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Jus ad Pacem in Bello? Afghanistan, Stability Operations and the International Laws Relating to Armed Conflict

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Introduction

One of the more notorious quotations widely attributed to George W. Bush, when he was campaigning for the presidency of the United States in 2000, was something to the effect that "[w]e don't do nation-building." As with many attributed quotations, the actual remark he made was less curt and slightly more nuanced. What actually happened was that in the course of a presidential debate with his opponent, Vice President Al Gore, Bush was asked if he would have supported US military involvement in the ill-fated expanded United Nations Operation in Somalia (UNOSOM II) in 1993–94[1] had he been president at the time. This is what he actually said in reply:

> [Somalia] [s]tarted off as a humanitarian mission and it changed into a nation-building mission, and that's where the mission went wrong. The mission was changed. And as a result, our nation paid a price. And so I don't think our troops ought to be used for what's called nation-building. I think our troops ought to be used to fight and

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> win war. I think our troops ought to be used to help overthrow the dictator when it's in our best interests. But in this case [i.e., Somalia] it was a nation-building exercise, and same with Haiti.[2] I wouldn't have supported either.[3]

This antipathy notwithstanding, and despite former President Bush's best efforts amid the rhetoric of the "Global War on Terror," the realities of the transnational military operational environment in the first decade of the twenty-first century have produced an exponential growth in the importance of what are now generally termed stability (or stabilization) operations, to such an extent that even US military doctrine now acknowledges such operations as "a core U.S. military mission . . . [to] be given priority comparable to combat operations."[4] The Ministry of Defence in the United Kingdom, whose long experience with so-called "small wars" in the postcolonial context during the withdrawal from Empire (approximately during the period 1945–65, including conflicts in Palestine, Malaya, Cyprus, Kenya and Aden) has led some foreign observers to suggest a particular mastery of nation-building and counterinsurgency campaigns,[5] has only recently—in January 2009—circulated a working draft of what will eventually become the first promulgation of a British doctrine on such operations.[6]

The current campaign in Afghanistan has been described as "a test case for international development assistance and bi- and multilateral cooperation"[7] even in the midst of sustained combat operations in substantial parts of the country, whereby "the main problems . . . are restoring security and establishing a functioning state."[8] Stability operations seem to have become the catchphrase for a new generation of military actions: indeed, they have come to be viewed as an essential stage in the type of conflicts most prevalent today, namely, asymmetric conflicts between State and non-State actors. In order to win the war it has become essential, in places like Iraq and Afghanistan, to win the peace, and that is done by stabilizing the situation in theater after the initial opposition has been defeated or at least contained.[9] The moment of hubris, when President Bush landed on the aircraft carrier *USS Abraham Lincoln* on May 1, 2003 and declared that major combat operations in Iraq had ended, did not in fact herald the conclusion of hostilities in Iraq: the coalition merely swapped one enemy (the State armed forces of the defeated Saddam Hussein regime) for another (various assorted non-State militias representing different sectors of Iraqi society, along with groups affiliated with Al Qaeda). In Afghanistan, by way of contrast, the main enemy has stayed the same—i.e., the Taliban—but its status changed from being the de facto government in control of up to 90 percent of Afghan territory in September 2001, to that of an insurgency dispersed in (mainly) the southern provinces of Kandahar and Helmand. Although intensive military operations against the Taliban continue, international

coalition forces in Afghanistan, acting in concert with the Afghan government of President Hamid Karzai, are attempting at the same time to continue apace with the reconstruction and development of the country: in a word, nation-building.[10]

Military operations in circumstances such as those prevailing in Afghanistan are situated at the intersections of two major fault lines in public international law: namely, they are at the junction of the *jus ad bellum* and the *jus in bello*, and simultaneously (within the *jus in bello*) at the junction of international and non-international armed conflicts. This article will, first, define stability operations in doctrinal terms and situate them within an international legal context. The significance of their legitimacy under the *jus ad bellum* will be briefly considered and related to the context of Afghanistan before their classification in terms of the international law of armed conflict (LOAC) will be analyzed. The application of the *jus in bello* to such operations will then be discussed, with reference to some specific operational problems such as the status and treatment of insurgents captured by coalition forces in Afghanistan, and the targeting of such insurgents. Finally, some tentative conclusions will be suggested as to the international law applicable to stability operations.

From Peacekeeping to Stability Operations

The phrase "stability operations" may represent, to some extent, new terminology; but it does emphatically not refer to a new phenomenon in the continuum of military operations. The military doctrinal term previously applied in the United States and United Kingdom was "military operations other than war" (MOOTW), a term that somehow always seemed to carry a faint hint of derision but nevertheless was undeniably useful as a catch-all phrase: in effect, it covered practically the entire spectrum of military operations, excluding only all-out "war."[11] From the mid-1950s until the early 1990s the principal manifestation of MOOTW was in "classic" peacekeeping operations undertaken pursuant to UN mandates.

Starting in 1992 with the situation in Somalia, the United Nations began to use two new terms—"peace enforcement" and "peace building"—which were distinguished from traditional peacekeeping. While *peacekeeping* involved the interposition of a military force with host State consent in order to supervise ceasefire or peace agreements already in place, typically with very restrictive rules of engagement that extended no further than authorizing the use of force in self-defense, *peace enforcement* came to be used to refer to what might be described as a "beefed-up peacekeeping operation," namely one in which the situation remained unstable enough to allow for an expansion of the permitted use of force in order to maintain the peace. This would generally occur in situations where the parties to the conflict might have reached a ceasefire or interim peace accord, but

its observance was too fragile for the interpositional force to preserve a passive role. Peace enforcement, in other words, was proactive and essentially involved the international force taking sides in the enforcement of obligations already entered into by the belligerents.[12] *Peace building*, on the other hand, encompassed a much wider range of activities designed to prevent the resumption or proliferation of a particular conflict, from disarmament and demobilization of the warring parties to election monitoring, from the strengthening of State institutions to the promotion of human rights and from the repatriation of refugees to the provision of humanitarian aid.[13] UN-mandated missions throughout the 1990s in Somalia, Haiti, Bosnia and Herzegovina, and Kosovo all had various combinations of the above list of activities taking place simultaneously. Their salient feature for the purposes of this discussion was that they all took place in conditions of continuing armed conflict or, at the very least, serious civil unrest.

Strangely, however, although the range of activities being assigned to these missions grew and although there was often manifestly no peace to keep, few outside the United Nations adopted the new terminologies outlined above: within the US government, for example, Congress continued to use the generic term "peacekeeping" to refer to all such operations, while the executive branch adopted the similarly generic "peace operations." In both cases, the inclusion of the word "peace" was manifestly misplaced since it created the misleading impression that such operations involved comparatively little risk for the military personnel assigned to them, whereas in fact they often saw soldiers in what amounted to full-scale warfighting operations. This, coupled with the stigma of failure that came in many circles to be attached to "peace operations" in 1990s, contributed—at least on a psychological level—to the shift in language away from peace and toward stability. Peace became the endgame, the ultimate objective to be achieved; hence, *jus ad pacem*. But the realities on the ground in places like Iraq and Afghanistan, with all their complexities and ambiguities, forced a general recognition that in order to have peace, it is necessary to have stability.

The US Department of Defense currently characterizes stability operations as "[m]ilitary and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions."[14] The US doctrinal definition of stability operations ("missions, tasks and activities [that] seek to maintain or reestablish a safe and secure environment and provide essential government services, emergency infrastructure reconstruction, or humanitarian relief"[15]) is situated within the following contemporary context:

> The character of this conflict [i.e., the post-2001 security environment] is unlike any other in recent American history, where military forces operating among the people of

> [the] world will decide the major battles and engagements. The greatest threats to our national security will not come from emerging ambitious states but from nations unable or unwilling to meet the basic needs and aspirations of their people. Here, the margin of victory will be measured in far different terms from the wars of our past. However, time may be the ultimate arbiter of success: time to bring safety and security to an embattled populace; time to provide for the essential, immediate humanitarian needs of the people; time to restore basic public order and a semblance of normalcy to life; and time to rebuild the institutions of government and market economy that provide the foundations for enduring peace and stability. This is the essence of stability operations.[16]

It is very telling—and very relevant for the assumption of this author, that the conduct of stability operations must be subject to the international law of armed conflict—that this description of the context for stability operations explicitly places them within a continuum of military operations, that is to say, in a spectrum of activity that in itself is closer to war than to peace.

In the United Kingdom, despite the lack at present of a formally promulgated doctrine on stability operations, military thinking is very much on the same lines as that of our US counterparts. Stability operations are understood to be those that impose security and control in a defined area while restoring and developing infrastructure and services, in collaboration with appropriate civilian agencies. They may involve kinetic or non-kinetic applications of force and may occur before, during or after major combat operations; or indeed, they may in themselves be the primary objective of a campaign. Their desired endgame, ultimately, is always to secure a transition of power and control to the civilian authorities of the host State. Recently the Chief of the UK General Staff characterized stability operations as involving "several different lines of operation—ensuring security, rebuilding essential services, promoting good governance and facilitating economic regeneration."[17] Discussing future trends for the British armed forces, he said:

> Instead of adapting each time we deploy, it is clear from recent experiences that we should be structured and trained to conduct an Intervention and Stabilisation operation almost as the default setting, with the right forces and the correctly qualified personnel with the right training to deliver the right effect from the outset.
>
> And this will require both kinetic and non-kinetic means—there will always be a need for soldiers who are trained to fight a hostile and implacable enemy, but there will also be a need for soldiers who are trained to deliver essential services until the situation is safe enough for civil agencies to engage; so there will be a need for soldiers trained to deliver humanitarian assistance, to assist with the delivery of local governance[,] and for soldiers who are experts in the local politics and culture of the area, and who can therefore initiate the early stages of reconciliation and peace-building.[18]

Perhaps the most significant aspect of General Dannatt's remarks is his suggestion that stability operations be regarded "almost as the default setting" for future British military capabilities. This reflects the British view that "major combat operations"—full-scale inter-State armed conflicts which have as their objective the total defeat of a governmental enemy, leading to its removal from power—are very much the exception in the contemporary paradigm of "fourth-generation warfare." In both the Afghanistan (2001) and Iraq (2003) campaigns, operations directed against the State (the Taliban in the former case, Saddam's armed forces in the latter) were over remarkably quickly; yet counterinsurgency fighting continues to this day, alongside attempts to transform the institutions and infrastructure of these failing States into stable, functioning authorities that are able to maintain law and order. Whether or not one accepts *in abstracto* the Bush administration's characterization of the contemporary security environment for America and her allies as a "long war,"[19] ongoing stability operations in Afghanistan and Iraq have aspects that definitely amount in effect to "war," even while the stated objective is peace.

Stability operations are nowhere mentioned in international law; neither the *jus ad bellum* nor the *jus in bello* explicitly recognizes the concept. Nevertheless, in light of the foregoing, it must be stated categorically that a key feature of contemporary stability operations is international legitimacy (as will be seen in the next section with specific reference to Afghanistan). While legitimacy is not the same thing as legality, the prevalent view in both the United States and the United Kingdom is that the main framework for international legitimacy *is* international legality: stability operations must take place on the basis of sound authority in international law, and must be conducted (in their specifically military aspects) in accordance with the international law of armed conflict.

Stability Operations and the Legality of the Use of Force

Two salient features of contemporary stability operations are that they tend to be (1) multilateral, i.e., conducted by coalitions, whether ad hoc or (preferably) within the framework of an established military alliance, like the North Atlantic Treaty Organization (NATO); and (2) legitimate, i.e., constituting a lawful use of force under either the UN Charter or customary international law—normally the former, since no stability operations as presently understood have taken place on such a controversial legal basis as the doctrine of humanitarian intervention, for instance. Current operations in Afghanistan will hereinafter be taken as the case study for discussion of stability operations and international law.

Although US and coalition forces first commenced military action against the Taliban militia and Al Qaeda elements in Afghanistan in Operation Enduring

Freedom (OEF) on October 7, 2001 pursuant to the right of individual and collective self-defense as recognized in Article 51 of the UN Charter (for which no Security Council mandate is legally required), and OEF continues to this day primarily in southern and eastern Afghanistan, internationally-mandated forces were first deployed to the country only in December 2001, after the Taliban had been ejected from its seats of power. The last main Taliban urban stronghold, Kandahar, was captured by coalition forces on December 7, two days after the signing of the Bonn Agreement, in which delegations of various Afghan political factions committed themselves to cooperation in the establishment of an Interim Authority that would rebuild the Afghan State after decades of conflict.[20] The Bonn Agreement specifically requested the Security Council

> to consider authorizing the early deployment to Afghanistan of a United Nations mandated force. This force will assist in the maintenance of security for Kabul and its surrounding areas. Such a force could, as appropriate, be progressively expanded to other urban centres and other areas. . . . It would also be desirable if such a force were to assist in the rehabilitation of Afghanistan's infrastructure.[21]

On December 19 two letters arrived at UN headquarters: one from the Afghan Minister for Foreign Affairs and the other from his British counterpart. The former stated somewhat opaquely that the envisaged international security force "could be deployed under Chapter VI or VII of the Charter."[22] The latter expressed the UK's willingness to serve as the initial lead nation for the proposed deployment, known as the International Security Assistance Force (ISAF), with the core missions of (1) assisting the establishment of the Interim Administration of Afghanistan in liaison with the UN Secretary-General's Special Representative in Kabul; (2) providing advice and support to the Afghan administration and the United Nations in Kabul on security issues; and (3) preparing for the establishment and training of new Afghan national armed and security forces, key infrastructure development "and possible future expanded security assistance in other parts of Afghanistan."[23] The British letter did not refer to specific chapters or articles of the UN Charter as the legal basis for the proposed deployment, but stated that it would be "based on the willingness expressed [on the part of the Afghan administration] to receive such a force and an authorizing Security Council resolution."[24] The letter also emphasized that the proposed international force "will have a particular mission authorized by a Security Council resolution that is distinct from Operation Enduring Freedom."[25] One day later, the Security Council, acting under Chapter VII of the Charter, passed the resolution referred to in the British letter and authorized the establishment, for an initial six months, of ISAF.[26] Apart from assisting in the

maintenance of security in Kabul and surrounding areas,[27] the only other task expressly mandated to ISAF at this stage was "to provide assistance to help the Afghan Interim Authority in the establishment and training of new Afghan security and armed forces."[28] As far as the use of force by the mission was concerned, the Resolution authorized ISAF troop-contributing nations (TCNs) to take "all necessary measures to fulfil its mandate."[29]

At this stage, therefore, ISAF was clearly an ad hoc "coalition of the willing" formed by mandate of the Security Council under Chapter VII of the Charter, with the use of force authorized in terms whose broad ambit recalls Article 42 of the Charter ("such action . . . as may be necessary"). The emphasis by the British—and other TCNs—on Afghan consent to the operation, however, would seem to militate against ISAF being an Article 42 enforcement action, since such actions are mandatory in nature and do not require host State consent. It would plainly be absurd to classify the ISAF mission as classic peacekeeping, because of the extent of actual fighting that was taking place in Afghanistan at the time of the force's initial deployment and that continues to this day. Perhaps better—albeit still imperfect—analogies might be the UN's enforcement actions in respect to Korea (1950), the Congo (1960) and Haiti (2004). The first case, that of Korea, was in fact the first instance in which the phrase "coalition of the willing" came to be used in the context of UN enforcement actions. Following the invasion of the Republic of Korea (ROK) by the forces of the Democratic People's Republic and the ROK's appeal to the UN for help, Resolution 83 of the Security Council recommended "that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the [North Korean] armed attack and to restore international peace and security in the area."[30] The result was three years of intensive hostilities, but the UN-ROK forces were not organized into a UN mission as such, nor was their contribution mandatory: it should be remembered that Resolution 83 merely *recommended* that UN member States provide military assistance to the ROK. Moreover, there was no civilian component and the operation was a classic warfighting campaign, with none of the reconstruction and development activities associated with stability operations.

In the second case the United Nations, having received a request for military assistance from the Prime Minister of the newly-independent Congo in the face of Belgian military intervention and the attempted secession of the province of Katanga, authorized the Secretary-General "to take the necessary steps . . . to provide the Government with such military assistance as may be necessary until . . . the [Congolese] national security forces may be able, in the opinion of the [Congolese] Government, to meet fully their tasks."[31] A subsequent resolution on the same matter urged "that the United Nations take immediately all appropriate measures

to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort."[32] Although the resulting force, the *Organisation des Nations Unies au Congo*, was officially a peacekeeping mission, it did become involved in actively suppressing the Katangese secessionists, thereby taking sides in a way that peacekeeping missions do not normally do. A remarkably complex operation for the time, with large civilian and technical components alongside military troops, it eventually came to number some twenty thousand officers and men.

The third case is perhaps the closest analogy to the deployment of ISAF: the Security Council created the *Mission des Nations Unies pour la stabilisation en Haïti* (MINUSTAH) in 2004,[33] a decade after authorizing a multinational force to intervene and effect "regime change." MINUSTAH is Brazilian-led and comprises some nine thousand personnel, with both military and civilian components; its wide-ranging tasks include ensuring a secure and stable environment (including reforming the Haitian National Police and protecting civilians from imminent threat of physical violence), supporting the constitutional and political process (including the administration of elections and the extension of State authority and good governance at all levels throughout Haiti), the promotion and protection of human rights[34] and the facilitation of humanitarian assistance.[35] Within that framework, in 2004–05 MINUSTAH personnel executed large-scale military raids, using lethal force, on the slum of Cité Soleil in the capital city of Port-au-Prince (an anarchic area in which armed gangs roam the streets shooting, looting, raping and kidnapping), with subsequent allegations of excessive collateral damage;[36] MINUSTAH soldiers have been killed, also.

In Afghanistan, strategic command, control and coordination of ISAF was assumed unilaterally by NATO on August 11, 2003,[37] and it remains a NATO operation to the present time—still separate from the American-led OEF, which has a far smaller number of TCNs and is not being executed within the framework of an international organization. The Afghan government immediately approved of NATO's assumption of the ISAF mandate and, indeed, addressed a formal request to the Security Council to expand the mandate so as to permit deployments of ISAF outside the Kabul area;[38] thus host State consent has continued to be a crucial element of the legal basis for stability operations in Afghanistan. This was then acknowledged and formalized by the Security Council in Resolution 1510, which authorized the expansion of ISAF's mandate and the continued use of all necessary measures to fulfill that mandate.[39] The ISAF mandate is renewable at yearly intervals, the latest Security Council authorization at the time of writing dating from September 22, 2008.[40] Current troop levels are approximately 55,100, supplied by a

total of forty-one States under NATO leadership.[41] Particularly prominent among ISAF's activities for some years have been the Provincial Reconstruction Teams (PRTs), which operate at a local level to rebuild infrastructure.[42] With the increasing emphasis on the need to transfer more and more capability and power in the field of security to the Afghan National Army (ANA), a major aspect of ISAF's operations now is the Operational Mentor and Liaison Teams, which are deployed to ANA partner-units across the country, with the objective of training and mentoring the ANA in its capability for independent operational deployments, coordinating ISAF-ANA liaison and ensuring the provision of enabling support to ANA units.[43]

The basis of ISAF's stability operations in international law appears uncertain to the extent that such operations are nowhere mentioned in the UN Charter, nor do they exist as a clear concept recognized by customary international law. Rather, they are a military doctrinal construct that reflects the realities of the types of operations being carried out in environments like that of Afghanistan, where conflicts are ongoing but international efforts are being made to shore up the legitimate government and increase its capabilities. ISAF is characterized by NATO as deriving from a peace-enforcement mandate under Chapter VII of the Charter, despite the fact that it is a "coalition of the willing" rather than a UN force.[44] In that sense, it is quite different from the operations mandated in Congo and Haiti discussed earlier. Comparisons with the UN-ROK forces fighting in Korea, the original "coalition of the willing," would be more helpful were it not for the fact that the latter had no element of stabilization, but were simply charged with fighting a full-scale war against external aggression by other States: the intra-State, asymmetric and counterinsurgency aspects so prominent in Afghanistan were entirely absent in Korea. Official British pronouncements on the legal authority for ISAF are sparse, but emphasize the combination of an invitation from the democratically elected government of Afghanistan and the mandate provided by the UN Security Council in Resolution 1510.[45]

We may surmise from the above that stability operations are an emerging concept in the international law governing the use of force and are thus effectively *sui generis*: they have not been previously recognized in customary law and have no explicit basis in the UN Charter or other treaties—except for ad hoc specific cases like (in relation to Afghanistan) the Bonn Agreement. However, appreciation of their legitimacy, through a combination of post-conflict morality and executive legal authority, is regarded as essential by States that participate in such operations.[46] They in fact represent a peculiar combination of what might be termed "invited intervention" and "authorized intervention"—*invited* by the host State and *authorized* by an international organization. Therefore, we may suggest that the *jus ad*

bellum legal basis of stability operations will differ from case to case, but will normally have in common the following features: (1) an invitation by the internationally legitimate government of the host State; (2) a mandate (even if postdating the actual start of the operation) from an international organization, ideally the United Nations; and (3) a multilateral coalition, either within the framework of an existing military alliance such as NATO, or on an ad hoc basis.

Whether stability operations could eventually take place absent one or more of the above features must be a matter of some legal uncertainty. In Operation Palliser in May 2000, the United Kingdom unilaterally planned and executed a limited military intervention in Sierra Leone, initially for the purpose of evacuating British, Commonwealth and European Union citizens at risk from the escalating threat to the capital, Freetown, from the advancing insurgent forces of the Revolutionary United Front (RUF). The noncombatant evacuation operation having been successfully accomplished, the British government then expanded the operation—again, unilaterally—and the troops retained control of the international airport, enabled the safe delivery of UN humanitarian aid into Sierra Leone, and provided security and stability in Freetown by patrolling the capital.[47] Operation Palliser was terminated on June 15, 2000, although the United Kingdom continued extensive involvement in ongoing multinational UN efforts to bring peace and security to Sierra Leone.

The government of Sierra Leone did not comment publicly on the British action; neither did the subsequent debates in the British House of Commons[48] and the House of Lords,[49] nor in the UN Security Council,[50] make any overt reference to the *legality* of the British intervention. Aside from the United Kingdom, eight States expressed approval of the British action in the Security Council,[51] as did Secretary-General Kofi Annan, although he made an oblique reference to the "limited mandate" of the British troops.[52] Following its last meeting to discuss the escalating crisis in Sierra Leone prior to the British deployment, the Security Council had issued a presidential statement in which it "call[ed] upon all States in a position to do so to assist" the UN forces already present in Sierra Leone, which might arguably have been a code that could reasonably have been interpreted as permitting State intervention without the need for any further authority from the UN,[53] although neither the Secretary-General nor any of the States in the Council expressed any views to that effect. None of the Council members that failed explicitly to endorse the British intervention actually commented on it at all publicly, so their real views on the matter must remain a subject of debate; but they clearly acquiesced in it. It should be noted that Operation Palliser was not a stability operation *ab initio*, although it did acquire characteristics thereof in the course of its execution. It was not requested by the host State, nor did it have a mandate from the

United Nations, although it was made in support of the UN peacekeeping mission already present in Sierra Leone (many of whose personnel were at the time being held hostage by the RUF). The element of morality—or perceived legitimacy—was undoubtedly present, and the operation was lawful on the basis that it was a limited humanitarian intervention for the protection of UK nationals and others for whom the United Kingdom had consular responsibilities; but its legality *qua* stability operation cannot be conclusively affirmed.

Stability Operations and the International Law of Armed Conflict

Just as stability operations are not mentioned in the international law governing the use of force, so, as a military doctrinal concept rather than a legal construct as such, they are equally absent from the international LOAC. To the extent that stability operations do not involve any actual armed hostilities, in their peaceful and civilian aspects, they evidently are not governed by the LOAC at all. The LOAC applies only in armed conflicts, which are generically defined in customary international law as existing

> whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party [to the conflict], whether or not actual combat takes place there.[54]

It would seem very clear, from the above descriptors, that an armed conflict continues to take place in certain parts of Afghanistan (primarily the south and east of the country) between the ANA and ISAF on the one hand, and insurgents (mostly Taliban) on the other. The law which governs the behavior of ISAF troops in other parts of the country, which have seen relatively sustained peace for some time now, will be considered further below. But to the extent that an armed conflict is taking place in certain parts of Afghanistan, it is governed by the LOAC and it is necessary to consider what type of conflict that might constitute, as the applicable rules differ to some extent between international and non-international armed conflicts.

International armed conflicts are defined in Common Article 2 of the 1949 Geneva Conventions as

> 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 recognized by one of them . . . [and] 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.

There is patently no armed conflict between two or more States in Afghanistan, since ISAF forces are present in the territory at the invitation of the State itself and are assisting the State against the insurgents. Nor could it conceivably be said that there is a "partial or total occupation of the territory" by ISAF, since that would require that the territory be under the effective control of the occupier, either following the complete defeat of the lawful sovereign (*debellatio*) or because the invading force has temporarily asserted its authority over the territory (belligerent occupation). In Afghanistan, ISAF has not occupied the territory belligerently vis-à-vis the current Afghan government, with which it is allied; and in those areas where it operates, it does so emphatically in support of the Afghan government and not on its own account.

Protocol I Additional to the Geneva Conventions in 1977 extended the scope of application in respect to international armed conflicts to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination."[55] Article 96(3) then provides for an "authority representing a people engaged against a high contracting party in an armed conflict of the type referred to in [Article 1(4)]" to make a unilateral declaration undertaking to apply the Geneva Conventions and Additional Protocol I. The Taliban has not sought to take advantage of these provisions, and even if it did, the argument could be defeated easily enough on the basis that the rights and obligations of the 1949 Conventions and the 1977 Additional Protocol only take effect following a unilateral declaration under Article 96(3) on a basis of reciprocity, i.e., the high contracting party in question must also have assumed the same rights and obligations under the same instruments. In the case of Afghanistan, the State is not a party to Additional Protocol I, and it is hard to see how these provisions could be binding upon ISAF States, even to the extent that (like the United Kingdom) they are parties to the Protocol.

If a conflict is not international in nature, then it must—if only by default—be non-international in nature. Non-international armed conflicts are defined in Common Article 3 of the Geneva Conventions as "armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties," which is essentially a negative definition. The notoriously high threshold of application for 1977 Additional Protocol II further requires that the conflict be

> 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 territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[56]

Quite apart from the fact that Afghanistan is not a high contracting party to Additional Protocol II, it is doubtful, in any case, whether the conditions for the applicability of the Protocol would be met by the present stability operations in Afghanistan. Article 1(1) refers only to the armed forces of the high contracting party *on its own territory*, which would not cover ISAF; and while the Taliban undoubtedly does have control of some territory and carries out "sustained and concerted military operations," it is most unlikely that it could be considered to be "under responsible command" and it has given no sign of willingness to implement the Protocol.

The default position under the treaties that constitute the bulk of the LOAC—particularly the Geneva Conventions and their Additional Protocols—would therefore seem to be that stability operations in Afghanistan that involve "resort to armed force . . . or protracted armed violence" in terms of the *Tadic* formulation[57] are neither an international nor a non-international armed conflict, properly speaking. Instead, they amount to "armed conflict not of an international character" in terms of Common Article 3.[58] The trouble with that approach, logical though it may be on the text of the treaties, is that Common Article 3, being the "minimum yardstick" for humanitarian protection in all armed conflicts, as recognized by the International Court of Justice in the *Nicaragua* case,[59] is notoriously vague, imprecise and of the utmost generality. It is for this reason that the recent approach of the Supreme Court of Israel, to the effect that Israeli military operations against Palestinian militants are subject to the law of international armed conflicts,[60] is in the opinion of the present author much to be preferred.

The main basis for this finding, that the military capabilities of Palestinian militant organizations are such as to equate their threat with that which might emanate from a State's armed forces, is at least as true in respect to the Taliban as it is in respect to Hamas. The Israeli court also concluded that the conflict between Israel and the Palestinians should be treated as international in nature for the purposes of the LOAC on the basis of the transnational nature of the military operations in question: they were crossing the internationally recognized frontiers of the State of Israel and were related to the context of Israel's belligerent occupation of the Palestinian territories since 1967.[61] Although, as noted above, the aspect of belligerent occupation is not relevant in the case of ISAF and Afghanistan, the fact of deployment of NATO troops across international frontiers in the territory of another

State could, by analogy, arguably be sufficient to bring ISAF stability operations within the dictum of the Israeli court.

In light of the above theoretical observations, what practical conclusions may be drawn as to the LOAC rules or principles to be applied by ISAF during combat operations in Afghanistan? In respect to the conduct of hostilities by ISAF troops, the force commander has recently directed that "[a]ll responses [to clear and identified danger] must be proportionate and the utmost of care [*sic*] should be taken to minimize any damage."[62] No doubt sensitive to recurrent Afghan complaints of excessive collateral damage caused by airstrikes, he added:

> We are engaged in a counterinsurgency in an extremely demanding environment. We are fighting an enemy that often cannot be identified before he has struck and then once he has, he hides among the civilian population. The battle is often waged among civilians and their property. We must clearly apply and demonstrate proportionality, requisite restraint, and the utmost discrimination in our application of firepower. No one seeks or intends to constrain the inherent right of self defense of every member of the ISAF force. However, Commanders must focus upon the principles which attach to every use of force—be that self defense or offensive fires. Good tactical judgment, necessity, and proportionality are to drive every action and engagement; minimizing civilian casualties is of paramount importance.[63]

If there are difficulties in applying specific treaty instruments of the LOAC to multinational coalition operations, the directive just cited, in its emphasis on the fundamental principles of necessity, proportionality and discrimination, suggests that at a minimum the customary rules of the LOAC derived from those principles are applicable.[64]

In respect to the protection of victims and treatment of persons *hors de combat*, it may be suggested in line with the above reasoning that Common Article 3 of the Geneva Conventions applies as the "minimum yardstick" of humanitarian treatment:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Although there have been reports recently of some unhappiness expressed by British service personnel at the fact that wounded Taliban fighters are being treated in the same operating theaters and in the same field hospital wards as wounded British soldiers,[65] it should be noted that this is no less than what is required by Common

Article 3 and Articles 12–15 of Geneva Convention I.[66] As regards civilians, Article 4 of Geneva Convention IV provides that "[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Since the stipulation in Article 4 is disjunctive ("conflict *or* occupation"), it would seem clear that Afghan civilians detained by ISAF troops could be covered by its provisions. In respect to captured Taliban fighters, the simplest expedient under the scheme established in Geneva Convention III would be either to classify them as prisoners of war (POWs) under Article 4(A)(2) (which is most unlikely because of their probable failure to satisfy the conditions stated therein), or to treat them as if they were POWs pending adjudication of their status under the LOAC by a competent tribunal under Article 5.[67]

The above discussion has centered on the type of armed conflict, if any, that subsists during the present stability operations in Afghanistan, and the rules and principles of the law of armed conflict to be applied to the conduct of ISAF thereunder. But it is entirely possible that in any given place and at any given time in Afghanistan, the situation may be stable and secure, and ISAF troops may accordingly not be involved in any armed conflict at all for the purposes of application of the LOAC. Although detailed analysis of the law applicable to ISAF in such situations is essentially beyond the scope of this piece, recent case law from the United Kingdom, arising from obligations under the European Convention on Human Rights (ECHR) as incorporated into UK domestic law by the Human Rights Act 1998 (HRA), requires that the likely position should be at least briefly noted. The full implications of the House of Lords decision in *R (on the application of Al-Skeini) v. Secretary of State for Defence*,[68] already commented upon by the present author in a previous edition of this series,[69] remain a matter of some uncertainty. For all that, it seems fairly clear that British troops deployed outside the United Kingdom on combat operations may be subject, in certain circumstances, to the provisions of the ECHR and the HRA. However, none of the cases decided so far in the British courts concerning the application of human rights law arise from the specific situation of Afghanistan and, indeed, all are materially distinguishable from the Afghan situation in one way or another. The *Al-Skeini* case, for example, arose in the context of British operations in Iraq at a time when that country was generally recognized to be in a state of belligerent occupation; as already indicated above, belligerent occupation is not relevant to Afghanistan at all. In the *Behrami* and *Saramati* cases, the European Court of Human Rights found certain actions (and, therefore, potential violations of the ECHR) by the multinational force in Kosovo since 1999 to be directly imputable to the United Nations itself, rather than to the individual TCNs. But that was in the context of an operation over which the

Security Council retained ultimate authority and control, with very specific allocation of tasks (i.e., de-mining) in the relevant Security Council resolution and in a territory that had neither sovereignty nor effective government of its own at the material time.[70] In Afghanistan, by contrast, the relevant resolutions do not allocate detailed specific tasks, authority and control rests with NATO and the North Atlantic Council, and Afghanistan remains a sovereign State with a legitimate government. Finally, two recent English cases[71] concerning liability for human rights violations in circumstances where British troops had actual custody of civilian detainees in Iraq again largely turn on detailed obligations under relevant Security Council resolutions (which are not applicable in the case of Afghanistan), their interaction with broader obligations under customary international law and the effect of Article 103 of the UN Charter.[72]

The *Al-Skeini* case is currently on appeal to the European Court of Human Rights so its final legal effect is likely to remain of uncertain scope and ambit for some time yet. At present, therefore, the most that can be asserted on the basis of current case law is that British forces on stability operations will be required to apply the ECHR and HRA if they are in belligerent occupation of territory and to persons under their effective control for the purposes of jurisdiction under the human rights instruments (which, as the House of Lords decided in *Al-Skeini*, is a higher standard than effective control under the LOAC and will essentially require British troops to have actual custody of civilian detainees). For reasons explained below, these conditions do not obtain in current stability operations in Afghanistan and are most unlikely ever to do so.

Conclusion: The United Kingdom and Stability Operations

Every State will take a different view on the determination of the existence of a state of armed conflict and the nature thereof. Generally the approach of the United Kingdom is to be as vague as possible concerning the legal classification of military operations in which British forces are engaged and to concentrate instead on the legal basis for such operations. Thus, statements from the British Ministry of Defence on the deployment and use of British troops in Afghanistan do not refer to their participation in an armed conflict in that country, merely to the fact that they are present as part of ISAF under the aegis of NATO, with a brief to aid reconstruction and with the approval of the UN Security Council.[73] The general position in the United Kingdom is that the determination of a state of armed conflict is a policy decision to be made by the government and one that "depends upon the status of the parties to the conflict, and the nature of the hostilities."[74] Thus, each individual situation needs to be examined separately on the basis of its own facts—the

actors and the nature of the hostilities—to determine if it amounts to an armed conflict or not. This decision may also be made by the judiciary in the course of legal proceedings, if relevant.[75]

As far as the British position on the nature of an armed conflict is concerned, again as a matter of both law and doctrine, any such determination must be done on a case-by-case basis, depending on the facts in each given situation.[76] The legal basis of the decision for UK authorities will be the international law definitions of international and non-international armed conflicts referred to above, in conjunction with the facts on the ground. If British forces are in action against the government or other official forces of any other State, the situation will be classified as one of international armed conflict—a decision made all the easier by the fact that virtually every State in the world is now a high contracting party to the Geneva Conventions. In any other situation in which British troops are deployed, the situation will be regarded as one of de facto non-international armed conflict. Thus, from the official point of view of the United Kingdom, the ongoing hostilities in Afghanistan and Iraq are in effect treated as internal conflicts in which UK forces are participating on the side of the governments of those States. The conflict in Afghanistan after the removal of the Taliban from de facto power in December 2001 is not considered to be a conflict between the British and Afghan States; it is between Afghan insurgents and the Afghan State, and the latter (with the sanction of the UN Security Council) invited British troops, along with those of other NATO States, to assist it in combating the insurgency, maintaining or restoring law and order, and assisting with reconstruction and development.

Although this position might seem counterintuitive—how can forces of one State be engaged in hostilities in another State, against foreign nationals, yet the conflict not be regarded as an international one?—it is in fact not devoid of sense from a strictly legal perspective. If the British and Afghan States are not at war with each other, but there is a conflict going on in Afghanistan, it cannot be international according to the definitions in the Geneva Conventions or Additional Protocol I; therefore, by default, it must be "not international." Whether it is then governed by Common Article 3 or by Additional Protocol II will depend, as far as British authorities are concerned, on whether the non-State party to the conflict is fighting under responsible command, has control of territory and is able to implement Additional Protocol II.[77] Again, this will be a policy decision made by the government.[78]

As for the specific rules of law applicable to British forces in Afghanistan, if those forces are engaged in actual armed hostilities, particular rules of the LOAC will apply as above. In respect to targeting operations, the United Kingdom as a matter of policy applies the rules concerning target selection and precautions in attack that

are contained in Additional Protocol I to *all* military operations, irrespective of the classification of the armed conflict in question.[79] In respect to detainees, given the UN mandate and the general context of stability operations in Afghanistan, British policy is to surrender all detainees to the Afghan authorities as quickly as possible after processing.[80] This latter policy may in due course be exposed to legal challenge, on the basis of concerns that the detainees' human rights may be violated in Afghan custody and in light of the UK's obligation of *non-refoulement* under the ECHR, as discussed particularly in the very recent decision in *Al-Saadoon and Mufdhi*.[81]

Finally, is should be borne in mind that under the military law of the United Kingdom,[82] British troops remain subject to the ordinary criminal law of the land wherever in the world they may be deployed and irrespective of whether or not they are deployed in a situation of armed conflict. Throughout the so-called "Troubles" in Northern Ireland (1969–2007), the use of force by British troops providing support to the civil authority was regulated by the ordinary criminal law, resulting in periodic trials of individual British soldiers (who had been accused of using excessive force) on charges of murder or manslaughter. The same principles apply when the deployment is to a territory outside the United Kingdom. In *Bici v. Ministry of Defence*,[83] it was accepted in principle that aspects of civil law—notably the torts of negligence and trespass to the person—could also be applicable in situations where British troops deployed on certain types of operation abroad could be shown to have a duty of care toward any persons killed or wounded as a result of their actions. It was emphasized that this will not be the case in full combat operations,[84] but it may very well turn out to be relevant to stability operations.

Notes

1. UNOSOM II was created by the UN Security Council with a remarkably broad mandate that encompassed humanitarian relief operations in Somalia, disarming the various militias, restoring law and order, and assisting in the establishment of a representative government and in the restoration of infrastructure. S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993). The mission was violently opposed by the Somali militias from the outset and US troops were withdrawn from the operation after American public opinion turned decisively against their continued involvement as a result of the deaths of eighteen US soldiers and the wounding of another eighty-three in the so-called First Battle of Mogadishu in October 1993.

2. Following a military coup displacing a democratically elected civilian government and ensuing political repression which resulted in an exodus of Haitian refugees across the Caribbean Sea toward the United States, the Security Council authorized the establishment of a US-led Multinational Interim Force "to use all necessary means to facilitate the departure from Haiti of the military leadership, . . . the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment." S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

3. Commission on Presidential Debates, The Second Gore-Bush Presidential Debate (Oct. 11, 2000), *available at* http://www.debates.org/pages/trans2000b.html.

4. US Department of Defense, Directive 3000.05, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations para. 4.1 (Nov. 28, 2005), *available at* http://www.dtic.mil/whs/directives/corres/pdf/300005p.pdf [hereinafter DoD Directive 3000.05]. *See also* Bob Hubner, *Developing Joint Stability Operations Doctrine*, A COMMON PERSPECTIVE (Oct. 2004), at 9.

5. *E.g.*, Robert M. Cassidy, *The British Army and Counterinsurgency: The Salience of Military Culture*, MILITARY REVIEW (May–June 2005), at 53, 59.

6. United Kingdom Ministry of Defence, Joint Doctrine Publication 3-40, Security and Stabilisation: The Military Contribution (as of January 2009 available only on a restricted basis for consultation and discussion purposes, not yet adopted as an official document and with no official standing).

7. Resolution on Stabilisation of Afghanistan: Challenges for the EU and the International Community para. 2, EUROPEAN PARLIAMENT, Doc. P6_TA(2008)0337 (July 8, 2008).

8. *Id.*, para. 19.

9. *See* Peter W. Chiarelli & Patrick R. Michaelis, *Winning the Peace: The Requirement for Full-Spectrum Operations*, MILITARY REVIEW (July–August 2005), at 4.

10. US Defense Secretary Donald Rumsfeld declared an end to "major combat" in Afghanistan on May 1, 2003. Kenneth Katzman, Congressional Research Service, *Afghanistan: Post-War Governance, Security, and U.S. Policy*, No. RL30588 (Nov. 26, 2008), at 7, *available at* http://assets.opencrs.com/rpts/RL30588_20081126.pdf. On the actual combat situation in Afghanistan, see *id.* at 22–25.

11. The term "war" has, of course, been largely replaced in international legal discourse since 1945 with the term "armed conflict." This terminological shift was connected initially with the development of the UN Charter and its move to outlaw any use of force that did not constitute either an act of self-defense or an enforcement action under Chapter VII of the Charter. With the changing nature of warfare in the international relations context, it also came increasingly to reflect the reality that most conflicts were no longer being fought between States; and even when they were, the States concerned were no longer willing formally to declare war on each other, but preferred to maintain a *status mixtus* of neither war nor peace. In the *jus in bello*, the term "armed conflict" was also explicitly enshrined in the language of the 1949 Geneva Conventions and, subsequently, their Additional Protocols. (Although, as discussed later in this article, the 1949 instruments did retain the concept of "declared war" as part of their scope of application. *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 197, 198 (Adam Roberts & Richard Guelff eds., 3d ed. 2000)). For elaboration and discussion of these trends, see Georg Schwarzenberger, *Jus Pacis ac Belli? Prolegomena to a Sociology of International Law*, 37 AMERICAN JOURNAL OF INTERNATIONAL LAW 460, 465–74 (1943); Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 INTERNATIONAL LAW QUARTERLY 11 (1951); Philip C. Jessup, *Should international law recognize an intermediate status between peace and war?*, 48 AMERICAN JOURNAL OF INTERNATIONAL LAW 98 (1954); Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 39, 39–45 (Dieter Fleck ed., 1995); LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 70–75 (2000).

12. *See* Nina M. Serafino, Congressional Research Service, *Peacekeeping and Related Stability Operations: Issues of U.S. Military Involvement*, No. RL33557 (Jan. 24, 2007), at 6, *available at* http://assets.opencrs.com/rpts/RL33557_20070124.pdf.

13. *Id.*
14. DoD Directive 3000.05, *supra* note 4, para. 3.1.
15. Chairman of the Joint Chiefs of Staff, Joint Publication 3-0, Doctrine for Joint Operations, at V-1 (Sept. 2006, with change 1, Feb. 13, 2008), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_0.pdf.
16. Headquarters, Department of the Army, FM 3-07, Stability Operations (2008), *available at* http://downloads.army.mil/docs/fm_3-07.pdf.
17. General Sir Richard Dannatt, Chief of the General Staff, Address to the Institute for Public Policy Research, London (Jan. 19, 2009), *available at* http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/ChiefStaff/20090119AddressToTheInstituteForPublicPolicyResearchLondon.htm.
18. *Id.*
19. *See* US Department of Defense, Quadrennial Defense Review Report v, 9–18 (2006).
20. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, attached to Letter from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2001/1154 (Dec. 5, 2001).
21. *Id.*, Annex I, paras. 3–4.
22. Letter dated 19 December 2001 from the Permanent Representative of Afghanistan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/1223 (Dec. 19, 2001), Annex.
23. Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/1217 (Dec. 19, 2001), Annex.
24. *Id.*
25. *Id.*
26. S.C. Res. 1386, operative para. 1, U.N. Doc. S/RES/1386 (Dec. 20, 2001).
27. *Id.*
28. *Id.*, operative para. 10.
29. *Id.*, operative para. 3.
30. S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).
31. S.C. Res. 143, operative para. 2, U.N. Doc. S/RES/143 (July 17, 1960).
32. S.C. Res. 161, operative para. 1, U.N. Doc. S/RES/161 (Feb. 21, 1961); this was supplemented by S.C. Res. 169, operative para. 4, U.N. Doc. S/RES/169 (Nov. 24, 1961).
33. *See* S.C. Res. 1542, U.N. Doc. S/RES/1542 (Apr. 30, 2004).
34. *Id.*, operative para. 7 (I–III).
35. *Id.*, operative para. 9.
36. *See* BBC News, *UN peacekeepers storm Haiti slum* (Dec. 15, 2004), http://news.bbc.co.uk/1/hi/world/americas/4096841.stm; United Nations Stabilization Mission in Haiti, Statement Relating to the Operation Conducted on 06 July 2005 at Cité Soleil, *available at* http://www.un.org/Depts/dpko/missions/minustah/pb060705e.pdf (last visited Feb. 19, 2009); Andrew Buncombe, *UN admits civilians may have died in Haiti peacekeeping raid*, THE INDEPENDENT (London), Jan. 10, 2006, at 25, *available at* http://www.independent.co.uk/news/world/americas/un-admits-civilians-may-have-died-in-haiti-peacekeeping-raid-522317.html.
37. Letter from the Secretary-General of the North Atlantic Treaty Organization addressed to the Secretary-General, Annex I, U.N. Doc. S/2003/970 (Oct. 2, 2003).
38. Letter from the Minister for Foreign Affairs of Afghanistan addressed to the Secretary-General, attached to U.N. Doc. S/2003/986 (Oct. 10, 2003).
39. S.C. Res. 1510, U.N. Doc. S/RES/1510 (Oct. 13, 2003).
40. S.C. Res. 1833, U.N. Doc. S/RES/1833 (Sept. 22, 2008).

41. NATO Topics, NATO's Role in Afghanistan, http://www.nato.int/issues/afghanistan/index.html (last visited Feb. 19, 2009).

42. According to the British Foreign & Commonwealth Office, PRTs

> embody a joint military and civilian approach to stabilising Afghanistan. . . . They bring together civilian and police experts, under the security umbrella provided by the military, to help extend the authority of the Afghan central government and help to facilitate development and reconstruction. PRTs also aim to support the reform of the Afghan security sector . . . .

FCO, Provincial Reconstruction Teams, http://www.fco.gov.uk/en/fco-in-action/uk-in-afghanistan/security/prt/ (last visited Feb. 19, 2009).

43. *See* Press and Media Service, NATO HQ Brussels, Fact Sheet, Operational Mentor and Liaison Team (OMLT) Programme – October 2008, *available at* http://www.nato.int/isaf/topics/factsheets/omlt-factsheet.pdf (last visited Feb. 19, 2009).

44. NATO, ISAF Mandate, *available at* http://www.nato.int/isaf/topics/mandate/index.html (last visited Feb. 19, 2009).

45. *See* UK Ministry of Defence, Defence Factsheet, Operations in Afghanistan: Background Briefing 2, *available at* http://www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInAfghanistanBackgroundBriefing2.htm (last visited Feb. 19, 2009).

46. *See* Jared Tracy, *Ethical Challenges in Stability Operations*, MILITARY REVIEW (Jan.–Feb. 2009), at 86. Tracy's article asserts, correctly, that Just War doctrine is of no use to consideration of the *jus ad bellum* of stability operations, because it only covers the rationale for going to war in the first place, while "there is nothing in *jus in bello* that compels the victorious nation to provide security, rebuild infrastructure, improve public services, and see to the establishment of a democratic form of government." *Id.* at 86. In consequence, Tracy posits that morality, rather than law, must be the basis of ethical understandings about what the military should or should not do in post-conflict operations. While I agree with Tracy that morality plays a part in contemporary military thinking, especially in situations as complex as that of Afghanistan, I consider that a strictly *legal* basis for stability operations does (and, indeed, must) exist.

47. *See* Kwaku Nuamah & I. William Zartman, *Intervention in Sierra Leone*, *in* MILITARY INTERVENTION: CASES IN CONTEXT FOR THE TWENTY-FIRST CENTURY 133, 145–49 (William J. Lahneman ed., 2004); Eric G. Berman & Melissa T. Labonte, *Sierra Leone*, *in* TWENTY-FIRST-CENTURY PEACE OPERATIONS 141, 181–82 (William J. Durch ed., 2006).

48. *See* Hansard (HC Debs) vol. 349, cols. 518–29 (May 8, 2000).

49. *See* Hansard (HL Debs) vol. 612, cols. 1233–40 (May 8, 2000).

50. *See* U.N. Doc. S/PV.4139 (May 11, 2000).

51. *Id.* at 8 (Canada), 9 (Malaysia), 11 (United States), 14 (Namibia), 15 (Argentina), 18 (Ukraine & France) and 22 (Portugal). Portugal did not have a seat on the Council at the time and attended as the representative of the European Union.

52. *Id.* at 3.

53. Statement by the President of the Security Council, U.N. Doc. S/PRST/2000/14 (May 4, 2000).

54. Prosecutor v. Tadic, Case No. IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

55. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(4), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 11, at 422, 423.

56. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1(1), June 8, 1977, 1125

U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 11, at 483, 484 [hereinafter Additional Protocol II].

57. *Supra* note 54.

58. This is the default position supported by a plurality of the US Supreme Court, in relation to the treatment of detainees captured in the "Global War on Terror" (including in the Afghan theater of operations). Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

59. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 218 (June 27). In *Tadic*, the International Criminal Tribunal for the former Yugoslavia also held that "the character of the conflict is irrelevant" in terms of the application of Common Article 3. Tadic, *supra* note 54, para. 102.

60. Public Committee Against Torture in Israel et al. v. Government of Israel et al., HCJ 769/02, Judgment, para. 21 (Dec. 13, 2006), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

61. *Id.*, para. 18.

62. Headquarters, International Security Assistance Force, Tactical Directive para. 4(a) (Dec. 30, 2008), *available at* http://www.nato.int/isaf/docu/official_texts/Tactical%20Directive_090114.pdf.

63. *Id.*, para. 5.

64. *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) (2 volumes: Volume I, Rules; Volume II, Practice (2 Parts)). Part I of the Rules ("The Principle of Distinction") contains many asserted customary rules of the LOAC that would be relevant to the conduct of hostilities by ISAF. These relate to the distinction between civilians and civilian objects on the one hand, and combatants and military objectives on the other (Rules 1–10); indiscriminate attacks (Rules 11–13); proportionality (Rule 14); precautions in attack (Rules 15–21); and precautions against the effects of attacks (Rules 22–24). *Id.* at 3–76.

65. *See* Jo Adetunji, *MoD defends hospital treatment for Taliban*, THE GUARDIAN (London), Jan. 23, 2009, at 2, *available at* http://www.guardian.co.uk/uk/2009/jan/23/military-afghanistan.

66. At the time of writing, a Canadian officer is to face a court-martial on a charge of illegally shooting a wounded and disarmed Taliban fighter in Afghanistan. Sean Chase, *Canadian soldier granted bail*, THE INTELLIGENCER, http://www.intelligencer.ca/ArticleDisplay.aspx?e=1377810&auth=SEAN%20CHASE,%20SUN%20MEDIA (last visited Feb. 19, 2009).

67. Although see further *infra*, text to note 80, concerning British practice in regard to persons detained by British forces in Afghanistan. The treatment of captured persons in Afghanistan has been the source of much controversy among the ISAF TCNs. *See, e.g.*, Vincent Morelli, Congressional Research Service, *NATO in Afghanistan: A Test for the Transatlantic Alliance*, No. RL33627 (Oct. 23, 2008), at 16–17, *available at* http://assets.opencrs.com/rpts/RL33627_20081023.pdf. This dissension has, moreover, been present from the outset of OEF, also in regard to the classification of such prisoners upon capture. *See* Robert Cryer, *The Fine Art of Friendship:* Jus in Bello *in Afghanistan*, 7 JOURNAL OF CONFLICT & SECURITY LAW 37, 68–82 (2002).

68. [2008] 1 APPEAL CASES 153.

69. *See* David Turns, *The Treatment of Detainees and the "Global War on Terror": Selected Legal Issues*, *in* INTERNATIONAL LAW AND MILITARY OPERATIONS 199 (Michael D. Carsten ed., 2008) (Vol. 84, US Naval War College International Law Studies).

70. Behrami v. France and Saramati v. France, Germany and Norway, 45 E.Ct. H.R. 41 (2007).

71. R (on the application of Al-Jedda) v. Secretary of State for Defence [2008] 1 APPEAL CASES 332; R (on the application of Al-Saadoon and Mufdhi) v. Secretary of State for Defence [2008] ENGLAND & WALES HIGH COURT 3098.

72. Whereby obligations arising under the Charter, such as those consequent upon mandatory Chapter VII resolutions of the Security Council, override inconsistent obligations arising from other international agreements.

73. *E.g.*, Adam Ingram, Minister of State, UK Military Operations in Afghanistan, Remarks to the All-Party Parliamentary Army Group (Oct. 24, 2006), *available at* http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/MinAF/UkMilitaryOperationsInAfghanistan.htm; Defence Factsheet, *supra* note 45.

74. UK Ministry of Defence, Joint Doctrine Publication 1-10, Joint Doctrine Publication – Prisoners of War, Internees and Detainees para. 403 (2006) [hereinafter JDP 1-10].

75. In an extradition case in recent years, for example, an English judge was faced with a Russian government claim that the situation in Chechnya in 1995–96 "amounted to a riot and rebellion, 'banditry' and terrorism." It was held, however, that "the events in Chechnya . . . amounted in law to an internal armed conflict." In support of that determination, the judge listed the following factors: "the scale of the fighting—the intense carpet bombing of Grozny with in excess of 100,000 casualties, the recognition of the conflict in terms of a cease fire and a peace treaty." Government of the Russian Federation v. Akhmed Zakaev (Bow Street Magistrates' Court, Nov. 13, 2003, at 2) (unreported; copy on file with the author). The factors listed do not apply to Afghanistan, except in respect to the scale and intensity of the fighting.

76. *See* UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT paras. 3.1–3.13 (2004) [hereinafter UK MANUAL].

77. As required by Article 1(1) of Additional Protocol II, *supra* note 56.

78. JDP 1-10, *supra* note 74, paras. 403–04.

79. The United Kingdom is bound by treaty obligation to apply the Additional Protocol I rules on targeting in all international armed conflicts to which it is a party. These rules "should [also] be treated as applicable" in non-international armed conflicts. UK MANUAL, *supra* note 76, para. 15.9.1.

80. UK Ministry of Defence, Joint Doctrine Publication 1-10.3, Joint Doctrine Publication – Detainees, paras. 116–17 (2006).

81. *Supra* note 71, paras. 44–53 and 204.

82. Specifically, the Army Act 1955, the Royal Air Force Act 1955 and the Naval Discipline Act 1957 (which will in the course of 2009 be progressively repealed and replaced with the new tri-service Armed Forces Act 2006).

83. [2004] ENGLAND & WALES HIGH COURT 786. The court found the Ministry of Defence to have civil liability in tort for the accidental killing and wounding of four Kosovar Albanians by British soldiers on peacekeeping duties near a demonstration in Priština.

84. *Id.*, paras. 84–105, citing in particular the Australian case of *Shaw Savill and Albion Company Ltd v. The Commonwealth* (1940) 66 C.L.R. 344 (concerning the liability of the State in tort for a collision on the high seas between an Australian warship and an Australian civilian vessel, caused by the navigational negligence of the warship's officers). Furthermore, the House of Lords decision in *Al-Skeini*, *supra* note 68, which confirmed that the ECHR and HRA were applicable to the case of the detainee Baha Mousa, who died in British military custody, was made on such narrow grounds as at least implicitly to exclude any possibility of similar liability in combat situations, where the troops could not be said to have effective control of the territory in question.

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