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The Use of Armed Force against Non-State Actors

International Law and the Role of the Norwegian Military in Afghanistan 2001 - 2002



Steinar Skaar

Abstract

The aim of this thesis is to examine the major issues of legality that apply to the use of military force against non-state actors, how these issues figured in the Norwegian discussion and how they influenced the decision-making process before and during our participation in Operation Enduring Freedom (OEF) until the end of 2002.

By examining the provisions of international law relevant to armed conflict, in particular related to the so-called “new wars”, the thesis argues that the use of armed force against non-state actors is a matter of some controversy. In particular this alludes to the notion of civilians directly participating in hostilities. It argues that in order to apply military force against non-state actors, there is a legal requirement to connect those actors to hostilities and define the time during which they participate in those hostilities.

Regarding the Norwegian discussion and decision making process, it argues that initially the Kosovo conflict of 1999, but in particular the Norwegian participation in Operation Enduring Freedom marked a substantial departure from Norwegian post-Second World War traditions with respect to the use of force. This did in turn influence the Norwegian discussion on legality by highlighting the implications of using military force against non-state actors.

It concludes that the Norwegian political discussion or decision making process did not address the particularities relevant to the use of force against non-state actors in any depth. Whereas International Humanitarian Law was frequently addressed in the public discussion and by various representatives of the Government, the particularities related to the legality of the Afghan conflict remained absent. Governmental statements and parliamentary discussions contain, with few exceptions, general references to international law and do not provide clarity on the Norwegian position.

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Introduction

Background

War no longer exists. Confrontation, conflict and combat undoubtedly exist all round the world - Nonetheless, war as cognitively known to most non-combatants, war as battle between men and machinery, war as a massive deciding event in a dispute in international affairs: such war no longer exists.¹

As a practitioner of military force, having spent almost a year in Afghanistan, I have developed a substantial interest for the legal aspects of contemporary conflicts. The background for the writing of this thesis can be found in a long discussion in Norway of whether the Afghan conflict, thus Norway's participation, constituted a war or not. Arguably, war as cognitively recognised in Norway would resemble Rupert Smith's description of the war that "no longer exists", i.e. industrialised war between nations' armies, requiring the full mobilisation of the state's resources. Hence, the Norwegian 2WW experience may still be considered to shape the public perception of war. However, as Smith rightly points out, such wars are exceptions in the contemporary world. Contemporary conflicts are of a different kind. They are not between massive armies on a defined battlefield, but between a variety of actors, both state and non-state, that oppose each other on a highly fragmented battlefield.

A major issue in the Norwegian discussion of whether Norway was fighting or participating in a war in Afghanistan, was, and indeed is: which rules apply? Which parts of IHL are applicable to Norwegian forces operating in Afghanistan? Norway prides itself of being highly conscious of International Law and has traditionally accepted every provision, treaty or custom, regulating armed forces' behaviour in conflict. Arguably, the official Norwegian focus on international law raises an expectation that this issue would have a predominant position in the decision-making process. However, this thesis aims to show that even though the issue of law was widely debated in Norway, neither the discussion nor the decision making process addressed the core legal issues relating to the particularities of the Afghan conflict.

A particular issue connected to contemporary conflicts is the presence of non-state actors. Such actors play a major role in most contemporary conflicts, but are normally not accepted as legal military opponents; they are not entitled to the status of combatancy as are members of states regular armed forces. One might suggest that an actor in a conflict is either a legitimate military opponent, as described in the Geneva Conventions, or a criminal that will

¹ Rupert Smith, *The Utility of Force* (London, Penguin Books, 2005), p.1.

be subject to a criminal investigation through the judicial system. States are generally not inclined to grant non-state actors status as combatants or as legitimate military opponents, even though a military response (as opposed to the criminal justice model) is frequently utilised. As will be discussed in this thesis, the legal status of such actors related to their participation in an armed conflict is subject to some controversy. The Counter Insurgency (COIN) campaign currently going on in Afghanistan exemplifies some of these controversies.

As will be shown, Norway's participation in Operation Enduring Freedom (OEF) was in many ways a novel experience. It was the first time since the Second World War that Norwegian fighter aircraft were deployed in support of ground operations and with a clear probability that their weapons would be used. The particularities of the Afghan conflict thus implied that force would most likely be used against non-state actors. The Norwegian participation in OEF is of particular interest because it portrays how the small state of Norway dealt with controversial issues of international law when actively supporting a major ally in conducting an armed conflict.

Literature review

This thesis argues that the Norwegian decision to participate in OEF, hence actively support the US lead military operations in Afghanistan was not supported by a comprehensive discussion of the legal aspects that follows by the particularities of such a conflict. These particularities are deduced from what may generally be described as the Changing Character of War and the parts of International Humanitarian Law that deals with the use of force in a non-international conflict against non-state actors, typically counter insurgency conflicts. Hence, the conceptual background for this thesis is supported by literature that relates mainly to two topics; the particularities of contemporary warfare and International Humanitarian Law.

The Changing Character of War

The so-called Changing Character of War has been widely discussed since the termination of the bipolar international system of the Cold War.² In short it alludes to the point that whereas war traditionally has been viewed as predominantly an inter-state activity, such wars are now exceptions. What has come instead is what several authors describe as "New Wars" that differs substantially from the "Old One's". The "Changing Character" thus indicates that there are particularities with such wars that need to be addressed when states consider engaging in an armed conflict. The literature discussed below provide a solid argument for a qualitative

² E.g: University of Oxford, "Changing Character of War", <<http://ccw.modhist.ox.ac.uk/>>, [accessed 20 August 2010].

change of the character of war since the end of the Cold War, a possible consequence thereof may be that the Law of Armed Conflict may not necessarily fit the contemporary situation.

In *The Utility of Force* General Sir Rupert Smith examines whether military force may still have utility in contemporary international society.³ Smith argues that conflict as foreseen during the Cold War, labelled interstate industrial war, no longer exists. Conflict has, according to Smith, been fragmented by a variety of factors, most notably; the actors that participate, the reasons for fighting, the way in which they fight and the way they are organised. Smith, especially in the last part of his book, emphasises his own experiences from the Kosovo conflict. He makes a strong argument that most contemporary conflicts are guided by a different logic than interstate war. Smith labels contemporary wars as “war amongst the people”. It is no longer armies facing each other on the battlefield, but rather violent conflicts that, for a number of reasons, occur in the midst of inhabited areas. This way of approaching conflict will obviously have consequences. It may, or even should, influence the training and equipping of military forces, but also raises important questions regarding the legitimacy and legality of the use of force. A possible weakness with Smith’s approach may be that he generalise too much based on his Kosovo experience. The Kosovo conflict was, like most conflicts, unique, and the experiences from this conflict may be difficult to apply generally throughout the world. Smith’s almost total rejection of traditional interstate war as a possibility may also be questionable.

The Israeli military historian and theorist Martin Van Creveld has written extensively on issues of contemporary conflict and military development. In his classical book *The Transformation of War* he rejects the idea of Clausewitzian Trinitarian war as a viable concept for understanding contemporary conflicts.⁴ Van Creveld argues that contemporary conflicts are mainly about the following issues:

- By whom war is fought - whether by states or by non-state actors.
- What war is about - the relationships between the actors, and between them and the non-combatants.
- How war is fought - issues of strategy and tactics.
- What war is fought for - whether to enhance national power, or as an end in itself.
- Why war is fought - the motivations of the individual soldier.

³ Smith, *The Utility of Force*. (London: Penguin Books, 2005).

⁴ Martin Van Creveld, *The transformation of War*, (New York : Free Press, 1991).

Van Creveld argues that the character of war has changed and that non-state actors play a highly important role in contemporary conflicts. In *The Transformation of War* and also in later works, Van Creveld indicates that the concept of nation states and state sovereignty has fragmented, and that powerful non-state actors will be the most likely opponent of any army in the future. He further indicates that the public, but also the military understanding of war, predominantly rests on the Clausewitzian concept of Trinitarian war. By making these suggestions, Van Creveld questions the contemporary concept of war, which he claims is based on the Clausewitzian approach, and argues that this is false. He argues that military forces need to adjust accordingly in order to be able to handle such conflicts, stating that the need for heavy equipment and large military formations may be replaced by constabulary-type forces that operate in the rather unclear area between military operations and law enforcement. Van Creveld's arguments are not undisputed. The decline of the nation state and the fragmentation of the principle of state sovereignty are not highly obvious. In the foreseeable future, sovereign states still seem to be the most potent players in the international society. Most states also seem to keep and utilise heavy military equipment in their inventories, as the Afghan conflict clearly shows. Still, arguably Van Creveld has made major contributions to the understanding of contemporary conflicts, and his work is used by various military academies teaching military theory.

In *The State, War and The State of War* Kalevi Holsti argues that war in most cases cannot be understood as an instrument of pursuing state interest.⁵ According to Holsti, war will, or indeed has, developed into what he calls "Wars of a Third Kind". He argues that, whereas until the end of the Second World War interstate war was the rule, this is now the exception. Most wars occur within states between various actors, both state and non-state, for reasons not easily contained within Clausewitz' political concept. Holsti refers to Martin Van Creveld in stating:

The Clausewitzian eighteenth- and nineteenth century concept of war ... is not only fast fading, but inappropriate as both an analytical and policy guide to those who must think and response to violence that concerns ideology and/or the nature of communities, rather than state interest.⁶

In Wars of a Third Kind, Hosti claims; "just as civilian/soldier distinction disappears, the role of outsiders becomes fuzzy. The laws of neutrality no longer apply because those who

⁵ Kalevi Holsti, *The State, War and the State of War*, (Cambridge: Cambridge University Press, 1996).

⁶ Ibid p.37.

are weak rely on outsiders for arms, logistical support and sanctuary”⁷ These wars are people’s wars and their nature is not political, as traditionally understood.

...the purposes of such wars are often to politicize the masses, to turn them into good revolutionaries and/or nationalists. Civilians not only become major targets of operations, but their transformation into a new type of individual becomes a major purpose of war.⁸

He argues that there are several differences between such wars and institutionalised or total war. Whereas war fought within the Napoleonic paradigm can be looked upon as a continuation of state policy to pursue state interests, this connection is not obvious in Wars of a Third Kind. Holsti argues that; “War as an instrument of foreign policy with limited goals is not necessarily the same phenomenon as war fought to preserve or establish a community”.⁹

In Wars of a Third Kind, the actors are not exclusively states. Whereas the traditional concept of war implies a conflict situation between states, this seems to be the exception in contemporary conflicts. History has, for example, through the wars of decolonisation and the activities of organisations like the IRA, ETA and PLO, produced a variety of non-state actors with political agendas who were willing to use force to obtain their objectives.

Holsti argues that Wars of a Third Kind will be the standard of future conflict. They must be understood within the framework of the weakening of (some) states, globalisation, ethnic and religious tension and quest for influence and resources. They occur, as Rupert Smith would have put it, “amongst the people” and state actors represented by regular military forces are only some of a range of actors.

The notion of a qualitative change in the character of war may also be found in the concept of 4th Generation Warfare (4GW). 4GW was first examined by LtCol William S Lind in a Marine Corps Gazette paper in 1989.¹⁰ Lind argues that modern warfare has developed through four generations, initiated by the 1648 Peace of Westphalia and the introduction of the state monopoly of violence.¹¹ In brief, the four generations of warfare are recognised by the following:

⁷ Kalevi Holsti, *The State, War and the State of War*, (Cambridge: Cambridge University Press, 1996), p.37.

⁸ Ibid, p.39.

⁹ Ibid, p.38.

¹⁰ William S Lind et al, *The Changing Face of War, Into the Fourth Generation*, (Marine Corps Gazette, Oct 1989), pp.22-26.

¹¹ William S Lind, *Understanding Fourth generation Warfare*, <http://antiwar.com/lind/index.php?articleid=1702>, [accessed 23 August 2010].

1) the use of massed manpower, 2) firepower, 3) maneuver, and now 4) an evolved form of insurgency that employs all available networks—political, economic, social, military—to convince an opponent's decision makers that their strategic goals are either unachievable or too costly.¹²

Lind argues that both the termination of the bipolar international system, but also technological and societal changes are factors that have moved the character of war into the Fourth Generation. The Fourth generation is characterised by a partly collapse in the state monopoly of violence, the introduction of powerful non-state actors and not least unconventional ways of fighting, e.g. the use suicide bombers and other means of terrorism.¹³ As such Lind's analysis do not differ substantially from those of Creveld's and Holsti's.

Common to analysis focusing on 4GW is the perception of a change in the character of conflict since the termination of the Cold War. However, whereas Lind's and Hammes' examination of contemporary conflicts contains highly useful analysis, the notion of four generations starting with the 1648 peace in Westphalia are according to Timothy J. Junio; "logically and temporarily inconsistent" and provides limited basis for understanding the development of war as such.¹⁴ Even more critical to the concept of 4GW is Dr. Antulio J. Echevarria II's in *Fourth-Generation War and Other Myths*.¹⁵ In particular, Echevarria denounces the idea of four generations of war, and, although accepting that 4GW proponents may present useful analysis of contemporary conflicts, argue that the concept itself carry highly limited if any utility, and as such may prevent rather than increase understanding of how to resolve contemporary conflicts.

Scholars like Mary Kaldor and Herfried Münkler have contributed to the notion of a change in the Character of War. In *New Wars Old Wars*, Kaldor, using the Balkan wars as her main case, argues that war between states is an anachronism, and that in particular economic interest is a driver for the continuation of conflict.¹⁶ In *The New Wars*, Münkler argues that

¹² Dr. Antulio J. Echevarria II, <<http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=632>> [accessed 25 Aug 2010].

¹³ The implications of 4GW is thoroughly examined in Thomas X Hammes, *The Sling and the Stone*, (St.Paul, Zenith Press, 2004).

¹⁴ For a critique against Fourth generation Warfare see: Antulio J. Echevarria, II, *Fourth Generation War and Other Myths* (Carlisle Barracks, PA: U.S. Army War College, Strategic Studies Institute, November 2005), iii. and Timothy J. Junio *Military History and Fourth Generation Warfare*, *The Journal of Strategic Studies*, Vol 32, No 2, April 2009, pp.243-269.

¹⁵ Antulio J. Echevarria II (2005) <<http://www.strategicstudiesinstitute.army.mil/pdf/files/pub632.pdf>> [accessed 3 Sep 2010].

¹⁶ Mary Kaldor, *Old Wars New Wars, Organized Violence in a Global Era.*, (Stanford, Stanford University Press, 2001).

states will no longer be the dominant actors, and that the emphasis has changed from the battle to a strategy of exhaustion.¹⁷ Like Kaldor and Smith, Münkler almost totally reject the concept of symmetric interstate war in the contemporary international society, arguing that war as a means of pursuing state policy is an anachronism. Instead wars has become existential, a way of life, in which it is questionable whether fighting represents a means to an end, or actually is an end by itself.

Whereas the above literature discuss the change of the phenomenon of war, with a possible exception of 4GW, terms like Hybrid War, Compound War and Three Block War addresses the development and the potential change of the tactical aspects of war. Colonel John J. McCuen discusses hybrid wars in a 2008 Military Review article.¹⁸ According to McCuen, hybrid wars are :

“a combination of symmetric and asymmetric war in which intervening forces conduct military operations against military targets while they must simultaneously – and more decisively – attempt to achieve control of the combat zone’s indigenous populations by securing and stabilizing them”.¹⁹

McCuen thus addresses one particularity of contemporary conflict by arguing that the soldier on the ground often will face multiple realities while operating in the combat zone. These realities may seem contradictory to the soldier because he will be fighting a dedicated enemy, while at the same time aiming at protecting the people that may be the basis for recruitment to the insurgency. Hybrid War indicates a mix of traditional symmetric warfare between regular forces and irregular, often non-state actors, using the whole spectrum of forceful means. The issues of irregularity and hybrid war have been discussed extensively by authors like Frank G. Hoffman and Nathan P. Freier.²⁰

When addressing the National Press Club, Washington D.C. in October 1997, Commandant of the Marine Corps, Charles C Krulak used the term “Three Block War” as useful for understanding the complexity of contemporary conflict.²¹ According to Krulak, a soldier on the 21st Century battlefield will simultaneously be: “feeding and clothing displaced

¹⁷ Herfried Münkler, *The New Wars*, (Oxford, Polity Press, 2005).

¹⁸ John J. McCuen, *Hybrid Wars*, Military Review, March-April 2008, pp.107–113.

¹⁹ Ibid, p.108.

²⁰ Frank G Hoffmann is a retired US Marine Corps officer that has written extensively on issues like irregular war and hybrid war. Mr Nathan P. Freier, is a Senior Fellow, at the International Security Program of the Strategic Studies Institute of the United States Army War College.

²¹ Charles C Krulak, *The Three Block War*, Address to the National Press Club, Whashington D.C., October 1997.

refugees, ...holding two warring tribes apart and, finally, they will be fighting a highly lethal mid-intensity battle". It is quite clear that by 2010, history has proved Krulak right, and that his description of the challenges of the modern battlefield fits neatly into the experiences of e.g. the Iraqi or Afghan theatres.

Being one of the architects behind the US Field Manual 3-24 on counter insurgency, and author of *The Accidental Guerrilla* David Kilcullen has become one of the worlds leading experts on counter insurgency warfare. Kilcullen argues that in order to understand the driving factors and motivations for a people to involve in an armed uprising, one must appreciate the local nature of such conflicts.²² Of particular interest is Kilcullen's theories on how terrorist organisations or insurgent movements uses deliberate intimidation techniques to alienate the population from the government and international forces, thus creating fertile grounds for recruitment to the insurgency.²³ The Accidental Guerrilla Syndrome consists of four phases, which Kilcullen calls: Infection, Contagion, Intervention and Rejection.²⁴ By deliberately using these techniques, Kilcullen argues that insurgent movements are able to use their local knowledge to gain an operational advantage, not easily equaled by e.g. coalition forces, as exemplified by the conflict in Afghanistan. Whereas Kilcullen's descriptions may not represent a new kind of war, insurgencies are not new phenomenon; his writings indeed provide useful insights in the particularities of contemporary warfare.

Whereas the above mentioned authors argues that traditional interstate war is something of the past, thus the character of war has changed, Dr. Colin S Gray argues that this is questionable. Gray rejects the idea that the use of force may, as a rule, be understood outside its classical political framework. He claims that the issues of state interest and competing ideologies continue to be the basis for possible future conflicts, just as they have been throughout the history of mankind. In *Another Bloody Century*, Gray claims that interstate war can by no means be expected to be a concluded part of human history.²⁵ Gray argues that the rising Eastern powers of China and India and their investments in heavy military equipment like aircraft carriers, combined with the ever-present incompatibilities of state interest, provide ample basis for future conflicts. The contemporary so-called Low Intensity Conflicts (LIC) may very well be a sign of our time, but not necessarily an everlasting concept of conflict. A similar view is presented by Jack S. Levy in his review of

²² David Kilcullen, *The Accidental Guerrilla*, (Oxford: Oxford University Press, 2009).

²³ Ibid, pp.28-38.

²⁴ Ibid, p.35.

²⁵ Colin S. Gray, *Another Bloody Century*, (London: The Orion Publishing Group Ltd, 2005).

Münkler's *The New Wars*.²⁶ Levy claims that Münkler goes to far in excluding interstate war for the foreseeable future, thus arguing along the lines of Gray. Gray's argument is not of vital interest to this thesis. However, it displays that the overwhelming literature pointing at the new paradigm of international conflicts may miss important characteristics of conflict that might be universal.

As the literature above displays, the scholarly focus on "The New Wars" is substantial. Even though some authors criticize the idea that there exists such a phenomenon as "New Wars", available literature and battlefield experience provides strong arguments in favour of a change in the character of war since the end of the Cold War. A consequence thereof is that the Napoleonic concept of industrialized interstate war based on mass mobilization of the nations' resources are of lesser relevance in understanding contemporary conflicts. Since the laws of war by and large were developed prior to the development described above, a possible consequence thereof may be that the laws of war may not cover contemporary conflict satisfactorily.

War and Law

A wide range of literature addresses law and the use of force. Of particular interest to this thesis is literature that discusses the use of force in contemporary conflicts in general, and the use of force against non-state actors in particular. Apart from scholarly literature on the subject, rulings by international judicial bodies like the International Criminal Court (ICC) and International Court of Justice (ICJ), hereunder the findings of the International tribunals for respectively Yugoslavia and Rwanda provide relevant interpretations of International Humanitarian Law (IHL). Emphasis is also on the International Committee of the Red Cross (ICRC) commentaries and guidance on the application of law in conflict. Even though the ICRC does not carry the authority to instruct states, it is mandated by the community of states to interpret the laws of war, and as such provides authoritative guidance on their application.

Andreas Paulus and Mindia Vashakmadze argues in an article in the International Review of the Red Cross, that asymmetrical wars challenges the current state of international humanitarian law, in particular the distinction between international and non-international conflicts.²⁷ Paulus and Vahakmadze addresses the mechanisms that trigger the application of IHL in the new types of conflicts "in particular, asymmetrical wars involving non-state

²⁶ Jack S. Levy, Book review; *The New Wars*, Political Science Quarterly, Spring 2006, Vol. 121 Issue 1, pp.177-178.

²⁷ A. Paulus and M. Vashakmadze, *Asymmetrical war and then notion of armed conflict – a tentative conceptualization*, International Review of the Red Cross, Vol 91, Number 873, March 2009, p.95.

entities”.²⁸ They argue that “the traditional dichotomy between international and non-international armed conflict does not quite match the complexity of modern day constellations”.²⁹ By introducing the term “Transnational Wars”, they indicate that a third category of war exists, in which “non-state groups operate transnationally or across the borders of occupied territories”.³⁰ Transnational wars would fall outside the scope of common article 3 of the Geneva Conventions, and would in most cases not fit article 1 of additional protocol II. However, the authors argue that both the Hamdan decision of the US Supreme Court and the Tadic jurisdiction decision of the ICTY suggest the presence of an armed conflict not of an international nature also in cases not explicitly covered by existing treaty law.³¹ Whereas control over territory is of substantial importance in article 1 to additional protocol II as to whether an armed group may be assumed to be party to a conflict, Paulus and Vahakmadze argues that the recent years development suggests that this requirement is of less importance in contemporary conflicts. However, they argue that the organisational, intensity and temporal requirement maintains its relevance as triggering mechanisms for the existence of an armed conflict, thus for the application of IHL. A consequence of the arguments put forward by Paulus and Vahakmadze would be that the 9/11 attack did not by it self amount to the existence of an armed conflict. Finally, they conclude by claiming that, even though IHL does not fit all aspects of contemporary armed conflict, it maintains its vital purpose of protecting the civilian population and those being *hors de combat*.³²

In *Untying the Gordian Knot*, Geoffrey S. Corn and Eric Talbot Jensen discuss whether the laws of war “apply to military operations against non-state actors”.³³ Of particular interest is their discussion of which “triggering” mechanisms that may allow for the application of the law of war as distinct to crime combating or human rights law. Whereas the triggering mechanisms for inter state war are relatively uncontroversial, this may not be the case for transnational wars against non-state entities. Corn and Jensen exemplifies this by the 9/11 attack on the US and the consequent “war on terror” arguing that “the rapid evolution of the nature of warfare exemplified by the post 9/11 Global War on Terror has outpaced the evolution of the legal triggers for application of this regulatory framework”.³⁴ They further argue that the clear distinction between international and non-international conflicts becomes

²⁸ A. Paulus and M. Vashakmadze, *Asymmetrical war and then notion of armed conflict – a tentative conceptualization*, International Review of the Red Cross, Vol 91, Number 873, March 2009, p.97.

²⁹ Ibid, p.100.

³⁰ Ibid, p.100.

³¹ Ibid, p.99.

³² Ibid, p100.

³³ G.S. Corn, E.T. Jensen, *Untying the Gordian Knot: A proposal for determining applicability of the laws of war to the war on terror*, (Temple Law Review, Vol 81, 2008), p.787.

³⁴ Ibid, p.796.

less clear in contemporary transnational conflicts, which typically takes place between a state and a non-state actor within the territory of a third state, using Israeli operations against Hezbollah in Lebanon as an example.³⁵ The challenges posed by such operations thus requires a revised approach as to what triggers the laws of war in order to avoid conflicts to remain unregulated. Corn and Jensen then connects the applicability of the laws of war to the use of status based Rules of Engagement (ROE). The basis for their argument is that by introducing status based ROEs as a basis for the application of force, states has accepted that an armed conflict exists that de facto implies the utilisation of the laws of war. Whereas conduct based ROEs basically allows for self defence measures when facing hostile acts or intents, status based ROEs allows for the use of force as an integral part of mission accomplishment.³⁶ Because the introduction of status based ROEs “implicitly invokes the target engagement authority to the laws of war”, the authors argue that they represent the “ultimate de facto indicator of armed conflict”.³⁷ Hence, if a state invokes status based ROEs in the fight against non-state actors on a third state territory, as most certainly was the case against Al Qaeda, this would certainly amount to an armed conflict according to Corn and Jensen.

A potential weakness with this argument is of course that a state may introduce status based ROEs also in situations which otherwise would not fall under the scope of the law of armed conflict, allowing for forceful military measures in situations normally assumed to amount to crime. Usually, military ROEs are more permissive than what would be accepted for crime combating, thus states may invoke status based ROEs based on national interest and not a thorough consideration of the qualification of the conflict.

In *International Law and the Use of Force*, Christine Gray discusses both *Jus ad bellum* and *Jus in bello* issues.³⁸ Gray examines the use of force in a wide range of conflict-scenarios, e.g. civil wars and the use of force, the notion of self-defence, the use of force against terrorism and the UN and the use of force. Of particular interest to this thesis is her discussion on the use of military force in cases of terrorism and non-state actors. Gray argues that existing law may be applied in most contemporary cases regarding the use of force, but indicates that situations like the one in Afghanistan and the rise of international terrorism may put into question the relevance of international law as it stands. She continues by arguing that state interest, hence realpolitik, makes international law dynamic in a way that is unusual in

³⁵ G.S. Corn, E.T. Jensen, *Untying the Gordian Knot: A proposal for determining applicability of the laws of war to the war on terror*, (Temple Law Review, Vol 81, 2008), p.800.

³⁶ Ibid, pp.813-818.

³⁷ Ibid, p.818.

³⁸ Christine Gray, *International Law and the Use of Force*, (Oxford: Oxford University Press, 2004).

domestic law.³⁹ There are, according to Gray, few disagreements about the actual law, neither treaty nor customary, but usually about the facts and their interpretation.

Gray arguably provides a viable normative framework for examining the use of armed force in various situations. She presents a nuanced view on the application of law balanced against, for example, the impact of state interest, thus she is sensitive to the political aspect of international law. As the case stands, Gray's position is arguably that, even though some lacunas exist, existing law sufficiently covers contemporary conflicts also related to terrorism and non-state actors.

In *Targeted Killing in International Law*, Dr. Nils Melzer discusses the various aspects of states targeting individuals as a function of law enforcement or within the paradigm of hostilities.⁴⁰ Apart from Dr. Melzer's own research on the area, the book entails the conclusions and indeed the discussions presented during the ICRC expert meetings on the subject on Direct Participation in Hostilities from 2003 – 2008. Melzer's book is arguably the most comprehensive discussion on targeted killing - thus states' use of lethal force against individuals - currently available.

Whereas targeting as a function of law enforcement is of marginal interest to this thesis, his discussion of the paradigm of hostilities is at its core. Melzer provides a thorough discussion on hostilities, thus addressing the core issues of applying force against non-state actors. Such actors may, as will be shown, only be targeted during the time in which they actively participate in hostilities.

Melzer addresses the relevant provisions of international law relating to both international and non-international conflicts. He accepts as a fact that international law addressing non-international armed conflicts is less developed than law addressing international armed conflicts. However, he claims that existing law, also with respect to states' use of targeted killing, provides satisfactory legal basis for states' use of force.

The ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* provides authoritative guidance on the use of armed force against civilians.⁴¹ It subsumes the discussions and conclusions of the ICRC expert meetings as mentioned above. It does not "endeavour to be binding to states", but "reflect the ICRC's institutional position as to how existing IHL should be interpreted".⁴²

³⁹ Christine Gray, *International Law and the Use of Force*, (Oxford: Oxford University Press, 2004).

⁴⁰ Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008).

⁴¹ International Review of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Volume 90, Number 872, December 2008.

⁴² *Ibid*, p.991.

The ICRC guidance presents a restrictive view on what amounts to Direct Participation, hence is emplaced firmly within the ICRC tradition of emphasising the protection of civilians in conflict. In particular, the Interpretive Guidance argues that the requirement for direct participation for civilians must be understood literally. As such, the so-called revolving door problem “does not represent a malfunction”, but is an integral part of IHL.⁴³ It is a challenge though that the restrictive approach provided by the ICRC is currently not widely accepted by states. The Rules of Engagement used by e.g. ISAF in Afghanistan is substantially more permissive than the ICRC guidance.⁴⁴

In Wippman and Evangelista’s *New Wars, New Laws* it is questioned whether the existing legal framework sufficiently covers the particularities of the new wars. The book consists of a collection of essays addressing the application of law in contemporary conflicts. It provides arguments suggesting that existing law is insufficient, thus in some circumstances being partly irrelevant, to arguments resembling those of Gray and Melzer. For the purpose of this thesis, *New Wars, New laws* provide an interesting contrast to those favouring use of the law as it stands.

In addition to the above-mentioned literature, the UN Charter, the Geneva Conventions and the rulings of internationally approved institutions, such as the International Court of Justice and the International Criminal Court, provide the legal background for this thesis.

The problem to be addressed

As the literature above suggest, the ”New Wars” pose various challenges to states related to the use of military force against non-state actors. This thesis aims at examining the legal basis for the application of force in Operation Enduring Freedom (OEF) and how the issue of law actually figured in the Norwegian discussion and decision-making process with respect to its support and participation in that operation. A founding assumption thus being that the legal complexities of contemporary conflicts, e.g. the counter insurgency campaign in Afghanistan, requires substantial in depth legal analysis prior to and during the conflict, in particular related to the Rules of Engagement and targeting procedures. It will be divided in two main sections. The first section aims at providing a conceptual legal framework for examining states’ use of armed force against non-state actors. Such application of force may not be sufficiently

⁴³ Ibid, p.1035.

⁴⁴ Based on the authors experience from the Afghan theatre. The ROEs are classified and can not be referred to in any detail in this thesis.

clarified within existing international law and may be subject to challenges regarding a potentially weak normative framework.

Section one of this thesis consequently aims at:

- Examining the major issues of legality related to the application of military force against non-state actors, hence providing a normative framework that may serve as a basis for further analysis.

Section two will examine the Norwegian case. In particular it will aim at identifying the degree to which issues of law actually figured in the Norwegian decision-making process, their impact and relevance. The selected time-span for this thesis is the period from the 2001 9/11 attacks and until the end of 2002. By the end of 2002, Norway was firmly established as an active contributor to the US-led Operation Enduring Freedom and most decisions regarding Norwegian force contributions had been made.

Section two consequently aims at:

- Examining the impact and relevance of law in the Norwegian discussion and decision-making process prior to and during the initial phase of Operation Enduring Freedom.

Methodology and structure

Analysing the Norwegian discussion and decision making process in view of a legal framework applicable to modern conflict is an ambitious undertaking. It is of that reason necessary to focus on those areas of law particularly relevant to the use of force against non-state actors, and to limit the case study accordingly. The methodology and structure depicted below should allow for combining a sufficient in depth discussion of law with a relevant case study of the Norwegian case.

Methodologically, this thesis will discuss the major aspects of international humanitarian law pertaining to the Afghan conflict and secondly examine how the issues of law figured in the Norwegian discussion and decision making process. The examination of the Norwegian case will predominantly apply a qualitative approach using statements from representatives of the Government and Parliament, material from official archives and interviews with representatives of the decision making bodies, e.g. Department of Defence, Ministry of Foreign Affairs and the Defence Staff in order to present a representative view on the Norwegian position. Based on the normative framework provided in section one, it will then analyse the extent to which the Norwegian process reflected the parts of international

humanitarian law relevant to the Norwegian participation in OEF and finally conclude to the extent which these issues had bearing on the Norwegian process.

Section One will examine the major legal issues relating to the use of armed force against non-state actors in general and within the scope of the Afghan conflict in particular. Of particular interest is the legal qualification of the conflict, the status of the actors and the issue of targeting. It aims at presenting the main legal issues pertaining to the Afghan conflict based on the existing provisions of International Law.

Section Two examines how Norway dealt with the issue of law in accordance with the decision to participate in OEF. Norway decided shortly after the 9/11 incidents to support US operations in what became a global effort against international terrorism. Most notably, Norway decided to offer military assistance to the US-led OEF in the autumn of 2001. In this section I will present the relevant parts of the discussion and decision-making process as it appeared in the Norwegian Government, Parliament, the military and the media from the 9/11 incident until the end of 2002. I have limited the time span to the end of 2002, because by then, most major and principally important decisions regarding Norwegian support to OEF was made.

Since the Norwegian participation in OEF in many ways was a novel experience, a brief look at the Norwegian history of using military force after the Second World War and the Norwegian political situation of the period in question will be presented.

I will then examine the Norwegian discussion and decision-making process. The decision-making process was mainly a governmental issue, even though on some occasions Parliament was consulted and did, of course, discuss Norway's involvement. Consequently, I will focus on the sources connected to the Government, be it within the political leadership, at the bureaucratic level or within the military leadership. However, Parliamentary sources provide useful information as well, as do the discussion that took place in the media. Of particular interest will be to identify arguments either related to international or domestic law. Whereas Norway deployed a range of military resources to Afghanistan, this thesis will mainly use the process related to the F-16 contribution. The F-16s was the military capacity that, apart from the Special Forces, was most likely to use their weapons.

Limitations and factors of uncertainty

There are applications of military power that are neither war nor conflict. The military can be used in humanitarian catastrophes, natural disasters and in other types of non-armed

operations. Such operations can easily be termed military operations, but they do not include the use of force. Such operations are not within the scope of this thesis.

In contemporary conflicts one will find commercial actors that act on behalf of a state such as security companies or similar bodies, like the US security firm Blackwater. The involvement of such firms in conflicts or war may present legal challenges, however the activities of such actors are outside the scope of this thesis.

Political decisions related to questions of national security and the use of military force are often conducted behind closed doors and without official minutes. The decisions are available as official statements, but the discussions and processes that led to those decisions will rarely be made public. Further, OEF and ISAF are ongoing operations. Even though official archives contain some unclassified material, classification is a challenge. I have identified several documents that provide information of interest to this thesis that cannot be used because of classification. Both the issue of closed doors discussions and classification may reduce the accuracy of the thesis.

However, having also had access to classified sources, I have found no material that contradicts my assessments or conclusions. The use of various open sources, interviews and available archive material has proved sufficient for the purposes of this thesis.

Afghanistan and the conflict; a background

Even though a thorough description of the Afghan conflict falls outside the scope of this thesis, some background is required in order to comprehend the issues discussed herein.

Contradictory to a common perception, Afghanistan has not always been war torn. The country experienced a period of relative peace and stability from the mid 1930s until the coup d'état in 1973.⁴⁵ Arguably, the main issues of the contemporary Afghan conflict can be traced back to the 1979 Soviet invasion and the establishment of the Afghan resistance. Prior to the Soviet invasion, the forces represented by ethnical, tribal, political and religious diversity were reasonably balanced, thus Afghanistan did not experience the factionalism seen after the Soviet occupation and up to the present day. However, when Mohammed Daoud, the King's cousin, instigated a bloodless coup d'état in 1973, it started the development that ended with the Soviet invasion in 1979.⁴⁶

The Soviet occupation and its consequences are assumed to be known to the reader. It officially ended in 1989 with a war-torn Afghanistan ravaged by war and more fragmented

⁴⁵ Barnett R. Rubin *The Fragmentation of Afghanistan* (New York: Yale University Press, 2002), pp.45-73.

⁴⁶ *Ibid*, pp.73-75.

than ever; the infrastructure severely damaged by years of harsh fighting and packed with weapons provided mainly by the Soviets, the US and Saudi Arabia.⁴⁷

The Afghan resistance, popularly called the “Mujahedin”, only partly united during the occupation, fell into disarray and factional activity. Since it had not united to any degree during the occupation, it presented no unifying force when the occupation ended. In addition, the resistance could be divided into two main categories. One had its origin within Afghanistan and got its support mainly from the US through the Pakistani intelligence service (ISI). It is commonly accepted that this category consisted of seven identifiable groups.⁴⁸ The other consisted mainly of non-Afghans, the main supporter of whom was Saudi Arabia, and was often termed Afghan-Arabs.⁴⁹ Arab and Muslim-dominated countries were the main providers of operatives to this group, Osama bin-Laden being one of them. Internal strife was common both within the seven Afghan groups and between the Afghans and the Afghan-Arabs. The origins of Al Qaeda can be found in the latter.⁵⁰

The early 1990s were marked by continuous fighting and civil war. The various seven Afghan Mujahedin groups fought each other as well as the Soviet-installed regime of Najibullah with its main stronghold in and around the capital of Kabul. The early 90s period was one of considerable instability and central power was weak or even non-existent. Several authors claim that the combination of a war-torn society literally armed to its teeth, a weak central power and commanders with private armies pursuing own interests were driving factors in the substantial destabilisation of Afghanistan.⁵¹ It also paved the way for the political movement that was the aim of the US attack 7th October 2001, the Taliban.

The Taliban, which basically means “religious student”, originated in the southern parts of Afghanistan with its main stronghold in and around the city of Kandahar. The organisation, lead by Mullah Mohammad Omar, practised a fundamentalist version of Sunni Islam, influenced by the Deobandis, prescribing almost total adherence to the original text of the Koran and the Hadiths.⁵² This version of Islam was taught at various Islamic religious schools, “Madrassas”, in refugee camps in Pakistan and in Afghanistan. It played a significant role in preparing young Afghans to submit to the ideology of the Taliban hardcore. Important

⁴⁷ Rubin *The Fragmentation of Afghanistan*, pp.247-265.

⁴⁸ Ibid, pp.201-220.

⁴⁹ Ibid, pp.196-225.

⁵⁰ Jason Burke, *Al Qaeda*, (London: Penguin, 2003), pp.72-86.

⁵¹ See Rubin, Burke and Crews/Tarzi.

⁵² R. D. Crews, A. Tarzi, *The Taliban and the Crisis of Afghanistan* (London: Harvard University Press, 2008) pp.42-43 and p.106-107.

is also the fact that the Taliban basically was a Pashto movement with a substantial Pashto nationalist agenda.

By the time of the US invasion in 2001, the Taliban controlled most parts of Afghanistan, except some parts in the North East. The Taliban regime represented as such the de-facto rulers of Afghanistan, though only being acknowledged by Pakistan, Saudi Arabia and the United Arab Emirates.⁵³ Apparently, the Taliban was at first welcomed by large parts of the Afghan society because they ended the bloody civil war and brought some kind of stability to the country.⁵⁴ However, it soon became apparent that their interpretation of Islam meant a harsh implementation of the Sharia, and no opposition was tolerated. Human rights were generally abandoned and especially women could no longer claim individual rights.

In Taliban-led Afghanistan, the internationalist movement of Al Qaeda found sanctuary. Whereas the Taliban was marked by a religious nationalist agenda, Al Qaeda was truly internationalist. Statements from the Al Qaeda leadership, in particular Osama bin Laden and Ayman Al Zawahiri frequently referred to the reestablishment of the Caliphate as their final goal. Jason Burke argues that Al Qaeda cannot be understood as a traditional organisation but more like an idea or even a tactic.⁵⁵ According to Burke, Al Qaeda as an organisation with a leadership, members and some kind of bureaucracy to some extent existed between 1996 and 2001. Its core consisted mostly of the so-called Afghan-Arabs, people who had participated in the resistance against the Soviets, but normally not of Afghan origin. The Afghan-Arabs may somewhat imprecisely be described as alienated individuals looking for a cause, a cause that could be found in the training camps in Afghanistan organised by, amongst others, Osama bin Laden. Bin Laden, himself a Saudi, had experience from the resistance against the Soviets, he had financial resources and he obviously had a cause. Bin Laden and the Al Qaeda organisation found shelter inside Afghanistan and allegedly planned what became the 9/11 operation from these training camps.

The exact relationship between Al Qaeda and the Taliban is somewhat unclear. None of them have been highly talkative. What seems clear is that not all of Al Qaeda's activities were well received by the Taliban regime.⁵⁶ There are indications of disagreements and criticism. Even though Al Qaeda found shelter in Afghanistan and collaborated with the Taliban, there are few if any indications that Al Qaeda operated effectively as agents for the regime. Burke argues that although the Taliban and Al Qaeda were closely connected, they

⁵³ *History Commons*, <<http://www.historycommons.org/context.jsp?item=a052597recognize>>, [accessed 6 August 2008].

⁵⁴ Burke, *Al Qaeda*, pp.116-135.

⁵⁵ *Ibid*, pp.1-21.

⁵⁶ *Ibid*, pp.116-135.

must be perceived as individual and separate entities - in other words, legally distinct. The internationalist goals of Al Qaeda did not fit nicely into the local and Pashto nationalist aims of the Taliban, although their religious ideas had certain similarities. A slightly different view is presented by Crews/Tarzi indicating that by the end of 2000, Al Qaeda units “contributed around 30 percent to 40 percent of the Taliban’s core military forces”.⁵⁷

What remains undisputed is that Osama bin-Laden and his proponents could operate quite freely inside Afghanistan and had the de facto protection of the Taliban regime.

Operation Enduring Freedom and transitional rule

The 9/11 actions of Al Qaeda lead to a US response; the launch of Operation Enduring Freedom on October 7th 2001. OEF was initially a US-led operation coordinated with Afghan groups that resisted the Taliban.⁵⁸ These Afghan groups were mainly situated in the Northern part of the country and were frequently referred to as the Northern Alliance. Soon the UK, and eventually a wide range of states pledged support to the US and contributed with military assistance. Operation Enduring Freedom became an “alliance of the willing”, with considerable international support.

OEF swept Afghanistan quickly. Kabul fell by mid November 2001, and the original stronghold of the Taliban, the city of Kandahar, was surrendered by early December. After the seizure of the major cities, the operation continued in the eastern mountains of Tora Bora in December 2001 and followed by Operation Anaconda in the spring of 2002. At this time, the Bonn agreement of December 2001 had already made provisions for an Interim Authority that should prepare for an emergency Loya Jirga to form within six months.⁵⁹ The Emergency Loya Jirga convened at 10th June 2002, and 13th June saw Hamid Karzai elected as head of the transitional government.⁶⁰ The establishment of the Emergency Loya Jirga and the election of Hamid Karzai is usually looked upon as the moment in time where the Afghan conflict ceased to be an international armed conflict (the parties being the Taliban on one side and the US and OEF allies on the other) and became a non-international conflict.

Even though internationally recognised Afghan authorities were installed in June 2002, OEF continued, and is still ongoing. The operation continues to be a major part of the alleged US “War on Terror”, and the US boasts a substantial military presence within Afghanistan. From 2006, the NATO-led International Security Assistance Force (ISAF) has gradually taken over

⁵⁷ R. D. Crews, A. Tarzi, eds, *The Taliban and the Crisis of Afghanistan*, p.113.

⁵⁸ Ibid, p.115.

⁵⁹ The Bonn agreement, <<http://www.afghangovernment.com/AfghanAgreementBonn.htm>>, [accessed 22 September 2009].

⁶⁰ Eurasianet: <<http://www.eurasianet.org/loya.jirga>>, [accessed 6 August 2008].

the military responsibility previously conducted within the framework of OEF. By August 2009, ISAF was the major foreign military force in Afghanistan consisting of more than 40 contributing nations with approximately 50,000 troops.⁶¹ The numbers will increase throughout 2009 – 2010 because of the US force expansion programme. Operation Enduring Freedom consists of approximately 20,000 troops, mainly US, though the exact number is not known. A major emphasis both within the frameworks of OEF and ISAF is put on training and equipping the Afghan National army (ANA) in order to enable it to independently handle the Afghan security situation.

Even though the Taliban regime was toppled in 2001 – 2002, large parts of Afghanistan continue to be war torn. Especially some provinces in the South and East, that used to be Taliban strongholds, frequently experience hostilities. After a relatively calm period from 2002 to 2004, the intensity of the fighting has escalated. There can be little doubt that Taliban and affiliated organisations violently reject the elected government and the foreign presence in Afghanistan.⁶²

Norway's participation in OEF; facts and figures

As one of many nations, Norway immediately pledged support to the US after the 9/11 incident. Shortly after the incident, work began within the Norwegian Foreign Office and the Department of Defence to decide if and how Norway could support the US in its efforts against global terrorism. The Norwegian Chief of Defence, General Sigurd Frisvold, participated at the time of the 9/11 incident in a NATO Military Committee meeting in Hungary together with most of his NATO colleagues. Frisvold recalls that he and his colleagues, after a short meeting, understood that NATO would be involved in the aftermath of the incident, and most likely in line with the provisions made in Article 5 of the North Atlantic Treaty.⁶³

Frisvold returned to Norway during the 12th September 2001, and already on the 13th the Chiefs of Staff were summoned for a meeting aimed at discussing possible Norwegian military force contributions. In case of a political decision in favour of such contributions, the list of military capabilities that could contribute to the support of the US militarily exceeded

⁶¹ ISAF homepage, *Isaf Troop Contributing Nations* < <http://www.nato.int/ISAF/structure/nations/index.html> >, [accessed 26 August 2009].

⁶² For a detailed discussion of the pre and post 9/11 Afghan conflict, see also David Kilcullen, *The Accidental Guerilla*, and Antonio Giustozzi, *Koran Kalashnikov and Laptop, Empires of Mud and Decoding the New Taliban*.

⁶³ General Sigurd Frisvold, interview, 8th November 2007.

ten, according to Frisvold. The list included Special Forces Units, F-16 fighter aircraft and mine-clearing units.

NATO invoked article V already on the 12th September in support of the US. Article V, commonly known as the ‘one for all, all for one’ article, states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.⁶⁴

Invoking article V made it clear that the 9/11 attack would have consequences for NATO and its member nations.

The decision to actively support the US in Operation Enduring Freedom and contribute with military forces was taken by the Norwegian Government and publicised 30th November 2001.⁶⁵ The initial Norwegian offer amounted to the following:

- Special Forces Units
- Mine-clearing units
- A National Support element in Kandahar
- One C-130 transport aircraft to be stationed in Kirgizstan in cooperation with Danish and Dutch units
- 15 lightly armoured vehicles as requested by the US
- 4 F-16 fighter aircraft, also requested by the US, to be deployed as soon as the logistical situation enabled deployment

The Norwegian Special Forces entered Operation Enduring Freedom at an early stage. Exact data about their participation is not known due to classification.

The Norwegian mine-clearing units were primarily used in and around Kabul.

⁶⁴ The North Atlantic Treaty, article V, <<http://www.nato.int/docu/basicxt/treaty.htm>> [accessed 22 September 2009].

⁶⁵ Norwegian Government Press release 062/2001, 30 November 2001 <http://www.regjeringen.no/nb/dokumentarkiv/Regjeringen-Bondevik-II/fd/233255/233259/norge_tilbyr_militaere_styrker.html?id=245147>, [accessed.23 September 2009].

The Norwegian C-130 operated from the US-led Manas Air Force base in Kirgizstan. The Norwegian participation was a coordinated venture in cooperation with Danish and Dutch units. This venture was named the European Participating Air Forces (EPAF). The Norwegian C-130 regularly operated inside Afghanistan, conducting transport missions in locations including Kabul, Baghram and Mazar e-Sharif.

The Norwegian F-16s also operated inside the EPAF framework. It consisted of 6 F-16 fighter aircraft operating from the Manas Airbase in Kirgizstan from 1st October 2002 to 1st April 2003. The Norwegian F-16s flew daily missions over Afghanistan, providing close air support for alliance ground troops. On two occasions the Norwegian aircraft launched weapons against opposing forces.⁶⁶ The exact number of casualties is not known, but allegedly several Taliban fighters were killed.

The Norwegian support to Operation Enduring Freedom continued with various force contributions until 2006, when Norwegian participation in the NATO-led International Security Assistance Force (ISAF) became the preferred political option. As of the summer of 2006, Norway withdrew all forces from OEF, focusing entirely on ISAF.

⁶⁶ At the 27th January one Norwegian F-16 released two laser guided bombs on a bunker complex in south-eastern Afghanistan, then again at the 10th February 2003, two F-16s released one Laser Guided Bomb each on hostile targets (according to Norwegian Defence internal web-site).

Section One; Conceptual framework

Chapter One, The question of legality

Introduction

As the literature described above demonstrates, the particularities of contemporary warfare present legal challenges to the use of force that is not substantially covered through existing treaty or customary law. This section aims at discussing legal issues related to the use of armed force against non-state actors. The application of force outside the law-enforcement paradigm is basically regulated through what is commonly known as the Law of Armed Conflict (LOAC) or International Humanitarian Law (IHL), commonly referred to as *ius in bello*.⁶⁷ According to Fleck, IHL: “comprises all those rules of international law which are designed to regulate the treatment of the individual – civilian or military, wounded or active – in international armed conflicts”.⁶⁸

This thesis will mainly discuss *ius in bello* issues, but some aspects of whether the use of armed force is justifiable, *ius ad bellum*, will also be addressed.

Its main scope is to “set limits to the way in which force may be used by prohibiting certain weapons and methods of warfare, by insisting that attacks be directed only at military objectives and that they should not cause disproportionate civilian casualties”.⁶⁹ IHL thus introduces rules that aim at reducing the suffering caused by war. A particularly important element of IHL is the distinction between those who may legally fight, combatants, and those who are protected, i.e. civilians and other protected individuals. IHL does not allow for a combination; only combatants may legally take part in hostilities.

IHL as described above mainly addresses international armed conflicts, i.e. interstate war; it does not apply similarly to conflicts which are not of an international nature. However, as discussed in the previous chapter, contemporary conflicts are usually not of an international character. Whereas parts of IHL applicable to international armed conflicts are relevant for non-international armed conflicts as well, IHL also contains some provisions that specifically address non-international armed conflicts. According to the ICRC study on international humanitarian law, “humanitarian treaty law does not regulate in sufficient detail a large proportion of today’s armed conflicts, that is non-international armed conflicts, because these

⁶⁷ Dieter Fleck, *Humanitarian Law in Armed Conflicts*, pp.39-62.

⁶⁸ *Ibid*, p.9.

⁶⁹ *Ibid*, p.10.

conflicts are subject to far fewer treaty rules than are international conflicts".⁷⁰ Arguably, conflicts like the Afghan conflict are not covered by a comprehensive legal regime in the way that international armed conflicts are. A further complicating issue is that contemporary conflicts are transnational in a sense that they do not fall easily within the scope of neither article 3 common to the Geneva Conventions or additional protocol 2 to the Convention.⁷¹

I intend in the following to identify the general provisions of international law related to armed conflict, in particular to address those areas relevant to the use of armed force against non-state actors.

From the perspective of international law, the initial distinction that must be made is to identify the presence of an armed conflict and qualify it in the legal sense. I further intend to examine the question of acts of aggression that may justify an armed response based on the self-defence paradigm, in particular whether self-defence is a viable option against non-state actors. For NATO countries, military application of force is regulated through Rules of Engagement and targeting procedures. Since international law arguably does not allow for non-state actors to be targeted by a membership approach, I will in particular examine the issues of defining hostilities and the time during which non-combatants are assumed to participate in hostilities.

The legal regime; general provisions

International law regulating armed conflict is, like all international law, a mixture of treaty and customary law. There is a particular dynamic connected to international law, based on the fact that it is developed through state practice and under the influence of state interest. Since no international body exists that may effectively enforce international law, its feasibility is highly dependent on state acceptance. However, an internationally accepted legal regime exists that is considered to apply to most situations of armed conflict. Arguably, most states tend to apply to those regulations, even when it is questionable whether the situation actually satisfies the prerequisites for being an armed conflict, or its qualification is unclear, as may be the situation in Afghanistan.

IHL contains a wide range of treaties that regulates the use of force in armed conflicts. Some of these treaties, like the Geneva Conventions (GC) I – IV, are considered to represent customary international law, and thus binding to all states irrespective of those states being a

⁷⁰ International Review of the red Cross (2005), *ICRC study on Customary International Humanitarian Law* <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0860/\\$File/ICRC_002_0860.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0860/$File/ICRC_002_0860.PDF)> [accessed 15 September 2009], p.6.

⁷¹ See A. Paulus and M. Vashakmadze, *Asymmetrical war and the notion of armed conflict – a tentative conceptualisation* (ICRC Review, Vol 91, Number 873, March 2009).

party to the convention. The GC additional protocols I and II of 1977, have not achieved the near-universal acceptance of the 1949 protocols, but they contain some provisions that are considered customary law, such as GC additional protocol II, article 4 on fundamental guarantees.⁷²

The provisions of international law relevant to this thesis would mainly be the common article 3 of GC I – IV and the provisions of GC additional protocol II of 1977 assumed to be customary law.

The International Court of Justice (ICJ) and the International Criminal Court (ICC) represent international institutions that enforce international law. The ICJ is part of the UN system and only states may be parties before the court. The ICJ:

...acts as a world court. The Court has a dual jurisdiction : it decides, in accordance with international law, disputes of a legal nature that are submitted to it by States (jurisdiction in contentious cases); and it gives advisory opinions on legal questions at the request of the organs of the United Nations or specialized agencies authorised to make such a request (advisory jurisdiction).⁷³

Whereas only states can be parties to cases before the ICJ, the ICC prosecutes individuals that are connected to “genocide, crimes against humanity and war crimes” in situations where these individuals are not prosecuted domestically.⁷⁴ The ICC is an independent institution based on the Rome Statute of 17th July 1998.

Rulings by the International Court of Justice and the International Criminal Court are useful sources of law, as are the International Tribunals for former Yugoslavia and Rwanda. Most states will accept such rulings as customary law, and act accordingly in situations of armed conflict. However, it is a challenge that some states, like for example the US, whereas being a party to the ICJ, does not invariably accept its jurisdiction ICJ and it is not a party to the Rome Statute of the ICC.⁷⁵

Finally, IHL contains a wide range of treaties regulating particular types of weapons or methods of warfare, like for example the Anti-personnel Mine Convention of 1997. This

⁷² Fleck, *Humanitarian Law in Armed Conflicts*, p.25.

⁷³ ICJ homepage, found at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&PHPSESSID=484acf0da30d7c14741cdb7c0a76557f>, [accessed 15 September 09].

⁷⁴ ICC homepage, found at: <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>, [accessed 15 September 09].

⁷⁵ .Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, found at <<https://www.law.georgetown.edu/internationalhr colloquium/documents/PICTProjectICJPaper.pdf>> [accessed 29 October 2010].

thesis assumes that such treaties are valid to the contracting parties regardless of whether the conflict is of an international or non-international nature.⁷⁶

Christine Gray argues that the starting point for any examination of the law is “the prohibition of the use of force in Article 2(4) of the UN Charter”.⁷⁷ The UN Charter is ratified by nearly all states and must be perceived to represent customary law; binding to all states. However, there are two important exceptions; self-defence and use of force approved by the UN Security Council. My starting point will be to examine the exceptions from the prohibition of the use of force and from there derive further issues that are relevant to the use of armed force against non-state actors.

The right to use force, Jus ad Bellum

The UN Charter explicitly forbids armed aggression as a means of pursuing national interests.⁷⁸ The prohibition on the use of force is generally acknowledged to represent *jus cogens*, although there are some disagreements about how to interpret this prohibition as, amongst others, the 1999 Kosovo conflict vividly demonstrated.⁷⁹ The only exceptions are the right to self-defence as defined in the charter’s Article 51 and the provisions made under it’s Chapter VII regulating the Security Council’s right to act in order to prevent “threats to the peace, breaches of the peace, and acts of aggression”.⁸⁰

There is a discussion in the international community on the legality of humanitarian intervention as a possible third option of lawful application of force without the explicit consent of the UNSC.⁸¹ There seems to be a division in the scholarly community between those in the legal profession who - according to the principles of *de lege lata* - cannot find provisions for such an interpretation, and scholars of political science and international politics who seem to focus more on policy considerations, hence the dynamic development of international law, based on state practice.⁸² The issue of humanitarian intervention and legality, interesting though it is, will not be touched upon in this thesis, mainly because it is only marginally relevant to the topics discussed.⁸³

⁷⁶ E.g. the *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996* article 1 (3): “In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol”.

⁷⁷ Christine Gray, *International Law and the Use of Force*, p.5.

⁷⁸ UN Charter article 2(4).

⁷⁹ Gray, *International Law and the Use of Force*, pp.31-42.

⁸⁰ UN Charter, chapter VII.

⁸¹ Gray, *International Law and the Use of Force*, p.29.

⁸² Janne Haaland Matlary, *Values and Weapons* (Hampshire: Palgrave Macmillan, 2006), pp.2-17.

⁸³ For a discussion of the legal status of Humanitarian Intervention, see e.g. Steven Haines, *The Influence of Operation Allied Force on the Development of Jus ad Bellum*, *International Affairs*, Vol 85, No 3, May 2009

As stated above, the UN Charter recognises two lawful ways of applying force, either by invoking self-defence or by the authority of an explicit UNSC resolution. Self-defence in particular was put forward as the motivation for the US attack on Afghanistan in October 2001. This thesis asserts that self-defence may, under certain circumstances, be invoked against non-state actors. I will in the following examine the two exceptions to the prohibition on the use of force, with particular emphasis on self-defence in the Afghan and OEF context.

Use of force based on UNSC resolutions

The codification of the UNSC authority is found in the Charter's Chapter VII, addressing "Action with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression".⁸⁴ If the UNSC finds that the relevant conditions exist, the UN Charter provides a set of measures available to restore "international peace and security". The SC has been extremely cautious about authorising the use of force against alleged aggressor states.⁸⁵ However, it has authorised a number of peacekeeping or peace enforcement operations, mainly with the consent of the receiving nations.⁸⁶ A number of these operations involve the presence of various types of non-state actors, reaching from mere criminal organisations to organisations with a political agenda. The possibility to apply force in such operations is normally laid down in the Rules of Engagement (ROEs) applicable to each particular operation. For peacekeeping operations, use of force would normally be in situations of self-defence only, whereas peace enforcement operations would normally boast more robust mandates, allowing limited use of force outside the self-defence paradigm.⁸⁷ As such, the use of force against non-state actors based on UNSC resolutions is undisputed, as has been demonstrated through several such operations in Africa and on the Balkans.⁸⁸

Self-defence and the Afghan case

The other exception from the prohibition of the use of force is "the inherent right to self-defence". The right to self-defence against an armed attack is undisputed in international law. The UN Charter codified in article 51 what was previously accepted as customary law:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this

⁸⁴ UN Charter, chapter VII.

⁸⁵ Gray, *International Law and the Use of Force*, pp.19 -230.

⁸⁶ *Ibid*, pp.252-281.

⁸⁷ *Ibid*, pp.195-230.

⁸⁸ David M. Malone (ed) *The UN Security Council*, (Boulder: Lynne Rienner Publishers Inc, 2004) pp.117-153.

right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁸⁹

For a state to exercise the right to self-defence, Article 51 of the UN Charter uses the term armed attack. However, the Charter is not precise in defining what constitutes an armed attack. Is a simple border episode involving exchange of gunfire sufficient, or are more extensive actions required? The UN general assembly resolution 3314, *Definition of aggression*, is aimed at defining more precisely what constitutes an armed attack.⁹⁰ In the frequently cited Nicaragua ruling, the ICJ used the *Definition of Aggression* to support its view.⁹¹ The Nicaragua judgement is later upheld as constitutive in defining acts of aggression, hence the definition of aggression is assessed to be the single most important codification of what constitutes an armed attack. Consequently, in order to invoke self-defence, states have to demonstrate that an act of aggression has been conducted.

However, a military response invoked by claiming self-defence cannot be punitive or be characterised as a reprisal in order to be lawful. The inherent right to self-defence is only lawful when it is used to repel either an ongoing attack or an attack that is obviously being prepared. The conditions that would have allowed for the use of force in self-defence prior to the 9/11 attacks must then still be assumed to have been present when the US and its allies launched their attacks on Afghanistan some weeks later. Clearly, this is a difficult question.

Even if an act of aggression has been conducted, further clarification is required with respect to a wide or narrow interpretation of the right to self-defence.⁹² A widely interpreted right to self-defence would include pre-emptive or even anticipatory self-defence, whereas a narrow interpretation would allow for self-defence to be invoked only when an attack actually is launched or obviously being prepared. The former interpretation would allow states substantial flexibility in deciding when self-defence may be invoked. However, the concept of pre-emptive self-defence is a case of continuous controversy, and the US attempt to “extend the right to self-defence to cover pre-emptive action has proved extremely controversial”.⁹³ According to Gray: “In practice, states making their claims to self-defence try to put forward

⁸⁹ UN Charter Article 51.

⁹⁰ UNGA resolution 3314 (1974), *Definition of Aggression*,
<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>
 [accessed 23 September 2009].

⁹¹ Gray, *International Law and the Use of Force*, p33, pp.65-69.

⁹² *Ibid*, p.98.

⁹³ *Ibid*, p.171

arguments that will avoid doctrinal controversy and appeal to the widest possible range of states.”⁹⁴ In the case of Afghanistan and the US attack, self-defence was launched, not to prevent an ongoing attack, but to prevent future aggression like the 9/11 incident.

One obvious weakness with the UN Charter, in connection with contemporary conflicts, is that it only discusses the actions of states.⁹⁵ Irregular forces or non-state actors are not mentioned. There are no explicit references to such actors in the UN Charter, and it is commonly recognised that the UN Charter discusses state behaviour. As an example, Israeli actions against Hamas and other non-state groups are usually justified by reference to self-defence. In its advisory opinion on the construction of a wall in the occupied Palestinian territory, the ICJ advised against the lawfulness of the wall, partly because it was built to protect Israel against a non-state actor within an Israeli-controlled area.⁹⁶ In the case of Congo vs. Cameroon, the ICJ also found that an armed attack triggering self-defence has to be launched from another state.⁹⁷ State practice before 9/11 shows few examples of self-defence being used to justify a military response to an attack from a non-state actor. Most of these examples are found in US and Israeli practice, and they did usually not receive support by the UNSC or by the majority of states.⁹⁸ Consequently, from the viewpoint of international law, it seems that invoking self-defence against a non-state actor may be controversial.⁹⁹

Osama bin-Laden published a Fatwa effectively declaring war on the US in 1996 and repeated it in 1998. He was assumed to have engineered the attacks on the US embassies in Kenya and in Tanzania in 1998 and on the USS Cole in 2000.¹⁰⁰ There is no evidence suggesting that the US considered itself at war with Al Qaeda at the time. Even though the US, on President Clinton’s orders, retaliated against alleged Al Qaeda strongholds in Afghanistan, the above-mentioned episodes were predominantly considered criminal acts, not acts of war. The criminal justice model, not a military reply, was the primary instrument of pursuing these incidents.¹⁰¹ Incidents where military force has been used against terrorism,

⁹⁴ Gray, *International Law and the Use of Force*, p.99.

⁹⁵ UNGA resolution 3314, article 1, stating: “Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state ...”.

⁹⁶ ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), <<http://www.icj-cij.org/docket/files/131/1677.pdf>>, [accessed 23 September 2009], para.163.

⁹⁷ Nobou Hayashi, interview PRIO, 5 May 2008.

⁹⁸ Gray, *International Law and the Use of Force*, pp.160-164.

⁹⁹ The UNSC resolutions 1368 and 1373 provides substantial support to the view that acts of terrorism may amount to an armed attack by e.g. “*Recognizing* the inherent right of individual or collective self-defence in accordance with the Charters” (1368) and “*Reaffirming further* that such acts, like any act of international terrorism constitute a threat to international peace and security” (1373).

¹⁰⁰ The 9/11 Commission Report, chapter 2, *Burke Al Qaeda*, p.25.

¹⁰¹ D. Wippman and M. Evangelista, eds, *New Wars, New Laws* (New York: Transnational Publishers, 2005), p.20.

have by-and-large been justified by the lack of law enforcement resources and not because they were assumed to constitute acts of war. The British use of the Army in Northern Ireland is an example of this. However, 12th September 2001, the UNSC passes resolution 1368 as its initial response to the 9/11 attacks. The resolution was “Recognizing the inherent right of individual or collective self-defence in accordance with the Charter”.¹⁰² This was the first time the UNSC made an explicit reference to the right to self-defence in response to attack from a non-state actor. The immediate response from most states favoured the US position that the Al Qaeda attacks represented an act of aggression in what Gray calls “an impressive unity among governments”, thus justifying a forceful response based on the right to self-defence.¹⁰³ The US position was that the 9/11 attacks represented a new kind of war, and that the US “is clearly at war with Al Qaeda”.¹⁰⁴

UNSC resolution 1368 and subsequent UNSC resolutions, the US and NATO actions in Afghanistan, and the fact that these actions were widely supported by the international community and several legal studies, provide a strong argument in favour of the US view that the right to self-defence, under given circumstances, also applies to attacks from non-state actors. Gray claims that “States today do not challenge the view that actions by irregulars can constitute armed attack...”.¹⁰⁵ Invoking self-defence against Afghanistan then became the initial effort in the US-led global war on terror.

The International Committee of the Red Cross (ICRC), however, contests the view that there can be such a thing as a global war on terror in the legal sense. As stated by the ICRC:

It is doubtful, absent further factual evidences, whether the totality of the violence taking place between states and transnational networks can be deemed to be an armed conflict in the legal sense. Armed conflict requires a certain intensity of violence, and among other things, opposing parties.¹⁰⁶

The question then is: against whom to respond? Even though Al Qaeda had strongholds or even bases inside Afghanistan, would that justify self-defence actions against the sovereign state of Afghanistan? It was soon accepted that the 9/11 incidents were planned and executed by Al Qaeda, not the Taliban regime of Afghanistan. For an attack on

¹⁰² UNSC Resolution 1368, <<http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>>, [accessed 23 September 2009].

¹⁰³ Gray, *International Law and the Use of Force* p.159.

¹⁰⁴ White House Counsel Alberto L. Gonzales to the American Bar Association on Law and National Security (Feb 24, 2004) in Wippman and Evangelista, *New Wars, New Laws*, p.14.

¹⁰⁵ Gray, *International Law and the Use of Force*, p.109.

¹⁰⁶ D. Wippman and M. Evangelista, eds, *New Wars, New Laws*, p.17.

Afghanistan to be lawful, arguably, Al Qaeda must effectively have been agents for the Taliban or sufficiently strong links had to exist between the two. It is doubtful whether just harbouring Al Qaeda would have made an acceptable legal justification.¹⁰⁷ As discussed in the introduction, Burke claims that Al Qaeda did most probably not operate as agents of the Taliban. On the other hand, Neamatollah Nojumi claims that Al Qaeda military units fought alongside Taliban forces against Masood by the end of 2000, thus indicating a formalised relationship between the two.¹⁰⁸ What remains a fact is that the Taliban let Al Qaeda use Afghan soil for training the operatives who eventually carried out the 9/11 incidents.

Even so, this thesis asserts that Al Qaeda and the Taliban must be perceived as legally distinct entities. It is conceivable that the US attacked Al Qaeda bases and strongholds inside Afghanistan without aiming to topple the Taliban regime, but this would be a highly difficult option of obvious practical reasons.

When the US launched OEF, it attacked both Al Qaeda and the Taliban. Even though the Taliban and Al Qaeda were accepted as distinct entities, there are no indications that they were perceived as such from a ROE or targeting perspective. A distinction was made between that status of Al Qaeda and Taliban detainees with respect to international law, stating that whereas there were arguments in favour of accepting Taliban operatives as Prisoners of War, this would not be the case for Al Qaeda Operatives.¹⁰⁹ Consequently, the US attacked a subject of international law, Afghanistan, based on the right to self-defence, arguing that sufficiently strong links existed between the Taliban and Al Qaeda to justify the attack. It may further be argued that the practical difficulties of separating the two in a military operation inside Afghanistan and the violent nature of the Taliban regime contributed to the legitimisation of the US attack.

As the case stands, state practice in the aftermath of 9/11 and UNSC resolutions, combined with statements from authoritative practitioners of international law, point in the direction that self-defence against a non-state actor under certain circumstances may be justified under the existing provisions of international law.¹¹⁰ This thesis asserts that, even though some questions arose with respect to the justifiability of the US armed response against Afghanistan, Operation Enduring Freedom was sufficiently supported by law and state practice to be assessed as legal.

¹⁰⁷ Nobou Hayashi, interview, 5 May 2008.

¹⁰⁸ Neamatollah Nojumi in R.D. Crews, A. Tarzi (eds), *The Taliban and the Crisis of Afghanistan*, p.113.

¹⁰⁹ Congressional Research Service, Report for Congress, April 11, 2002: *Treatment of "Battlefield Detainees" in the War on Terrorism* <<http://www.globalsecurity.org/security/library/report/crs/9655.pdf>>, [accessed 23 April 08] p.1.

¹¹⁰ Gray, *International Law and the Use of Force*, pp.108-115.

A legal qualification of the Afghan conflict and OEF

The next issue is that of a legal qualification of the conflict. From the perspective of international law, a qualification is necessary in order to decide what rules apply. As discussed above, this thesis asserts that an attack from a non-state actor can be assessed as an armed attack, and consequently that a military response may be legal based on the concept of self-defence.

When the US chose a military response in October 2001, it is reasonable to assume that they departed from the law enforcement model as the only viable option in dealing with Al Qaeda and considered itself at war with Taliban-led Afghanistan and Al Qaeda. The US received considerable support for this view, and various nations rapidly contributed with forces to OEF. NATO, for the first time in its history, invoked Article 5 as a response to the attack and to demonstrate support to the US in its operations against Al Qaeda and the Taliban regime.

The question then arises; what kind of conflict was this? This question is interesting, because the legal qualification of the conflict is directly related to the determination of which rules apply. This, in turn, relates to the status of the insurgents and the legal basis for the application of force.

International humanitarian law generally divides conflicts into two separate categories: International Armed Conflicts and Non-International Armed Conflicts.

An international armed conflict is a conflict between two or more of “the high contracting parties”.¹¹¹ High contracting parties can only be states, thus international armed conflicts are conflicts between states.

The initial operations of OEF arguably qualified as an international armed conflict.¹¹² The parties were states (the US and its allies vs. Afghanistan), even though the Taliban regime, with a few exceptions, was not widely recognised by the international community and did not have a seat in the UN. However, it is undisputed that the Taliban regime was the de-facto ruler of Afghanistan, and as such was regarded as a state actor. It is widely accepted that this phase lasted until the installation of Hamid Karzai as president of the Afghan Transitional Administration 13th June 2002. However, it is possible to argue that within the framework of the international armed conflict between Afghanistan and the US and its allies, a non-international armed conflict was taking place between the US and Al Qaeda.¹¹³ Al Qaeda had access to parts of Afghan territory, and operated to some extent in close cooperation with the

¹¹¹ GC, I-IV, Common Article 2.

¹¹² Wippman and Evangelista, eds, *New Wars, New Laws*, p.18.

¹¹³ Nobou Hayashi, interview PRIO, Oslo 5 May 2008.

Taliban regime. However, Al Qaeda was effectively not operating as an agent of the Taliban. They were different entities, hence legally distinct. The International Criminal Tribunal for Former Yugoslavia (ICTY) asserted, when dealing with the Balkan wars, that it was possible to have several legally distinct conflicts taking place at the same time within the same territory.¹¹⁴ Consequently, this thesis asserts that the Afghan conflict in its initial phase qualified partly as an international and partly as a non-international conflict.

The next phase of the Afghan conflict started with the establishment of the Karzai-led Transitional Administration in June 2002.

The legitimacy of the Transitional Administration related to the Bonn agreement of December 2001. It provided for an interim Authority to be established in Afghanistan “upon the official transfer of power on 22 December 2001”.¹¹⁵ The main purpose of the Bonn agreement was to initially establish a transitional authority, then within six months to effect the installation of an emergency Loya Jirga and the Transitional Administration until the election to the Loya Jirga within two years. The Transitional Administration was, as stated in the Bonn agreement, mandated through several UNSC resolutions, most notably UNSC res. 1378.

Through the de facto dismantling of the Taliban regime, provisions made at the Bonn agreement and the UNSC resolutions relating to Afghanistan in the autumn 2001, arguably, the Transitional Administration, not the Taliban, represented the legitimate authorities of Afghanistan. Even though the presence of the US military most certainly had similarities with an occupation, the situation must be conceived as different from the later occupation of Iraq or the Israeli occupation of the West Bank. This thesis asserts that the US and allied forces’ positioning in Afghanistan, from the installation of the Transitional Administration, was acting in support of the legitimate Afghan authorities, hence not acting in the capacity of an occupying force.

Since the Taliban and their followers no longer could be regarded as Afghanistan’s legitimate representatives, the conflict no longer qualified as an International Armed Conflict. Consequently, there are two legally distinct alternatives:

1. The conflict, thus the paradigm of hostilities, had been brought to an end. The disturbances caused by the former regime and its followers were considered a criminal problem and would be solved through a criminal justice model. Application

¹¹⁴ Nobou Hayashi, interview PRIO, Oslo 5 May 2008.

¹¹⁵ The Bonn Agreement, <<http://www.afghangovernment.com/AfghanAgreementBonn.htm>>, [accessed 23 September 2009], Article 1.

of military force was an acceptable option only when law enforcement resources were incapable of fulfilling their mission (e.g. the position of the British Army in Northern Ireland).

2. The conflict, thus the paradigm of hostilities, was still ongoing, but its status needed to be determined. A military response model was a viable and lawful option of combating the opposition.

The factual situation in Afghanistan was, and is, obviously alternative 2. Alternative 2 does not rule out a criminal justice model, but will affect the application of force and the status of the insurgents.

This thesis consequently asserts that the Afghan conflict qualified as a non-international armed conflict from the installation of the Karzai-led Transitional Administration by June 2002.

The legal regime applicable to the Afghan conflict in its initial phase

The GC I – IV regulate conduct in war and the protection of civilians and prisoners of war within international armed conflicts. As stated in GC common article 2:

“In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them”.¹¹⁶

“The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.¹¹⁷

Only states can be “High Contracting Parties” and the view that only interstate armed conflict qualifies as an international armed conflict is widely supported both in the academic communities and amongst most states. GC I – IV are generally considered to represent customary law, and consequently binding to all states with or without their ratification in all conflicts of an international character.

There have been some debate as to whether the GC I – IV applied to this part of the Afghan conflict. Whereas their applicability in international conflicts is undisputed, the particularities of the Afghan conflict complicated the issue. As the previous discussion concludes, the initial phase of the Afghan conflict may, at least partly, qualify as an International Armed Conflict. The laws of war, as laid down in the GC I – IV, should

¹¹⁶ GC I – IV, Article 2.

¹¹⁷ Ibid.

consequently apply. Taliban soldiers conducting operations and adhering to the provisions in GC III, article 4, would therefore be entitled to Prisoner of War (POW) status if captured, and otherwise share rights and duties as specified in the convention, e.g. the status of combatancy. The US has not contested this view, but claimed that Taliban soldiers generally operated outside the conditions stated in GC II art 4 and consequently did not meet the criteria laid down in the convention.¹¹⁸ Taliban soldiers not adhering to these provisions were consequently labelled illegitimate combatants. They did not achieve POW status when captured by US or allied forces, nor were they granted protection as combatants. On the 7th February 2002, President Bush issued the following guidance:

- The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the Al-[Qaeda] detainees.
- Al-Qaeda is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.
- Although we never recognised the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.
- Therefore, neither the Taliban nor Al-Qaeda detainees are entitled to POW status.
- Even though the detainees are not entitled to POW privileges, they will be provided many POW privileges as a matter of policy.¹¹⁹

Parts of the basis for this presidential guidance remains classified, but the US Centre for Law and Military Operations suggests that the since Taliban generally did not meet the provisions of GC III, article 4, they would not be entitled combatant or POW status.¹²⁰ Some of these individuals are still assumed to be detained by US authorities, and the question of their legal status have been subject to substantial controversy.

¹¹⁸ Congressional Research Service, Report for Congress, *Treatment of "Battlefield Detainees" in the War on Terrorism*, April 11, 2002: <<http://www.globalsecurity.org/security/library/report/crs/9655.pdf>>, [accessed 23 April 08], pp.29-31.

¹¹⁹ Center for Law and Military Operations, *Legal Lessons Learned From Afghanistan and Iraq, Major Combat Operations (11 September 2001 – 1 May 2003)*: <<http://www.fas.org/irp/doddir/army/clamo-v1.pdf>>, [30 August 2009], pp.53-54.

¹²⁰ Ibid p.54, footnote 144.

The legal regime applicable to the Afghan conflict in its second phase

Whereas International Armed Conflicts are covered by a substantial legal regime, firmly supported by state practice, this is not the case for conflicts of a non-international character.¹²¹ The legal regime covering non-international conflicts are mainly GC I-IV, common article 3, and the GC additional protocol II of 1977.

The main purpose of article 3 common to the GC I – IV is to provide a minimum of protection to all participants of conflicts “not of an international nature”. It states: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions ...”¹²²

Common article 3 is generally accepted as customary law and as such provides a minimum of protection to all “persons taking no active part in the hostilities” in non-international armed conflicts.¹²³ Melzer makes a strong argument that article 3 applies to all armed conflicts not of an international character. The question of interest is whether the conflict qualifies as an armed conflict or not. As long as the conflict rises above the threshold of “internal disturbances and riots”, it may be safely assumed that article 3 will apply.¹²⁴ As previously discussed, the Afghan conflict doubtlessly rose above this threshold.

However, the US contested that common article 3 applied to members of Al Qaeda based on a view that “article 3 does not address a gap left by common article 2 for international armed conflicts that involve state non-state entities, and it does not reach an armed conflict in which one of the parties operates from multiple bases in several states”.¹²⁵ It falls outside the scope of this thesis to provide a detailed discussion of the US view, but the US view was not widely supported internationally.¹²⁶

In addition to Common Article 3, Protocol II additional to the GC states that its field of application is:

...all armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its

¹²¹ Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, p.25.

¹²² GC I – IV, Article 3.

¹²³ Cf. Statute of the International Criminal Court, Article 8:2 (c) and Article 8:2 (e).

¹²⁴ Melzer, *Targeted Killing in International Law*, pp.252-255.

¹²⁵ Memorandum for Alberto R Gonzales, Counsel to the President, and William J. Haynes January 22, 2002, *Re: application of treaties and Laws to Al Qaeda and Taliban Detainees*, : <<http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>>, [accessed 23 September 2009], p.6.

¹²⁶ Melzer, *Targeted Killing in International Law*, pp.263-266.

territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹²⁷

I will in the following examine five challenges of applying the GC additional protocol II in the Afghan conflict.

First, the additional protocols are not ratified by states to the same degree as GC I – IV. The US is not party to all provisions of the additional protocol II, but generally complies with the rules as a matter of policy.¹²⁸

Second, its field of application is quite narrow. Melzer argues that: “the scope of application of Additional Protocol II is much narrower than that of Article 3 GC I – IV”.¹²⁹ It is explicitly restricted to “non-international armed conflicts taking place within a state between its own armed forces and non-state actors”. Melzer thus argues that: “Additional Protocol II does not apply when governmental armed forces are confronting non-state actors outside of their own territory or when a conflict within a state does not involve its own governmental armed forces”.¹³⁰ The scope of Additional Protocol II would effectively rule out its applicability with respect to the US-led OEF in Afghanistan.

Third, the Afghan conflict contained certain characteristics of an international character. The opposing fighters entered Afghanistan from neighbouring countries, like Pakistan, and they may be of different nationalities. Coll provides a strong argument that an intimate relationship existed between the Taliban and the Pakistani Intelligence Service (ISI) during the Taliban period.¹³¹ The current modus operandi of the opposing forces indicates that there still are connections, even support, between Taliban leadership and Pakistani intelligence services.

According to the Norwegian Judge Advocate General Handbook on IHL, the following can result in an internal conflict developing an international character:¹³²

- Certain conflicts of liberation
- Internationalisation through foreign support
- Control by a foreign state

Due to the covertness of the opposing forces’ operations and classification of OEF intelligence information, it is difficult to assess the extent of international influence on

¹²⁷ GC Additional Protocol II, Article 1.

¹²⁸ Melzer, *Targeted Killing in International Law*, p.265.

¹²⁹ Ibid, p.255.

¹³⁰ Ibid, p.257.

¹³¹ Steve Coll *Ghost Wars*, (London : Penguin, 2004), pp.291-294, 296,414.

¹³² Arne Willy Dahl, *Håndbok i militær folkerett* (Oslo: Cappelen, 2008) p.33: Original text: [Følgende momenter kan medføre at en væpnet konflikt som ellers er intern får en internasjonal karakter: Visse frigjøringskriger, Internasjonalisering gjennom bistand fra utlandet, styring fra utlandet].

Taliban operations. However, it is undisputed that the Taliban and Al Qaeda are organisations whose operations were not confined to Afghan territory, and that they were internationally connected. In the case of the Taliban, authors like Steve Coll has indicated a strong, even formalised connection to Pakistan through the Pakistani Intelligence Service, ISI.

Forth, it is conceivable to define the Afghan conflict within the framework of the US Global War on Terror. The phrase “global” immediately indicates a conflict of an international nature. One could argue that since the US defines itself as at war with Al Qaeda, and OEF was (and is) a part of the US Global War on Terror, the conflict is an armed conflict of an international nature. However, “international” by definition indicates a conflict between states, which clearly is not the case. The US position on this is not very clear. According to Wippman and Evangelista, whilst “... the Bush administration has stated explicitly what it thinks the conflict with Al Qaeda is not, it has been rather vague about what it thinks it is”.¹³³ A more appropriate term could be “transnational conflict” as discussed by amongst others Corn and Jensen and Paulus and Vashakmadze.¹³⁴ As mentioned above, the ICRC also presents serious doubts as to whether it is possible to define a conflict “against a loosely connected clandestine network” as a party to a conflict.¹³⁵ Even though the US-led Global War on Terror has an explicitly transnational character, it seems inappropriate to apply this as an argument for classifying the Afghan conflict as an international armed conflict.

Fifth, we must consider the composition of the ISAF and OEF forces. Both ISAF and OEF are operations with international participation. Whereas OEF were, and are, predominantly American, 40 nations currently contribute to ISAF. However, it is doubtful whether this would affect the qualification of the conflict. OEF was, at least after June 2002, conducted with the consent of the legitimate Afghan authorities and the opposing forces did not represent any accepted state or legitimate political entity. Neither state practice nor judicial literature supports a view where international contributions in support of the legitimate government would internationalise the conflict in the legal sense.

Whereas the above discussion demonstrates that GC Additional Protocol II cannot be applied to the Afghan conflict in its entirety, it contains several provisions that are considered customary law applicable to armed conflicts in general. The ICRC list of customary rules of IHL includes, amongst others, the provisions of GC Additional Protocol II article 4 on

¹³³ Wippman and Evangelista, eds, *New Wars, New Laws*, p.16.

¹³⁴ For a more in depth analysis of the legal consequences of transnational wars, see: G.S. Corn and E.T.Jensen, *Untying the Gordian Knot: A proposal for Determining applicability of the Laws of War to the War on Terror* and Paulus and Vashakmadze, *Asymmetrical war and the notion of armed conflict – a tentative conceptualisation*.

¹³⁵ Wippman and Evangelista, eds, *New Wars, New Laws*, p.17.

humane treatment and article 13 on protection of the civilian population.¹³⁶ In addition, the 2006 Sanremo protocol and the ICRC study on customary law of 2005 identify several areas of IHL that are considered customary law applying to all conflicts outside the initial scope of the treaties.¹³⁷ Consequently, in addition to GC I – IV Article 3, this thesis asserts that the GC Additional Protocol’s provisions regarded as customary law applies to the Afghan conflict and OEF.

Status of the insurgents and the legality of the use of force

One of the main aspects of IHL is to separate combatants from non-combatants. Combatancy is a status that applies to members of states’ armed forces.¹³⁸ In principle, only combatants may be legally targeted within the framework of an armed conflict, and they uphold certain rights and obligations as stated in the GC.¹³⁹ Personnel who are not combatants are defined as civilians and are protected according to IHL.

However, combatancy as a status giving certain rights and duties to individuals only applies to certain categories of individuals inside the framework of an armed conflict. According to Dahl, these are:¹⁴⁰

- Members of states’ armed forces (with certain exceptions, such as medical personnel and chaplains).
- Members of resistance movements (on certain conditions).
- Participants in spontaneous resistance against an invasion.

Even though IHL allows for certain categories not belonging to states’ armed forces to be defined as combatants, the conditions stated in the GC will normally deny these categories such status in most contemporary conflicts. GC additional protocol II, Article 1 effectively denies groups like Al Qaeda the status of combatancy .

Whereas the Taliban soldiers may have been covered by the provisions of GC I-IV during the conflict’s initial phase, the same did not apply to members of other organised armed groups, like Al Qaeda operatives. Al-Qaeda, as a non-state actor and not a “High Contracting Party”, did not benefit from the same regulations that apply to combatants. States

¹³⁶ ICRC listing of customary rules to IHL: <[http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/customary-law-rules-291008/\\$FILE/customary-law-rules.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/customary-law-rules-291008/$FILE/customary-law-rules.pdf)> [accessed 15 September 2009], pp.9-10.

¹³⁷ 2006 Sanremo manual on the *Law of Non International Armed Conflict*: <<http://www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill..pdf>> the ICRC *Study on Customary International Humanitarian Law* : <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0860/\\$File/ICRC_002_0860.PDF](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0860/$File/ICRC_002_0860.PDF)>, [accessed 15 Sep 2009].

¹³⁸ Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, pp.65-101.

¹³⁹ Ibid, pp.65-101.

¹⁴⁰ Dahl, *Håndbok i militær folkerett*, p.66, original text:[Medlemmer av de væpnede styrker (uniformerte soldater) med unntak av sanitetspersonell, feltprester, militære pasienter og krigsfanger, medlemmer av organisert motstandsbevegelse på visse vilkår, deltagere i spontan motstand mot invasjon).

are generally not inclined to grant insurgents status as combatants, amongst other reasons because this would most probably give them a status that would be contradictory to state interest. Al Qaeda operatives would then logically be deemed civilians, and their violent activities subject to criminal proceedings. The legal term of such activities can be found in GC AP II, article 13, stating that “Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities”.¹⁴¹ The right of armed forces to target civilians that take direct part in hostilities (DPH) in an armed conflict is undisputed.

The point of departure for the following discussion is, consequently, that members of private armies like Al Qaeda and also the Taliban in the conflict’s second phase were civilians that could not legally use force to obtain their objectives.

From the perspective of law, this leaves two items of interest with regards to the status of the insurgents, namely the paradigm of hostilities and the definition of civilians directly participating in hostilities.¹⁴² In the following, I will present a general overview of the legal assessment of the Afghan conflict with respect to the status of the actors and proceed to the discussion of the paradigm of hostilities and civilians that are DPH.

The paradigm of hostilities

As the above discussion demonstrates, IHL does only apply inside the paradigm of hostilities as opposed to that of law enforcement. In cases covered by the law enforcement paradigm, domestic law and Human Rights Laws (HRL) are applicable, whereas these regulations are of lesser, though not totally without, interest to situations of armed conflict. In order to decide whether IHL applies, it is necessary to decide whether the situation rises above the threshold of an armed conflict.¹⁴³ This is particularly important because it is generally recognised that there is a lower threshold for the use of force within the paradigm of hostilities than that of law enforcement.¹⁴⁴ This thesis asserts that the Afghan conflict rose above that threshold, and that consequently, the particular provisions of IHL applying to armed conflicts would apply pending the qualification of the conflict as either international or non-international. That does not mean that every act of violence within the Afghan conflict would qualify as hostilities. Acts of violence, which would normally be assessed as criminality, will not necessarily change status even if they occur within the framework of an armed conflict. Melzer thus argues that only acts of violence directed against a military adversary may be assessed as hostilities: “Even in contexts generally governed by the law of hostilities, the use of force

¹⁴¹ GC Additional Protocol II, Article.13.

¹⁴² Melzer, *Targeted Killing in International Law*, pp.244–245, pp.252-278.

¹⁴³ Ibid, pp.244-245.

¹⁴⁴ Ibid, pp.256-257.

against persons protected against direct attack must, therefore, comply with the stricter standards of the law enforcement paradigm".¹⁴⁵

Given this argument, government and coalition forces in Afghanistan may not apply military force against civilians conducting criminal activities as they would against individuals or groups conducting hostilities. They have, as Melzer states, to comply with the stricter standards of the law enforcement paradigm.

However, the factual situation on the ground complicates the distinction between the paradigm of hostilities and that of law enforcement. In situations of armed conflict, it may sometimes be highly difficult to distinguish between acts of crime and hostile acts. The Afghan conflict displays several incidents where the distinction between criminal activities and hostile acts are blurred or even impossible to discern. Even though the principal rule indicates that a particular activity would be considered an act of crime, thus belonging to the law enforcement paradigm, the circumstances of the Afghan conflict provides a strong argument for defining a variety of such actions within the paradigm of hostilities. Because of the potential legal ambiguity of such situations, it is highly relevant to define or assess which activities may be said to constitute hostile acts.

A civilian firing his weapon against the opposing forces will most clearly be assessed as engaging in hostilities. That individual can thus be targeted within the self-defence paradigm or. However, the definition of hostilities may not be as straightforward as this example depicts. The frequent cases of roadside bombs and suicide attackers in both Iraq and Afghanistan provide a case for an expanded definition of hostilities. The question is whether the perpetrator has to "pull the trigger" himself in order to conduct hostilities, or if preparing or planning an attack is sufficient. International law has no clear answer to this, but it is generally assumed that the closer the perpetrator is to the "triggerman", the more likely it is that his or her actions may be deemed hostile. Melzer argues that both attacks and certain activities preceding the attack may be addressed by the law of hostilities, and as such be covered under the provisions of IHL.¹⁴⁶ Consequently, the emplacement of a roadside bomb will most probably constitute an act of hostility. The making of the bomb and the transportation of the bomb to its intended place of use may also constitute an act of hostility. However, sheltering the maker of the bomb may in most cases be considered to be a criminal act, thus not constituting a hostile act, and should consequently be addressed in accordance with the law enforcement paradigm.

¹⁴⁵ Melzer, *Targeted Killing in International Law*, p.277.

¹⁴⁶ See also the ICRC Interpretive Guidance on Direct participation in Hostilities on direct and indirect causation, pp.1021-1025.

Civilians directly participating in hostilities (DPH)

The problem that armed forces often face when engaging non-state actors participating in hostilities is what is normally termed the revolving door problem. A typical example would be an individual who works as a school teacher during the day and engages in an insurgency at night-time. GC additional protocol II, article 13, states that “Civilians shall enjoy protection afforded by this part, unless for such time as they take a direct part in hostilities”.¹⁴⁷ From a legal perspective, the definition of “for such time as they take a direct part in hostilities” is not a precise definition. States, the ICRC and the International Institute of Humanitarian Law (IIHL) at Sanremo have made efforts to resolve the problem.¹⁴⁸ As the case stands, I will use the ICRC policy of defining DPH on the one hand (restrictive approach) and Israeli practice on the other hand (broad approach) to exemplify the problem.

According to researcher Nobou Hayashi at the Peace Research Institute in Oslo, the ICRC is advocating a restrictive approach.¹⁴⁹ A restrictive approach will typically be a literal appreciation of the term *take direct part*, namely that an individual is DPH only when he is directly and actively engaged in an act assessed to be hostile. Typical examples would be firing, or obviously preparing to fire his or her arm, preparing explosive devices “on the premises” for their intended use and so on.¹⁵⁰ The restrictive approach would rule out targeting the previously mentioned school teacher during the day-time. A restrictive approach would further indicate that leaders and planners doing staff work cannot be targeted when they are not performing their principal activities of conducting war fighting.

On the other hand, the Israeli Supreme Court did rule in favour of the Israeli Defence Force (IDF) allowing for direct targeting on terrorist operatives.¹⁵¹ First, the court found that a state of armed conflict exists between Israeli and Palestinian terrorist organisations. Then it found the conflict to be of an international nature. Terrorist operatives were considered unlawful combatants, and as such could not claim protection as being civilians. The court eventually decided: “The law of targeted killing is determined in the customary international law, and the legality of each individual such act must be determined in light of it”. The court found that the principles on which targeted killings rested was those of protecting civilians, military necessity and proportionality.

¹⁴⁷ GC Additional Protocol II, Article.13.

¹⁴⁸ See e.g. the ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* of 26 February 2009

¹⁴⁹ Nobou Hayashi, interview, 5 May 2008.

¹⁵⁰ International Review of the Red Cross, *Interpretive Guidance on the Notion of DPH under IHL*, Volume 90, Number 872, December 2008, p1022

¹⁵¹ Israeli Supreme Court Ruling of 14 December 2006, *Summary of Israeli Supreme Court Ruling on Targeted Killings*: <<http://www.jewishvirtuallibrary.org/jsource/Politics/sctassass.html>>, [accessed 13 May 2008].

The consequences of the Israeli Supreme Court decision were that it would not be possible for a terrorist or insurgent to change status frequently. If he or she is an active participant in an organisation connected with terrorist activities, he or she can be targeted as long as the connection to such activities is firmly established. The individual cannot claim protection according to IHL, and can be targeted in accordance with the principles of military necessity and proportionality.

Naturally, both the ICRC and Israeli approach present important challenges. The ICRC approach does not resolve the revolving door problem, whereas the Israeli approach creates important challenges regarding the legal protection of individuals.

It remains undisputed that civilians lose their protection according to IHL when they are DPH. The key question is defining DPH in terms of what activities may constitute hostilities, as well as their duration. As the discussion above demonstrates, there is a disagreement within the international community between those advocating a restrictive approach and those supporting a wider approach. The basis for when military forces may or may not apply force will be the operation in question's Rules of Engagement (ROEs) and targeting procedures.¹⁵²

However, states do not interpret international law similarly; one will find some states advocating a narrow approach and others advocating a wide approach to DPH. In a coalition operation like OEF, states may introduce national restrictions on their own forces that may not be in line with the overall ROEs for the operation.

DPH is a fundamental term in this thesis. In non-international armed conflicts, it is the term that forms the basis for every decision on whether to apply force. The key questions, which are not properly solved within judicial literature or by state practice, are the duration of DPH and which activities may influence individuals being labelled DPH. Whereas combatancy is a status based on individuals' membership in a state's armed forces, the membership approach bears little or no validity for non-state actors. Non-state actors are, by definition, civilians, and can only be targeted for the time they are labelled DPH. This thesis asserts that the use of military force outside the law enforcement paradigm may only be used against protected persons for the time they are labelled DPH. The Rules of Engagement and targeting procedures should consequently be based on an assessment on what constitutes hostilities and the notion of DPH.

¹⁵² NATO, MC 362/1, 30 June 2003.

Rules of Engagement and their use

Rules of Engagement (ROE) are the common way of regulating the use of force in contemporary military operations, whereas targeting is a process that includes selection, approval and ultimately the use of force against individuals, infrastructure or other target categories. It is ultimately the ROEs and the targeting process that may allow for the use of force. ROE's serves mainly two purposes; ensure operational effectiveness and that the use of force is compliant to international law.¹⁵³

The ROEs and the subsequent targeting process are precisely where law and operations connect, typically in a counter insurgency campaign like the Afghan conflict. Whereas the use of force in an international armed conflict is legitimate against an adversary based on his membership in a state's armed forces, the use of force in a Counter Insurgency campaign must comply with the stricter rules as previously demonstrated by this thesis. Consequently every effort to apply force outside mere self defence will be supervised by lawyers assuring compliance to IHL.¹⁵⁴

When military forces assess whether force may be applied, their point of departure will normally be to examine the set of ROEs. Most NATO members apply the NATO definitions as defined in the Military Committee (MC) document 362. MC 362 defines a set of ROEs that may be authorised for NATO operations, and that in principle function as a guideline when NATO members develop nation-specific ROEs.¹⁵⁵ MC 362 defines the purpose of ROEs as: "Rules of Engagement (ROE) are the authorisation for, or limits on, the use of force during military operations"¹⁵⁶

However, OEF was a US-led operation, indicating that US definitions would apply. The US Joint Publication (JP) 1-02 defines ROEs as: "Directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered. Also called ROE"¹⁵⁷.

Usually, ROEs will be developed for a specific military operation or theatre. The US has developed a Standing ROE (SROE), defined below:

¹⁵³ NATO, MC 362/1, 30 June 2003. See also Corn and Jenssen, pp.803-807.

¹⁵⁴ Based on the authors participation in the ISAF targeting process and ISAF practise.

¹⁵⁵ Military Committee document 362 is the NATO standard guideline for developing ROE.

¹⁵⁶ NATO, MC 362/1, 30 June 2003, Part I, Introduction.

¹⁵⁷ US Joint Publication 1-02, (2001, as amended through April 2009),

<http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf>, [accessed 19 August 2009].

- “SecDef-approved standing rules of engagement (SROE) that implement the inherent right of self-defence and provide guidance for the application of force for mission accomplishment”.
- “Fundamental policies and procedures governing action to be taken by US force commanders during all military operations and contingencies”.¹⁵⁸

There are, broadly speaking, two reasons for developing ROEs.¹⁵⁹ One is to allow for the precise use of force in order to achieve the desired objectives. The second is to restrain the use of force, in order to prevent violations of domestic and/or international law and national or alliance policy. The point of departure for developing ROEs may thus be one of the following:

- Use of force in military operations is assumed to be unrestricted from the outset and the ROEs main purpose is to restrict it.
- Use of force (outside the scope of self-defence) is assumed to be prohibited and the ROEs define the circumstances and describe the nature of force that may be applied. Force may consequently only be applied where it is explicitly authorised.

The ROEs will usually be accompanied by rules regulating authorisation. Whereas the authorisation of relatively mild use of force - such as the checking of cars for weapons or detaining personnel - may be delegated to lower level commanders or even individual soldiers, the use of lethal force would normally require authorisation at senior military or even at political level. State practice, even for NATO members, is pending national policy and is not necessarily synchronised. ROEs are usually classified and will never be published for ongoing operations.

The issue of legality: conclusion

Whereas international law is well developed in international armed conflicts, the legal basis for non-international conflicts is less developed. In addition, there is some controversy about the qualification of conflicts. The US-led Global War on Terror exemplifies this, mainly because the term “global” indicates that it has certain attributes resembling an international armed conflict. According to David Wippman:

It is not at all clear that international humanitarian law, whether treaty or custom, countenances the notion of a global, transnational armed conflict that is neither international in the traditional sense of a conflict between two or more states or non-

¹⁵⁸ US Chairman of The Joint Chiefs of Staff Instruction 3121.01A (2000), <http://www.fas.org/man/dod-101/dod/docs/cjcs_sroe.pdf>, [accessed 18 August 2009].

¹⁵⁹ Norwegian Armed Forces Joint Operational Doctrine (2007), p.37.

international in the traditional sense of a conflict between a state and insurgents operating from within its territory.¹⁶⁰

This thesis argues that the level of violence in the Afghan conflict clearly exceeded what can be deemed as internal disturbances and tensions. Consequently, it qualified as an armed conflict in the legal sense. The thesis argues that the conflict qualified partly as an international and partly as a non-international conflict in its initial phase. It further argues that the Afghan conflict after the fall of the Taliban qualified solely as a non-international armed conflict. Insurgents, not having status as combatants, would be covered by certain provisions of IHL, mainly GC I-IV article 3 and those provisions of GC additional protocol II that are considered customary law. In addition, the non-derogable rights of HRL will always prevail. Since non-combatants will be protected according to IHL, their targetability is subject to whether they engage in activities that will deny them this protection; Direct Participation in Hostilities. The issue of DPH is of relevance both with respect to the type of activities that may qualify as hostilities and the duration the individual will retain this labelling. This thesis argues that both direct hostile acts and certain activities preceding the actual attacks may constitute acts of hostility, thus allowing the individual in question to be labelled DPH.

Finally, the procedural tools used by military organisations to allow for the use of force are the ROEs and the targeting processes. It is generally acknowledged that these procedures must comply to international and domestic Law, e.g. as stated in the NATO Document MC 362/1, ROE: "Formulation of ROE is influenced by a variety of factors. ROE first must be lawful. International law defines the lawful limits for the use of force during military operations".¹⁶¹ The targeting process is also closely supervised by legal advisers in order to avoid violations of international and domestic law. This thesis argues that at the core of the application of force in non-international armed conflicts outside the scope of self defence lies the notion of DPH, hence the notion of DPH should be reflected in the procedural tools used by the military to allow for the use of force.

As a final comment on the issue of non-state actors and their status in armed conflicts, it is clear that the existing legal regime does not grant non-state actors, not being recognised as a legal party to the conflict, rights as combatants. There is currently no inclination in state practice to allow the Taliban, Al Qaeda or other opposing forces such rights.

¹⁶⁰ Wippman and Evangelista, eds, *New Wars, New Laws*, p.18.

¹⁶¹ NATO, MC 362/1, 30 June 2003.

Section Two: the Norwegian discussion and decisions

Introduction to Section Two

The previous section aimed at establishing a theoretical framework wherefrom the issues of legality may be discussed. In Section Two I aim to present the Norwegian discussion and decision-making process as it appeared in Government, Parliament, the Military and in the media, focussing on issues related to the legality of armed force against non-state actors. As will be demonstrated, the Norwegian political discussion did not to any degree explicitly focus on the impact of using armed force against non-state actors. Apart from a few articles more broadly addressing International Humanitarian Law, this particular issue was almost absent in the Norwegian discussion. However, the consequence of the Norwegian decision to participate in Operation Enduring Freedom was acceptance of the use of armed force against non-state actors based on a military response model. As the previous section indicates, such use of force is controversial.

As discussed in Section One, acts of violence may be categorised either as a judicial issue (crime or the combating of crime) or within the legal framework addressing armed conflicts (the paradigm of hostility). Violence as a function of crime will normally be pursued by a judicial response, based on domestic law, and is interesting to the international community insofar as it does not violate International Human Rights law. As opposed to criminal law, the use of armed force is highly politicised - to use Clausewitz phrase: “the continuation of politics but with other means”. The political aspect of the use of armed force may complicate the application of law. However, it is commonly accepted that the use of military force outside the scope of mere self-defence requires a legal justification.¹⁶² The main aim of the empirical section, therefore, will be to present and analyse the main parts of the discussion and decision-making process as it actually happened in Norway, regarding the provision of support to, and consequent participation in, Operation Enduring Freedom in view of the conceptual background in Section One.

Section Two will be divided into two chapters. The first chapter will start with a short examination of the Norwegian post-2WW experience regarding military operations and use of force. Norway’s post-2WW military experience is of interest for the later analysis of the Norwegian discussion and decision-making process that concluded with participation in Operation Enduring Freedom. I will then introduce the political situation in Norway from September 2001 until the end of 2002 in order to facilitate an understanding of the discussion and decision-making process that will be presented in chapter two.

¹⁶² See G.S. Corn and E.T. Jenssen, *Untying the Gordian Knot*, pp.791-796 for a discussion on the requirement to avoid that armed conflict falls in an unregulated gap.

I will present my findings in the second chapter. As mentioned above, there are few references directly related to the status of the insurgents in Afghanistan, even though non-state actors like Al-Qaeda and Osama bin Laden are mentioned on numerous occasions. It may thus be argued that the status of the insurgents were of minor interest regarding Norway's support to the US and Operation Enduring Freedom. However, if this were the case, it may also be argued that an important issue of Norwegian support to, and participation in, this conflict was not properly addressed. Findings of interest to this thesis, therefore, must be those that in some way influenced the Norwegian view on the legality of use of armed force against non-state actors. Consequently, not only statements from Governmental officials, leading politicians and the military, but also articles and media-coverage discussing the use of force in general are of particular interest. I therefore aim at presenting the relevant part of the discussion as it appeared in governmental papers and press releases, in Parliament and in the media. I will in particular search for arguments, discussions and topics that may be connected to international law. This will provide an empirical basis for analysing to which extent issues of legality actually figured in the Norwegian discussion and how they were treated in the decision-making process.

Chapter Two; Norwegian use of force and the political landscape

A short look at Norwegian history and the use of force

This thesis argues that partly the Kosovo conflict, but in particular the participation in OEF, was a marked departure from Norwegian post-2WW traditions with respect to the use of its armed forces.

Norway has since the end of the Second World War satisfied its security requirements from three distinct avenues. As a small nation, Norway saw itself best served by a strong international legal system, restricting stronger states' opportunities to recourse to force. The UN Charter thus provided the first line of defence for Norwegian security needs.

Prior to WW II, Norway considered neutrality as the best way to avoid being subject to an armed attack. The German attack in 1940 and its consequent occupation provided sufficient arguments for leaving the idea of neutrality in favour of a military alliance. The second avenue of providing security to Norway was thus provided by the NATO alliance.

Finally, Norway developed strong links to the US as a third line of defence, in case the UN Charter or NATO would prove to be insufficient.

Subsequently, the Norwegian post-2WW view on the use of force may be derived from its requirement for a strong UN and its orientation towards NATO and the US. This left application of Norwegian military force to either: cases of national emergencies, e.g. in case of an armed attack on Norway or NATO allies; or: UN-led peace-keeping missions.

The strategic importance of NATO's Northern Flank and the relative weakness of the Norwegian military made Norway a net importer of NATO- and US-provided security. At the core of the Norwegian defence planning was the invocation of NATO's article 5 in case of a Soviet attack. This was regularly exercised during the 70s and 80s with large-scale NATO exercises in Northern Norway. The main purpose of the Norwegian armed forces, in case of an attack, was to provide sufficient "holding-time" for NATO and US reinforcements to deploy into the area.¹⁶³

Outside the paradigm of the supreme emergency, UN peace-keeping missions became the only acceptable option. Norway was a firm supporter of the UN, and saw itself best served by a strong international legal system based on the UN-charter. The Charter's article 2(4), prohibiting the use of force, was perceived as a fundamental guarantee to avoid acts of aggression. Norway was consequently a substantial supporter of UN peace-keeping missions.

¹⁶³ Olav Riste, *Norway's Foreign Relations* (Oslo: Universitetsforlaget, 2005) pp.206-234.

Arguably, Norway based its security requirements on a combination of a strong international legal system provided by the UN, alliance obligations based on its membership in the NATO-alliance and finally its bilateral relationship with the US.

Simultaneously, Norway developed an idea, or self-image, as a “peace-nation”.¹⁶⁴ In particular, Norway was inclined to support the UN-system in order to create the conditions for peace in a number of conflicts. As an example, the Norwegian politician Eirik Solheim, in the capacity as special advisor to the Norwegian foreign office, was highly active in the Sri Lankan peace negotiations during the late 90s and early 2000s. Neither the Norwegian perspective on what served Norwegian security interests best, nor the idea of Norway as a “peace-nation”, did fit very well into the concept of NATO conducting offensive out-of-area operations, or the idea of the Military transformed to an expeditionary corps.

Then, the Kosovo conflict and Operation Allied Force came about. Whereas the earlier operations on the Balkans had been conducted with a UN-mandate, NATO’s attack on Serbia 24th March 1999 had not. It was not a peace-keeping “blue helmet” operation, and it soon became apparent that this was war fighting on a scale not seen in Europe since the Second World War. Similarly, it was clear that Norway supported the operation and would actively participate by deploying F-16 fighter aircraft to Italy. The Norwegian political discussion relating to this operation is quite interesting. As demonstrated above, the Norwegian view has traditionally been what is now labelled the “UN-track”. The “UN-track” boasts relative political consensus in Norway. Most political parties will argue that it is in Norway’s interest to adhere to the UN when use of force may be an option, as the discussion preceding the second Iraq conflict displayed.¹⁶⁵ Unilateral use of force or “alliances of the willing” have never been popular within the Norwegian political establishment or in the Norwegian popular opinion. Arguably, there is also a greater inclination within the political left to be in favour of the use of force when it is clearly mandated through the UN Security Council.¹⁶⁶

Operation Allied Force represented to a large degree a breach of this tradition. Before and during the operation, even representatives of the political left argued intensively in favour

¹⁶⁴ Cf. Foreign Minister, Jonas Gahr Støre, speech held at the Norwegian Peace Centre, 24 april 2006: *Norway as a peace-Nation, myth or reality*, Original text: [*Norge som fredsnasjon – myte eller virkelighet*]: <http://www.regjeringen.no/nb/dep/ud/dep/utenriksminister_jonas_gahr_store/taler_artikler/2006/norge-som-fredsnasjon--myte-eller-virkel.html?id=273461>, [accessed 16 September 2009].

¹⁶⁵ *Bergens Tidende*, Interview with Prime Minister Kjell Magne Bondevik, 17 October 2002, *Norway would emphasise the UN-track*. Original text: [*Når det gjelder Irak, satser Norge på FN-sporet*].

¹⁶⁶ *Norwegian News Agency*, 31 December 2002, *Only the Socialist party and the centre Party opposes Norwegian participation in the Iraq war*, original text: [*Kun SV og Senterpartiet sier absolutt nei til norsk medvirkning i en krig mot Irak*].

of the operation in view of the alleged ethnic cleansing taking place in Kosovo at the time.¹⁶⁷ As such, political statements contributed to the legitimisation of an operation whose legality could be questioned. Operation Allied Force may have introduced a sense of realism in Norwegian foreign policy with regards to the use of force, which had not previously been very apparent. It became obvious to the Norwegian public and political community that there were shortfalls within the UN system that in some circumstances could legitimise the use of force outside the “UN-track”. It may thus be argued that the Kosovo experience was instrumental in preparing the Norwegian authorities and Military for subsequent international operations like those in Afghanistan.

Whereas the Kosovo-conflict served as an eye-opener with respect to contemporary conflicts and the role of the Norwegian military, the Afghan conflict marked a departure from the Norwegian post-2WW tradition. For the first time since WWII, Norwegian forces were put in a position where they were likely to use force outside the paradigm of mere self-defence in regular military, even offensive operations.¹⁶⁸

In 2005, the Centre – Conservative coalition lost the election, and a coalition between the Labour Party, the Centre Party and the Socialist Party was formed. The new administration (called Stoltenberg II) reintroduced the “UN track” as the desired option and by 2006 withdrew Norway from OEF.¹⁶⁹

The Norwegian political landscape

Norway is a constitutional monarchy based on the parliamentary system. The Government is dependent on parliamentary support and election for Parliament is held every fourth year. Presently, seven parties are represented in Parliament.¹⁷⁰ The current Cabinet is composed of a coalition of the Labour Party, the Socialist Party and the Norwegian Centre Party, popularly named Stoltenberg-II since the current Prime Minister, Jens Stoltenberg, also occupied the position 17th March 2000 to 19th October 2001 (Stoltenberg-I). The current coalition boasts

¹⁶⁷ Norwegian News Agency, 21 October 1998, *The leader of the Socialist Party supported NATO operations against the Serb military*, original text: [*Partileder Kristin Halvorsen, som ga sin tilslutning til NATO-aksjoner mot serbiske militære stillinger i Kosovo og Serbia, står fortsatt for dette standpunktet*].

¹⁶⁸ In Operation Allied Force, the Norwegian F-16 contribution operated out of Grazzanise Airstation in South Italy. Their main task was to provide Air Defence coverage to the Allied Air Operations. The Norwegian Aircraft was not equipped for and did not have an offensive role in e.g. targeting ground targets.

¹⁶⁹ *The Soria Moria declaration*, Original text: [*Det er i norsk interesse at vi har en FN-ledet verdensorden og ikke en situasjon der nasjoner tar seg til rette på egenhånd. Regjeringen vil arbeide for et kraftig styrket FN*]: <<http://www.regjeringen.no/upload/kilde/smk/rap/2005/0001/ddd/pdfv/260512-regjeringsplattform.pdf>>, [accessed 16 September 2009].

¹⁷⁰ Norwegian Parliament homepage: <<http://www.stortinget.no/no/Representanter-og-komiteer/Partiene/Partioversikt/>> [accessed 13 July 2009].

majority in Parliament, whereas earlier Cabinets normally did not enjoy such support and had to seek political support in Parliament on a case-by-case basis.

The Cabinet does not, as a rule, have extensive executive powers, nor can it veto Parliamentary decisions. However, foreign policy is assumed to be the domain of the Government, though it is to some degree customary that Parliament is consulted in issues of major national importance.¹⁷¹ Use of military force outside Norwegian boundaries, such as active support to the US-led Operation Enduring Freedom, would constitute an obvious case where the Cabinet consults Parliament.¹⁷²

The 2001 election for Parliament was held on the 10th September. The Cabinet at the time was pure Labour (Stoltenberg-I), but the Party lost the election. Consequently, at the time of the 9/11 incident, the Labour Government was in transition to opposition. The new Cabinet was inaugurated 19th October 2001. It consisted of a coalition of parties from the political centre and the Conservatives.¹⁷³ The Prime Minister, Kjell Magne Bondevik, came from the Christian Democratic Party, whereas the Foreign Minister, Jan Petersen, and Minister of Defence, Kristin Krohn Devold, were Conservatives. This was Bondevik's second time as Prime Minister; hence the administration was named Bondevik-II. Bondevik's previous term as Prime Minister was from October 1997 until March 2000.¹⁷⁴ Bondevik thus had gained some experience in dealing with armed conflicts from the Kosovo conflict.

What could be expected from the new administration, and did it indicate a change in Norwegian Foreign Policy with respect to the "UN track" or alliance obligations? By the time of its inauguration, the 9/11 incident and the US operations in Afghanistan were still major political issues. As will be shown, both the outgoing Labour Government and the new coalition strongly condemned the 9/11 attacks and uttered substantial support to the US actions in Afghanistan. By the time of its inauguration, the newly elected Government did not in any way indicate that its policy would depart from that of the previous Government with respect to the US and the fight against international terrorism. However, as will be shown, representatives of some parties criticised both the US actions in Afghanistan and the Norwegian support to OEF.

¹⁷¹ T.L. Knutsen, G. Sørbo and S. Gjerdåker, eds, *Norges utenrikspolitikk* (Oslo: Cappelen, 1997), pp.22-23

¹⁷² Constitutional practice, cf. The Norwegian Constitution § 26, litra 2. Original text: [Traktater angaaende Sager af særlig Vigtighed og i alle Tilfælde Traktater hvis Iværksættelse efter Konstitutionen nødvendiggjør en ny Lov eller Storthingsbeslutning, blive først bindende, naar Storthinget har givet sit Samtykke dertil].

¹⁷³ Composition of the new Cabinet at *regjeringen.no*:

<http://www.regjeringen.no/nb/om_regjeringen/tidligere/oversikt/ministerier_regjeringer/nyere_tid/regjeringer/kjell-magne-bondeviks-andre-regjering-20.html?id=438739>, [accessed 16.September.2009].

¹⁷⁴ Norwegian Governments since 1945, *regjeringen.no*:

<http://www.regjeringen.no/nb/om_regjeringen/tidligere/oversikt/ministerier_regjeringer/nyere_tid/regjeringer/kjell-magne-bondeviks-forste-regjering-1.html?id=438733>, [accessed 22 September 2009].

Chapter Three: the Norwegian discussion and decision-making process

The changing character of war and the Norwegian discussion

In Section One; this thesis argues that the character of war has changed. War, as understood within the Napoleonic concept - as massive armies facing each other on the battlefield - “no longer exist” according to General Sir Rupert Smith.¹⁷⁵ This thesis argues that predominant contemporary war does not fit the Napoleonic concept of war. It argues that there are qualitative differences between the Napoleonic concept of war and most contemporary conflicts. In particular, this relates to the complexity of the conflicts and to the status of the actors, of which many are non-state. It asserts in Section One that contemporary conflicts, in particular in view of the changing character of war, affect the application of International Humanitarian Law.

The Norwegian perception of contemporary war by the time of September 2001 will serve as an introduction to the later discussion on legality. As will be shown, it seems like the political leadership makes a distinction between war and armed conflict, reserving the former term for international armed conflicts. The main aim of this chapter will be to identify whether the Norwegian political and military leadership comprehended the complexity and particularities of the military actions taken after the 9/11 incident, hence if this situation posed particular challenges regarding use of force and legality from a Norwegian perspective.

The Military

To what extent was the novelty of the Afghan conflict appreciated by the Norwegian military? Did appreciation of this novelty in turn translate into a thorough examination of the legal issues that may derive from such an understanding? An official Norwegian appreciation of the changing character of war may typically be found in official statements from the Ministry of Defence, the Defence Staff or the Norwegian Operational Headquarters, in doctrinal documents, and in material used at military academies. In addition, statements related to particular incidents, such as the 9/11 incident and the “War on Terror”, may indicate the presence of such an understanding.

A natural place to start is to examine the Norwegian Armed Forces Joint Operational Doctrine of February 2000.¹⁷⁶ This doctrine was issued only a short time after the Kosovo conflict and Operation Allied Force. By this time, Norway had actively supported the Kosovo

¹⁷⁵ Smith, *The Utility of Force* p.1.

¹⁷⁶ *Norwegian Armed Forces Joint Operational Doctrine* part A and B, February 2000.

campaign with fighter aircraft and had been involved in both the UN and NATO operations in the Balkans during the 90s.

The Norwegian Doctrine of 2000 touches upon various forms of war in part A, chapter 2, “Conflict and Military theoretical basis”, including interstate war, civil war, irregular warfare and asymmetry.¹⁷⁷ However it does not discuss these topics in any depth. The doctrine defines irregular war as: “A war where some or all major parties do not wage war in the same way that we do, that is, not by the same doctrines as us”¹⁷⁸ Similarly, it defines two forms of asymmetry: technological and organisational. Organisational asymmetry is defined as: “A war where the warring parties have substantial differences in the way they organise and use their military forces”.¹⁷⁹

In paragraph 2.13, the Doctrine discusses various forms of warfare.¹⁸⁰ The opening sentence in this paragraph states that: “Even though all warfare employs both firepower and mobility, these elements constitute the basis for two distinct forms of warfare, namely attrition, which places main emphasis on firepower, and manoeuvre, which places main emphasis on mobility.”

The doctrine arguably indicates that the approach preferred by the Norwegian military is the manoeuvrist approach, by focusing on manoeuvre warfare and how it may best be conducted. Similarly, the Doctrine’s part 2, *Operations*, discusses how to apply the principles of manoeuvre warfare in combat. It is quite obvious that the Norwegian Doctrine of 2000 emphasises the conduct of major war within the Napoleonic paradigm. Its main focus is the application of regular military formations in a fight against similar organisations. It is possible to argue that the principles of manoeuvre warfare may also be applied outside the scope of major war. This is of course true. Manoeuvre theory may be applied against a wide range of opponents. However, the Doctrine does not emphasise Counter-Insurgency campaigns like the Afghan conflict. Rather, it describes large-scale formation warfare against similar opponents. Its focus is on the battle and how to win it. It may therefore be argued that the Norwegian doctrine of 2000 did not, at least in any depth, reflect the particularities of protracted warfare against a non-state actor that is highly difficult to distinguish from the civilian population.

¹⁷⁷ *Norwegian Armed Forces Joint Operational Doctrine* February 2000, part A, pp.21-50. original text: [Konflikt og militærteoretisk grunnlag].

¹⁷⁸ *Ibid*, p.27, original text: [Irregulær; en krig hvor alle eller noen av de toneangivende parter ikke fører krig på samme måte som oss, altså ikke etter de same doktriner som vi støtter oss til].

¹⁷⁹ *Ibid*, p.27, original text: [en krig hvor det hos de stridende parter er stor forskjell på hvordan de militære styrker er organisert og hvordan de brukes].

¹⁸⁰ *Ibid*, p.47. Original text [Selv om all krigføring bruker ildkraft og mobilitet, utgjør disse elementene fundamentet for to atskilte former for krigføring: en utmattelsesform (attrition) som legger hovedvekten på ildkraft, og en manøverform som legger hovedvekten på mobilitet].

Did this mean that the Norwegian military leadership was unaware of the particularities of such warfare? According to General Sigurd Frisvold, it was obvious merely a few days after the 9/11 incident that Norwegian military contributions in support of the US might be required. Consequently, the military leadership promptly initiated a fact-finding process on the 13th September 2001, in order to identify capacities that Norway could offer in support of the US if requested by the Norwegian Government. Frisvold particularly mentioned the experiences gained during the Kosovo conflict, and the restructuring of the Norwegian military that had been ongoing for some time, as important factors for the identification of useful military capacities within a very short timeframe.¹⁸¹ The military leadership focused mainly on reacting fast in order to be able to provide useful military capacities to the Norwegian political leadership in case a US request materialised. Frisvold stated that when the process of actually preparing military capacities gained speed later in the autumn of 2001, his main focus was to physically prepare the forces and to equip them with robust Rules of Engagement and targeting procedures. According to Frisvold, categorising the type of conflict he was about to embark upon was mainly left to the political authorities.¹⁸²

Frisvold indicated that by autumn 2001, there was an awareness within the Military that the ongoing restructuring and the recent experiences from the Balkans had been valuable in preparing the Norwegian armed forces for the participation in conflicts such as OEF. Frisvold did not mention whether the presence of two simultaneous but legally distinct conflicts was assessed with respect to the Norwegian policy on application of force. However, he stated that substantial effort was made in developing ROEs and targeting procedures, thus indicating an appreciation of the challenges represented by the Afghan theatre. However, the restructuring of the Norwegian military during the late 90s was predominantly a function of alliance obligations rather than a deeper analysis of the possible types of conflicts Norway would encounter. In particular, and Frisvold mentioned this during the interview, it was unfortunate that the Norwegian Air Force had not been able to contribute in Operation Allied Force with Air-to-Ground capacities. Norway's restructuring programme did therefore emphasise developing capacities that would enable cooperation with, and in support of, its major allies, in particular the US.

¹⁸¹ Frisvold, interview 8 November 2007.

¹⁸² Ibid.

The political leadership

To what degree did the political leadership comprehend the particularities of the conflict they were about to enter? This is a difficult question to answer. There are few, if any, open sources that explicitly address the particularities of using the Norwegian military in conflicts where the opposing actors are predominantly non-state. Terms derived from an appreciation of “The Changing Character of War” seemed to be reserved to the academic communities and, to some degree, the Military.

First, it is of interest to examine the general Norwegian appreciation of what may constitute war. The issue of whether the Afghan conflict actually constituted a war was subject to some discussion in Norway in the autumn of 2007, especially due to Norwegian losses in Afghanistan. This may serve as an example of the political thinking on this issue. When Norwegian politicians were asked about the status of the Afghan conflict, for example whether Norway was participating in a war, they tended to apply a legalistic approach to the problem by addressing the fact that Norwegian war legislation was not activated and that there was no state of war between Norway and Afghanistan.¹⁸³ Being a party to a war has obvious legal consequences. For example, the Norwegian Judge Advocate General stated that since the Norwegian wartime legislation was not implemented, Norway was not at war in a legal sense.¹⁸⁴ The Norwegian Emergency Preparedness law of 1950 referred to by the Judge Advocate General, often mentioned as the *War Law*, mainly deals with the issues of how to handle major national emergencies resembling that of the German attack on Norway April 9th 1940.¹⁸⁵

Others, who do not apply a legal definition, may label a conflict war based on, for example, the annual number of casualties.¹⁸⁶ Labelling the conflict might be of mere theoretical interest, but as briefly discussed in the introduction, contemporary war may not coincide with the popular notion of war. Whereas there was little doubt that Norwegian Forces conducted war-like operations in Afghanistan, both Governmental and Parliamentary representatives upheld that Norway was not at war. A typical example may be found in a statement made by the Norwegian Minister of Finance, Kristin Halvorsen, who in an

¹⁸³ The War Legislation refers to the Norwegian Law of 15th December 1950 on Particular Decisions in case of War, Threat of War and Similar Circumstances. The War Legislation provides the Government with executive powers, e.g. in mobilisation issues, certain issues of national logistics and empowering military commanders. Since the War Law was not activated, it was argued that no state of war existed between Norway and Afghanistan.

¹⁸⁴ The Judge Advocate General and the Judge Advocates are the legal advisers to the Norwegian Armed Forces in matters of criminal and disciplinary law. Combined they constitute the Norwegian military prosecuting authority, <<http://home.c2i.net/genadv/english.htm>> [accessed 20 May 2009].

¹⁸⁵ Norwegian Department of Defence, Emergency Preparedness Law of 1950.

¹⁸⁶ *Aftenposten*, 10 November 2007. Discussion between the Judge Advocate General and various researchers on the question “Is Norway in a state of war or not”.

interview in the Norwegian newspaper *Dagbladet* explained that one reason for not labelling the Norwegian participation in Afghanistan as war, was that “war is a state of conflict between states”.¹⁸⁷ Similarly, in an interview in the Norwegian newspaper *Aftenposten* 6th November 2007, the Norwegian Minister of Defence was reluctant to label the Afghan conflict, and especially the Norwegian involvement, as war.¹⁸⁸

Apart from the legal issues, there was no enthusiasm in the political community for admitting that Norway was participating in a war. The implication of the phrase “war” seemed to be all too negative to actually use it.

The above statements are from 2007. However, governmental statements, press releases and speeches still indicate that by September 2001, the view on what represented war was changing. This mainly depends on three factors.

First, the 9/11 incident was, as previously demonstrated, frequently referred to as an act of war. Both the Norwegian Prime Minister at the time of the 9/11 attacks, Jens Stoltenberg, and Foreign Minister Torbjørn Jagland, described them as acts of war, and stated that the US had every right to react in self-defence. Later in the autumn of 2001, the newly elected Prime Minister, Kjell Magne Bondevik, addressed the Norwegian Parliament stating: “The terror attacks the 11th September was a declaration of war. It was a declaration of war against the international judicial order, against international relations, against the free and open society, and against human dignity itself”¹⁸⁹ By this time, it was clear that there were no traditional warring parties, no formal declaration of war, nor conventional armies involved.

Second, most statements appreciate the presence of a non-state actor. Whereas war has usually been perceived as an interstate activity, the non-state actor of Al Qaeda was rapidly identified as the perpetrator of an act of war. In an article in the Norwegian newspaper *Aftenposten* 26th September 2001, the Norwegian Minister of Foreign Affairs Torbjørn Jagland stated that “We must stick together in the fight against international terrorism”.¹⁹⁰ In this article, Jagland argued that the US president had equalled the terrorist attacks to acts of war against the US, and stated that the US would initiate any counter-efforts deemed

¹⁸⁷ *Dagbladet*, 10 November 2007. Interview, Minister of Finance, Mrs Kristin Halvorsen.

¹⁸⁸ *Aftenposten* 6 November 2007. Interview, Minister of Defence, Mrs Anne-Grete Strøm Erichsen.

¹⁸⁹ Prime Minister Kjell Magne Bondevik, addressing Parliament 8 November 2001. Original text: [*Terroranslagene mot USA 11. september var en krigserklæring. Det var en krigserklæring mot den internasjonale rettsorden, mot internasjonalt samkvem, mot frie og åpne samfunn, mot toleranse, og mot selve menneskeverdet*]. Whereas both Prime Minister Bondevik and other leading politicians referred to the 9/11 incident as a declaration of war, this must be understood as rhetorical expressions. It could not be understood as legal statement, as e.g. alluding to a formal state of war between Norway and Afghanistan in conjunction with the later Norwegian military support to OEF.

¹⁹⁰ *Aftenposten*, Article by Minister of Foreign Affairs, Torbjørn Jagland, 26 September 2001. Original text: [*Vi må stå sammen i kampen mot internasjonal terrorisme*].

necessary. Jagland indicated the presence of an international terrorist network in general and pointed in direction of Osama bin Laden in particular. He stated that the UN Security Council resolution 1368 made clear that the 9/11 incident threatened international peace and security, a phrase commonly accepted to lead to additional Security Council resolutions that more explicitly legitimised the use of force.

Third, whereas war fighting has traditionally focused on winning battles, political statements indicate an appreciation of this not being a war predominantly for the battlefield. It required a wide range of actions, for example political, economical, judicial or military. Hence, Foreign Minister Jagland stated in an article in *Aftenposten* 26th September 2001 that:

Apart from pure military means, the US is working on a long-term strategy against international terrorism based on a wide spectrum of political, diplomatic, judicial and economical means. This is a wise and considered strategy that we from the Norwegian side fully support.¹⁹¹

Similarly, in a speech to the Norwegian Parliament 8th November 2001, Prime Minister Bondevik stated that:

The fight against terrorism must be conducted with a range of political, diplomatic, judicial and financial instruments. Regrettably it is also necessary to use military instruments. The Taliban regime has not cooperated with the international community in prosecuting those responsible of the 11th September attacks, but instead acted as their supporters.¹⁹²

Conclusion: the Changing Character of War and the Norwegian appreciation

By the time of the 9/11 incident, Norway's most recent military experience was that of the Balkan theatre. As stated by General Frisvold, the Balkan experience had contributed substantially to the development of the Norwegian military in a way that made it more useful in international and alliance operations. Even though the military doctrine at the time was predominantly focused on manoeuvre warfare and large formation war-fighting, it may be argued that the Norwegian Military was conceptually cognisant of the challenges posed by the upcoming Afghan conflict. In either case, the main military emphasis was not on the character

¹⁹¹ Ibid. Original text: [*Utover rene militære tiltak arbeider USA med en langsiktig strategi mot internasjonal terrorisme, basert på et vidt spekter av politiske, diplomatiske, juridiske og økonomiske virkemidler. Dette er en klok og gjennomtenkt strategi som vi fra norsk side støtter fullt ut*].

¹⁹² Bondevik, addressing Parliament 8 November 2001. Original text: [*Kampen mot terrorisme føres med politiske, diplomatiske, rettslige og finansielle virkemidler. Dessverre er det også nødvendig å bruke militære virkemidler. Dette fordi Taliban-regimet ikke har villet samarbeide med det internasjonale samfunn om å stille de ansvarlige for angrepene 11. september til ansvar, men istedenfor opptrer som deres støttespillere*].

of the conflict, but on the preparation and provision of capacities that were politically useful and in line with alliance obligations and requirements. The issue of law connected to the use of military force against non-state actors did not attract much attention within the Military.

Similarly, political statements of the autumn of 2001 indicate a common appreciation of the conflict that arose as a result of the 9/11 attacks that was very different from the perception of war as an interstate conflict fought by regular armies. The frequent references to, and clear acceptance of, the US claim of self-defence connects with the Norwegian emphasis on use of force as a viable option only when it is supported by provisions of the UN Charter. In addition, what Norway perceived as alliance obligations is instrumental in interpreting the Norwegian reactions.

Though not explicitly addressed, it seems that the political leadership at the time appreciated the novelty of the situation and the practical challenges that might follow from this. However, the available sources do not suggest that the political leadership addressed in any depth the challenges that may result from such an understanding of war. In particular, the Taliban and Al Qaeda were not mentioned in a way that indicated an appreciation of these actors as operationally and legally distinct.

The Norwegian discussion and legality

Introduction

This thesis argues that the use of force may only be legitimate if it is authorised through an internationally approved legal system. As such, it assumes that state sovereignty is insufficient as a legal basis for the application of military force. Police use of force is only legal insofar as it is executed in accordance with domestic law and not violating the state's international obligations, such as non-derogable Human Rights. A similar approach may be used regarding states' use of military force. However, as discussed in Section One, whereas domestic law usually is quite precise in regulating police use of force, states' use of military force is not subject to similar precision. Arguably, international law is by nature highly politicised. It subsumes treaty and customary law with state practice and state behaviour. The rise of international judicial bodies, such as the ICC and the ICJ may restrain states' use of force, but has not moved states' use of force from the political arena to that of the courtroom.

This thesis argues that there are seldom major disagreements about the rules; they are accepted by most states. The differences between states materialise predominantly in the interpretation of the rules, and disagreements regarding the facts. It is therefore a major challenge when dealing with international law, that just to refer to it in general - which was frequently done by Norwegian leading politicians - does not necessarily provide clarity in which rules actually apply and how the state intends to comply with them.

As mentioned above, the Norwegian discussion before and during the country's participation in Operation Enduring Freedom contained numerous references to international law. The importance of international law was frequently insisted upon by Norwegian officials, particularly when discussing the use of force. Norway is a signatory to all major conventions regulating the use of force and has incorporated most of its international legal obligations in domestic law. However, what may be questioned is the extent to which the obvious rhetorical focus on law actually translated into the decision-making process regarding use of force.

I aim in the following to present the Norwegian discussion as it happened in the Government, the Military, the Parliament and in the public sphere, and connect it to the decision-making process. Of particular interest is to identify the role legal issues played in the decision-making process.

Derived from the discussion in Section One, the main issues related to the use of armed force against non-state actors are the following:

- Did the 9/11 attack constitute an act of aggression in the Norwegian perception?

- A legal qualification of the conflict from a Norwegian perspective?
- The conflict and the actors, the Norwegian approach.
- Rules of Engagements (ROEs) and Targeting:
 - How did Norway define hostilities?
 - The revolving door issue.

Did the 9/11 attack constitute an act of aggression in the Norwegian perception?

In Section One, I discuss the UNGA resolution 3314, Definition of Aggression, as a commonly accepted definition of what constitutes an armed attack, thus justifying an armed response against the perpetrator. Was the 9/11 attack perceived as an armed attack by the Norwegian Government?

Norwegian officials apparently appreciated the novelty of the circumstances that caused the conflict in Afghanistan. Even if the US was not attacked by a state entity, the sheer volume and cruelty of the incident immediately resulted in comments indicating the presence of a war or war-like situation. As Foreign Minister Torbjørn Jagland stated in *Verdens Gang* (VG) 12th September 2001: “This is modern war against democracy”.¹⁹³

The first official comments indicated a similar appreciation of the 9/11 attacks as acts of war. The “war” analogy was used on numerous occasions.

In a press release on the 11th September 2001, Prime Minister Jens Stoltenberg stated that: “this is an attack on the US and the American people.”¹⁹⁴ Arguably, the intent of this press release was to present the first official Norwegian statement of the incident. The phrase used by the Norwegian Prime Minister indicates that he perceived the incident as an act that went beyond crime. “Attacking the US and the American people” arguably translates as an act of war. Similarly, Foreign Minister Torbjørn Jagland in an article in *Aftenposten* referred to the UNSC resolution 1368, which made it clear that the incident was assessed “to constitute a threat to international peace and security” and that it “confirmed the US right to self-defence”.¹⁹⁵

A few days later, Jagland, addressing the Oslo Military Society, elaborated further on the attack and its possible consequences. In this speech, he again referred to UNSC resolution

¹⁹³ VG, 12.September.2001. Original text: [*Dette er moderne krigføring mot demokratiet*].

¹⁹⁴ Press release 173/2001, Prime Ministers Office. Original text: [*Dette er et angrep på USA og det amerikanske folk*].

¹⁹⁵ Jagland in *Aftenposten*, 26.September.2001. Original text: [*terroranslagene mot USA utgjør en trussel mot internasjonal fred og sikkerhet and uttrykkelig bekreftet USAs rett til selvforsvar*].

1368 as a verification of the US right to invoke self-defence as stated in the UN-charter article 51. Jagland claimed that: “There is consequently no demand for additional authorisation or mandate from the UNSC for the US to, alone or in coalition, apply armed force against the perpetrators of the act of terrorism”¹⁹⁶

The Prime Minister’s office stated in a press release dated 4th October 2001; “the US has an obvious right to self-defence. This is anchored in international law, in the UN Charter and through decisions in the UN Security Council”.¹⁹⁷

Senior Advisor at the Department of Defence (DoD), Judicial Section, Jarl Erik Hemmer claimed that the connection between Taliban and Al Qaeda was assumed to be sufficiently strong to allow for the US attack to be directed against the Taliban regime.¹⁹⁸ There was “no doubt” within the DoD that the attack was sufficient to invoke self-defence by the US. According to Hemmer, it has also earlier been accepted that attacks by non-state actors have been accepted as sufficient as to justify self-defence, although he did not mention any examples of this. The 9/11 attacks almost immediately caused a “state acceptance” of its constituting an armed attack.

Similarly, Assistant Director General in the Judicial Department of the Foreign Office, Martin Sørbye, stated that; “both the Foreign Office and the Department of Defence shared the view that there was a solid basis in international law to respond against Afghanistan based on the right to self-defence.”¹⁹⁹.

Both Hemmer and Sørbye underline the speed at which things were happening in the aftermath of the 9/11 incident, indicating that legal assessments were partly done under substantial time pressure. They both indicate that the almost complete unanimity between the judicial departments and the political authorities reduced the necessity for more in-depth judicial considerations. What was assessed as most important was to clarify the Norwegian position as the situation developed. Speed was of the utmost importance. Both Hemmer and Sørbye claimed that this information was forwarded up through “the chain of command”. Statements from General Frisvold also indicate that the cooperation between the legal sections

¹⁹⁶ Jagland, Addressing Oslo Military Society, 1.October.2001. Original text: [Det kreves altså ingen ytterligere autorisasjon eller mandat fra Sikkerhetsrådet for at USA – alene eller sammen med andre - skal kunne benytte væpnet makt mot dem som sto bak terroraksjonene].

¹⁹⁷ Press release 182/2001, Prime Ministers Office. Original text: [USA har en soleklar rett til selvforsvar. Dette er forankret i folkeretten, i FN-pakten og gjennom vedtak i FN’s sikkerhetsråd].

¹⁹⁸ Jarl Erik Hemmer, Senior Advisor at the Department of Defence (DoD), Judicial Section, Interview, 16 April 2007.

¹⁹⁹ Martin Sørbye, Assistant Director General in the Judicial Department of the Foreign Office, Interview, 7 May 2008.

and the political and military leadership was quite close.²⁰⁰ Given the unanimous statements from the senior bureaucrats, it seems highly likely that assessments on whether the 9/11 attack constituted an act of aggression were discussed at the political level and formed a part of the basis upon which the Norwegian Government made their statements.

The Norwegian Parliament did not convene after summer holiday before the 10th October 2001. Consequently, the Norwegian Parliament did not discuss the issue of the 9/11 attack in any depth in the immediate aftermath of the 9/11 incident. However, the Parliamentary Extended Committee on Foreign Affairs stated already on the 13th September 2001 that they fully supported the US.²⁰¹ The chair of the Parliament's Foreign Committee, Einar Steensnæs, made it clear that Parliament supported the Government and accepted Norwegian obligations towards NATO.²⁰² He stated that; "a united Parliament is behind the US. But we presuppose that the US reaction will be in accordance with International Law".²⁰³

Based on the interviews with representatives of the bureaucracy and statements from leading politicians, it seems quite clear that the official perception of the 9/11 attack was that it constituted an act of aggression, and thus an armed attack.

Did any diverging viewpoints materialise regarding whether the 9/11 attack actually constituted an act of aggression?

As mentioned above, there was almost complete unanimity within the Government and the bureaucracy. However, some criticism or objections were raised by Members of Parliament and the representatives of the academic community.

Both the Socialist Party and the Centre Party expressed objections to the possibility of the US embarking on a war against either Al Qaeda or the Taliban, and in particular objected to the potential Norwegian support for such actions.²⁰⁴ At the core of the objections to a military response seem to be a perception of the 9/11 attacks being predominantly a criminal action that should be dealt with within the law enforcement paradigm, not militarily.

Members of Parliament (MP) of the Socialist Party, Ågot Valle and Audun Lysbakken, expressed "substantial scepticism" towards the Norwegian support to the US. Their main concern was that Norway could be involved in a military NATO operation.²⁰⁵

²⁰⁰ Frisvold, interview 8 November 2007.

²⁰¹ *Norwegian News Agency*, 13 September 2001.

²⁰² *Ibid.*

²⁰³ *Ibid.* Original text: [*Et bredt og samlet Storting står bak USA. Men vi forutsetter at USAs reaksjon vil være i samsvar med folkeretten*].

²⁰⁴ *Bergens Tidende*, 14 September 2001, Statements by MP Ågot Valle of the Centre Party and MP Audun Lysbakken of the Socialist Party.

²⁰⁵ *Ibid.*

Similarly, MP of the Centre Party, Rune Skjælaaen, stated that he thought Norway should have voted against NATO implementing its article 5. On the 15th September, it became clear that the leader of the Socialist Party, Kristin Halvorsen, had signed a petition against Norwegian support to “US revenge actions against innocent civilians”.²⁰⁶

Similarly, some representatives of the academic communities of law and international relations expressed doubts as to whether the 9/11 incident actually constituted “an act of aggression” as defined by the UNGA.

Already on the 21st September 2001, Professor of Law at the Institute of Public law at the University of Oslo, Geir Ulfstein, indicated that the US right to self-defence was questionable, insofar as self-defence could only be invoked against states, not a non-state actor.²⁰⁷ The 9/11 attack should be perceived as a criminal action, requiring a judicial response, not a military counter-attack. Ulfstein argued that the principles of immediacy, necessity and proportionality did not allow for self-defence actions. Finally, Ulfstein argued that UN Security Council resolution 1368 did not provide the necessary authority to use military force against Afghanistan.

Professor Jørgen Aall at the Institute of Jurisprudence at University of Bergen discussed the difference between self-defence and revenge in an article in *Bergens Tidende*.²⁰⁸ Aall argued that, apart from in situations of a major national emergency, such as an invasion, it could not be up to the state in question to decide whether an act could invoke the right to self-defence. Aall indicated the necessity of direct or indirect state involvement in order to invoke self-defence. His main argument was that the UN Charter’s article 51 presupposes the presence of an armed attack or act of aggression by a state. The UN Charter provides strict and precise conditions for invoking self-defence, and Aall questioned whether these conditions were present in such a way that a US attack on Afghanistan was justified. However, Aall also indicated that the 9/11 attacks was of a magnitude that could influence the interpretation of Article 51 of the UN Charter in favour of the US response.

Since both Ulfstein and Aall argued that armed conflicts required the presence of a state on both sides, they questioned whether the Al Qaeda attack constituted an act of aggression. These viewpoints found some support among other debaters as well, like Professor of International Politics Nils A. Butenschøn, who claimed that “an organisation or

²⁰⁶ *Klassekampen*, 15 September 2001. Original text: [*mot norsk støtte til amerikanske hevnaksjoner som rammer uskyldige sivile*].

²⁰⁷ *Aftenposten*, 21 September 2001.

²⁰⁸ *Bergens Tidende*, 22 September 2001.

individual cannot wage war in the legal sense”.²⁰⁹ A similar view was presented by the bishop of Oslo, Gunnar Stålsett; “This is international crime, not war. It is a distinction that is fundamental to hold on to”.²¹⁰

Additionally, it is possible to identify widespread scepticism against attacking Afghanistan on the political left. In a market research published by *Aftenposten* 11th October 2001, it was stated that the Socialist, Centre and Liberal Parties contained a majority that was against the US attack on Afghanistan.²¹¹

Finally, the public discussion, as it was presented through the media, clearly indicated a popular perception of the 9/11 attack as an act of aggression.

The Norwegian database *A-text* contains all editorial content from most Norwegian newspapers. The *A-text* database allows for combining various search words in order to identify the amount of articles containing those words.

By combining “Afghanistan” and “war”, a total of 2,470 hits were presented for the timeframe between 12th September 2001 to 30th June 2002. In comparison, by combining “Afghanistan” and “crime” only 77 hits are presented. Similarly, by combining “terrorism” and “war” a total of 1,234 hits were presented, whereas “terrorism” and “crime” presented only 143 hits.²¹² With a few exceptions, the majority of the articles on terrorism and war or terrorism and crime were connected to the Afghan conflict. A closer scrutiny of the content of these articles reveals that the 11/9 incident most certainly was also perceived as a criminal action, not only as an act of war, but the sheer volume of war rhetoric was overwhelming.

The newspaper most clearly advocating a divergent view on the conflict was *Klassekampen*.²¹³ The newspaper, representing the political left, was a major contributor of viewpoints that diverged from the official policy. During the initial phase, *Klassekampen* presented 370 articles, editorials etc. that included both “Afghanistan” and “War”, ranging from mere descriptive articles to explicitly criticising the US-led operations.²¹⁴

²⁰⁹ *Klassekampen*, 15 September 09, Original text: [*En organisasjon eller person kan ikke gå til krig, i ordets folkerettslige forstand*].

²¹⁰ *Aftenposten*, 16 September 2001. Original text: [*Dette er internasjonal kriminalitet, ikke krig. Det er en forskjell det er helt fundamentalt å holde fast ved*].

²¹¹ *Aftenposten*, 11 October 2001, referring to survey commissioned by *Aftenposten* and executed by Opinion 8–10 October 2001.

²¹² *A-text* database by Retriever, 10 June 09.

²¹³ *Klassekampen*, translates to *the Class Struggle*.

²¹⁴ Retrieved from the *A-text* database, (1 June 09), Search words *Afghanistan* and *War*.

An analysis of the Norwegian perception

Arguably, the Norwegian official perception of the 9/11 attack was that it constituted an act of aggression, thus an armed attack on the US, which justified the US in initiating military operations against the perpetrators. The official perception was to some extent challenged, but the challenge did not gain much momentum and basically remained restricted to the political left. In addition, whether the 9/11 attack actually constituted an act of aggression was questioned by some representatives of the academic community. Was the definition of aggression a part of the Norwegian discussion or decision-making process?

The definition of aggression requires a conflict between states. As stated in its Article 1; “aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state”.²¹⁵ The Norwegian official policy on the 9/11 incident seemed to contradict this. Official statements leave little doubt that the incident was perceived as “an act of aggression”.

Article 2 and 3 of UNGA resolution 3314, though also requiring state vs state conflicts, more precisely addresses the kind of actions that may constitute an armed attack. In particular, Article 3 defines acts that may qualify as acts of aggression, of which some clearly resemble the 9/11 attacks. As such, there may be isolated arguments within the Definition of Aggression that support the view that an attack by a non-state actor is an armed attack. However, neither the governmental nor the public discussion contained substantial traces of discussions about the UNGA resolution 3314. Arguably, it did not form a substantial part of the Norwegian discussion, even though some debaters, mainly belonging to the scholarly community, touched upon related arguments.

The Norwegian Government argued almost entirely in favour of the 9/11 attack as constituting an armed attack because of its magnitude and consequences. Whether the idea that actions by a non-state actor may constitute an armed attack has developed to be commonly accepted state practice may be questioned. However, this was clearly the position of the Norwegian Government in the autumn of 2001.

Legal qualification of the conflict: the Norwegian perspective

The previous paragraph establishes Norway’s position as perceiving the 9/11 attack as an act of aggression. Acts of aggression may justify a forceful reaction as an act of self-defence. The Norwegian view was that US use of military force against Afghanistan was justified based on the perception of the 9/11 attack as an armed attack. The question then arises, what kind of

²¹⁵ UNGA resolution 3314, Article.1.

armed conflict did the US embark upon on the 7th October 2001, supported by several nations, including Norway?

In Section One, this thesis argues that the conflict's first phase was as a combination of an international armed conflict (US and allies vs Taliban) and a conflict of a non-international character (US and allies vs Al Qaeda). It then continued as a conflict of a non-international character from the establishment of the emergency Loya Jirga in June 2002. Qualification of the conflict is a prerequisite for deciding what rules apply. As discussed in Section One, there is a distinction between the rules applicable to conflicts of an international character and conflicts of a non-international character. Arguably, the rules regulating conflicts not of an international character are far less developed than the former. Additionally, the Afghan theatre was by its nature highly complicated regarding the various actors involved. It did not fit neatly into the international legal system regulating armed conflicts.

By the 30th November 2001, Norway officially pronounced that it would offer military forces in the fight against international terrorism.²¹⁶ The forces were offered to OEF and the area of interest was Afghanistan. As such, the qualification issue became one of practical importance. Norwegian soldiers could soon be in a position facing Taliban soldiers and/or Al Qaeda operatives.

The question then arises: how was the issue of legal qualification dealt with in the Norwegian discussion and decision-making process?

7th October 2001 until June 2002

The first phase of the Afghan conflict started with the US attack, 7th October 2001. The attack was a direct response to the 9/11 incident. The US claimed it was a self-defence action taken in order to prevent further hostile activities from the perpetrators of the attack. The US position received widespread support from most states, including Norway. In Section One, I argue that the initial phase actually contained two partly merging but legally distinct conflicts, one of an international character against the Taliban and one of a non-international character against Al Qaeda and its supporters. From the perspective of the soldier on the ground, this may not be a meaningful distinction; in Afghanistan it would have been highly difficult to separate the two on the battlefield. However, from a legal point of view, the difference is of utmost importance. Taliban soldiers, being members of one of the warring parties' armed forces, would from the outset classify as combatants. However, the status of combatancy would not apply to members of Al Qaeda, so targeting those would at least theoretically imply

²¹⁶ Department of Defence, Press release 062/2001, 30 November 2001.

a different set of ROEs. Targeting an Al Qaeda operative would require positive identification beyond what is required for combatants, based on whether the individual operative was “directly participating in hostilities”.

The previous paragraph clarifies the Norwegian position as perceiving the 9/11 attack as “an act of aggression”, justifying an armed response on behalf of the US and consequently NATO. The next step will logically be to discuss the Norwegian view on the type of conflict that emerged 7th October 2001 in order to clarify the prerequisites for the later Norwegian support to and participation in Operation Enduring Freedom.

First of all, the sheer volume of war-related rhetoric, both in the form of political statements and in newspapers, indicated an appreciation of an armed conflict, not a law enforcement operation. For the timeframe between 12th September 2001 and end of June 2002, the A-text database displays a total of 2,470 articles, editorials and press statements that combines “Afghanistan” and “War”. In comparison, only 77 combine “Afghanistan” and “crime”. The previous paragraphs also show that war analogies were used frequently by Norwegian politicians when describing the 9/11 incident.

The US attack on the 7th October did not change the political rhetoric. In a press statement issued the same day as the attack, Prime Minister Stoltenberg stated that: “The US executes its obvious right to self-defence according to the UN Charter. It is clear that Osama bin Laden and his network of terrorists conducted the cruel attacks on the US 11th September.”²¹⁷

As a result of the election on the 10th September 2001, the new administration was installed 19th October with the inauguration of the Bondevik-II administration. In his speech to Parliament 26th October 2001, Foreign Minister Jan Petersen argued along similar lines as the previous government. He stated that: “Both the US and any other country that is hit by international terrorism has an obvious right to execute self-defence. This is in accordance with international law, and made clear through UNSC resolutions”.²¹⁸ In the same speech, Petersen stated: “Norway fully supports the military operations. Osama bin Laden cannot be fought without the use of military force”.

²¹⁷ Prime Ministers Office, Press release 186/2001, 15 November 2001, Original text: [*USA utøver den soleklare retten til selvforsvar som landet har etter FN-pakten. Det er klart at Osama bin Laden og hans terroristnettverk gjennomførte de grufulle angrepene på USA 11. September.*].

²¹⁸ Foreign Minister Jan Petersen, Addressing Parliament 26 October 2001. Original text: [*Både USA og ethvert annet land som blir rammet av internasjonal terrorisme, har en soleklar rett til selvforsvar. Denne retten er forankret i FN-pakten, og slått fast gjennom vedtak i FNs Sikkerhetsråd.*] and [*Norge står også fullt og helt bak de militære operasjonene. Osama bin Laden og hans støttespillere kan ikke bekjempes uten bruk av militære maktmidler.*].

Both the previous and the new government argued along similar lines. Phrases like “self-defence” and “military operations” were frequently used, though statements explicitly naming the conflict “war” were rare.

This thesis argues that the Afghan conflict could qualify as two simultaneous but legally distinct conflicts in its initial phase. Official statements do not add much clarity on this matter. Official statements do not suggest a perception of the Afghan conflict as one of an international character and one of a non-international. They basically refer to the right to self-defence, the support to the US and the initiation, presence and necessity of military operations in Afghanistan. Based on the official statements, it may be argued that once the operations had started, Norwegian politicians did not separate between Taliban and Al-Qaeda with respect to ROEs or targeting. As an example, Prime Minister Bondevik stated in an article in *Aftenposten* 15th November 2001: “The terrorist network of bin-Laden and Al Qaeda must be destroyed. The initial aim presented itself. Afghanistan could not remain a protected space for terrorists that plan mass murder of civilians around the world.”²¹⁹

Later in the same article, Bondevik discussed the necessity of removing the Taliban regime and presented among others a legal argument for doing that by pointing in the direction of UNSC resolutions.

The Minister of Defence at the time, Kristin Krohn Devold, has stated that she consistently used “Military operation mandated by NATO” when describing the operations.²²⁰ In her reply to my questionnaire, she did not address the issue of a legal qualification of the conflict. The main issue was to “get the job done” in order “to create peace under as secure conditions for Norwegian soldiers as possible”. When asked if she assessed it to be a sufficient legal foundation for initiating military operations against Afghanistan, her reply was “It was a crystal clear agreement both within this and the former Government that the legal conditions were present for executing military operations against Afghanistan”. The legal foundation was, according to Devold, a major issue prior to assessing Norwegian contributions.²²¹

Some clarity may be provided by representatives of the bureaucratic level. According to Jarl Erik Hemmer, the Norwegian view did not differ from that of “most states” in that the

²¹⁹ *Aftenposten*, statement by Prime Minister Bondevik, 15 November 2001, Original text: [*Terroristnettverket til bin Laden og Al Qaida må ødelegges. Ett første viktig mål sa seg selv: Afghanistan kunne ikke forbli et beskyttet sted for terrorister som planlegger massedrap av sivile rundt i verden*].

²²⁰ MoD Krohn Devold, reply to questionnaire. Original reply: [*militær operasjon med FN og Nato-mandat*].

²²¹ *Ibid.*

conflict was assessed to be an international armed conflict until the summer of 2002.²²² Then, from the establishment of the emergency Loya Jirga in June 2002, the conflict changed into one of a non-international character. Hemmer did not mention to which extent these issues were explicitly discussed with the political leadership of the Department of Defence, or to which extent they were addressed as part of the decision-making process. However, he strongly indicated an almost complete unanimity within the political leadership and between the judicial departments of the DoD and the Foreign Office in their view that the conditions for self-defence, thus a US armed response, were unquestionable.

Assistant Director General, Ministry of Foreign Affairs, Judicial Department, Martin Sørby emphasised that Afghanistan - a subject of international law - provided protection and even active support to Al Qaeda. The Norwegian assessment was that; “the right to self-defence was executed in response to the violation of international law that Afghanistan or Taliban had committed by giving Al Qaeda the possibility to operate”.²²³ Sørby made no comments that could indicate whether the possible legal duality of Afghan conflict in its initial phase was discussed.

A third source of information is The Norwegian Parliament. The Parliament did address various issues related the 9/11 attack and the US reactions to it. However, none of these touched specifically upon the qualification of the conflict, even though several Members of Parliament raised more general issues related to international law.

In the parliamentary session 26th October, Parliament discussed the 9/11 incident and the subsequent US response. Prime Minister Bondevik addressed Parliament, stating that: “The military operations that the US currently is conducting are supported by a wide range of states, they are a legitimate defence according to international law and the UN Charter, and are confirmed by the UNSC”.²²⁴

In the discussion following the Prime Minister’s speech, several members of Parliament addressed the possible consequences of aerial warfare in Afghanistan, the possibilities and consequences of collateral damage, and the possibility of the US use of cluster munitions.

Former Foreign Minister Jagland, now in the capacity as Member of Parliament, stated in his speech that responding against Afghanistan was necessary in order to incapacitate the

²²² Hemmer, interview 16 April 2007.

²²³ Sørbye, interview 7 May 2008.

²²⁴ Prime Minister Bondevik, addressing Parliament, 26 October 2001. Original text: [*De militære tiltakene USA nå gjennomfører med støtte av en lang rekke land, utgjør legitimt forsvar i henhold til folkeretten og FN-pakten og er bekreftet av Sikkerhetsrådet*].

terroristic networks of Al Qaeda: “What is the alternative [to military operations, *my remark*]? The alternative is to sit and wait until these networks and groups may continue to operate from Afghanistan and wait for the next attack”.²²⁵

In her reply to Jagland the leader of the Socialist Party, Kristin Halvorsen, questioned what may be perceived a successful outcome of the acts of war initiated against Afghanistan. In her reply, Halvorsen asked how: “citizens not originating from Afghanistan, but from Egypt and Saudi Arabia, inspired and trained by bin-Laden” would be rendered harmless by bombing Afghanistan.²²⁶ Even though Halvorsen’s analyses of the connection between Al Qaeda and Taliban may be questioned, her reply indeed indicated an appreciation of the complexity of the Afghan conflict.

Apart from some appreciation of the Afghan theatre consisting of a state actor (Taliban) and a non-state (Al Qaeda), Parliament did not address the issue of the qualification of the conflict. To the extent that international law was mentioned, it was only as a general reference as stated by, for example, the Prime Minister; “according to international law”.²²⁷

Finally, the public discussion may reveal additional viewpoints regarding the classification of the conflict. The public discussion would of course not have been a part of the decision-making process as such, but neither government nor Parliament may be assumed to be untouched by the discussion in the media. This may be particularly valid if viewpoints were put forward by influential debaters belonging either to the media itself or to influential academic communities. Bjørn Jacobsen, MP of the Socialist Party and member of the Parliamentary Defence Committee, especially pointed in direction of Geir Ulfstein’s criticism of the 9/11 attack as sufficient for invoking self-defence, citing it as an important and influential proponent of his own view on the conflict.²²⁸

Norwegian newspapers touched upon the issue of the different actors on several occasions. There were numerous references to Al Qaeda, Osama bin-Laden and the Taliban. I have previously established the connection between the 9/11 incident, the Afghan theatre and the perception of an armed conflict. There were some discussions as to whether this was actually the case. However, the sheer volume of articles connecting the Afghan conflict with the term “war” suggests that the popular perception was that this was a war-like situation, not

²²⁵ Jagland addressing Parliament, 26 October 2001. Original text: [*Hva er alternativet til dem? Alternativet er sannsynligvis å sitte å vente på at disse nettverkene og disse gruppene skal kunne fortsette å operere ut fra Afghanistan, vente på neste angrep*].

²²⁶ Halvorsen in Parliament, 26 October 2001. Original text: [*gjennomført av statsborgere ikke fra Afghanistan, men fra Egypt og Saudi-Arabia, inspirert eller trent opp av bin Laden*].

²²⁷ Prime Minister Bondevik, addressing Parliament, 26 October 2001. Original text: [*I henhold til folkeretten*].

²²⁸ Bjørn Jacobsen, Member of Parliament of the Socialist Party, interview 8 May 2008.

a police-type mission. From there on, the discussion regarding the categorisation of the conflict was almost non-existent. Available sources do not suggest perception of two legally distinct conflicts requiring separate legal bases. Hence it may be argued that neither the public discussion nor the political process at the time addressed the possible judicial duality of the first phase of the Afghan conflict and Operation Enduring Freedom.

June 2002 until December 2002

By the establishment of the emergency Loya Jirga and the installation of Hamid Karzai as interim President, it is commonly accepted that the conflict ceased to have an international character. From this point in time, the conflict, at least from the perspective of international law, consisted of non-state actors violently opposing the legitimate Afghan governmental forces and their allies, hence qualifying it as a non-international conflict. From the establishment of the emergency Loya Jirga, the Taliban would no longer be in a position where they could be accepted as combatants. Since the conflict now could no longer be assessed as two simultaneous, but legally distinct conflicts, the situation became one of less complexity from a legal viewpoint. At this point in time, Norway was also firmly established as an active supporter of Operation Enduring Freedom and had already deployed various force contributions to Afghanistan, among others, Special Forces units. In addition, the preparations for the Norwegian F-16 Fighter Aircraft contribution were quite advanced, with the aim of deploying the aircraft by the 1st October 2002.²²⁹

The political discussion indicated that the Afghan conflict was still perceived as an armed conflict. There are few, if any, indications that the fall of the Taliban regime and the establishment of the provisional Afghan administration under the provisions of the Bonn declaration changed the perception of the conflict.

In a feature article in *VG*, 13th September 2002, Defence Minister Devold addressed the progress achieved in the fight against terrorism under the heading “The long war”.²³⁰

In a press release 27th September, Defence Minister Devold stated that the most important task of the Norwegian F-16s was to “deter future acts of terrorism and contribute to a stable situation in Afghanistan”.²³¹ In the same press release, it is stated that “the task of the

²²⁹ DoD, Press release 33/2002, 28 May 2002.

²³⁰ Krohn Devold, DoD, 13 August 2002. Original text: [*Den langvarige krigen*].

²³¹ DoD, Press release 47/2002, 27 September 2002. Original text: [*Den viktigste oppgaven for de norske jagerflyene blir å virke avskrekkende, og å fremme en stabil utvikling i Afghanistan*] and [*Flyene skal for øvrig gi støtte til allierte styrker på bakken når det oppstår behov for det, og de kan bli satt inn i bekjempelse av Al-Qaida- og Taliban-grupperinger og deres militære anlegg*].

F-16s will be to support allied forces on the ground and that they may be used in combating Al Qaeda and Taliban groups and their infrastructure”.

2nd October 2002, Prime Minister Bondevik addressed the situation in Afghanistan in the newspaper *Vårt Land*. The heading of the article was; “Norway is fighting a war against international terrorism”.²³² In this article, Bondevik stated that this is not a war between Norway and Afghanistan. Norway is combating international terrorism by participating in military operations in Afghanistan. He continued; “If it is necessary to bomb military targets in Afghanistan – active Al Qaeda and Taliban groups, their bases, infrastructure and equipment, thorough procedures according to Norwegian policy will be executed before bombing is approved”.

Finally, Defence Minister Devold addressed the judicial basis for the war in Afghanistan in a MoD comment on the 14th October 2002. In this article, she argues that the war in Afghanistan is conducted in accordance with all necessary provisions of international law.²³³ Again it is referred to as “the war in Afghanistan”.

Even though the Prime Minister emphasised expressions like “combating international terrorism” and “participating in military operations”, the Norwegian official perception of the conflict seem not to have changed substantially. During the first phase of the conflict, it may be argued that the conflict consisted of two simultaneous but legally distinct conflicts. This was obviously not the case after June 2002. As such, when Norwegian officials were discussing Al Qaeda and remnants of the Taliban in the same sentence, not making a distinction between the two, it seems more appropriate than in the first phase. However, it is difficult to see a change in the political leadership’s perception of the conflict from phase one to phase two.

From the perspective of the bureaucracy, it seems that there was an appreciation of the changing character of the conflict. Hemmer stated that from the perspective of the DoD, the conflict ceased to be of an international character by the establishment of the emergency Loya Jirga and the consequent election of Hamid Karzai as preliminary president in June 2002.²³⁴

The Norwegian Parliament did not discuss this issue in any detail. There is a continued concern by some MPs on the issue of Norwegian soldiers being put under the command of the US and that the US did not share the Norwegian view on some issues of international law. For

²³² Prime Minister’s office, 2 October 2002. Original text: [*Norge er i krig mot internasjonal terror*] and [*I den grad det vil være nødvendig å bombe militære mål i Afghanistan – aktive al-Qaida og Taliban grupperinger, og deres gjenværende baser, anlegg og utstyr - vil grundige prosedyrer i henhold til norske retningslinjer følges før det gis klarsignal til bombing*].

²³³ DoD, Press release, 14 October 2002. Original text: [*krigen i Afghanistan*].

²³⁴ Jarl Erik Hemmer, interview 16 April 2007.

example, MP Åslaug Haga of the Centre party, on the 8th May 2002, asked about the possible consequences of Norwegian soldiers being under US command and the US not being a part of the Landmine convention.²³⁵ There are other discussions on whether the use of military means served a purpose. In particular, representatives of the Socialist Party are sceptical towards the use of military force in general and Air Power in particular. When addressing these issues in Parliament, they often argued in favour of emphasising a law enforcement response as opposed to the military operations conducted within the framework of OEF. However, available sources suggest that the Norwegian Parliament did not explicitly discuss the qualification of the conflict and the possible consequences thereof.

Analysis of the Norwegian perception of the qualification of the conflict

A legal qualification of the conflict is an issue of a certain judicial complexity requiring in-depth knowledge of international law that could not be expected to be discussed publicly with some precision. The political discussions seem to confirm this. The statements referred to above are mostly policy statements from leading politicians that rarely contain in-depth analysis of the situation; they just refer to what may be perceived as official government policy. It can hardly be expected that complicated issues of international law are discussed in such statements.

However, assessments that at least touched upon the qualification issue seem to have been made at the bureaucratic level at the Foreign Office and the MoD. They indicate that the Norwegian view on the conflict that emerged 7th October 2001 was that it was one of an international character. According to Martin Sørbye at the Judicial Department of the Foreign Office, it was a common perception that the US claim of self-defence was directed against Afghanistan, being a subject of international law, because of their support to the perpetrators of the 9/11 attack.²³⁶ Statements from the bureaucratic-level judicial experts indicate a perception that invoking self-defence was justifiable since there was a presence of a state entity, the Taliban regime. In addition, Hemmer of the MoD argued that self-defence may be invoked against a non-state actor as well.²³⁷ However it seems, based on the information provided by the judicial department of the Foreign Office, that the Norwegian view was that self-defence was invoked against the Taliban regime of Afghanistan and that the operations

²³⁵ Parliamentary Question hour, 8 May 2002, MP Åslaug Haga, question 32. The Parliamentary Question hour is conducted on a regular basis, in order to allow for MPs to forward questions to members of the cabinet that are replied to in Parliament.

²³⁶ Sørbye, interview 7 May 2008.

²³⁷ Hemmer, interview 16 April 2007.

against Al Qaeda came as a result of the international armed conflict between the US and its allies versus the Taliban.

Statements from leading politicians to some extent seemed to contradict this view. As the examples above indicate, the political leadership perceived the Taliban and Al Qaeda as a conceptual entity from an operational viewpoint, be it in phase one or phase two. Statements from the Prime Minister, the Foreign Minister and the Minister of Defence indicate a perception that self-defence was invoked against Al Qaeda and that the toppling of the Taliban regime was necessary in order to eradicate the Al Qaeda training facilities in Afghanistan. However, official statements do not indicate perception of a distinction between Al Qaeda and Taliban requiring different approaches by the Norwegian military, such as separate ROEs or targeting procedures. Neither statements from General Frisvold nor Defence Minister Devold indicate that different ROEs were developed for use against different types of actors based on a perception of two legally distinct conflicts.

Neither the military leadership nor the political authorities addressed the issue publicly and it was not discussed in any depth in the media. The conflict in Afghanistan was generally perceived as a geographically limited conflict, not part of a worldwide “war on terror”. It was legitimised through application of the UN Charter article 51 (self-defence) and subsequent UNSC resolutions. If a legal qualification of the conflict was an issue in the decision-making process or the political discussion, it never reached the public sphere and was not reflected in governmental policy statements. Subsequently, it may be argued that the qualification issue did not attract much attention outside the bureaucratic judicial communities and was of minor importance in the decision-making process related to the utilisation of Norwegian forces in theatre, like ROE development and targeting processes.

The conflict, the actors and identification - the Norwegian approach

In Section One, this thesis argues that apart from members of the armed forces of the Taliban (in phase one); the opposition in Afghanistan consisted of civilians illegally participating in hostilities. These actors, by definition, commit crimes when they conduct hostilities, they cannot claim the status of, or expect treatment as, combatants in the sense that they cannot claim impunity for their violent actions. However, they may under certain circumstances be targeted as a part of a military response model “for the time they actively participate”. Targeting these actors would logically require a different set of ROEs than targeting the Taliban. Whereas Taliban soldiers could be targeted by a membership approach, Al Qaeda operatives could not. As discussed in Section One, it is highly questionable if the membership

approach is a viable option for non-state actors, and the rules regulating the targeting of non-combatants is an issue of some legal controversy.

The Afghan theatre consisted (and consists) of a variety of actors that either actively supported the insurgency, were involved in traditional criminal activities like the drugs trade, or a combination of the two. Whereas the former may be addressed through a military response model, pure crime usually requires a judicial response. In the case of the latter, military forces may only be used insofar as law enforcement resources are insufficient, and then only in support of the law-enforcement efforts.

In order to develop a reasonable set of ROEs and targeting procedures, some kind of actor analysis thus seemed to be required. How was the actor issue of the Afghan conflict handled by Norway?

I indicate in the previous paragraph that neither the political leadership nor the Military distinguished between the Taliban and Al Qaeda operatives for operational purposes. The opposition to the US operation was perceived as a conceptual entity. Whereas this was of minor consequence in phase two - the opposition then, by definition, consisted only of non-combatants (civilians) - it was certainly of consequence in phase one.

According to the Norwegian MoD, the presumption up until June 2002 was that Taliban soldiers in principle could satisfy the conditions for being legal combatants. However, again according to the MoD, information presented at the time indicated that they did not satisfy these conditions and that Norway would consequently not accept Taliban soldiers as combatants.²³⁸ In addition, as will be addressed in the following discussion, Norway as a minor contributor was not in a position to develop procedures that deviated substantially from those of the US. If the US did not separate between the Taliban and Al Qaeda, it would have been highly difficult for Norway to implement procedures that allowed for such separation.

According to General Frisvold, the issue was not addressed in any depth by the Military.²³⁹ He did not indicate that the Defence Staff made any attempts to legally or operationally separate between members of the Taliban armed forces and Al Qaeda operatives.

Frisvold stated that it was discussed at the political level in the Extended Foreign Policy Committee of the Parliament and in the MoD, but not so much by the Military. The military priority was to get robust ROEs and targeting procedures that allowed for interaction with our allies and took care of own force's security. However, Frisvold confirmed that the

²³⁸ MoD, Hemmer, in E-mail, 14 Juli 09.

²³⁹ Frisvold, interview 8 Nov 2007.

ROE's were designed for war-type operations. Frisvold did not elaborate on, or define more precisely, the implications of war-type operations. For the purpose of this thesis, war-type operations must be assumed to be qualitatively different from, for example, peace support operations, allowing for substantially more robust ROEs. It may consequently be assumed that the ROEs allowed for the use of force outside the scope of mere self-defence.

Available sources suggest that the status of the actors of the Afghan conflict was not addressed in any depth by the political authorities or the military leadership. Political statements to the media indicate a view on the Taliban and Al Qaeda as an operational entity, being termed terrorists or irregulars. If the issue of differentiating between the actors was discussed at the political level it certainly did not reach the public sphere. Consequently, it may be argued that Norway did not make a substantial effort in analysing the actors with the aim of legally or operationally separate the two. Al Qaeda operatives and Taliban soldiers were perceived as an entity and no analysis was required in order to develop separate ROEs or targeting procedures.

ROEs and Targeting

In the following, I will discuss the issue of ROEs and targeting in the Norwegian case, and in particular examine the issues of defining hostilities and "for the time they participate".

The Norwegian contribution to OEF consisted of various capacities as mentioned above. However, the military units most likely to apply force were the Special Forces and F-16 contributions. Since most, if not all, information regarding the Special Forces contribution is subject to classification, I will mainly use the Norwegian F-16 contribution to exemplify the Norwegian case. Whereas the above discussion on the Norwegian case has included references to the public discussion, I will in the following only examine the political and military internal process. Issues of ROEs and targeting seldom reached the public sphere, and were addressed on a very few occasions mainly related to the issue of collateral damage.

The Norwegian units participating in Operation Enduring Freedom were put under US command as an integral part of the operation, though with some national restrictions imposed. Those restrictions were (and are still) classified, but neither General Frisvold nor the Norwegian MoD have indicated any major departures from OEF procedures or ROEs, though the Norwegian policy was less permissive than the US' in some circumstances.²⁴⁰ Norwegian policy, when entering operations like this, has traditionally been to comply with the operation in question's already established ROEs - as long as they did not depart from Norwegian

²⁴⁰ Frisvold, interview 8 November 2007, Hemmer, interview 16 April 2007.

policy, were in accordance with Norwegian interpretations of international law and otherwise in accordance with Norwegian international obligations. This, apparently, was the case also for OEF. In a message from the Norwegian DoD to the Defence Staff summer 2002, it is stated that Norway had not developed national ROEs.²⁴¹ Similarly in a reply to MP Åslaug Haga April 2002, the Defence Minister underlines that “the common Rules of Engagement applicable to the forces are examined and accepted by Norwegian authorities”.²⁴² The implication would be that Norway had accepted and adhered to the ROEs already established for OEF.

However, according to both Krohn-Devold and Frisvold, developing ROEs had high priority when it became clear that Norway would actively contribute to OEF. Krohn-Devold stated that a thorough process had been conducted in the autumn of 2001, aimed at developing robust ROEs that allowed for tight cooperation with US and allied forces, and were in accordance with Norway’s legal obligations.²⁴³ General Frisvold supported this view, emphasising the Military’s focus on developing robust ROEs that would enable Norwegian forces to integrate seamlessly into OEF operations.²⁴⁴ It is not clear whether this meant that Norway at some point in time aimed at establishing a set of national ROEs or just assessed the ones already established for OEF as appropriate also for the Norwegian contribution, though with some adjustments based on national policy. The above statements suggest that the latter appreciation is correct.

According to Colonel Steinar Hannestad who at the time was in charge of the Norwegian Defence Command Situation Centre, the main emphasis in the autumn of 2001 was to prepare Norwegian support to the US as mentioned previously.²⁴⁵ The initial force contributions, such as mine-clearing and CIMIC units, were not supposed to engage in offensive operations, thus minimising the requirement for ROEs outside the scope of self-defence. According to Hannestad, the issue of ROEs, and in particular targeting, gained momentum during the spring of 2002 in connection with planning of the Norwegian F-16 contribution. The F-16s were supposed to support OEF in an Air-to-Ground role in which offensive engagements would be likely. In particular, Norway emphasised the necessity of positive identification of those individuals or groups of individuals to be engaged before use of force was allowed. Hannestad confirmed that this was a prerequisite in order for the

²⁴¹ DoD archives, message of 30 July 2002.

²⁴² DoD, letter to the President of the Storting (Parliament), 25 Apr 2002. Original text: [*Jeg vil imidlertid understreke at de felles Rules of Engagement som styrkene opererer under, er gjennomgått og akseptert av norske myndigheter*].

²⁴³ Devold, reply to questionnaire 6 November 2007.

²⁴⁴ Ibid.

²⁴⁵ Colonel Steinar Hannestad, interview 21 August 2009.

Norwegian units to apply force. Hannestad also mentioned that Norway agreed on a list of specified target categories, against which a forceful engagement could be effected.

Whereas Norway applied to the OEF ROEs, though with some restrictions imposed, there was a clear focus on developing a national targeting policy. Even though Norway had participated in Operation Allied Force in Kosovo, Norwegian forces had not previously been deployed in an offensive posture as was the case for OEF. Deploying Norwegian F-16 to OEF made it clear that Norwegian forces could easily come into the position that they had to apply force, such as dropping bombs on Taliban or Al Qaeda operatives. Norwegian aircraft had not released weapons since the Second World War; hence this would be a novel situation for the Norwegian political leadership, the Military and the public opinion. A situation where Norwegian F-16s bombed Al Qaeda or Taliban forces inflicting casualties would be one of substantial political impact, as actually proved to be the case when Norwegian F-16s attacked enemy forces in January 2003.²⁴⁶

Whereas ROEs are developed to give guidance on when force may be applied, the targeting process deals with the actual application of force. It allows for the military commanders to select particular targets and decide how to deal with them. The US Joint Publication (JP) 1-02 defines targeting as: “The process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities”.²⁴⁷

A decision to apply lethal force may be the result of this process, but a Counter Insurgency (COIN) Campaign like OEF would usually aim at minimising such use of force. The US Field Manual (FM) 3-24, issued in 2006, discusses COIN tactics, and particularly emphasises the necessity of minimising the use of force in order to “win the people” rather than “to beat the enemy”.²⁴⁸ Consequently, the targeting process may result in decisions ranging from increased surveillance and monitoring of particular targets to so-called capture operations aimed at apprehending individuals or, if the situation so requires, ultimately engage a target with lethal force. Both operational and legal considerations are emphasised throughout the process. In particular, each single target will be thoroughly checked against the provisions of International Law before its approval.

As mentioned by Hannestad, the process of developing a Norwegian targeting policy gained speed spring 2002. The Norwegian Special Forces had already been deployed to

²⁴⁶ *Aftenposten*, Editorial, 29 January 2003.

²⁴⁷ *US Joint Publication 1-02*, (2001, as amended through April 2009), found at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf, [19 August 2009].

²⁴⁸ *US FM 3-24* (Washington DC, 2006), pp.11-12.

theatre for some time, but the covert nature of their operations has not allowed for analysis of their procedures. The Norwegian senior officials clearly indicated that the issue of targeting was highly emphasised in particular when planning for the Norwegian F-16 contribution.²⁴⁹ Col Hannestad confirms that whereas the initial Norwegian contributions mostly would require robust self-defence criteria, the F-16 contribution required a focus on developing a targeting policy hitherto unknown in Norway. In a note to the MoD in May 2002 on the issue of targeting in connection with the F-16 contribution, it is stated: “We have limited national political-military competence on targeting issues, and we have no established procedures or a targeting organisation for handling the questions that may arise”.²⁵⁰

When preparing for the Norwegian F-16 contribution, the MoD acknowledged that the Norwegian forces would have to rely heavily on US intelligence and the US targeting process. It would therefore be of vital importance that Norway had representatives in the OEF Chain of Command who had the qualifications needed to assess the quality and reliability of the US-provided intelligence.²⁵¹ In practice, this was done either at the tactical level by on-scene commanders or by so called “red-card holders” situated at various US in-theatre command posts.²⁵² Red-card holders were Norwegian officers handling the Norwegian policy throughout the operation. The red-card holder’s main task was to “do everything possible to assure that the targets were neither civilians nor civilian items, or were subject to particular protection, but were military targets”.²⁵³ The Norwegian representatives in connection with the F-16 contribution were planned to be situated in the US command posts conducting Command and Control over the OEF air assets, such as the Joint Task Force Headquarters at Bagram airfield north of Kabul.²⁵⁴ According to Hannestad, the red-card holders received thorough briefings at the MoD on Norwegian policy, legal obligations and so on.²⁵⁵ Norwegian authorities could thus claim national control over important matters, such as when and under which circumstances Norwegian personnel were allowed to engage in case of hostilities.

Both Frisvold and Hannestad indicated that the political authorities did not deem it necessary to have detailed political control over the selection of single targets, but that target

²⁴⁹ Krohn Devold, reply to questionnaire, 7 November 2007, Frisvold, interview 8 November 2007.

²⁵⁰ DoD, Judicial Branch, note to MoD, 14 May 2002. Original text: [*For Norge har vi liten politisk-militær kompetanse innen targeting problematikken, og vi har ingen etablerte prosedyrer eller en etablert targeting organisasjon for håndtering av de spørsmål som kan oppstå*].

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Hannestad, interview, 21 August 2009.

categories or target types would require some kind of political approval.²⁵⁶ The target categories would have to be legitimate in respect of international law and in line with Norwegian policy. As an example of target categories was mentioned “armed Al Qaeda and Taliban soldiers”.²⁵⁷

Authorisation of engaging targets in any particular event was delegated to either Norwegian lower level commanders, to red-card holders situated at in-theatre command posts or, in some situations, the Chief of Defence.²⁵⁸ General Frisvold recalls an episode where he was jogging on the outskirts of Oslo and received a phone call on his secure phone from the red-card holder at Bagram Airbase in Afghanistan, requesting authorisation to apply force by Norwegian F-16s. After some considerations, he denied the request because it was assumed to be outside the agreed policy, even though the target it self was legally acceptable.²⁵⁹ However, the actual decision would only exceptionally be brought back to Norway. The on-scene commanders and the red-card holders became those who, for all practical purposes, dealt with the issue of if and when Norwegian F-16s could use their weapons.

To conclude on the Norwegian discussion and decision-making process on ROEs and targeting, this thesis asserts the following:

- Norwegian authorities retained responsibility for Norwegian forces’ activities.
- Norwegian political authorities would authorise certain target categories eligible for engagement.
- Norwegian policy would be handled on a day-to-day basis by red-card holders situated in US in-theatre command posts
- Norwegian authorities would have a final approval on what targets could be engaged, mainly by the use of the red-card holders.
- Norway applied to the US OEF ROEs, though with some restrictions imposed.
- Engagement by Norwegian forces would require a positive identification of the enemy.
- Hostile acts or intents were required in order for Norwegian forces to apply force.

²⁵⁶ Hannestad, interview, 21 August 2009, Frisvold, interview 8 November 2007.

²⁵⁷ Note, from MoD to the Governmental Security Committee, 19 June 2002. Original text [Bevæpnede Al Qaida/Taliban soldater].

²⁵⁸ Note, from MoD to the Governmental Security Committee, 19 June 2002. Original text [Bevæpnede Al Qaida/Taliban soldater].

²⁵⁹ Frisvold, interview 8 November 2007.

Analysing the Norwegian process on ROEs and targeting

This thesis asserts that in order to apply force outside the scope of self-defence against a non-combatant, participation in hostilities is required. Whereas individuals belonging to the Taliban armed forces arguably could be targeted using a membership approach in the first phase of the conflict, non-state actors could not. International law requires that non-combatants may be targeted only for the time they actually commit hostilities. The conceptual challenges with this are discussed in Section One. The issue of defining hostilities and active participation is instrumental in order to develop legally robust ROEs and targeting procedures. Consequently, analysing the Norwegian process on ROEs and targeting may be derived from the following two questions.

- How was the issue of hostilities discussed in Norway, and did Norway define hostilities when addressing the issue of ROEs and targeting procedures?
- The issue of “for the time they actively participate” is of major importance in order to decide whether a non-combatant is targetable or not. To which extent was this issue on addressed in the Norwegian discussion and decision-making process?

Defining hostilities

As demonstrated in Section One, international law requires participation in hostilities in order to engage an opponent outside a membership approach. However, what constitutes hostilities may be a question of interpretation. International law does not provide clear guidance on this issue. It is consequently an issue that is left for states to decide, within the boundaries provided by various sources of law and state practice.

The US and its NATO allies differentiate between direct attacks, hostile acts and hostile intents. I will in the following examine the military appreciation of these items, connect it to the Norwegian case and analyse it in connection with the law.

A direct attack would usually justify an armed response based on the “inherent” right to self-defence. A hostile act may typically be an act, not constituting a direct attack, which directly put an individual or unit in harm’s way. An armed response to a hostile act would require ROEs authorising such a response. Since OEF was a US-led operation, I will in the following use US definitions, even though Norway would normally comply with NATO definitions as stated in the MC 362 document.

According to the US Chairman of The Joint Chiefs of Staff Instruction 3121.01A, a hostile act is defined as:

An attack or other use of force against the United States, US forces, and, in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property. It is also force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel and vital US Government property.²⁶⁰

Hostile intent is basically about the threat to use force, and would usually require both intent and ability. However, the causal connection between the activity and its possible harmful consequence is less clear. International law has no precise definition of hostile intent, but as discussed in Section One, it is generally assumed that the closer the perpetrator is to the “triggerman”, the more likely it is to define his or her intentions as hostile.

The US Chairman of The Joint Chiefs of Staff Instruction 3121.01A defines hostile intent as:

The threat of imminent use of force against the United States, US forces, and in certain circumstances, US nationals, their property, US commercial assets, and/or other designated non-US forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel or vital USG property.²⁶¹

Neither a hostile act nor a hostile intent automatically implies that an individual becomes a target that may be dealt with forcefully. Except for cases of obvious self-defence, the application of force will be decided by an authorised commander in accordance with the established ROEs. It may further be of importance to distinguish between acts or intentions of hostility and acts of crime. Application of military force against the latter will be lawful only insofar as law enforcement resources are inadequate, and that the military effort is conducted in support of and in conjunction with law enforcement requirements.

This thesis asserts that the above definitions provide some clarity as to what may constitute hostilities. However, the Afghan conflict provides a variety of examples of activities that do not fit easily into the rather broad definitions above. In Section One, the issue of proximity to the “triggerman” is discussed. It is doubtful whether the above definitions provide sufficient clarity as to how close an individual needs to be to the “triggerman” in order to be assessed as participating in hostilities.²⁶² It could consequently be

²⁶⁰ US Chairman of The Joint Chiefs of Staff Instruction 3121.01A (2000), <http://www.fas.org/man/dod-101/dod/docs/cjcs_sroe.pdf>, [accessed 18 August 2009], p.A5.

US Chairman of The Joint Chiefs of Staff Instruction 3121.01A (2000), <http://www.fas.org/man/dod-101/dod/docs/cjcs_sroe.pdf>, [accessed 18 August 2009], p.A5.

²⁶² See the ICRC discussion on direct and indirect causation in the ICRC Interpretive Guidance on the Notion of DPH in IHL, pp.1020–1022.

expected that states provided further clarification on the definition of hostilities when developing ROEs and targeting procedures.

To what extent did Norwegian authorities discuss the content of the phrase “hostilities” and did it influence the development of ROEs?

Col Hannestad stated that Norwegian forces could only use force as a response to a hostile act.²⁶³ He did not recall that Norway developed a national policy on what would constitute a hostile act, the logical consequence of which would be that Norway complied with the US definitions. The detailed interpretation of what constituted hostile acts was for most practical purposes left to Norwegian in-theatre representatives, such as the red-card holders. According to Frisvold, Norway emphasised developing ROEs and targeting procedures that would assure that Norwegian forces use of force were in accordance with Norwegian policy and obligations, but did not discuss any in-depth definitions of hostile acts or intents.²⁶⁴

The issue of whether hostile intent was deemed sufficient for targeting seems to have been addressed by the Defence Staff and the MoD. Again, it is difficult to assess the precise content of the phrase “hostile intent”. General Frisvold indicated that in connection with the Special Forces contribution, the Military asked for and received approval for the view that hostile intent was sufficient for use of force, including lethal force.²⁶⁵ He did not indicate whether this was in situations of self-defence only, or if hostile intent itself was sufficient for defining a target as hostile outside the scope of self-defence. The latter appreciation would thus have allowed for an individual to be targeted at the choice of OEF forces. Frisvold again indicated that his main aim was to get robust ROEs and targeting procedures that did not hamper military operations or endanger Norwegian units or personnel. According to Frisvold, this was perfectly understood at the political level and the Military “got the ROEs they needed”.²⁶⁶

Whereas it seems that the issue of defining hostility was not widely discussed, the issue of target categories attracted some attention. Target categories are generally not specified, but MoD documents clarify that target categories must be “legitimate military targets”. As an example of a target category, one document mentions: “Armed Al Qaeda/Taliban soldiers”.²⁶⁷ This is to some extent related to the issue of defining hostilities

²⁶³ Hannestad, interview 21 August 2009.

²⁶⁴ Frisvold, Interview, 8 November 2007.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

because it would allow for engaging certain categories of individuals or installations, if those individuals otherwise satisfied the conditions of being classified as hostile. As discussed above, Norwegian authorities did not seem to distinguish between the Taliban and Al Qaeda, either from an operational or legal perspective. Neither Frisvold nor Hannestad indicate an appreciation of Taliban and Al Qaeda as separate entities requiring individual procedures. In a note to the Defence Minister, the issue of targeting procedures and ROE's was discussed.²⁶⁸ It discusses the necessity of politically approved target categories. The document does not reveal or discuss actual ROEs, but indicates the challenges that must be met by those ROEs.

The document states that the political level need to approve certain target categories, but that the actual target designation within those already approved categories did not require political endorsement. The reference to "target categories" was repeated in a MoD note to the meeting of the Governmental Security Committee on the 20th of June 2002.²⁶⁹ If "Armed Al Qaeda/Taliban soldiers" were defined as a target category, one would expect that the ROEs allowed for their engagement or capture. Without detailed insight in the actual ROEs, the issue is difficult to address. However, from the perspective of international law, this categorisation raises at least one significant issue. By the time these documents were written, the conflict was still perceived as an international armed conflict. Taliban soldiers could consequently be targeted by a membership approach, whereas Al Qaeda operatives could not. Al Qaeda operatives could only be targeted for the time "they were directly participating in hostilities". It may consequently be argued that from the perspective of international law, Taliban soldiers may be categorised as a "target category" in the initial phase, whereas it is questionable whether international law allows for such categorisation of a non-state actor like Al Qaeda. Available sources suggest that this issue was not addressed. From the establishment of the interim administration in June 2002, the Taliban would no longer be assumed to represent a state entity and would consequently be categorised as non-state actors no different from Al Qaeda operatives. From this point in time, also targeting the Taliban would require a sufficiently clear connection to their participation in hostilities.

The use of target categories indicates a membership approach. In non- international conflicts where the opposition is not combatants, i.e. civilians, their targetability depends on their direct participation in hostilities, not by belonging to certain and possibly identifiable groups. The issues of military necessity and proportionality will clearly influence the targetability of certain targets also in non-international conflicts. However, the threshold for

²⁶⁸ Note to MoD, 14 May 2002.

²⁶⁹ Note from MoD to the Governmental Security Committee, 19.June 2002.

applying force outside the scope of combating individuals or groups of individuals directly participating in hostilities must be assumed to be higher in non-international than in international armed conflicts. It may consequently be questioned to which extent the use of target categories in this case is feasible insofar as it is not connected to a viable definition of hostility.

Statements from military and MoD officials and discussions in MoD documents indicate a pragmatic approach to these issues. A finely tuned judicial approach that distinguished between the Taliban and Al Qaeda could hamper operational freedom, thus reducing the forces' ability to act purposefully. Defining certain target categories as eligible for engagement would obviously ease the decision-making process, a process that would frequently require swift decisions. As the previous discussion demonstrates, there was an almost complete unanimity within the political community and the bureaucracy of the necessity to support the US and OEF. This may, at least partially, explain that finely tuned judicial assessments were not perceived as necessary as long as Norwegian use of force was assumed not to violate Norwegian obligations or policy.

To conclude the discussion on defining hostilities, this thesis asserts the following.

- Norwegian units were committed to Norwegian law and the country's international obligations, also when those rules and obligations contradicted those of the lead nation, being the US.
- The Norwegian discussion and decision-making process mainly focused on developing a suitable process for handling ROEs and targeting procedures process.
- Norway agreed on specific target categories as being eligible for engagement. Target categories should be in accordance with Norway's policy and international obligations.
- A positive identification of individuals or groups of individuals was necessary before use of force was acceptable.
- Norway did not distinguish between Taliban and Al Qaeda for operational purposes.
- Available sources suggest that defining hostilities was not addressed within the Norwegian process. The definitions applied by the US would consequently apply also for Norwegian units.
- Handling Norwegian policy was in most instances left to Norwegian in-theatre representatives, such as the red-card holders.

For the time they participate

The next issue is the Norwegian discussion of *for the time they participate*. Section One particularly addresses the so-called revolving door problem; individuals partly participating in hostilities and partly carrying on with their normal civilian life. As discussed in Section One, the revolving door problem is one of substantial interest when addressing the use of force and non-state actors. Non-state actors will in most cases have the status of civilians, thus not being targetable by a membership approach. This thesis argues that the targeting of such individuals outside the scope of self-defence would require a definition or appreciation of “for the time they participate”. To which extent was this an issue in the Norwegian discussion and decision-making process?

It is possible to foresee a situation where Norwegian F-16s would be called to attack a target that had been perceived to represent a direct threat to ground forces, but were withdrawing by the time the aircraft were in position to release its weapons. A narrow approach to the issue of DPH would not allow for engagement, whereas a wider approach would permit engagement based on the assumption that the withdrawing forces could constitute a future threat.²⁷⁰ Apparently, this issue was not addressed in any depth within the Norwegian decision-making process.

The Norwegian MoD did not provide definitions or guidance of *for the time they participate*.²⁷¹ According to Hemmer, the limitations were assumed to be taken care of through the targeting process “based on international law, ROEs, SPINS etc”.²⁷² General Frisvold did not indicate that any efforts were taken within the military leadership in order to develop guidance on the matter. Frisvold’s comments indicate that the military was not too concerned with this issue and mainly saw it as a judicial and political matter. This coincides with Hannestad, who pointed out that most decisions regarding use of force were left to the in-theatre representatives, based on their knowledge of Norwegian operational capacities, Norwegian policy and legal obligations. Hannestad indicated that there may have been an issue of immediacy with respect to whether an armed response could be justified. Hannestad further stated that the Norwegian F-16s main task was to be on airborne alert positions, using their weapons as a response to a situation requiring urgent response. There are no indications that the Norwegian F-16s participated in pre-planned offensive engagements. It may

²⁷⁰ Whether withdrawing forces may be considered DPH depends on whether they were regrouping to prepare for later attacks, or effectively were escaping, thus not constituting a future threat. The ICRC Interpretive Guidance would rule out attacking escaping forces since they would not comply to the definition of being directly engaged in hostilities, see the Interpretive Guidance, Deployment and Return, p 1033

²⁷¹ MoD, Hemmer, E-mail, 14 July 09.

²⁷² Ibid, Original text: [*basert på folkerettslig bakgrunnsrett, gjeldende ROE, SPINS etc*].

consequently be argued that Norwegian use of force in most cases would fall under the self-defence paradigm. However, it is questionable whether the actual *modus operandi* of OEF would remove the requirement of defining “for the time they participate”.

Evidence suggests that no national policy on “for the time they participate” was developed, nor that the issue was addressed at any depth within the MoD or with the Norwegian red-card holders. It consequently seems that the issue was left almost entirely to the red-card holders for interpretation. This thesis thus argues that the issue of “the time they participate” was not addressed in any depth within the Norwegian discussion, and was consequently no factor in the decision-making process as to Norwegian forces’ use of force.

Conclusion, Section Two

Whereas Section One provides the conceptual framework of the use of armed force against non-state actors, Section Two examines the Norwegian perception of contemporary conflicts and the legal aspects of the Norwegian support to the US and participation in Operation Enduring Freedom.

The Norwegian post-Second World War history with respect to the use of force have predominantly been focused on either the defence of Norway in case of a supreme emergency, or UN-led, so-called blue-helmet operations. The Norwegian participation in Operation Allied Force in 1999, and in particular Operation Enduring Freedom, marked a departure from this tradition. This thesis argues that by September 2001, the Norwegian perception of war was predominantly that of a major conflict between states, not the fragmented battlefield of Afghanistan or similar conflicts. The supreme emergency represented by the possible scenarios of the Cold War was still at the core of Norwegian defence planning, as for example the Norwegian Joint Operational Doctrine of 2000 demonstrates. However, both the military and political leadership were cognisant of the particularities posed by the 9/11 attack and the consequent US attack on Afghanistan, though there was a general reluctance to term the conflict war.

As demonstrated in Section Two, Norwegian politicians made several statements that indicated a perception of the complexity of the Afghan conflict. Military means was mentioned as one of many means that could be used in order to solve the Al Qaeda and Taliban problem. It thus seems clear that already by autumn 2001, Norwegian politicians did not foresee a pure military solution for Afghanistan.

Neither the political leadership nor the bureaucracy or the military leadership indicated that there were controversies or disagreements regarding the legal issues of the Norwegian participation in OEF. The US claimed that the 9/11 attack was an act of aggression. This view was supported by the Norwegian Government and a vast majority in Parliament. The public discussion, as it appeared in Norwegian newspapers, indicated a widespread support for the US and the right to respond against the attackers. Some critical voices were raised, predominantly by representatives of the legal academic communities and representatives of the political left. However, these objections did not gain substantial support, and remained an exception throughout the timeframe discussed by this thesis.

This thesis argues that the Afghan conflict in its initial phase partly qualified as an international and partly a non-international armed conflict, whereas it qualified solely as a non-international armed conflict in its second phase. The Norwegian position was arguably that it qualified as an international armed conflict in its initial phase and changed status to a non-international armed conflict after the establishment of the interim Government in June 2002. Dividing it into two legally distinct conflicts was not addressed and as a consequence, Norway did not distinguish operationally or legally between the Taliban and Al Qaeda. Both Frisvold and Krohn Devold stated that developing ROEs and targeting procedures were emphasised in the autumn of 2001 in connection with the initial force contributions. However, other sources, like the MoD archives, suggest that developing suitable ROEs and targeting procedures first gained momentum by the spring of 2002 in connection with the planning of the Norwegian F-16 contribution. Norway emphasised developing robust ROEs that would allow for seamless integration with the US. In principle, OEF ROEs and targeting procedures were accepted by Norway, though with some national restrictions imposed so as not to violate Norwegian policy or legal obligations.

The particularities of using military force against non-state actors with respect to defining hostilities and DPH were not addressed in any depth. The issue was supposed to be dealt with by Norwegian red-card holders or in-theatre commanders based on their knowledge of Norwegian policy and operational necessity.

Summary, conclusion and closing remarks

This thesis argues that whereas the international legal system covering international armed conflicts is well developed, non-international armed conflicts do not boast similar attention. As a result, the predominant contemporary conflicts are not covered by a comprehensive legal regime. In addition, the legal regime covering non-international conflicts does not have the same universal legitimacy as for example the GC I–IV. The lack of a comprehensive legal regime allows for a wider interpretation of the rules based on state interest, as the US position with respect to the status of Taliban soldiers and Al Qaeda operatives demonstrates.

When Norway decided to support the US by a military contribution to OEF, it was clear that this would not be a peace support operation under the auspices of the UN. As such the participation deviated substantially from the post 2 WW experiences of the Norwegian military and what was commonly assumed to be the Norwegian approach, the so called UN track. In addition, the Afghan conflict did not compare to the general perception of war in Norway. It was a new type of conflict, to which Norway had highly limited experience. Consequently, Norway's participation in OEF required an appreciation of major issues connected to the application of law and the use of force that previously had not been addressed in any depth in Norway.

Hence, the core issues to be examined by this thesis were:

1. The major issues of legality related to the application of military force against non-state actors, hence providing a normative framework that may serve as a basis for further analysis.
2. The impact and relevance of law in the Norwegian discussion and decision-making process prior to and during the initial phase of Operation Enduring Freedom

In Section One, the major issues of legality connected to the application of force against non-state actors is discussed. Initially, the thesis clarifies that the general provisions for the legal use of force, in particular by addressing the provisions relevant to non-international armed conflicts. It argues that claiming self defence against non-state actors, as were the case of the US vs. Al Qaeda, is a matter of some controversy. Recent state practice and evolution within international law indicate that non-state actors may conduct acts of aggression, thus justifying a state's armed response against the actors in question. Such a perception opens for, at least in theory, the existence of an armed conflict between a state and a non-state actor, a view substantially supported by the UNSC resolutions 1368 and 1373. US

statements after the 9/11 incident indicate that this was the US position towards Al Qaeda. This thesis argues that the use of armed force against non-state actors are mainly connected to the issues of acts of aggression, classification of the conflict, status of the actors and their identification, and finally the issue of targeting. It argues that use of armed force against non-state actors is lawful only insofar as it is connected to the conduct of hostilities. However, the preconditions set by international law for non-state actors to be perceived as a party to an armed conflict, hence allow for a membership approach, does not fit the particularities of the Afghan theatre. As such, targeting Al Qaeda operatives is lawful only insofar as they take direct part in hostilities. Consequently, this thesis argues that the key questions are to identify criteria for defining hostilities and “for the time they participate”. The current legal regime does not provide precise definitions for either of these issues. As the case stands, the ICRC interpretive guidance argues in favour of a far less permissive practice than what is current state practise in e.g. the Afghan conflict.²⁷³

In section two, the thesis examines the impact and relevance of law in the Norwegian discussion and decision making process. It argues that even though the issue of international law was highly visible in the Norwegian public discussion, it was not a substantial part of the decision-making process. Based on the examination above, it suggests that there are three main reasons why this was not the case:

First, understanding the changing character of war: The issue of the changing character of war is important because it relates to the understanding of law in armed conflicts. If the Norwegian perception of war did not allow for the Norwegian participation in OEF to be termed war, that could create serious challenges as to which legal regime should be applied. Statements from Government officials and leading politicians suggest some appreciation of the particularities of the Afghan conflict, but not a deeper understanding of how those particularities would connect to law.

Second, the factors of time and unanimity: The process of dealing with the Afghan conflict and preparing military capacities to the US efforts were subject to considerable time pressure. The time factor, combined with the obvious political momentum to support the US, did not allow for finely tuned judicial assessments. In addition, the almost complete unanimity between the various actors of the decision-making process added to the appreciation that finely tuned judicial assessments were not necessary.

²⁷³ Whereas the ROEs and targeting processes of ISAF and OEF are classified, there is no doubt that the ISAF and OEF procedures open for the active targeting of individuals outside the scope of the ICRC Interpretive Guidance (based on my own experiences from the theatre).

Third, the issue of pragmatism: Norwegian decision-makers had no doubt that OEF was legal, and that Norway was obliged to support the US militarily. Since Norway was a minor contributor, developing a national set of rules for the application of force would be highly complicated. If the Norwegian rules and procedures departed too much from those of the US, Norway would hardly be welcomed into the coalition. Statements from Government officials suggest that this must have been assessed as contradictory to Norwegian interests. This thesis asserts that the development of a Norwegian ROE and targeting process thus concentrated on examining the US regulations, and be assured that they did not depart too much from what otherwise would be Norwegian policy. Apart from less permissive targeting procedures, there are no indications that the Norwegian procedures departed substantially from those of the US.

This thesis concludes that, even though law played a substantial rhetorical role, neither the Norwegian discussion nor the decision-making process addressed the issue of applying military force against non-state actors in the Afghan conflict in any depth. The rhetorical focus did not translate into a thorough examination of the particular issues that derive from such use of force. Norway did not distinguish operationally between the Taliban and Al Qaeda in the conflict's initial phase, it did not make an in-depth analysis of the status of the actors and it did not develop a national policy for defining hostilities or DPH. Evidence suggests that Norway did not address in any depth the provisions of GC I–IV article 3, GC additional protocol II or other sources of law relevant to the Afghan theatre. Neither did Norway develop a national policy on how to deal with these provisions. The policy and procedures of the US were, with some exceptions, accepted by Norway.

The political debate since the 2001 decision to support OEF has not moved substantially on the matter of law. It is widely acknowledged that the Afghan conflict qualifies as a non-international armed conflict, but the political leadership seems to make a distinction between armed conflict and war, still reserving the latter term for international armed conflicts.²⁷⁴ The Norwegian position on the ICRC Interpretive Guidance is not known, but current practise in the Afghan conflicts suggests that Norway concur to the ISAF ROE and targeting procedures, thus applying a more permissive policy than the recommended by ICRC.²⁷⁵ The Norwegian military contribution to ISAF is widely recognised throughout the political establishment and, apart from some objections put forward by the Socialist Party, has unanimous support in Parliament. The particular issues of law addressed in this thesis remains

²⁷⁴ Dagbladet, 10 November 2007. Interview, Minister of Finance, Mrs Kristin Halvorsen.

²⁷⁵ Base on the authors experiences from serving in ISAF.

almost absent in the public and political discussion; hence the particularities of the Afghan conflict with respect to IHL are still an area that would benefit from political and public attention.

Acronyms:

Acronym	Meaning	Explanation
CIMIC	Civil Military Cooperation	
COIN	Counter Insurgency	
DoD	Department of Defence	
DPH	Directly Participating in Hostilities	
GC	Geneva Conventions	
HRL	Human Rights Law	
ICC	International Criminal Court	
ICJ	International Court of Justice	
ICRC	International Committee of the Red Cross	
IDF	Israeli Defence Force	
IHL	International Humanitarian Law	
IRA	Irish Republican Army	
ISAF	International Security Assistance Force	
ISI	Inter-Services Intelligence	Pakistani Military intelligence Service
LOAC	Law of Armed Conflict	
MC	NATO Military Committee	
MoD	Minister of Defence	
MP	Member of Parliament	
NATO	North Atlantic Treaty Organisation	
OEF	Operation Enduring Freedom	
POW	Prisoner of War	
PRIO	Peace Research Institute Oslo	
ROE	Rules of Engagement	
SPINS	Special Instructions	Explanatory or supplementary amendments to the document's main body. Used in military orders and ROE documents
UK	United Kingdom	
UN	United Nations	
UNGA	United Nations General Assembly	
UNSC	United Nations Security Council	
US	United States of America	
VG	Verdens Gang	Newspaper
WMD	Weapons of Mass Destruction	
4GW	Forth Generation Warfare	

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