Controlling the use of force: legal regimes

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Paul Ducheine and Eric Pouw

Introduction: legitimacy

> "Well spoken, knight", said the jester, "If only you would care to remember that fighting evil does not render one virtuous! Good and evil are enemies, but there may not be much to distinguish between them"
> *Tonke Dragt, 1987: 305)*

Good and evil are separated by a very thin line. This is common knowledge to the military, especially to their legal advisors. The jester – in the above quotation – eloquently expresses the fact that doing 'the right thing' is not sufficient (for knights). 'The right thing' has to be executed in 'the right way' as well. This double standard is closely related to the issue of 'legitimacy'.

Recent military operations like *Operation Enduring Freedom (OEF)*, *Iraqi Freedom* and *International Security Assistance Force for Afghanistan (ISAF)* proved the crucial role of legitimacy of and within operations for the public and political appreciation of these operations. Legitimacy is a principle of democratic societies vested in the rule of law, and is especially applicable to the armed forces. It implies that (1) the military require a *legal basis* for their (domestic and international) operations; and that (2) these operations when executed comply with the applicable *legal regimes*. Not by coincidence, this double standard is one of the principles of the Dutch Army's military doctrine (Koninklijke Landmacht, 2009: 107). The legal component of this principle consists of the legal basis for and the legal regimes applicable to the operations. The social and ethical components relate to public support for the operations. As recent history shows, deficiencies in the legal basis of an operation (like Iraqi Freedom) and/or violations of or disrespect for the applicable legal regimes (Abu Ghraib and Guantanamo Bay) have a negative effect on the

social component of legitimacy, as is evident in the decline of public support for the so-called Global War on Terror.

As such, OEF and ISAF have also been criticized. OEF supposedly lacked a legal basis, since it involved the reaction in self-defence of the United States (US) and its allies after a terrorist assault. Three elements were questioned. First, could a terrorist assault constitute an armed attack triggering the United States' right of self-defence? Second, can a Non-State Actor (NSA) like Al Qaida be the author of such an armed attack? Third, to whom should the US reaction in self-defence be addressed: Al Qaida or Afghanistan of both? ISAF's legal basis was also questioned, since it – at least partially – rested on the consent of a newly installed (interim) Afghan government: a government that existed only as a result of the regime change following OEF.

This chapter addresses the *legal bases* of OEF and ISAF by examining a specific branch of international law: *ius ad bellum* (the right to wage war). Any discussion of the legal basis of ISAF is futile without having considered the background of the preceding OEF. Another incentive for analyzing both operations is the fact that the two cover the full spectrum of potential legal bases, and for that reason they are exemplary for modern military operations.

General rule: prohibition of force

Irrespective of their objectives or origins, military operations such as OEF and ISAF are only allowed in the current *ius ad bellum* as set out by the United Nation's (UN) Charter. The use of force, as well as the threat of force, is forbidden in inter-State relations by Article 2(4) of the UN Charter:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

The meaning and purport of this prohibition forms the basis for all discussions in the *ius ad bellum* on the legitimacy of extra-territorial military operations. Although some support a liberal view of Article 2(4), we adhere to the more accepted extensive interpretation, meaning that any use of (or threat with) cross-border armed (i.e., military) violence by UN member States, for whatever reason, is forbidden, unless the UN Charter or international law provides in an exception to this rule (Ducheine, 2008: 127).

Armed or military use of force may encompass many shapes and means. In essence, 'force' involves the application of physical force, regardless of the scale of it. The threat with force, too, is forbidden when this use of force itself cannot be legitimized (Stürchler, 2007).

Article 2(4) seeks to protect three values. First, it prohibits force that violates a State's *territorial integrity* (Schachter, 1984: 649). Secondly, the prohibition safeguards a State's *political independence*. Thirdly, Article 2(4) prohibits the use of force that interferes with the UN's purposes of maintaining international peace and security and – in view of that – preventing and ending any threats against that peace, as well as repressing acts of aggression or other breaches against peace.

Although the prohibition on force primarily refers to inter-state relations, it also covers cross-border use of force against NSAs as such, since these cross-border operations against inter alia Al Qaida, affect the territorial integrity of the State where the NSA is located (Ducheine, 2008: 135-138).

Therefore, temporary or limited breaches of the territorial integrity or political independence, for instance, in the form of a brief actions against NSAs, as was the case in the US response to Al Qaida's bomb attacks on US embassies in Kenya and Tanzania (Operation Infinite Reach, 1998) – irrespective of their objectives – also fall under the prohibition (Ducheine, 2008).

While, as a basic rule, the use of inter-state force is prohibited, cross-border military operations, irrespective of their nature or cause, may nevertheless be lawful, provided they find a basis in (one of) the three accepted exceptions (Dinstein, 2005: 88; Simma, 1999: 2):

1. intervention with the consent of, or invitation by a (host) nation;
2. authorization of the UN Security Council under Chapter VII of the UN Charter;
3. self-defence.

These three exceptions will be briefly and generally introduced in the next paragraph. Later on, the exceptions will be analyzed to determine whether they constitute a legal basis for the operations involved: OEF and ISAF.

Exception 1: Consent

Within the boundaries of international law, each sovereign State is allowed to give another State permission to carry out military operations on its territory (Ducheine, 2008: 341-349), provided that the consent is: (1) genuine (i.e., not 'manipulated' as in the Austrian 'Anschluss'); (2) may be attributed to the legitimate government of the inviting State; and (3) that the operations remain within the limitations set by the inviting State, and they do not exceed the restrictions that would be applicable for the inviting State, when executing these operations (Nolte, 1999). Once consent is expressed by the inviting States, their operations will be bound and regulated by specific legal regimes.

Exception 2: UN SC Authorization

Although States regularly – rightfully or not – appeal to their right of self-defence to legitimize their resort to force, the primary exception to the prohibition on force

as it has been in effect since 1945 concerns the use of force authorized by the UN Security Council, using its powers under Chapter VII (Ducheine, 2008: 292-339).

In the collective security system of the UN, the Security Council holds the primacy for maintaining and restoring international peace and security. As the occasion arises, the Security Council may define a situation as 'a threat to the peace, a breach of the peace or an act of aggression' (see article 39). This qualification opens the road to, and is a prerequisite for, the authorization of the use of force against state or non-state actors. This authorization is based on the powers that have been adjudicated to the Security Council under (article 42) Chapter VII of the UN Charter.

The authorization for the use of force provides the legal basis for (a group of) States, or a regional organization, to use force against the designated *state or non-state actor(s)* in order to impose the will of the international community on those actors (Blokker, 2000: 544). This authorization normally contains the phrase 'to use all necessary means' or 'to take all necessary measures', which – when necessary – also includes the use of force. The authorization, which is ordinarily laid down in a UN Security Council Resolution, thus not only includes the authorization to use force in a designated mission, but also the mandate or the purpose of that mission. The use of force is by definition restricted to the necessities of the applicable mandate.

However, the UN Security Council is not always willing or able to qualify situations as a threat to the peace [etc], or authorize the use of force subsequently. This inactivity is mainly caused by fact that the UN Security Council is a political body, which means that, apart from the collective security system, there are other (geo-) political interests among the permanent and non-permanent members of the UN Security Council that may play a role (Ducheine and Pouw, 2009). For that reason, States may resort to the third exception on the prohibition of force: self-defence.

Exception 3: Self-Defence

Self-defence concerns a State's resort to force to protect its sovereignty and independence against the illegal use of force by others. The threefold purpose of self-defence is:

1. to repel an impending or transpiring armed attack;
2. to negate the consequences thereof;
3. and to prevent a sequel to the initial attack.

As the collective security system of the UN shows various imperfections in practice (*supra*), States appeal to this inherent right in the majority of cases of inter-state use of force. The right to self-defence is laid down in article 51 of the UN Charter:

> 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, until the Security Council has taken measures necessary to maintain international peace and security.

Self-defence is allowed conditionally (Ducheine, 2008: 140-276; Gill and Fleck, 2010: 190-197). It can, first of all, be invoked only after an armed attack has occurred or in case of an imminent threat thereof, provided such threat is 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'. Also, a series of multiple smaller attacks may qualify as an armed attack on the basis of the accumulation of events doctrine or *Nadelsticktaktik* (Ducheine and Pouw, 2009: 57).

Secondly, self-defence is a temporary right until the UN Security Council has taken effective measures to resolve the situation. Self-defence operations, thirdly, have to be reported immediately to the UN Security Council. Fourthly, self-defence has to meet the intrinsic conditions of necessity (including immediacy) and proportionality (Ducheine and Pouw, 2009: 57-58). The conditions first of all determine whether the execution of the operation, as such, is legitimate. If one or both conditions is flawed, the operation lacks a correct legal basis and is unlawful. In addition, the conditions define the content of the operation, in that they regulate the size, the intended intensity and effects, as well as the form of the operation. These conditions are closely related and carefully balanced.

Necessity is related to (1) the armed attack and the purpose of self-defence, (2) the purpose of the attack(er), and (3) the availability of alternatives (Gill, 2003: 17). The latter criterion implies that peaceful alternatives – such as mediation, consultation or law enforcement initiatives – prevail over the military response in self-defence. If force has to be applied against the NSA of an armed attack (e.g. Al Qaida), this is primarily a responsibility of the State in which territory the group is situated. This State could consent to or grant permission for an operation on its territory. If consent is not expressed, it must then be subsequently considered whether such an operation is possible with authorization of the UN Security Council.

If these alternatives are absent, not available in time, or not expedient in the sense that they may be expected to be effective, the necessity to self-defence is present. Once realistic alternatives present themselves during a self-defence operation, or the threat or the source of the attacks has been eliminated, the necessity for self-defence terminates. This is also the case when the Security Council or the State involved takes effective measures, after all.

Proportionality refers to (1) the parity between the attack and the defence measured in terms of the total scale and effects of both, and (2) the purpose of the attack(er) and the defence.

Enduring Freedom as well as ISAF unmistakably qualify as cross-border military use of force, and fall therefore under the prohibition of force. If States involved cannot appeal to one of the exceptions to the general rule, a sound legal basis is absent and the legitimacy of the operation under the *ius ad bellum* becomes questionable. Below, it will be considered whether exceptions to the prohibition on force in the context of OEF and ISAF are applicable.

Enduring Freedom

Operation Enduring Freedom involved the immediate response of the United States and their allies after Al Qaida had launched its devastating attacks on the World Trade Centre, the Pentagon and Flight 93 in September 2001. OEF commenced on October 7, 2001, when US and British Forces launched attacks on Al Qaida and the Afghan Taliban regime that was harbouring and supporting Osama bin Laden's organization in Afghanistan. The US (and the United Kingdom) notified the UN Security Council, as required under article 51 of the UN Charter, that they had 'initiated actions in the exercise of its inherent right of […] self-defence following the armed attacks that were carried out against the United States on 11 September 2001' (UN Doc S/2001/946).

Although the UN Security Council implicitly condoned the US response by 'recognizing the […] inherent right of self-defence' in its Resolutions 1368 and 1373, the resort to self-defence as a legal basis for Enduring Freedom fuelled a fierce debate amongst States and jurists. The debate focused on a number of topics or academic legal questions. First of all, did the '9/11' terrorist attacks constitute an 'armed attack' triggering the US' right to self-defence? Secondly, could a NSA (i.e., Al Qaida) qualify as the 'author' of an armed attack? Thirdly, who should be the addressee of the self-defence operation: Al Qaida and/or the supportive Afghan Taliban regime? And finally, did Enduring Freedom comply with the substantial requirements of self-defence, especially necessity and proportionality? These four sources of debate will be analyzed below.

Armed Attack: threshold

Although an armed attack is a prerequisite for self-defence, it is not defined, and therefore subject to debate. In general, an armed attack is characterized by the application of cross-border (conventional or unconventional) armed force by regular or irregular armed forces (Ruys, 2010). As an armed attack 'denotes a reasonably significant use of force which rises above the level of an ordinary criminal act' it requires a minimum level in terms of 'scale and effects' (Gill and Fleck, 2010: 191).

Since the '9/11' attacks were launched from abroad (i.e., the attackers were foreign nationals who entered the US for the very purpose of the execution of the attacks), they imply a cross-border element. Secondly, the attacks undisputedly denote the application of use of force, as the (three) hijacked planes were used as unconventional flying bombs in a coordinated operation. The use of force, measured by its scale and effects, outweighs the heights of normal criminal (and even terrorist) behaviour. As such they were easily comparable to a very substantial conventional armed attack launched by regular armed forces (Ducheine, 2008). The fact that the attacks had been launched by an irregular armed group, Al Qaida, is a separate issued that is addressed infra.

Armed Attack: author

Normally, an armed attack is launched by a state actor, usually the regular armed forces, which was also the general idea when the UN Charter was crafted at the end of WWII. In the '9/11' case, however, the author turned out to be a terrorist group, operating on its own behalf, and for that reason a NSA. This circumstance seemingly deviated from the accepted views on self-defence up to/until 2001.

The argument that armed attacks executed by these NSAs granted the United States a right to call into effect their inherent right to self-defence and launch Enduring Freedom was questioned. At present, however, it can be argued – certainly in view of the practice and views since 2001 – that NSAs can also qualify as authors of an armed attack (Ducheine, 2008: 162-170). History contains a number of incidents in which NSAs have launched attacks that were qualified by the defending State as an armed attack. Dated, but nevertheless the starting point for any discussion in this field, is the 1837 Caroline case in which the acts of a rebel group triggered the right of self-defence. More recently, Hezbollah's 2006 attacks triggered Israel to respond in self-defence (which was criticized however for reasons of proportionality and necessity). Turkey resorted to numerous self-defence operations after attacks by the PKK, operating from Iraqi territory (UN Doc S/1995/605), and the US responded with Operation Infinite Reach against Al Qaida in Sudan and Afghanistan in 1998 after the bombing of its embassies in Kenya and Tanzania (UN Doc S/1998/780).

The fact that the authorship of armed attack is not restricted to States, but also applies to NSA, is, first of all, supported by the fact that the UN Charter is silent or neutral in this respect. Secondly, the Caroline case had – besides the treaty provisions in the UN Charter – long established the customary nature of self-defence against these NSAs (Tibori Szabó, 2010). Thirdly, the International Court of Justice ruled in its famous Nicaragua case that armed attacks include not merely action by regular forces, but also cross-border acts by irregulars, provided that they are equivalent in scale and effects to attacks carried out by regular forces. Fourthly, the UN Security Council implicitly qualified the '9/11' attacks as armed attacks when referring to the 'inherent right to self-defence' in the preambles of resolutions 1368 and 1373. Finally, it is relevant to note that NATO concluded that the '9/11' attacks were armed attacks in the meaning of its cornerstone provision of Article V of the NATO Treaty.

We conclude that the 'authorship' of armed attacks extends over state and non-state actors, provided that, in the latter situation, the attacks equates to attacks in terms of scale and effects of regular armed forces. In sum, Al Qaida qualified itself therefore as the author of an armed attack, and triggered the United States' right to respond in self-defence.

Before OEF could be launched, one other issue had to be resolved: against whom should the operation be directed?

Self-defence: addressee

In more general terms, the previous issue could be rephrased as: who is the addressee of self-defence (Ducheine, 2008: 255-274)? Before launching Enduring Freedom, the US had to answer this very question. The question was complicated by the fact that the author – Al Qaida – 'resided' in, and received (material) support from the then Afghan government: the Taliban. The US resolved this question by directing Enduring Freedom not only against the NSA, but also against the supportive (and involved) Afghan State. Although few states and international lawyers criticized the former decision (i.e., to act against Al Qaida), the latter was more disputed.

Logic dictates that the addressee of self-defence and the attacker (the author of the armed attack) are one and the same. In the '9/11' situation, this line of reasoning would designate Al Qaida as the principal target of Operation Enduring Freedom. Support for this conclusion can be found in the fact that the International Court of Justice never *explicitly* condoned this interpretation, and that history and customary law provide for an undisputable example in this respect: the Caroline case.

The reality, however, is far more complicated since any defensive operation against Al Qaida, by definition (except for the High Seas), affects the harbouring State(s). Thus, since it was believed that Al Qaida was operating from Afghan territory, the defensive operations logically had to take place in Afghanistan, thereby interfering with its territorial integrity. However, a modern reading of the *ius ad bellum* supports the argument that Afghanistan had to tolerate the United States' resort to self-defence operation on its territory (Ducheine, 2008: 259-261).

Complicating things even further, besides designating Al Qaida as the principal addressee, the US identified the Afghan Taliban regime as an additional addressee of Enduring Freedom. Although this decision was criticized by some, the argument can be made that the Taliban regime was substantially involved in the '9/11' attacks and that, as a consequence, the State of Afghanistan could be seen as the co-author of the attacks (Ducheine, 2008: 208). Hence, the US was entitled to address Enduring Freedom against the Afghan State as well. This designation had an impact on two intrinsic elements of self-defence: necessity and proportionality.

Self-defence: intrinsic conditions of necessity and proportionality

Above, in relation to OEF, two aspects of the armed attack as prerequisite for self-defence, as well as the aspect of the addressee of self-defence have been analyzed. Now, the fourth issue, the intrinsic conditions for self-defence, will be discussed. OEF received criticism for two additional reasons related to these intrinsic conditions: necessity and proportionality.

First of all, some argued that the US could have responded otherwise, e.g. by responding under the paradigm of law enforcement instead of under the paradigm of armed conflict (the so-called *War on* Terror) or through a UN Security Council authorization, thereby questioning the necessity of OEF. Secondly, it was argued that the US should have restricted its response to the primary author of the '9/11'

attacks (i.e., Al Qaida) and that by extending it to the Taliban regime and the Afghan State as well, OEF exceeded what was acceptable in terms of proportionality.

As concluded previously, necessity is related to (1) the armed attack (assaults) and the purpose of self-defence; (2) the purpose of the author of the attack; and (3) the availability of alternatives. The fact that Al Qaida had proved itself capable of continually launching attacks over a number of years with the support of states such as Afghanistan, is a relevant factor. As soon as Al Qaida is prevented from carrying out further attacks, the necessity of self-defence ceases. In sum, therefore, it is justified to argue that the US had to resort to an armed self-defence reaction against Al Qaida; after all, a state does not have to accept such breaches.

With regard to alternative methods for a solution, gaining consent from the Afghan Taliban regime for the military operation (against itself and Al Qaida) was not a feasible option. With respect to a UN Security Council-mandated operation, the US had the right to respond on the basis of self-defence, until this body would take matter into its hands effectively. It may be argued that, to date, the UN Security Council has implicitly condoned the US response without actually taking initiatives that indicated a Chapter VII authorization, and that would remove the basis to use of force on self-defence. The fact that the US has a permanent seat in the Security Council is, of course, a relevant factor.

Since it seemed to be impossible to fend off new attacks, or to prevent their (renewed) success by restricting defensive operations to Al Qaida solely, the US apparently had no other solution but to direct its attacks to the co-author of the '9/11' attacks, the Afghan Taliban regime as well. Gill (2003: 33) argues that 'eradication of the Al Qaeda network in Afghanistan and consequently the overthrow of the Taliban regime' was the only option. The 'symbiotic' relation between Al Qaida and the Taliban regime which held power in Afghanistan had a strong influence on that option (Stahn, 2002: 225).

Proportionality cannot be considered separately from necessity. As was said above, it relates, on a macro level, to (1) the parity between the total scale and effects of an attack versus defence, and (2) the relation between the purpose of the defence and the attack preceding it (Ducheine and Pouw, 2009: 65). Sometimes a large-scale reaction, such as OEF, to a relatively limited attack, such as Al Qaida's attacks on '9/11', is unavoidable (Gill, 2007: 124). This is, for instance, relevant in case of a danger of continuation or repetition of those attacks. In such a case the ability of the attacker must sometimes be countered in order to undo the consequences of the attack and avoid a repetition. In this respect it can be argued that a military response against Al Qaida as well as Afghanistan was proportionate, since there was evidence that Al Qaida had been involved in a series of terrorist attacks against the US (e.g. the 1993 attack against WTC, the 1998 embassy bombings in Africa, the 2000 attack against the USS Cole). Apart from that, it was announced by Al Qaida that renewed attacks had been planned (O'Connell, 2002: 899).

Conclusion: Legitimacy of OEF

It can be concluded that OEF qualifies as an act of self-defence, triggered by Al Qaida's '9/11' attacks. These attacks could be labelled as an armed attack, regardless of the fact that they had been executed by NSAs who used unconventional means to cause severe damage. As such, the US were – within the constraints of necessity and proportionality – entitled to launch their response on October 7, 2001, to which a number of allies, the Netherlands included, attributed military forces.

Shortly after the beginning of OEF, the UN Security Council in its resolution 1386 of December 21, 2001, implicitly reaffirming the US' right of self-defence, additionally agreed with the establishment of the *International Security Assistance Force for Afghanistan* or ISAF. It is this mission that is central to this volume, and its legality in terms of legal basis will subsequently be analyzed.

ISAF

In contrast to the complexity of the legal basis for OEF, ISAF's legal basis can be more easily established. It is grounded in a UN Security Council authorization under Chapter VII of the UN Chapter, supplemented later on with the consent of the (interim) Afghan central government (Ducheine and Pouw, 2010).

It should be noted that, even though they take place simultaneously in the territory of Afghanistan, OEF and ISAF are two intrinsically different international operations, each serving their own purpose, but with a common point of departure: Al Qaida's '9/11' attacks in the US.

UN Security Council authorization

On December 21, 2001, only a few months after the commencement of OEF, the UN Security Council issued its resolution 1386, which authorized, 'as envisaged in Annex I to the Bonn Agreement, the establishment for 6 months of an International Security Assistance Force'. ISAF was initially mandated 'to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment' (UN Doc S/RES/1386).

The mandate, renewed by succeeding resolutions 1413 and 1444, empowered 'the Member States participating in [ISAF] to take *all necessary measures* to fulfill its mandate', thereby implying the authority to use military force in fulfillment of ISAF's mandate. A coalition of the willing (i.a., the UK, Turkey, Germany and the Netherlands), subsequently headed the multinational force before NATO took over in 2003.

In October 2003, the UN Security Council expanded ISAF's initial mandate, which was limited in geographical terms and tasks:

> [The Security Council], authorizes expansion of the mandate of the [ISAF] to allow it, as resources permit, to support the Afghan Transitional Authority and its successors in the maintenance of security in areas of Afghanistan outside of Kabul and its environs, so that the Afghan Authorities as well as the personnel of the United Nations and other international civilian personnel engaged, in particular, in reconstruction and humanitarian efforts, can operate in a secure environment, and to provide security assistance for the performance of other tasks in support of the Bonn Agreement (UN Doc S/RES/1510).

ISAF's command was transferred to NATO. Geographically, ISAF's Area of Operations was extended to the north (stage I), whereas its mandate now also included supportive tasks to implement the Bonn agreement. Later on ISAF also assumed responsibility for the western part (stage II, 2005), and the southern part of the country (stage III, 2006).

Eventually, in February 2006 ISAF's and OEF's areas of responsibilities merged, which was welcomed by the UN SC in Resolution 1659:

> [The Security Council] welcomes the adoption by NATO of a revised Operational Plan allowing the continued expansion of the ISAF across Afghanistan, closer operational synergy with the Operation Enduring Freedom (OEF), and support, within means and capabilities, to Afghan security forces in the military aspects of their training and operational deployments;
> With the final move to the east (stage IV), concluded in October 2006, NATO now covers Afghanistan completely.

The contribution of the Netherlands, central in this volume, was authorized with UN SC Resolution 1707, fits within stage III, and was situated in the south of Afghanistan (Klep and van Gils, 2005):

> [The Security Council] expressing, in this context, its support for the Afghan Security Forces, with the assistance of ISAF and the Operation Enduring Freedom (OEF) coalition in contributing to security in Afghanistan and in building the capacity of the Afghan Security Forces, and welcoming the extension of ISAF into Southern Afghanistan, with effect from 31 July 2006, the planned further ISAF expansion into Eastern Afghanistan and the increased coordination between ISAF and the OEF coalition.

ISAF, the Dutch contributions included, thus received its mandate directly from the UN Security Council, operating under Chapter VII of the UN Charter. Its mandate is summarized by NATO as follows: to protect the Afghan people; to build the capacity of the Afghan security forces and enable them to assume responsibility for security themselves; to counter the insurgency; and to enable the delivery of

stronger governance and development. Implied is the task to protect its own (and coalition) forces.

Consent

As of June 2002, consent, as expressed by the interim government of Hamid Karzai, serves as a second and additional legal basis for ISAF's mission. This consent is widely regarded as genuine and valid, although some refer to the fact that Karzai was installed as a direct result of the regime change enabled by the US (and allies) and their Operation Enduring Freedom. The adequate response to these concerns would be that the regime change in Afghanistan was the result of a legitimate operation under *ius ad bellum*. Apart from that, since the Bonn Conference of December 2001, Karzai has acted as the president of the (interim) Afghan government. A significant date in this respect is 13 June 2002, on which the Loya Jirga appointed Karzai as Interim President of the new position as President of the Afghan Transitional Administration. As of the latter date, consent is expressed in the Military Technical Agreement between NATO (i.e. ISAF) and the Afghan Interim Administration regarding ISAF:

> [The] Interim Administration understands and agrees the Mission of the ISAF is to assist it in the maintenance of the security in the area of responsibility […]. The Interim Administration understands and agrees that the ISAF is the international force authorized by UNSCR 1386 and may be composed of ground, air and maritime units from the international community. 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.

It should be remembered however, that consent can be subject to restrictions expressed by the sovereign of the Afghan State. These restrictions concern the conditions that determine ISAF's military operations.

Conclusion

The purpose of this chapter was to examine the legal basis of ISAF, and of the preceding OEF. After all, the legal legitimacy of modern military operations consists of two elements, the legal basis being the first, respect for applicable legal regimes being the second.

OEF is based on self-defence, triggered by Al Qaida's '9/11' attacks against the US. As such the '9/11' attacks have contributed to knowledge of the *ius ad bellum*, since sincere concern about the applicability of self-defence had been raised, especially among legal scholars. Although Al Qaida lacks statehood, it qualified as the author of the initial attacks. Being the author, a legal basis existed to subject Al Qaida to

the US' military response, OEF. In addition, Afghanistan, as the sponsor of Al Qaida, could also be made subject to the use of force under self-defence.

Following OEF, ISAF initially was authorized by the UN Security Council, and equipped with a mandate that was limited in scope and geography. After the initial authorization in 2001, ISAF mandate – in terms of scope and geography – was expanded by subsequent UN SC resolutions. Today, ISAF plays a significant security role in the whole of Afghanistan.

References

Blokker, N. (2000) Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by 'coalitions of the able and willing'. *European Journal of International Law* 11(3), 541-568.

Dinstein, Y. (2005) *War, Aggression and Self-Defence* (4th ed.). Cambridge: University Press.

Dragt, T. (1987) *De brief voor de koning (The letter to the King)*. Leopold.

Ducheine, P.A.L. (2008) *Krijgsmacht, Geweldgebruik & Terreurbestrijding; een onderzoek naar juridische aspecten van de rol van strijdkrachten bij de bestrijding van terrorisme* (*Armed Forces, Use of Force and Counter-Terrorism. A study of the Legal aspects of the role of the armed forces in combating terror)*. Nijmegen: Wolf Legal Publishers.

Ducheine, P.A.L. and Pouw, E.H. (2009) Operation Change of Direction: A Short Survey of the Legal Basis and the Applicable Legal Regimes. In: De Weger, M. Osinga, F. and Kirkels, H. (eds.) *NL-ARMS 2009 – Complex operations: Studies on Lebanon (2006) and Afghanistan (2006-present)*. Breda: Netherlands Defence Academy, 51-59.

Ducheine, P.A.L. and Pouw, E.H. (2010) *ISAF operaties in Afghanistan: oorlogsrecht, doelbestrijding in counterinsurgency, ROE, mensenrechten & ius ad bellum (ISAF operations in Afghanistan: law of war, targeting in counterinsurgency, ROE & ius ad bellum)*. Nijmegen: Wolf Legal Publishers.

Gill, T.D. (2003) The Eleventh of September and the Right of Self-Defense. In: Heere, W.P and International Society for Military Law and the Law of War (Netherlands National Group) (eds.) *Terrorism and the military: international legal implications* The Hague: T.M.C. Asser Press, 23-37.

Gill, T.D. (2007) The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy. In: Schmitt, M. N. and Pejic, J. (eds.) *International law and armed conflict: exploring the faultlines. Essays in honour of Yoram Dinstein*. Leiden: Martinus Nijhoff, 113-155.

Gill, T.D. and Fleck, D. (2010) *The handbook of the international law of military operations*. Oxford, New York: Oxford University Press.

Klep, C. and Van Gils, R. (2005) *Van Korea tot Kabul. De Nederlandse militaire deelname aan vredesoperaties sinds 1945 (From Korea to Kabul. Dutch military participation in peace operations since 1945)*. Den Haag: Sdu.

Koninklijke Landmacht (2009) *Land Doctrine Publicatie: Militaire Doctrine voor het Landoptreden, LDP I (Royal Nertherlands Army Doctrine Publication, part I).* Amersfoort: OTC Operatiën.

Nolte, G. (1999) *Eingreifen auf Einladung. Zur völkerrechtlichen Zulässigkeit des Einsatz fremder Truppen im internen Konflikt auf Einladung der Regierung*. Berlin: Springer.

O'Connell, M.E. (2002) Lawfull self-defense to terrorism. *University of Pittsburgh Law Review*, 63 (Summer), 889-908.

Ruys, T. (2010) *'Armed Attack' and Article 51 of the UN Charter – Evolutions in Customary Law and Practice.* New York: Cambridge University Press.

Schachter, O. (1984) The Legality of Pro-democratic Invasion. *American Journal of International Law* 78(3), 645-650.

Simma, B. (1999) NATO, the UN and the Use of Force: Legal Aspects. *European Journal of International Law* 10, 1-22.

Stahn, C. (2002) International Law at a Crossroad? The impact of September 11. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 62, 183-256.

Stürchler, N. (2007) *The Threat of Force in International Law*. Cambridge: Cambridge University Press.

Tibori Szabó, K. (2010*) Anticipatory Action in Self-Defence – The Law of Self-Defence – Past, Present and Future.* Amsterdam: University of Amsterdam.

Part II
Security

5 Controlling the use of force
Legal regimes

Paul Ducheine and Eric Pouw

Introduction

Legitimacy is vital to all military operations. As we introduced in Chapter 3, the legal component of legitimacy (and the legal framework) can be divided in two parts. First, the *legal basis* for a specific operation. Second, the rules that are applicable during the conduct of operations (Ducheine, 2008). The latter is referred to as *legal regimes*, the central theme in this chapter. Both parts are related with the social component of legitimacy: moral and popular support. Excessive use of force or violations of the applicable rules during the conduct of operations can have an injurious effect on public support for the operation as well. This support – both in troop contributing nations, as well as in the area of operations – is indispensable for the success of any (peace support) mission. Therefore, it is of utmost importance for armed forces to control the use of force during these missions, and to apply and respect the rules by which this is done.

This chapter presents the primary legal regimes and techniques by which the use of force in the context of military operations by ISAF is regulated (Ducheine and Pouw, 2010). It deals with the techniques used to control and legalize the force used to execute ISAF's mandate, mission and tasks (as given and delineated by the UN Security Council and ISAF's superior authorities).

First and second, the analysis covers two international legal regimes applicable to ISAF's use of force: human rights law and the law of armed conflict. Thirdly, rules of engagement are introduced. Fourthly, other (supplementary) mechanisms such as tactical directives, standard operation procedures and instructions and special instructions (for air forces) are described. For practical reasons of economics, the four of them will be referred to as legal regimes.

The relevance of a proper delineation of the applicable legal regimes – including its content – is vital to the individual soldier, to commanders on all levels, and to the political decision makers and leaders. In most of the following regimes, the soldier, the commander, the politicians and/or the state itself, may be held responsible when the regime has been violated.

Human Rights Law

The first controlling regime for the use of force is international human rights (HR). HR obligations of states 'shape' the conduct of operations by its armed forces, even when they operate abroad like in Afghanistan. The applicability of HR to these *extraterritorial* military operations is a highly debated topic, and within the context of multinational operations like ISAF, the problems are even more complex. The main concern of states involved in operations in Afghanistan involves the question whether and if so, to what degree, they are bound by the obligation to respect or ensure the human rights of individuals affected by their military operations. If it can be established that states had an obligation to do so, they may be held responsible for violations of human rights.

Amongst states and legal scholars, the discussion concentrates around two questions. The first is whether human rights obligations are applicable outside the territory of a troop contributing nation (Gondek, 2009). In other words, should human rights be guaranteed abroad during missions? This issue refers to the discussion whether human rights law governs ISAF's detention operations and the use of force in Afghanistan (Dennis, 2005).

Once the first question is answered affirmatively, the second is how the human rights should be guaranteed when operating abroad. The latter issue denotes issues covering the procedures used during detention operations, such as interviewing techniques, rights of detainees, the permissibility of forceful interrogation techniques (such as water boarding) or the definition of 'humane treatment' to which detainees are entitled.

Before analyzing the scope of application, and the applicable rules in the context of operations in Afghanistan, we will reiterate the purpose of the HR.

Purpose

Before embarking on the two questions that are addressed below, it is useful and necessary to pay attention to the origin and *raison d'être* of international human rights obligations. International human rights were originally devised 'to protect the individual against the arbitrary exercise of power by the authorities of the territorial state' (Coomans and Kamminga, 2004: 1). With respect to guaranteeing human rights, states are double-hatted. They have to protect the individual against violations of human rights, while at the same time they themselves bear responsibility for violations, since they are committed by their own organs (Ducheine, 2008: 381).

The first question during extraterritorial operations is whether armed forces – as state organs – are supposed (or even obliged) to respect and ensure human rights whilst operating in a violent, insecure and often hostile environment abroad (Ducheine, 2008: 380-466). This question implies that we first determine the threshold for applicability, which concentrates on the question whether a person is 'within the jurisdiction' of a state.

Scope of Application

After the proclamation of the Universal Declaration on Human Rights by the General Assembly of the United Nations (1948) numerous regional and global treaties have been concluded, such as the European Convention on Human Rights (ECHR, 1950) and the International Covenant on Civil and Political Rights (ICCPR, 1966). State parties to these treaties are bound to respect and ensure the rights and privileges as laid down in these treaties to every individual who can be found within their jurisdiction. Concentrating on the ECHR, Article 1 reads:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in […] this Convention.

The logic of this is that state parties are only capable of guaranteeing the human rights obligations when they exercise adequate or effective power over persons (in a certain territory).

International human rights obligations are, apart from a few exemptions, primarily restricted to the territory of the state party involved. Increasingly however, extra-territorial behaviour of states (e.g., when participating in multinational operations like ISAF) may affect an individual's human rights (Lorenz, 2005). First of all, extraterritorial acts of state agents may bring persons within the jurisdiction of the state insofar they exercise authority over such persons. This may be a source of jurisdiction in the case of arrest, detention, or abduction. We will refer to this source of extra-territorial jurisdiction as *State Agent Authority* (SAA). Secondly, in a number of situations a state may exercise effective control over an area outside its own territory, for instance as a result of military occupation, or when exercising public powers with the consent of the local government or authorization of the UN Security Council. We will refer to this source as *Effective Control of an Area* (ECA). In contrast to the situations of jurisdiction falling under SAA or ECA, it still remains unclear whether 'direct action' (e.g., targeting, attacks or exchange of fire) in itself is sufficient to generate jurisdiction.

When jurisdiction through either SAA or ECA has been established, human rights treaties become applicable. During periods of SAA (e.g., detention, arrest, abduction) or ECA (e.g., occupation of a UN mandated peacekeeping operation), human rights obligations will be applicable, and, as a consequence, numerous human rights obligations may influence the conduct of operations in general, and the use of force in particular. For example, during ISAF's mission, the rules related to detention, and arguably also those concerned with the use of force have all, to some degree, been influenced by the human rights regime.

Human Rights Rules

Once jurisdiction can be established, human rights law has an impact on various aspects of military operations. Even when jurisdiction cannot be established, human rights can influence the use of force and the conduct of operations by means

of other supplementary mechanisms, such as rules of engagement, standard operation procedures or tactical directives. We will limit ourselves to the right to life, the right to liberty and the right of physical integrity with respect to inhabitants of area of operations abroad.

Among the clearest examples of the controlling effects of the HR regime are ISAF's rules concerning 'detention of non-ISAF personnel' (Roberts, 2006: 443):

> Commanders at all levels are to ensure that detention operations are conducted in accordance with applicable international law and human rights standards and that all detainees are treated with respect and dignity at all times. The strategic benefits of conducting detention operations in a humanitarian manner are significant. Detention operations that fail to meet the high standards mandated herein will inevitably have a detrimental impact on the ISAF Mission.

These and other rules can also be found in the *Military Technical Agreement (MTA) Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan ('Interim Administration')*, of January 4, 2002. Its provision that detainees may – in principle – not be detained for more than 96 hours demonstrates that standards derived from the European Court of Human Rights' jurisprudence are applicable to ISAF-detentions, or at least, have been used (albeit arguably more as a matter of policy than of law) (Nauta, 2008: 178). In addition to the MTA, Canada, Denmark, the Netherlands, Norway and the UK have concluded so-called Memoranda of Understanding (MOUs) with the Afghan government concerning the treatment by, and transfer of detainees to the Afghan authorities (Amnesty International, 2007: 21). Even after the transfer of detainees, the Dutch Foreign Office keeps track of the detainees transferred to the Afghan authorities.

Secondly, the right to life is protected by the prohibition of arbitrary killing. However, individual self-defence and lawful acts of war resulting in the loss of life are permitted. Within the system of the ECHR however, an independent investigation has to be launched once individuals die as a result of acts of the armed forces (e.g., ISAF).

Finally, when interviewing detainees, European ISAF forces are restricted in their interviewing techniques as a result of jurisprudence based on the ECHR. The European Court ruled that the combination of sleep and food deprivation, stress positions (such as wall standing), white noise, and blindfolding ('hooding') are forbidden since they can result in inhumane treatment and/or violations of the physical integrity.

Regardless whether human rights treaties are formally applicable or not, some of its rules are laid down in rules of engagement, standard operating procedures and other directives and applied for policy or operational reasons. Although sometimes argued otherwise, human rights law is relevant to all military operations, even when the operations take place within, or amount to, an armed conflict which is primarily

governed by international humanitarian law of the law of armed conflict, which will be dealt with below.

The Law of Armed Conflict

Contrary to Cicero's 'silent enim leges inter arma', even warfare has constraints and limitations, as is rightfully expressed through 'et inter arma vigent leges'. This motto, used by the Netherlands Army Legal Service, expresses the fact that warfare has long been regulated by rules of conduct.

The Law of Armed Conflict (LOAC) – also referred to as international humanitarian law – is the primacy regime applicable to operations taking place during, or amounting to armed conflict. Once an armed conflict exists, LOAC automatically applies to all parties in the conflict – irrespective of their status.

However, like HR, LOAC is also applied for policy reasons outside the scope of armed conflict (Ducheine, 2009).

After having set the floor by reiterating the purpose of the LOAC, we analyze the scope of application, and the applicable rules in the context of operations in Afghanistan.

Purpose

So, what does LOAC regulate? LOAC has – of old – tried to find a balance between the requirements and the reality of the phenomenon of war itself, on the one hand, and the principle of humanity, on the other. This is expressed in its dual purpose (Kalshoven and Zegveld, 2001: 12):

1. the protection of those who do not (any longer) take part in the hostilities (especially civilians, but also combatants who have been put hors de combat);
2. regulating the allowed means and methods of warfare.

In other words, the LOAC has an internal balance between the core principles of military necessity and humanity (Dinstein, 2004: 16). The main difference with HR, which we addressed earlier, is that HR is principally designed to protect individuals from the use of arbitrary state power. Thus, with respect to the use of force, or the detention of individuals, states are prohibited to deprive a person of the right to life (by killing) or his liberty (by detention). Only in very exceptional situations, and if so, only under strict conditions, may a person be killed or detained. It follows, in the case of the right to life, for example, that a premeditated killing is, in principle, not lawful under HR. In contrast, LOAC – in light of the reality of war, and taking into account the sovereignty-based principle of military necessity – allows for the premeditated killing of individuals, provided it takes cognizance of the humanitarian constraints built into LOAC. The other LOAC principles of distinction, proportional-

ity and chivalry follow from military necessity and humanity, but must be viewed all as interlinked (Ducheine and Pouw, 2010: 72).

Before commanders make use of the LOAC to control the use of force and the conduct of operations, two issues have to be solved. First of all, does the situation amount to an armed conflict, and if so, secondly, is it an international or a non-international armed conflict. The latter issue is vital since it implies a designation of the part of LOAC that applies as the regime governing hostilities; parts that differ significantly in quantity and quality. We analyze both issues below.

Scope of Application

The principal issue relates to the status of the conflict (e.g., the expression if violence between the (state organs of the) Government of the Islamic Republic of Afghanistan (GIROA) and the armed insurgency, the so-called OMF: Opposing Militant Forces) (Ducheine, 2009). The status of this conflict is not undisputed, although a number of States (e.g., Germany) and international organizations (most notably the UN and the ICRC) by now have qualified it as an (non-international) armed conflict, in which ISAF aligns with the GIROA. Other states are ambivalent as to the status of the conflict. In order to delineate the constraints applicable to ISAF's use of force, it is vital to analyze whether LOAC is applicable to Afghanistan and ISAF's operations. In other words, whether the violent state of affairs in Afghanistan qualifies as an armed conflict. The primary question here is: what is an armed conflict? This concept is not defined in the law of war treaties. The following definition can be derived from the jurisprudence of international criminal tribunals:

> An armed conflict exists whenever there is a resort to armed force [1] between States or [2] protracted armed violence between [a] governmental authorities and organized armed groups or [b] between such groups within a state.

The opinion of the parties involved about the existence of an armed conflict is not decisive: an armed conflict is a factual situation (e.g., 'war'). For an armed conflict, two cumulative conditions must be met. There must be: (1) actual hostilities of certain intensity, consisting of a number of related armed incidents, which (2) are carried out by opposing organized armed groups capable of undertaking military operations over longer periods of time.

Below, these general conditions of the intensity of the violence and the degree of organization of the armed group are considered briefly in the context of Afghanistan, to determine the existence of an armed conflict.

With regard to the degree of organization or the armed forces, there is little doubt that the regular armed forces in the conflict, such as those of the ISAF members and the Afghan National Army (ANA) meet the criteria for organization (Ducheine, 2009). However, this is less obvious in relation to irregular armed groups. For irregular armed groups, e.g. the OMF, this may be established with the

help of a number of indicative criteria as set by the Yugoslavia Tribunal (ICTY) in the *Haradinaj* case (ICTY, 3-4-2008, IT-04-84-T, § 60):

> As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the "organization" criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.

In a detailed analysis of the Afghan situation between 2005-2009, it was concluded that the OMF in general, and the Taliban in particular, are an organized armed group, which appear to have the capability to carry out coordinated operations over an extended period of time against the Afghan government, government troops and foreign troops, including ISAF (Ducheine, 2009: 296).

The second requirement for the existence of an armed conflict concerns the intensity of the fighting. Jurisprudence shows that, contrary to situations of internal crime and unrest that are characterized by 'isolated and sporadic acts of violence (disorganized and short-lived)', the use of force in (an internal) armed conflict ought to be 'protracted', distinguishing it from incidental (internal) armed violence. Intensity can be assessed by means of several indicative criteria, as was concluded in the earlier mentioned *Haradinaj* case (ICTY, 3-4-2008, IT-04-84-T, § 49):

> These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.

In the aforementioned analysis, the conclusion was drawn that the hostilities or the intensity of the armed violence in Afghanistan at least reaches the threshold of a (non-international) armed conflict in terms of intensity. A fairly clear pattern of mutual factual hostilities was discerned.

In sum, in Afghanistan there appears to be an armed conflict between the Afghan government – supported by ISAF – on the one side, and OMF, or in any case the Taliban, on the other. This conclusion is in line with that of international observers and reporters, among whom the UNSG, who in November 2008 referred to 'the ongoing armed conflict in Afghanistan' (UN Doc. S/2008/695). In its annual report

over 2007 the ICRC concluded that '[t]he armed conflict in Afghanistan spread considerably in 2007' (ICRC, 2008: 181). HRW stated that, since 2002, 'hostilities have comprised a non-international armed conflict in which Afghan government forces and US, NATO, and other coalition partners are fighting against anti-government forces' (Human Rights Watch, 2007: 79). The German Foreign Minister Dr. Guido Westerwelle explicitly referred to the abovementioned two tier threshold test and stated in Parliament (DEU Bundesregierung, 2010):

> The intensity of the hostilities in combination with the existence of an organisation of armed groups, leads to the conclusion that the situation in which ISAF is operating, in the North also qualifies as an armed conflict within the terms of LOAC. Whether we like that politically or not, such is the case. Whether we call it an armed conflict or otherwise, reality does compel us to accept a situation of an armed conflict. We are obliged to those who are deployed in this dangerous situation area, to qualify the situation as it is.

The conclusion that the hostilities between Afghan Security Forces supported by ISAF on the one hand, and Opposing Militant Forces on the other hand, qualify as an armed conflict, implies that the LOAC is applicable to the operations of ISAF.

LOAC Rules

The follow-up question relates to the part of LOAC that is applicable to this type of conflict. Therefore, it is necessary to identify whether an international or a non-international armed conflict exists.

Since the armed conflict does not concern a conflict between states, it disqualifies as an international armed conflict (IAC). By definition, it thus should be characterized as a so-called non-international armed conflict (NIAC), to which Common Article 3 to the Geneva Conventions is applicable. Since Afghanistan only ratified the Second Protocol Additional to the Geneva Conventions, which specifically deals with conflicts of a non-international character, in 2009, this Common Article 3 is the core of treaty law applicable to the hostilities before that date.

This small portion of treaty law is complemented with a large component of so-called customary law, related to non-international armed conflicts. Part and parcel of this customary law applicable to the Afghan NIAC are the five principles of LOAC: military necessity, humanity, distinction, proportionality and chivalry. Other rules of a customary nature have been identified in jurisprudence by international criminal tribunals, and by the ICRC. The latter concluded its comprehensive research into customary rules of war in 2005 (Henckaerts and Doswald-Beck, 2005). Although controversy exists as to its research methods, a number or customary rules are beyond dispute (Dinstein, 2006). Some of these rules elaborate on specific principles (e.g., the definition of a military target related to the principle of distinction). Others relate to humanity (e.g., the protection of civilians from hostilities, in particular from indiscriminate attacks; the protection of civilian objects, in

particular cultural property; or the protection of all those who do not (or no longer) take active part in hostilities). Certain means and methods of warfare (e.g., indiscriminate attacks, attacks that result in excessive collateral damage) are also ruled out.

The combination of common article 3 to the Geneva Conventions, the principles of LOAC and the customary rules of law, delineate and shape the conduct of hostilities and the use of force applied by ISAF in its operations in Afghanistan.

At times, allegations that LOAC has been violated by ISAF forces can be heard. Quite interestingly, however, no single case has been brought to a Dutch court yet. Although the Public Prosecutor had to oversee more than a thousand cases in which the use of force by Netherlands forces was accounted for, no case was brought to trial (Ducheine, 2009). With respect to the battle of Chora (2007), the Public Prosecutor, after one year of research, explicitly concluded that during the hostilities, 'force had been used within the constraints of LOAC and the ROE' (Openbaar Ministerie, 2007).

Rules of Engagement

Besides Human Rights and the LOAC, the use of force in modern military operations (like ISAF) is regulated by so-called Rules of Engagement (ROE). ROE are defined as 'orders or directives that are intended to ensure commanders and their subordinates use only such force or other measures as are necessary, appropriate and authorized by higher command' (Gill and Fleck, 2010: 586). ROE are a crucial instrument for commanders to direct and control the use of force during operations.

ROE result from three sources: operational, legal and political. Within the existing legal framework of HR, LOAC, but also of national and international penal or disciplinary codes, force is permitted to a certain extent. Even during the war, the use of force is generally constrained through LOAC (and HR). Lawful use of force is, however, further restricted for operational (or strategic) and for policy reasons. Thus, a *prima facie* legitimate military objective ('military target'), that is attacked under the LOAC, will not be targeted if operational imperatives requires this, for instance if the target is needed for follow-on operations. In the same way, political imperatives may restrict the available and legitimate set of means of warfare, for instance as a result of public opinion or diplomatic positions. In sum, promulgated ROE reflect the use of force that is legally, operationally and politically acceptable. In any way, ROE may never supersede conduct that is legally permissible.

ROE are used in all types of operations, regardless of their legal basis, and qualification as an armed conflict and/or peace (enforcement) operation or not (Gill and Fleck, 2010: 586). When, as in ISAF, an armed conflict exists, ROE will further restrict the force that is otherwise permissible under the LOAC.

In the absence of an armed conflict, ROE are the sole sources for the use of force. ROE thus provide commanders and their troops with the authority to use force in designated ways and modes. ROE will normally provide troops with the authority

to manoeuvre, to use airspace, or to search and detain individuals if and when they constitute a threat to personnel or the mission.

The authority to promulgate ROE rests within the command authority (Gill & Fleck, 2010: 119ff). Each level of command is entitled to (further) restrict – not expand – the ROE and thus to regulate the amount of force when ordering subordinate commanders during missions. The ISAF ROE are authorized by the North Atlantic Council, and implemented through the NATO chain of command currently in charge of ISAF. As a result of diverging legal obligations, and political or diplomatic positions, Troop Contributing Nations use so-called 'national caveats' and 'amplifications' to bring multinational ROE in line with their national (legal or political) position. These caveats and amplifications are part and parcel of ROE in multinational operations.

Caveats involve clauses that usually restrict a particular ROE for reasons of national legal obligations, national policy or operational restraints. Examples of national caveats may involve, *inter alia*, a geographical restriction, prohibiting armed forces to operate outside (or within) a designated area; instrumental limitations, prohibiting or restricting the use of certain weapons or ammunition; limitations with respect to the level of approval for execution of certain operations, the use of certain weapon systems or specific units (for example special forces); or interpretations of certain terminology within the ROE, such as hostile act or intent. Amplifications are used when a nation wants to clarify its position with respect to a particular ROE, for instance to illuminate the definition of one of the terms used (e.g., in case of 'self-defence') a term of art that has different meanings in different legal systems around the world.

Therefore, a multinational commander will require a so-called 'ROE and caveat matrix' to obtain and maintain situational awareness in this respect. Clearly, such national considerations may influence the coordination and execution of ISAF operations.

Additional Sources

In addition to HR, LOAC and ROE, other supplementary mechanisms such as Tactical Directives, Standard Operation Procedures and Instructions (SOPs and SOIs) and Special Instructions (for air forces, SPINS) are used to control the use of force (Ducheine, 2010). These documents contain additional guidelines that set out the modus operandi for designated operations such as, targeting, fire support or detention. They also set the procedures applicable to these operations, or the required generic mind-set for the operations as a whole. To give one example of the former: in detention operations, a medical check-in by a qualified physician is required for any detainee that sets foot in a detention or holding facility. The authority for detention is vested within the ROE of the LOAC; the way in which detention is organized is laid down in a SOP. Through this SOP, human rights obligations are safeguarded.

In that respect, Commander ISAF has issued a number of Tactical Directives in which he expressed his intent and his view on the required *modus operandi* in counterinsurgency operations like ISAF. In 2009, General McChrystal stated: 'I expect leader at all levels to scrutinize and limit the use of force like close air support against residential compounds and other locations likely to produce civilian casualties' and 'I expect our force to internalize and operate in accordance with my intent'.

A last source for controlling and restricting the use of force originates from the fact that ISAF operates with the consent of the Afghan state (see Chapter 3). The famous 'Karzai 12' are but one example of the fact that Afghanistan exercises jurisdiction within its territory, which enables it to restrain ISAF's operations in some respect. The 'Karzai 12' refer to a dozen rules, initiated by president Hamid Karzai, set down by the ISAF commander general McChrystal, with the purpose to keep Afghan civilian casualties to a minimum (Washington Times, 2009).

Conclusion

The purpose of this chapter was to provide an overview of the primary legal regimes and techniques through which the use of force in ISAF is regulated: human rights, the Law of Armed Conflict (LOAC), Rules of Engagement (ROE), and supplementary techniques. These legal regimes differ in purpose, scope of application and in the material content of their rules. Based on the case-law of human rights courts, it can be concluded that in the context of Afghanistan, states are bound by international human rights (HR) obligations when they detain individuals. It remains controversial whether this is also the case in relation to the use of force. We have also determined, on the basis of the organization of armed groups and the intensity of violence, that in Afghanistan a non-international armed conflict (NIAC) takes place. As a result, ISAF's operations are to be planned and executed in conformity with LOAC. HR as well as LOAC are also used outside their formal scopes of application as a result of policy considerations. In other words, human rights can be applied even in the absence of jurisdiction, and LOAC can be applied outside an armed conflict. In addition, the use of force is further regulated through so-called Rules of Engagement. Supplementary techniques (SOPs, SOIs, Tactical Directives) are used to further delineate the (procedures for the) use of force.

In sum, ISAF's use of force is regulated in a comprehensive manner through the use of multiple legal regimes. However, the use of force is applied by man, not by legal regimes, the consequence being that troops are to be properly trained in (the application) of these regimes.

References

Amnesty International. (2007) *Afghanistan – Detainees transferred to torture: ISAF complicity?*

Coomans, F. and Kamminga, M.T. (eds.) (2004) *Extraterritorial Application of Human Rights*. Oxford: Intersentia.

Dennis, M.J. (2005) Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation (Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory). *American Journal of International Law* 99(1), 119-141.

DEU Bundesregierung. (2010, 10-02-2010). *Regierungserklärung des Bundesministers des Auswärtigen, Dr. Guido Westerwelle, zum deutschen Afghanistan-Engagement nach der Londoner Konferenz vor dem Deutschen Bundestag am 10. Februar 2010 in Berlin* Available at:http://www.bundesregierung.de/nn_1514/Content/DE/Bulletin/2010/02/16-1-bmaa-bt.html.

Dinstein, Y. (2004) *The Conduct of Hostilities under the Law of International Armed Conflicts.* Cambridge: Cambridge University Press.

Dinstein, Y. (2006) The ICRC Customary International Humanitarian Law Study. *Israel Yearbook on Human Rights* 36, 1-15.

Ducheine, P.A.L. (2008) *Krijgsmacht, Geweldgebruik & Terreurbestrijding; een onderzoek naar juridische aspecten van de rol van strijdkrachten bij de bestrijding van terrorisme* (*Armed Forces, Use of Force and Counter-Terrorism. A study of the Legal aspects of the role of the armed forces in combating terror)*. Nijmegen: Wolf Legal Publishers.

Ducheine, P.A.L. (2009) ISAF en oorlogsrecht: 'Door het juiste te doen, vreest gij niemand' (ISAF and law of war: 'By doing the right thing, nobody frightens you). *Militair Rechtelijk Tijdschrift* 102(6), 277-300.

Ducheine, P.A.L. (2010) De status van aanwijzingen van buitenlandse commandanten bij de beoordeling van functioneel militair geweldgebruik. (The status of orders by foreign commanders in judging functional use of military force) *Militair Rechtelijk Tijdschrift*, 103(3), 145-154.

Ducheine, P.A.L. and Pouw, E.H. (2010) *ISAF operaties in Afghanistan: oorlogsrecht, doelbestrijding in counterinsurgency, ROE, mensenrechten & ius ad bellum* . Nijmegen: Wolf Legal Publishers.

Gill, T.D. and Fleck, D. (2010) *The Handbook of the International Law of Military Operations*. Oxford, New York: Oxford University Press.

Gondek, M. (2009) *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties*. Antwerpen: Intersentia.

Henckaerts, J.-M. and Doswald-Beck, L. (2005) *Customary International Humanitarian Law* (Volume I: Rules). Cambridge: Cambridge University Press.

Human Rights Watch. (2007) *The Human Cost – The Consequences of Insurgent Attacks in Afghanistan*.

ICRC (2008) *ICRC Annual Report 2007*. Geneva: ICRC.

Kalshoven, F. and Zegveld, L. (2001) *Constraints on the waging of war. An introduction to International Humanitarian Law* (3rd ed.). Geneva: ICRC.

Lorenz, D. (2005) *Der territoriale Anwendungsbereich der Grund- und Menschenrechte. Zugleich ein Beitrag zum Individualschultz in bewaffneten Konflikten*. Berlin: Berliner Wissenschafts-Verlag.

Nauta, D.R.D. (2008) De behandeling van gevangengenomen personen tijdens counter-insurgency missies (The treatment of imprisoned persons during counter-insurgency missions). *Militair Rechtelijk Tijdschrift* 101(6), 173-183.

Openbaar Ministerie (2007), *Geweldsaanwendingen Chora rechtmatig*, 30-6-2007. Available at: www.om.nl/organisatie/item_144364/item_147874/nieuwsberichten/@148343/om.

Roberts, A. (2006) Human rights obligations of external military forces. In: International Society for Military Law and the Law of War (ed.) *The rule of law in peace operations, Receuil XVII International Congress ISMLLW.* Bruxelles: ISMLLW, 429-450.

The Washington Post (2009) 'U.S. troops battle both Taliban and their own rules', November 16. Available at:www.washingtontimes.com/news/2009/nov/16/us-troops-battle-taliban-afghan-rules.