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***Current Issues of International Law in
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“Inter Arma Enim Silent Leges” (In times of war the law falls silent)

Marcus Tullius Cicero

Abstract

The study sheds light on the current tendencies if the international law on warfare can successfully be applied in the practical reality in the progress of counterinsurgency and counterterrorism efforts.

There have been two phenomena identified recently in the warfare which are endangering public security and public safety of the democratic states of the world: terrorism and insurgency. Both of them mean a threat and violation to the population and the government authorities. It has been queried in the military literature whether these new forms of warfare should be handled by military engagements or law enforcement. This is, nevertheless, not just a dilemma of the strategy how to combat against it, but should be, at the same time, in accordance with the international legal regulations, too.

When this study is going to outline how the international law based on the principles of traditional warfare can be applied to insurgent or terrorist groups, special emphasis will be given, if the relevant laws have failures in regulating these new forms of warfare, and if so, what changes should be proposed for the recent regulations of the international law.

Key words

terrorism, insurgency, counterterrorism, counterinsurgency, international law, law of warfare, law of humanitarian treatment, human rights, international criminal law, legitimacy, rule of law, UN Charter

Introduction

This study tries to shed light on the current tendencies if the international law on warfare can successfully be applied in the practical reality in the progress of counterinsurgency and counterterrorism efforts.

There have been two phenomena identified recently in the warfare which are endangering public security and public safety of the democratic states of the world: terrorism and insurgency. Both of them mean a threat and violation to the population and the government authorities. It has been queried in the military literature whether these new forms

of warfare should be handled by military engagements or law enforcement. This is, nevertheless, not just a dilemma of the strategy how to combat against it, but should be, at the same time, in accordance with the international legal regulations, too.

The international law of war developed by the end of the 2nd World War was basically modeled to the traditional - symmetric - warfare. After the 2nd World War the main form of warfare has been much rather asymmetric, than symmetric. We can state that both insurgency and terrorism represent an asymmetric warfare. Traditional warfare became rather exceptional¹, but insurgency with the characteristics of terrorism became the rule during the last decades.

The starting point of this study is that similarity between insurgency and terrorism seems to be more important than to make by all means sharp division between them. This is because the international law from many aspects does not differentiate the groups with armed forces if they are insurgent or terrorist, or has other terminologies than the military science.

When this study is going to outline how the international law based on the principles of traditional warfare can be applied to insurgent or terrorist groups, special emphasis will be given, if the relevant laws have failures in regulating these new forms of warfare, and if so, what changes should be proposed for the recent regulations of the international law.

1. Attempts for Defining Insurgency and Terrorism

Several definitions of insurgency and terrorism have been identified in the military literature, which at the same time try to make distinction between them. Phrases, like insurgency, irregular warfare, unconventional warfare, revolutionary warfare, guerilla warfare, terrorism are often used in the military literature as synonymous terminologies.² This is because all of these forms of armed conflict mean an asymmetric warfare. Further similarities, such as committing terrorist attacks, pursuing radical aims, intimidating civilians, etc., have been seen in these forms of warfare.

It should be noted that *terminology of insurgency* can be used to the armed troops in revolution, freedom fight, guerilla war and civil war, because the latter ones all have the political and military characteristics of insurgency.

Symmetric warfare has been identified as two opposing adversaries dispose of armed force that are similar in all aspects such as force structure, doctrine, asset, and have comparable tactical, operational and strategic objectives. Traditional warfare took place in most cases between state regular armies until the middle of the 20th century.

Insurgencies – typified as *asymmetric warfare* – could be seen even before the 2nd world war³, but were not widespread. Asymmetric warfare – as opposed to symmetric warfare - means that the opposing party is unable or unwilling to wage the war with comparable force, and has different political and military objectives than its adversary.

¹ The last traditional war was in 2008 between Georgia and Russia. James Turitto: Understanding Warfare in the 21st Century, International Affairs Review, Volume XVIII, No. 3: Winter 2010 page 10, downloaded from <http://www.iar-gwu.org/node/145> website on 15 of Sept. 2013

² Jane E. Gibish: Warfare in the 21st Century, Modern Warfare Volume VII No 3.. U.S. Army War College 2010.

³Max Boot: “Invisible Armies: An Epic History of Guerrilla Warfare from Ancient Times to the Present” (Liveright publishing Co.) 2013. page 375-378

These new forms of the asymmetric warfare are not just emerging political or military issues in our days, but a confused legal problem, too. In other words, terrorism and insurgency is not just an academic legal issue, and it is not the same how the laws define them. This is because sanctions, criminal consequences, investigating authorities, jurisdiction, military response, intelligence and law enforcement, etc. as the legal issues of terrorism and insurgency should sufficiently be regulated by the international and domestic laws.

*Insurgency has been defined with the following characteristics*⁴:

- *Organized movement* of a group, which, at the same time, leads to a protracted violent conflict.
- The involved groups' aim is to *overthrow the constituted government, or fundamentally change the political and social order* in a state or a region, or *weaken the control and legitimacy* of the established government.
- The means of an insurgent group to reach their aims are *subversion, armed conflict, sustained violence, social disruption* and *political actions*.
- Their aim has been rooted in the claim for *autonomy or independency* for an ethnic minority, a *more democratic government*, or *political and economic rights* to a social class.

All the definitions of the *terrorism* emphasize that terrorists use *violence* and *threat* against the population, property, places of public use, public transportation system, infrastructural and other facilities in order to reach a *general fear* in the society with *political, ideological* or *religious* aims.⁵ Terrorist attacks – as opposed to insurgency – are normally *unpredictable* and *random* in order to trigger psychological effects, i.e. *intimidation* and *government overreaction*. Terrorist groups are *clandestine* agents increasingly on *transnational level*.

It is an essential question as to whether on the basis of definitions of insurgency and terrorism we can make *clear difference* between them.

Both of the insurgents and terrorists are based on violence in actions, have political aims, and insurgent groups use not just mean guerilla warfare, but often commit terrorist attacks, too, or similarly to the terrorist groups, are financed from organized crimes. Terrorist groups, on the other hand, are often also well-organized, and tend to escalate the violent conflict.

Some differences between them, however, are *typical*: insurgent groups, for example, try to control one of the territories of the state, while terrorists normally not, insurgents occasionally respect the law of war, but the terrorists never, insurgents try to have the support of the population, while it is not important for terrorists, insurgents do not necessarily attack civilians, but it is the rule for terrorists.

We can mention as *examples of overlapping* in some groups that have characteristics of an insurgent group, despite they are considered terrorists.

⁴ Jason Rineheart: Counterterrorism and Counterinsurgency, Perspectives on Terrorism, Vol 4, No 5 (2010) Terrorism Research Initiative and the Center for Terrorism and Security Studies downloaded from <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/122.pdf> website on 13 of 2013.

⁵ Ben Saul, "Defining 'Terrorism' to Protect Human Rights" in Sydney Law School Legal Studies Research Paper ,No. 08-125 (2008) p. 1

Al Qaeda has a worldwide network, and regularly infiltrates insurgent groups in other countries, such as Iraq, Afghanistan and Syria.

The *Hamas* forms the part of the Palestine Authority and the *Hezbollah* has 11 seats in the Lebanese government, so they are in fact state authorities implementing social welfare tasks, too.⁶ *Hezbollah* is evidently a terrorist group, and the military faction of the *Hamas* has also been pronounced so by the European Union some months ago.

The *Kurdish in Turkey* and the *Chechen in Russia* have all the characteristics of an insurgent group, e.g. they form an organized group of an ethnic minority in a given territory of the state, claim autonomy or an independent state for them, and use political means, military force against the government, however they have been on the blacklist of the terrorist groups, due to the terrorist attacks they implement. Insurgent groups in the war in *Bosnia* and *Kosovo* during the 1990-s with the same characteristics were considered as insurgents, but not terrorists.

Both the *ETA* and the *IRA* have a double face in their warfare: their strategy is similar to the terrorists, e.g. they attack civilians and do not want to acquire territory, but they are typified at the same time by guerilla warfare, e.g. exploited bridges or attacked police stations.

Overlapping is even more complicated in the *Palestine Liberation Front*: its groups of a few members crossed the border of Israel and exploited objects and crowded places, took hostages, attacked villages and killed civilians. These Palestine terrorist groups controlled territories both in Lebanon and Jordan where recruited members and had terrorist training camps, too, but implemented armed attacks in the area of Israel.

The insurgent groups in *Afghanistan* and *Iraq* perpetrated terrorist attacks against the civilians in the way of suicide bombings, exploiting international organizations, embassies, schools, markets, etc., but as well as guerilla attacks by using traditional warfare against military bases of the Afghan army or the NATO.

It should be clear on the basis of these examples, that *insurgent groups use terrorist means, too*, if they see it more efficient than the guerilla warfare, or, in many cases they did not have any other choice than to do so, either, because of the special fields, e.g. high hills, or jungles, where they fight.

It can happen sometimes that not just the insurgents, but also the *terrorists are supported by the civilians*, as it was the case in Iraq, where the Sunni tribes had cooperated with *Al Qaeda* until they became fed up with the frequent terrorist attacks. In Afghanistan, where the *Al Qaeda* has been interwoven with the Taliban, and commits terrorist attacks together with them, the *Al Qaeda* enjoys the support of the local tribes. The *Hamas* and the *Hezbollah* are also strongly supported by the populations in Gaza and Lebanon.

It would be difficult, too, to find a terrorist group that does not pursue *concrete political aim*: the *Al Qaeda* aims to establish a world caliphate based on the fundamentalist Islam culture and destroy the West, the *Hezbollah* supports insurgent groups in other countries, such as Iraq and Syria with political goals, and the *Hamas* aims to eliminate the Israeli state. Even those terrorist groups, such as the Muslim Brotherhood, the AQIM, *Al Shabaab*, etc., which ideology represents only religious features on the surface, i.e. the fundamental Islam, are deeply rooted in politics, when aim to fight against the secularization, or try to hinder a more democratic process in Muslim countries.

⁶ Lara Deeb: "Hezbollah: A Primer". Middle East Report, 31 of July 2006. Retrieved on 31 of May 2011.

Local militias in African countries, e.g. Mai-Mai in Congo, LRA in Uganda, NPF in Liberia, etc., often *do not follow any political aim*, even if they are supported by the Al Qaeda, or other terrorist groups, they just use the advantages of a weak government that cannot efficiently control some areas of the state and try to maintain themselves from certain crimes and violent actions against the civil population.⁷ Militias otherwise have all the characteristic of insurgents, but cannot be considered so, much rather simple *criminals*.

In order to make *distinction* between insurgency and terrorism, the most important point of view is as to whether they commit common crimes or use lawful armed force. When doing so, we have to face up to further issues: if the insurgents perpetrate violate actions, they should be considered terrorists? When insurgents seriously violate the international law, for example attack civilians, civil objects, kill the prisoners, etc., they evidently cannot be identified as lawful combatants. The problem with it is that insurgents often go beyond this, and commit organized crimes, as well, e.g. drug trafficking, smuggling of weapons, taking of hostages, money laundry, etc., in order to finance their activities. This is because insurgents in most cases try to counterbalance their asymmetric position against the state regular army which necessarily leads to the violation of the law on warfare and the criminal law.

After having analyzed the differences, it should be clear that we cannot identify any insurgent or terrorist group that would have only terrorist or insurgent characteristics. As we could see from the aforementioned examples, *there are no clear insurgent or terrorist groups in the practical reality*, but non-state armed troops having more or less features of insurgency, terrorism or organized crimes.

2. Challenges of the Legal Regulations in Counterinsurgency and Counterterrorism

There are two legal status in the international law with regard to armed troops: the *law of war* differentiates if they meet the requirements of a regular army (having uniforms, or distinctive sign, carrying arms openly, being under responsible command and respecting the law of war) and the *law of humanitarian treatment* makes difference on the basis of having a war character, or not.

Consequently, an insurgent group will be considered to be under the force of the law of war, and the law of humanitarian treatment, if they meet the aforementioned requirements. If not, they – similarly to the terrorists - will be treated as *criminals*.

When the insurgents are under the force of the international law on warfare, they have to respect the law of war and the law of humanitarian treatment, and in return, they will be treated by the state regular army as combatants of warfare. The armed conflict between the insurgents and the government army will be subject to a *military engagement* on the basis of the rules of war.

If insurgents are considered as criminals – when they commit terrorist and organized crimes, or crimes “just” against the public safety, public order or the state power⁸ – they will

⁷ Stephen Ellis: History of the Conflict in Liberia, *World Movement for Democracy* 2011. downloaded from <http://www.wmd.org> website on 20 of Oct. 2013

⁸ Insurgents – according to the domestic laws – are always in an illegal position, unless they do not commit violate actions, e.g. in the case of a peaceful demonstration permitted by the state authorities, because every violent action against the state power, are regulated by the laws as crimes in most countries.

be put under the force of *law enforcement*, i.e. come up for trial based on the rules of the criminal procedure.

When people offend or would like to remove the existing government other than by democratic elections, *it is always unlawful according to domestic laws*. The peaceful demonstration permitted by the public authorities is the only exception. In other cases, when citizens are unsatisfied with the government, and express it in *violent actions*, such as riot, conspiracy (Bolshevik Party in Russia) revolution (fundamentalist Islamists in Iran) freedom fight (Che Guevara in South America) guerilla war (Taliban in Afghanistan) civil war (Syria) military putsch (Chile) domestic laws normally regulate it as *crimes against the state power*.

On the other hand, however, the *international law entitles the state to use military force in self-defense*, when an armed attack has occurred in the boundaries of the state, even if the insurgent group is not under the law of war. (Article 51 of the UN Charter) The only limitation for the state in crushing the insurgency is to respect human rights and international criminal law.

If the insurgency has been crushed, the state uses *criminal enforcement*: arrest, trial and punishment. It is possible that the government gives *amnesty* to the insurgents after the insurgency has been crushed, which reflects to the political compromise has been made between the insurgents and the government.

When the insurgency wins, and the insurgents can establish a new state on the territory where the ethnic minority lives, or if they can overthrow the government, the other states, according to the international customary law, will *approve the new state or government*, provided it is operating efficiently. A new state or a new government are just rarely come into existence in a lawful way - Hungary and Germany can be mentioned as examples in 1990 - the majority has been as a result of revolution, insurgency, freedom fight, or military putsch. *Legitimacy* evidently lacks in the latter cases. International customary law expects, for this reason, the new state or the government to consolidate its legitimacy with election or referendum.

Distinction between insurgency and terrorism in the international law *is not accordance* with the new challenges of asymmetric warfare. When governments have to face up to the problem of insurgency or terrorism, they cannot achieve any decision on the basis of such legal issues, whether to use military engagement or law enforcement, because in most cases it would go *against the rationality*. As mentioned earlier, there is no clear difference either in the theory or in the practice between insurgency and terrorism.

Military engagement is often *necessary* against terrorist groups, e.g. in Afghanistan or Iraq, where law enforcement would obviously be inefficient. Or, when Bin Laden, who was a terrorist, not an insurgent, had to be liquidated, the special forces of the US Army implemented a military operation. As another example, the Israeli Army in more cases attacked Gaza and South Lebanon and used its military armed forces, as a reaction to the terrorist attacks from these areas. The government can successfully use the armed forces of the police when a riot has broken out, for example, but against most terrorist organizations it'd be a failure.

It does not seem to be reasonable, either, from the side of the government army to respect the rules of war when insurgents or local militant gangs perpetrate terrorist crimes, even if they should be considered as a regular army by the laws.

The problem, from legal point of view, is even more complicated when the insurgents or terrorists have been *captured*: they should be treated as criminals, and if so, which court will have the competence to proceed in the criminal case? Examples of the prisoners in Guantanamo Bay and Abu Graib led to a widespread debate in the US, if the human rights of the captured terrorists, such as the right to life, human dignity, and fair jurisdiction, should be respected, or not. Preconception can be made on the basis of this exposition that regulations of counterinsurgency and counterterrorism are fairly *vague* in the international law, and should be adjusted to the *new challenges of asymmetric warfare*.

3. Characteristics of the International Law of War

The first attempt to codify the law of war happened in 1863, in the midst of the American Civil War. President Lincoln asked Francis Lieber, a jurist and political philosopher, to draft a code of warfare in order to regulate the armed conflict. The so called "*Lieber Code*" – served as a base for the Geneva Conventions - regulates instructions for the Government Armies of the US in the field. Its 157 articles were concerned with martial law, military jurisdiction and the treatment of spies, deserters and prisoners of war.⁹

The *recent sources of the international law regulating warfare* are as follows:

- Geneva Conventions and its protocols
- Hague Conventions and its protocols
- United Nations Charter
- International Criminal Law
- Treaties on Human Rights
- Rules of Engagement

Recently, the law of war has been regulated by the international law, not by the domestic laws. International law has *two main characteristics*, which determine the applicability of the law of war, too.

One is that the provisions of the international law shall obligate a state, only if it has ratified an international contract, but only in the framework of this contract. For example, if a state has not signed the Geneva Conventions, it is problematic, how to have it kept the rules of the prisoners of war.

Certain organizations of the European Union have supremacy to pass legal norms, and apply them by the courts, even if it is against the member states' domestic laws. The EU law is called, for this reason, as "*sui generis*" law.¹⁰ International organizations, such as the United Nations itself, *do not have the right to regulate international affairs*, because only the international treaties, charters, conventions, etc. can do so. So, only the provisions of the UN

⁹ George Ripley and Charles Anderson Dana (ed.). "Lieber, I. Francis". *The American cyclopaedia: a popular dictionary of general knowledge* page 10.

¹⁰ Marek Hlavac: Less than a State, More than an International Organization: The Sui Generis Nature of the European Union", *Harvard University - Harvard Kennedy School (HKS)*, 2010. *working papers series* 02 Dec 2010 downloaded from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719308 website on 20 Oct 2013

Charter shall be applied and only to its signatory nations. Or, the UN Human Right Committee, for example, cannot make any obligatory decision in the legal cases of human rights to the signatory nations, just give recommendations to them.

The international law – as opposed to domestic laws – has been based on mainly the *cooperation* among the nations rather than that of the *law enforcement*.

The latter one is, however, the essential part of the domestic laws, because the state can enforce its will only if uses its political power thorough the legislation, the public administration, and jurisdiction. The legal norms passed by the parliament or the administrative authorities can be implemented only by the use of law enforcement, such as police, prosecutions, courts, prisons, etc. Sanction has normally been an essential part of the legal norms in the domestic laws: when the provision of the law is not implemented voluntarily, the sanction should be applied by the state authorities. Law enforcement has been the rule in domestic laws, and alternative means, such as the use of mediators in the trials, or the declarations in the legal norms are rather exceptional.

The prevailing legal means in the international law are several forms of *cooperation*, e.g. establishing ad hoc committees, organizing conferences, writing reports, recommendations, diplomatic negotiations, mediating peace, etc. *reprisal* and *retortion* can legally be used against a state, if it violated the international law, so that lawful actions can be enforced. The most traditional sanction, *to start a war* against a state violates the recent international law, so it cannot be widely applied anymore, just in exceptional cases regulated by the international law.

There are *two exceptions*, when despite the lack of law enforcement character the provisions of the *international law can be enforced*. The Security Council of the United Nations is empowered by the Article 42 of the UN Charter to authorize member nations *to use military force* to deal with any situation that the Council determines to be threat to international peace, a breach of the peace or an act of aggression. This provision can be used only when other means, such as diplomatic measures or economic sanctions have been or would be ineffective to deal with the threat.

The other exception is the *International Criminal Court* that will open a criminal procedure against the criminals who have perpetrated international crimes, even if the state, whose citizens are the criminals, is unwilling to, or cannot do so. The military leaders of the former Yugoslavia were punished in this way.

International law is generally considered as “*soft law*”, which is its other characteristic. It means that legal norms of the international law are so generally formulated that in the concrete cases it can be interpreted in several ways.

The interpretation of the legal provisions depends to a great extend on the political power of the states that will apply them in the practical reality. The US and Great Britain interpreted the provisions of the Article 51 of the UN Charter in the way, that they had the right in self-defense to attack Iraq in 2006, however one of the essential conditions, i.e. the armed attack by Iraq against these countries missed.

There are “*ius cogens*”, not just “soft” legal norms, too, in the international law, such as the prohibition of the use of force, non-intervention, or human rights, for example, which means that these legal institutions have been interpreted in the legal practice by the international organizations as a case law and will be implemented, if possible, in a strict way.

The *international customary law* means those rules, that have been widely and for a long term applied in the practice, based on international treaties, conventions, agreements, charters, declarations, or covenants, and have a uniform interpretation.

Rules of engagement issued by the commandant, for example, can be mentioned as customary law, because its provisions are not legal norms, but should be based on the international law on warfare. Acknowledgement of a new state by the other ones can be mentioned as an example to the customary law.

Human rights are formulated as *legal principles* in the international agreements.¹¹ This is a reason, why the interpretation of human rights so important, either in the way of case law, as it has been a tradition in the common law, or in the practice of jurisdiction similarly to the European continental laws.

4. The Law of Humanitarian Treatment and Human Rights

The Geneva Convention is called as international law for the *humanitarian treatment of war*, but the Hague Convention is the *law of the war*. At the moment, with one exception, every country of the world has already ratified both the Geneva and Hague Conventions, but not all of their protocols. The only exception is West Sahara, which has been occupied by Morocco, so it does not have independent state-system to achieve any own decision.

The Geneva Convention consists of 3 conventions and 3 protocols.¹² They regulate the treatment of the *wounded, sick and shipwrecked*, the *prisoners of war*, the *civilians* and the *victims*. The most important rules for the treatments:

- Prisoners of war (the captured combatants) cannot be attacked any more, but should be spared, and have the right to human treatment, such as health care, clothes, food, personal property, decorations, badges of rank, payment for their work, correspond with their relations, etc.
- Wounded, and sick have the right to medical treatment, evacuation, but the dead have the right to medical examination about the death, identification, collection of their bodies and remains, burial according to the rites of their religion.
- Civilians who do not take active part in the armed conflict and the combatants who have ceased to be active, have the right not to be attacked, compensation for their injuries, death damages in their property, and for being refugees.
- Violence to life, persons and human dignity, such as murder, mutilation, cruel treatment, torture, degrading treatment with the prisoners of war, the sick, the wounded and the civilians, also taking of hostages are prohibited.

¹¹ Margrét Steinarsdóttir: Sources of International Law, Human Rights Center 2012, downloaded from <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightskonceptsideasandfora/theconceptsofhumanrightsanintroduction/sourcesofinternationallaw/> website 10 Oct. 2013

¹² The Geneva Conventions of 1949 and their Additional Protocols, downloaded from <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/> website on 21 Oct 2013

- Carrying out executions is also prohibited, unless previous judgment pronounced by a regularly constituted court, with all the judicial guarantees. Prohibition of execution does not mean the pure killing, rather the right to a fair jurisdiction.

The provisions of the Geneva Convention shall be applied in the following cases:

- *Declared war* between the signatory nations.
- If the opposing nation is not signatory, when it accepts the Convention.
- If *the armed conflict happened in the boundaries of the country* between the government army and the insurgent group, or two insurgent groups, provided it has a war character.

Enforcement of the provisions in the Geneva Conventions is less problematic, when there are two or more states in the armed conflict, however enforcement cannot happen in a direct way even in these cases.

Using a *protecting power (mediator)* selected from those states that did not take part in the conflict, but agreed to look after the interest of a state that is a party to the conflict has been the most common way to manage the conflict. The “mediator” state has the competence to establish communication between the parties of the conflict, monitor the implementation of the Conventions, visit the zone of armed conflict and advocate the prisoners of war.

Geneva Conventions will be applied in the case of insurgency, too, if it has a *war character*, which is a widely debated issue. It has been queried for example, how to know if an insurgency has a war character, or not, when this terminology has neither been defined, nor interpreted.

Nevertheless, the *definition of insurgency* has not been identified by any international legal regulation, either.

As mentioned earlier, there may be armed conflicts with war character between the government army and the local militias, when the militias cannot be considered by the military practice as insurgent groups, but local criminal gangs. Can we draw the conclusion that the government army and the local militia do not have to respect the provisions of the Geneva Convention in such cases? On the basis of the relevant legal regulations, there is no answer to this question. It is another matter, if in the lack of clear regulations sufficient solutions have already developed in the practical reality.

Further questions will be raised: if the insurgents perpetrated terrorist and organized crimes can be treated as prisoners of war, after they have been captured, in the way it is identified in the Geneva Convention, or, they should be sent to trial as soon as possible? Or: who is entitled in such cases to investigate if they are suspicious with committing crimes, which should base a criminal procedure against them? These are, however, not just theoretical questions. After the prisoners had been kept in Guantanamo for five years, it turned out that only a few of them were terrorists. Terrorist in Afghanistan, Pakistan and Yemen, for example, have been liquidated in a targeted killing, without any judgment made by a court.

The provisions of the Geneva Conventions do not determine the legal status of the opposing parties in the internal armed conflict. The government is entitled to treat captured insurgents as criminals by its domestic law, even if they are under the force of the Geneva Conventions and ought to treat as prisoners of war.

It should be noted that there is no agreement among the legal scholars as to whether or not there exists international law of armed conflict that shall be applied in the internal armed conflict.

This challenge has been justified by the legal disputes in the US, when the Supreme Court in the *Hamdan case* (Hamdan had been Bin Laden's driver and bodyguard who was captured in Afghanistan and held in Guantanamo Bay)¹³ declared that the armed conflict caused by the Al Qaeda terrorist attacks does not have an international character, but happened on the territory of a party of the Geneva Conventions. For this reason, not all the provisions of the Geneva Conventions shall be applied, but only the Article 3, that determines *the rights* of the unlawful combatants *to a fair trial*.

Human rights should also be examined from the point of view of its relevance in the counterinsurgency and terrorism. Human rights were first regulated by the Universal Declaration of Human Rights developed by the General Assembly of the UN in 1948. The most important agreement, the International Covenant on Civil and Political Rights came into force in 1976. Customary international law of human rights has also been created as a result of a consistent practice.

Human rights related to terrorism and insurgency are listed in the international law, on one hand as *minimum standards during the investigation*, arrest, detention, trial and punishment, but also as *the right to self-determination*, which is the right of people to independent, democratic institutions free from outside interference, on the other hand.

This is a question how the human rights shall be applied in the affairs of wars, insurgencies, terrorism, and other armed conflict?

As we could see in the analyses above, the Geneva Conventions shall not be applied in every internal armed conflict, because of the vague legal regulations. Human rights, for this reason, have a *subsidiary role* in the legal practice. When the Geneva Conventions cannot be applied, human rights having an "*ius cogens*" character in the international laws cannot be violated by the state, non-state groups or individuals, no matter what kind of armed conflict, and on which place occurs. However, the US legal practice did not accept that every provision of the Geneva Conventions shall be applied to the prisons in Guantanamo Bay the public authorities of the US struggled for 5 years to determine their human rights, especially the interpretation of the torture. Prisoners were finally taken to trial, although not in a reasonable length of detention.

Opportunities *to enforce human rights* do not show a uniform picture in the international law.

Neither the *UN Human Rights Council*, nor the *UN Human Right Committee* has the right to make decision in the concrete cases, but investigate individual complaints, review fulfillment of human rights, analyze reports, give comments and opinion, mediate peace, etc. Only the *Security Council* has the right to take actions, such as economic sanctions, peace enforcement, and creation of International Tribunals for prosecution and punishment of human rights violators, against the states violated human rights in relations with the threat to the peace and breach of the peace, or acts of aggression.

¹³ Emily Bazelon Invisible Men: Did Lindsey Graham and Jon Kyl mislead the Supreme Court?— *State Magazine* downloaded from http://www.slate.com/articles/news_and_politics/jurisprudence/2006/03/invisible_men.html website

In spite of the fact, that neither the UN Human Rights Council nor the UN Human Right Committee has the right to make decision in the legal cases of human rights, they successfully developed a *case law system*, which serves as a base for the interpretation of human rights in the concrete cases.

The European Union has established the *European Court of Human Rights* that is entitled to make judgment obligatory for the member states in human rights cases. The ECHR applied human rights in the legal cases of armed conflict in more times. Right to life was interpreted, for example, when civilians were killed in the armed conflicts. The ECHR developed a strict interpretation in this matter: when combatants are among civilians and begin to attack the enemy, an offensive operation can be implemented, only if it is necessary to protect civilians, or, if civilians who are taking part in the attack do not react to the warning.

The *importance of human rights* in the armed conflict has been growing, because the traditional law of humanitarian treatment cannot be applied in asymmetric warfare, like insurgency and terrorism. Human rights can serve as a limitation both for the parties involved in the armed conflicts, in the lack of sufficient legal regulations on warfare.

5. The Law of War I. (Ius in Bello)

The first Hague Convention was ratified in 1899, the second in 1907, but the conference where the third convention would have been negotiated, was cancelled due to the start of the 1st World War.

The *Hague Conventions* have three main parts:

- *Law of War* (ius in bellum) regulates the means and methods in war, such as injuring the enemy, attack, defense, military movement, treatment of spies, use of the white flag, capitulation, armistice, occupied territories and protected objects and zones.
- *International war crimes*: genocide, crimes against humanity and aggression.
- Regulation of *prohibited/restricted weapons*.

The law of war shall be applied to the combatants of armies, militias and other voluntary groups, if they wear uniform or distinctive sign (badge, armband) carry arms openly, operate under responsible command and respect the law of war and customs.

Interpretation of this legal provision is fairly ambiguous, because besides the government armies it has been extended to other military groups, as well. It is easy to identify if the combatants of a military group meet the requirements of a *regular army*.

If the military groups *do not respect* the law of the war, the government army does not have to do so, either. In other words, if an insurgent group implements terrorist attacks against the government army, as it occurs in Afghanistan by the Taliban, or in Turkey by the Kurdish, for example, the government army will be entitled to attack the military group (insurgent group or militia) with other means, too, than regulated by the law of war.

We could hardly mention such an example from the cases of last decades, when in the asymmetric warfare the insurgent group would have respected the law of war. Consequently, these regular armies normally implement other military engagements, than based on the

traditional warfare regulated by the Hague Conventions. *Targeted killing*, such as liquidation, combat drones, air bombing, or *special operation* and *intelligence* as examples can be mentioned to this new way of military engagement.¹⁴

It is important to query, too, that if Hague Conventions are not applied anymore in most cases, is there any law that would regulate these military engagements? If not, we can draw the conclusion that asymmetric warfare is *unregulated* by the international laws, and the parties involved in the armed conflict are not limited by any rule, except the international crimes, and the human rights.

Enforcement of the law of war is also problematic. The *International Court of Justice*, or the *International Law of Arbitrary* will proceed, but only if the parties in the conflict will entitle them to do so. These courts, however, cannot make a judgment that can be enforced to the states. This is why only 200 cases were taken to these courts during the last 90 years. If these courts do not proceed in the case, consultation, diplomatic negotiation will be applied, ad hoc committee will be set up, or conference will be organized to give recommendation to the parties in the conflict. The state that violated the law of war should pay compensation to the victims and the state that suffered unlawful actions.

International criminal law called in the legal terminology as "*delicta iuris gentium*" was born in 1945, after the 2nd World War, when the Nazi war criminals had to be punished. Earlier it belonged to the issues of state sovereignty to regulate an act as a crime.

The following crimes have been regulated by the international law as crimes: *genocide*, *crimes against the humanity*, *war crimes* and *crimes related to aggression*. Crime against humanity can be murder, torture, slavery, deportation, imprisonment, sexual harassment, chasing of groups, etc. war crimes are regulated by the Geneva Convention, such as attacking civilians, killing wounded, or combatants when they surrendered, humiliating war of prisoners, taking of hostages, execution without judicial guarantees, etc .

The relevance of it is that these acts shall be considered as crimes, even if the domestic laws of the states do not regulate them so, and people regardless of being combatant of a regular army, insurgent, terrorist or civilian will be taken to trial before the International Criminal Court.

The *International Criminal Court* was established in 2002 in Hague, and at the moment 122 states are its members. The International Criminal Court *has the competency to open a criminal procedure against a person committed international crimes*, if the person is the citizen of a signatory state, or, the crime was committed in the area of a signatory state. In other cases, especially if the host state is unwilling or not capable to investigate the case, the Security Council has the right to decide the case will be sent before the International Criminal Court. At the moment there are 12 persons (from Uganda, Congo, Republic of South Africa, Darfur) who are under criminal procedure initiated by the International Criminal Court.

The United Nations has the right to establish *ad hoc international criminal courts*, too.¹⁵ Such courts proceeded first in the criminal cases of Nazis in 1945 in Nurnberg, and later against the criminals of the former Yugoslavia, Rwanda, Sierra Leone, Cambodia and Lebanon.

¹⁴ Greg Miller, Julie Tate and Barton Gellman: The drone campaign, The Washington Post, 2012, downloaded from http://www.washingtonpost.com/world/national-security/documents-reveal-nsas-extensive-involvement-in-targeted-killing-program/2013/10/16/29775278-3674-11e3-8a0e-4e2cf80831fc_story.html website

6. The Law of War II. (Ius ad Bellum)

The right of the states to *start a war* against other states was not prohibited by any law until the 20th century. The provisions of the Hague Convention passed by the Conference in 1907 required only the declaration of war before the state attacked the other one. The new legal regulation which shall apply to the “*ius ad bellum*” was passed after the 2nd World War by the *United Nations*.

“*Ius ad bellum*” is the right of the states to use force against other states regulated by the UN Charter, but can be applied only in exceptional cases. The Article 2 (4) of the UN Charter *prohibits the member states to threat or use of force* against territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. The Article 2 (1) of the UN Charter declares the *sovereign equality* of the member states, which should be interpreted as the *prohibition of state intervention* in another context. The Article 2 (7) of the UN Charter explicitly prohibits the United Nations to intervene in matters which are essentially within the domestic jurisdiction.

In other words, prohibition of the use of force and prohibition of state intervention is the rule in the UN Charter, which gives priority to the *pacific settlement of disputes* in the maintenance of international peace and security, such as negotiation, mediation, conciliation, arbitration, judicial settlements, etc. in the Article 2 (3) of the UN Charter.

These principles of the UN Charter are interpreted in the declarations of the General Assembly and the resolutions of the Security Council.

Regarding the insurgency and terrorism, we need to know which cases shall be under the provisions of the *UN Charter*, and which ones will be subject to *domestic criminal law enforcement*.

It is *the right of the Security Council* to determine the existence of any threat to peace, breach of the peace, or act of aggression, then to make recommendations, or decide what measures shall be taken (Article 38 of the UN Charter) The Security Council, as a first step, tries to apply *measures*, such as interruption of economic relations, means of communications, such as rail, sea, air, postal, telegraphic, radio, etc., and diplomatic relations. (Article 41 of the UN Charter) When these measures seem to be inadequate, the use of *demonstrations, blockade and other operations* by air, sea and land forces is allowed in the case of threat to peace, breach of the peace and aggression. (Article 42 of the UN Charter)

According to the Article 42 of the UN Charter, the Security Council has the right to use *military force*, or may authorize a member nation to do so, if the Security Council determines to be a threat to, or a break of the international peace, and aggression, provided the aforementioned conditions are met, and the diplomatic measures and economic sanctions seem to be inefficient to manage the situation.

More resolutions of the Security Council during the 1970-es interpreted the *aggression*: using weapons and armed force, declaring war, invading, occupying or bombing the territory of the

¹⁵ Global Policy Forum: International Criminal Tribunals and Special Courts, downloaded from <http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts.html> website

state, blockade, sending armed gangs, irregular army or mercenaries, etc. shall be considered as aggression.

It is important that *only the Security Council has the right to use*, or authorize for the use of *military force*, because the definition of the aggression given by the UN Charter is only in the form of exemplary list of acts, which can be interpreted by the states involved in the conflict in more ways. The practical reality shows, that the states do not often admit that they have violated any international law, but often accuse the other one to provoke the conflict, and refer to it as a base to their reaction, or consider themselves in the conflict as the victims of the aggression, but not the aggressor. There happened cases when the state thought political benefit from attacking another state more important than to respect the international laws. The most pregnant example to this is the several conflicts between Israel and its neighboring countries.

The resolution passed by the Security Council on the use of military force is based on unanimous voting of the members of the Security Council, which represents a strong support of the member nations on one hand, but can be a hinder in achieving the decision, if the political standpoints of one or more member states are different. The Security Council consists of the strongest states of the United Nations, for this reason its resolutions are *not independent from the actual political interests* of its members. Furthermore, it has the exclusive right to interpret the generally formulated “threat to peace and breach of peace” or “international peace and security” legal terminologies. It has been *tangible* on the basis of the resolutions of the Security Council *how political views of its members influence the decisions*.

The Article 51 of the UN Charter regulates the right to *self-defense*. When armed attack has occurred, the nation may use military force in individual self-defense, or protect the other nation, where the armed attack has occurred, in collective defense. This right to self defense continues until the Security Council takes measures necessary to maintain peace and security.

As opposed to the Article 42 of the UN Charter, *there is no need for a resolution* passed by the Security Council in Article 51 of the UN Charter to declare if the member nations have the right to individual or collective self-defense in the concrete cases. This is *fairly problematic*, because concrete cases can be interpreted in more ways. Perhaps it is not an exaggeration to state that *the states interpret the provisions of the Article 51 of the UN Charter in the manner of their political goals* as it happened when the US and Great Britain attacked Iraq in 2006. It can be limited only by the resolution of the Security Council that declares a state as aggressor, for example Israel, when used the right of self-defense in response to the terrorist attacks of the Hamas.

For example, the Article 51 of the UN Charter determines the right to self defense only if the *first armed attack* has occurred. *Anticipatory self-defense* has a wide interpretation of this provision of the UN Charter. It means that using military force to defeat the threat of an armed attack even before the first strike occurs can be justified on the basis of self-defense.

The definition of armed attack has not been defined by the UN Charter, because after the 2nd World War it originally was modeled to the traditional warfare, which was fairly ambiguous. As mentioned earlier, it has become a vague area in the second part of the 20th century.

After the 9/11 terrorist attack, the Security Council passed the *Resolution 1368*, reflecting to the terrorist attack occurred in New York, Washington D.C and Pennsylvania on September 11, 2001. The Security Council declared the terrorist attack of 9/11 is a *threat to*

international peace and security, and expressed that perpetrators, organizers and sponsors of this terrorist attack should urgently be brought to justice. This resolution also declared that those *responsible for aiding, supporting the perpetrators, organizers and sponsors*, will be held accountable.

There have been *several interpretations* on the basis of Resolution 1368, which otherwise seems to be a declaration rather than a legal provision.

The first conclusion to be made on the interpretation of the Resolution 1368 is that terrorist attacks have been taken *under the force of the Article 42 and Article 51*. Based on these articles, the Security Council *authorized the member nations of the UN to use military force*, and at the same time declared the right of the nations to individual and collective self defense in response to the terrorist attack of 9/11.

The Resolution 1368 makes it clear, too, that military force is allowed to use in the case of terrorist threat, but *does not specify when, where and how much force* may be used. The lack of such an interpretation is also problematic in the concrete cases.

Israel for example, has regularly been attacked by the Hezbollah and the Hamas in the way of suicide bombing, explosion, taking of hostages and missiles. These are armed attacks, and terrorist attacks at the same time perpetrated by those terrorist groups that are strongly sponsored by the state.¹⁶ The Israeli state used military force against Gaza and Lebanon as sponsoring state, but it was not always supported by the Security Council. The reason expressed by the Security Council was that Israel used prohibited weapon, and *did not keep the principle of the proportionality* in its respond, for example killed civilians. The other side of the truth is that the Palestine combatants used human shields and put the military objectives in hospitals.

One thing seems to be sure on the basis of the Resolution 1368: terrorist attacks shall be under the force of the UN Charter.

Further conclusion to be drawn is that not only the individuals and groups taking part in terrorist attacks should be responsible, but the *states, that sponsor the terrorist groups*, as well.

The terrorist attack of 9/11 was evidently an international terrorist attack, perpetrated by the terrorist group, Al Qaeda, not the Afghan state. The US attacked the Afghan state, based on the Resolution 1361, which interpreted the Article 51 of the UN Charter in the way that the Afghanistan is a sponsoring state. President Bush gave Afghanistan an ultimatum to extradite Bin Laden otherwise the state will be attacked by the US military forces. It is obvious that the Afghan state was a sponsoring state, even if they would not have rejected the extradition of Bin Laden. That is, on the tribal areas of Afghanistan, which were uncontrolled by the state, the Al Qaeda had (and still has) terrorist training camps and other terrorist facilities. Interpretation of Resolution 1361 *gave the right in this way to the US to use military force against Afghanistan*, however the terrorist attack of 9/11 was perpetrated by the Al Qaeda, not the Afghan state.

The military force in the form of *targeted killing* used by the US *against Pakistan or Yemen*, for example, *cannot be justified* on the basis of such interpretation of the Resolution 1361. This is because it cannot be proved if these states in fact support terrorist groups in any

¹⁶ Anthony H. Cordesman: The Lessons of the Israeli-Lebanon War, CSIS, 2008. 23-25.o.

way, or if so, they really want and are able to control the tribal areas. Regardless, neither of these states was directly involved in any armed attack or did not threaten or violate international peace and security in any way, which would serve as a base for the use of force against them.

When the US and Great Britain attacked Iraq, *it was not based on any resolution of the Security Council*. The Security Council passed two resolutions in 1998 and in 2002, in which declared that Iraq did not cooperate with the International Atomic Energy Agency, and obligates it to do so. The US and Great Britain justified the starting war to Iraq in 2006 with the *right to self-defense*: they wanted to find the weapons of mass destruction and destroy them, capture the terrorists and assure that those who are in need can receive the humanitarian aids. They also referred to the fact that did not aim to violate its territorial integrity and political independency. This is, however an *extremely wide way of the interpretation* of the self-defense, because the Article 51 of the UN Charter can be applied only in the case of on *armed attack*, which did occurred in any way from the side of Iraq.

The Resolution 1361 can be applied in the case, too, when a nation under terrorist attack *request the assistance* of other nation, and can be considered as collective self-defense. The incumbent government, as it happened in Mali, may ask another state to intervene, i.e. the government of Mali asked French government to help crush the insurgent group in the Northern part of the country.

These examples show *how widely* the right to use of armed forces can be interpreted in the practical reality, and *can adjust it to the actual political benefit* of the politically strongest states.

The other question is when a state can use force in the case of insurgency, civil war, revolution, or military putsch which occurs *in the boundaries* of the given state. The state obviously has the right to regulate the use force in such cases in the constitution or in domestic acts, but it is queried in the international law, if other states or international organizations can intervene. These armed conflicts can easily lead to *undesirable effects*, such as illegal weapon trade, terrorism, wave of refugees, ethnic cleansing, etc., which threatens the international peace and security. The NATO air bombing, for example, was implemented in the former Yugoslavia in 1999 on the basis of the resolution of the Security Council, in which this was the reason for the intervention. The Syrian civil war has generated the same problems, like it was in Kosovo in 1999, but the Security Council has not achieved any decision until this time in the case.

Prohibited intervention is interpreted by the Security Council as the *intervention in the internal cases of the state*, for example, support of terrorism, insurgency or internal armed conflict in the form of weapon transport, military base, military advisers, etc. It has often happened during the last decades that terrorist groups, for example, the Al Qaeda and the Hezbollah intervened in Iraqi war and Syrian civil war, or Russia, too, with weapon transport to the Syrian civil war. As mentioned earlier, prohibited intervention cannot be punished in a direct way by the international law, unless it jeopardizes the international peace and security based on the Article 42 of the UN Charter.

Intervention can be *indirect*, too, such as blockade, embargo, too, which can be lawful actions, in the case of threat to force and use of force.

The Article 1 of the UN Charter determines as one of the aims of the Unites Nations to respect and promote human rights and fundamental freedom. *Violation of human rights* can also base of a lawful intervention, as mentioned earlier, if it is related to the international

peace and security. According to the international legal practice, only the Security Council has the right to take actions in these cases. One of these actions is the *peace enforcement*, which means that the opposing parties of the civil war should be disarmed by using military force. This was the reason why the Security Council decided to use peace enforcement in Bosnia in 1992-95 and in Congo in 2003, for example.

The international customary law acknowledges the right of the government to facing in internal armed conflict *to conduct military operations those citizens taking an active part in hostilities against the government*, in addition to law enforcement activities. This is the case when the armed conflict does not have any international character, as was examined earlier in this chapter.

7. Constitutional Rights vs. Efficiency Requirements

Counterinsurgency and counterterrorism require the so called “*comprehensive approach*” both on domestic and international level, which supposes military, intelligence, law enforcement, jurisdiction, and administrative means to be applied at the same time. *Efficiency requirements* can be guaranteed only in this way. There are, however, contradiction between efficiency requirements and the *traditional principles* of the Western democracy, such as the rule of law, constitutionalism, pluralism, human rights, freedom, openness, tolerance, etc. The Western countries try to balance between the *individual liberty* and *public safety* in their counterterrorism efforts.

It should be noted that for the legislation of the European Union only the Islam terrorism has any relevance, because local insurgencies or local terrorist groups have not existed anymore.

As a reaction of the terrorist attacks in 2004 in Madrid and in 2005 in London, the European Union more intensively began to take part in counterinsurgency, and elaborated a *new strategy* to it. It is especially important for the legislation of the European Union, because it should be in accordance with the basic principles and values of its charters.

Laws on the counterterrorism should be based on the requirements identified by the European Union public policy. These are as follows: quick, coherent, goal-oriented, cost-effective operations, and clear, unambiguous legal regulations.

According to the *self-critic* of the European Union, the relevant legal regulation is often not capable to follow efficiency requirements of the counterinsurgency, which led to inadequate and insufficient operations.

There have been two emerging issues in this field: *competence* of the international organizations vs. domestic public authorities, and the possible *limitation of the constitutional rights*.

Regarding the former one, it is problematic, how to share the competence of intelligence on international and domestic level, such as collecting and analyzing data, law enforcement, immigration and border management, so that overlapping and the withdrawal of the competence of the member states can be avoided.

It is still debated in the EU in what extend certain constitutional rights, such as right to privacy, ownership, fair jurisdiction, human dignity and freedom, can be limited so that efficiency requirements of the counterinsurgency can be achieved.

The *Stockholm program*¹⁷ determined four principles of counterterrorism:

- *Prevention*

This principle emphasizes on one hand the elimination of social problems, the promotion of religious and ethnic tolerance, economic development and democracy in the countries where terrorism has developed. It is evident that the instability of the state and the underdeveloped economy is a hotbed of terrorism, especially when the state follows a politics based on extreme ideologies. This is why the European Union supports Gaza, for example, or finance research, which try to shed light on the social and economic problems related to terrorism.

On the other hand, prevention will be more efficient, if the relationship with terrorist groups, such as financial support, communication, participation in their training camp, spread of extremist ideologies, recruitment, information, etc. will be regulated by laws as crimes. The intelligent agencies had had information about the terrorists involved in the terrorist attacks in Marseille in 2012 and in Boston in 2013, but could not have the right to arrest them, until they perpetrated the terrorist crimes.

- *Protection*

This principle expresses a requirement that constitutional rights could be limited only on the basis of *necessity* and *proportionality*. That is, it is necessary to collect more personal data (fingerprint, DNA, profiling), check the mails and phones, etc. when terrorists are pursued.

Identification technologies and *analytical capabilities* which have developed during the last decade can reveal, from a huge amount of data, certain connections and risks of the terrorism, e.g. the moving and customs of the terrorists, their plans, messages, etc. This can, however, easily make the citizens *at the mercy of the state*, especially when the personal data are streaming among the public authorities without any control.

The *right to fair jurisdiction* has been highlighted among the constitutional rights.

The fair criminal procedure has to assure that the evidences should be based on facts, but not on preconceptions, the right to appeal against the violation of the procedural rules, detention should be based on a court resolution, interrogation cannot be humiliating or cannot be based on torture, and the accountability of the public authorities.

- *Respond*

This requirement emphasizes the *consistency of law enforcement*, i.e. every terrorist crimes should be punished, and the *solidarity* which intends to compensate the victims of the terrorist attacks.

It needs an *international cooperation* in prosecution, such as arresting suspected people, identifying terrorists, collecting evidences, providing information, electronic registration, cross border hot pursuit, border check management, etc.

There have been international agreements developed through the United Nations for the prosecution, extradition and investigation of the specified terrorist offenders.

¹⁷ European Council: THE STOCKHOLM PROGRAMME — AN OPEN AND SECURE EUROPE SERVING AND PROTECTING CITIZENS (2010/C 115/01) C 115/4 Official Journal of the European Union 4.5.2011.

- *Pursue*

It means a *more efficient prosecution*, which requires the modification of certain traditional criminal procedural rules.

The terrorism has been interwoven with the organized crime. The terrorist groups finance their activities from money laundering, drug trafficking, weapon transport, etc. The network of the terrorist groups has become even more complicated. Freezing bank accounts and property, blacklisting, for example, are important means of the criminal procedure

New technology, such as the identification of the body, face, eyes, ears, the verification and identification of the visa, or checking chemical and biological weapons, bombs, cash, etc., will also be applied in the prosecution.

8. Questions of Legitimacy and the Rule of Law in COIN

Counterinsurgency has been thought after the failures of the military engagements in the Iraqi and Afghan wars to be a more complex issue, i.e. an *integrated set of military, political, economic and social measures*, which aim to end the armed conflict, but instead, create and maintain a stable political, economic and social structures, and resolve the underlying causes of the insurgency. This is called as “*win the population strategy*”.

The “win-the-population” strategy of the counterinsurgency aims to have the *support of the population*, and the incumbent government competes with the insurgent groups to reach this goal. The population will sympathize with the side that can offer better governance, i.e. security, welfare, economic development, rule of law, democratic elections, public safety, human rights, etc.

Legitimacy forms an integral part of the “win-the-population” strategy. There have been several attempts in the military literature to determine the contents of this terminology.

The *traditional meaning* of legitimacy in the political sciences is the origin of the political power of the state. According to the Western view, the precondition of the legitimacy is the democratic elections. The legitimacy in the theocratic states is based on the religion and is thought that the source of the political power should be the god, and the role of the government is to implement its will. Autocratic states are not considered as legitimate.

The meaning of the legitimacy *in the counterinsurgency* has been extended to as a system of management means in the given situation of the counterinsurgency campaign. It has two parts: the security operation aims to minimize the armed conflict in the way of killing only the most fanatic leaders, giving amnesty to the insurgents, declaring ceasefire or armistice, etc.

The Iraqi security operation, called “Anbar Awakening” was successful, because the brutal terrorist attacks frightened the Sunni tribes away the Al Qaeda, and began to support the incumbent government. The Sunni tribes later were integrated in the police, and got amnesty. As a result, the number of the terrorist attacks dramatically decreased. Such a program was not successful in Afghanistan, where only the 3% of the Taliban wanted to join the government forces. The militias in Congo, for example, formed the part of state regular army after the militias had been crushed.

Detention policy of the counterinsurgency should help the host nation to develop their jurisdiction so that they can open a legal procedure against the criminals, but not to send them to the courts of other countries. When the host nation does not have sufficient jurisdiction, as it was the case in Iraq, or is reluctant to take the criminals to the trial, the International Criminal Court should proceed.

It is important during the security operations, when a foreign country or international organization implements it, to show that the country is *not occupied by the enemies*, but they help to establish security and basic public services.

The other step of the counterinsurgency campaign is the *stability operation*. It aims to establish the *basic institutions of a well operating government*, such as legislation, public administration, jurisdiction, law enforcement, democratic voting system, social welfare system, infrastructure services, open media, etc.

The *rule of law* has a great importance during the security and stability operations. The general constitutional interpretation of the rule of law outlines security, predictability and lawfulness. The *military doctrine of the rule of law* in the counterinsurgency campaign covers *concrete legal requirements*, such as accountability to laws, supremacy of law, equality before the law, fairness in applying law, access to law, separation of power, participation of the population in decision making, procedural and legal transparency, state monopoly in the use of force and resolution of disputes, stable law, etc.

The rule of law is also related to the question of “*reciprocity*” or “*exemplarism*”, which means two options for the counterinsurgency to choose: the reaction to the criminal actions of the insurgents will be reprisal with unlawful engagements, or to respect the rule of law, even if the insurgents do not do so. No doubt that the latter one will succeed in the long term, because of the support of the population.

Application of the rule of law is especially important, when the incumbent government establishes *jurisdiction*, because some efficiency requirements can be assured only in this way. For example, if the criminals of the insurgency will not be taken to the court, punished in a brutal way, executed without judgment of the court, tortured, humiliated, etc., the stability operation will lose its legitimacy in the eye of the population.

Efficient legislation can be guaranteed only by the use of the rule of law, because only the rule of law can achieve the principles of the democracy, such as participation in the decision-making process, free elections, transparency, integrity, accountability, etc. which are the guarantee to avoid development of dictatorship.

We have to emphasize, however, that the aim of the counterinsurgency campaign is not to establish a *western-type democracy*, but a government that can provide the basic state functions with taking into account the *local traditions*, as well. For example, most of the Muslim countries would reject the equality of the women and ethnic minorities, or the legislation and jurisdiction are often based on the Islam. The incumbent government in Afghanistan established a court-system, as a part of the state power, but the population did not relied on it, much better the “*jirga*”, the tribal council that decides in legal disputes, and has a legislative function, as well.

During the way from the “kill and capture” strategy toward the “win-the-population” strategy the incumbent government has to face certain legal problems.

The *targeted killing* is used against the leaders of the terrorist and insurgent groups in the form of combat drones, air bombings, special operations, intelligence, because otherwise it would be impossible to capture them. They can often successfully hide in the population, e.g. terrorists on the tribal areas of Afghanistan and Pakistan that are not controlled by the state, or in the high hills, e.g. Tora Bora in Afghanistan, or on the desert. Neither law enforcement, nor traditional military engagement will be a sufficient means to capture them.

Targeted killing, however it is a highly sufficient means with a great political benefit, e.g. liquidating of Bin Laden, is still an unlawful action, unless it should be considered as a military use of force authorized by the Security Council, or based on self-defense. This is because even if these leaders are not under the force of the law of war and humanitarian treatment, they have human rights that cannot be violated in any way. Targeted killing is against certain human rights, such as the right to life and fair jurisdiction.

Furthermore, it occurs fairly frequently that *civilians* are also attacked in targeted killing. This has been debated even in the military doctrines in which situation civilians can be attacked. As mentioned earlier, the European Court on Human Right elaborated its interpretation for such cases, which hardly can be applied in the practical reality. According to the American approach, to be the member of the war-fighting apparatus is enough for the military forces to attack them, but the opinion of the Red Cross is that direct casual relationship is needed for the combatants to attack. In most cases of the targeted killing it is, however, almost impossible to separate civilians from the terrorists, especially in crowd, bombing, or buildings. It is a custom, for example in Afghanistan that the guests shoot at the weddings in the air, which can be mixed with attacking combatants. The drone combatants, special operations, and the air bombings cannot be targeted only to terrorist persons, as opposed to “traditional” liquidations implemented by the intelligent agencies. It has become a practice of the warfare that civilians killed and injured in targeted killings will be compensated by the government of the military forces that is responsible for the targeted killing.

Targeted killing is a best example for the *dilemma* whether to prefer efficiency of the military engagement or respect the laws on war.

From legal point of view, this problem seems to be unresolved. Many lawyers suggest for the armies to introduce non-lethal weapons, such as directed energy beams, malodorants, calmatives, etc. in these cases. These kinds of weapons can incapacitate persons, while minimizing fatalities and injuries.

Summary

A general conclusion can be drawn based on this study that recent international law on warfare cannot sufficiently be applied in the practical reality. The reason is that warfare has changed a lot during the last decades, in other words, traditional symmetric warfare has increasingly been replaced by new forms of asymmetric one, such as terrorism and insurgency.

Further problem we have to face to is that if terrorism, which is typified in most cases as a clandestine non-state actor with international character, connected occasionally to state authorities or directly supported by the state, should be considered as a criminal issue, even if terrorist groups are similar in their methods to warfare. Counterterrorism, that is, often

requires military engagements, too, besides law enforcement, so that it should be efficient. International law is fairly contradictory when on one hand refers to terrorist groups as subject to criminal law of the domestic laws, which seems to be increasingly insufficient in concrete cases, but does not admit the right of use of force based on the law on warfare on the other hand, even if use of military force has been required.

There have happened important efforts in establishing cooperation among the states in the counterterrorism in the field of criminal law, such as prosecution, investigation, trial, or punishment, and administrative law, too, such as cross border management, border checking, immigration, etc. These new forms of counterterrorism, however, can be successful, only if terrorist attacks occur in the areas of the Western countries. Not insurgency, just terrorism has been typical in these countries.

Criminal law regulating warfare has had an increasingly international character, which means on the other hand, that it is going to be less and less subject to domestic monopoly. The International Criminal Court and the ad hoc criminal courts have already had a great relevance in this matter. Terrorism and insurgency in the Muslim countries arises other problems, than in the Western countries. Failed states, or those that cannot effectively control some of their areas, have been a hotbed of terrorism and insurgency. Neither of them can be defeated with pure criminal means.

Military engagements by the incumbent government against terrorism and insurgency is normally allowed, because domestic laws entitle the government to do so, but it is quite problematic in the international law, when other states and international organizations, such as the UN, the NATO or the EU, can intervene in the states struggling with terrorism and insurgency. The case, when the incumbent government cannot cope, or is unwilling either, with the problem of terrorism or insurgency, and intervention of other state has become necessary, is a vague issue.

Terrorism vs. insurgency cannot be differentiated in neither the military sciences, nor the military practice, due to overlapping. Terrorism has greatly been interwoven with the insurgent groups, or the supporting states, and insurgent groups often have a double character: guerilla warfare and terrorist attacks at the same time, furthermore in many cases both of them are related to the organized crime.

International law, respecting the principles of national sovereignty and non-intervention, admit the right to use of force against other countries only in exceptional cases, i.e. in self-defense or if the Security Council decides so, based on the violation of international peace and security. It is not an exaggeration to state that state-intervention in such situations has been subject to political issues rather than that of international law. This is because the provisions of the latter one can be interpreted in many ways, due to its generally formulated legal norms, and also, the politically dominated character of the Security Council.

Further problem with the international legal regulation on the warfare is that it cannot make difference between terrorism and insurgency due to the lack of any legal definition. Laws, instead, make distinction on that basis if the armed conflict has occurred between regular armies, or not, or if it has a war character. Terrorism and insurgency in our days just rarely operate in this traditional way, but have special features.

It is also problematic in the international law on the warfare that it cannot make difference between terrorism and insurgency in the lack of sufficient legal definition. Laws, instead, make distinction on the basis if the armed conflict has occurred between regular

armies or not, or has a war character. Terrorism and insurgency in our days just rarely operate in this traditional way, but have special features.

When special military engagements, such as targeted killing, use of special force, liquidations, intelligence, etc. should be implemented in the counterterrorism and counterinsurgency, it cannot be decided in the concrete cases, as to whether the law on warfare, i.e. Hague Conventions and Geneva Conventions shall be applied or not. It would be especially important to make clear if these military forces have to respect these laws on warfare, or not, both to in their relations with the enemies and civilians.

In the lack of sufficient regulations of the international laws, human rights will be applied in these military engagements. Human rights, however, are not the best legal institutions to make sufficient legal decisions in military issues. For example, it cannot be answered clearly, based on human rights, when civilians and civil objects can be attacked by the military forces, which is a most emerging issue of counterinsurgency and counterterrorism.