *International & Comparative Law Quarterly Publication*, 1994 r., p. 952

⁵³⁹ *Ibidem.*, p. 952

from responsibility under Afghan law but not under Taliban law.

To summarize, UK soldiers will be held liable for violation not of ROE but of their respective military codes.

3.5.4 ROE IMPLEMENTATION IN UK

British ROE are introduced before each particular military operation. Initially, there is a reference to the so-called Political Policy Indicator which clarifies the trends regarding the foreseeable or expected development of the operation. In fact, there may be three types of conclusions such as: X ray – de-escalation, Zulu – escalation of the situation and Yankee – *status quo*. When structuring particular ROE there is also a reference to the right to self-defense as stated in section 3 (1) of the 1967 Criminal Law Act which says that “A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large”.⁵⁴⁰ This rule, despite being part of the law of England and Wales, is similar to the law of other parts of UK i.e. Northern Ireland and Scotland.

As to the practical aspects of shaping ROE, usually they are created within the realm of cooperation of the following levels of command. At the top there is the Command Joint Task Force (CJTF), then below there are another four levels, i.e. the Land Component Commander, the Army Component Commander (ACC), the Maritime CC and Special Forces. Below this structure, for example for Maritime CC, there is the Commander Task Group (CTG) and then there are the particular Task Units. When there is a need for Rules of Engagement for a particular operation, a specific Task Unit sends a so-called ROEREQ (ROE Request) to the higher level, i.e. the Commander Task Group. As a result of the request, a so-called ROEAUTH (ROE authorization) which contains the ROE for the anticipated operation is provided. Each level may apply to the higher level of command and, for example, CTG, may request to the Maritime CC for ROE. Before issuing, ROE are verified in terms of their coherence with other Component Commanders’ ROE and, if needed, also at the CJTF level.⁵⁴¹

⁵⁴⁰ Criminal Law Act 1967, c. 58 available at <http://www.legislation.gov.uk/ukpga/1967/58/section/3> (10.12.2013)

⁵⁴¹ Commander Ian Park, during his presentation at the Sanremo Institute of International Humanitarian Law ROE workshops held from 8th to 12 September 2014.

3.6. OTHER LEGAL ISSUES RELATED TO ROE

In order to examine a broader perspective of ROE I shall describe other regulations, which are relevant to ROE, such as Standard Operating Procedures (SOP). Some of the military forces activities in Afghanistan are regulated not only by ROE but also by Standard Operating Procedures (SOP). They provide information which support ROE. Similarly to ROE, access to them is limited.

ROE are introduced in the operational plan of the mission, the so-called OPLAN. In case of the NATO operation, it is Appendix E to the OPLAN.⁵⁴² OPLAN also provides other documents such as Standard Operating Procedures. These documents are less sensitive than ROE so their establishment is less complicated. Usually SOP do not reach the same level of secrecy as ROE. SOP provide procedures on several issues which help to unify cooperation between the operation's components. They are of special value in a multinational environment. For example, SOP for claims was introduced by OPLAN Appendix AA Legal. It provided that NATO HQ Claim's Office was located in Kabul and seen as an appellate instance. Whereas the primary subject for dealing with claims is the claims unit of TCN (Troops Contributing Nation).⁵⁴³

SOP, in general, provide a set of information which helps to smoothly run a military operation. They may regulate the situation within a multinational operation i.e. claims, but also regulate basic activities such as the issue of unloading a weapon before entering a DFAC (dining facility).

However, there are SOP of crucial importance in terms of the mission perception and its contribution to the rule of law in the country where the operation is taking place. Such was the case of the SOP on the transfer of detainees.

SOP 362, which regulates the transfer of detainees, states that the detainees are eventually to be handed over to the authority of the Government of Afghanistan (GOA).⁵⁴⁴ This straightforward SOP, in practice, raised several issues. The treatment of detainees

⁵⁴² Order of the Operational Command HQ, SOP for claims of civilian population resulting out of Polish Military Forces operation in Afghanistan, 21 December 2007, NATO unclassified, nr 5227/07 ,p.1

⁵⁴³ Order of the Operational Command HQ, SOP for claims of civilian population resulting out of Polish Military Forces operation in Afghanistan, 21 December 2007, NATO unclassified, nr 5227/07, p2.

⁵⁴⁴ Standard Operating Procedure – Detention on Non-ISAF Personnel (SOP 362) NATO/ISAF UNCLASSIFIED REL GCTF NATO/ISAF UNCLASSIFIED REL GCTF, p. 24, point 2 and 3, available at <https://info.publicintelligence.net/ISAF-DetaineeSOP.pdf> (10.10.2014)

transferred to Afghan forces became especially questionable. The issue was brought to light in the case of *R. (on the application of Evans) v Secretary of State for Defence*⁵⁴⁵. The case was related to the practice of the British forces when transferring suspected detainees. The British forces were transferring detainees held in British custody in Afghanistan to a governmental intelligence organization called the National Directorate of Security (NDS). The claimant, who is a peace activist, brought the case to public interest by stating that there is a potential risk of mistreatment of the transferees in Afghanistan.⁵⁴⁶ The general British policy is that such detainees are to be transferred to the Afghan authorities within 96 hours or released, but are not to be transferred where there is a real risk at the time of transfer that they will suffer torture or serious mistreatment.⁵⁴⁷ The claimant contended that the assessment had been wrong and unfounded throughout and that transfers should not have been made and should not now be made.⁵⁴⁸

In order to regulate the situation of detainees, on 23 April 2006 the Memorandum of Understanding (MOU) entered into force between the UK and the Government of Afghanistan.

The MOU concerned the transfer of persons detained in Afghanistan to the Afghan authorities by UK armed forces.⁵⁴⁹ Based on this MOU, detainees were transferred to Kandahar, Kabul and Lashkar Gah.⁵⁵⁰

In addition, there was an Exchange of Letters (EoL) between the UK and other ISAF states on the one hand and the Government of Afghanistan on the other, outlining an additional provision about the access to the Afghan facilities by personnel of the transferring states and by non-governmental and international bodies.⁵⁵¹

As a result of the inspection of the detaining facilities conducted without prior notification, the British forces decided not to transfer detainees to NDS facilities in Kabul. Transfer of detainees to other locations such as Kandahar was restricted.⁵⁵²

⁵⁴⁵ *The Queen (on the application of Maya Evans) v Secretary of State for Defence*, High Court of Justice Queen's Bench Division Divisional Court 25 June 2010 [2010] EWHC 1445 (Admin) 2010 later Evans

⁵⁴⁶ *The Queen (on the application of Maya Evans) op. cit.*, par. 2

⁵⁴⁷ Par 1 Evans

⁵⁴⁸ Par 22 Evans

⁵⁴⁹ Par 26 Evans

⁵⁵⁰ Par 29 Evans

⁵⁵¹ Par 27 Evans

⁵⁵² Par. 35 Evans

This case brought an interesting issue of extraterritorial application of human rights⁵⁵³, and interoperability between SOP and the TCN legal system. It also shows the complexity of modern military operations. SOP are a natural and convenient mechanism to create a unified and compatible environment for military forces. However their application should be preceded by meticulous analysis of the legal environment of the TCN similar to the one conducted in respect to ROE.

3.7. THE ROLE OF MILITARY MANUALS

Military manuals play a supplementary role toward understanding, interpreting and implementing IHL. They are to be divided into two categories: domestic manuals and international manuals. International manuals are the result of joint effort of experts working in their personal capacity and representing the collective and agreed view of participating experts, whereas national military manuals tend to be prepared to express the view of the state as to which rules bind this state and how these rules are to be interpreted.⁵⁵⁴

An example of published international manuals are the Sanremo Manual in International Law Applicable to Armed Conflicts at Sea published by the International Institute of Humanitarian Law and very much discussed Interpretive Guidance on the notion of Direct Participation in Hostilities published by the ICRC.⁵⁵⁵

International Manuals, even in the early days of the development of treaty law when humanitarian law was far less codified, were never sources of binding law. For example, the famous Oxford Manual adopted in 1880 was never ratified.

Nowadays, international humanitarian law is a system which rapidly develops. It is tempting to consider International Manuals or Interpretive Guidance as customary law. But they are not law now, just as they were not in the 19th century. These manuals are not a source of international law; they simply reflect the opinion of experts engaged in their creation.⁵⁵⁶ Still, they are to be a kind of authoritative source of knowledge, a confirmation of existing law in an easy to use form from which the text of a law may be easily extracted when it's needed for practical application. At the very least manuals are to be seen as a form of a

⁵⁵³ More on extraterritorial application of human rights In chapter 2 on Detainees.

⁵⁵⁴ W. Boothby, *Conflict Law - The Influence of New Weapons Technology, Human Rights and Emerging Actors*, 2014, Asser, p.66

⁵⁵⁵ W. Boothby consider ICRC Customary law study and ICRC Interpretive guidance alongside International Manuals due to the fact that are result of teachings of the most qualified publicist, Boothby, *op. cit.* p.67

⁵⁵⁶ W. Boothby, *op. cit.* p.87

progressive development⁵⁵⁷ and lead to *lege ferenda* conclusions.⁵⁵⁸ What is most important is that international manuals have proved to be of valuable assistance to all those who deal with practical aspects of IHL observance such as legal advisers to military forces. They set forth a useful framework against which inadequacies in the law can be at least partially addressed.⁵⁵⁹ In this respect, international manuals may be of great value during the process of preparing ROE and safeguarding national troops when operating within an international environment.

As to domestic manuals, such as the one published by the British MoD, their aim is to provide an interpretation of international law, the state practice of law as seen by the United Kingdom, and possibly *opinio iuris* which can be used in the development of the law.⁵⁶⁰ Military IHL manuals are a very helpful set of interpretations of non-confidential directives to all kinds of armed forces. They play a supplementary role toward ROE. However, taking into consideration the role of judicial judgments in the British legal system, there is also a different perception of humanitarian law manuals. Published in 2004, the *United Kingdom Manual of the Law of Armed Conflict* is a continuation of the *Manual on the Law of War on Land* written in 1958 by Sir Hersch's Lauterpacht. A current manual is published jointly by the Ministry of Defence (MoD) and Oxford Press. The idea behind this publication is to present principles of *ius in bello* from the British perspective. It clearly indicates British *opinio juris* and the state practice.

The question is how a manual may affect both ROE for the British forces and IHL implementation in the UK in general. It is not binding but it is a statement of will made with some reservations.⁵⁶¹ Additionally, in contrary to ROE, manuals are widely available. They may be subject to research. Nowadays, an increasing tendency can be observed to cite national manuals as evidence before international tribunals.⁵⁶² As such, they may obtain the status of a customary law since they constitute state practice and influence *opinio iuris*. As a result, the UK's MoD was cautious on controversial issues⁵⁶³ because manuals' directives

⁵⁵⁷ Ch. Garraway, *The use and abuse of military manuals*, Yearbook of International Humanitarian Law Vol. 7, 2004 r., p. 429

⁵⁵⁸ W. Boothby, *op. cit.* p.87

⁵⁵⁹ W. Boothby, *op. cit.* p.87

⁵⁶⁰ Ch. Garraway, *op.cit.* p. 431

⁵⁶¹ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press 2004), p. viii of preface available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf (10.11.2013)

⁵⁶² Ch. Garraway, *op. cit.* p. 434

⁵⁶³ Ch. Garraway, *ibidem.* p. 434

may return to the British legal system as a binding principle of customary law.⁵⁶⁴ Of course the II Hague Convention of 1899 says that the Parties to the Convention should issue instructions to its armed forces which must conform to the law and customs of war.⁵⁶⁵ So it is challenging to strike the balance between the implementation and avoidance of creating too strict an interpretation of the law.

The second issue result from the nature of modern operations i.e. internalization of military actions. Many countries issue their own manuals. The problem arises when allied countries take diametrically-opposed views of the law in their manuals.⁵⁶⁶ To avoid this situation, an unofficial “working group” was formed of legal officers from the United States, the United Kingdom, Canada, Australia and New Zealand who have been meeting on an irregular basis since the late 1970s.⁵⁶⁷ This may, at least in theory, iron out some of the frictions.⁵⁶⁸

As to the British Manual, despite some criticism based on merits, for example the lack of reference to the “Global War on terror” concept or continuous support for reprisals, which is very debatable practice,⁵⁶⁹ it is of a great value. It plays a supportive role to ROE especially during peace time where there is enough time to analyse particular scenarios. Polish forces have no similar manual. The only attempt to fill the gap was made by the Military Centre of Civic Education in Warsaw. Two publications, the first designated to private soldiers and non-commissioned officers and the second to officers, written in collaboration with academics and officers and former military prosecutors seem to play a similar role.

564 I Ch. Garraway, op. cit, p. 435

565 Hague Convention (II) with Respect to the Laws and Customs ... 29 July 1899, entered into force 4 September 1900) (1899) 187 CTS 429 available at <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>

566 Ch. Garraway, op. cit. p. 435

567 Ibidem, p. 435

568 Ibidem, p. 435

569 Natalino Ronzitti, Review of Book, UK MINISTRY OF DEFENCE (ed.), *The Manual of the Law of Armed Conflict*, Oxford, Oxford University Press, 2004 (in:) *The Italian Yearbook of International Law* 2004, vol. 14, p.494 available at

[http://books.google.pl/books?id=tLcin2NyJQgC&pg=PA493&lpg=PA493&dq=The+Manual+of+the+Law+of+Armed+Conflict+by+UK+Ministry+of+Defence+role&source=bl&ots=RbgieoekcP&sig=RWuY1xcbe_-ofGyCdiMQV3AsBac&hl=pl&sa=X&ei=FkHqU-6jHYPCof2UgPAH&ved=0CEYQ6AEwBg#v=onepage&q=The%20Manual%20of%20the%20Law%20of%20Armed%20Conflict%20by%20UK%20Ministry%20of%20Defence%20role&f=false\(10.11.2013\)](http://books.google.pl/books?id=tLcin2NyJQgC&pg=PA493&lpg=PA493&dq=The+Manual+of+the+Law+of+Armed+Conflict+by+UK+Ministry+of+Defence+role&source=bl&ots=RbgieoekcP&sig=RWuY1xcbe_-ofGyCdiMQV3AsBac&hl=pl&sa=X&ei=FkHqU-6jHYPCof2UgPAH&ved=0CEYQ6AEwBg#v=onepage&q=The%20Manual%20of%20the%20Law%20of%20Armed%20Conflict%20by%20UK%20Ministry%20of%20Defence%20role&f=false(10.11.2013))

3.8 ROE IN BRITISH ARMY – PRACTICAL ISSUES

The above-mentioned aspects related to law observance on the battlefield have to be assessed against another issue which is soldiers' ability to understand the basic text and command. Even the most accurate rules are not automatically understandable for a soldier. As research shows, it is estimated that some 42% of soldiers have literacy skills below Level 1 (standard expected of 5-6 year olds).⁵⁷⁰ With such low literacy skills, following rules may not be an issue of conscious choice of what is good or wrong but an issue of not understanding basic commands.

This research clearly shows that for ROE implementation two elements are necessary. The first is clarity of law. The second, equally important, is the issue of properly prepared educational programs orientated to soldiers.

CONCLUSION

Rules of Engagement produce a legal challenge during modern military operations. On the one hand, they are of a great value. They contribute to the unification and compatibility of the mission. They are particularly important in a multinational environment. They help to create a more efficient military structure where each of the components may communicate using the same language and terms. On the other hand, their legal character is debatable. As I argued in this chapter, they may not be considered as a source of international law. Within a domestic legal system they also shouldn't be considered legally binding. This means that ROE, as a whole, should not be considered as any form of law or order. They obtain a legal order character only when they are, or elements of it are, introduced into a particular commander's order. However, even when properly introduced to the military order, they do not exclude the application of criminal law and other laws such as international criminal or humanitarian law. As a result, from the perspective of the possible legal responsibility before a court of law, the most important is following the law of the country of origin rather than Rules of Engagement. This conclusion is based on the comparative analysis of the Polish law and Law of England and Wales.

ROE may be, under some circumstances, a mitigating factor of criminal responsibility. As argued above, they may lead, under some circumstances, to the exclusion of

⁵⁷⁰ P. Rowe, *Military misconduct during international armed operations: "bad apples" or systemic failure?*, *Journal of Conflict & Security Law* 2008, p. 175

culpability. However, one must not forget that following orders is one of the major obligations of a soldier. A lack of following orders may result in disciplinary or criminal responsibility.

This places particular importance on the legal services of every army, especially operating in alliance with countries with lower legal standards, for example, Afghan or US forces. It is up to the legal service to provide a clear and consistent with national criminal law set of Rules of Engagement which help troops on the ground. It is also vital to introduce a system of education and implementation of IHL suitable to every level of the chain of command. Part of this system are and should be military manuals. However, it is equally important to train soldiers in the decision making process related to observance of IHL and ROE during peace time. As mentioned above, training should be properly tailored to every level of military structure from the basic programs and training designed for foot soldiers to more advanced and complex training for commanders.

CHAPTER 4
MODERN COUNTERINSURGENCY UNDER INTERNATIONAL HUMANITARIAN
LAW

*Do not try to do too much with your own hands.
Better the Arabs do it tolerably than that you do it
perfectly. It is their war, and you are to help
them, not to win it for them.*

*Actually, also, under the very odd conditions of
Arabia, your practical work will not be as good
as, perhaps, you think it is."*

Lawrence of Arabia⁵⁷¹

INTRODUCTION

My thesis addresses legal issues arising out of military operations in Afghanistan, focusing on *ius in bello* practical aspects of the NATO operation. The discussion about a new vision of counterinsurgency and its compliance with the International Humanitarian Law could raise important legal questions, which would have an effect on contemporary international law. This thesis will analyse the modern counterinsurgency approach brought by General Petraeus, arguing that in some cases this approach better fits the needs of civilian population than outdated treaty regulations.

It is suggested that conclusions drawn and observations made with regard to Afghanistan could be of wider significance and application. It is because many politicians and scholars believe that insurgencies and asymmetric conflicts are likely to be the wars of the future⁵⁷². These 'new wars', are anti governmental in nature. They are fought by different types of militias, paramilitaries, gangs and loosely organized rebel groups instead of organized militaries for whom military victory may be impracticable, inefficient or insufficient to achieve their aims. In these new wars, economic motivations and mindless

⁵⁷¹ T. E. Lawrence, 27 Articles, Arab Bull., Aug. 20, 1917, art. 15. Making a Molehill out of a Mountain: The U.S. Army's Counterinsurgency Doctrine Applied to Operational Law in Iraq Captain Russell E. Normant & Captain Ryan W. Leary.

⁵⁷² G. Sitaraman, *op. cit.*, p. 1770.

ethnic hatred had replaced national interests or ideological visions as the driving forces of these conflicts. In modern days conflicts the civilian population, are to be considered the centre of gravity. These wars are often conducted in an environment where the collapse of state structures and the disintegration of the social fabric take place.⁵⁷³ Justification of the future asymmetric character of the conflicts also lays in economy. According to Kuźniar, 16% of the world's population spends 75% of global military expenses. As he argues, a power and military expenditures of rich countries will push poorer countries and entities into asymmetric warfare.⁵⁷⁴ This is why it is so important to face the challenge and try to analyse the law applicable during modern asymmetrical, non-international armed conflicts.

The law of armed conflict is also known as the laws of war or international humanitarian law, was developed and codified in times of more traditional state to state conflicts.⁵⁷⁵ It was created to fit the type of conventional, symmetrical, international wars fought in the 19th and 20th centuries with an assumption that the conventional war strategy - kill or capture the enemy - was the route to victory. Symmetrical warfare is to be understood as an armed conflict between states of roughly equal military strength.⁵⁷⁶ Even when two countries represent different level of equipment and training vide Iraq vs US (2003), or Georgia vs Russia (2008), they refer to the traditional way of conducting the war. They operate under similar principles using similar means of warfare.⁵⁷⁷ In traditional conflicts, the need to destroy an enemy has traditionally been considered the centre of gravity, reflecting the concept of Frederick the Great of "entire destruction of your enemies" which can be accomplished by death, injury, or any other means.⁵⁷⁸ Only once common art. 3 of 1949 the Geneva Conventions was enacted, did humanitarian law become more orientated on non-international armed conflicts. Nevertheless, non-international armed conflicts are still far less regulated than international ones. Both law and strategy are currently better developed in order to address classical, conventional international armed conflicts.

⁵⁷³ N. Lamp, *Conceptions of war and paradigms of compliance: the 'new war' challenge to international humanitarian law*, *Journal of Conflict and Security Law*, vol. 16, 2011, p. 227-228.

⁵⁷⁴ R. Kuźniar, *Polityka i siła, Policy and Power*, Scholar, Foundation of International Studies, Warsaw, 2005, p. 294-295.

⁵⁷⁵ L. Blank, A. Guiora, *Teaching an old dog new tricks: operationalizing the law of armed conflict in new warfare*, *Harvard National Security Journal*, vol 1, 2010, p. 45.

⁵⁷⁶ T. Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 *International Review of the Red Cross*, vol. 87, 2005, p. 152.

⁵⁷⁷ E. Benvenisti, *The legal battle to define the law on transnational asymmetric warfare*, *Duke Journal of Comparative and International Law*, vol. 20, 2010, p. 340.

⁵⁷⁸ G. Sitaraman, *Counterinsurgency, the war on terror, and the laws of war*, *Virginia Law Review*, vol. 95, 2009, p. 1751.

However, modern conflicts are - in most cases - non international in character. During non-international conflicts there is usually an asymmetrical balance of force resources. Non-state actors employ asymmetric means and methods against state military forces.⁵⁷⁹ Inequalities in arms and the significant disparity between belligerents have become a prominent feature of various contemporary armed conflicts such as the one in Afghanistan. The spread of innovations like portable hand-held missiles, difficult to detect or undetectable explosives, and communication tools offered loosely-organized insurgents affordable and effective means of confronting stronger opponents.⁵⁸⁰ Democratization or privatization of the means of warfare provided opportunities for non-state actors to challenge not only their own governments but also the international powers.⁵⁸¹ The particular characteristics of modern day asymmetric conflicts result in certain repercussions for the application of the fundamental principles of international humanitarian law.⁵⁸² In asymmetric conflicts, the principle of reciprocity which traditionally forces conflict parties to observe IHL, is betrayed and chivalrous values replaced by treachery.⁵⁸³ In an asymmetric conflict between governmental or pro-governmental forces and local insurgents, neither side has incentives to comply and obey the law of IHL. It is partially because the regulation of asymmetric warfare requires a different structure of incentives to have any effect on the parties.⁵⁸⁴ Consequently the asymmetric conflict possesses both normative and institutional challenges which affect strategy, tactics and politics issues. The normative challenges stem from the fact that the traditional *ius in bello* is not sensitive to the power relations between adversaries in asymmetric conflicts. This is due to the assumption of equality of arms which is unrealistic in most non-international asymmetric armed conflicts.⁵⁸⁵ The laws of war favour the stronger army because the weaker party is expected to play by the rules that predetermine its defeat.⁵⁸⁶ The weaker side is likely to find such a law morally questionable and certainly not worthy of compliance.⁵⁸⁷

⁵⁷⁹ D. Stephens *Counterinsurgency and Stability Operations: A New Approach to Legal Interpretation*, p. 291 [in:] *International Law Studies, The War in Iraq: A Legal Analysis*, Ed. R. A. Pedrozo, Naval War College Newport, Rhode Island, vol. 86, 2010.

⁵⁸⁰ E. Benvenisti, *op. cit.*, p. 339.

⁵⁸¹ E. Benvenisti, *op. cit.*, p. 339.

⁵⁸² R. Geiß, *Asymmetric conflict structures*, ICRC Review, Vol. 88, No. 864, 2006, p. 757

⁵⁸³ T. Pfanner, *op. cit.*, 161

⁵⁸⁴ E. Benvenisti, *op. cit.*, p. 341.

⁵⁸⁵ E. Benvenisti, *op. cit.*, p. 342.

⁵⁸⁶ E. Benvenisti, *op. cit.*, p. 342.

⁵⁸⁷ E. Benvenisti, *op. cit.*, p. 342

In conventional conflicts, the centre of gravity of the military operations was to kill or capture the enemy or its military forces. Current conflicts show a significant change in emphasis. The centre of gravity is a civilian population; the war is often conducted to win the “hearts and minds” of the population.⁵⁸⁸ What is more, the traditional doctrine to kill and capture is sometimes changed to a more holistic one. The new “win-the-population” doctrine imposes different types of obligation on military forces.⁵⁸⁹ The only effective way of “winning” a modern armed conflict is to bring stability, sound economy and rules of law. For that purpose, military means and methods have to be mixed with policing ones. Currently, as Pfanner argues, “it is debatable whether the challenges of asymmetrical war can be met with the contemporary law of war. If war between States is on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well.”⁵⁹⁰ It seems that the current situation may require the modification of rules of international humanitarian law. In terms of internal conflict, humanitarian law has little to offer in rebuilding the state. It also says little about the means and methods of conducting warfare. It does however forbid some means and methods. Those means and methods rightfully forbidden in international armed conflict may be useful and successfully implemented during non-international counterinsurgency operations. Finally, there are areas of counterinsurgency which are not governed by the humanitarian law but only by the human rights law.

This chapter will evaluate the legal challenges arising out of modern counterinsurgency operations, arguing that general principles of international humanitarian law do not fully match modern counterinsurgency. This is because humanitarian law has become inadequate to meet challenges posed by modern conflicts. As some argue, law of armed conflicts (LOAC) is inapplicable or simply cannot work in the new warfare. Others contend that, while still relevant, LOAC needs new treaties or protocols to be effective.⁵⁹¹ The most recent substantive amendments to the Geneva Law occurred with the adoption of the Additional Protocols to the Geneva Conventions in 1977. Since then, despite the rapid development of international law, little has been done to address the burning questions of modern humanitarian law, notwithstanding the adoption of instruments restricting or

⁵⁸⁸ Field Manual, *op. cit.*, p. 1-28.

⁵⁸⁹ G. Sitaraman, *op. cit.*, p. 1757.

⁵⁹⁰ T. Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 *International Review of the Red Cross*, vol. 87, 2005, p. 158.

⁵⁹¹ L. Blank, A. Guiora, *op. cit.*, 48.

prohibiting the use of certain types of weapon, including anti-personnel landmines. Customary Law Study published by the International Committee of the Red Cross often lacks convincing *opinio iuris* and state practice. To address the above issues, I will present not only the concept of counterinsurgency but also the notion of insurgency. It should help to better understand the dynamics related to the modern armed conflict.

This chapter is also an opportunity to discuss the most important issues related to IHL from the perspective of modern counterinsurgency. The principle of distinction will be presented as a part of discussion on targeted killing and the role of military oriented humanitarian projects such as PRT. Further, the principle of proportionality will be discussed. In this chapter, I will also refer to the notion of the civilian loss compensation during the conduct of lawful and unlawful military operations under IHL. Additionally, this chapter will refer to another vital issue of humanitarian law, i.e. the validity of the law of occupation in the light of concepts such as *ius post bellum* from the perspective of modern counterinsurgency. The last part of this chapter will be dedicated to the use of non-lethal weapons in a non-international asymmetric environment.

4.1. MODERN INSURGENCY

An “insurgency” is an organized, popular movement aimed at overthrowing a constituted government through use of violence and armed conflict. It is a protracted political and military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other authority.⁵⁹² This non legally binding definition emphasises that all insurgencies have one feature in common, which is the fact that they are aiming at, or in the process of, taking over governing capabilities from the government; “a government that is losing to an insurgency isn’t being out-fought, it is being out governed”.⁵⁹³ Insurgency, being a manifestation of deeper, widespread issues in society, is premised on winning “heart and minds”.⁵⁹⁴

There are different types of insurgency. They can be conspiratorial in nature (Bolsheviks scenario), military-focused (all types of military coup d’état), urban (Latin

⁵⁹² D. Kilcullen, *Counterinsurgency*, Hurst and Company, London, 2010, p. 1.

⁵⁹³ D. Kilcullen, *op. cit.*, p. 149.

⁵⁹⁴ G. Sitaraman, *op. cit.*, p. 1766.

America) or protracted popular war.⁵⁹⁵ The last one is especially interesting. Protracted popular war is usually asymmetric in nature and raises the most complex legal, economic and political challenges. This kind of insurgency is being fought in Iraq, and, what is most important from my perspective, in Afghanistan.

The protracted theory of war was shaped by Mao Zedong. His theory of protracted war outlines a three-phased, political-military approach. The first phase is a strategic defence when the government has a stronger correlation of forces and insurgents must concentrate on survival and building support. The second is a strategic stalemate, when force correlations approach equilibrium and guerrilla warfare becomes the most important activity. The third phase is a strategic counteroffensive, when insurgents have superior strength and their military forces move to conventional operations to destroy the government's military capability.⁵⁹⁶ These three phases are conducted with one major principle in mind - the civilian population is the centre of gravity in an insurgency.⁵⁹⁷

All these phases of insurgency are present in Afghanistan. There are areas such as the central and northern provinces where Taliban activity is limited, which corresponds with the first phase. There are provinces where strategic stalemate has taken place such as Ghazni, Wardak and Logar. There are provinces where Taliban forces have reached the level where they could conventionally destroy governmental forces (the third phase), as in southern and eastern provinces - especially Helmand and Kandahar. At the practical level, the presence of insurgents in Afghanistan is indicated by their control of security, law making and administration, licit and illicit goods trade and taxation.

Governing any territory is not possible without a sustainable economy. This is why insurgents create a war economy. As a result, states lose their grip on the activities of the insurgents. Nowadays, an asymmetric conflict often evolves from an idealistic struggle into a self-propelled business. In failed states such as Afghanistan, the war is a chance for insurgents to obtain money and power. Accessibility of light arms creates the situation that being an insurgent is the way to provide food and security for the group or tribe. War in such a case is not as Clausewitz said "an act of force to compel our enemy to do our will" or an "extension

⁵⁹⁵ U.S. Army and U.S. Marine Corps Manual, Counterinsurgency, FM 3-24, MCWP, 2006, p. 1-26, hereinafter COIN Manual

⁵⁹⁶ COIN Manual, *op. cit.*, p. 1- 31,

⁵⁹⁷ J. Corum, *Development of modern counterinsurgency theory and doctrine*, p. 39 [in:] G. Kassimeris, J. Buckley, *Modern Warfare*, Ashgate 2010.

of national policy”, but rather an end in itself. A situation of endemic war creates space for warlords and for all those who gain from armed conflicts.⁵⁹⁸ The question of security is particularly important. By constantly challenging the governmental and ISAF forces, insurgents create an atmosphere of insecurity, especially to all whose activity is related to the government. On the other hand, insurgents provide some kind of security in territories where they are dominant. Consequently they are a cause of but also a remedy, for lack of security. However, even a complete victory of the insurgents does not provide security to the whole country, e.g. for the last twenty years Afghanistan’s security situation has deteriorated.⁵⁹⁹ Part of the insurgents’ dominance is shown by the creation of their own law and administration. In the territories where Taliban execute control, shadow district and provincial governors are in power.⁶⁰⁰ Additionally, to prevent abuse by local military commanders, the institution of ombudsman has also been established by the insurgents.⁶⁰¹ A certain type of law has also been imposed by the insurgents. This is especially visible in the territories where informal systems of law such as Sharia are already dominant. These informal legal systems, although popular, are often under strong pressure from local warlords and strongmen.⁶⁰²

In certain areas, drug production is another key issue of the conflict in Afghanistan, but it is also characteristic to most of the modern armed conflicts. For example: a farmer earns an estimated 13 000 USD from a hectare of poppy fields versus 400 USD from a hectare of wheat.⁶⁰³ The example shows what sort of incentive a drug production offers to both insurgents and farmers. Drug production is a part of the war economy in Afghanistan. The existence of a failed state or a state without control over its territory creates space for warlords to establish drug production. Profits from narcotics production corrupts local administration in every province. It is almost impossible to carry out the simplest development project unless

⁵⁹⁸ H. Munkler, *Die Neuen Kriege- The New Wars*, WAM, Krakow, 2004, p. 100.

⁵⁹⁹ UN Report A/65/873– S /2011/381 *The situation in Afghanistan and its implications for international peace and security* <http://unama.unmissions.org/LinkClick.aspx?link=SG+Reports%2F110623+SG+report+June+2011.pdf&tab id=1741&mid=1888> (visited 3/10/2011).

⁶⁰⁰ International Crisis Group, *The insurgency in Afghanistan's heartland*, Asia Report, 27 June 2011, p. 13 [www.crisisgroup.org/~media/Files/asia/southasia/afghanistan/207%20The%20Insurgency%20in%20Afghanistans%20Heartland.pdf](http://www.crisisgroup.org/~/media/Files/asia/southasia/afghanistan/207%20The%20Insurgency%20in%20Afghanistans%20Heartland.pdf) (3/08/2011).

⁶⁰¹ D. Kilcullen, *Counterinsurgency*, London 2010, p. 158.

⁶⁰² N. Nojumi, D.Mazurana, E.Stities, *Afghanistan's Systems of Justice: Formal, Traditional and Customary*, (Tufts University, 2004) (in:) S. Sharma, P. Kumar Sen, *Institutionalization of the Justice System, Reflections on a survey on the Afghan people*, 2008, Asia foundation p. 45, available at www.asiafoundation.org

⁶⁰³ A. Rashid, *Descent into chaos - how the war against Islamic extremism is being lost in Pakistan, Afghanistan and Central Asia*, Allen Lane, 2008 p. 321.

drug lords clear them first.⁶⁰⁴ According to the US government, an estimated 360 million dollars of its aid has ended up directly in Taliban hands.⁶⁰⁵ It completely corrupts the legal economy and as a result in 2006 drug production contributed 46% of Afghanistan GDP.⁶⁰⁶

The next issue to be discussed is taxation. According to the international and Afghan law enforcement officials' estimate, the insurgents need 600 – 800 million US dollars a year to conduct their operations.⁶⁰⁷ This money is gathered by insurgents in two ways. The first is the illicit production of goods and smuggling. The second is taxation. A non-state taxation levy is imposed by insurgents on almost every movement of goods both licit and illicit. This is not only damaging towards the local population but also to the state's economy.⁶⁰⁸ Additionally, it removes from the state the possibility of having revenues to uphold the police and military forces.

Taking into consideration the above mentioned insurgents' activities, this thesis will go on to present the means and methods of modern counterinsurgency. The threat posed by an insurgency needs to be addressed by a particular approach of warfare. This type of warfare embraces dedicated military and police means and methods utilized by counterinsurgent.

4.2. MODERN COUNTERINSURGENCY

In March and April 2003, the United States forces conquered Baghdad with breath taking speed and the word counterinsurgency was then odd and obscure. Senior US decision makers expected to leave Iraq quickly and victorious. However, an unexpected enemy equipped with AK 47 and planting IEDs disrupted their plans. Unconventional, asymmetric warfare attacks kept rising. Very soon, the US forces and its allies found themselves embroiled in counterinsurgency warfare with all that accompanies it; i.e. a new doctrine, a new type of enemies, a new approach toward the use of military power on land, in the air, but also training local forces, educating local administration. The "Mission Accomplished" speech delivered by the US President George W Bush on May 1, 2003 on the USS Abraham Lincoln was considered almost humorous. It was after that speech when the vast majority of

⁶⁰⁴ Ahmed Rashid, *op.cit.*, p. 330.

⁶⁰⁵ T. Coghlan, *Dream of creating a new nation is broken by neglect, despair and death; Early hopes of success have been lost in a mire of corruption and tribal hatred, reports; Afghanistan 10 years on*, The Times (London) November 25, 2011 available at <http://www.lexisnexis.com>, visited 25/11/2011.

⁶⁰⁶ Ahmed Rashid, *op.cit.*, p. 330.

⁶⁰⁷ International Crisis Group, *The insurgency in Afghanistan's heartland*, *op. cit.*, p. 25.

⁶⁰⁸ International Crisis Group, *The insurgency in Afghanistan's heartland*, *Ibidem.*, p. 25.

casualties during Iraq conflict occurred.⁶⁰⁹ Since then, insurgency has flooded Iraq. The coalition effort was adversely affected by the fact that the development of the modern counterinsurgency thinking was done while actually fighting counterinsurgency.⁶¹⁰

Counterinsurgency, in general, “are military, paramilitary, political, economic, psychological and civic actions taken by a government to defeat insurgency”.⁶¹¹ This non-legally binding definition embraces a broad spectrum of activities.⁶¹² A counterinsurgent's task is different from a conventional warrior's one. He or she is supposed to work smarter rather than harder while planning and executing counterinsurgency strategy.⁶¹³ Since insurgents are embedded in the local community, counterinsurgency can be defined as the "military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgents, to rid them from the society. As insurgents derive their support from the local population, only when the local population turns against the insurgency can counterinsurgency be considered successful”.⁶¹⁴ This new approach requires a multidisciplinary approach both from scholars and practitioners. During modern counterinsurgency operations, it is necessary for military forces to melt into local environment by collecting tribal and demographical intelligence as well as threat intelligence.⁶¹⁵ It is also vital to require knowledge on subjects such as governance, economic development, public administration and the rule of law.⁶¹⁶

Modern counterinsurgency operations are not a new development, but they have never before seemed to be so essential to future conflicts.⁶¹⁷ Counterinsurgency embraces holistic activities orientated on civilian population. Killing the opponent is considered the last resort.⁶¹⁸ This argument is supported by gen. David Petraeus in his *Manual on Counterinsurgency* where he presents some of the major principles of conducting anti insurgency operations. They are as follows: a) sometimes, the more you protect your force the

⁶⁰⁹ More at http://www.globalsecurity.org/military/ops/iraq_casualties.htm (10.11.2013)

⁶¹⁰ T. Rid, T. Keaney, *Understanding counterinsurgency; doctrine, operations, and challenges*, Routledge, London, 2010, p. 1.

⁶¹¹ COIN manual, *op. cit.* 1-1.

⁶¹² J. Kelly, *Legal aspects of military operations in counterinsurgency*, Military Law Review, vol. 21, 1963, p. 95

⁶¹³ D. Stephens, *op. cit.*, p. 292.

⁶¹⁴ G. Sitaraman, *op. cit.*, p. 1773

⁶¹⁵ D. Kilcullen, *Intelligence*, p. 147 [in:] T. Rid, T. Keaney, *Understanding counterinsurgency; doctrine, operations, and challenges*, Routledge, London, 2010.

⁶¹⁶ COIN Manual, *op. cit.*, p. X.

⁶¹⁷ G. Sitaraman, *op. cit.*, p. 1770.

⁶¹⁸ D. Kilcullen, *Counterinsurgency, op. cit.*, p. 5.

less secure you may be, b) some of the best weapon for counterinsurgent is do not shoot, c) sometimes, the more force is used, the less effective it is, and d) the more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.⁶¹⁹

During counterinsurgency operations civil security, essential services, governance, economic and infrastructure development are of a great importance.⁶²⁰ The balance of offensive and defensive operations is also essential to counterinsurgency (COIN). In that respect COIN differs from peacekeeping operations. In peacekeeping operations, an absence of violence is the goal. In COIN situations, the goal is much more compound, where the lack of violence may mask the insurgents' preparation for combat.⁶²¹ However, the cornerstone of any counterinsurgency is to establish security for the civilian population. Without a secure environment, no reforms can be implemented.⁶²² Security is based not on a military presence in military bases and travelling in armoured vehicles from point A to B, but rather on proximity to the local population, foot patrolling.⁶²³ To be successful in counterinsurgency, troops have to engage with the populace. Close contact with the local population allows soldiers to learn to understand the social environment, to build trust and to have the opportunity to obtain intelligence.⁶²⁴ According to gen Petraeus, "kindness and compassion can often be as important as killing and capturing insurgents".⁶²⁵ To obtain success, counter insurgents must rely heavily on the indigenous security and military forces. It embraces sponsoring, training and mentoring local forces.

An important element of granting security to the civilian population is to understand the local environment. An instrument which helps to do that has been introduced by the American forces in the form of Human Terrain Teams (HTT). They gather civilian and military experts on sociology, anthropology, language and religion and provide military commanders with information, which is called operational culture. Their activity helps commanders and foot soldiers to avoid typical mistakes based on a lack of knowledge of religion and social links. Political Advisors (POLAD) are engaged in a similar way. Their aim is to help to shape the political environment in which military commanders operate. This

⁶¹⁹ COIN Manual, *op.cit.*, p. 1-149, 1-153, 1-150, 1-151.

⁶²⁰ COIN Manual, *op.cit.*, p.1-19.

⁶²¹ COIN Manual, *op.cit.*, p.1-20.

⁶²² COIN manual, *op. cit.*, p.1-23, par. 1-131.

⁶²³ D. Kilcullen, *Counterinsurgency, op. cit.*, p. 35.

⁶²⁴ COIN manual, *op. cit.*, p.5-9, table 5-1.

⁶²⁵ COIN manual, *op. cit.*, p.5-12, table 5-2.

helps the commanders to establish their presence in the political environment of the military area of operation.

One of the best known ISAF programmes, orientated on the civilian population, is the Provincial Reconstruction Team (PRT) project. Such teams operate in each province under the control of the ISAF countries and coordinate, develop, and fund local projects. Their aim is to rebuild the country in cooperation with local population which is to determine what is needed to make society stable and secure from the insurgent ideology. These projects are also used to gain trust and support of the local population and in this way supporting the counterinsurgency efforts. The Provincial Reconstruction Team may be seen as the military's answer to addressing the security sector reform, reconstruction, development and governance domains of counterinsurgency operations.⁶²⁶ Female Engagement Teams are another example of civilian population orientated activities. Their aim is to motivate local female communities into pro-development and education programs.

As part of the counterinsurgency effort, many states operating in Afghanistan run Rule of Law and Good Governance programmes. They are orientated towards introducing the rule of law and on building a foundation for the state. These programs are often run in cooperation with civilian institutes such as the Max-Planck Institute in Heidelberg which has prepared several law educational projects in Afghanistan.⁶²⁷

All the above mentioned projects and initiatives are involved – directly or indirectly - in state reconstruction and supporting the local population, calculated to turn the local population against insurgents. This modern approach to counterinsurgency equates military effort with nation building.⁶²⁸ However, none of these projects and programmes changes the character of the military presence. It is warfare and it remains as a violent clash of interests between organized groups characterized by the use of force.⁶²⁹ ISAF forces are entitled and sometimes obliged to use a deadly force.

The main question which arises from these examples is how those military and civilian measures are seen in the light of international humanitarian law. All parties to the asymmetric conflict conduct both civilian and military actions. Insurgents are blended with the civilian

⁶²⁶ J. Bebbler, *The Role of Provincial Reconstruction Teams (PRTs) in Counterinsurgency Operations: Khost Province, Afghanistan*, Small Wars Journal, March 31, 2011.

⁶²⁷ More on projects conducted at the Max Planck Institute within the framework of the Afghan Team: www.mpil.de/ww/en/pub/research/details/know_transfer/afghanistan_project/afghanistan_team.cfm (3.08.2011).

⁶²⁸ D. Kilcullen, *Intelligence, op. cit.*, 148

⁶²⁹ COIN manual, *op. cit.*, p.1-1.

population as the enemy moves within and through the population, whereas the governmental and foreign armed forces carry out projects which are often not military in nature. Consequently, during counterinsurgency operations, it is difficult to define what military effort is and what is not. This issue has to be considered with one fundamental assumption in mind. The observance of humanitarian and human rights law in case of counterinsurgency is of utmost importance. Any human rights or humanitarian law abuse committed by intervening forces – apart from strictly moral dimension, has also a pragmatic one. Such events quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine counterinsurgency effort in both long and short term aspect.⁶³⁰

4.3 PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW AND CONTEMPORARY COUNTERINSURGENCY

4.3.1 THE PRINCIPLE OF DISTINCTION

This sub-chapter addresses the issue of the principle of distinction during the conduct of counterinsurgency operations in a non-international armed conflict environment. Issues related to the principle of distinction are of great importance during contemporary armed conflicts. Without identifying who is an enemy and who could be targeted, it is impossible to conduct military operations, both in legal and practical ways. In conventional conflicts it was fairly easy to distinguish an enemy from civilians. Currently, insurgents intentionally avoid identification. They can be distinguished not by their uniform but rather by their participation in hostilities. In this sub-chapter, I discuss the notion of the principle of distinction during a non-international armed conflict. I will also try to address the notion of targeted killing. Finally, I will refer to the legal status of Provincial Reconstruction Teams (PRTs) project run by NATO and its allies, which is a complicated matter and may be the subject of different interpretations closely related to the issue of principle of distinction.⁶³¹

⁶³⁰ COIN manual, *op. cit.*, p.1-24, par. 1-132.

⁶³¹The Provincial Reconstruction Team is designed to fill the gap in the development of governance and reconstruction domains when the international community and nongovernmental organizations (NGOs) are unable or unwilling to operate in certain areas, largely due to security concerns. While this does lead to some consternation among NGOs and international organizations and complaints that the armed forces are “militarizing” humanitarian operations, the fact is that only military organizations have the resources and capacity to sustain themselves and operate in a hostile environment while conducting these types of activities. (Ryan 2007, 59) PRTs inevitably cross over into the “humanitarian space” traditionally owned by NGOs and international aid organizations. There is also different perception of security between the two – military emphasis is on “national security, public order and force protection” while civilian ant to “ensure belligerents do not perceive them as a threat.” Humanitarian organizations provide assistance without regard to political

The principle of distinction holds that “parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.⁶³² The principle is expanded to non-international armed conflict by article 13 of Additional Protocol II which provides that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”.⁶³³ The importance of the principle is highlighted by art 85 (3) (a) API, which states that violation of the principle of distinction is deemed a grave breach and under art 85 (5) a war crime. The principle was acknowledged by the International Court of Justice, as one of the “intransgressible principles of international customary law” that “must be observed by all States whether or not they have ratified the conventions”.⁶³⁴ Additionally, the principle of distinction attained customary nature for both international and non-international armed conflicts. Art 1 of the ICRC study on customary law formulates the following principle: “the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians”.⁶³⁵ Some persons during both international and non-international armed conflicts are indisputably protected against direct attack; namely civilians⁶³⁶, persons *hors de combat*⁶³⁷, medical⁶³⁸ and religious personnel.⁶³⁹ Members of armed forces may not be regarded as protected until they lay down their arms or are placed *hors de combat*, or unless they serve as medical or religious personnel.⁶⁴⁰

During unconventional asymmetrical operations, the counterinsurgent must separate the insurgents from the civilian population.⁶⁴¹ However, in practice this principle raises several problems. On the one hand during operations such as that in Afghanistan, NATO and allied

objective. (Dziedzic and Seidl 2005, 2-3) after Bebbler, Robert J., *The Role of Provincial Reconstruction Teams (PRTs) in Counterinsurgency Operations: Khost Province, Afghanistan*". Small Wars Journal. March 31, 2011, p. 8

⁶³² Art. 48 AP I

⁶³³ International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict With Commentary*, p. 11 <http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf>

⁶³⁴ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, p. 257., par. 76.

⁶³⁵ ICRC Study on customary law, Rule 1, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1

⁶³⁶ Art. 13 AP II

⁶³⁷ Art. 7(1) AP II

⁶³⁸ Art. 25 AP II

⁶³⁹ Art 27 APII

⁶⁴⁰ Inter alia Common art. 3, art. 10 AP II

⁶⁴¹ G. Sitaraman, *Counterinsurgency, the war on terror, and the laws of war*, Virginia Law Review, vol. 95, 2009, p. 1786.

troops are conducting military and civilian activities. Their actions blur the line between what is military activity and what is not. On the other hand, those who are fighting against the government; i.e. insurgents, guerrillas or terrorists, melt into the civilian population. Often persons who appear to be civilians periodically engage in hostilities; this makes determining who is a legitimate target nearly impossible. Commanders on the ground need to provide their troops, day after day, the following information: (1) who and when they can shoot, (2) who and when they can detain, and (3) who they have to protect.⁶⁴² Nonetheless, providing the answers to these questions may not be enough.

4.3.1.1 TARGETED KILLING

Targeted killing is subject to the principle of distinction. Without a clear distinction who is and who is not a legitimate target, this method of warfare may not be implemented. It is also one of those issues which are the subject of passionate discussions amongst contemporary international lawyers. From the perspective of this thesis, it is necessary to address the legal challenges resulting from targeted killing. This method of warfare is popular and tempting for modern counterinsurgents.

Since the issue of targeted killing is extremely broad, the focus here is restricted to targeted killing in non-international armed conflict. Reference will be made to domestic situations and to international armed conflicts only when it is necessary to understand the notion of targeted killing generally. The question of the legality of targeted killing is not only important from the perspective of modern counterinsurgency; it is also an important element of a general dispute on humanitarian law applicable during contemporary wars.

Targeted killing is not a new phenomenon. In the 1960s and the 1970s, at the peak of “popularity” of organizations such as RAF, PLO, IRA⁶⁴³ and Black September, several states, such as Germany, Britain or Israel, were operating unlawful shoot-to-kill policies⁶⁴⁴, which in many respects may be considered identical to targeted killing. Nowadays the situation appears to have changed. Targeted killing is in the process of escaping the shadowy realm of half legality and non-accountability, and gradually gaining legitimacy as a lawful method of modern warfare.⁶⁴⁵ Undefined in a positive law in the past, targeted killing has become a

⁶⁴² L. Blank, A. Guiora, *op. cit.*, 48.

⁶⁴³ RAF - Red Army Faction, PLO - Palestine Liberation Organization, IRA - Irish Republican Army.

⁶⁴⁴ N. Melzer, *Targeted*, *op. cit.*, p. 9.

⁶⁴⁵ N. Melzer, *Targeted*, *op. cit.*, p. 9.

popular method during a protracted non-international armed conflict, particularly in a counterinsurgency environment. Targeted killing offers some advantages; for example, it may limit the possibility of collateral damage amongst the civilian population, especially during surgical special forces operations. At the same time, targeted killing may be affected by some institutional flaws. One of the major challenges is the identification of the legitimate target. Despite the development of precise military technologies, the lack of a clear identifiable battlefield and extensive involvement of civilians requires a level of accuracy almost impossible to reach. Targeted killing may be considered as a useful method during counterinsurgency operations, but it also raises questions regarding the character of those attacks.

From various definitions of targeted killing⁶⁴⁶, the most comprehensive, for the purpose of this thesis, is provided by Melzer. According to him, targeted killing is a method of employing lethal force against human beings.⁶⁴⁷ It is done with the specific intent, premeditation (*dolus directus*) to kill, as opposed to unintentional, accidental, negligent or reckless use of lethal force.⁶⁴⁸ It is used to target individually selected persons rather than collective, unspecified or random targets.⁶⁴⁹ Targeted persons must not be in physical custody by those targeting them.⁶⁵⁰ Finally, targeted killing must be attributable to a subject of international law.⁶⁵¹ A simplified definition is provided by Col. Peter Cullen which says that “targeted killing is the intentional slaying of a specific individual or group of individuals undertaken with explicit government approval”.⁶⁵²

Positive IHL not only prohibits direct attacks against civilians, but also obliges parties to an armed conflict to choose means, methods and targets of attack with a view to avoiding,

⁶⁴⁶ For example P. Alston, J. Morgan-Foster, W. Abresch, *The competence of the UN Human Rights Council and its special procedures in relation to armed conflicts: extrajudicial executions in the "war on terror"*, E.J.I.L.08, 19(1), 183-209; A. Radsan, R. Murphy, *Measure twice, shoot once: higher care for CIA targeted killing*, University of Illinois Law Review, 2011, p. 1202-1241.

⁶⁴⁷ N. Melzer, *Targeted killing in international law*, Oxford monographs in international law, 2008, p. 3.

⁶⁴⁸ N. Melzer, *Targeted*, *op. cit.*, p. 4.

⁶⁴⁹ N. Melzer, *Targeted*, *op. cit.*, p. 4.

⁶⁵⁰ N. Melzer, *Targeted*, *op. cit.*, p. 4.

⁶⁵¹ N. Melzer, *Targeted*, *op. cit.*, p. 4. “Subjects of international law are primarily states but in certain situations and for limited purposes, may also include non-state actors. Deprivations of life is attributable to non-state actors may, therefore, qualify as targeted killing to the extent that international law regulates, prohibits, or penalizes the use of lethal force by them”.

⁶⁵² Col. P. M. Cullen, *The role of targeted killing in the campaign against terror*, USAWC Strategy Research Project U.S. Army War College Carlisle Barracks, 2007, p. 1.

and in any event minimizing, incidental harm to civilians.⁶⁵³ Targeted killing belongs to the methods of warfare which under some circumstances may limit civilian casualties. The question needs to be asked whether targeted killing should be allowed under human rights and humanitarian law in non-international armed conflict as a part of a counterinsurgency.

The human rights standard in respect of targeted killing was established by the European Court of Human Rights in *McCann v UK*.⁶⁵⁴ As a result of this case, some fundamental principles were articulated and established: every individual benefits from the presumption of innocence; persons suspected of perpetrating or planning criminal acts should be arrested, detained and interrogated with due process of law; if there is a credible evidence that such persons were involved in planning or carrying out terrorist acts they should be afforded a fair trial before a court of law and, if convicted, sentenced by the court to a punishment provided by law.⁶⁵⁵ Following that line of argumentation, the targeting of suspected terrorists or insurgents under human rights law may be justified only when interpreted as protection of potential victims of terrorist acts or insurgent activity. Under non-armed conflict circumstances, based on a law-enforcement model and due process, the use of lethal force to defend persons against unlawful violence is justified only when absolutely necessary⁶⁵⁶; for example, in the case of self-defence.

This situation however is different in the case of armed conflict. Humanitarian law constitutes, as established by the International Court of Justice, *lex specialis* toward human rights.⁶⁵⁷ As a result, some principles of human rights are suppressed during armed conflict.⁶⁵⁸ Precedence of the *lex specialis* of IHL does not exclude the applicability of human rights law. However, what is crucial is that the lawfulness of the deprivation of life occurring for reasons related to an armed conflict must be determined, first and foremost, by reference to the *lex specialis* of IHL. IHL as *lex specialis* provides a legal framework designed for the special situation of armed conflict. When rules of IHL are not sufficiently clear or precise to determine the lawfulness of the deprivation of life of a particular individual, these rules have

⁶⁵³ Arts. 57 (2),a, ii; 57 (2), c; 57 (3) AP I. This rule is considered part of customary IHL by Henckaerts and Doswald-Beck, Rule 15.

⁶⁵⁴ *McCann v UK*, 21 EHRR (1996) 97.

⁶⁵⁵ D. Kretzmer *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* The European Journal of International Law Vol. 16, 2005, p. 178

⁶⁵⁶ D. Kretzmer *op.cit* p. 202.

⁶⁵⁷ ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), paragraphs. 24–25.

⁶⁵⁸ D. Kretzmer *op.cit* p. 185.

to be clarified through the usual means of treaty interpretation, and by reference to the general principles of IHL. Human rights applicability during armed conflict is justified when IHL does not provide any rule at all, and where is no sufficient guidance which can be derived from the general principles of IHL.⁶⁵⁹ In terms of targeted killing in non-international armed conflict, there is no need to refer to human rights law since the relevant regulations could be found in IHL.

During an armed conflict, humanitarian law allows targeting only of combatants.⁶⁶⁰ Civilians lose their protected status when they actively take part in hostilities.⁶⁶¹ However, during non-international armed conflict such as in Afghanistan, there is no such legitimate target category as combatants. The only two categories which could be considered as a legitimate target are: an insurgent which by direct participation in hostilities lost his or her protected status of civilian, or an insurgent who lost his or her protected status because he or she belongs to an armed group or dissident forces.

4.3.1.2 DIRECT PARTICIPATION IN HOSTILITIES

United Nations Assistance Mission in Afghanistan (UNAMA) uses a definition of “civilian” that reflects the standards of international humanitarian law. For the purposes of the conduct of hostilities “civilians” are understood, under international humanitarian law, to mean all persons who are not members of military/paramilitary forces or members of organized armed groups who have a continuous combat function, of a party to a conflict. Civilians may lose their protection against attacks for such time as they take a direct part in hostilities. A person who is a member of a military/paramilitary force or of an organized armed group and who is hors de combat (wounded, sick, shipwrecked, detained or surrendering) or who belongs to the medical or religious personnel of the armed forces must be protected from attack.⁶⁶²

⁶⁵⁹ N. Melzer, *Targeted...*, *op. cit.*, p. 81.

⁶⁶⁰ Article 23(b) of the Annex to Hague Convention IV of 1907 (Convention Respecting the Laws and Customs of war on Land) stated that it was forbidden “to kill or wound treacherously individuals belonging to the hostile nation or Army.” Articles 37 and 44 of Additional Protocol I prohibit the perfidious killing or wounding of enemies.

⁶⁶¹ Art 51. 3 AP I., art 13.3 AP II

⁶⁶² UNAMA, UNHCHR Afghanistan, *Annual report 2013 Protection of civilians in armed conflict*, p. xv available at http://unama.unmissions.org/Portals/UNAMA/human%20rights/Feb_8_2014_PoC-report_2013-Full-report-ENG.pdf

In an armed conflict such as in Afghanistan, insurgents deliberately do not distinguish themselves from the civilian population. It is clearly not a new phenomenon, but in contemporary non-international armed conflicts it is the rule rather than the exception. In modern war the line between civilians and combatants tends to become blurred. Insurgents who take up arms at night may be peaceful farmers during the day. When civilians participate directly in hostilities, humanitarian law suspends their protection. In particular, they may be attacked and they need not be considered when trying to minimize harm to civilians.⁶⁶³

Firstly, what distinguishes a protected civilian from a lawfully targeted insurgent in non-international armed conflicts is a notion of direct participation in hostilities. Humanitarian law is clear in this respect; civilians are protected against attack “unless and for such time as they take direct part in hostilities.”⁶⁶⁴ According to the ICRC commentaries, direct participation in hostilities is a “direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where activity takes place”.⁶⁶⁵ This causal relationship exists when acts are “intended to cause actual harm to the personnel and equipment of the armed forces”.⁶⁶⁶ Some examples include taking up arms or otherwise trying to kill, injure or capture enemy personnel or destroy enemy property. Also, civilians serving as lookouts, guards or intelligence agents for military forces may be considered to be directly participating in hostilities.⁶⁶⁷ Nevertheless, even such obvious examples may raise doubts during a non-international asymmetric conflict. Is a 10- year-old villager observing NATO convoys and communicating that fact to Taliban cells a legitimate target?

An interesting case-by-case approach was presented by the Israeli Supreme Court in the Targeted Killing case. The court found that, in each case certain cumulative requirements have to be fulfilled: “1) information regarding the identity and activity of a person providing a legal basis for his/her targeting must be thoroughly verified; 2) even legitimate military targets cannot be attacked if less harmful means, such as arrest can be employed; 3) after each targeted killing a retroactive, thorough and independent investigation must be conducted regarding the precision of identification of the target and the circumstances of the attack and

⁶⁶³M Schmitt, *Deconstructing direct participation in hostilities: the constitutive elements*, New York Journal of International Law and Politics, 2010, p. 702.

⁶⁶⁴ Art 51. 3 AP I., art 13.3 AP II, Rule 6 of the Customary law study.

⁶⁶⁵ Y.Sandoz, Ch. Swinarski, B. Zimmermann, *AP I Commentary*, 1987, p. 1679

⁶⁶⁶ Y.Sandoz, Ch. Swinarski, B. Zimmermann, *op.cit.*, p. 1942

⁶⁶⁷ M Schmitt, *op.cit.* p. 705.

any collateral damage must withstand the proportionality test”.⁶⁶⁸ Additionally, the court stated that “the following cases should also be included in the definition of taking “direct part” in hostilities: a person who collects intelligence on behalf of armed forces, whether on issues regarding the hostilities, or beyond those issues; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, but rather an indirect part in the hostilities. The same is the case regarding a person who aids unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid.”⁶⁶⁹ This also holds true for persons who distribute propaganda supporting those unlawful combatants.⁶⁷⁰

In May 2009, the International Committee of the Red Cross published its ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’.⁶⁷¹ The ICRC proposed constitutive elements of direct participation. According to the guidance, the act must be likely to adversely affect the military operations and capacity of a party to an armed conflict.⁶⁷² There must be a direct causal link between the act and the harm, that involves one causal step between the action and the harm, and the act must be specifically selected to directly cause the required threshold of harm to a party in the conflict.⁶⁷³ As a result of this kind of approach, those who build improvised explosive devices (IEDs) fail to meet the ICRC test, because unlike the insurgents who plant the device, they do not cause the harm within “one causal step”.⁶⁷⁴ This “one causal step” approach additionally excludes from targeting all individuals engaged in the general war effort, such as logistic, intelligence collecting and similar activities.

This approach seems to be extremely strict and difficult to apply in practice and therefore could be seen as highly disputable. This is because the aim of the principle of distinction is to protect the civilian population. When the criteria of identifying protected

⁶⁶⁸ HCJ 769/02 Pub. Comm. Against Torture in Israel v. Governemnt of Israel (Targeted Killings)- §40, 60

⁶⁶⁹ HCJ 769/02 Pub. § 35.

⁶⁷⁰ HCJ 769/02 Pub. § 35.

⁶⁷¹ M Schmitt, *op. cit.* p. 698.

⁶⁷² M Schmitt, *op. cit.* p. 712.

⁶⁷³ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 51, 53 (2009).

⁶⁷⁴ G. Sitaraman, *op.cit.*, p. 1785

groups are unclear, those who need the protection may lose it. As Michael Schmitt says, “suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to endanger disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible - in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted. Although it might seem counter-intuitive to broadly interpret the activities that subject civilians to attack, in fact, doing so is likely to enhance the protection of the civilian population as a whole”.⁶⁷⁵ This less restrictive interpretation of the targeting process would allow the targeting of objects that, indirectly but effectively, support and sustain the enemy’s war fighting capability.⁶⁷⁶ In this scenario, targeting a person who produces IEDs would be legitimate.

This understanding of the commentary seems to go beyond the ICRC’s intention. The ICRC position was presented by Cassese. He supports the view that the scope of direct participation in hostilities should be restricted to actual engagement of civilians in combat as well as open carrying of arms during military deployments. According to Cassese, civilians may not be targeted when planning or preparing an attack or after committing it.⁶⁷⁷ This seems to be along the lines of the Red Cross interpretation; however Cassese presents an interesting mixture of HRL and IHL. In regard to Palestinian suicide bombers “who are far from openly carrying weapons”, infiltrating Israel “with intent on concealing explosives on their body”, he states that “it would be preposterous to require that Israelis open fire against such Palestinians only if they carry their explosives openly”.⁶⁷⁸ In his discussion, Cassese turns to the human rights standards applied by the European Court of Human Rights and concludes that targeted killing may be justified when Israeli authorities, once seeing a suspected suicide bomber, call him to a summon and if not receiving any response, may open fire against him or her. Similarly, authorities may open fire when there is no time for such summons and accumulatively when it is manifested that a person is concealing explosives on his or her body.⁶⁷⁹ Cassese avoids referring to the notion of direct participation governed by the IHL. He refers to a notion of absolute necessity and proportionality under HRL.

⁶⁷⁵ M Schmitt, *op. cit.* p. 738.

⁶⁷⁶ M Schmitt *The Principle of discrimination, op. cit.* p. 149.

⁶⁷⁷ A. Cassese, *Expert Opinion on Israel’s Targeted Killing*, p. 19-20, available at <http://www.stoptorture.org.il/files/cassese.pdf> (8/11/11)

⁶⁷⁸ A. Cassese, *Expert, op.cit.* p. 9 pt 16

⁶⁷⁹ A. Cassese, *Expert, op.cit.* p. 9 pt 16-17

Consequently, he finds a civilian who poses a threat not as an individual who directly participates in hostilities i.e. a legitimate target under IHL, but as a civilian who, by his actions comparable with military attack, is a target under human rights standards. This reasoning has one important flaw. In an armed conflict situation governed by IHL, Cassese brings human rights law type targeting principles. He excludes persons who directly participate in hostilities, though not openly, from military targeting. Such reasoning is contrary to the far more liberal approach supported by the IACiHR Report on Colombia which states “that civilians may become subject to direct attack when they prepare for, participate in, and return from combat.”⁶⁸⁰ Cassese’s position may lead to a lack of balance between the parties of engagement in Israel for example; i.e. one party of the conflict may be targeted all the time i.e. civilians and combatants⁶⁸¹ whereas the other party may be targeted under strict regulations of both IHL and HRL.

In the more liberal approach, direct participation in hostilities is understood as a conduct that functionally corresponds to the governmental armed forces. It includes planning, organizing, recruiting and logistics.⁶⁸² A proposal to extend the notion of direct participation to the general war effort, without direct connection to the hostilities, seems to go beyond what conventions and custom in international law permits.⁶⁸³ This extensive approach allows for the targeting almost everyone in the asymmetric non-international armed conflict battlefield.

Taking into consideration all of the above approaches, the most persuasive view is that civilians who take part directly in hostilities on a sporadic, unorganized basis may be subject to direct attack when they prepare for, participate in, and return from combat. However, they regain protection against attack in intervals between specific hostile acts during non-international armed conflicts. Civilians may not be targeted when they are engaged in support activities, which do not directly harm the adversary.⁶⁸⁴ Consequently, a person may be a subject of targeted killing only when directly engaged in hostilities. Activities such as

⁶⁸⁰ Nils Melzer 337, IACiHR Report Colombia Chapter IV § 53. <http://www.cidh.oas.org/DefaultE.htm>

⁶⁸¹ According to the relevant Fatwa all Israeli citizens are considered as a military target because they serve, served or going to serve in IDF. For example Sheik Qaradawi justified such operations when the targets were civilians, reasoning that “the Israeli society is militaristic in nature. Both men and women serve in the army and can be drafted at any moment. On the other hand, if a child or an elderly person is killed in such an operation, he is not killed on purpose, but by mistake, and as a result of military necessity. Necessity justifies the forbidden”. Vide Muhammad Munir, *Suicide attacks and Islamic law*, ICRC Law Review, Vol. 90, 869, p. 75

⁶⁸² N. Melzer, *Targeted...*, *op. cit.*, p. 338.

⁶⁸³ N. Melzer, *Targeted...*, *op. cit.*, p. 341.

⁶⁸⁴ N. Melzer, *op. cit.*, 337.

planning, organizing, recruiting are excluded from the possibility of employing targeted killing toward individuals during non-international armed conflict.

The situation looks different when speaking of insurgents, who are members of armed groups. In such situations, insurgents in a non-international armed conflict need to fulfil the criteria set out in Art 1 of AP II for being recognized as dissident armed forces or organized groups. This article states that insurgents need to be “(...) under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. According to the ICRC commentary, “the existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to regular forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other hand, of imposing discipline in the name of the facto authority”.⁶⁸⁵ This argumentation supports a broad interpretation of direct participation in hostilities and possibility of targeting individuals as long as they are members of armed groups. Members of armed groups (such as terrorists or insurgents) whose function is to commit a chain of hostile acts, being civilians, lose their protection for as long as they assume that function, and they may be attacked directly even in the intervals between hostilities.⁶⁸⁶ This approach is supported by the ICRC commentary on Art 13 AP II.⁶⁸⁷ It provides: “those who belong to armed forces or armed groups may be attacked at any time”. It means that a particular individual, member of an armed group, is no longer protected by humanitarian law. States practice indicates that it is a common approach.⁶⁸⁸ Governmental forces do not hesitate to directly attack insurgents regardless of whether they are or they are not engaged in a military operation. These attacks are neither denied nor internationally condemned as long as they do not lead to excessive collateral damage.⁶⁸⁹ States’ practice and interpretation of the ICRC Commentary suggest that, in terms of the principle of distinction, members of

⁶⁸⁵ ICRC Commentary Art. 1, APII § 4463

⁶⁸⁶ N. Melzer, *Targeted*, *op. cit.*, p. 33.

⁶⁸⁷ Art. 13. 3 3. “*Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities*”.

⁶⁸⁸ South East Asia 1960’ and 70’, Central America 80’, Colombia, Sri Lanka, Uganda, Chechenya, Sudan vide N. Melzer, *Targeted...*, *op. cit.*, p. 317. Afghanistan, Iraq (author).

⁶⁸⁹ N. Melzer, *Targeted...*, *op. cit.*, p. 317

organized armed groups belonging to a non-state party are not protected as civilians.⁶⁹⁰ Their status is equivalent to organized state armed forces.⁶⁹¹

Additionally, Melzer presents a convincing list of criteria which needs to be cumulatively fulfilled during non-international armed to make targeted killing allowed under IHL. These are as follows: “a) it has to constitute an integral part of conducting hostilities, b) it has to contribute effectively to achievement of a concrete and direct military advantage without having an non-lethal alternative, c) it has to be directed against an individual not entitled to protection against direct attack, d) it has to not be expected to inflict incidental death, injury or destruction on person and objects protected against attack that would be excessive in relations to the concrete and direct military advantage anticipated, e) it has to be planned and conducted so to avoid erroneous targeting, as well as to avoid, and in any event minimize, the incidental infliction of civilian death, injury or destruction, f) it has to be suspended when targeted individual surrenders or otherwise falls *hors de combat*, g) it has not to be conducted by the undercover forces feigning non-combatant status or otherwise by resort to perfidy, h) it has not be conducted by resort to poison, expanding bullets or other prohibited weapon and must respect restriction imposed by IHL on booby-traps and other devices“.⁶⁹²

In the Afghanistan conflict’s reality, it is allowed to come to the conclusion that the following categories of persons may be considered as legitimate targets. They are as follow; Taliban forces, Haquani network and Hekmatyar HiG.⁶⁹³ It may be considered problematic to target individuals who represent the political interests of these organizations. This is because political activity does not constitute an integral part of conducting hostilities. As far as it is known, only Hekmatyar’s organization has built its political wing, present *inter alia* in Kabul. Hekmatyar’s political wing differentiates itself from Taliban leaders from Queta in Pakistan by the fact that they do not play any military role. On the contrary, the Taliban leadership primarily plays a military role and as such may be targeted. Members of these groups are no longer considered to be civilians but rather are seen as members of organized groups of a party to the conflict in Afghanistan.

⁶⁹⁰ Organized groups were commonly attacked in most non international armed conflicts such as Colombia, Sri Lanka, East Timor, Afghanistan and Chechenya to mention only the few.

⁶⁹¹ N. Melzer, *Targeted...*, *op. cit.*, p. 317

⁶⁹² N. Melzer, *Targeted...*, *op. cit.*, p. 426-427.

⁶⁹³ Detailed description of military groups in Afghan conflict in Chapter II

In Afghanistan, however, there is a group of individuals who are not members of armed or dissident forces. They participate in hostilities on a sporadic, irregular basis - so called part-time Taliban. They participate in hostilities when they are paid or when they are obliged to do so by family or tribal relations. In this case, what makes them a legitimate target is their direct participation in hostilities. So as long as they prepare for, participate in, and return from combat, they may be considered as legitimate targets. All individuals even sporadically engaged in the planning or production of IEDs are to be considered to be legitimate targets. It is so when the planting or production of IEDs constitutes a part of direct participation in hostilities.

Targeted killing follows the idea of proportionality. Direct hitting of suspected insurgents allows for the limiting of possible collateral damages. It seems that despite mistakes that may occur, the policy of targeted killing remains an effective tactic during counterinsurgency operations.⁶⁹⁴ However, the modern counterinsurgency approach formulates an assumption that there is a necessity to strike a balance between lethal and non-lethal methods. This approach suggests that lethal force should be used against insurgent leaders. In case of other persons who could otherwise be considered as lawful targets under IHL such as community leaders or moderate insurgents, a different approach should be applied such as negotiations and non-lethal means.⁶⁹⁵

4.3.1.3. *PROVINCIAL RECONSTRUCTION TEAM (PRT)*

The establishment of PRTs by the Coalition forces in Afghanistan, as was mentioned previously, has blurred the lines between the role and objectives of political and military players on the one hand and humanitarian players on the other, creating serious problems for an organization such as the International Committee of the Red Cross (ICRC).⁶⁹⁶ On the other hand, PRTs are often the only possible way of rebuilding the country and bringing in money for development. NGOs are not able to operate in the most volatile districts in Afghanistan or even in Kabul due to security reasons.⁶⁹⁷

⁶⁹⁴ Col P. M. Cullen, *op. cit.* p. 8.

⁶⁹⁵ COIN manual, *op. cit.*, 5-30, table 5-8.

⁶⁹⁶ P. Krähenbühl, *The ICRC's approach to contemporary security challenges: A future for independent and neutral humanitarian action*, ICRC Reiview 2004, Vol. 86, p.

⁶⁹⁷ Such as Polish Humanitarian Organisation Foundation
http://www.pah.org.pl/m/502/2009_raport_merytoryczny.pdf (10.09.2013)

PRTs are considered as a means to extend the reach and enhance the legitimacy of the central government. They usually consist of 50 to 300 troops and representatives of development and diplomatic agencies.⁶⁹⁸ In secure areas, PRTs maintain a low profile, whereas in more volatile areas, PRTs work closely with combat units and the local government.⁶⁹⁹ In every case, PRTs activities embrace security sector reform, building local governance, reconstruction and development.⁷⁰⁰

The question of the legality of PRTs is important. PRTs focus their humanitarian activity on the civilian population. PRT effort is included in the military structure. Personnel engaged in these projects wear uniforms and are under a military chain of command and responsibility. These projects are orientated toward a military (politically motivated) gain. As such, their activities blur the line between what is and what is not military action and may affect the principle of distinction.

As was established in Chapter II, the conflict in Afghanistan is not international. As a result, common Art. 3 and AP II are applicable.⁷⁰¹ Customary humanitarian principles are applicable as well. However it is difficult to establish a legal framework for PRT activities. This is because it is a new invention, not regulated by humanitarian law. To address the legal ramifications of PRT from the perspective of the principle of distinction, it is necessary to refer to the already existing humanitarian law norms. Common article 3 says little about the principle of distinction.⁷⁰² However, it does state that “in the case of armed conflict not of an international character (...) each party to the conflict shall be bound to apply, as a minimum, the following provision; “Persons taking no active part in the hostilities, (...) shall in all circumstances be treated humanely”.⁷⁰³ The lengthy definition of expressions such as "humane treatment" or "to treat humanely" is unnecessary, as they have entered sufficiently into current parlance to be understood.⁷⁰⁴ So humanitarian projects run by military forces may be considered as being correspondent with the common Art. 3. Similarly, AP II also states the

⁶⁹⁸ COIN manual, *op. cit.*, 2-12, par. 2-51.

⁶⁹⁹ COIN manual, *op. cit.*, 2-12, par. 2-51.

⁷⁰⁰ COIN manual, *op. cit.*, 2-12, par. 2-51

⁷⁰¹ Afghanistan ratified AP II as most of the ISAF countries. There are 27 PRTs. Most of them are run by the European countries which ratified APII

⁷⁰² J. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, IRRC, Vol. 85/850/2003, p. 313-320

⁷⁰³ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. 75 U.N.T.S. 31, entered into force Oct. 21, 1950

⁷⁰⁴ ICRC Commentary on GC I, p. 53, <http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument>

principle of humanitarian treatment by Art 4.⁷⁰⁵ What is more, Art. 4.3 states that children shall be provided (...) (a) education. This corresponds to the PRTs' activity in terms of building schools and providing relevant educational materials such as books. Treaty law do not forbid the PRT activities, consequently we may assume that their activities are legal.

The analysis becomes more complicated if we try to look at the legal constraints of the PRT's activity from the perspective of the principle of distinction. It is particularly important when there is a necessity for referring to the PRT's major infrastructure works such as school or hospital, roads and similar projects.

AP II has little to say about the principle of distinction in terms of military objectives. In this respect, customary law is more specific. Rule 8 says: "In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage".⁷⁰⁶ This definition of military objectives is currently widely accepted.⁷⁰⁷

PRT's effort is an intrinsic part of counterinsurgency and constitutes an effective contribution to the military effort, in the sense that it enhances the likelihood of success. Every school, every road and every hospital built by the PRT forms part of the military counterinsurgency measures. It is a part of a battle for "hearts and minds". It is smart, it is pragmatic, but it is still warfare; especially that PRTs are responsible not only for the construction of civilian orientated buildings but also buildings which are police or military in nature such as a police academy in Nuristan Province.⁷⁰⁸ In some respects, it resembles the situation of Israel in occupied territories. Building an infrastructure of governance increases governmental control over the contested territory. Although the infrastructure is civilian, the results are military and they constitute a response toward insurgency.⁷⁰⁹ So the question is; whether military built objects are military objectives?

⁷⁰⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

⁷⁰⁶ ICRC Customary rules index - http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8

⁷⁰⁷ ICRC Customary rules index - http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8

⁷⁰⁸ Army Staff Sgt. G. Caligiuri, *Nuristan PRT brings professional training to ANP*, available at http://www.blackanthem.com/News/Allies_20/Nuristan_PRT_brings_professional_training_to_ANP5055.shtml, visited 24/11/2011.

⁷⁰⁹ G. Swiney, *Saving Lives : the Principle of Distinction and the Realities of Modern War*, The International Lawyer, vol. 39 , 2005, p. 754.

There are two possible ways of qualifying PRT projects in legal terms. The first option is that we will consider the status of schools, and other community orientated constructions, by analysing where the money comes from. As a result, every NATO PRT sponsored activity could be considered as a military one because, by winning hearts and minds, it achieves the aim of counterinsurgency and makes an effective contribution to military action. This approach may be supported by the gen. Petraeus position presented in COIN manual. According to him “all operations have an intelligence (military) component. All soldiers and marines collect information whenever they interact with the populace. Operations should therefore always include intelligence collection requirements.”⁷¹⁰ As a result, every PRT military member contributes to the general military effort of the governmental party.

The second option is to accept PRT activity as civilian in character and exclude their projects from being considered as legitimate targets for insurgents. PRT staff are included in the military chain of command and responsibility. They wear uniforms and a distinctive sign. They are protected by a military escort. While performing their tasks, they are a legitimate target. But when their task is finished, a school or a road which was built by them becomes a civilian object which is protected by the humanitarian law.⁷¹¹

Nowadays, there is no alternative to military-sponsored aid. Impartial NGOs are not able to rebuild the country. Their activity is often not coordinated and they lack proper funding. This constitutes a broader problem. In Afghanistan it is extremely difficult to find any institution or organizations which are non-governmental and impartial. Even the UN is not impartial. It is aligned with one set of belligerents and does not act as an honest broker in ‘talking peace’ to the other side. They are an advocate for humanitarian principles and impartial humanitarian action and at the same time they act as the main interlocutor on reconstruction and development issues with the government and the Coalition forces.⁷¹² A similar situation applies to NGOs.

PRTs are part of the counterinsurgency effort. Their actions may affect the principle of distinction but there is little choice. Only governments are able to provide the amount of money which significantly changes the situation in places like Afghanistan - and only

⁷¹⁰ COIN manual *op cit.*, p. 3-1, par 3-4.

⁷¹¹ It is also disputable. For insurgents destruction of the school offers a definite military advantage when hearts and minds or terrorizing of the local community is at stake.

⁷¹² A. Donini – *Between a rock and a hard place: integration or independence of humanitarian action?* ICRC Review, vol. 93, March 2011, p. 152.

governments are able to provide some form of protection to PRT specialists. In asymmetric, non-international armed conflicts, PRTs are a necessary element.

Of course, PRT projects need to be developed not only from the perspective of the legal qualification, but also from the perspective of practical functioning. In general, I praise the PRT idea but it is not free of flaws. PRTs often face the common constraints; for example, infrastructure projects may be executed only during warm months.⁷¹³ Often appropriated financial sources are not transferable for the next year. Then the PRT's activity becomes limited only to the small projects, even if sources for long-term projects such as schools, medical facilities, or routes would be more appropriate. Unfortunately, in Poland limitations of legal and procedural nature mean that a PRT project needs to be written, accepted, passed in due time to the public competitive bidding law, realized and delivered within a calendar year (budget year) – and we speak about projects realized often in distant localities, in the country torn apart by the armed conflict. Such obstacles exist unfortunately and not only within the Polish forces' legislation. Additionally, the PRT staff are subjected to the same rotation as the regular troops (six months deployment), so it is difficult to keep continuity of the planned actions. Those constraints concern all ISAF troops. What is more disturbing is the lack of coordination of activities between different PRTs and between PRTs and NGOs. Additionally, local counter partners and contractors are not always able to perform their contracts for security and safety reasons, or are simply unreliable. On the other hand, investments channelled throughout PRTs are of the utmost importance, because they are orientated on state building in Afghanistan. One cannot forget that the main Taliban presence indicator is the creation of the parallel administrative system, with their own quasi governor, Shura, and social support.⁷¹⁴ From that perspective, PRTs are a very important aspect of counterinsurgency and an element of the *ius post bello* approach.

4.3.2 THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality requires that losses resulting from a military action should not be excessive in relation to the expected military advantage.⁷¹⁵ An undue focus on the military objective might lead to the ignoring of civilian casualties or regard them as an

⁷¹³ During the winter months it is impossible to do any construction works.

⁷¹⁴ Ghaith Abdul-Ahad, *Face to face with the Taliban*, article available at www.guardian.co.uk/world/2008/dec/14/afghanistan-terrorism/prin. (09.10.2013)

⁷¹⁵ *The manual of the law of armed conflict – UK Ministry of Defence*, Oxford 2004, p. 25

unfortunate accident occurring in the course of legitimate military activities. The principle of proportionality counters this tendency by requiring a constant weighing of military and humanitarian values.⁷¹⁶ It was set out by the Additional Protocol I in two different references.⁷¹⁷ Art 51 (5) (b), that commanders should “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.⁷¹⁸ Additionally, “an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.⁷¹⁹ The principle of proportionality was explained by the ICTY in Galić case where the court concluded that: “the practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack”.⁷²⁰

There are two issues to be addressed. The first is whether the principle of proportionality is applicable during non-international armed conflict. The second how human

⁷¹⁶ J. Fenrick, *Attacking the enemy civilian as a punishable offense*, Duke Journal of Comparative and International Law, vol. 7, 1997, p. 545.

⁷¹⁷ *The manual of the law of armed conflict – UK Ministry of Defence*, op. cit. p. 25.

⁷¹⁸ AP I art. 57 (2) (a) (iii) i (b)

⁷¹⁹ AP I art. 57 (2) (b)

⁷²⁰ Prosecutor v *Galic*, Case No. IT-98-29-T, Judgment, par. 58 available <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>

rights supplement the principle of proportionality during NIAC. As to the LOAC, there is no reference to the principle of proportionality in treaty law regulating non-international armed conflict i.e. common Artt. 3 and AP II. The ICRC study on customary law says that “launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited”⁷²¹. However, state practice in fact seems to be contrary to the ICRC study⁷²², while the *opinio iuris* is inconclusive. The excessive use of close air strikes supported during the initial stage of the operation in Afghanistan by the coalition forces led by the US, may be used as an example of an action contradictory to the ICRC customary principle 14. It could be argued that the principle of proportionality was not established as a state practice. It seems that wise counterinsurgency thinking is better for the protection of a civilian population than vague customary rules. When Gen. Stanley McCrystal was in command over ISAF and OFE forces, he changed the approach of foreign forces toward insurgents. In August 2009, he wrote about a need of “protecting the Afghan people, understanding their environment, and building relationships with them”.⁷²³ This way of thinking quickly brought results in limiting collateral damage amongst the civilian population. Limitation of collateral damage even beyond the requirements of the alleged principle of proportionality is of great value during a counterinsurgency operation. In conventional engagement, if military forces are facing a hundred opponents, and twenty are killed, then they can assume that eighty are left. In counterinsurgency, this logic does not hold: the 20 killed may have 40 relatives who are now in a blood feud with security forces and may feel obligated to take revenge. So the new number of the enemy is not 80 but 120.⁷²⁴

Of course, collateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons. Despite an obligation to avoid locating military objectives within or near densely populated areas, to remove civilians from the vicinity of military objectives, and to protect their civilians from the dangers of military operations, it is often not

⁷²¹ Rule 14

⁷²² Vide argumentation presented in ICRC customary law – rule 14 state practice.

⁷²³ R. Barber, *The proportionality equation: balancing military objectives with civilian lives in the armed conflict in Afghanistan*, Journal of Conflict & Security Law, 2010, p. 158.

⁷²⁴ D. Kilcullen, *Counterinsurgency*, London 2010, p. 57.

feasible.⁷²⁵ Such a situation often occurs in Afghanistan. In most cases, insurgents operate in populated areas. As a result of governmental or NATO troops response, collateral damage is often unavoidable. When certain conditions are fulfilled, collateral damage is lawful during the war, yet there are ways to limit the damage. During the counterinsurgency operation in Afghanistan, some commanders have managed to provide a better standard of protection than the one granted by humanitarian law.

As the COIN Manual states; “In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained. But in COIN operations, [military] advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained. In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape”.⁷²⁶

Of course in modern armed conflicts, smart weaponry has increased the options available to the military commanders.⁷²⁷ There is a general expectation that NATO weaponry will be more precise than that used by insurgents. Some types of precise weaponry are simply not available to insurgents. As mentioned above the protection of the civilian population is central to the counterinsurgent's strategy. Attacks resulting in collateral damage are not likely to gain popular support for the counterinsurgent. Even attacks that kill only insurgents may have the effect of sparking protests, creating the desire for vengeance by family members or tribal relatives, and fuelling the insurgency further. The counterinsurgency approach modifies the notion of "concrete and direct military advantage anticipated".⁷²⁸ In the long term, a situation of concrete and direct military advantage is not the destruction of a particular object or killing insurgents but the provision of peace and stability.

As a result, a counterinsurgent might interpret proportionality in a different manner. Not as the classical equation of military benefits versus humanitarian costs, but rather as a cost benefits analysis in which humanitarian and strategic interests operate on both sides of

⁷²⁵ J. Fenrick, *Attacking the enemy civilian as a punishable offense*, Duke Journal of Comparative and International Law, vol. 7, 1997, p. 547.

⁷²⁶ COIN Manual p. 7.32, For example, Aryn Baker, *Why Obama's Afghan War Is Different*, Time magazine, available at www.time.com/time/world/article/0,8599,1908724,00.html?xid=rss-fullworld-yahoo (09.10.2014)

⁷²⁷ *The manual of the law of armed conflict, op. cit.*, p. 25

⁷²⁸ G. Sitaraman, *Counterinsurgency, the war on terror, and the laws of war*, Virginia Law Review, vol. 95, 2009, p. 1790

the scale.⁷²⁹ In such a scenario, proportionality in counterinsurgency is likely to be more humanitarian in its orientation than proportionality in traditional, conventional warfare.

As to the human rights application and its relation to the principle of proportionality, the counterinsurgency approach modifies LOAC interpretation of this principle. COIN seems to resemble human rights approach. The IHRL approach does not divide combatants and civilians or civilians who lost their protected status. It rather stresses the value of every human life and the extraordinary character of killing people in the course of action. But leaving aside the relevancy of combatants' or participants' lives in an armed conflict, it could be argued that the principle of proportionality under IHRL is stricter than under IHL regime, because it requires reducing casualties to minimum whereas humanitarian law sets up the prohibition of excessive incidental or collateral damage.⁷³⁰ But even the strict approach under IHRL does not imply that "incidental damages" are not acceptable. European Court of Human Rights jurisprudence confirms that the means necessary to fight insurrection are not the same as for the quelling of a riot.⁷³¹ Interesting in terms of coexistence IHRL and IHL in counterinsurgency operations is understanding of principle of proportionality delivered in *Ergi v Turkey*.⁷³² In this case, the court said that any anti terrorist operation planned by Turkish authorities should seek to avoid or minimise the loss of lives of villagers caused not only by the Turkish forces, but also by the fire power of the PKK members caught in the ambush. This approach modifies the classical IHL interpretation that each belligerent is responsible for the damage to civilians caused by its own forces.⁷³³

4.4 ISSUE OF CIVILIAN COMPENSATION

The issue of compensation constitutes another challenge to non-international asymmetric conflicts. Civilians are often harmed when, lawfully or unlawfully under IHL, military operations are conducted. They also get injured in typical incidents such as car accidents, incidental destruction of property or destruction of the local environment which constitutes a part of war's reality. In a counterinsurgency, these losses are particularly difficult

⁷²⁹ G. Sitaraman, *op.cit.*, p. 1790.

⁷³⁰ ⁷³⁰ A. Gioia, *The role of the European human rights in monitoring compliance with humanitarian law in armed conflict*, (in:) *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Naftali, Oxford University Press, 2011 p.231

⁷³¹ A. Gioia, *ibidem*, p.231

⁷³² Case of *Ergi v. Turkey*, (66/1997/850/1057) available <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58200>, provided by A. Gioia, *ibidem*, p.231

⁷³³ A. Gioia, *ibidem*, p.231

to accept. Winning “hearts and minds” of the local population is one of the key strategies of successful counterinsurgency, which obliges parties to the conflict not only to conduct military operations according to the rules of law, but also to compensate losses which are a result of it. It may be argued that this obligation goes beyond the one put down by humanitarian law and follows Gen Petraeus’ statement that “money is my most important ammunition in this war”.⁷³⁴

In this sub-chapter, I shall present the legal framework of a compensation policy during international and non-international armed conflict. Further, I will refer to two existing legal problems. The first one considers whether legal regulations governing compensation refer to non -international armed conflicts. The second problem is the question of whether compensation regulations apply to situations where there has been no violation of IHL.

Finally, ISAF and the US regulations toward compensating the civilian population in Afghanistan as a part of counterinsurgency efforts will be presented. Civilians harmed during an armed conflict have a right to compensation or other remedies for their losses.⁷³⁵ Art. 57 of Additional Protocol I says that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”. Additionally, Art. 57. 2 says “with respect to attacks (...) those who plan or decide upon an attack shall (ii) take 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 or civilian life, injury to civilians and damage to civilian objects”. Similarly, Art. 58 API “the Parties to the conflict shall, to the maximum extent feasible: (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”

These regulations oblige parties to the international armed conflict to do everything to limit unnecessary destruction. If a state fails to avoid destruction or injury then it is obliged to

⁷³⁴ <http://usacac.army.mil/cac2/call/docs/09-27/intro.asp>

⁷³⁵ G. Sitaraman, *op. cit.* p. 1790

pay compensation. It is a well-established rule in a treaty law⁷³⁶ and in the doctrine. This principle was confirmed by the Permanent Court of International Justice in the *Chorzów Factory case* in 1928. The Court stated that “it is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation (...) Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself”.⁷³⁷ When any destruction or injury occurs during an international armed conflict, then according to the AP I art. 91, “a Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces”. The normative framework of these articles refers to the “general principle of international law”.⁷³⁸ Such compensation is due only when both violation of law and loss or damage have occurred.⁷³⁹ According to the ICRC commentary, the responsibility covers “all acts committed by members of the armed forces of a Party to the conflict, and not only unlawful acts (or omissions conflicting with a duty to act) in the sense of the Conventions and the Protocol.”⁷⁴⁰ In this respect, states are responsible for all types of internationally wrongful acts⁷⁴¹ as well as omissions of its organs.⁷⁴²

The commentary also refers to the legal principle known as “no-fault” or “strict liability”; i.e., a concept of objective responsibility or liability which enters into play simply on the ground that an act or omission took place in the territory or under the jurisdiction of the State.⁷⁴³ As ICRC commentary argues, it seems possible that a party to the conflict could be liable to pay compensation even in the case where no particular violation of the rules of the Conventions and the Protocol, or of another rule of the law of armed conflict, has occurred. Such a liability could arise when the act or omission took place in the territory or under the jurisdiction of the State. However, such a liability could not be based on the Art. 91 AP I.⁷⁴⁴

⁷³⁶ 1907 Hague Convention (IV) art. 3 “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces”.

⁷³⁷ PCIJ, *Chorzów Factory case*, vol. II. Ch. 42, § 102.

⁷³⁸ ICRC Commentary on IHL, par. 3654.

⁷³⁹ ICRC Commentary on IHL, par. 3655.

⁷⁴⁰ ICRC Commentary on IHL, par. 3661.

⁷⁴¹ ICRC Customary Study, rule 149, p. 1. http://www.icrc.org/customary-ihl/eng/print/v1_rul_rule149

⁷⁴² ICRC Customary Study, rule 149, p. 2

⁷⁴³ ICRC Commentary on IHL, par. 3661.

⁷⁴⁴ ICRC Commentary on IHL, par. 3661.

To summarize, in situations governed by the Conventions and the API there is an obligation to compensate a victim of the wrongful act. Whereas, when IHL regulations and particularly the principle of proportionality in targeting are applied, the attacking army has no further responsibilities to civilians.⁷⁴⁵

The situation is different in a conflict regulated by common Art. 3 and AP II. Neither of these regulations addresses the issue of compensation. The only source of law may be found in customary rules. However, it could be questioned whether ICRC study provides a convincing argumentation. In this respect, particularly rule 149 states that “A State is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces; (b) violations committed by persons or entities it empowered to exercise elements of governmental authority; (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct”⁷⁴⁶. It means that according to ICRC, state practice establishes this rule to violations committed in both international and non-international armed conflicts. States’ practice is based on military manuals.⁷⁴⁷ It is a confusing argumentation since it seems that regulations in most manuals are clearly copied from Art. 91 of API. Additionally, these manuals do not provide information as to when they should be applied, i.e. in an international or a non-international armed conflict. It seems that Art. 91 of AP I was literally copied to the most of military manuals without necessary division on situations govern by the law of NIAC and IAC. As such, it is difficult to argue that principle of compensation is established as customary rule in non-international armed conflict.⁷⁴⁸

To summarize, in situations governed by the common Art. 3 and AP II, there is no legal obligation upon states to compensate victims of wrongful act under a treaty and customary law. An additional issue is the question of compensation resulting out of lawful operations under IHL. The problem is that treaty law and customs regulate the situation of compensation based, under some circumstances, on the violation of IHL. It does not regulate situations of damage or loss which are the result of lawfully conducted military operations – “strict liability” or “no-fault approach”. In such situations, victims of collateral damage have

⁷⁴⁵ G. Sitaraman, *op. cit.* p. 1791.

⁷⁴⁶ ICRC Customary Study, rule 149.

⁷⁴⁷ State practice – ICRC Customary IHL http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule149

⁷⁴⁸ N. Lamp, *op.cit.*, p. 250.

no remedy against governmental forces. In this respect, following IHL may be argued as contrary to the principle of “winning hearts and minds”. For an average villager it does not matter whether his crops were destroyed in the course of a legitimate action or not. For him, what is crucial is that his crops were destroyed at all.

In contrast, counterinsurgency strategy suggests that compensating civilians who are harmed, injured, or killed during legitimate military operations would actually be a wise tactic.⁷⁴⁹ To address this problem, countries contributing to the military operation in Afghanistan decided to pay relevant compensations but they approach this issue in a twofold way.

In Afghanistan, ISAF has introduced regulations which provide the civilian population compensation for damage. It is a quick and efficient system. It is based on the annex to the NATO regulation called OPLAN – ROE.⁷⁵⁰ It provides a legal basis for the Compensation Office at ISAF HQ in Kabul. The Compensation Office is the appellate organ toward Troops Contributing Nations relevant compensation authorities. This compensation policy is particularly important in everyday situations such as car accidents, destruction of property of small value and similar. This creates a better perception of the ISAF forces and constitutes an example of providing a better standard than the one foreseen by IHL.

US forces have introduced a separate, from ISAF, system of condolence payment - called “solatia”. It is a nominal payment made directly to a victim or the victim’s family to express sympathy, especially when it is compatible with existing local customs.⁷⁵¹ “Solatia” is not considered as compensation or payment based on claims of responsibility. These payments in US forces structure are paid out of the Commanders Emergency Response Program (CERP)⁷⁵² through personal and operational appropriations.⁷⁵³ As the “solatia” payment process is discretionary and decentralized to the level of a particular commander, the procedure is inconsistent and *ad hoc*.⁷⁵⁴ Both systems are examples of compensation regulations which provide better standards to the civilian population than IHL.

⁷⁴⁹ G. Sitaraman, *Counterinsurgency, the war on terror, and the laws of war*, Virginia Law Review, vol. 95, 2009, p. 1791

⁷⁵⁰ OPLAN – Operation Plan, RoE- Rules Of Engagement

⁷⁵¹ G. Sitaraman, *op.cit.* 1792.

⁷⁵² G. Sitaraman, *op.cit.* 1794.

⁷⁵³ G. Sitaraman, *op.cit.* 1792.

⁷⁵⁴ G. Sitaraman, *op.cit.* 1794

Before summarizing, one aspect of the compensation should not be forgotten. As Ganesh Sitaraman says “it seems that compensation policy is aligned with counterinsurgency strategy”. Nonetheless, one must remember that institutionalizing the "responsibility to pay" via direct compensation, may not always be a wise choice. Compensating a family during the conflict may make them an easy target for insurgents who discover their wealth. Compensation policy therefore must be of in-kind, communal or other form which does not turn victims into targets.⁷⁵⁵ Realities of the modern conflict are, however, far from ideal. There are areas where paying compensation in-kind will be a plausible solution. Yet there are areas where it is difficult or impossible, for example to buy live stock. In such cases, one needs to have experience and a vet on board, otherwise there is a risk of buying ill animals and procuring more problems than those encountered by simply providing financial compensation.

The above mentioned observations lead to two *de lege ferenda* conclusions. First of all, it is necessary to unify compensation policy within ISAF and OEF operations. This unification should also take into consideration the idea of responsible policy payments. The choice between in-kind and financial payment needs to be done under careful examination of what may better serve the local community.

Secondly, it is necessary to consider substantive changes in humanitarian law addressing non-international armed conflict. The idea of introducing compensation regulations in case of IHL violations should be taken into account. It may also be arguable to introduce relevant regulation in case of damages resulting out of lawfully conducted operations based on “strict liability” approach. This kind of approach may be seen from two different angles. An argument may be raised that responsibility for lawful military operations may confuse soldiers when they execute ordered operations. Paying compensation based on a “strict liability” principle may limit the operational capabilities of military forces. The counter opinion may be that compensating damages occurring in the course of a legitimate military operation addresses the most humanitarian values. These values are of utmost importance during non-international armed conflicts because these conflicts are internal and usually their aims are different from the international ones. In NIAC stability, state building and peace are the aims. In such cases, compensation based on strict liability may be considered, under some circumstances, as a healing factor desirable from the military perspective.

⁷⁵⁵ G. Sitaraman, *op.cit.* 1796.

Referring to the human rights standards could be particularly interesting. As previously argued, humanitarian law constitutes *lex specialis* toward human rights. In case of a lack of regulations provided by humanitarian law, when it is not contrary to the nature of armed conflict, human rights may be applicable. In situations governed by human rights such as when the police destroy someone's house by mistake or as a result of a lawfully conducted operation, then they are obliged to pay compensation - compensation based on "strict liability" approach.

4.5 LAW OF OCCUPATION VS. IUS POST BELLUM FROM THE PERSPECTIVE OF MODERN COUNTERINSURGENCY

One of the many problems relating to modern counterinsurgency is that it tends to operate in a grey area of international law. Counterinsurgency is often fought on the borders of the law of armed conflict, the law of occupation and the law of peace. It is often conducted within the framework of the nation building or quasi occupation.

To describe this phenomenon of *terra nulla* of international law, the concept of *ius post bellum* was created. It is not a legal concept but derives its name from two existing bodies of law: *ius ad bellum* and *ius in bello*. These bodies of law have been well codified. Yet with the exception of the law of belligerent occupation, neither *ius ad bellum* nor *ius in bello* provide much guidance on temporary interventions after war and before peace.⁷⁵⁶ As Boon says "the illusion that war and peace are absolute, constituting a binary system, has stymied the growth of legal principles in this transitional stage."⁷⁵⁷ It could be questioned whether those who are exercising temporary power have a right or an obligation to reform national laws and institutions. For example, how should ethnic, religious or economic tensions be handled and how would natural resources be dealt with; should they be nationalized or subject to an international scheme?⁷⁵⁸ These questions need to be addressed from two perspectives: From the perspective of an international armed conflict, where occupation takes place, and from the perspective of a non-international armed conflict where a foreign power intervenes on behalf of the government.

⁷⁵⁶ K.E. Boon, *Obligations of the new occupier: the contours of a jus post bellum*, Loyola of Los Angeles International and Comparative Law Review, vol. 31, 2009, p. 58

⁷⁵⁷ K.E. Boon, *op.cit.*, p. 59

⁷⁵⁸ K.E. Boon, *op.cit.*, p. 59

In the case of Afghanistan, both elements are present. At the beginning, the military operation constituted an international armed conflict where parties or a party to the conflict was obliged to fulfil its obligations under the law of occupation.⁷⁵⁹ After the Karzai's government was established, the operation turned into a non-international armed conflict.

In such a situation, the question of occupation is clearly more complex. On the one hand, there is a question of continuity; how long will the occupation last? What if state X enters into the internal conflict of another country directly, without an international phase? Does the international community then have any state building obligations toward that state? These questions are important because there is a striking resemblance between the successful outcomes of modern counterinsurgency, nation building and *ius post bellum*. To be successful in a counterinsurgency (COIN) operation, one has to establish a state as an independent, self-sufficient body. In this respect, nation building and *ius post bellum* are similar to the aim of modern counterinsurgency.⁷⁶⁰

The legal status of the occupier is regulated by the 1907 Hague Regulation (articles 42 – 56). The most relevant Article 43 states: “the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”.⁷⁶¹ This regulation (already in existence for more than a hundred years) reflects the position at that time. The final status of the occupied territory was a matter to be resolved by the parties in a peace treaty. In the meantime, the task of international law was to preserve *status quo*.⁷⁶²

Complementary to the Hague Regulation was the IV Geneva Convention relating to the protection of civilian persons in time of war⁷⁶³ - particularly Articles 27-34 and 47- 48 which refer to the legal obligations of the occupier. These Articles establish a minimum

⁷⁵⁹ G. T. Harris, *The Era of Multilateral Occupation*, Berkeley Journal of International Law, Vol. 24, 2006, p. 2. More on notion of occupied territory vide: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136, p. 78 (July 9) “Territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.”

⁷⁶⁰ D. Kilcullen, *Intelligence, op. cit.*, 148.

⁷⁶¹ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

⁷⁶² Ch. Garraway, *From relevance of jus post bellum: a practitioner's perspective*, p. 153 [In:] C. Stahn, J.K. Kleffner, *Jus post bellum, towards a law of transition, from conflict to peace*, Cambridge University Press, 2008.

⁷⁶³ Y. Dinstein, *The International law of belligerent occupation*, Cambridge, 2009, p. 7.

standard of governance.⁷⁶⁴ IV GC introduces also a cessation of the applicability of Convention. It states in Art. 6 “that the application of the present Convention shall cease on the general closure of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general closure of military operations”. Additional Protocol I develops these standards. As a supplementary to treaty law, several customary rules were also recorded in the ICRC study. For example, rule 41 states that “the occupying power must prevent the illicit export of cultural property from the occupied territory and must return illicitly exported property to the competent authorities of the occupied territory”.⁷⁶⁵ Rule 51 states that “in occupied territory: (a) movable public property that can be used for military operations may be confiscated; (b) immovable public property must be administered according to the rule of usufruct; and (c) private property must be respected and may not be confiscated; except where destruction or seizure of such property is required by imperative military necessity”.⁷⁶⁶

To summarize the treaty law and ICRC study guidance, the occupying power should make three assumptions: occupation is temporary, non-transformative, and limited in scope.⁷⁶⁷ As a result, any attempt to permanently reform or change an occupied state would be unlawful.⁷⁶⁸ But the promise that occupiers will preserve *status quo ante*, as Kirsten Bonn writes, was demonstrated to be a fiction.⁷⁶⁹

The major issue relating to the applicability of the law of occupation is that the consistent and almost universal disuse of it calls into question to what extent this branch of

⁷⁶⁴ G. H. Fox, *Humanitarian Occupation*, Cambridge University Press, 2008, p. 238.

⁷⁶⁵ ICRC study on customary law available http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule41?OpenDocument&highlight=occupation (12.10.2013)

⁷⁶⁶ ICRC study on customary law available http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule41?OpenDocument&highlight=occupation(12.10.2013)

⁷⁶⁷ N. Bhuta, *The Antinomies of Transformative Occupation*, European Journal of International Law, vol. 16, 2005, p. 726.

Vide Hague Convention (IV) on respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907

Art. 55.” The occupying State shall be regarded only as *administrator and usufructuary* of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct”.

⁷⁶⁸ G. T. Harris, *op.cit.*, p. 9.

“For example change of the laws of the occupant is permissible if “necessitated” by the occupant’s interest or by military necessity” Prof. Openheim quoted by the E.H Schwenk, in *Power of the military occupant under art 43, Hague Regulation*, Yale Law Journal, 1945, p. 400.

⁷⁶⁹ K.E. Boon, *op.cit.*, p. 61.

humanitarian law retains legal authority.⁷⁷⁰ State practice indicates almost no compliance with the law of occupation; this is sometimes illustrated by the general lack of meaningful international condemnation when it is disregarded.⁷⁷¹ As Harris states, “the law of occupation long been in a state of innocuous desuetude”.⁷⁷² What makes this law even less relevant to modern challenges is that the main body of treaty and customary regulations are applicable only during an occupation resulting out of international armed conflict. This means that the law of occupation is inapplicable to non-international armed conflicts.⁷⁷³

The above mentioned argument clearly highlights the challenges arising from current military operations. Since Afghanistan forms the main focus of this case study, the situation needs to be examined in more detail. The international phase of the conflict in Afghanistan took place at the end of 2001 and beginning of 2002. After concluding the Bonn agreement, the Karzai’s government was established.⁷⁷⁴ With the initiation of the Operation Enduring Freedom and ISAF, allied troops conducted military operations with the Afghan government’s consent. The international phase put an obligation on foreign forces to uphold the law of occupation. Once this phase was concluded, the conflict turned into a non-international phase, at which point the law of occupation would not be applied.

This may raise a question whether the international community is responsible for Afghanistan or other post-conflict areas? It seems that the answer is yes. The international community has changed its approach toward an armed conflict. It has been a long way from the concept of ‘splendid isolation’ to a human rights based interventionism. For example, the New NATO strategy says that “NATO has a unique and robust set of political and military capabilities to address the full spectrum of crises – before, during and after conflicts”.⁷⁷⁵ The same approach is being presented by the EU countries during operations in Chad, Kosovo and Congo.

⁷⁷⁰ G. T. Harris, *op.cit.*, p. 11. Similar situation of transformative occupation took place not only in Afghanistan and Iraq but also in Kosovo, Bosnia and Herzegovina, Cambodia and East Timor just to mention a few. More on it vide N. Bhuta, *op. cit.*, 735-736.

⁷⁷¹ G. T. Harris, *op.cit.*, p. 11. It is difficult to find any example of occupation which is conducted according to all principles of occupation law within last 100 years.

⁷⁷² G. T. Harris, *op.cit.*, p. 10.

⁷⁷³ Y. Dinstein, *op. cit.*, p. 33.

⁷⁷⁴ More information on this in chapter 1.

⁷⁷⁵ NATO new Strategic Concept adopted in Lisbon, 19 Nov. 2010 ww.nato.int/lisbon2010/strategic-concept-2010-eng.pdf p. 4 (12.10.2013)

Ius post bellum is something more than just responsibility for post conflict countries. Nowadays this notion is commonly used⁷⁷⁶, although it is not new. The concept was already recognized by the German philosopher and just war theorist, Immanuel Kant, at the end of eighteenth century.⁷⁷⁷ The question however, is whether nowadays it has any legal meaning.⁷⁷⁸ In this sub-chapter, I will try to present a contemporary meaning of the *post ius bellum* in the context of modern counterinsurgency expectations.

Ius post bellum seems to be a broad concept embracing both conflict and post conflict societies.⁷⁷⁹ It is perceived as a framework for dealing with the challenges of post conflict transformation and state building. It has also been associated with the conduct of legislative reforms in post conflict areas and the consolidation of the rule of law.⁷⁸⁰ As argued previously, the law of occupation is increasingly perceived as an insufficient answer to the legal challenges of peace building⁷⁸¹ or modern counterinsurgency. So the fundamental question is whether *ius post bellum* can be understood in a normative sense, as a concept which regulates the relationship between participants of an armed conflict in situations of transition, rather than a moral principle or a legal catchword.⁷⁸²

The regulation which may indicate the *in statu nascendi* character of *ius post bellum* is UN SC Resolution 1483.⁷⁸³ The Security Council created a framework where the Special Representative of the Secretary General acting in collaboration with CPA⁷⁸⁴ was given a specific task to undertake changes in the Iraqi infrastructure which went far beyond what

⁷⁷⁶ K.E. Boon, *op.cit.*, p. 58.

⁷⁷⁷ R.P. DiMeglio, *The evolution of Just war tradition: defining jus post bellum*, *Military Law Review*, vol. 186, 2005, p.133.

⁷⁷⁸ E. van Zadel, I. Österdahl, *What will jus post bellum mean? Of new wine and old bottles*, *Journal of Conflict & Security Law*, vol. 14, 2009, p. 175.

⁷⁷⁹ E. van Zadel, I. Österdahl, *op. cit.*, p. 176.

⁷⁸⁰ C. Stahn, *Jus post bellum: mapping the discipline(s)*, *American University International Law Review*, vol. 23, 2008, p. 321.

⁷⁸¹ C. Stahn, *op. cit.*. 321.

⁷⁸² C. Stahn, *op. cit.*. 321.

⁷⁸³ S /RES/1483 (2003). This particular Resolution is interesting. On the one hand it supports law and institution revision when at the same time it supports idea of respecting the same laws and institutions, what seems to be contradictory. Vide art 4 Calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future; where art. 5 Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907; The same point of view is represented by many scholars vide DAVID J. SCHEFFER, *BEYOND OCCUPATION LAW*, *American Journal of International Law*, vol. 93 , 2003, p. 844.

⁷⁸⁴ Coalition Provisional Authority in Iraq

might be permitted under a conservative approach toward the law of occupation.⁷⁸⁵ Accordingly, the CPA adopted over 100 measures designed to remove the legal and institutional instruments of the Husain regime.⁷⁸⁶ The Security Council resolutions played similar role in other “quasi-occupation” situations, such as Kosovo⁷⁸⁷ and East Timor.⁷⁸⁸ This raises questions about the relationship between the UN regulations and international humanitarian law. To what extent may UN Security Council Resolutions supplement and override the provisions of humanitarian law?⁷⁸⁹ This is particularly worth looking at in the light of Art. 103 of the UN Charter which states: “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.⁷⁹⁰ This argument should be particularly relevant with respect to the *in statu nascendi* character of the *ius post bellum*.

The concept of *ius post bellum* was also used by the UN SG Boutros Boutros Ghali in his proposal for post conflict peace building in *An Agenda for Peace* (1992).⁷⁹¹ Although such a document cannot be seen as equal to the SC Resolutions it may constitute a part of the *in statu nascendi* process. Doctrine and scholars also support the concept of *ius post bellum*. For example, Michael Pugh indicates the role of the rule of law as a part of *ius post bellum* process. In this respect he refers to the statement made by Lord Ashdown who, in his seven principles of *post bellum* operations, emphasizes the requirement to establish the rule of law as quickly as possible.⁷⁹²

A different perspective is presented by Freeman and Djukic. As they argue; “it is unclear whether proponents of *ius post bellum* envisage an entirely new set of rules and principles for ensuring post conflict peace or whether they instead envisage the transportation,

⁷⁸⁵ Ch. Garraway, *op.cit.*, p. 155.

⁷⁸⁶ McGurk, *Revisiting the law of nation building: Iraq in transition*, Virginia Journal of International Law, vol. 45, 2005, p. 461.

⁷⁸⁷ SC enacted Resolution 1244 which provided a legal basis for the international presence with power to build democratic institutions and reform economic structures in Kosovo. This resolution did not refer to the international law of occupation although Kosovo was occupied by international forces. More on it vide B.H. McGurk, *op. cit.*, p. 455.

⁷⁸⁸ Ch. Garraway, *op.cit.*, p. 155.

⁷⁸⁹ Ch. Garraway, *op.cit.*, p. 155.

⁷⁹⁰ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁷⁹¹ M. Pugh, *The challenges of post conflict intercession: three issues in international politics*, p. 116 [In:]

C. Stahn, J.K. Kleffner, *Jus post bellum, towards a law of transition, from conflict to peace*, Cambridge University Press, 2008.

⁷⁹² M. Pugh, *op.cit.* 121.

modification, or expansion of existing legal norms".⁷⁹³ It is also unclear whether *ius post bellum* standards vary for international or non-international armed conflicts. It is also difficult to determine when *ius post bellum* would commence, due to the fact that conflicts, such as in Afghanistan, could easily continue for years.⁷⁹⁴

Such a conservative perspective sees nation building or modern counterinsurgency as technically unlawful under the traditional law of occupation.⁷⁹⁵ Some scholars even say that the international law of state building in failed or post conflict states does not exist.⁷⁹⁶ It is debatable that modern counterinsurgency and humanitarian interventions have brought a new model of occupation for which nation-building is the primary goal. It seems that this approach constitutes a creation of a new law of occupation. The disuse of GC IV leads countries to refer mostly or entirely to the UN resolutions which govern multilateral peace or peace enforcement operations. Taking into consideration the asymmetrical character of modern conflicts, nation building and counterinsurgency under the UN umbrella seem to be not only an interesting but a necessary option. The development of the concept of human rights obliges the international community not only to intervene, but also to create an environment where mass atrocities/war crimes/genocide are much less likely to take place in the future. To prevent this, state building, implementation of good governance and the support of a sound economy has to take place. All these activities constitute a broad interpretation of *ius post bellum*. In some cases, modern counterinsurgency and *ius post bellum* share the same principles and methods (Afghanistan). In terms of principles, both are orientated towards bringing and sustaining peace to the civilian population as the centre of gravity. As to the methods, they are orientated toward nation building, rule of law and development of the country's infrastructure and economy. But the environment in which this is applicable differs; counterinsurgency is only relevant in situations where insurgency exists, whereas *ius post bellum* is relevant both where insurgency exists and situations where it does not exist. Counterinsurgency is considered as a method of warfare. *Ius post bellum* is considered as an *in statu nascendi* legal concept.

⁷⁹³ M. Freeman, D. Djukic, *Jus post bellum and transitional justice*, p. 224 [In:] C. Stahn, J.K. Kleffner, *Jus post bellum, towards a law of transition, from conflict to peace*, Cambridge University Press, 2008.

⁷⁹⁴ M. Freeman, D. Djukic, *op. cit.* 225-226.

⁷⁹⁵ G. T. Harris, *op. cit.*, p. 2

⁷⁹⁶ B.H. McGurk, *op.cit.* 453.

It also has to be remembered that concept *ius post bellum* according to some scholars is applicable during NIAC. As I indicated before, the distinction between NIC and IAC in the light of modern development of IHL fades. According to Boon, this supports the idea of the creation of a unified set of *ius post bellum* that applies regardless of whether it is NIAC or IAC. As she argues, the *ius post bellum* principles are applicable to NIAC where they coincide with those applicable in IAC.⁷⁹⁷ I concur with this position.

4.6 NON- LETHAL WEAPON

The use of non-lethal weapons (NLW) could positively contribute to counterinsurgency operations. In some circumstances, military aims may be achieved without lethal means and methods of warfare. The use of non-lethal weapons may cause fewer casualties amongst insurgents, especially in urban warfare scenarios. Additionally, the use of non-lethal weapons could lower the possibility of collateral damage.⁷⁹⁸ This is especially important during operations like the one in Afghanistan where the main task for the NATO allied troops is to bring security and stabilization. Giving a commander the option not to use deadly force is very tempting. The question is whether it is allowed under international humanitarian law to use such means of warfare..

According to the US Department of Defence, non-lethal weapons “are explicitly designed and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment”.⁷⁹⁹ Another definition states that it is a device which incapacitates 98% of the targets, has no effect on 1% and causes permanent damage to another 1%, half of which will die.⁸⁰⁰ As Haberland states, the notion of non-lethal weapons seems to be a label for the guiding principle behind their intended use.⁸⁰¹ According to NATO and US officials, it is simply a short form to express a concept of less lethal weapons designed to limit casualties⁸⁰². The major difference between lethal and non-lethal weapons is that the latter are intended not

⁷⁹⁷ K. Boon, *The application of ius post bellum in non-international armed conflict*, (in:) C. Stahn, *Ius post bellum – mapping the normative foundations*, Oxford, 2014, p. 266

⁷⁹⁸ B. Haberland, *Certain Controversies concerning non-lethal weapons*, New Zealand Armed Forces Law Review, vol. 6, 2006, p. 20

⁷⁹⁹ Policy for Non-Lethal Weapons, Department of Defense Directive, No 3000.3, July 9, 1996, art. 3.1, available at <http://www.dtic.mil/whs/directives/corres/pdf/300003p.pdf> (9/10/11)

⁸⁰⁰ B. Haberland, *op.cit.*, p. 23. John Kenny Human Effects Advisory Panel Program – I couldn’t find an original quotation

⁸⁰¹ B. Haberland, *op.cit.*, p. 24

⁸⁰² B. Haberland, *op.cit.*, p. 24

to kill opponents. Of course, even lethal weapons do not result in 100% lethality. According to the ICRC, the estimated lethality rate for wounds from lethal weapons such as rifles and fragmentation weapons is approximately 20-25%.⁸⁰³

Non-lethal weapons comprise the following technologies: electromagnetic (laser and microwaves), electric, chemical, biological and biochemical technologies (eg. tear gas, toxic incapacitating agents), mechanical technologies (nets, barriers), acoustic technologies (e.g. infra and ultrasonic generators), kinetic technologies (e.g. rubber and plastic bullets, water cannons etc.).⁸⁰⁴

As with any other weapons, treaty and customary prohibitions are applicable. Non-lethal weapons should not be indiscriminate in nature or be used indiscriminately against combatants or non-combatants. Even though NLWs do not cause unnecessary suffering and superfluous injury, they should be used in accordance with the principle of proportionality⁸⁰⁵ and distinction. However, it needs to be remembered that even the indiscriminate use of non-lethal weapons causes less lethal damage to civilians than traditional weapons. This is because civilians are not usually seriously harmed as non-lethal weapons are designed to incapacitate.⁸⁰⁶

Significant controversy exists with regard to the use of chemical agents, especially those referred to as Riot Control Agents (RCAs). Those chemical agents used commonly as RCAs are a type of less lethal weapon that include tear gas, pepper spray, and other irritants. They are intended to cause pain to any individual with uncovered or unprotected eyes, skin and respiratory areas and are used mainly to control crowds or individuals.⁸⁰⁷ In general RCAs are considered as chemical weapons, which is why legal regulations are provided for their use during armed conflicts.

The prohibition of the use of chemical weapons during international armed conflicts was provided for the first time in 1899 by the Hague Declaration Concerning Asphyxiating Gases.⁸⁰⁸ It was confirmed by Article 22 and 23 of the Hague Convention which forbids the employment of “poison or poisoned weapon” and “arms, projectiles, or material calculated to

⁸⁰³ D. P. Fidler, *The international legal implications of 'non-lethal' weapons*, Michigan Journal of International Law, vol. 21, 1999, p. 56.

⁸⁰⁴ B. Haberland, *op.cit.*, p. 22.

⁸⁰⁵ B. Haberland, *op.cit.*, p. 28.

⁸⁰⁶ D. P. Fidler, *op.cit.* p. 84.

⁸⁰⁷ J. Fry, *Gas smells awful: UN for ces, riot control agents and the chemical weapon convention*, Michigan Journal of International Law, vol. 31, 2010, p. 480.

⁸⁰⁸ Hague Declaration Concerning Asphyxiating Gases, July 29, 1899.

cause unnecessary suffering”.⁸⁰⁹ Prohibition of the use of poisonous gases was developed by the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.⁸¹⁰ Among other things, this Protocol prohibited "the use in war of asphyxiating, poisonous or other gases" where tear gas could be considered both as an “other gas”, or as an asphyxiating, poisonous one.⁸¹¹ Extensive use of tear gas in Vietnam by the USA led to the issuing of a statement by the Secretary General U Thant that tear gas as a method of warfare is prohibited by the Protocol 1925.⁸¹² Fully comprehensive in respect to the tear gas prohibition is Art. 1 (5) of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons (CWC) which states: “Each State Party undertakes not to use riot control agents as a method of warfare”.⁸¹³ According to the Convention, RCA means “any chemical not listed in a Schedule, which can produce rapidly in humans a sensory irritation or disabling physical effects which disappear within a short time following termination of exposure”.⁸¹⁴ The only relevant exception to Article I (5)'s is found in Article II (9) (d), which says that (...) “law enforcement including domestic riot control purposes”⁸¹⁵ allows to use RCAs”. This exception applies only when a law enforcement intention is clearly made by the state deploying the RCAs. In other words, if a chemical agent is deployed and does not fit within the law-enforcement exception of Article 1 (9), then it is a banned chemical weapon.⁸¹⁶ The problem is that the Convention does not provide a definition of either law enforcement or method of warfare.⁸¹⁷ Lack of definitions of law enforcement and method of warfare raise an issue about the legitimate use of RCAs during peace keeping, humanitarian and disaster relief operations, hostage rescue missions and similar.⁸¹⁸ During such operations, it is difficult to differentiate between what is a permissible law enforcement action and what is a forbidden method of warfare. In practice, tear gas was used on several occasions by the UN or UN

⁸⁰⁹ Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, art. 22, October 18, 1907.

⁸¹⁰ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65

⁸¹¹ J. Fry, *op. cit.* p. 482.

⁸¹² J. Fry, *op. cit.* p. 485.

⁸¹³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Treaty Doc. 1993 No. 103-21.(CWC)

⁸¹⁴ Art. II (7)

⁸¹⁵ CWC

⁸¹⁶ J. Fry, *op. cit.* p. 499.

⁸¹⁷ J. Fry, *op. cit.* p. 499.

⁸¹⁸ D. P. Fidler, *op.cit.*, p. 72.

authorized forces in Korea, Kosovo, Rwanda, Haiti, Congo, East Timor and others.⁸¹⁹ Additionally some countries, for example the USA, allow the use of RCAs during armed conflict. It was confirmed by the US president that American military forces may use RCAs in international and non-international armed conflicts defensively to save lives.⁸²⁰

What may additionally complicate the use of RCAs is a dual character of missions such as the one in Afghanistan. NATO forces were obliged to conduct not only combat, military operations but also stabilization, police type one. Should in such situation the actions

⁸¹⁹ J. Fry, *op. cit.* p. 472-495.

⁸²⁰ The US Field Manual (1956) states: It is the position of the United States that the Geneva [Gas] Protocol of 1925 does not prohibit the use in war of ... riot control agents; The US Rules of Engagement for Vietnam (1971) stated: Riot control agents will be used to the maximum extent possible. CS agents can be effectively employed in inhabited and urban area operations to flush enemy personnel from buildings and fortified positions, thus increasing the enemy's vulnerability to allied firepower while reducing the unnecessary danger to civilians and the likelihood of destruction of civilian property.

The US Air Force Pamphlet (1976) restates Executive Order No. 11850 of 8 April 1975 and specifies: The legal effect of this Executive Order is to reflect national policy. It is not intended to interpret the Geneva [Gas] Protocol of 1925 or change the interpretation of the United States that the Protocol does not restrain the use of riot control agents as such.

The US Air Force Commander's Handbook (1980) states: The United States does not regard the Geneva [Gas] Protocol as forbidding use of riot control agents ... in armed conflict. However, the United States has, as a matter of national policy, renounced the first use of riot control agents ... with certain limited exceptions specified in Executive Order 11850, 8 April 1975. Using ... riot control agents ... in armed conflict requires Presidential approval.

The US Operational Law Handbook (1993) states: The following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: (...) Using weapons which cause unnecessary suffering, prolonged damage to the natural environment, or poison weapons. This prohibition does not preclude the use of herbicides or riot control agents by US forces in wartime when authorized by the President of the US or his delegate.

The US Naval Handbook (1995) states: The United States considers that use of riot control agents in armed conflict was not prohibited by the 1925 [Geneva] Gas Protocol. However, the United States formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Uses of riot control agents in time of armed conflict which the United States considers not to be violative of the 1925 [Geneva] Gas Protocol include:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting prisoners of war.
2. Situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
3. Rescue missions involving downed aircrews or escaping prisoners of war.
4. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Such employment of riot control agents by U.S. forces in armed conflict requires NCA approval. Use of riot control agents as a "method of warfare" is prohibited by the 1993 Chemical Weapons Convention. However, that term is not defined by the Convention. The United States considers that this prohibition applies in international as well as internal armed conflict but that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and non-combatant rescue operations conducted outside of such conflicts. The United States also considers that it is permissible to use riot control agents against other than combatants in areas under direct U.S. military control, including to control rioting prisoners of war and to protect convoys from civil disturbances, terrorists and paramilitary organizations in rear areas outside the zone of immediate combat.

Documents available http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule75

of NATO forces be considered as law enforcement under the UN resolutions? If the answer is yes, then RCAs should be allowed. If the answer is no, then the use of RCAs is illegal. Several UN resolutions relate to the law enforcing character of the operation in Afghanistan. For example, SC Resolution 1386 (2001) “authorizes, (...) an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas”⁸²¹. Further, the resolution not only confirms that the UN recognize “that the responsibility for providing security and law and order throughout the country resides with the Afghans themselves, welcoming in this respect the cooperation of the Afghan Interim Authority with the International Security Assistance Force”, but this resolution also states that the UN Security Council “authorizes the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil the mandate of the International Security Assistance Force.”⁸²² The authorization of ISAF forces provided by the the UN Security Council is in many respects similar to the authorization of the UN run or the UN approved operations. For instance, RCAs were used in Haiti by UNMIH (United Nations Mission in Haiti) forces.⁸²³ According to the resolution 867⁸²⁴, the main aim of the UNMIH was to maintain security and stability, and help the country to return to constitutional rule and give assistance in holding elections.⁸²⁵ Similar UN interventions took place in Congo Western and Central Africa.⁸²⁶

The above mentioned examples are based on the following interpretation of Art 1.5 CWC: “(...) State Party undertakes not to use riot control agents as a method of warfare”. It is forbidden to use RCAs as a method of warfare during either international or non-international armed conflicts. It is lawful, however, to use RCAs as methods of policing or crowd control. It is of particular importance when we take into consideration the character of the operation in Afghanistan, where several different operations are being conducted (for example the EUPOL mission⁸²⁷ and NATO led ISAF missions).

Each of these operations has its own agenda. EUPOL is the European Union police operation. The aim of this mission is to “contribute to the establishment of sustainable and

⁸²¹ Art 1, S /RES/1386 (2001).

⁸²² Art. 2, S /RES/1413 (2002).

⁸²³ J. Fry, *op. cit.* p. 488.

⁸²⁴ S/RES/867 (1993)

⁸²⁵ Mission background available at http://www.un.org/Depts/DPKO/Missions/unmih_b.htm (12.10.2013)

⁸²⁶ J. Fry, *op. cit.* p. 491- 494.

⁸²⁷ European Union Police Mission in Afghanistan.

effective civil policing arrangements that will ensure appropriate interaction with the wider criminal justice system under Afghan ownership”.⁸²⁸ In such a case, the use of RCAs within the training or mentoring process is justified and lawful. In the case of ISAF the situation is more complicated. As mentioned above, the aim of ISAF is “providing security and law and order”. The dynamics of the current situation puts ISAF forces within the framework of armed conflict. This means that ISAF forces conduct regular military operations of both a defensive and offensive character. However, they also conduct policing operations such as securing national elections⁸²⁹ or training local police. Similar policing operations take place at military run check points. According to the Gen Petraeus COIN manual, the key to the success in counterinsurgency is not only an active participation in the fight with insurgents, but also the creation of security forces⁸³⁰ and participation in security type operations with local counterparts.⁸³¹ This is because the primary frontline of counterinsurgency is often one of the police character - not military.⁸³² This creates a situation where military forces execute police activity and therefore should be allowed to use RCAs. On the other hand, the same military forces should not be allowed to use RCAs during a combat situation. This situation is even more complex when an escalation of force is taking place. For example, if NATO troops are engaged in crowd control – a police type situation can easily evolve into a combat situation.

NLWs offer precision, accuracy and effectiveness that can help to save military and civilian lives. In some respects, their use may break the circle of violence.⁸³³ This feature is particularly desirable during a counterinsurgency operation. However, there is a danger that NLWs may precede the use of lethal weapons which may subsequently lead to possible violation of humanitarian law.

The dual character – military and police - of counterinsurgency is a fact. One day, soldiers may be engaged in a combat operation where they cannot resort to RCAs, whereas the next day in a police operation, where they would be allowed to use a non-lethal RCAs.

⁸²⁸EUPOL background available at the official EUPOL website <http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eupol-afghanistan/factsheets.aspx?lang=en> (12.10.2013)

⁸²⁹For example Polish Military Contingent was responsible for securing Ghazni province election day in 2009 <http://wiadomosci.wp.pl/kat,1342,title,Wybory-w-Afganistanie-Polacy-dwukrotnie-interweniowali,wid,11415906,wiadomosc.html?ticaid=1d2ec>

⁸³⁰ COIN Manual, *op. cit.*, p 6-2, par. 6-6,

⁸³¹ COIN Manual, *op. cit.*, p 6-21, par. 6-104,

⁸³² COIN Manual, *op. cit.*, p 6-19, par. 6-90,

⁸³³ B. Haberland, *op.cit.*, p. 43.

This not only follows Sun Tzu's premise "those skilled in war subdue the enemy's army without battle", but also fulfils humanitarian law expectations.⁸³⁴

CONCLUSION

Modern counterinsurgency rejects a kill-capture strategy. Instead, counterinsurgents follow a win-the-population strategy, which is directed on building a stable and legitimate political order.⁸³⁵ Such an approach was brought against the ideology of a global war on terror (GWOT) introduced by the George W. Bush administration, which retained a very conventional strategy: to win against your opponent you need to kill or capture the terrorists. This strategy failed both on practical and legal level.

By using asymmetrical means and methods of warfare, insurgents violate the basic principles of IHL. However, the use of conventional ways of combat would be of a suicidal character for them. On the other hand, NATO forces have to be "more papal than the pope" and they are obliged to follow humanitarian standards, since military intervention has a stabilization agenda. As such, ISAF's aim is not to physically eliminate the opponent, but to bring peace and stability. As long as NATO forces will be engaged in such operations, they have to follow humanitarian principles. It is not because of reciprocity or belief in humanitarian values by foot soldiers, but because of strategic pragmatism and historical experience. The one who loses moral legitimacy, loses the war.⁸³⁶

Modern conflicts pose a challenge toward treaty law. Treaty law was created to fit conventional wars. Such wars are no longer dominant. A brief analysis of the last 60 years of global history indicates clearly that international wars constitute a minority. But the last 60 years of world's history also bring unprecedented developments in human rights and its observance, which impose a different type of obligation on military forces. The new standards require that not only a military intervention with humanitarian agenda takes place, but when an armed conflict is completed, human rights need to be observed as well. This approach is confirmed not only by strategists but also by the international community. For example, the UN Res 1674 on the importance of preventing conflicts through development emphasized the

⁸³⁴ Sun Tzu, *Art of War*, p. 77

⁸³⁵ G. Sitaraman, *Counterinsurgency, the war on terror, and the laws of war*, Virginia Law Review, vol. 95, 2009, p.1745

⁸³⁶ COIN Manual, *op. cit.*, p 7-9, table

significance of preventing an armed conflict through the promotion of economic growth, poverty eradication, sustainable development, national reconciliation, good governance, democracy, the rule of law, as well as respect for, and protection of, human rights.⁸³⁷ The transformations of Bosnia and Herzegovina, Kosovo or East Timor are good examples of such an approach. At the same time, the lack of engagement of Americans in state building in Afghanistan in 1988 after the Russian's withdrawal is an example how things may go wrong. The same type of international failure at the beginning of 1990's led to the genocide in Rwanda.

Another issue is how the principles of IHL work in an asymmetric environment of a non-international armed conflict. What is often allowed under conventional IHL may not be acceptable in a modern counterinsurgency policy.⁸³⁸ Killing a member of a particular community instead of arresting him may fuel insurgency rather than limit it.⁸³⁹ For example, the bombing of the only hospital in a 100 km radius may be lawful under IHL (if utilized by the insurgents for the military purposes), but it is not acceptable under counterinsurgency policy.⁸⁴⁰ This is because protecting the population is a centre of gravity to the counterinsurgent's strategy.⁸⁴¹ Particularly with the rise of instant communication and publicity, any kill-capture operation could easily be found unreasonable by domestic and international opinion and reduce the legitimacy of the intervening counterinsurgent forces and their ability to win "hearts and minds".⁸⁴²

Modern counterinsurgency, *ius post bellum*, addresses challenges presented in this chapter. Some major humanitarian law principles are better protected by a wise commander than by treaty law. Some other branches of humanitarian law such as law of occupation have lost legal significance. The problem is that protection during an armed conflict should not depend on the discretion of a military commander.

Most of the issues discussed above share one common feature – uncertainty of law applicability. It is difficult to convince a soldier on the ground that a person who sporadically

⁸³⁷ UNSC Res 1674 available at <http://www.un.org/News/Press/docs/2006/sc8710.doc.htm> (10.11.2014)

⁸³⁸ G. Sitaraman, *Counterinsurgency, the war on terror, and the laws of war*, Virginia Law Review, vol. 95, 2009, p. 1775

⁸³⁹ G. Sitaraman, *op.cit.*, p. 1788

⁸⁴⁰ Similar situation took place in Ghazni province in 2009 where Polish troops forcibly entered Mosque in Ghazni city available at http://wyborcza.pl/1,107491,6328619,Afganczyzy_wsciekli_na_polskich_zolnierzy.html (12.10.2011)

⁸⁴¹ G. Sitaraman, *op.cit.*, p. 1790.

⁸⁴² G. Sitaraman, *op.cit.*, p. 1790.

attacks him may not be a target. Similarly, it is difficult to convince a local population that heavy armoured vehicles, full of soldiers are much needed humanitarian help provided by PRT. It is difficult for a military commander to understand why the interpretation of the principle of proportionality so much depends on armed conflict qualification – international or non-international armed conflict. It is not easy for an Afghan farmer to understand that the destruction of his crops was legal collateral damage under international humanitarian law. It is also complicated to convince members of the national Shura that the laws and types of government which NATO forces support are better than their own, hundreds- years-old system. Finally, it is a challenge to convince anyone that the use of tear gas during an armed conflict to control a crowd is a worse crime than using bullets.

New wars where counterinsurgency is fought do not pose a strategic threat to nuclear superpowers such as the USA, the UE or China. However, these low intensity conflicts may not be left alone. These wars modify traditional, conventional laws of war. Humanitarian law created for a Eurocentric wars needs to be revised because is primarily applicable in distant lands were not conventional armed conflicts are fought. It means that maybe it is time to think how to change the law in order to meet the challenges of the modern conflict.

A modern asymmetric conflict locates the civilian population at its centre of gravity. The conflict in Afghanistan marks NATO's largest military involvement in history and is also a good example of a modern armed conflict.

For years, the conflict in Afghanistan was considered a 'task or test' for NATO and the international community. In December 2014, the mission was brought to a "responsible end", according to the White House.⁸⁴³ It is debateable whether the mission was a political and military success. From my perspective, the most important issues were the legal challenges resulting from military operation there.

In my thesis, I mainly addressed *ius in bello* the practical aspects of NATO's operation. I tried to refer not to just one or two issues, but to all those I found to be important during my service in Afghanistan.

At the beginning of this thesis, I gave a brief analysis of the situation in Afghanistan. To offer a further-structured consideration, I also provided the legal framework of the operation in Afghanistan, from the perspective of International Humanitarian Law (IHL). This presentation constitutes a point of departure for further consideration. The above-mentioned introduction does not by any means cover all issues related to the military operation in Afghanistan; however it discusses some important conclusions.

Firstly, it indicates the nature of the conflict. At a glance, the situation on the ground shows how complex and difficult a modern military operation can be. Mass illicit substances production, black market goods, lack of taxation, lack of state control is in fact a *modus operandi* of a modern armed conflict. It places a particular obligation on intervening states such as state rebuilding, improving the host state legal system, banking and taxation. These are actions that transcend classic military operation aims and goals.

In the introductory chapter I also provided a sound ground for considering the initial stage of the US–Taliban conflict as an international armed conflict. As a result, I find a possible committing of war crimes and grave breaches of the Geneva Convention by the

⁸⁴³ White House statement and release <http://www.whitehouse.gov/the-press-office/2014/05/27/fact-sheet-bringing-us-war-afghanistan-responsible-end>

United States and other pro-central government coalition members such as General Dostum Uzbek's.

This initial consideration brings me to the first substantive and crucial issue in chapter two which is the treatment of detainees during a modern military operation.

Contrary to international conflicts, during a non-international armed conflict detainees do not gain protected status. To structure this chapter I provided a full definition of prisoners of war during an international armed conflict. The main reason for this was to provide an in-depth analysis of the relevant law. Further, I analysed the notion of the unlawful combatant. This concept is particularly debatable since, although strongly supported by US legislature and jurisprudence, it is not accepted as legally-binding by other states. In fact, bringing another concept into an already legally complicated world of shades in asymmetric conflicts is particularly harmful. Especially taking into consideration the long history of systematic abuses of detainee's by the US forces.

Detainees of a non-international armed conflict are protected by both regimes i.e. human rights and humanitarian law. Firstly, I analysed the scope of the detainee's protection under humanitarian law. This is particularly problematic because many participants of the conflict in Afghanistan are not party to Additional Protocol II to the 1949 Geneva Conventions. For example, the US are not, neither is Afghanistan, only since 2009, where it became a state party. Of course, highly debatable is the observance of AP II by the armed opposition such as the Taliban despite issuing their own ROE called Layeh for Mujahidin which follows basic humanitarian principles.

The issue of protection of detainees under humanitarian law in NIAC is also one of the vital topics of my thesis. Since detainees are afforded little protection under humanitarian law in non-international armed conflicts, I had to analyse the scope of human rights' applicability in NIAC not only territorially, but also extraterritorially. The issue of human rights application brings important challenges. Firstly, it is important for NATO state parties. Often, human rights standards are different in NATO countries which are obliged to follow ECHR judgements and they are different in the USA. This means that when insurgents are detained by military forces from Europe they are, under some circumstances, protected by regional human rights instruments, such as the European Convention on Human Rights. To secure the provision of the desired human rights standards, European Forces should follow a different set of rules. It is, however, difficult to find common ground even for all European forces. A classic example of this are the so-called national caveats where several states, particularly

European, adopted many of them. There were, according to General James Jones, more than eighty caveats in Afghanistan significantly affecting the performance of many countries in Afghanistan⁸⁴⁴. These national caveats were mostly European in origin. This could have, and in fact it did have, a rather immense effect on the interoperability of NATO forces in Afghanistan. This part of my thesis brings following conclusion: firstly, there should be a joint training matrix for all European NATO member states. This should follow a detailed analysis of existing jurisprudence of ECHR and its relation to military operations. There is no doubt that European states and the USA depend on each other during military operations. However, it has to be done accordingly. A potential solution could be the specialization of European states during territory operations out of Article 5. For example, German forces have several constraints and caveats, and Polish and British forces are more willing to operate combat missions. This could lead to specialization based on particular tasks. For example, Czech and German forces could be responsible for development and humanitarian aid. French forces for air support, whereas British, Dutch and Polish forces could be responsible for combat ground operations. Another recommendation would be signing a joint so-called Memorandum of Understanding regarding detainees in the host country. Such agreement allows, for example, control of the status of detainees while obliging the signatory's adherence to ECHR's rules. The question of applicability of humanitarian law and human rights continuously brings the issue of interoperability of the western armed forces in a multinational environment.

In the third chapter I attempt to deal with the legal concept I find the most challenging: Rules of Engagement and their debatable legal status. Rules of Engagement constitute an important element during modern military operations, contributing to the unification and compatibility of the mission and helping to create an efficient military structure where each component can communicate using the same language and terms. However, I found their legal status to be unclear. In the third chapter I argue that despite the legal nature of ROE, they may not be considered as law at least in Poland and England and Wales. What constituted a challenge in the third chapter was the lack of similar legal analysis conducted on the status of ROE. Due to this lack of reference point, I had to conduct a full-screen type of research regarding all aspects of ROE.

⁸⁴⁴ More available at <http://www.aco.nato.int/resources/1/documents/nato%20at%20war.pdf>, footnote.2

Firstly, I was trying to set a legal framework for my research. Often during military missions, relevant agreements regarding the status of forces are concluded such as Status of Forces Agreement or Military Technical Agreement. Their aim is to regulate the status of deployed forces.

Secondly, to provide a full spectrum of applicable law, I presented the legal regulations applicable to Polish armed forces which affect our understanding of ROE.

Thirdly, I presented the definition of ROE. Since their foundation comes from military manuals which are not legally binding sources, I try to provide as many definitions as possible to give to the reader a chance to shape their own vision of ROE.

The most challenging was the section where I position ROE within an existing system of law i.e. in Poland and England and Wales. The point of departure was a debate whether ROE constitute a source of international law. After presenting argument that ROE doesn't constitute a source of international law, I try to position ROE within a domestic legal system. Thorough analysis indicates that ROE may not be considered as a legally binding act such as regulations or military orders. As such, ROE should be excluded as a source of domestic law. Particularly interesting was the Nangar Khel case study, when eventually a Military Court in Poland referred in its judgment to the concept of ROE, sentencing soldiers on the ground of misinterpretation of ROE and military order jointly⁸⁴⁵. This judgment is very peculiar in this respect as it introduces a complementary legal character of ROE without any actual legal grounds for it. From my perspective, the Court misinterpreted the law and the notion of ROE. This case is still pending before the Appellate Court.

The situation is only slightly clearer under the law of England and Wales. As presented, there is no evidence which may indicate the legal character of ROE under the law of England and Wales. In fact, ROE should be treated only as technical measures whereas soldier's responsibility may be derived only from the relevant law.

My conclusion supports the view that ROE only obtain the character of a legal order when they are implemented according to a particular commander's order. Apart from the implementation of ROE, they do not exclude the application of criminal and other laws, such as international criminal or humanitarian law. As a result, from the perspective of the possible legal responsibility before a court, the most important point is following the law of the

⁸⁴⁵ More information available at <http://www.tvn24.pl/wiadomosci-z-kraju,3/wyrok-ws-ostrzalu-nangar-khel,525700.html>

country of origin, rather than Rules of Engagement. I base this conclusion on a comparative analysis of Polish law and the law of England and Wales. This conclusion does not exclude other legal solutions in other countries. In consideration of ROE, I also express the necessity for proper implementation and dissemination of IHL and ROE, especially in a multinational environment. Particularly, I point to a linguistic barrier and refer to Peter's Rowe intellectual barrier as well.

Another interesting element of this chapter is the role of military manuals. Since Britain has a long history of publishing influential military manuals, I took the opportunity to take a closer look on their status. Despite the lack of legal meaning, they are of high importance. It is due to the quality of the contributing authors and public availability. Their analysis contributes to a unified European approach toward challenges of modern conflicts.

Next issue of great interest to me was the new approach taken toward insurgency in Afghanistan. The General David H. Petraeus Manual on Counterinsurgency reshaped the US's and the International Security Assistance Force's approach towards insurgents. This brought about change not only on the part of the leadership, but foremost with a new vision of counterinsurgency and a new strategy for fighting the enemy. This is currently the most commonly applied doctrine of modern warfare which affects the applicability of International Humanitarian Law. Both IHL and COIN locate civilians at their centre of gravity, placing emphasis on the limitation of collateral damage by constraining the use of indiscriminate methods of warfare such as aerial bombardment. Both IHL and COIN have difficulties with positive identification of the enemy. By using asymmetrical means and methods of warfare, insurgents often violate the basic principles of IHL. On the other hand, NATO forces have to maintain a spotless record at all times, and are obliged to follow humanitarian standards, since military intervention usually has a stabilization agenda. As such, the ISAF's aim is not to physically eliminate the opponent, but to bring peace and stability. As long as NATO forces are engaged in such operations, they must be more Catholic than the Pope.

This chapter brings an interesting observation about the coexistence of human rights and humanitarian law. It also brings the almost unsolvable issue of interoperability of US and European forces. It is also one of the most important parts of my thesis especially since COIN apparently requires a thorough analysis from the IHL perspective.

When writing this chapter I faced all possible challenges resulting from modern multinational operations. To set the scene, I provide a definition of insurgency and counterinsurgency. These two, closely correlated phenomena, reshaped a vision of

understanding of modern armed conflicts and applicable humanitarian law. What attracted me first was the answer to the question of how principles of IHL apply to COIN strategy. The first principle was the principle of distinction. It is intrinsically a matter of humanitarian law to decide who should be a legitimate target. What is challenging is that insurgents or terrorists in a modern conflict try to blend in with the local population as much as possible. What is problematic is what type of legal regime also applies that, in some respects, human rights may affect the use of lethal means and methods in the situation of a non-international armed conflict. This is where these two regimes meet i.e. targeted killing. I demonstrate in this section, due to the exclusive character of IHL in this respect, that only humanitarian principles are applicable. The most interesting aspect of targeted killing comes with the identification of the legitimate target. Prolonged discussion on direct participation in hostilities was of great help. In chapter four, I presented a debate on direct participation in hostilities resulting from the publication of the International Committee of the Red Cross. Particularly interesting are views presented by Nils Melzer and Professor Cassese. I discuss the views presented by Professor Cassese indicating that his approach of mixing human rights with humanitarian law in regard to targeting is highly debatable both in NIAC and IAC. I agree, in this respect, with targeting principles interpreted by Nils Melzer. I also concur with Melzer's view on targeting individuals members of organized groups. I present, in this respect, arguments indicating the lack of possibility of targeting members of political wings of some groups such as Gulbudin Hekmatyar's in Kabul. As for a recommendation, it would be plausible to establish a joint pattern of targeting among allied forces or at least forces on a European level. This is challenging in a multinational environment where one operation may be executed by soldiers from several countries often with a different approach to understanding targeting and the notion of direct participation in hostilities.

Another example of blurred lines between what is civilian and what is military I discussed in point 4.1.4 of this thesis. The concept of Provincial Reconstruction Teams brought a lot of military-structured humanism to the modern battlefield. Soldiers rebuilding schools, travel routes, helping to channel a significant amount of governmental money to local people sounds like a wonderful solution. Is it? In this section, I indicate the challenges resulting from PRT operation. Firstly, I present argumentation indicating that action in terms of humanitarian support are within a legal framework of IHL treaty law. The situation is more complicated when it comes to principle of distinction. Firstly PRTs act in a similar way to the Taliban. They pretend to be civilian although they are not. Secondly, PRTs constitute an

important aspect of military effort during the counterinsurgency. My main question is how to consider PRTs' actions and their results i.e. buildings, travel routes and such similar aspects. PRTs' actions, I consider, are military, despite the civilian-orientated agenda. In terms of results, I suggest a classical interpretation of military objectives and civilian objects. This is so even though I strongly feel that it is European-centric interpretation. For the western world where humanitarian law was coined, schools are clearly a civilian object. For the Taliban, for whom educated girls constitute a direct threat toward their political agenda, this is not the case. Such an approach finds support in experts' opinion on Israel's action on occupied territory where civilian actions and objects in some respect obtain a military character.

Another aspect of modern counterinsurgency lies in the principle of proportionality. This principle allows collateral damages in armed conflicts which are not acceptable under the human rights regime. In this part, I discuss that the COIN strategy adapts a less lethal approach due to the civilian population orientated agenda. What I also discuss is the question of coexistence of HR and IHL from the perspective of the principle of proportionality. The ECHR position presented in *Ergi v Turkey* introduces harsh HR requirements into a humanitarian law governed operation.

In the next part, I referred to the issue of *ius post bellum*. This recently reinvigorated concept by the Grotius Centre and Professor Carsten Stahn brings a lot of international law scholarly attention. Elements of this discussion I found in practical terms during my work in Afghanistan. I indicate that the traditional understanding of occupation in modern conflict is no longer applicable. Simply, traditional law of occupation has become less and less relevant in our times where nearly every military operation leads to substantive change in government or the existing legal, political or economic order.

As I argue in this section, I consider *ius post bellum* as an *in statu nascendi* legal concept. I hope that I provide credible arguments on behalf of the existence of both international organizations practice and *opinio iuris* indicating the existence of the *ius post bellum* concept in contemporary international law related to both NIAC and IAC respectively. I strongly believe that it would be interesting to follow Professor Christopher Greenwood's article on the relation between *ius ad bellum*, *ius in bello* and add to this to *ius ad bellum*, however, this task is beyond this thesis.

In the last substantive part of my thesis I refer to the use of non-lethal weapons (NLW) during NIAC. This small piece brings, yet again, all challenges related to modern conflicts. In this part I provide definitions of NLW. I also divide them into several subgroups of NLW.

What I found in this part most fascinating was the issue of the use of tear gas. This is because this rather common use of means of quelling riots during peace time, according to a literal interpretation of IHL, is not legal during an armed conflict. So this small piece brings solid arguments against Tadic ruling and, in general, a significant blow against increasing customization of IHL and the role of jurisprudence in this respect. As I suggest in this part, humanitarian law forbids the use of chemical weapons, which includes tear gas. During peace time, when IHL is not applicable, the same tear gas is allowed. Is it possible that on the territory of one country this regime may be applicable separately? For example, in the south of Afghanistan where fierce fighting occurred between government forces and the Taliban, should the law of armed conflict rules be applicable, whereas should the northern parts only be governed by human rights? Or maybe we should apply humanitarian law even more flexibly? For example, during a combat situation in place x, we should apply IHL, whereas in non-combat situations in the same place only HR? When, for example, do soldiers need to disperse rioters, not insurgents? This approach is, in my opinion, necessary to avoid casualties during an escalation of a situation involving force or the potential for force. This approach is logical. Why refer to warning shots when we can use a less-escalating method i.e. tear gas. However, this approach overrules the interpretation of law provided by the International Court for the Former Yugoslavia, in the famous Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the case of Dusko Tadić, wherein the court declared that the geographical scope of armed conflict applies to the entire territory of the parties to the conflict, and not only to the narrow context of combat operations.⁸⁴⁶ In fact, in Afghanistan, as well as in other places, in the same location could be executed a military action and then, twelve hours later, a law enforcement action. This indicates the necessity of tailoring a new approach which takes into consideration the aim of the operation, the reality of the theatre of combat, the civilian population, and the law. In this respect, the international humanitarian law of armed conflicts is particularly ripe for change.

⁸⁴⁶ Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, IT-94-1-A - ICTY <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>, par. 69

RECOMMENDATIONS

- 1) A successful military operation in a non-international armed conflict environment has to be conducted with a state rebuilding agenda
- 2) Joint training matrix for all European NATO member states
- 3) Joint MOU for all European NATO member states related to the status and treatment of detainees
- 4) Specialization of European forces
- 5) Joint European Manual on law of armed forces
- 6) Joint European Manual on targeting principles particularly on direct participation in hostilities
- 7) Discussion on the nature of customary law and the role of tribunals in a multinational military environment
- 8) Discussion on interoperability of US and European forces in terms targeting and distinction.

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