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Current Issues of International Law in Regulating Counter–Insurgency and Counter–Terrorism

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"Inter Arma Enim Silent Leges"
(In times of war the law falls silent)
Marcus Tullius Cicero

The study sheds light on the current tendencies and examines if the international law on warfare can successfully be applied in practical reality in the progress of counterinsurgency and counterterrorism efforts. There have been two phenomena identified recently in warfare which endanger the public security and public safety of the democratic states of the world: terrorism and insurgency. Both of them mean a threat and attack on the population and the government authorities. It has been queried in military literature whether these new forms of warfare should be handled by military engagements or law enforcement. This is, nevertheless, not just a dilemma concerning the strategy on how to combat against them, but should be, at the same time, all done in accordance with the international legal regulations. 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 to see 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 international law.

Keywords: *terrorism, insurgency, counterterrorism, counterinsurgency, international law, law of warfare, law of humanitarian treatment, human rights, international criminal law, legitimacy*

Introduction

This study tries to shed light on the current tendencies if the international law on warfare can successfully be applied in practical reality in the progress of counterinsurgency and counterterrorism efforts. There have been two phenomena identified recently in warfare which endanger the public security and public safety of the democratic states of the world: terrorism and insurgency. Both of them mean a threat and attack on 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 about the strategy on how to combat against it, but should be, at the same time done in accordance with international legal regulations. The international law of war developed by the end of World War II was basically modeled on traditional — symmetric — war-

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fare. After World War II the main form of warfare has become much more asymmetric, than symmetric. We can state that both insurgency and terrorism represent asymmetric warfare. Traditional warfare became rather exceptional, [1] 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 making sharp divisions between them. This is because international law from many aspects does not differentiate between the groups of armed forces, if they are insurgents or terrorists, or has other terminologies than military science. 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 to examine 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 to Define Insurgency and Terrorism

Several definitions of insurgency and terrorism have been identified in military literature, which at the same time try to make distinctions between them. Phrases, like insurgency, irregular warfare, unconventional warfare, revolutionary warfare, guerilla warfare, terrorism are often used in military literature as synonymous terminologies. [2] This is because all of these forms of armed conflict represent 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* could be used for 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 disposing of armed forces 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 regular armies until the middle of the 20th century. Insurgencies — typified as *asymmetric warfare* — could be seen even before World War II, [3] 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. These new forms of 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 how the laws define them is significant. 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 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 *terrorism* emphasize that terrorists use *violence* and *threats* 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: 1] 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 a *transnational level*. It is an essential question as to whether on the basis of definitions of insurgency and terrorism we can make *clear differences* between them. Both of the insurgents and terrorists use violent acts, have political aims, and insurgent groups use not only guerilla warfare, but often commit terrorist attacks, too, or similarly to the terrorist groups, are financed by 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 do not, insurgents occasionally respect the law of war, but 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 *examples of overlapping* in some groups that have characteristics of an insurgent group, but despite of this, they are considered terrorists. *Al–Qaeda* has a worldwide network, and regularly infiltrates insurgent groups in other countries, such as Iraq, Afghanistan and Syria. *Hamas* forms part of the Palestine Authority and *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 Hamas has been declared as such 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 themselves and use political means, military force against the government, however they have been on the blacklist of terrorist groups, due to the terrorist attacks they implement. Insurgent groups in the war in *Bosnia* and *Kosovo* during the 1990s with the same characteristics were considered as insurgents, but not terrorists. Both the *ETA* and the *IRA* have had a double face in their warfare: their strategy is similar to 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. destroying bridges or attacking police stations.

Overlapping is even more complicated in the *Palestine Liberation Front:* its groups of a few members crossed the border of Israel and blew up objects and crowded places, took hostages, attacked villages and killed civilians. These Palestine terrorist groups controlled territories both in Lebanon and Jordan where they recruited members and had terrorist training camps, too, but they also implemented armed attacks in the area of Israel. The insurgent groups in *Afghanistan* and *Iraq* perpetrated terrorist attacks against the civilians through suicide bombings, exploiting international organizations, embassies, schools, markets, etc., as well as guerilla attacks by using traditional warfare against military bases of the Afghan army or NATO. It should be clear on the basis of these examples, that *insurgent groups use terrorist means too,* if they see it as more efficient than guerilla warfare, or, in many cases they did not

have any other choice than to do so, because of the special fields, e.g. high hills, or jungles, where they fight. It can happen sometimes that not only the insurgents, but also the *terrorists are supported by the civilians*, as was the case in Iraq, where the Sunni tribes cooperated with al–Qaeda until they became fed up with the frequent terrorist attacks. In Afghanistan, where al–Qaeda has been interwoven with the Taliban, and commits terrorist attacks together with them, al–Qaeda enjoys the support of the local tribes. Hamas and 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 aims:* al–Qaeda aims to establish a world caliphate based on fundamentalist Islamic culture and to destroy the West, Hezbollah supports insurgent groups in other countries, such as Iraq and Syria with political goals, and Hamas aims to eliminate the Israeli state. Even those terrorist groups, such as the Muslim Brotherhood, al–Qaeda in the Islamic Maghreb (AQIM), al–Shabaab, etc., whose ideology contain religious features on the surface, i.e. fundamentalist Islam, are deeply rooted in politics, when they aim to fight against secularization, or try to hinder a more democratic process in Muslim countries.

Local militias in African countries, e.g. Mai–Mai in Congo, Lord's Resistance Army (LRA) in Uganda, anti–balaka in Central African Republic (CAR), [7: 461] etc., often *do not follow any political aim,* even if they are supported by 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 distance themselves from certain crimes and violent actions against the civilian population. [8] Militias otherwise have all the characteristic of insurgents, but cannot be considered such, much rather simple *criminals.* In order to make a *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, should they be considered terrorists? When insurgents seriously violate international law, for example attack civilians, civilian objects, kill 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 a state's 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 couldn't 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 practical reality,* but non–state armed troops having more or less features of insurgency, terrorism or organized crime.

2. Challenges for Legal Regulations in Counterinsurgency and Counterterrorism

There are two legal statuses in international law with regard to armed troops: the *law of war* denotes those meeting the requirements of a regular army (having uniforms, or a distinctive sign, carrying arms openly, being under responsible command and respecting the law of war); the *law of humanitarian treatment* makes a difference on the basis of having a war-like

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 terrorists — will be treated as *criminals.* When the insurgents are under the authority 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's 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 criminals — when they commit terrorist and organized crimes, or crimes "only" against public safety, public order or the state power[2] — they will be under the authority 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 riots, 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 within 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 whether a political compromise has been made between the insurgents and the government. When the insurgency wins, and the insurgents establish a new state in 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 rarely comes into existence in a lawful way — Hungary and Germany can be mentioned as examples in 1990 — the majority have been the result of revolution, insurgency, freedom fighting, or a 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 an election or referendum.

Distinction between insurgency and terrorism in international law *is not in 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 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

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

terrorist, not an insurgent, had to be liquidated, the special forces of the US Army implemented a military operation. Further examples would be when the Israeli Army in several 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 would 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 a regular army by the laws. The problem, from a legal point of view, is even more complicated when the insurgents or terrorists have been *captured:* should they 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 Ghraib 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. Preconceptions can be made on the basis of this exposition that regulations of counterinsurgency and counterterrorism are fairly *vague* in 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", which* served as a basis 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 international law, not by 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 to decide how to have it keep the rules concerning the prisoners of war.

Certain organizations of the European Union have authority to pass legal norms, and apply them through the courts, even if it is against the member states' domestic laws. The EU law is called, for this reason, a *"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 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, it can simply give recommendations to them. International law — as opposed to domestic law — has been based on mainly the *cooperation* among the nations rather than that of *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 legislation, 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 trials, or declarations in legal norms are rather exceptional.

The prevailing legal means in 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 international law, so that lawful actions can be enforced. The most traditional sanction, *to start a war* against a state violates recent international law, so it cannot be widely applied anymore, just in exceptional cases regulated by 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 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 a 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 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 *"soft law"*, which is its other characteristic. It means that legal norms of the international law are so generally formulated that in concrete cases it can be interpreted in several ways. The interpretation of the legal provisions depends to a great extent on the political power of the states that will apply them in practical reality. The US and Great Britain interpreted the provisions of the Article 51 of the UN Charter in this way, that they had the right of self–defense in attacking Iraq in 2006, however one of the essential conditions, i.e. the armed attack by Iraq against these countries was missing. 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 legal practice by the international organizations as a case law and will be implemented, if possible, in a strict way.

International customary law means those rules that have been widely and for a long term applied in practice. It is based on international treaties, conventions, agreements, charters, declarations, or covenants, and has 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 of customary law. Human

rights are formulated as *legal principles* in international agreements. [11] This is a reason, why the interpretation of human rights is so important, either in the way of case law, as it has been a tradition in 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 international law for the *humanitarian treatment of war,* but the Hague Convention is the *law of 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 an independent state–system to achieve any of its own decisions.

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 treatment:

- Prisoners of war (the captured combatants) cannot be attacked any more, but should be spared, and have the right to humane treatment, such as health care, clothes, food, personal property, decorations, badges of rank, payment for their work, correspondence with their relations, etc.
- Wounded and sick have the right to medical treatment, evacuation, but the dead have the right to medical examinations to establish cause of death, identification, collection of their bodies and remains, burial according to the rites of their religion.
- Civilians who do not take an 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 property, and for being refugees.
- Violence to life, persons and human dignity, such as murder, mutilation, cruel treatment, torture, degrading treatment of the prisoners of war, the sick, the wounded and the civilians, also taking of hostages are prohibited.
- 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 pure killing, rather the right to 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 a signatory, when it accepts the Convention.
- If *the armed conflict happened within the boundaries of the country* between the government army and the insurgent group, or two insurgent groups, provided it has a war-like 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 act as advocate for 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-like 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-like character between the government army and the local militias, when the militias cannot be considered by military practice as insurgent groups, but simply 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 practical reality.

Further questions will be raised: if the insurgents, terrorists and organized crime factions can be treated as prisoners of war after they have been captured, in the way it is identified in the Geneva Convention, or, should they be sent to trial as soon as possible? Alternatively, who is entitled in such cases to investigate any suspicions of committing crimes, which might be the base of 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 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 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 be treated 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 case of internal armed conflict.

This challenge has been justified by the legal disputes in the US, when the Supreme Court in the *Hamdan case* (Hamdan was bin Laden's driver and bodyguard who was captured in Afghanistan and held in Guantanamo Bay) [13] declared that the armed conflict caused by 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 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 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 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 on 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 legal practice. When the Geneva Conventions cannot be ap-

plied, human rights having an *"ius cogens" character* in international laws cannot be violated by the state, non–state groups, or individuals, no matter what kind of armed conflict, and in which place it 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 torture. Prisoners were finally taken to trial, although not within a reasonable length of detention. Opportunities *to enforce human rights* do not show a uniform picture in international law. Neither the *UN Human Rights Council*, nor the *UN Human Right Committee* has the right to make decisions in the concrete cases, but investigate individual complaints, review fulfillment of human rights, analyze reports, give comments and opinions, 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. 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* (ECHR) that is entitled to make a judgment obligatory for the member states in human rights cases. The ECHR applied human rights in the legal cases of armed conflict several 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 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 World War I. 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 signs (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 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 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 means other than regulated by the law of war.

We could hardly mention such an example from the cases of last decades, when in asymmetric warfare the insurgent group respected the law of war. Consequently, these regular armies normally implement other military engagements than based on traditional warfare regulated by the Hague Conventions. *Targeted killing*, such as liquidation, combat drones, air bombing, or *special operation* and *intelligence* can be mentioned as this new type 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 international laws, and the parties involved in the armed conflict are not limited by any rule, except international crimes, and 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 forced upon 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 committees will be set up, or conference will be organized to give recommendations 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 *"delicta iuris gentium"* was born in 1945, after World War II, 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.* Crimes against humanity can be murder, torture, slavery, deportation, imprisonment, sexual harassment, persecution of groups, etc. war crimes are regulated by the Geneva Convention, such as attacking civilians, killing wounded, or combatants when they surrender, humiliating prisoners of war, taking 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 combatants of a regular army, insurgents, terrorists or civilians will be taken to trial before the International Criminal Court. The *International Criminal Court* was established in 2002 in The 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 who 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 if 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 procedures 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.

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 World War II by the *United Nations.*

"Ius ad bellum" is the right of 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 threaten or use 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. Article 2 (7) of the UN Charter explicitly prohibits the United Nations from intervening in matters which are essentially within 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 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 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 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 a threat to, or a break of 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 1970s interpreted *aggression:* using weapons and armed force, declaring war, invading, occupying or bombing the territory of the state, blockade, sending armed gangs, irregular army or mercenaries, etc. shall be considered aggression.

It is important that *only the Security Council has the right to use,* or authorize the use of *military force,* because the definition of the aggression given by the UN Charter is only in the form of an exemplary list of acts, which can be interpreted by the states involved in the conflict in more ways. Practical reality shows, that the states do not often admit that they have violated any international law, but often accuse the other one of provoking the conflict, and refer to it as a base of their reaction, or consider themselves victims of the aggression, but not the aggressor. Cases have happened when the state thought the political benefit from

attacking another state was more important than to respect international laws. The most pregnant examples of this are 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 hinder achieving a decision, if the political standpoints of one or more member states are different. The Security Council consists of the strongest states of the Unites 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 *tangibly* witnessed that the basis of the resolutions of the Security Council display *how political views of its members influence the decisions.*

Article 51 of the UN Charter regulates the right to *self –defense*. When an armed attack has occurred, the nation may use military force in individual self–defense, or to 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 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 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 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 it used the right of self–defense in response to the terrorist attacks of Hamas. For example, 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 in 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 World War II it originally was modeled on 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 the terrorist attack that occurred in New York, Washington, D.C. and Pennsylvania on September 11, 2001. The Security Council declared the terrorist attack of 9/11 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 Resolution 1368 is that terrorist attacks have been taken *under the force of 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 be used 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

concrete cases. Israel for example, has regularly been attacked by Hezbollah and Hamas in the way of suicide bombing, explosions, 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: 3–6] The Israeli state used military force against Gaza and Lebanon as sponsoring states, but it was not always supported by the Security Council. [17: 23–25] The reason expressed by the Security Council was that Israel used prohibited weapons, and *did not keep to the principle of proportionality* in its response, for example civilians casualties. 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. A 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 Article 51 of the UN Charter in the way that Afghanistan was 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, in the tribal areas of Afghanistan, which were uncontrolled by the state, 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 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 Resolution 1361. This is because it cannot be proved if these states in fact support terrorist groups in any 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 it declared that Iraq did not cooperate with the International Atomic Energy Agency, and is obligated it to do so. The US and Great Britain justified starting the war with 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 humanitarian aid. They also referred to the fact that they did not aim to violate its territorial integrity and political independency. This is, however an *extremely wide mode of interpretation* of self–defense, because Article 51 of the UN Charter can be applied only in the case of an *armed attack*, which occurred from the side of Iraq.

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

These examples show *how widely* the right to use armed forces can be interpreted in 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 *on 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 questionable in international law, if other states or international organizations can intervene. These armed conflicts can easily lead to *undesirable effects*, such as illegal weapons trade, terrorism, wave of refugees, ethnic cleansing, etc., which threatens international peace and security. *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, al–Qaeda and Hezbollah intervened in the Iraqi war and Syrian civil war, or Russia, too, with weapon transports to the Syrian civil war. As mentioned earlier, prohibited intervention cannot be punished in a direct way by international law, unless it jeopardizes international peace and security based on 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 of force and use of force. 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 international peace and security. According to international legal practice, only the Security Council has the right to take actions in these cases. One of these actions is *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 1992–1995 and in Congo in 2003, for example. International customary law acknowledges the right of the government facing an internal armed conflict *to conduct military operations against 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 be applied at the same time. *Efficiency requirements* can be guaranteed only in this way. There are, however, contradictions between efficiency requirements and the *traditional principles* of Western democracy, such as the rule of law, constitutionalism, pluralism, human rights, freedom, openness, tolerance, etc. Western countries try to balance between *individual liberty* and *public safety* in their counterterrorism efforts. It should be noted that for the legislation of the EU only Islamic terrorism has any relevance, because local insurgencies or local terrorist groups do not exist anymore. As a reaction to the terrorist attacks in 2004 in Madrid and in 2005 in London, the European Union began more intensively to take part in counterinsurgency, and elaborated a *new strategy* for it. It is especially important for the legislation of the EU, because it should be in accordance with the basic principles and values of its charters.

Laws on counterterrorism should be based on the requirements identified by the European Union's public policy. These are as follows: quick, coherent, goal–oriented, cost–effective operations, and clear, unambiguous legal regulations. According to the *self–criticism* of the

European Union, the relevant legal regulation is often not capable to follow efficiency requirements of counterinsurgency, which led to inadequate and insufficient operations. There have been two emerging issues in this field: *competence* of international organizations vs. domestic public authorities, and the possible *limitation of constitutional rights.* Regarding the former one, it is problematic to share the competence of intelligence on an 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 as to what extent certain constitutional rights, such as right to privacy, ownership, fair jurisdiction, human dignity and freedom, can be limited so that efficiency requirements of counterinsurgency can be achieved.

The EU Counter–terrorism strategy [18] determined four principles of counterterrorism:

- *prevention;*
- *protection;*
- *response;*
- *pursuit.*

Terrorism has interwoven with organized crime. 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 criminal procedure. New technology, such as the identification of body, face, eyes, ears, the verification and identification of visa, or checking chemical and biological weapons, bombs, cash, etc., will also be applied in prosecution.

8. Questions of Legitimacy and the Rule of Law in counter-insurgency (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.* It aims to end the armed conflict, and create and maintain stable political, economic and social structures, and resolve the underlying causes of the insurgency. This is called a *"win the population strategy"*.

The "win–the–population" strategy of counterinsurgency aims to gain 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 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 legitimacy is democratic elections. The legitimacy in theocratic states is based on religion and it is thought that the source of political power should be god, and the role of the government is to implement its will. Autocratic states are not considered as legitimate ones.

The meaning of legitimacy *in counterinsurgency* has been extended to 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 by 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 from al–Qaeda, and they began to support the incumbent government. The Sunni tribes later were integrated into 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 3% of the Taliban wanted to join the government forces. The militias in Congo, for example, formed part of the state's regular army after the militias had been crushed.

Detention policy of 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 was the case in Iraq, or is reluctant to take the criminals to trial, the International Criminal Court should proceed.

It is important during security operations, when a foreign country or international organization implements it, to show that the country is *not occupied by enemies*, but is helping 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 on the use of force and resolution of disputes, stable law, etc.

The rule of law is also related to the question of *"reciprocity"* or *"examplarism"*, which means two options for counterinsurgency to choose: the reaction to the criminal actions of the insurgents will mean reprisals using 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. If, for example, the criminals of the insurgency will not be taken to court, will be 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 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 taking into account *local traditions*, as well. For example, most Muslim countries would reject the equality of women and ethnic minorities, as legislation and jurisdiction are often based on Islam. The incumbent government in Afghanistan established a court–system, as a part of state power, but the population did not rely on it, rather it turned to the "jirga", the tribal council that decides in legal disputes, and has a legislative function, as well. During

the move from the "kill and capture" strategy towards the "win–the–population" strategy the incumbent government has to face certain legal problems.

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 in 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 in the desert. Neither law enforcement, nor traditional military engagement will be a sufficient means to capture them.

Targeted killing, however highly sufficient a means with a great political benefit, e.g. liquidating of bin Laden, is still an unlawful action, unless considered 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 military doctrines as to 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 practical reality. According to the American approach, to be a 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 causal relationship is needed for the combatants to attack. In most cases of targeted killing it is, however, almost impossible to separate civilians from the terrorists, especially in crowds, bombing, or buildings. It is a custom, for example in Afghanistan that the guests shoot at the weddings in the air, which can be mistaken for an attack. The drone combatants, special operations, and the air bombings cannot target only terrorist persons, as opposed to "traditional" liquidations implemented by the intelligence agencies. It has become a practice of 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. [19: 10] Targeted killing is a best example for the *dilemma* of whether to prefer efficiency of the military engagement or respect the laws on war. From a legal point of view, this problem seems to be unresolved. Many lawyers suggest the armies 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 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. A further problem we have to face 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 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 the one hand it refers to terrorist groups as subject to the crimi-

nal law of domestic laws – which seems to be increasingly insufficient in concrete cases – but does not admit the right to use the force based on the law on warfare on the other hand, even if use of military force has been required.

There have been important efforts in establishing cooperation among the states in 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 Western countries. [20] Not insurgency, only terrorism has been typical in these countries. Criminal law regulating warfare has had an increasingly international character, which means on the one hand it is going to be less and less subject to a 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 Muslim countries pose other problems than in 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 are normally allowed, because domestic laws entitle the government to do so, but it is quite problematic in international law, when other states and international organizations, such as the UN, NATO or the EU intervene in the states struggling with terrorism and insurgency. The moment when the incumbent government cannot or is unwilling to cope with the problem of terrorism or insurgency, the intervention of another state becomes necessary, is a vague issue. Terrorism vs. insurgency can be differentiated in very difficult ways in the military sciences, and in military practice as well, due to overlapping. Terrorism has greatly interwoven with insurgent groups, or 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 organized crime. [20]

International law, respecting the principles of national sovereignty and non–intervention, admit the right to use 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.

A further problem with the international legal regulation on warfare is that it cannot differentiate between terrorism and insurgency due to the lack of any legal definition. Laws, instead, make a distinction on the basis that if the armed conflict has occurred between regular armies, or not, or if it has a war-like character. Terrorism and insurgency in our days rarely operate in this traditional way, but have special features. It is also problematic in international law on warfare that it cannot differentiate between terrorism and insurgency for a lack of sufficient legal definition. Laws, instead, make distinctions on the basis of the armed conflict having occurred between regular armies or not, or having a war-like character. [21]

When special military engagements, such as targeted killing, use special forces, liquidations, intelligence, etc. should be implemented in counterterrorism and counterinsurgency, cannot be decided in 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 in their relations with enemies and civilians.

With the lack of sufficient regulations of 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 civilian objects can be attacked by military forces, which is the most emerging issue of counterinsurgency and counterterrorism.

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