

Humanitarian law vs. counterinsurgency – is there a need to change the law?

dr Piotr Łubiński

INTRODUCTION

The law of armed conflict – also known as the laws of war or international humanitarian law – was developed and codified in times of more traditional state-to-state conflicts.¹ It was created to fit the type of conventional, symmetrical, international wars fought in the XIX and XX centuries with an assumption that conventional war strategy - kill or capture the enemy – was the route to victory. This symmetrical warfare is to be understood as armed conflict between states of roughly equal military strength.² Warring parties operated under similar principles of conducting military engagement using similar means and methods of warfare.³ In traditional conflicts, the need to destroy an enemy has been considered as the centre of gravity, reflecting the concept of Frederick the Great of the "entire destruction of your enemies" which can be accomplished by death, injury, or any other means.⁴

However, modern conflicts are – in most cases – of non-international character. During non-international conflicts there is usually an asymmetrical balance of force resources. Non-state actors employ asymmetric means and methods against state military forces.⁵ Inequalities in arms and significant disparity between belligerents have become a prominent feature of various contemporary armed conflicts such as the one in Afghanistan. Democratization or privatization of the means of warfare provided opportunities for non-state actors to challenge not only their own governments but also international powers.⁶ The particular

¹ L. Blank, A. Guiora, *Teaching an old dog new tricks: operationalizing the law of armed conflict in new warfare*, Harvard National Security Journal, vol 1, 2010, p. 45.

² T. Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 International Review of the Red Cross, vol. 87, 2005, p. 152.

³ E. Benvenisti, *The legal battle to define the law on transnational asymmetric warfare*, Duke Journal of Comparative and International Law, vol. 20, 2010, p. 340.

⁴ G. Sitaraman, *Counterinsurgency, the war on terror, and the laws of war*, Virginia Law Review, vol. 95, 2009, p. 1751.

⁵ D. Stephens *Counterinsurgency and Stability Operations: A New Approach to Legal Interpretation*, p. 291 [in:] International Law Studies, *The War in Iraq: A Legal Analysis*, Ed. R. A. Pedrozo, Naval War College

Newport, Rhode Island, vol. 86, 2010.

⁶ E. Benvenisti, *op.cit.*, p. 339.

characteristics of modern day asymmetric conflict result in certain repercussions for the application of the fundamental principles of international humanitarian law (IHL).⁷ In asymmetrical conflicts, the principle of reciprocity, which traditionally forces the conflict parties to observe IHL, is not often obeyed and chivalrous values are replaced by deception and treachery.⁸ In an asymmetrical conflict between governmental or pro-governmental forces and local insurgents, neither side has any incentives to comply and obey the law of IHL. It is partially because the regulation of asymmetrical warfare requires a different structure of incentives to have any effect on the parties'.⁹ As a result, asymmetrical conflict poses normative and institutional challenges for what affects strategy, tactics and politics related to the conflict. The normative challenges stem from the fact that the traditional *ius in bello* is not sensitive to the power balance relations between adversaries in asymmetrical conflicts. It is because of the assumption of equality of arms that in most non-international asymmetrical armed conflicts is unrealistic.¹⁰ The laws of war favour the stronger army because the weaker party is expected to play by the rules that predetermine its defeat.¹¹ The weaker side is likely to find such a law morally questionable and certainly not worthy of compliance.¹²

Additionally, there is a shift in the centre of gravity in modern conflicts. Under conventional thinking, conflicts were orientated towards killing or capturing the enemy or its military forces. Current wars, however, show a significant change in emphasis. The centre of gravity is a civilian population; the war is often conducted to win the "hearts and minds" of the population.¹³ The new "win-the-population" doctrine imposes different types of obligations on military forces¹⁴ The only effective way of "winning" a modern armed, asymmetrical conflict is to bring stability, sound economy, and rules of law. For that purpose, military means and methods have to be mixed with policing and state-building ones. Currently as Pfanner argues "it is debatable whether the challenges of asymmetrical war can be met with the contemporary law of

⁷ Robin Geiß, *Asymmetric conflict structures*, ICRC Review, Vol. 88, No. 864, 2006, p. 757

⁸ T. Pfanner, *op.cit.*, 161

⁹ E. Benvenisti, *ibidem*, p. 341.

¹⁰ E. Benvenisti, *ibidem*, p. 342.

¹¹ E. Benvenisti, *ibidem*, p. 342.

¹² E. Benvenisti, *ibidem*, p. 342

¹³ Field Manual, *op. cit.*, p. 1-28.

¹⁴ G. Sitaraman, *op. cit.*, p. 1757.

war".¹⁵ It seems that the current situation may require modification of the rules of international law.

This article will evaluate the legal challenges arising out of modern counterinsurgency operations, particularly the use of non-lethal weapons, arguing that the general principles of international humanitarian law do not fully correspond with modern armed conflicts. As some argue, law of armed conflicts (LOAC) is inapplicable or simply cannot work in new warfare. Others contend that while still relevant, LOAC needs new treaties or protocols to be effective.¹⁶ The most recent substantive amendments to Geneva law occurred with the adoption of the *Protocol Additional to the Geneva Conventions of 12 August 1949* in 1977.¹⁷ Since then, despite rapid development in international law, little has been done to address burning questions of modern humanitarian law, notwithstanding the adoption of instruments restricting or prohibiting the use of certain types of weapon, including anti-personnel landmines.

MODERN COUNTERINSURGENCY

In March and April 2003, the United States forces conquered Baghdad with breathtaking speed. Senior US decision makers expected to leave Iraq soon and victorious. However, an unforeseen enemy equipped with AK 47s, planting IED's, crossed their plans. Unconventional, asymmetrical warfare attacks kept rising. Very soon the US forces and its allies found themselves embarked in counterinsurgency warfare with all that accompanies it: i.e. new doctrines, new types of enemies, new approaches toward the use of military power on land and in the air, but also training local forces, educating local administration, etc. The infamous "Mission Accomplished" speech delivered by US president George W Bush, Jr. on May 1, 2003 on the USS Abraham Lincoln was far from the truth. It has been since that speech when the vast majority of casualties during the Iraq conflict occurred.¹⁸ The coalition effort was adversely affected by the fact that the development of their modern counterinsurgency thinking was done while actually fighting counterinsurgency.¹⁹

¹⁵ T. Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 International Review of the Red Cross, vol. 87, 2005, p. 158.

¹⁶ L. Blank, A. Guiora, *op. cit.*, 48.

¹⁷ <http://www.icrc.org/ihl/INTRO/475?OpenDocument>

¹⁸ Vide http://www.globalsecurity.org/military/ops/iraq_casualties.htm

¹⁹ T. Rid, T. Keaney, *Understanding counterinsurgency; doctrine, operations, and challenges*, Routledge, London, 2010, p. 1.

In general, counterinsurgency “is military, paramilitary, political, economic, psychological and civic actions taken by a government to defeat insurgency”.²⁰ This non-legally binding definition embraces a broad spectrum of activities.²¹ A counterinsurgent's task is different from a conventional warrior's one. He or she is supposed to work smarter rather than harder during planning and executing counterinsurgency strategy.²² Since insurgents are embedded in the local community, counterinsurgency can be defined as the “military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgents, to rid them from the society. Since insurgents derive their support from the local population, only when the local population turns against the insurgency can counterinsurgency be considered successful”.²³

This approach requires a multidisciplinary approach both from scholars and practitioners. During modern counterinsurgency operations it is necessary for military forces to meld into the local environment by collecting tribal and demographic intelligence, as well as threat intelligence.²⁴ It also requires current knowledge on subjects such as governance, economic development, public administration and the rule of law.²⁵

Modern counterinsurgency operations are not a new development, but they have never before seemed to be so essential to future conflicts.²⁶ Counterinsurgency embraces holistic activities orientated towards the civilian population. Thus, killing the opponent is considered a last resort.²⁷ This argument is supported by General David Petraeus in *The U.S. Army's Counterinsurgency Field Manual*²⁸, where he presents some of major principles of conducting anti insurgency operations. They are as follow: a) sometimes, the more you protect your force the less secure you may be; b) some of the best weapons for counterinsurgent is do not shoot; c) sometimes, the more force is used, the less effective it is; and d) the

²⁰ COIN manual, *op. cit.* 1-1.

²¹ J. Kelly, *Legal aspects of military operations in counterinsurgency*, *Military Law Review*, vol. 21, 1963, p. 95

²² D. Stephens, *op. cit.*, p. 292.

²³ G. Sitaraman, *op. cit.*, p. 1773

²⁴ D. Kilcullen, *Intelligence*, p. 147 [in:] T. Rid, T. Keaney, *Understanding counterinsurgency; doctrine, operations, and challenges*, Routledge, London, 2010.

²⁵ COIN Manual, *op. cit.*, p. X.

²⁶ G. Sitaraman, *op. cit.*, p. 1770.

²⁷ D. Kilcullen, *Counterinsurgency*, *op. cit.*, p. 5.

²⁸ <http://www.fas.org/irp/doddir/army/fm3-24.pdf>

more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.²⁹

During counterinsurgency parties to the asymmetric conflict have to conduct both civilian and military actions. Insurgents are blended with the civilian population, whereas the governmental and foreign armed forces carry out projects which are often not military in nature. As a result, during counterinsurgency operations it is difficult to define what military effort is and what is not. This issue has to be considered with one fundamental assumption in mind. Observance of humanitarian and human rights law is in case of utmost importance in counterinsurgency. Any human rights or humanitarian law abuse committed by intervening forces – apart from a strictly moral dimension has also a pragmatic one. Each such an event quickly becomes known throughout the local populace and eventually around the world. Illegitimate actions undermine counterinsurgency efforts in both long and short-term aspects.³⁰

ISSUE OF APPLICABILITY OF NON-LETHAL WEAPON DURING CONFLICTS OF NON INTERNATIONAL CHARACTER

The use of non-lethal weapons (NLW) could positively contribute to counterinsurgency operations. In some circumstances, military aims may be achieved without lethal means and methods of warfare. The use of non-lethal weapons may cause fewer casualties amongst insurgents, especially in urban warfare scenarios. Additionally, the use of non-lethal weapons could lower the possibility of collateral damage.³¹ This is especially important during operations like the one in Afghanistan, where the main task for the NATO allied troops is to bring security and stabilization. Giving a commander the option not to use deadly force is very tempting. The question is whether it is allowed under international humanitarian law to use such means of warfare.

According to the US Department of Defence, non-lethal weapons “are explicitly designed and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment”.³² Another definition states that it is a device which incapacitates 98% of the targets,

²⁹ COIN Manual, *op.cit.*, p. 1-149, 1-153, 1-150, 1-151.

³⁰ COIN manual, *op. cit.*, p.1-24, par. 1-132.

³¹ B. Haberland, *Certain Controversies concerning non-lethal weapons, New Zealand Armed Forces Law Review*, vol. 6, 2006, p. 20

³² Policy for Non-Lethal Weapons, Department of Defense Directive, No 3000.3, July 9, 1996, art. 3.1, available at <http://www.dtic.mil/whs/directives/corres/pdf/300003p.pdf> (9/12/12)

has no effect on 1%, and causes permanent damage to another 1% – half of which will die.³³ As Haberland states, the notion of non-lethal weapons seems to be a label for the guiding principle behind their intended use.³⁴ According to NATO and US officials, it is simply a short form to express a concept of less lethal weapons designed to limit casualties.³⁵ The major difference between lethal and non-lethal weapons is that the latter is intended not to kill opponents. Of course, even lethal weapons do not result in 100% lethality. According to the ICRC, the estimated lethality rate for wounds from lethal weapons, such as rifles and fragmentation weapons, is approximately 20-25%.³⁶

Non-lethal weapons comprise the following technologies: electromagnetic (laser and microwaves); electric; chemical; biological; and biochemical technologies (e.g. tear gas, toxic incapacitating agents); mechanical technologies (nets, barriers); acoustic technologies (e.g. infra- and ultrasonic generators); kinetic technologies (e.g. rubber and plastic bullets, water cannons), etc.³⁷

Use of non-lethal weapons (NLW) is under the same scrutiny in treaty and customary law as with any other weapons. NLW should not be indiscriminate in nature or be used indiscriminately against combatants or non-combatants. Even though NLW's do not cause unnecessary suffering and superfluous injury, they should be used in accordance with the principle of proportionality³⁸ and distinction. However, it needs to be remembered that even indiscriminate use of non-lethal weapons causes less lethal damage to civilians than traditional weapons. This is because civilians are not usually as seriously harmed as non-lethal weapons are designed to incapacitate.³⁹

What raises significant controversy is an issue of the use of chemical agents – especially those referred to as Riot Control Agents (RCAs). Those chemical agents are a type of less lethal weapon that include tear gas, pepper spray, and other irritants. They are intended to cause pain to any individual with uncovered or unprotected eyes, skin and respiratory

³³ B. Haberland, *op.cit.*, p. 23

³⁴ B. Haberland, *op.cit.*, p. 24

³⁵ B. Haberland, *op.cit.*, p. 24

³⁶ D. P. Fidler, *The international legal implications of 'non-lethal' weapons*", Michigan Journal of International Law, vol. 21, 1999, p. 56.

³⁷ B. Haberland, *op.cit.*, p. 22.

³⁸ B. Haberland, *op.cit.*, p. 28.

³⁹ D. P. Fidler, *op.cit.* p. 84.

areas, as a means to control crowds or individuals.⁴⁰ In general, RCAs are considered as chemical weapons which is why legal regulations are provided for their use during armed conflicts.

Prohibition of the use of chemical weapons during international armed conflicts was provided for the first time in 1899 by the Hague Declaration Concerning Asphyxiating Gases.⁴¹ It was confirmed by article 22 and 23 of the Hague Convention which forbids the employment of “poison or poisoned weapon” and “arms, projectiles, or material calculated to cause unnecessary suffering”.⁴² Prohibition of the use of poisonous gases was developed by the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.⁴³ Among other things, this Protocol prohibited “the use in war of asphyxiating, poisonous or other gases” where tear gas could be considered both as “other gas” or as an asphyxiating, poisonous one.⁴⁴ Extensive use of tear gas in Vietnam by the USA led to the issuing of a statement by the Secretary General UN Thant that tear gas as a method of warfare is prohibited by the Protocol 1925.⁴⁵ Fully comprehensive in respect to the tear gas prohibition is art. 1 (5) of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons (CWC) which says: “Each State Party undertakes not to use riot control agents as a method of warfare”.⁴⁶ The Convention defines RCA as “any chemical not listed in a Schedule, which can produce rapidly in humans a sensory irritation or disabling physical effects which disappear within a short time following termination of exposure”.⁴⁷ The only relevant exception to Article I(5)'s is found in Article II(9)(d), which says that (...) “law enforcement including domestic riot control purposes”⁴⁸ allows to use RCAs”. This exception applies only when a law enforcement intention is clearly made by the state deploying the RCAs. In other words, if a chemical agent is deployed and does not fit

⁴⁰ J. Fry, *Gas smells awful: UN for ces, riot control agents and the chemical weapon convention*, Michigan Journal of Interantional Law, vol. 31, 2010, p. 480.

⁴¹ Hague Declaration Concerning Asphyxiating Gases, July 29, 1899.

⁴² Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, art. 22, October 18, 1907.

⁴³ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65

⁴⁴ J. Fry, *op. cit.* p. 482.

⁴⁵ J. Fry, *op. cit.* p. 485.

⁴⁶ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Treaty Doc. 1993 No. 103-21.(CWC)

⁴⁷ Art. II (7)

⁴⁸ CWC

within the law-enforcement exception of Article I(9), then it is a banned chemical weapon.⁴⁹ The problem is that the Convention does not provide a definition of either law enforcement or method of warfare.⁵⁰ Lack of definitions of law enforcement and method of warfare raise an issue about the legitimate use of RCAs during peacekeeping, humanitarian and disaster relief operations, hostage rescue missions, etc.⁵¹ During such operations it is difficult to differentiate between what is a permissible law enforcement action and what is a forbidden method of warfare. In practice, tear gas was used on several occasions by the UN or UN authorized forces in Korea, Kosovo, Rwanda, Haiti, Congo, East Timor and others.⁵² Additionally, some countries, for example the USA, allow the use of RCAs during armed conflict. It was confirmed by the US president that American military forces may use RCAs in international and non-international armed conflicts defensively to save lives.⁵³

⁴⁹ J. Fry, *op. cit.* p. 499.

⁵⁰ J. Fry, *op. cit.* p. 499.

⁵¹ D. P. Fidler, *op.cit.*, p. 72.

⁵² J. Fry, *op. cit.* p. 472-495.

⁵³ **The US Field Manual (1956)** states: It is the position of the United States that the Geneva [Gas] Protocol of 1925 does not prohibit the use in war of ... riot control agents; **The US Rules of Engagement for Vietnam (1971)** stated: Riot control agents will be used to the maximum extent possible. CS agents can be effectively employed in inhabited and urban area operations to flush enemy personnel from buildings and fortified positions, thus increasing the enemy's vulnerability to allied firepower while reducing the unnecessary danger to civilians and the likelihood of destruction of civilian property.

The US Air Force Pamphlet (1976) restates Executive Order No. 11850 of 8 April 1975 and specifies: The legal effect of this Executive Order is to reflect national policy. It is not intended to interpret the Geneva [Gas] Protocol of 1925 or change the interpretation of the United States that the Protocol does not restrain the use of riot control agents as such.

The US Air Force Commander's Handbook (1980) states: The United States does not regard the Geneva [Gas] Protocol as forbidding use of riot control agents ... in armed conflict. However, the United States has, as a matter of national policy, renounced the first use of riot control agents ... with certain limited exceptions specified in Executive Order 11850, 8 April 1975. Using ... riot control agents ... in armed conflict requires Presidential approval.

The US Operational Law Handbook (1993) states: The following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: (...) Using weapons which cause unnecessary suffering, prolonged damage to the natural environment, or poison weapons. This prohibition does not preclude the use of herbicides or riot control agents by US forces in wartime when authorized by the President of the US or his delegate.

The US Naval Handbook (1995) states: The United States considers that use of riot control agents in armed conflict was not prohibited by the 1925 [Geneva] Gas Protocol. However, the United States formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Uses of riot control agents in time of armed conflict which the United States considers not to be volatile of the 1925 [Geneva] Gas Protocol include:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting prisoners of war.

What additionally complicates the use of RCAs is the dual character of many missions such as, for example, the one in Afghanistan where NATO forces conduct both military and stabilization operations; i.e. some forces from members of NATO participate in regular armed conflict while others conduct police operations. Should NATO forces be considered as law enforcement under UN resolutions? If the answer is yes, then RCAs should be allowed. If the answer is no, then the use of RCAs is illegal. Several UN resolutions refer to the law enforcing character of the operation in Afghanistan. For example, SC Resolution 1386 (2001) “authorizes, (...) an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas”.⁵⁴ Further resolution not only confirms that the UN recognizes “that the responsibility for providing security and law and order throughout the country resides with the Afghans themselves, and welcoming in this respect the cooperation of the Afghan Interim Authority with the International Security Assistance Force”, (...) but this same resolution also states that the UN Security Council “authorizes the Member States participating in the International Security Assistance Force to take all necessary measures to fulfill the mandate of the International Security Assistance Force.”⁵⁵ The authorization of ISAF forces provided by the UN Security Council is in many respects similar to the authorization of UN-run or UN-approved operations. For example, RCAs were used in Haiti by UNMIH (United Nations Mission in Haiti) forces.⁵⁶ According to

2. Situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.

3. Rescue missions involving downed aircrews or escaping prisoners of war.

4. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Such employment of riot control agents by U.S. forces in armed conflict requires NCA approval. Use of riot control agents as a “method of warfare” is prohibited by the 1993 Chemical Weapons Convention. However, that term is not defined by the Convention. The United States considers that this prohibition applies in international as well as internal armed conflict but that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and non-combatant rescue operations conducted outside of such conflicts.

The United States also considers that it is permissible to use riot control agents against other than combatants in areas under direct U.S. military control, including to control rioting prisoners of war and to protect convoys from civil disturbances, terrorists and paramilitary organizations in rear areas outside the zone of immediate combat.

Documents available http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule75

⁵⁴ Art 1, S /RES/1386 (2001).

⁵⁵ Art. 2, S /RES/1413 (2002).

⁵⁶ J. Fry, *op. cit.* p. 488.

the resolution 867,⁵⁷ the main aim of the UNMIH was to maintain security and stability, and help the country to return to constitutional rule and give assistance in holding elections.⁵⁸ Similar UN interventions took place in Africa.⁵⁹

The above-mentioned discussion refers to the literal interpretation of article 1.5 CWC: “(...) State Party undertakes not to use riot control agents as a method of warfare”. It is forbidden to use RCAs as a method of warfare during either international or non-international armed conflicts. It is lawful, however, to use RCAs as methods of policing or crowd control. It is of particular importance when we take into consideration the character of the operation in Afghanistan, where several different operations are being conducted, for example, the EUPOL mission⁶⁰ and NATO-led ISAF missions. Each of these operations has its own agenda. EUPOL is the European Union police operation. The aim of this mission is to “contribute to the establishment of sustainable and effective civil policing arrangements that will ensure appropriate interaction with the wider criminal justice system under Afghan ownership”.⁶¹ In such a case, the use of RCAs within the training or mentoring process is justified and lawful. In the case of ISAF, the situation is more complicated. As mentioned above, the aim of ISAF is “providing security and law and order”. The dynamics of the current situation puts ISAF forces within the framework of armed conflict. This means that ISAF forces conduct regular military operations of both a defensive and offensive character. However, they also conduct policing operations such as securing national elections⁶² or training local police. A similar policing operation takes place at military run check-points. According to the counterinsurgency manual, the key to success in a counterinsurgency is not only an active participation in the fight with insurgents, but also the creation of security forces⁶³ and the participation in security type operations with local

⁵⁷ S/RES/867 (1993)

⁵⁸ Mission background available at http://www.un.org/Depts/DPKO/Missions/unmih_b.htm

⁵⁹ J. Fry, *op. cit.* p. 491- 494.

⁶⁰ European Union Police Mission in Afghanistan.

⁶¹ EUPOL background available at the official EUPOL website

<http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eupol-afghanistan/factsheets.aspx?lang=en>

⁶² For example Polish Military Contingent was responsible for securing Ghazni province election day in 2009 <http://wiadomosci.wp.pl/kat,1342,title,Wybory-w-Afganistanie-Polacy-dwukrotnie-interweniowali,wid,11415906,wiadomosc.html?icaid=1d2ec>

⁶³ COIN Manual, *op. cit.*, p 6-2, par. 6-6,

counterparts.⁶⁴ This is because the primary frontline of counterinsurgency is often one of police character – not military.⁶⁵ It creates a situation where military forces execute police activity and therefore should be allowed to use RCAs. On the other hand, the same military forces should not be allowed to use RCAs during combat situations. This situation is even more complex when an escalation of force is taking place. For example, if NATO troops are engaged in crowd control – a police type situation can easily evolve into combat situation.

NLW offer precision, accuracy and effectiveness that can help to save military and civilian lives. In some respect, their use may break the circle of violence.⁶⁶ This feature is particularly desirable during a counterinsurgency operation. However, there is a danger that NLW may precede the use of lethal weapons, which may lead to a possible violation of humanitarian law.

The dual character – military and police – of counterinsurgency is a fact. One day, soldiers may be engaged in a combat operation where they cannot resort to RCAs, whereas the next day in a police operation, where they would be allowed to use non-lethal RCAs. This not only follows Sun Tzu’s premise that “those skilled in war subdue the enemy’s army without battle” but also fulfills humanitarian law expectations.

The above-presented examples show that, NLW may be efficiently utilized during armed conflict of non-international character. Secondly, it raises the issue of possible modification of the law applicable during non-international, asymmetrical conflicts.

CONCLUSION

Modern counterinsurgency rejects kill-capture strategy. Instead, counterinsurgents follow win-the-population strategy, which is directed to building a stable and legitimate political order.⁶⁷ Such an approach was brought against the ideology of global war on terror (GWOT) introduced by rgw George W. Bush administration, which retains very conventional strategy: to win your opponent, you need to kill or capture the terrorists. This strategy failed both on practical and legal level.

⁶⁴ COIN Manual, *op. cit.*, p 6-21, par. 6-104,

⁶⁵ COIN Manual, *op. cit.*, p 6-19, par. 6-90,

⁶⁶ B. Haberland, *op.cit.*, p. 43.

⁶⁷ G. Sitaraman, *Counterinsurgency, the war on terror, and the laws of war*, Virginia Law Review, vol. 95, 2009, p.1745

By using asymmetrical means and methods of warfare, insurgents often violate basic principles of IHL. However, the use of conventional ways of combat would be of suicidal character for them. On the other hand, NATO forces have to be more royal than the king and they are obliged to follow humanitarian standards, since military intervention has a stabilization agenda. As such, the ISAF aim is not to physically eliminate the opponent but to bring peace and stability. As long as NATO forces will be engaged in such operations, they have to follow humanitarian principles. It is not because of reciprocity or belief in humanitarian values by foot soldiers, but because of strategic pragmatism and historical experience. The one who loses moral legitimacy, loses the war.⁶⁸

Modern conflicts pose a challenge toward treaty law. Treaty law was created to fit conventional wars. Such wars are no longer dominant. A brief analysis of the last sixty years of the world's history clearly indicates that international wars constitute a minority. But also, the last sixty years of the world's history also bring the unprecedented development of human rights and their observance, that imposes a different type of obligation on military forces. The new standards require that not only military intervention with a humanitarian agenda takes place; but also when an armed conflict is completed, human rights need to be observed. This approach is confirmed not only by strategists but also by the international community. For example, UN Res. 1674 on the importance of preventing conflicts through development, emphasized the importance of preventing an armed conflict through the promotion of economic growth; poverty eradication; sustainable development; national reconciliation; good governance; democracy; the rule of law; as well as respect for, and protection of human rights.⁶⁹ Transformations of Bosnia and Herzegovina, Kosovo or East Timor are good examples of such an approach. At the same time, the lack of engagement of Americans in state-building in Afghanistan in 1988 after Russia's withdrawal, is an example of how things may go wrong. The same type of international failure at the beginning of the 1990s led to genocide in Rwanda.

What is acceptable under conventional warfare, also from an IHL perspective, may not be acceptable in a modern counterinsurgency

⁶⁸ COIN Manual, *op. cit.*, p 7-9, table

⁶⁹ UNSC Res 1674 available at <http://www.un.org/News/Press/docs/2006/sc8710.doc.htm>

policy.⁷⁰ Killing a member of a particular community instead of arresting them may fuel insurgency rather than limit it.⁷¹ For example, the bombing of the only hospital in a 100 km radius may be lawful under IHL (if utilized by the insurgents for military purposes), but it is not acceptable under counterinsurgency policy.⁷² This is because protecting the population is a centre of gravity to the counterinsurgent's strategy.⁷³ Particularly with the rise of instant communication and publicity, any kill-capture operation could easily be found unreasonable by domestic and international opinion and reduce the legitimacy of the intervening counterinsurgent forces and their ability to win "hearts and minds".⁷⁴

Some major humanitarian law principles are better protected by wise command than by treaty law. Some other branches of humanitarian law such as the law of occupation have lost legal significance. But some others, such as the one related to the use of non lethal weapons, should be modified.

New wars where counterinsurgency is fought do not pose strategic threat to nuclear superpowers such as the USA, the UE or China. However, these low-intensity conflicts may not be left alone. These wars modify traditional, conventional laws of war. Humanitarian law created for a Eurocentric world needs to be – foremost – applicable in Rwanda, Afghanistan or Colombia. It means that maybe it is time to think how to change the law in order to meet the challenges of modern conflict. Non-symmetrical conflicts are wars of the future. According to Kuźniar, 16% of the world's population spends 75% of global military expenses. As he argues, an overwhelming power and range of military burden expenditure of rich countries will push poorer countries and entities into asymmetrical warfare.⁷⁵ This is why it is so important to face the challenge and try to analyse and develop law applicable during modern asymmetrical, non-international armed conflicts.

⁷⁰ G. Sitaraman, *Counterinsurgency, the war on terror, and the laws of war*, Virginia Law Review, vol. 95, 2009, p. 1775

⁷¹ G. Sitaraman, *op.cit.*, p. 1788

⁷² Similar situation took place in Ghazni province in 2009 where Polish troops forcibly entered Mosque in Ghazni city

http://wyborcza.pl/1,107491,6328619,Afganczyzy_wsciekli_na_polskich_zolnierzy.html (12.10.2012)

⁷³ G. Sitaraman, *op.cit.*, p. 1790.

⁷⁴ G. Sitaraman, *op.cit.*, p. 1790.

⁷⁵ R. Kuźniar, *Polityka i siła, Policy and Power*, Scholar, Foundation of International Studies, Warsaw, 2005, p. 294-295.

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