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Counterinsurgency in New Wars – Human Security as a Strategic Military Advantage

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Abstract

This thesis examines how essential aspects of the human security approach can be incorporated into current counterinsurgency strategy to make it more effective and humane. The theory of new wars is applied as a theoretical conceptualization of contemporary warfare, and the US Army Marine Corps Counterinsurgency (COIN) Manual is seen as the primary military strategic response to these conflicts. Rather than killing and capturing insurgents, the essential imperative of the COIN strategy is to win the war by winning the hearts and minds of the population. However, this thesis argues that the law currently governing counterinsurgency, international humanitarian law (IHL), was constructed on the assumption that conventional war strategy of killing or capturing the enemy is the way to achieve victory. Counterinsurgency strategy is therefore very different from the strategy undergirding IHL. The fact that IHL has evolved from conventional war strategy and thinking has contributed to the evolvement of a kill-capture mindset among military professionals, creating a stumbling block for of COIN operations, which categorically rejects killing and capturing.

The goal of this thesis is thus to modify and refine counterinsurgency theory, so it becomes an effective military strategy to apply in cases of new wars. By interviewing soldiers and scrutinizing aspects of the human security approach, the thesis proposes the following changes to the COIN manual. First, COIN operations should be governed by international human rights law (IHRL) rather than IHL, as this would facilitate a transition from the current kill-capture mindset towards a win-the-population approach. Secondly, there should be an enhanced focus on civil-military cooperation, enabling a holistic approach to the operations. Thirdly, COIN operations should be civilian led, this will give the operation legitimacy and include the civilian population in the peace process. Lastly, soldiers who are deployed on COIN missions should receive extensive cultural training and education, to ensure that they are capable of gaining the trust and respect of the civilian population.

1. Introduction

Since the end of the Second World War, the nature of war has changed. The wars of today are primarily internal, and often entail participation of a vast number of non-state actors. Grasping the changing nature of war has been attempted by practitioners as well as scholars, as the decline of inter-state wars and the subsequent increase in intra-state wars has demanded a new conceptualization of what war is. One of the most prominent attempts to do this has been the concept of new wars, developed by Mary Kaldor[1]. Kaldor argues that the change from 'old' to new wars lies in the logic of the war itself. The changing logic becomes apparent by analyzing the actors involved, their goals, the methods of warfare and their forms of finance[2]. The actors in new wars consist of a vast combination of state and non-state actors, aiming at gaining power in the name of a specific identity, making identity politics the goal of the war[3]. The control of the population is the main method of war, and the preferred tactic is to direct violence toward civilians, to control them through fear. Financing is largely decentralized, and finances are often collected through violent tactics and illegal activities emerging as a result of the conflict. Due to the new logic, armed groups often only exist as a result of the conflict, which naturally entails that they are ultimately not interested in ending the war, as it has become their raison d'être[4]. The changing logic makes it insufficient to focus on security strictly as a military problem as participants in the conflict find socioeconomic reasons for motivating a protraction of the insecure situation, forcing the military to use a more holistic approach. This means that elements of traditional hard security and development have become interconnected, and merely applying raw military power is insufficient in bringing an end to new wars. The emergence of new wars and their changed logic, demands a change in the way war is understood and examined. This has provoked new strategies that are not merely focusing on military tactics but trying to incorporate elements which have traditionally been perceived as developmental.

Counterinsurgency is one of the strategies attempting to deal with some of the challenges of new wars. Developed by military professionals, it has been the preferred strategy to deal with insurgents,

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[1] Mary Kaldor, *New and old wars*, Third Edition, 2012.

[2] Kaldor 2012, *supra note* 1, p. 7.

[3] Identify is here understood as identities – be it national, clan, religious or linguistic – that individuals are ascribed or connected voluntarily to. Identity politics refers to the claim to power on the basis of a particular identity, in contrast to geo-political or ideological goals. See Kaldor 2012, *supra note 1*, p. 7-8.

[4] Mary Kaldor, "In Defense of New Wars", *Stability*, Vol. 2, No. 1 (2013), p. 2-3.

by focusing on winning the hearts and minds of the civilian population as the primary strategy for victory. Ideally, the win-the-population approach is supposed to ensure that insurgent groups lose the ability to recruit new members among the civilian population. Furthermore, by gaining credibility, the counterinsurgents can collect more and better intelligence, via the civilian population. Counterinsurgency is not a new concept and has previously been used, especially by Western countries in their attempt to suppress colonial states. However, a modern doctrinal development was the 2006 U.S. Army and Marine Corps Counterinsurgency Manual (COIN Manual), composed by General David H. Petraeus. The manual was produced for the US military and compared to classic military doctrine; it is radical in its approach as it argues that "the more you protect your force, the less secure you may be"[5]. This is based on the assumption that to be successful in counterinsurgency; the population needs to be protected, as it is from within the population that insurgents operate and recruit. The manual even goes on to argue that "the more force is used, the less effective it is."[6]. This argument is linked to the fact that the more force is used, the higher the risk is for collateral damage, which is counterproductive when trying to earn the trust of the civilian population[7]. Even though the COIN manual deals with a lot of the challenges of new wars, its implementation has not yet successfully created lasting security and stable peace in any of the places it has been applied[8]. COIN was implemented via a tactical directive as a strategic change in Afghanistan in 2009, by the leader of the International Security Assistance Force (ISAF), General McChrystal. The directive effectively reversed the strategy, moving away from the classical approach applied in old wars; in order to win you must destroy the military and the will of the people. According to McChrystal, alienating the population was the most significant threat to the success of the mission, and the war could therefore not be won based on the number of enemies killed. This inspired him to urge the coalition forces to demonstrate caution when using force and warn against the use of airstrikes that might cause collateral damage[9].

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[5] The U.S. Army Marine Corps, *Counterinsurgency Field Manual*, No. 3-24, 2007, p. 48.
[6] The U.S. Army Marine Corps, *supra note* 5, p. 48.
[7] The U.S. Army Marine Corps, *supra note* 5, p. 48.
[8] Counterinsurgency has a rich history and has been applied in multiple places. This thesis however focuses on counterinsurgency, as presented in the COIN manual, that is until now limited to being operationalized in Afghanistan and Iraq. In this thesis, success of counterinsurgency should entail winning the hearts and minds of the population in order to create lasting security and stable peace. For further discussions of the 'succes or failure' of counterinsurgency in Iraq and Afghanistan see: Magnus Norell, "COIN in Afghanistan - Winning the Battles, Losing the War?", FOI Memo 3123, (2010).
[9] Stanley McChrystal, "Tactical Directive", *NATO*, 6 July 2009, (available at https://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf).

By looking at the outcome of the war in Afghanistan, it is no overstatement to say that the western forces have not been able to square the circle of fighting the insurgency to ensure peace, stability and security. Instead, an increasingly alienated Afghan population have had to experience an increasing number of dead and wounded as a consequence of the airstrikes carried out by the allies. In 2009, General McChrystal ordered that air strikes should only be used as a last resort. However, the COIN operation in Afghanistan was not a success because parts of the military leadership and the soldiers involved, kept operating within a kill-capture paradigm, rather than a win the population approach which resulted in continued incidents of collateral damage and Afghans dying at the hands of those who were there to help. The kill-capture approach focusses on killing or capturing the enemy, and is categorically rejected by the strategic foundation of the COIN manual, as winning the population is the central imperative. In this thesis, it is argued that the failed COIN operation in Afghanistan was due to the kill-capture paradigm. Deeply integrated into the military mindset, is the notion that war is won through killing or capturing the enemy by utilizing excessive force. This kill-capture paradigm stems from the way conventional and classical wars were conducted, and how they were fought. In conventional warfare, winning is accomplished by inflicting as much damage as possible, destroy the opponent's military power, suppress his will and conquer his country. This Clausewitzian[10] strategy has become such an integrated part of military thinking, training and education, that soldiers and military leaders conducting COIN operations are not capable of following the win the population approach. Following the kill-capture mindset, killing and capturing is not only a natural part of war, but it is also a conduct that is legally accepted by the law. Even though the law governing armed conflict, namely International Humanitarian Law (IHL), is fundamentally trying to lessen human suffering during armed conflicts, it has proven problematic in the context of counterinsurgency as the military is using it as a tool to analyze how much damage is legally acceptable. By having a wide interpretation of the principles of military necessity and proportionality, the military uses IHL to justify the use of force. This is counterproductive in regard to the COIN strategy, since collateral damage and targeting combatants can be legal under IHL, it justifies killing in war and reproduces the rationale of the kill-capture paradigm. In this thesis, we trace the history of IHL from the Lieber Code to the Geneva Conventions of 1949, to demonstrate how IHL is essentially constructed on the assumption that warfare involves a kill-capture strategy. We conclude that the kill-capture strategy, which the laws of war are premised on, is a strategic assumption highly inappropriate for counterinsurgency in new

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[10] Carl von Clausewitz, On War, 2007, p. 13.

wars. IHL might have been the most comprehensive legal compromise states could reach to lessen human suffering in war, however, as an unintended consequence, it is encouraging the maintenance of the kill-capture mindset and is thus a stumbling block for the success of COIN operations.

Changing the mindset is difficult, and will require more than one or two changes. In this regard, the human security approach, introduced by Mary Kaldor and Christine Chinkin, is likely to provide some theoretical answers. The human security approach is focusing on the security of individuals. It combines elements from human rights and international development, to develop a framework in which security can be operationalized in new wars. Human security advocates for several principles, which are different from conventional approaches to war and security. The first principle is the primacy of human rights, which means that the goal of any intervention should be to protect the inherent human rights of civilians, rather than defeating the enemy. This will ensure that the counterinsurgents cannot justify collateral damage as a military necessity, which will enable them to win the hearts and minds of the civilian population. The second principle is the establishment of a legitimate political authority, which is crucial to gain the support of the civil population, and give credibility to the counterinsurgents. The third principle is an enhanced focus on a bottom-up approach including local ownership and participation. The bottom-up approach has been a long-standing part of development, but according to the human security model, it also needs to be taken into account in military operations. This will ensure that the civilian population is included in the development process, which means that they are offered a better alternative than joining the insurgents[11].

As IHL is reproducing the kill-capture mindset, changing the applicable law regime in new wars is an imperative. Changing the law regime applicable under COIN operations, from IHL to International Human Rights Law (IHRL), would facilitate a change in how soldiers operate during missions. IHRL is significantly more restrictive in the amount of force that can be used, which means that it will no longer be legal to kill, except in cases of self-defense. This will make it illegal to kill insurgents as a military necessity, which would reduce the collateral damage that is unavoidably linked to attacks. By operating under IHRL in COIN operations the military would thus not be able to justify killing as legally acceptable. This would force the military to move away from the justification inherent in the kill-capture paradigm, that killing and capturing is a

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[11] Mary Kaldor, *Human Security*, 2007, p. 185-190.

fundamental part of warfare. Moving away from the kill-capture paradigm, would pave the way for an enhanced focus on the protection of civilians, that is such an integral part of the COIN strategy.

A stumbling block for operating under IHRL in COIN operations, is the incentive for the counterinsurgents to adhere to a more restrictive legal regime. Reciprocity has traditionally been an important part of adhering to international law, but in counterinsurgency it is useless since insurgents are not adhering to the law, creating an asymmetric nature which does not offer the necessary preconditions for reciprocity. However, this thesis suggests that the counterinsurgents gain a strategic self-interest from changing the law regime, as they will be able to win the hearts and minds of the population by significantly restricting the use of force. This follows the principle of exemplarism which argues that by adhering to the law, counterinsurgents will be able to act exemplary, and this will help them gain legitimacy and credibility.

Nevertheless, implementing changes to ensure the success of COIN operations, will require more than changing the law. By integrating civilian and military effort as prescribed by the human security approach, COIN operations will be able to deal with both security and developmental issues simultaneously. COIN is not about using force, but about winning the hearts and minds of the population. This includes securing the population, providing essential services and build legitimate political and legal institutions. Furthermore, as the armed forces are associated with killing and capturing, and civilian organizations are not, the legitimacy of COIN operations would greatly benefit from being under civilian leadership. Today, civilian institutions are often reluctant to cooperate with the military, as they do not want to be associated with the use of excessive force. Operating under civilian leadership will allow COIN operations to benefit from the expertise of both civilian workers and soldiers. This will ensure that the civilian population develops a more positive association with the military.

New wars are likely to continue in the future and counterinsurgency has become the most prominent approach since containment and deterrence dominated military strategy during the Cold War. However, when implemented counterinsurgency has not yet successfully created lasting stability and peace. On this account, billions of dollars have been spent, and thousands of lives have been lost. This thesis sheds light on how principles from human security and the strategy of the COIN manual, reinforces each other. The results are significant, offering a model that in addition to being more humane is also significantly more effective on the military strategic level.

The thesis is radical in its approach to the law and argues that IHL is inherently inappropriate as the legal structure governing counterinsurgency. By integrating IHRL into COIN strategy, the ultimate argument of the thesis is that it should be desired by counterinsurgents to have more restrictive laws governing new wars, because it will be both morally and strategically beneficial.

The first chapter of the thesis explains why new wars serve as a solid theoretical focal point when examining the changing nature of contemporary warfare. IHL is then introduced as the applicable law regime in new wars. We then demonstrate how IHL, because of its inherent connection to conventional warfare, is strengthening a kill-capture mindset and how this mindset encourages a very permissive interpretation of fundamental categories of IHL. In the second chapter, we analyze the military strategy of counterinsurgency, by introducing the U.S. COIN Manual as a doctrinal reference point. We then go on to examine how COIN has been operationalized in Afghanistan and what difficulties this implied. The results of the analysis are substantial proving that the most significant challenge to effective counterinsurgency is that the underlying kill-capture paradigm, allowed for by IHL, is still dominating military thinking and makes it impossible to focus primarily on the protection of civilians. In chapter three, we introduce the human security approach, which contains elements that could be extremely useful for the success of COIN. The chapter explains what human security is, and which elements we find useful to implement into counterinsurgency. Chapter four discusses how, in practice, components of human security can be integrated into the COIN strategy. This chapter thoroughly examines which concrete elements would be useful to merge, in order strengthen the COIN doctrine. Our most significant argument is that integrating crucial aspects of human security into the COIN doctrine, will make it more humane and eventually create a more effective strategy. Chapter five is focusing on the interviews we conducted with Danish soldiers. In this chapter, we go through some of their observations, in an attempt to further refine our final proposals and to tackle some of the challenges they identify. Finally, chapter six presents our concrete proposals to a refined COIN doctrine. The ultimate argument presented in this thesis is that by implementing our proposals, COIN operations will be more humane and more effective.

1.1. Interview

The conducted interviews were prepared in a semi-structured way so that we had made "*(..) plans sufficient to meet practical and emotional expectations while at the same time providing for the*

possibility of "hanging loose," or altering the course of the interview to go where the informant wants to lead."[12]. This ensured that we got our questions answered, but by also leaving time and space for the interviewee to express him/herself, we were able to explore aspects that were not explicitly included in our questions.

Since requested by several of the interviewees, all the interviewees are kept anonymous. We perceived that as an opportunity for the soldiers to speak more freely, not being afraid of possible repercussions. The interviewees will, therefore, be referred to as soldier 1, 2, 3, 4, 5, 6 and 7, to keep their identities hidden. All interviews were audio recorded, and are referred to by date and the number of the soldier.

The interviews were conducted to get an insight on the applicability of the COIN manual. As the manual is a strategic guidance for soldiers conducting counterinsurgency, we wanted to examine how soldiers who have been deployed in armed conflicts perceived it. Their experience could thus provide us with a practical evaluation of COIN, from soldiers working on the manual level. In addition to having operated under IHL, the interviewees have also been operating under Danish domestic law, as they have been assigned to assist the police in protecting local Jewish institutions in and around Copenhagen. This means that they have specific experience with operating under IHL and under laws that only allows killing in self-defense. This makes their contribution invaluable, as they have actual experience with one of the primary changes this thesis proposes for the COIN manual. Unfortunately, there is a somewhat limited number of soldiers who have performed both tasks and obtained experience with operating under both IHL and domestic law. This is also reflected in the limited number of interviews conducted. It can be questioned whether this is a problem for the validity of the conclusion and whether the findings are generally applicable to the reality. However, the foundation of the thesis is rooted in already existing theory, which we used to develop our proposals. The interviews were used to test and refine these proposals, based on the findings we did. This means that the empirical foundation of our proposals is based primarily on pre-existing theory, with the interviews providing a more practical view. So, by utilizing the work of academics in the field and of military professionals, who draws on a combination of theory and practical experiences, we were able to analyze which changes were needed in the COIN doctrine. Through the interviews, we were provided with new insights on the challenges and potential

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[12] John M. Johnson & Timothy Rowlands, *The Interpersonal Dynamics of In-Depth Interviewing*, in: Jaber F. Gubrium, et al. (eds.), The SAGE Handbook of Interview Research: The Complexity of the Craft, 2012, p. 103.

changes the soldiers thought the doctrine required. After analyzing which insights were useful and which were not, we have used these insights to further refine the doctrine.

What we wanted to achieve with our interviews were multifaceted. First of all, we wanted to see how soldiers would perceive the idea of combining the already existing COIN doctrine with aspects of the human security model. We assumed that the soldiers still linked the idea of war to the classical aspects of defeating the enemy by killing or capturing him, ultimately linking it up to the rigid categories of combatant/non-combatant and therefore good versus evil. We were consequently expecting them to be skeptical of the proposals we made. The aim was therefore not merely for them to approve our proposals, but rather to get them to point out possible strengths and weaknesses. Furthermore, the interviews were linked to the soldiers' experience in the field, which gives a practical insight into which advantages and disadvantages operating under the new COIN model would provide.

1.2. Legal Instruments

The legal focus of this paper is centered around the Laws of War, more specifically IHL. Throughout the paper, the law is analyzed as rules that set up restrictions for parties to an armed conflict and sets up privileges and obligations for those involved in military operations. IHL is a subject-specific law (*lex specialis*) that governs armed conflicts and is, therefore, the primary source of law when dealing with armed conflicts. Contrary, IHRL are inherent entitlements that apply to all humans, solely at the account of being human, and it is therefore in principle applicable at all times (*lex generalis*)[13]. Both legal regimes are used in the paper, IHL representing the law regime that is currently governing armed conflicts, and IHRL representing the law regime that we would like to govern counterinsurgency operations when applied in new wars.

The thesis uses relevant case law, to help clarify and interpret the law. This will only be used as guiding principles, as international law does not operate with *stare decisis*, as previous court decisions are not legally binding on future decisions. Instead, the principle of *jurisprudence constant* is used, as even though court decisions are not legally binding, they are still regarded as

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[13] ICRC, "International Humanitarian Law and International Human Rights Law Similarities and differences", *ICRC*, 2003, (available at https://www.icrc.org/eng/assets/files/other/ihl_and_ihrl.pdf)

highly persuasive[14]. The thesis thus uses earlier court decisions as a tool of interpretation that is highly persuasive, but not legally binding.

Finally, the thesis also uses the views and interpretation of the International Committee of the Red Cross (ICRC). The ICRC's role in interpreting IHL has been invaluable, and it is, therefore, natural to consider their views when trying to understand the laws of war. It should be noted, that the ICRC does not have any authority to make legally binding interpretations, but they are in this thesis regarded as highly authoritative.

1.3. Scope of Thesis

Since the concept of war is consistently used throughout the thesis, it does need some clarification. The thesis is an attempt to depict and refine the currently dominating approach of counterinsurgency, as reflected in the US COIN manual (2006). Mary Kaldor's concept of new wars is used as the conceptual framework, that defines what the parameters of our thesis are. This means that the model we are proposing is linked strictly to military operations in new wars. Classical, or old, inter-state wars are not the subject of the paper, and the refined COIN doctrine that we develop and propose is therefore not applicable to such. The thesis aims to evaluate the current counterinsurgency strategy, as reflected in the 2006 COIN manual, and to recommend alterations that makes counterinsurgency when applied in new wars more humane and more efficient.

The thesis is interdisciplinary as it is an attempt to combine military strategy, international relations and international law. By analyzing and discussing what mindset the law regimes of IHL and IHRL produces. The thesis is especially focused on how IHL is part of both retaining and reproducing the kill-capture mindset, in a circular process that is self-perpetuating. IHRL, on the other hand, is proposed as an alternative law regime, that could encourage a change from the kill-capture mindset to an approach focused exclusively on protecting civilians.
The primary aim of the thesis is to refine and develop the existing COIN doctrine. By integrating theories of security into military strategies, the thesis develops proposals that provide a more efficient and a more humane counterinsurgency strategy.

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[14]Robert L. Henry, "Jurisprudence Constante and Stare Decisis Contrasted", *American Bar Association* Journal, Vol. 15, No. 1 (January 1929), p. 11-13.

1.4. Empirical Choices

To examine the possibilities of changing fundamental aspects of counterinsurgency, making it more humane and thereby more efficient, we have used a variety of different empirical sources. Writings from scholars have been used to broaden our knowledge of the field, to get a deeper understanding of what needed to be changed. Theories have been used to examine previous cases of counterinsurgency, which has helped us analyze the strengths and weaknesses of earlier approaches. Military doctrines and writings by military leaders, especially high-level military Generals, have been used to gain a practical understanding of counterinsurgency. These texts have given us a deeper understanding of how counterinsurgency could be operationalized. Interviews have been conducted, to evaluate the findings we made, as they were used to further refine our proposed changes and alterations to COIN in new wars.

2. New Wars and International Law

This chapter examines how contemporary warfare can be conceptualized through the concept of new wars. The new wars concept is used throughout the entire thesis, as a theoretical reference point when analyzing and discussing contemporary conflicts. Furthermore, this chapter will introduce IHL as the law regime applicable to new wars. Lastly, it is demonstrated how IHL was created on the assumption that wars are won by killing or capturing the enemy. Thus, IHL evolved from a conventional war strategy and a mindset of kill-capture. This mindset encourages an excessive permissiveness in the interpretations of the categories inherent in IHL.

2.1. Conceptualizations of Contemporary War

The end of the Cold War symbolized a fundamental change in the international political environment. Moving away from the division of East and West, a new globalized era slowly came into existence. During this period, a new type of warfare became predominant, especially since the proxy wars between the two major powers, the US and the Soviet Union, were on the retreat. A decline in classical inter-state conflicts and an increase in intra-state conflicts, involving one or more states contributing with troops[15], caused a change in the dynamics and logic of wars. This changing logic has been the subject of much debate amongst scholars and practitioners, and several different terms have been introduced to accommodate the need for understanding and conceptualizing it[16.] During the Cold War the American military used the term 'low-intensity conflict' which was used to describe guerrilla warfare and terrorism[17]. Hybrid wars have been one of the most prominent attempts to term the changing nature of contemporary warfare and have also frequently been used by the American military. In 2007 Frank G. Hoffman argued that the blurring lines between the conventional and irregular use of force, along with the blurring between the categories of combatants and non-combatants, was a product of hybrid wars. Hybrid warfare is an attempt to describe how multiple forms of warfare are used at the same time, and how non-state, as well as state actors, participates in both conventional and irregular conflicts as long as it serves their

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[15]Therése Pettersson and Peter Wallensteen, "Armed conflicts, 1946–2014", *Journal of Peace Research*, Vol. 52, No. 4 (2015), p. 536-550.

[16] Concepts like hybrid wars, wars among the people, non-linear wars and post-modern wars, have all been attempt to conceptualize contemporary conflicts. For more see: Frank G. Hoffman, "Conflict in the 21st Century: The Rise of Hybrid War", *Potomac Institute for Policy Studies*, 2007. Rupert Smith, *The Utility of Force*, 2008. Chris Hables Gray, *Postmodern War: The New Politics of Conflict*, 1998.

[17] Kaldor 2012, *supra note 1*, p. 2.

goals[18]. In that regard, Hoffman argued that hybrid wars are waged by states and political groups, incorporating a range of different modes of warfare including "conventional capabilities, irregular tactics and formations, terrorist acts including indiscriminate violence and coercion, and criminal disorder"[19]. Hoffman concludes that the future poses new and diverse challenges, emphasizing the blurring between state and non-state actors, and the development of unanticipated tactics. He believes that the institutional framework, in the US nonetheless, will have to adapt and undergo significant changes to accommodate these new challenges that hybrid warfare poses[20]. The concept of hybrid warfare is quite similar to the concept of new wars, as both attempts to accommodate the changing nature of contemporary war. However, the new wars concept offers great attention to the fact that the predominant way of analyzing conflicts is currently through the lenses of an 'old war' logic, even though warfare has changed. According to the new wars theory, since the logic of war has changed, so should the scholarly approach, legal practice and policymaking[21]. Backing this analytical point is the Chief of the General Staff of the Russian Federation, General Valery Gerasimov. In 2013 he gave a speech, where he emphasized the changing nature of war which he coined 'non-linear war'. The lines between war and peace are blurring, and as a consequence, war is no longer being declared. The effectiveness of non-military means, such as political and strategic goals, have outgrown the efficacy of military power. Frontal engagements are ultimately becoming a thing of the past, and instead, asymmetrical actions such as internal opposition, the use of special forces and informational actions are becoming the predominant method of contemporary warfare. The rapidly changing international environment contributes to the vulnerability of the state. Gerasimov underlined that "a perfectly thriving state can, in a matter of months and even days, be transformed into an arena of fierce armed conflict, become a victim of foreign intervention, and sink into a web of chaos, humanitarian catastrophe, and civil war."[22]. It is precisely these changing features that demands a paradigm change in how we understand and perceive war.

2.2. What is New Wars?

Mary Kaldor constructed the term new wars, which is derived from the idea that with the new globalized era a new type of organized violence emerged. The term is divided into two words,

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[18] Frank G. Hoffman, "Conflict in the 21st Century: The Rise of Hybrid War", *Potomac Institute for Policy Studies*, 2007, p. 24.
[19] Hoffman, *supra note* 18, p. 58.
[20] Hoffman, *supra note* 18, p. 58.
[21] Mary Kaldor and Christine Chinkin, *International law and New Wars*, 2017, p. 6.
[22] Valery Gerasimov, "The Value of Science in Prediction", *Military Industrial Kurier*, 2013, (available at https://inmoscowsshadows.wordpress.com/2014/07/06/the-gerasimov-doctrine-and-russian-non-linear-war/).

namely 'new' which is to distinguish the perception of new wars from the prevailing perception of war that has been used in the earlier era, and which is therefore labeled as old wars. The word 'war' is used to emphasize the political nature of the new type of organized violence that is emerging. Organized violence is blurring the distinction between war, "defined as violence between states or organized political groups for political reasons"[23], and organized crime which involve "violence undertaken by privately organized groups for private purposes"[24]. By blurring the lines between these two understandings, war might be understood as both a clash of wills, as Clausewitz described it[25], and as a mutual enterprise in which the warring parties have more to gain from the war itself than they have to end it. Inherent in new wars is the logic of a mutual enterprise rather than a contest of wills, and that leads to these wars being more protracted, more sporadic, difficult to contain geographically and extremely difficult to end. Problematically, it is the failure to understand the logic behind new wars, that has often led to failed responses in the attempt to solve them[26]. Resolving conflicts, in a modern globalized world, requires an understanding of the changing nature of contemporary war, and this is where the concept of new wars is useful. It is important to underline that, the concept is not an empirical category, and the empirical foundation of the concept is therefore not necessarily new. Instead, it is an attempt to understand the new logic behind contemporary war, which should then be used in both academic research and as policy guidance.

New wars entail four distinct characteristics which make them different from old wars; goals and identities, actors, tactics, and forms of finance. New wars are predominantly fought in the name of identity, and the goal is to gain exclusive access to the state for individuals labeled with a specific identity. In contrast, old wars have been fought in the name of political ideas and geopolitical goals[27]. Identities in new wars can be divided into three categories which are the most common, namely; ethnic, religious or tribal[28]. These identities are fluid, but in war they often become ascribed, making it impossible to move from one identity to another. Once violence erupts, the identities are used to mobilize and to target through the imposition of a binary usage of us and them, which inflicts hatred and violence[29].

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[23] Kaldor 2012, *supra note* 1, p. 2.
[24] Kaldor 2012, *supra note* 1, p. 2.
[25] Clausewitz, *supra note 10*, p. 13 & 100.
[26] Kaldor & Chinkin, *supra note 21*, p. 7.
[27] Kaldor 2012, *supra note 1*, p. 7-8.
[28] Kaldor & Chinkin, *supra note* 21, p. 7-8.
[29] Kaldor & Chinkin, *supra note 21*, p. 8.

The actors in new wars are significantly different than the actors in old wars. Old wars were fought by states, through regular armed forces. These forces were wearing uniforms and were subject to national law. In contrast, the actors in new wars are a combination of cross-border non-state actors and networks of states, who are all involved in the conflict. These include a variety of actors such as; regular armed forces, warlords, paramilitary groups, terrorists, mercenaries, private security contractors and criminal groups[30]. The involvement of a vastly diverse set of actors makes the application of international law extremely difficult in these conflicts.

The means of war is another characteristic that has changed. In the wars that were fought up to the early part of the twentieth century, almost 90 percent of those killed or wounded were, under the definition of international law, combatants[31]. In the wars emerging at the end of the twentieth century, the victim profile is almost the exact opposite. 80 percent of the killed or wounded were civilians, and only 20 percent were soldiers on active service[32]. The violence used against civilians in new wars is often directed towards women. International organizations estimate that 20.000 to 50.000 women were raped, during the last ten years of the Balkan wars[33]. Human Rights Watch estimate the corresponding figure during and after the genocide in Rwanda to be more than a quarter of a million[34], strengthening the notion that rape has become a deliberate strategy in new wars.

In old wars, decisive battles between opposing militaries was the means of the war. Capturing territory and defeating the enemy were the goals. In new wars, the violence is mainly directed against civilians and there are very few decisive encounters. As the goals are achieved through political control of territory, the most commonly used tactic of new wars is displacement of the civilian population[35]. Violence against civilians is used as intimidation which generates fear, in particular targeting those who oppose or are of a different identity than the controlling armed group[36]. This gives the armed groups control of areas through tactics of fear, violence and displacement of the civilian population. This trend has led to a blurring between ordinary life and large-scale violence, and war simply becomes the way of life. The normalization of war infiltrate the whole system, and civilians engaging in illegal activities linked to the conflict, becomes

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[30] Kaldor & Chinkin, *supra note 21*, p. 11-12.
[31] Herfreid Münkler, *The New Wars,* 2005, p. 14.
[32] Münkler, *supra note 31*, p. 14.
[33] Münkler, *supra note* 31, p. 14.
[34] Clotilde Twagiramariya and Meredeth Turshen, *What Women Do in Wartime: Gender and Conflict in Africa,* 1998, p. 102.
[35] Münkler, *supra note* 31, p. 14.
[36] Kaldor and Chinkin, *supra note 21*, p. 13-14.

accepted and legitimate. The war therefore becomes a way for the warring parties, and civilians, to survive and provide an income, in some cases even earning considerable fortunes. Civilians are often forced to choose between displacement or joining an armed group, as participating in the conflict becomes the only viable way to survive. A typical pattern of new wars is that in the short-term, robbery, plunder and varying types of slave labour becomes normal, and in the long-term the development of shadow economies becomes a completely integrated aspect of the war. This causes belligerents and groups associated, to develop an apparent interest in the continuation of the war[37]. In contrast financing in old wars were dominated by taxation and the state borrowing money. The war economy was thus centralized, autarchic and totalizing, meaning that the entire civil population was hugely involved in the war economy. The finance of new wars is completely different as it is largely decentralized, and there is very little relation between the war economy and the civilian population, in relation to taxation and work. Instead, financing new wars is done primarily through the use of violent tactics such as extortion, looting, demanding payment at checkpoints, money for protection and ransom for kidnapping. Due to the decentralized economy, the unemployment rate in new wars is exceptionally high, and people are forced to relocate or join armed groups to survive. Ultimately, these new characteristics can explain the longevity and spill-over effect of the new wars. These wars are extremely difficult to end since the warring parties have a mutual interest in keeping the war going, in order to survive as a group. This is a result of the recruitment through identity, the binary labels that it entails and the decentralized criminal forms of finance.

2.3. Critique of the New Wars Concept

The new wars thesis has encountered its share of criticism, especially on the points on whether new wars are in fact new and whether they are actually war. This section will go through some of the most common critiques and discuss how the dynamics of the new wars concept should be comprehended.

2.3.1. Are New Wars 'New'?

The most common critique of new wars is that they are not empirically new. This has been brought up on numerous occasions and in relation to a variety of elements of the new war thesis. In reference to how new wars are different than old wars, Stephen Reyna questions the fact that private militaries, guerrilla warfare, and insurgency should be traces of new wars. Instead, he argues that

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[37] Münkler, *supra note, 31, p. 14.*

these non-state actors were indeed also part of colonial civil wars[38]. Actors in the new wars thesis are therefore not new at all, as similar actors can be dated back to colonial wars. Reyna also challenges Kaldor's argument that new wars are fought in the name of identity as opposed to ideology, which was the goal of old wars. He underlines that 'new wars' are indeed also fought for ideological reasons; "Consider the case of Hissene Habré, president of Chad between 1983 and 1990. Before coming to power, when still a rebel movement leader, he fought with a vaguely socialist ideology. Immediately after being overthrown he formed a new rebel movement. This fought under the ideological banner of 'democracy'."[39]. This is elaborated by Kalyvas, who argues that the categories within a left-right political understanding linked to the Cold War, blinded casual observers in analyzing wars, and resulted in many of the old wars being overstated in relation to ideology[40]. This has caused researchers to use a flawed analysis, when interpreting the old civil wars. In this regard, the end of the Cold War did not necessarily cause a decline in the ideological motivation of civil wars, but rather a decline in the conceptual categories that were used to interpret these wars[41]. The contribution of new wars is therefore nothing new, but merely a flawed perception of both contemporary and former civil wars.

Kalyvas goes on to argue that mass population displacement is not a new phenomenon, as is evident when analyzing classical civil wars such as the Russian, Spanish and Chinese civil war[42]. Furthermore, violence in old civil wars has been just as horrific and targeted against civilians as it has been in new civil wars. Kalyvas in this regard states that "the perception that civil wars are particularly cruel predates new civil wars—it is one of the most enduring and consistent observations, stressed by observers and participants alike, ever since Thucydides' depiction of the civil war in Corcyra."[43]. Again, he challenges that there is a change from old wars, where the goal of the war was to defeat the enemy through capture of territory in decisive battles, to new wars, where battles are rare and violence is mainly directed against civilians[44]. Most of Kalyvas' critique follows the trajectory that new wars equal civil wars. This is, however, controversial since Kaldor emphasizes that new wars are a mixture of "war (organized violence for political ends), crime (organized violence for private ends) and human rights violations (violence against civilians)."[45].

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[38]Stephen Reyna, "*Taking place: "new wars" versus global wars*", *Social Anthropology*, Vol. 17, No. 3 (2009), 294.
[39] Reyna, *supra note 38*, p. 295.
[40] Stathis Kalyvas, *""New" and "old" civil wars, a valid distinction"*, *World Politics*, vol. 54, issue 1, 2001, p. 108.
[41] Kalyvas, *supra note 40*, p. 109.
[42] Kalyvas, *supra note 40*, p. 110.
[43] Kalyvas, *supra note 40*, p. 114.
[44] Kaldor & Chinkin, *supra note 21*, p. 13-14.
[45] Kaldor 2013, *supra note 4*, p. 6.

This definition indicates that the new wars concept is not the same as the concept of civil wars. Instead, it is a mixture of different kinds of organized violence, and therefore a more complex and comprehensive conceptualization of war. That is not to say that contemporary civil wars do not possess the traits of new wars, they do indeed. The point is simply that the classical concept of civil wars does not comprehend the complexity of contemporary conflicts, which inevitably leads to a need for a re-conceptualization, i.e., new wars. The new wars concept, therefore, tries to change the way we perceive war, especially civil war, as it is currently too limited in its perception.

As new wars are a mixture of war, crimes and human rights violations, it inevitably leads to criticism of whether the concept actually deals with 'war'. John Mueller has argued that war is becoming obsolete and that conflicts claimed to be wars are closer to the characterization of criminal acts[46]. Mueller, therefore, agrees with Kaldor, in that contemporary conflicts is a combination of crimes and war. He does, however, question the fact that it is labeled war, as war as a concept is becoming obsolete. It could be problematic to describe conflicts that are closer related to crimes than to war, as new wars, as there will be a risk of securitizing the conflict[47], leading to the use of military force instead of policing. This is a critical point, as it is argued that the police and intelligence services, operating under civilian authority, are much more effective in dealing with criminals[48]. Ironically, this is also inherent in Kaldor's solution to new wars, the human security concept, as she argues that military engagement should follow the lines of policing[49]. This criticism is indeed a valid one, and the response is rather pragmatic. In order to solve these new wars, international political attention is needed. Criminal organizations and bandits do not easily gain international attention on the highest level, and declaring something a criminal act is, therefore, insufficient to achieve international political attention[50]. The importance of international political will should not be taken lightly, as it may very well be the only way to fundamentally change the approach we have towards war and warfare. Another point is that the distinction between war and crime is a blurred one, and the new wars thesis is therefore also an attempt to construct a conceptual framework that can comprehend both.

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[46] John Mueller, *The remnants of War*, 2007, p. 115-116.
[47] For more on securitization see: Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis*, 1998.
[48] Michael Howard, "What's in a name?: How to Fight Terrorism", *Foreign Affairs*, January/February 2002.
[49] Kaldor 2007, *supra note* 11, p. 185-190.
[50] Kaldor 2013, *supra note* 4, p. 6.

As mentioned earlier, the most common critique of the new wars thesis is that it is not empirically new. This does, however, miss the fundamental point of the thesis. The concept of new wars is not an empirical category, and the idea behind the concept is therefore not to set up a theoretical framework on whether or not something is a new war. Instead, it attempts to change the way the logic of war is understood and how contemporary warfare should be analyzed[51]. The change of logic is arguably the most significant contribution of the concept, and the newness of the empirical foundation is, therefore, less relevant. Jacob Mundy underscores the importance of what the new logic of new wars contributes with, 'Whether we choose to reject, embrace or reformulate concepts such as.... new wars, our justifications should not be based on claims of alleged coherence with particular representations of history. Rather such concepts should be judged on the basis of their ability to address the very phenomena they seek to ameliorate".[52]. Mundy's emphasis is on finding a way to deal with contemporary wars, and not on what parts of the empirical foundation of new wars is different than that of the old ones. Instead, he argues that scholars should focus on whether the logic it wants to elucidate is an accurate depiction of the nature of contemporary conflicts[53]. Kaldor follows this line of argument arguing that "The term 'new' is a way to exclude 'old' assumptions about the nature of war and to provide the basis for a novel research methodology."[54]. She argues that the concept of new wars is an essential part of moving away from an old and rigid paradigm, as it is not possible to understand the actors, goals, and logic that exists in contemporary wars within the current understanding of war.

2.4. Which Law Regime Governs New Wars?

The complexity of new wars leaves the question of whether IHL is the applicable law regime to these conflicts. In order to determine the applicable set of rules in any given conflict, the classification of the conflict is essential. Prior to the 1949 Geneva Conventions, customary law and treaty rules applied without reference to conflict characterization[55]. This is, however, not the reality of today where different sets of laws are governing different types of conflicts. Although rarely occurring the classification of an armed conflict in the case of declared war between two states is relatively simple. In such a case, the conflict would qualify as an international armed conflict (IAC),

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[51] Kaldor 2013, *supra note* 4, p. 1.
[52] Jacob Mundy, "*Deconstructing civil wars: Be- yond the new wars debate*", *Security Dialogue*, vol. 42, No. 3 (2011), p. 289.
[53] This argument is also backed by Edward Newman see: Edward Newman, "*The 'New Wars' Debate: A Historical Perspective Is Needed*", *SAGE Publications*, Vol. 35, No. 2, (2004), p. 186.
[54] Kaldor 2013, *supra note* 4, p. 3.
[55] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, First Edition, 2010, p 149.

and should be regulated by the Geneva Conventions in its entirety[56]. Thus, if two or more High Contracting Parties to the Geneva Convention are resorting to armed force against each other, we are dealing with an interstate conflict under common article 2, which means that all of the 1949 Geneva Conventions and additional protocol I should apply. Depending on whether the state parties are fighting each other, or if they are fighting an armed opposition group, the conflict could also be categorized under common article 3 as an intrastate conflict, to which common article 3 and possibly additional protocol II applies[57].

2.4.1. International Armed Conflict Under Common Article II of the Geneva Conventions

In common article II of the Geneva convention, armed conflict is defined as "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 recognized by one of them"[58]. According to the ICRC, "any differences arising between states and leading to the intervention of members of the armed forces is an armed conflict"[59]. Thus, if two or more states are engaged in armed conflict against each other, it is, following common article II of the Geneva Conventions, an International Armed Conflict, in which all four of the 1949 Geneva Conventions, and for ratifying states, the 1977 additional protocol I, shall apply. The application of additional protocol I can be found in article 1(3) of the same protocol that states, "this protocol supplements the Geneva Conventions" and "shall apply in the situations referred to in article 2 common to those conventions"[60]. The 1977 additional Protocol I furthermore specify in article 1(4), that the situations referred to in Common Article II of the Geneva Conventions "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes"[61]. A declaration of war is thus not required to trigger a common article II international armed conflict, and how the conflict is characterized by the two states is irrelevant[62], as the prerequisite for an international armed conflict is that an armed conflict between at least two states is occurring.

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[56] Solis, *supra note 55*, p 150.
[57] Solis, *supra note 55*, p. 150.
[58] David Turns, *The law of armed conflict (International Humanitarian Law)*, in: Malcom D. Evans (ed.), International Law, 2014, p. 827.
[59] Jean Pictet, *Commentary on The Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick In Armed Forces in the Field*, 1952, p. 32.
[60] Solis, *supra note 55*, p 150.
[61] International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, article 1(4).
[62] Solis, *supra note 55*, p. 151.

2.4.2. Non-international Armed Conflicts Under Common Article 3 of the Geneva Conventions

Common Article 3 is the only article in all of the Geneva conventions that deal with internal armed conflicts and civil wars, and it has been characterized as one of the most significant innovations of the 1949 Geneva Conventions[63].

The founders of the 1949 Geneva conventions determined that there should be a minimum of humanitarian protection for the victims in internal armed conflicts occurring inside a state's sovereign borders, even without any involvement of foreign states. This extended the principles of the Geneva Conventions to non-international armed conflicts, contesting the classical notion of national sovereignty[64]. Common article 3 entails a group of humanitarian norms, and is often referred to as a miniature version of the Geneva Convention, because it contains the basic elements of the rest of the Conventions, but applies to non-international armed conflicts instead[65]. Common Article 3 provides that

"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 at a minimum, the following provisions: Persons taking no active part in 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 similar criteria"[66].

Included in common article 3 are specific prohibitions including violence to life and person, in particular murder, mutilation, cruel treatment, torture, taking hostages, humiliating and degrading treatment. In sum, what common article 3 calls for is humane treatment in non-international armed conflicts[67][68].

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[63] Solis, *supra note* 55, p. 96.

[64] International Committee of the Red Cross, "The Geneva Conventions of 1949: Origins and Current Significance", 2009, (available at: https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm).

[65] International Committee of the Red Cross, *Commentary on Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 1958, p. 34.

[66] International Committee of the Red Cross, *supra note* 65, p. 151.

[67]. The ICRC's study of customary international law is beneficial as general guidance to what constitutes humane treatment. *"The actual meaning of humane treatment is not spelled out, the requirement... is an overarching concept. It is generally understood that the detailed rules found in international humanitarian law and human rights law give expression to the meaning of humane treatment... however, these rules do not necessarily express the full meaning of*

Characterizing an armed conflict as a NIAC is to some extent a negative definition. The threshold of armed conflict, which will be discussed later, first of all, needs to be met. This means that the fundamental prerequisite for a NIAC is that the degree of organization and control of territory, on the part of the non-state actor, has to be grave enough to reach an armed conflict. Second, the conflict shall not be international in character, which means that NIAC's are defined as not being an IAC. As we have seen, new wars are broad in definition, encompassing both the characterization of IACs and NIACs and arguably even conflicts below the threshold of armed conflicts. It is thus evident that IHL is applicable to new wars, both in case of IAC and NIAC.

2.4.3. Common Article 3

Common Article 3 applies only in armed conflicts not of an international character, occurring in the territory of one of the High Contracting Parties. Unlike every other article in the four 1949 Conventions, article 3, distinguishes between genuine armed conflict and internal instances of riot, disorder or banditry, where it has no application[69]. An important point about common article 3, in the light of new wars, is that if the armed conflict is between two or more states, it is an international armed conflict to which all of the four Geneva Conventions should apply[70]. However, when Common Article 3 applies to a conflict, no other parts of the 1949 Geneva Conventions applies, which means that some rules are not applicable, such as the Prisoner of War (PoW) status, as this is only part of the Geneva Convention IV[71].

As laid out in common article 3, non-international armed conflict to which common article 3 applies, arises in cases of internal armed conflicts. In other words, there is a common article 3 non-international armed conflict if there is an armed conflict within a state, and the opponents are not members of another state's armed force. Former case law from the International Tribunal for the Former Yugoslavia (ICTY) has developed a basis for differentiating between common article 3 armed conflicts and other forms of internal conflict.

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what is meant by humane treatment, as this notion develops over time under the influence of changes in society". See: International Committee of the Red Cross, *The Geneva Convention of 12 August 1949*, 12 August 1949, article 3, p 152.
[68] Jean-Marie Henckaertes and Louise Doswald-Beck, *Customary International Humanitarian Law* vol. I, *rules*, 2005, Rule 87, p. 307-308.
[69] Pictet, *supra note* 59, p. 36.
[70] International Committee of the Red Cross, *The Geneva Convention of 12 August 1949*, 12 august 1949, art. 2, p. 35.
[71] International Committee of the Red Cross, "International Humanitarian Law and the challenges of Contemporary Armed Conflicts", *international review of the Red Cross,* September 2007, p728.

"The test applied by the Appeals Chamber to the existence of an armed conflict for the purpose of the rules contained in Common Article 3, focuses on two aspects of a conflict: the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."[72].

It seems safe to conclude that armed conflicts between a state and non-state actors fall under Common Article 3. This entails that the rules governing NIACs falls under common article 3, and they are therefore different from the rules followed in an IAC. The rules governing NIACs are not static, but rather reflects changing circumstances. The last decade has been marked by an international recognition of the fact that the concept of war crimes and grave breaches are applicable in internal as well as in international armed conflict[73]. This notion was hinted by the ICTY appeals chamber during the Tadic case. In an appellant opinion, the Chamber initially took the position that "we must conclude that, in the present state of development of the law, article 2 of the ICTY statute (Grave Breaches of the Geneva Conventions of 1949) only applies to offenses committed within the context of international armed conflict"[74] but in the same decision, the appeals chamber opened the door for changes to this notion by stating that:

"we have no doubt that they (violations of rules of warfare in international law) entail criminal responsibility regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect elementary considerations of humanity, widely recognized as the mandatory minimum for conduct in armed conflict of any kind."[75]

Six years after, the appeals chamber in the Celebici case ruled that:

"In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of

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[72] *Prosecutor vs. Dusco Tadic,* IT-94-1-T, Opinion and Judgement, International Criminal Tribunal for the Former Yugoslavia (ICTY), 7 May 1999, para. 562.
[73] Solis, *supra note 55,* p. 99.
[74] *Prosecutor v. Tadic* IT-94-1-A, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY, 2 October. 1995, para 84.
[75] *Prosecutor v. Dusco Tadic,* IT-94-1-A, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY, 2 October. 1995, para 129.

similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person."[76]

To summarize, this shows how the decline in inter-state wars and the emergence of new wars have changed the way IHL is governing armed conflicts. The law has to evolve to keep up with a changing environment, and applying IAC violations to the case of NIAC has in this regard been attempted.

New wars can fall under the categories of either IAC or NIAC, and common article 3 is applicable in both cases. Since new wars are characterized by internal and external involvement, by state and non-state actors, the question is whether it can be a NIAC and an IAC simultaneously.

2.4.4. IAC and NIAC Happening Simultaneously

It has been held by the ICTY and the ICJ that a particular conflict can entail aspects of both international and non-international character. In the Nicaragua case, the ICJ asserted that the conflict between the Contras and the Nicaraguan forces was an armed conflict not of an international character, whereas the conflict between the US and Nicaragua was an international armed conflict[77]. Adding to this, in the Tädic case the ICTY held that an international conflict may exist alongside an internal conflict[78].

An example of this could be when a state is held responsible for being unable or unwilling to deal with a terrorist group that threatens the security of a third state. If the victim state reacts by attacking the suspected terrorists, on the territory of the host state, it can result in a conflict between victim state and host state, victim state and terrorist group and maybe even host state and terrorist group. In this situation, an international armed conflict arises between the two involved states. This situation can be illustrated through the US attack on Afghanistan, as a response to 9/11. The US was claiming that the Taliban Government of Afghanistan was supporting al-Qaeda, and an international armed conflict erupted between the US and Afghanistan. The breakout of an IAC between

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[76] *Prosecutor v.* Delalic, et al., IT-96-21-A, Judgement, ICTY, 20 Feb. 2001, para 172.
[77] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, International Court of Justice, 27 June 1986, para. 219.
[78] *Prosecutor v. Dusco Tadic,* IT-94-1-A, Judgement, ICTY, 15 July 1999, para. 84.

Afghanistan and the US, did not mean that the conflict with al-Qaeda disappeared, but rather that the conflict came to entail both international and non-international aspects[79].

The law governing armed conflict is thus premised on a distinction between IAC and NIAC even though such a sharp distinction is hard to apply in new wars. New wars might under international law be classified as NIAC, but in reality, a more suitable description might be a mixed conflict, because they include both internal and international elements. Bassiouni exemplifies this dynamic with a reference to the conflicts in Rwanda and the great lakes area of Africa, including Congo and Uganda. These conflicts were characterized as internal conflicts despite the fact, that they were marked by high levels of foreign involvement by other African states, involving the presence of foreign fighters and causing a spillover into neighboring states[80]. As described by Mary Kaldor, new wars are not international conflicts involving regular armies and declarations of war, but in spite of this, the level of foreign intervention makes them more than internal conflicts. In a globalized context, internal wars often entail that different foreign actors have an interest at stake, regional states, powerful states such as the US, international organizations such as the UN, the EU and the Arab League, NGO's, humanitarian organization and a considerable influence by diasporas. This can be exemplified through the Syrian conflict which has followed the pattern of internationalization. The Syrian regime is supported both by Iran, Hizbollah and Russia while the US-led international anti-ISIS coalition is supporting the Syrian Democratic Forces. Furthermore, the conflict has had spillover effects to neighboring states, manifested in violent clashes with Turkey. It is, however, not an international armed conflict under international law, as the conflict is officially fought between the Syrian regime and non-state opposition groups. Even though there is a substantial international involvement and presence, the states involved are not officially at war with each other[81].

2.4.5. IHL and New Wars

Even though non-state actors cannot become parties to and ratify treaties, they are still bound by them and therefore equally have to comply with IHL. This is iterated by the Sierra Leone Special Court Appeals Chamber, "it is well settled that all parties to an armed conflict whether states or

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[79] David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence", *The European Journal of International Law,* Vol. 16, no.2, (2005), p.196.

[80] Cherif Bassiouni, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors", *Journal of Criminal Law and Criminology,* Vol 98, no. 3, (2008), p. 748.

[81] UN General Assembly, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, Human Rights Council, A/HRC/21/50, 16 August 2012, para 12.

non-state actors are bound by international humanitarian law, even though only states might become parties to international treaties"[82]. Furthermore, non-state actors are also bound by customary international law, which is the reason that the UN human rights council's special procedures, which includes fact finding missions and special rapporteurs, investigate human rights violations, and violations of IHL by all parties to the conflict[83].

The rigid categories of combatant/non-combatant in IHL leaves no room for categorizing non-state actors. This becomes a problem when applying the principle of distinction, as the states armed forces can have a hard time identifying the insurgents from the civilians. Furthermore, by not granting any legal status to insurgents, states take away their right to fair treatment. This leaves states with fewer legal obligation in relation to how they handle non-state actors, but it also leaves insurgents with fewer obligations in relation to IHL. The result is that states can treat members of non-state groups worse than they would treat individuals of state forces. This asymmetry in the adherence to IHL, creates a problem for the principle of reciprocity, as non-state actors do not tend to care about the laws of war, making the conflict less humane.

To conclude this section, new wars can fall under the categories of IAC and NIAC, or both categories simultaneously. Notwithstanding what category the conflict falls under, as a minimum common article 3 is applicable which entails that, new wars are regulated by IHL.

2.5. The Kill Capture Paradigm of IHL

Having established that IHL is the law regime in new wars, we examine how the laws of war has evolved from a conventional war strategy of winning via killing and capturing the enemy. In this section, we trace the history of the modern laws of war, from the Lieber code to the to the Geneva Conventions of 1949, to demonstrate that IHL, is founded on the perception that warfare involves a kill-capture strategy.

The fundamental goal of conventional warfare is the destruction of the enemy "his forces, whether by death, injury, or any other means - either completely or enough to make him stop fighting… the

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[82] *Prosecutor v. Sam Hinga Norsman*, SCSL-2004-14-AR72(E)) 31, Decision on preliminary motion based on lack of jurisdiction (child recruitment), Special Court of Sierra Leone, 31 May 2004, para 22.
[83] See: UN Human Rigths Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/30/48, 13 August 2015, para 151-152.

complete or partial destruction of the enemy must be regarded as the sole object of all engagements"[84]. When engaged in the war in Vietnam, the US army used body counts as an indicator of how successful the war was being conducted. Ultimately, the US Army was trying to reach the point where the numbers of killed enemies would surpass the willingness of the enemy population and government to continue their resistance. The application of firepower, as in World War II, was the primary mean of compelling the enemy to fulfill your will[85]. Ganesh Sitaraman frames this notion as the "kill-capture" approach building on the assumption that during a battle the goal is to kill or capture the enemy's forces to the level where he surrenders[86]. Frederik the Great argued that the objective of war was the entire destruction of your enemies[87] and Carl von Clausewitz argued that the overriding principle of war should be the destruction of enemy forces[88]. Perhaps elaborated even more illustrative, the Italian military strategists Giulio Douhet stated that war necessitates "smashing the material and moral resources of a people.. until the final collapse of all social organization"[89]. This shows that the conventional war model had its center of gravity on the destruction of the enemy and on destroying the populations will, in order to make them reluctant to support the national war machine. This kill-capture paradigm has been the conventional approach of military strategists for hundreds of years, and it was also, by far, the most prevailing paradigm during the era of codifying the laws of war. The kill-capture approach has overtime contributed to the development of the laws of war in two linked trajectories. First, the laws of war have limited violence during conflict, and as a humanitarian necessity, its object has been to lessen human suffering. At the same time, it has acted as a blueprint for war, enabling violence, as it legitimizes killing as something that is unavoidable and a natural part of warfare. In this regard, the laws of war become a manifestation of a compromise between humanitarian considerations and military necessity.

The laws of war have its origins in the Lieber Code, which was the first endeavor to codify the laws of war [90]. The code was constructed during the American Civil War, by Francis Lieber, a Professor at Columbia College in New York. The instructions were only binding on the forces of the United

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[84] Clausewitz, *supra note 10*, p. xxvi.
[85] Philip Chr. Ulrich, "Overwhelming Force - A Persistent Concept in US Military Thinking From the American Civil War to Vietnam", *Danish Defence College*, 2012, p. 13.
[86] Ganesh Sitaraman, "Counterinsurgency, the War on Terror and the Laws of War", *Virginia Law Review 1745,* 2009.
[87] Sitaraman, *supra note* 86, p. 5.
[88] Clausewitz, *supra note 10*, p. xxvi.
[89] Sitaraman, *supra note* 86, p. 6.
[90] Solis, *supra note* 55, p. 39.

States, but they resembled the laws and customs of war present at the time[91]. The Lieber Code later became the basis of further codification on the laws of war, and similar regulations were issued by Great Britain, France, Prussia, Spain, Russia, Serbia, Argentina and the Netherlands[92]. Therefore, the Lieber Code became an important starting point in the codification of global laws governing armed conflicts. This importance is also signified by the UK Manual on the Law of Armed Conflict, which makes a reference to the Lieber Code, as being the most important codification of the customs of war[93]. One of Lieber's more significant contributions was the adoption of the doctrine of military necessity as a way to limit what was permissible in war. The principle of military necessity allowed for extensive kill-capture operations, including the direct destruction of armed enemies and persons whose destruction was incidentally unavoidable[94]. Although offering some restrictions to the conduct of warfare, the Lieber Code still reflected the kill-capture approach of military strategists and understandings such as Douhet's notion of smashing the recourses of the people. In this regard, Lieber did not object to tactics of starvation, even when it included civilians. Reflecting the kill-capture paradigm, Article 17 of the Lieber Code states that "War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed so that it leads to the speedier subjection of the enemy"[95] and "The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war"[96]. Even though the Lieber Code did provide humanitarian improvements, it was still created in a kill-capture mindset. This meant that it did not change the fundamental perception, that war was inevitable and the goal was to defeat the enemy through the use of force.

Several years later the principle of military necessity achieved further recognition, in what is another early example of codifying the laws of war, the St. Petersburg Declaration of 1868. The St. Petersburgh declaration applied the Lieber code, and went even further, with more concrete restrictions. States that signed the St. Petersburgh declaration renounced the use of certain exploding projectiles in war, arguing that "the only legitimate object which states should endeavor

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[91] International Committee of the Red Cross, "Instructions for the Government of Armies of the United States in the Field (Lieber Code)", 24 April 1863, (available at https://ihl databases.icrc.org/ihl/INTRO/110).

[92] Thomas E. Holland, *The laws of war on land (Written and unwritten)*, 1908, p. 72-72.

[93] UK Ministry of Defense, *The Joint Service Manual of the Law of Armed Conflict*, 2004, p. 7.

[94] International Committee of the Red Cross 1863, *supra note 91*, Article 15.

[95] International Committee of the Red Cross 1863, *supra note 91*, Article 17.

[96] International Committee of the Red Cross 1863, *supra note 91*, Article 21.

to accomplish during war is to weaken the military forces of the enemy"[97]. This notion, which is part of the preamble of the declaration, might be the most significant part of the St. Petersburgh declaration because it articulates the concepts of unnecessary suffering and military necessity. This means that if the object of military action is not to weaken the military forces of the enemy, it is illegitimate. This, of course, underlines the presence of the kill-capture approach, but inherent in the declaration is also the point, "that the employment of such arms would…be contrary to the laws of humanity"[98]. By establishing the principle of unnecessary suffering during war while at the same time, accepting that killing is unavoidable, the declaration restrained certain killings while also legitimizing and thereby empowering killings as an inevitable part of war.

Other parts of the laws of war were codified during The Hague Peace Conferences in 1899 and 1907. Hague Regulation IV continued the codification of customary laws of war which began with the Lieber Code. The fundamental principle of distinction between combatants and non-combatants, was appended to The Hague regulation IV of 1907 stating that, "The laws, rights, and duties of war apply to armies, militia, and volunteer corps that are commanded by a person responsible to subordinates, that show a distinctive emblem, that carry arms openly, and that follow the laws and customs of war."[99]. The principle of distinction here declares battle against combatants as being an essential part of war, which in turn justifies killing and capturing the enemy. Regulation 20 of Convention No. IV states that prisoners of war must be repatriated to their home countries as quickly as possible[100], which entails that during the hostilities they can be held by the belligerent. When scrutinizing The Hague Regulations, it becomes clear that the means of warfare are not unlimited. Actions resulting either in unnecessary suffering as well as attacks on unarmed and persons who have surrendered are forbidden[101]. However, even though adding restrictions to the conduct of warfare humanizes the process of war, the red line throughout The Hague regulations is that war necessitates killing and capturing.

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[97] International Committee of the Red Cross, *"Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight"*, 29 November/11 December 1868, (available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0 051547C).

[98] International Committee of the Red Cross 1868, *supra note 97*.

[99] International Committee of the Red Cross, "Convention (IV) respecting the Laws and Custom of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague Convention IV)", 18 October 1907, article 1, (available at https://ihldatabases.icrc.org/ihl/INTRO/195).

[100] International Committee of the Red Cross 1907, *supra note 99*, regulation 20.

[101] International Committee of the Red Cross 1907, *supra note 99*, regulation 23.

The Geneva Conventions from 1949, are the latest codification of the laws of wars and is also known as international humanitarian law (IHL). Each of the four Geneva Conventions offers protection to peoples from the violence and suffering of war. The Conventions protects the wounded, sick and shipwrecked at sea, prisoners of war and civilians. But in spite of the humanitarian foundation, the four Geneva Conventions, like the Lieber Code and The Hague Regulations, enables the kill-capture paradigm and accepts the premise that war, and the violence and death in it, is unavoidable. This is strongly exemplified by the International Committee of the Red Cross's (ICRC) commentary, where it is stated that the soldier who is seeking to kill, may be killed himself[102]. This again underlines that, even though the Geneva Conventions aims to lessen human suffering in war, it is still illustrative of the core assumption, that killing and capturing the enemy is a central feature of war[103].

The laws of war have for over a century assumed that the necessary strategy for victory in war is destroying the enemy either by killing or capturing him. In the pursuit of achieving this goal, a certain degree of collateral damage, in the form of civilians killed in action and the destruction of civilian property, has been accepted as a military necessity. The development of the laws of war points to the fact that, the incorporation of different conventions and declarations, has been an attempt to lessen human suffering in war. Problematically, the laws of war are fundamentally linked to the kill-capture paradigm, which accepts and legitimize killing in war. The result has been that the laws of war have tried to both constrain and enable violence in war. The underlying principles of military necessity, distinction, and proportionality all share this duality, and this has fueled the already existing kill-capture paradigm, which produces an acceptance of war as unavoidable, and killing in war as necessary.

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[102] Pictet, *supra note* 59, p. 136.
[103] Sitaraman, *supra note* 86, p 9.

3. COIN - A Strategic Response to New Wars

This chapter sets out to show how a strategy aiming at winning over the population by focusing on population security, has been developed and adopted by Western forces in Afghanistan through the COIN doctrine. The first part will show how restrictions on the use of force, has become an integral part of military strategy in finding a suitable solution to the challenges of new wars. The second part will analyze the conflict in Afghanistan to show that it is a prime example of a new war. This will then be used to discuss how the COIN doctrine was implemented, and how it worked, as the overall strategy in Afghanistan.

Since the terrorist attacks on New York and Washington in September 2001, new security measures have reshaped the operational reality amongst soldiers from Western countries such as the US, the UK and Denmark. From the beginning of the new millennium, Western states have involved themselves in a particular type of conflict, referred to by the Danish Defense College as, insurgency warfare[104]. One of the natural implications of the changing warfare, is that new strategies for addressing contemporary conflicts are needed. However, according to the Danish Defense College the ongoing conflicts have, mistakenly, been conceptualized in the vocabulary and mindset of conventional warfare[105]. The new wars school of thought has contributed to comprehension of why conventional military thinking has limited value in the armed conflicts of today. Borrowing a COIN term, Mary Kaldor argues that the strategy of inflicting 'fear and hate' assumed by various belligerents in new wars, should not be met by conventional war thinking, but rather by a strategy of winning "hearts and minds"[106]. Kaldor argues that the appropriate international response to new wars should be the creation of an "environment where people can act freely without fear and where inclusive forms of politics can be nurtured"[107]. More specifically, responses against new wars should aim at winning over the population which means that operations should ultimately eschew aggravating local communities. A task that conventional industrial sized and organized militaries traditionally have been poorly equipped to handle[108]. But as we shall see coalition forces have

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[104] Jens Ringmose, Kenneth Pedersen, Lars Mouritsen and Peter Dahl Thruelsen, "The Anatomy of Counterinsurgency Warfare", *Danish Defence College*, 2008, p. 5.
[105] Ringmose, *supra note 104*, p. 6.
[106] Kaldor 2012, *supra note 1*, p. 121.
[107] Kaldor 2012, *supra note 1*, p. 143.
[108] Sten Rynning and Olivier Schmitt, "Alliances", Forthcoming in Alexandre Gheciu and William Wholforth (eds.), *Oxford Handbook of International Security*, 2017, p. 4. For more on the inability of conventional armies to conduct COIN operations, see McChrystal's initial assesment; "ISAF is a conventional force that is poorly configured for COIN".

incorporated the concept of population security into their campaigns in Afghanistan as part of their counterinsurgency strategy, as laid out in the COIN manual[109]. In Iraq, the COIN strategy was implemented as strategy for the Multinational Forces through the "Commanders Counterinsurgency Guidance"[110]. In Afghanistan, General McChrystal, commander of the International Security Assistant Forces (ISAF), argued for a new and better approach, building on all the latest discoveries and rediscoveries completed by the US Military under the leadership of General Petraeus and with the assistance of authorities in the field, such as David Kilcullen. McChrystal argued that "this is a different kind of fight"[111] therefore "we must conduct classic counterinsurgency operations"[112] and "ISAF will change its operating culture to pursue a counterinsurgency approach that puts Afghan people first"[113]. McChrystal believed that the COIN doctrine was an appropriate response to the new challenges of contemporary warfare, and he argued that by winning hearts and minds of the population, ISAF could ultimately win the war.

Mary Kaldor defines new wars as driven by the logic of mutual enterprise where, "the warring parties are interested in the enterprise of war rather than winning or losing it"[114]. Modern era insurgency erupts subsequent to state failure and is not necessarily aiming at overtaking a functioning political body, but rather aims at "scavenging its carcass, or contesting an ungoverned space"[115]. This notion is changing the dynamics of war, as the actors involved are dependent on the conflict in order to survive. Actors in new wars are not interested in peace or settlements, and ending the conflict is therefore difficult through classical peace agreements. Counterinsurgency expert David Kilcullen describes insurgencies as, social systems that grow organically in local societies but usually develops links globally with other insurgencies[116]. This is also one of the central points identified by Kaldor in her new wars thesis, where it is argued that new wars often entail a myriad of transnational connections[117].

Stanley McChrystal, "Commanders Initial Assessment", *Department of Defense*, 2009, (avaliable at: https://media.defense.gov/2017/Jun/19/2001765050/-1/-1/0/AP_BRAND_MCCHRYSTALS_ASSESSMENT.PDF)

[109] The U.S. Army Marine Corps, *supra note* 5.

[110] David. H Petraeus, "MNF-Iraq Commander's COIN Guidance", *Military Review,* Vol. LXXXVIII, No. 5 (September 2008), p. 2-4.

[111] Stanley McChrystal, "Commanders Initial Assessment", *Department of Defense*, 2009, p. 1-1, (available at https://media.defense.gov/2017/Jun/19/2001765050/-1/-1/0/AP_BRAND_MCCHRYSTALS_ASSESSMENT.PDF)

[112] McChrystal 2009 B, *supra note* 111, p. 1-2.

[113] McChrystal 2009 B, *supra note* 111, p. 2-11.

[114] Kaldor 2013, *supra note* 4, p. 13.

[115] David Kilcullen, "Counter-Insurgency Redux", *Survival*, Vol. 48, No. 4 (Winter 2006–07), p. 2.

[116] David Kilcullen, "Countering Global Insurgency", *Small Wars Journal*, Vol. 28, Issue 4 (2005), p. 17-18.

[117] Kaldor 2012, *supra note 1*, p. 2.

Another trait of the new wars, is that the method of contemporary wars resembles that of guerilla warfare, where territory is captured through political control of the population. Kaldor argues that new warfare incorporates insurgency techniques of destabilization, by sowing fear and hatred to control the population[118] – this notion is also identified by the COIN manual that argues that because insurgents often suffers from a lack of resources, they compensate by "sowing chaos and disorder anywhere, in the early stages of insurgency, because they are aware of the fact that the government will fail if it is unable to maintain order"[119].

As a result of the changing nature of warfare the need for a new approach emerged among a number of American officers, academic defense scholars and people working in civil affairs[120]. The new thinking concentrated on a holistic strategy in dealing with new wars, and was made mainstream in Iraq and Afghanistan. The new approach aims at establishing population security in order to defeat the enemy and was manifested in the US Army and Marine Corps COIN manual, which was published in 2006. The basis of the strategy that was operationalized in Afghanistan and Iraq can be derived from this manual that was published in 2006. The manual was originally meant for Iraq but was subsequently also applied in Afghanistan in an effort to change the strategy from an enemy-centric focus to a population-centric focus[121]. In 2009, General Petraeus argued that counterinsurgency with its two key principles of, securing and serving the population, and separating the reconcilable from the irreconcilables, very much resembles Mary Kaldor's human security approach, which will be discussed later[122].

The Field Manual draws on French experience with counterinsurgency from Algeria[123] which is why it contains a number of references to the late French colonel, David Galula, and his thoughts on the strategy of counterinsurgency. According to Galula, the support of the population is as necessary for the counterinsurgents as it is for the insurgents. Controlling an area and preventing the development of political insurgency cells, requires the support and active participation of the population. This leads to the notion that in successful counterinsurgency civilian casualties should be avoided. Therefore, counterinsurgents will have to operate under limited conditions, compared to

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[118] Kaldor 2012, *supra note 1*, p. 9.
[119] The U.S. Army Marine Corps, *supra note 5,* para 1-9, p. 4.
[120] Shannon D. Beebe and Mary Kaldor, *The Ultimate Weapon is No Weapon*, 2010, p. 67.
[121] Thomas Galasz Nielsen, Mahroona Hussain Syed, David Vestenskov, *Counterinsurgency and Counterterrorism: Sharing Experiences in Afghanistan and* Pakistan, 2015, p. 27.
[122] Beebe & Kaldor, *supra note 120,* p. 68.
[123] The U.S. Army Marine Corps, *supra note 5*, p. 13 & 252.

conventional warfare, and should avoid falling into the temptation of using excessive force when targeting insurgents. This is according to Galula because the counterinsurgents will be measured on their ability to provide security and maintain order in the society[124]. Essentially, Galula argues that the guiding principle of the COIN strategy should build on laws that are based on the need to gain support from the majority of the population[125]. The realization that public support for the host state is closely linked to the conduct of counterinsurgents, makes counterinsurgency operations highly political, which is illustrated in this quote by Galula: "Essential though it is, the military action is secondary to the political one, its primary purpose being to afford the political power enough freedom to work safely with the population".[126] Galula provides us with the basic strategy and tactics, necessary to successfully defeat insurgencies through the development of a political leadership that is capable of garnering public support.

The 2006 publication of the COIN manual, with its focus on population security, was the basis for the strategy laid out by the western forces in Iraq[127].The COIN Manual wrestles with the new realities of new wars and recommends a "paradigm shattering"[128] in the approach to these conflicts. The fact that the COIN manual is a new and radical approach, is made explicit in the introduction by Sarah Sewall who argues that "the counterinsurgency field manual challenges much of what is holy about the American way of war. It demands significant change and sacrifice... Those who fail to see the manual as radical probably don't understand it, or at least understand what it is up against"[129]. The COIN manual is confrontational and counterintuitive to the requirements of conventional warfare because it perceives an insurgency as a political struggle where the center of gravity is the population, who remains "the deciding factor in the struggle"[130]. This is in huge contrast to conventional warfare, that builds on a kill-capture paradigm where defeating the enemy is the only viable way to win.

The consequences of implementing the COIN manual and its imperatives[131], have been extensive in that they were incorporated into the guidelines and protocols of the multinational forces in Iraq. The manual therefore not only applies to the US military, but to all the participating multinational actors

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[124] David Galula, *Counterinsurgency Warfare theory and Practice,* 2006.
[125] Galula, *supra note* 124, p. 54-55.
[126] Galula, *supra note* 124, p. 63.
[127] Ulrich, *supra note* 85, p. 3.
[128] The U.S. Army Marine Corps, *supra note* 5, p. xxxv.
[129] The U.S. Army Marine Corps, *supra note* 5, p. xxi.
[130] The U.S. Army Marine Corps, *supra note* 5, p. xxv.
[131] The U.S. Army Marine Corps, *supra note* 5, p. 44-45.

under operation Enduring Freedom in Iraq. Likewise, in 2009 the COIN manual was also implemented as the overall strategy for the International Security Assistance Forces (ISAF) in Afghanistan, by General Stanley McChrystal. The fundamental principles of the manual are built on the theory that protecting civilians and causing the least amount of damage possible, is an efficient strategy to win over the 'hearts and minds' of the population. According to the manual, winning over the population is the only way to defeat insurgents, and it therefore includes the following principles, which are in strong contrast to conventional warfare strategy, and might seem paradoxical; "Sometimes, the more you protect your force, the less secure you may be"[132], "Some of the best weapons for counterinsurgents do not shoot[133]" and "Sometimes, the more force is used, the less effective it is"[134]. Common for these principles is the notion of restriction. The COIN manual changes the focus of war from conventional goals of killing or capturing the enemy to protecting the population and establishing a functioning society.

Following these principles will expose the counterinsurgents to a bigger risk, but it is important to understand that if COIN is carried out properly, the increased risk to the counterinsurgents will only appear in the beginning of the operation. By using less force, the counterinsurgents will expose themselves more, but this is a prerequisite of winning over the 'hearts and minds' of the population, which will in turn enable the counterinsurgents to operate more safely among the civilian population. This will enable them to gather intelligence more easily, while also making it harder for the insurgents to recruit new members from the civilian population, which will help them defeat the insurgents. The increased tactical risks in the short-term will therefore be a strategical investment in the long-term success.

In this regard, the manual challenges the fundamental military principle of force protecting, by arguing that protecting your own forces is completely reconcilable with protecting the civilian population. The fundamental idea of the manual is that tactical risks for counterinsurgents on the short term, will reduce the strategic risks on the long-term. Using less force by exercising restraint in utilizing firepower, will reduce collateral damage and thereby result in less enemies prone to attack the counterinsurgents later on[135].

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[132] The U.S. Army Marine Corps, *supra note* 5, p. 48.
[133] The U.S. Army Marine Corps, *supra note* 5, p. 49.
[134] The U.S. Army Marine Corps, *supra note* 5, p. 48.
[135] The U.S. Army Marine Corps, *supra note* 5, p. xxix.

The strategy of winning over the population, inherent in counterinsurgency, differs from conventional war thinking in that, although counterinsurgency has a place for killing and capturing the enemy, it is not the primary focus. The ultimate focus of counterinsurgency is to gain support from the population. Because of the quest for population support, counterinsurgency is not limited to military operations but entails political, legal, economic, and social reconstruction in order to win over the population and prevent the success of the insurgency. Counterinsurgency is defined by the COIN manual as the "military, paramilitary, political, economic, psychological and civic actions taken by a government"[136]. The shift from earlier approaches, like the war on terror, to a counterinsurgency approach should thus be understood as a shift in strategy. Since the adversary is embedded in the society, the task of the counterinsurgent becomes considerably different from the tasks of the conventional soldier. Because counterinsurgency builds on winning over the population, counterinsurgency is inherently in conflict with the kill-capture mindset. This argument is very explicitly pointed out in the COIN manual, as it argues that "killing insurgents…by itself cannot defeat an insurgency"[137]. Since the population is the most important source of strength for both the insurgents and the counterinsurgents, the civilian population, and not the enemy, is the center of gravity.

For individuals who are used to think in lines of the kill capture paradigm, the COIN strategy might seem paradoxical, radical and counterintuitive. Traditional war doctrines encourage force protection because the soldiers are an essential source of strength. If soldiers in COIN operations has a strict focus on force protection they will likely loose contact to the population and will not be able to obtain knowledge about their needs. Therefore, counterinsurgents need to be a part of the society, despite the greater risk. As expressed by the COIN manual: "Sometimes, the more you protect your force, the less secure you may be"[138]. This a reference to what is discussed above, namely that failing to win over the 'hearts and minds' of the population, will create a less secure environment for the soldiers to operate in. So, in COIN operations, soldiers have to be part of the society by interacting with the local population. The only way this is possible, is by having troops on the ground who are willing to walk amongst the local population, showing them that the counterinsurgents are there to help. This will give the counterinsurgents respect and credibility, and eventually they will win the hearts and minds of the civilian population.

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[136] The U.S. Army Marine Corps, *supra note* 5, para 1-2 at p. 2.
[137] The U.S. Army Marine Corps, *supra note* 5, para 1-14 at p. 5.
[138] The U.S. Army Marine Corps, *supra note* 5, para 1-149 at p. 48.

In the conventional approach to war, the complete eradication of the enemy forces would lead to victory and the victors would then be able to compel the enemy to fulfil the will of the victor[139]. Economic and technological progress have been the classic components of achieving this goal, by creating destructive weapons to defeat the enemy. However, destructive weapons and the use of force often equals collateral damage and tactical mistakes which, in a counterinsurgency context, often make the population lose faith in the counterinsurgents. One of the principles in the COIN manual specifically points to the fact that more force is not always the most comprehensible way to act, "Therefore, sometimes doing nothing is the best reaction[140]". Since the logic in new wars have changed, a conventional or classic approach to war seems to be inadequate to solve them. Conventional military forces are trained to kill or capture the enemy, and they ignore the political, economic and cultural environment in which they operate. Since these are all very important components of defeating the enemy in new wars, it makes conventional forces problematic to apply in counterinsurgency. Even though some of the COIN strategies have been implemented, they are still within the mind-set and framework of old wars, which inevitably makes them inefficient. An example of this is that intelligence gathered from civilians, in support of the counterinsurgents, is used to target and kill insurgents. According to Nagel, this approach is ineffective on the long run, "because for every insurgent killed another one, or often several, will appear"[141]. Gaining public support is an effective way of gathering intelligence, but using it to target and kill insurgents might be counterproductive. The point that Nagel is making is that insurgent groups are made up of people with families and friends, and killing them will therefore create resentment in the civilian population, making it much easier for the insurgents to recruit new members. Therefore, killing the insurgents might not be the best solution to win the war, but since it is such an inherent part of the kill-capture paradigm, and such a fundamental part of conventional warfare and military thinking, it is difficult to change. What is needed is therefore a change in the tactics and strategy, but also a change in the mind-set that is applied in new wars.

This section has illustrated how restrictions and limitations on the use of force is crucial to a successful counterinsurgency because the strategy for victory is to win the population rather than to kill or capture the enemy.

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[139] Clausewitz, supra note 10, p. xxvi.
[140] The U.S. Army Marine Corps, *supra note* 5, para 1-152 at p. 49.
[141] Galula, *supra note 124,* p. viii.

3.1. Afghanistan – A New War?

The war in Afghanistan, that followed 9/11, stands as a prime example of the failure to adjust conceptions of war to the new global context[142]. In the following section, we analyze how the war in Afghanistan serves as a testimony to the changing logic of war, that is a fundamental part of the new war thesis. The section is divided in the same categories as the new wars theory uses to conceptualize contemporary war.

A failing state. At the time of the invasion in 2001, Afghanistan was on the verge of a state collapse. Afghanistan has always been a weak state, in the sense that it has been dependent on revenue from outside, and the Afghan government have never exercised much control outside the capital of Kabul. Due to decades of war and large-scale population displacement, the capacity of the Afghan state to govern was significantly weakened. The Saudi and US backed mujahidin, during the Soviet Occupation from 1979 to 1989, are the forerunners of the warring parties of today. However, this resistance strategy, of making the country ungovernable for the Soviet occupier, in the end made Afghanistan ungovernable for themselves. Afghanistan follows the same pattern as many countries in Eastern Europe and Africa experienced, where the fall of the Soviet Union drove countries into civil war. The Soviet occupation of Afghanistan ended in 1989, but the communist government managed to hold on to power until 1992, when an infight broke out between the resistance commanders which resulted in the rise of the Taliban. The Taliban government never controlled all of Afghanistan, and contributed little to state building and development, which is one of the reasons that removing them from power was not very challenging[143].

The warring parties. The situation in Afghanistan as it was in 2006 is a reflection of the immediate past of Afghanistan where the breakdown of the central government and the subsequent power vacuum, resulted in the emergence of warlords and local leaders taking charge and setting up patronage networks of regional warlords, local military commanders and sub-commanders organizing themselves in tribal, clan, ethnic political and criminal groupings[144]. Thus, the war in Afghanistan was, and still is, fought by networks of state and non-state actors consisting of

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[142] Kaldor 2012, *supra note 1,* p. 152.
[143] Kaldor 2012, *supra note 1,* p. 157-158.
[144] David Macdonald, *Drugs in Afghanistan – Opium, Outlaws and Scorpion Tales*, 2007, p. 110.

insurgents, militias working with the government, the government and coalition forces[145]. The insurgents in Afghanistan can be described as anti-governmental, consisting of individuals and armed groups with various backgrounds, motivations and command structures, encompassing the Taliban, Hezb-e-Islami, the Haqqani Network and others[146]. The coalition forces include large numbers of private security contractors, and can be described as a hybrid network, that is typical of new wars. Ordinary criminals are also participating in the violence and are often difficult to differentiate from the other actors participating in the violence[147].

Their goals. Common for the insurgents is that they are all in opposition to the foreign occupation. The largest insurgent group, the Taliban, is made up of poor young men that are typically educated in the madrassahs of Pakistan. The sociopolitical goal of the Taliban is to bring about a religious regime that does not tolerate any other religion. The insurgency in Afghanistan has been joined by other groups of young men. Some who might have experienced humiliation from the government and coalition forces, during night raids or when passing checkpoints, and they use the insurgency as a way to retaliate. Others use the insurgency as a cover for criminal activities and they use the insurgent groups for protection. Common for the groups participating in the insurgency is that they are united by the narratives of nationalism, salafi Islam and the struggle against the West[148].

The tactics. Since 2002, civilians in Afghanistan have been directly targeted by the Taliban and other armed groups. These attacks include threats, intimidation and physical attacks on schools, often carried out through suicide bombings, abductions and executions[149]. Amnesty International have been looking at violence directed towards civilians by armed groups, before the new COIN approach was implemented in 2009. The study by Amnesty illustrates that armed groups including, the Taliban, Hizb-e Islami and al-Qaeda in their struggle against the central government in Kabul and the international coalition, have applied tactics of deliberately attacking civilians. In targeting civilians, the armed groups employ a great variety of tactics, but the attacks include a specifically high frequency of kidnappings. Kidnappings has by Taliban commanders been proclaimed as a

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[145] For a complete list of the warring parties, including all non-state actors, participating in the conflict in Afghanistan see Upsala Conflict Data Program, "Afghanistan", *UCDP*, 2018, (available at http://ucdp.uu.se/#country/700)

[146] Annyssa Bellal, Gilles Giacca, Stuart Casey-Maslen, "International Law and Armed Non state Actors in Afghanistan", *International Review of the Red Cross*, Vol. 93, No. 881, (March 2011), p. 49.

[147] Kaldor 2012, *supra note 1*, p. 161.

[148] Kaldor 2012, *supra note 1,* p. 164.

[149] Amnesty International, "Afghanistan: All who are not friends are enemies: Taliban abuses Against Civilians", *Amnesty International*, 2007, p. 1, (available at https://www.amnesty.org/download/Documents/ASA110012007ENGLISH.pdf)

good tactic, and it is a tactic that the armed groups in general have been encouraging[150]. The increased tactic of targeting civilians becomes evident when looking at the statistics. In 2007 1,582 civilians were killed in the conflict, and this number increased to 2,412 in 2009[151]. In this regard, the UN identified that in 2009 the Taliban was responsible for 76 percent of civilian deaths, in 2010 that number was still as high as 75 percent and in 2011 the Taliban was responsible for 80 percent of civilian deaths[152]. The Taliban have specifically placed Improvised explosive devises (IEDs) in girl schools, which underlines the point that civilians are the direct targets of attacks[153].

The tactics applied by the insurgents in Afghanistan are typical of new wars. They seek to exert influence over the local communities by spreading fear and intimidation. An example of this is the high frequency of groups of fighters, that enter Afghanistan from Pakistan where they apply the tactics of fear and intimidation to collect taxes from the local population. These groups might hire criminals with the aim of destabilizing certain areas, by killing or expelling those who are not sympathetic to their cause, paving the way for ascertaining control over the area. It is also not uncommon that they attack protected buildings such as hospitals and symbolic buildings as mosques, so that there is no place for civilians to feel safe. In addition to these cruel tactics, the insurgents are also increasingly utilizing children, trained in madrassahs, to carry out attacks[154]. It is the same tactics that are used by warlords, who try to intimidate locals in order to secure support in elections, or to control criminal activities. To create an unstable and insecure environment for the civilian population, the Taliban insurgents have explicitly and systematically directed violence against NGOs and humanitarian workers, denying them access to beneficiaries. In 2005, the Taliban even issued a fatwa, a religious order calling for the death of all infidels and persons working with or supporting the occupation of Afghanistan[155].

Displacement of civilians is also a common tactic in new wars[156] , which becomes apparent in Afghanistan where it is estimated that 40 percent of the country's 28 million population have been

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[150] Amnesty International, "*Amnesty International Report 2008 - Afghanistan*", *Amnesty International,* 28 May 2008, (available at: http://www.refworld.org/docid/483e27741a.html).

[151] Neta C. Crawford, "War-related Death, Injury, and Displacement in Afghanistan and Pakistan 2001-2014", *Watson Institute for International Studies*, 2015, p. 2.

[152] United Nations, "Citing rising death toll, UN urges better protection of Afghan civilians", UN News, 2011, (avaliable at https://news.un.org/en/story/2011/03/368462-citing-rising-death-toll-un-urges-better-protection-afghan-civilians).

[153] Ben Arnoldy, "In Afghanistan, Taliban kills more civilians than U.S.", Christian Science Monitor, 31 July 2009, (avaliable at https://www.csmonitor.com/World/Asia-South-Central/2009/0731/p06s15-wosc.html).

[154] Kaldor 2012, *supra note* 1, p. 171.

[155] Thomas H. Johnson, "On the Edge of the Big Muddy: The Taliban Resurgence in Afghanistan", *China and Eurasia Forum Quarterly*, Vol. 5, No. 2 (2007), p 106.

[156] Kaldor 2012, *supra note* 1, p. 9.

displaced, at some point in their lives[157]. The International Displacement Monitoring Center reports that, from the beginning of the civil war in 1992 to right before the invasion in 2001, there was an estimated number of 400,000 displaced persons, centered mainly in camps near Jalalabad, Mazar-i-Sharif and Heart. With the subsequent rise of the Taliban in 1996, the conflict resulted in additionally 1 million displaced persons[158].

Methods of finance. The main sources of finance for the war in Afghanistan are external aid and revenue from poppy production. The power of the warlords is closely tied to the economy as it has developed over the last two decades[159]. The economy relies greatly on the cultivation of poppy and the production of opium, but there are also substantial revenues in arms smuggling and unregulated trade of legitimate goods[160]. To put it in perspective, the poppy production in Afghanistan (2017) is estimated to be worth between $4.1 billion - $6.6 billion, or between 20 and 32 percent of the GDP[161]. Opium production as a source of revenue is difficult to monitor, and just as difficult to hinder because it is organized through underground networks. In 2007, it was estimated that narcotics was responsible for half of the Afghan GDP, which has resulted in a huge amount of capital being directed to the insurgents. This has allowed the insurgents to fund training, weapons, and other utilities in order to secure the continuation of a functioning insurgency[162]. This is closely linked to what Kaldor calls the mutual criminal enterprise. As the insurgents are very dependent on the large production of opium, which is only possible as long as Afghanistan does not have a functioning state, the insurgents are not looking to end the war, no matter who wins, because they are dependent on the money from the opium production to survive as a group.

Conrad Schetter defines the Afghan economy as a "bazar economy", which has emerged as the result of the destruction of the traditional economy and state structures. Since the state based economy is no longer functioning, ordinary Afghan people have no possibility of getting jobs and gain a basic income. This has changed the labor marked and forced people to earn money from war related actions such as smuggling, opium production and illegal trafficking[163].

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[157] Kaldor 2012, *supra note* 1, p. 172.
[158] Internal Displacement Monitoring Centre, "Afghanistan", *IDMC*, 30 April 2018, (available at http://www.internal-displacement.org/countries/afghanistan).
[159] Macdonald, *supra note 144*, p. 110.
[160] Johnson 2007, *supra note* 155, p. 100.
[161] United Nations Office on Drugs and Crime, "Afghanistan Opium Survey 2017", *UNODC*, May 2018, p. 5, (available at http://www.unodc.org/documents/crop-monitoring/Opium-survey-peace-security-web.pdf).
[162] Johnson 2007, *supra note* 155, p 100.
[163] Christine Noelle-Karimi, Conrad Schetter and Reinhard Schlagintweit (eds.), *Afghanistan – A Country Without a State?*, 2001, p.16.

In addition to the opium revenues, the main sources of finance stems from drug smuggling, looting and pillage, timber smuggling, illegal gem smuggling, human trafficking, kidnappings and hostage taking[164]. An example of a service that has emerged as result of the anarchic situation is found in Nuristan south of Hazarajat. Here there has been a development of hotels, roads and bazaars since an infrastructure was needed to secure supply routes for insurgents. The private bus and truck drivers who are profiting from transporting mujahidin to the front, serves as an example of civilians getting involved in the illegal war based economy, because they have no other job options [165]. This is again drawing parallels to the concept of mutual enterprise, as the income on which the civilian population builds their life, is related to the conflict. This means that if the conflict ends, so will their primary source of income. Not only civilians are dependent on the war economy in Afghanistan. The Local police forces are also very often engaged in illegal activities and corruption. The corruption is considered systemic and it is a known fact that it also reaches deep into the government. The disorganized, poorly trained and corrupt Afghan National Police (ANP) is an inefficient institution and in 2005 it was estimated by the senior US drug enforcement official in Afghanistan that 90 percent of the ANP chiefs took active part in protecting the narcotics industry[166].

Afghanistan is clearly characterized by the typical aspect for new wars, namely that all sides on all levels are engaged in a mutual enterprise stemming from the conflict, involving global, national and local connections, that is dependent on the continuation of violence[167]. This chapter has thus shown that Afghanistan stands as a prime example of what Kaldor defines as a new war.

3.2. COIN in Afghanistan

In this section, we will show how rigidly sticking to the kill-capture paradigm, despite of the instructions in the coin manual, has prevented success when implementing the COIN doctrine in Afghanistan.

When considering the more theoretical aspects, the COIN strategy is very well reflected in the 2009 McChrystal report. In line with the imperatives of the COIN manual, General McChrystal called for the establishment of a comprehensive counterinsurgency campaign, that focused on gaining the

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[164] Kaldor 2012, *supra note* 1, p.174.
[165] Noelle-Karimi, *supra note* 163, p. 6.
[166] Johnson 2007, *supra note* 155, p. 100-101.
[167] Kaldor 2012, *supra note* 1, p. 175.

support of the population by shielding them from threats. McChrystal argues in his initial assessment, articulated in a report to Secretary of Defense Robert Gates, that, "As we analyzed the situation, I became increasingly convinced of several themes: that the objective is the will of the people, our conventional warfare culture is part of the problem... and finally, that protecting the people means shielding them from *all* threats"[168]. McChrystal was fully aware of the conventional structure of ISAF, that was preoccupied with force protection, and he believed that the focus on force protection alienated the coalition forces from the Afghan population. This manifested itself through fortified bases with limited or no contact between the Afghan population and NATO forces[169]. Pointing to the population-centric focus of the new strategy, McChrystal argued that, "ISAF is a conventional force that is poorly configured for COIN...Pre-occupied with protection of our own forces, we have operated in a manner that distances us –physically and psychologically from the people we seek to protect"[170]. McChrystal was convinced that when the coalition forces were engaged with the enemy, they had a tendency to rely on an indiscriminate use of firepower, which protected coalition forces but caused civilian casualties, and was counterproductive in winning over the people[171]. He underlined that focusing on short-term safety might compromise long-term objectives, "we run the risk of strategic defeat by pursuing tactical wins that cause civilian casualties or unnecessary collateral damage"[172]. Winning over the population was the key component of the COIN strategy that McChrystal wanted to implement, and he was aware that causing collateral damage was completely counterproductive in achieving the goal of population security. The focus on short-term security, through coercive tactics, would cause a more insecure environment on the long-term, and prevent the coalition forces from achieving their goal of winning the war. Success for the strategic changes therefore demanded a change of mind-set from the soldiers and the military leaders. The classic hierarchy of putting force protection first, needed to be changed, so that it became subordinate to the protection of civilians, especially by avoiding collateral damage.

In July 2009, General McChrystal issued a revised tactical directive to provide guidance for the employment of force, in ISAF operations[173]. The tactical directive emphasized the importance of

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[168] McChrystal 2009 B, *supra note* 111, p. 1-3.
[169] Galasz Nielsen, *supra note* 121, p. 31.
[170] McChrystal 2009 B, *supra note* 111, p. 1-2.
[171] Galasz Nielsen, *supra note* 121, p. 31.
[172] McChrystal 2009 B, *supra note* 111, p. 1-2.
[173] McChrystal 2009 A, *supra note* 9.

avoiding tactical victories through coercion, as that would lead to strategic defeats. In the directive, it is stressed that the mission of ground commanders, in line with the recommendations laid out in the McChrystal report, entails winning the trust of the Afghan population: "in order to minimize the risk of alienating the Afghan population, and in accordance with international law, ISAF operations must be conducted in a manner that is both proportionate and reasonable"[174]. Elaborating a similar recommendation McCrystal stated that "when requesting close air support, ground commanders and joint tactical air controllers must use appropriate munition or capabilities to achieve desired effect"[175]. Proportionality and necessity are fundamental principles in IHL, when assessing the tactics of a military operation. This means that these recommendations are in line with already existing rules under IHL. However, operations that might be in accordance with the rules of IHL, could still be too coercive in relation to the COIN strategy. McChrystal's argument was that the military have used the principles of proportionality and necessity to assess how much force was legally acceptable to use, which was problematic since winning over the population could only happen by using the least amount of force possible.

Unfortunately, the operations involved more military actions, often the use of lethal force, than was intended by McChrystal. One of the reasons was that most of the war efforts in Afghanistan went through the Department of Defense rather than the State Department. This made it difficult to bring about the needed change of mind-set, from killing enemies to winning over the population through civilian protection, which was such an essential part of the COIN strategy[176]. Instead, the focus evolved around the enemy in Afghanistan, which resulted in continuous airstrikes on Taliban and Al-Qaeda positions predominantly carried out by unmanned predator drones. General Tommy Franks came to describe the use of Predator drones as his most efficient tool in hunting down and killing al-Qaeda and Taliban leadership, and he described it as "critical to our fight"[177]. In the same spirit, President Obamas chief of counterterrorism advisor John Brennan argued that targeted strikes are completely in line with the IHL principle of necessity. His argument was that, individuals that are part of al-Qaeda or associated forces are legitimate targets and that the US therefore is allowed to target them in the same manner that they targeted Japanese and German leaders during the second world war. Likewise, Brennan argued, targeted strikes are in line with the principle of distinction because drones have the ability to precisely target a military objective, minimizing

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[174] McChrystal 2009 B, *supra note* 111, p. E-2.
[175] McChrystal 2009 B, *supra note* 111, p. E-2.
[176] Kaldor 2012, *supra note* 1, p. 178-179.
[177] Kaldor 2012, *supra note* 1, p. 180.

collateral damage. And finally, he argued that targeted strikes also conform to the principle of proportionality as it is possible to target individual terrorists, or small groups of terrorists, with munition that is adapted to avoid harming others in the immediate vicinity[178]. Like Brennan, the US State Departments former Legal Adviser, Harold Koh, has also asserted that US targeting practices, and lethal operations carried out by the use of drones, do conform to all applicable laws, including the laws of war[179]. Other prominent legal scholars, such as Michael N. Schmitt, finds no reason to treat drones differently than other weapon systems under the jus in bello, and argues that the use of drones rather represents strict fidelity to the existing norms of international humanitarian law. He reaches the conclusion that there is no sound basis for heightened concern about the use of drones because they may actually enhance the protection that persons and objects are entitled to under IHL[180].

Since 2009, when McChrystal issued his new strategic directive, the way ISAF forces have conducted the war in Afghanistan has changed. The use of aerial bombardments and artillery has dramatically decreased, in order to accommodate the essential part of the COIN strategy, of winning over the population. However, there has been an unfortunate and unforeseen dramatic increase in the use of targeted strikes through the use of predator drones. As previously argued, the protection of civilians and winning over the population, is only possible if there is a change in the mind-set of the military. The use of predator drones is not reflecting that change, actually quite the opposite. Even though drone strikes are causing less collateral damage than aerial bombardments and artillery, they are causing just as much resentment in the civilian population. Arguably, it does not make a big difference for the civilians, whether the attack was intentional or unintentional, or whether it was proportionate or disproportionate, in the end it will still create resentment. This was exemplified by the Pakistani boy Zubair, who spoke to the US Congress in 2013, "I no longer love blue skies. In fact, I now prefer grey skies. The drones do not fly when the skies are grey"[181]. The drones are associated with fear, also for the civilian population. This causes resentment against those who use the drones, which is primarily Western forces. Zubair elaborates, "When sky

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[178] John O. Brennan, "Transcript of Remarks by John O. Brennan - The Ethics and Efficacy of U.S. Counterterrorism Strategy", *Wilson Center*, 30 April 2012, (available at https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy).
[179] Michael N. Schmitt, "Drone attacks under the jus ad bellum and jus in Bello – Clearing the 'Fog of Law'", *Yearbook of International Humanitarian Law*, Forthcoming, 2011, p. 2.
[180] Schmitt, *supra note* 179, p. 2.
[181] Alexander Abad-Santos, "This 13-year Old is Scared When the Sky is Blue Because of Our Drones", *The Atlantic*, 29 October 2013, (available at: https://www.theatlantic.com/politics/archive/2013/10/saddest-words-congresss-briefing-drone-strikes/354548/).

brightens, drones return and we live in fear."[182]. Drones might be more accurate and cause less collateral damage than some of its counterparts, but contrary to Schmitt's notion that the use of drones should not be basis for a rise in concern, the opposite seems to be true when considering the overarching COIN strategy that aims at winning the hearts and minds of the population. Utilizing drones in a counterinsurgency context seems to be working directly against the strategical considerations of the COIN manual.

The US administration has been eager to use drones as they believed it kept operations well within the parameters of IHL. This is a perfect example of why COIN has not yet been working. Within the kill-capture paradigm, the categories of IHL is seen as principles that the military can use to assess how much force is legally acceptable. This line of thought is clearly reflected in the statistics, as the number of bombs and missiles released by drones in 2015 were twice the number of bombs and missiles dropped, by any weapon, in 2009[183]. When conducting COIN, the goal is to use the minimal amount of force possible, in order to win the trust of the population. The usage of drones has therefore significantly damaged the possibility for COIN to be successfully carried out. The former US commander in Afghanistan General Barno has argued that, "when we attack like that in the middle of the night, even if we don't kill any civilians we are seen as cowards, hitting from afar in the middle of the night. We should go in there on foot in daylight with Afghan elders and arrest them"[184]. In this context, massive antipathy has spread among the Afghan population, where the deaths of civilian have not only been seen as unnecessary, but also dishonorable, leading to further alienation of the local population. An example, was the attack in Takhar in September 2010, after implementing the COIN strategy. Relying merely on signal intelligence, the attack killed an Afghan elderly, Zabet Amanullah, who was suspected of being a former Taliban member. Amanullah was helping his nephew with his election campaign, and together with nine other civilians, he was killed by a predator drone[185]. There have been numerous incidents like this, where drone attacks, carried out by either the US or NATO, have caused death and injury to innocent Afghan civilians. In a counterinsurgency context, the implications of this kind of actions are profound. The International

[182] Abad-Santos, *supra note* 181.
[183] Josh Smith, "Exclusive: Afghan drone war - data show unmanned flights dominate air campaign", *Reuters*, 21 April 2016, (available at https://www.reuters.com/article/us-afghanistan-drones-exclusive/exclusive-afghan-drone-war-data-show-unmanned-flights-dominate-air-campaign-idUSKCN0XH2UZ).
[184] Kaldor 2012, *supra note* 1, p. 180.
[185] Julius Cavendish, "Intelligence Failure 'led to Deaths of Afghan Civilians'", *Independent*, 11 May 2011, (available at https://www.independent.co.uk/news/world/asia/intelligence-failures-led-to-deaths-of-afghan-civilians-2282688.html).

Crisis Group notes that when a child is killed in a village in Afghanistan, the village, fueled on revenge, will be opposing the responsible forces for the next 100 years[186]. When McChrystal implemented his strategy in 2009, he made efforts to avoid civilian casualties. Unfortunately, drones came to be the most commonly used tool to target the Taliban. Drones seem to be immensely effective when killing insurgents, but utilizing this weapon sometimes has unfortunate consequences for civilians, which in turn affects the whole area that is struck. By some observers, it is suggested that any injury to insurgent groups, caused by drones, is instantly outweighed by the ability of the insurgents to exploit civilian casualties, to persuade people to support the insurgency[187].

The use of drones causes resentment among the local population, as stated by an anonymous writer in Kandahar, "The foreign soldiers don't fight face to face because they are too scared of the Taliban. However, they should fight face to face and not send in the aircraft bombers because in doing so they kill civilians"[188]. Drones might have the capability to punish insurgents but they do not contribute to the establishment of a legitimate state authority. In order to establish such an authority, a high number of ground forces, cooperating with civilians in providing services for the local population, is needed. Intelligence is an important element in any COIN operation, as it is paramount in order to track down insurgents. In the end, people are more likely to share intelligence with someone they trust[189].

The COIN operation in Afghanistan was a step in the right direction. But it lacked the mind-set, which should drive soldiers to think out of the kill-capture paradigm and help the local population, rather than protect themselves. McChrystal was well aware of this, and pointed to the fact that limiting collateral damage, "requires a cultural shift within our forces"[190]. Notwithstanding McChrystal's intentions and efforts, a considerable tension remained in the COIN mission in Afghanistan, between the efforts to defeat the Taliban and the effort to achieve population security. This tension was well reflected in the use of excessive force through the increase of drones strikes, despite McChrystal's directions not to apply overwhelming force.

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[186] Johnson 2007, *supra note 155,* p. 124.
[187] James Igoe Walsh, "The Effectiveness of Drone Strikes in Counterinsurgency and Counterterrorism Campaigns", *U.S. Army War College Strategic Studies Institute,* September 2013, p. V.
[188] Johnson, *supra note* 155, p. 128.
[189] Walsh, *supra note 187*, p. 46.
[190] McChrystal, *supra note* 9, p. 2.

Building on this, the question we pose is if such a cultural change can be brought about merely by arguing for greater adherence to the already existing rules of IHL. Currently, IHL is used as an excuse to allow damage if only the attack adheres to the principles of distinction, necessity and proportionality, as exemplified by John Brennan. We propose that the change in mind-set, that is needed, could come from changing the law that counterinsurgency operates under. In the following chapter, we examine how IHL has become an obstacle to successful COIN operations.

3.3. IHL – An Obstacle to COIN?

This chapter argues that the laws of war, or IHL, is an obstacle for a successful COIN operation. The kill-capture paradigm is an inherent part of traditional military thinking, and the mind-set that it brings is closely associated to the principles of distinction, proportionality and necessity, which are integral parts of IHL. Counterinsurgency requires a minimal amount of force, as the strategy for victory is not done through a kill-capture approach but rather through winning-the-population. This chapter looks at some of the specific challenges that the underlying kill-capture paradigm in IHL creates in counterinsurgency.

3.3.1. The Principle of Distinction

The principle of distinction, between combatants (belligerent parties to the conflict) and non-combatants (civilians and those rendered *hors de combat),* has been described as one of the "cardinal" principles of the laws of war by the International Court of Justice (ICJ)[191]. The importance of this principle is reflected in Additional protocol 1 to the 1949 Geneva Conventions, that refers to it as a "basic rule"[192]. Even though distinction has become one of the most important principles in the laws of war, it has encountered some difficulties. The binary categories of combatant and non-combatant has been the subject of much discussion, especially in relation to the actors in new wars. Belligerents who are not part of a state army, finds themselves in a grey area between the two categories. This has developed a new unofficial category named illegal combatants. This category is corresponding to when civilians lose their non-combatant privileges. In the case of a NIAC, customary international law dictates that the protection traditionally afforded to those with the status of civilian, under APII article 13 (3), persists "unless and for such time as they take a

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[191] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ, 8 July 1996, para 78.
[192] International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, article 48.

direct part in hostilities[193]. In other words, there must exist a direct relationship between the operation and the actor or object. In the context of NIAC, the ICRC has proposed three requirements for deciding whether actions qualify as taking "direct participation in hostilities". Following these requirements, there must exist "a threshold regarding the harm likely to result from the act, a relationship of direct causation between the act and the expected harm and a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict"[194]. From this follows the restriction that the counterinsurgents are only allowed to attack insurgents when they are engaged in actions amounting to the listed criteria, which allows insurgents to 'put down arms' to obtain protection from direct attack. This has caused some problems, as counterinsurgent forces has not been able to direct their attack towards insurgents, who shift from the illegal combatant to the non-combatant category. In an attempt to tackle this, the ICRC has introduced the continuous combat function[195], in which those who hold a continuous combat function lose protection against direct attack. This function only becomes active if insurgents takes direct part in the hostilities. The ICRC have tried to clarify this, by arguing that the directness entails a "direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place"[196]. In this regard, direct participation in hostilities therefore implies that there is a sufficient causal relationship between the act of participation and its immediate consequences. Finally, a direct causal relationship exists when acts are "intended to cause actual harm to personnel and equipment of the armed forces"[197]. This means that if insurgents take direct part in hostilities, they are placed in a category of illegal combatants. An important elaboration comes in relation to those individuals who are part of an organized armed group, "Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-state party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function."[198]. The question then arises, when do individuals stop taking direct part in the hostilities, and when do they

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[193] International Committee of the Red Cross, "Customary International Humanitarian Law", *ICRC*, Vol. 1 (2005), rule 6, (available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6).
[194] Nils Melzer, "Interpretive guidance on the notion of Direct Participation In Hostilities Under International Humanitarian Law*", ICRC*, 2009, p. 46.
[195] Melzer 2009, *supra note 194,* p. 35.
[196] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, *ICRC*, 1977, para. 1679.
[197] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, *ICRC*, 1977, para. 1942.
[198] Melzer 2009, *supra note* 194, p. 34.

stop being part of the organized armed group. Fueled by the kill-capture mindset, the military has been keen to interpret the continuous combat function as wide as possible, enabling them to target insurgents much easier.

A fundamental problem with the principle of distinction, is the legitimization of killing. As discussed earlier, counterinsurgency operations should not be operationalized via the kill-capture paradigm. However, the principle of distinction is, by the military, being interpreted as a way to justify killing insurgents. The COIN doctrine builds on a strategy of winning over the population, and categorically rejects the kill-capture approach. Even though insurgents might fit into the standard of taking direct part in hostilities, the COIN strategy requires a more comprehensive and holistic approach to the actions of counterinsurgents. The current laws of war are not a helpful guidance in counterinsurgency, as they fuel an underlying mind-set that is counterproductive. General David Petraeus understood that, and engaged in a sophisticated risk/benefit calculation when applying COIN. Rather than only adhering to the laws of war, operations was mandated in light of the possible consequences of targeting insurgents. Petraeus introduced the concept of analyzing every operation, and assessing the costs and benefits by asking, "*Will this operation take more bad guys off the street than it creates by the way it is conducted*?"[199]. As a premise, COIN operations should adhere to the applicable law regime, but also require a more thorough consideration of the insurgent, including sociopolitical considerations such as sectarian, tribal or regional connections.

Some individuals are forced to take direct part in hostilities, for economic, societal or other reasons. These individuals are not fighting for ideological reasons, as is actually very rare in new wars[200], but instead they are fighting to survive. David Kilcullen refers to these individuals as "accidental guerillas", who have been manipulated into taking part in the insurgency but lacks the ideological drive[201]. In counterinsurgency, these accidental guerillas are also the persons who might be convinced to work against the sponsors of the insurgency, sharing crucial intelligence. However, IHL is not able to facilitate a legal regime that encourages these kinds of considerations. The principle of distinction is fostering an old assumption, that war is driven by a kill-capture

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[199] David H. Petraeus, "Learning Counterinsurgency: Observations from Soldiering in Iraq", *Military Review*, Januar-Feburary 2006, p. 57 & p. 63.
[200] Kaldor 2013, *supra note* 4, p. 2.
[201] David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of Big* One, 2009, p. 38.

strategy and that idealized warfare is fought in conventional battles, by armies of professional soldiers. Distinction requires that armies must distinguish between combatants and civilians, and military objects and civilian objects, which ultimately allows the counterinsurgents to kill if the target is in the right category. This creates a mind-set that prevents thorough considerations of whether it makes sense to target an individual, with respect to whether that will have strategic repercussions for the COIN operation as a whole.

3.3.2. Proportionality

The traditional relationship between distinction and proportionality is rather simple. The principle of distinction determines whether or not the object in question can be targeted, civilians for example cannot[202]. If the object is rendered positive for attack, the principle of proportionality requests the incidental damage or collateral damage stemming from the attack to be proportionate to the advantage gained from it. If the damage from the attack is disproportionate to the military gain, it is illegal to perform and prohibited by the Geneva conventions[203].

Like the principle of distinction, the traditional proportionally test fits poorly in the frames of COIN operations. It is of course important to remember that the principle of proportionality was originally, and still is, a tool to minimize human suffering in war. However, like the entire framework of IHL, proportionality is, in military terms, understood as a way to legally cause collateral damage, if it is military necessary. Counterinsurgency demands a greater focus on the protection of civilians, and the law needs to encourage a change of the kill-capture mind-set in the military. In old wars, kill-capture operations were a suitable strategy for winning the war, which meant that military and humanitarian goals were in direct opposition to each other. The more enemies you could neutralize, the bigger your chance of victory. This meant that proportionality was a way to limit armed conflicts, by setting some humanitarian standards. The military have tried to follow this principle, but the humanitarian constraints have traditionally been in contradiction to the overall strategy and thus, the interest of the military[204]. That is not the case in COIN operations. Humanitarian concerns are part of the COIN strategy to win the war, so there is not necessarily a need for a tradeoff. The fundamental problem with the principle of proportionality is, that an attack might take place if the anticipated military advantage, stemming from the attack, outweighs the expected civilian loss. As

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[202] Jean-Marie Henckaertes and Louise Doswald-Beck, *Customary International Humanitarian Law* vol. I, *rules*, 2005, p. 3.
[203] International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, art 51(5).
[204] Sitaraman, *supra note* 86, p. 32.

it is a military advantage to minimize civilian losses, the COIN manual offers another way to apply the principle of proportionality. "(I)n COIN operations, [military] advantage is best calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained… In COIN environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape[205]". This builds on the idea that the application of the principle of proportionality in a COIN context, might consider an additional sociopolitical layer. This follows that any attack, that causes harm or death to civilians, will create greater resistance against the counterinsurgents and increase the appeal of the insurgents[206]. When considering targeting an insurgent, the COIN manual suggests assessing the potential future harm the insurgent might cause, in relation to the potential of alienating the civilian population further. The traditional proportionality test is therefore a poor fit to the COIN strategy. In the ICRC commentary to the additional protocols, the principle of proportionality is viewed as a tactical consideration rather than a strategic one. For example, it is noted that the military advantage should be "substantial and relatively close"[207], and that the "advantages which are hardly perceptible and those which would only appear in the long term should be disregarded"[208]. In contrast, counterinsurgency actually suggests a greater protection of civilians from kill-capture operations, because it is beneficial as a long-term strategy. The application of proportionality as a tactical consideration in counterinsurgency, is therefore ineffective and counterproductive. As Sarah Sewall emphasizes in the introduction of the COIN manual: "killing the civilian is no longer just collateral damage. The harm cannot be easily dismissed as unintended. Civilian casualties tangibly undermine the counterinsurgent's goals… [T]he fact or perception of civilian deaths at the hands of their nominal protectors can change popular attitudes from neutrality to anger and active opposition"[209]. When the overall goal is winning over the population any attack will be counterproductive, especially when resulting in collateral damage. If the civilian population do not trust the counterinsurgents, it will cause backlashes manifested in protests and enemy propaganda which will give further life to the insurgency. Therefore, the military benefits gained from attacks are smaller in counterinsurgency than in conventional warfare.

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[205] The U.S. Army Marine Corps, *supra note 5*, p. 247-248.
[206] The U.S. Army Marine Corps, *supra note 5*, p. 249.
[207] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *ICRC*, 1977, para. 2209, p. 684.
[208] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *ICRC*, 1977, para. 2209, p. 684.
[209] The U.S. Army Marine Corps, *supra note 5*, p. xxv.

Proportionality in counterinsurgencies should not be seen as a tradeoff between military advantage and acceptable humanitarian costs. Instead it should be analyzed as a cost-benefit analysis, where the humanitarian considerations and military strategic interest operate on both sides of the scale. Targets, even if legitimate, might be counterproductive to attack, as it can hamper progress in winning over the population. Proportionality in counterinsurgency should therefore have a bigger emphasis on the humanitarian aspect than in conventional warfare[210]. As a result, the principle of proportionality in counterinsurgency should be applied with more emphasis on humanitarian considerations. The law does not advocate that collateral damage is less important than military advantages, but it does give the possibility to apply this interpretation.

3.3.3. Military Necessity

The primary idea behind the laws of armed conflict was, and is, to create a balance between military necessity and humanitarian requirements[211]. In theory, the necessity principle restrains the exercise of military power, thus forbidding any use of military power that is unnecessary in order to achieve the military goal. Furthermore, the humanitarian requirements forbid means and methods of warfare that leads to unnecessary suffering. The military necessity requirement can also be perceived as being entirely opposed to humanitarian concerns, functioning solely to enable the use of force and belligerent activity. Necessity therefore holds a twofold legal function of enabling and constraining, because it permits the degree of force that is required to achieve the military goal.

The problem is that, even though military standards and doctrines have evolved, the military understanding of the necessity principle has stayed the same. In counterinsurgency, the necessity principle is not necessarily the effective constraining factor. Because in a counterinsurgency context, constraining the force used by the military, is in the military's own interest as it enhances operational effectiveness. By showing concern towards domestic public opinion, the counterinsurgents explicitly illustrate their wish to win the hearts and minds of the population. Completely adhering to IHL, and the principle of military necessity, allows for the use of force against any person who is considered a combatant, as long as the expected civilian damage that might stem from the attack is considered proportionate.

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[210] Sitaraman, *supra note 86*, p. 33.
[211] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, *ICRC*, 1977, p. 683.

The COIN doctrine argues for an even more restrictive way of using force than, the necessity principle. As we have seen, the ISAF commander in Afghanistan imposed various restrictions on conduct during operations. Commanders were ordered to use precision munitions whenever possible, even though IHL does not impose such requirements. Additionally, commanders were directed to make additional efforts to ensure that houses, from which ISAF troops were shot from, were completely free of civilians before opening fire themselves. In this situation, responding fire would be legal under IHL, following the principle of proportionality[212]. First of all, this shows the impotency of the necessity principle during counterinsurgency, but the argument here is that application of the necessity principle in a counterinsurgency context is sometimes outright counterproductive. As we have seen in Afghanistan, contrary to the intentions of General McCrystal, the focus on taking out enemies prevailed and resulted in a continuation of airstrikes by drones. The argument made in this regard, by John Brennan was that targeted strikes "conform to the principle of military necessity"[213]. His conventional military mindset, is further illustrated when he makes reference to the way that the US was allowed to target Japanese and German military leaders during the second world war. Brennan defends the tactic of using drones by referring to explicitly to International law, "as a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense… there is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies"[214]. Even though force protection is being explicitly referred to as being counterproductive by the COIN manual, the quote by Brennan illustrates how it is almost impossible for the military, not to speculate in lines of force protection. It also becomes apparent how the notion of killing the enemy, instead of arresting him, is completely dominant, "*Now, I want to be very clear. In the course of the war in Afghanistan and the fight against al-Qaida, I think the American people expect us to use advanced technologies, for example, to prevent attacks on U.S. forces and to remove terrorists from the battlefield. We do, and it has saved the lives of our men and women in uniform*"[215]. The COIN strategy in Afghanistan did not change the fundamental force protection mind-set, that is such an integral part of military thinking. ISAF used drones, because they fought that killing the enemy was the best response, and it was not in violation

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[212] Michael N. Schmitt, "Targeting and International Humanitarian Law in Afghanistan", *Naval War College International Law Studies*, 2009, p. 312.
[213] Brennan, *supra note 178.*
[214] Brennan, *supra note 178.*
[215] Brennan, *supra note 178.*

of IHL. This contributes to the argument, that military necessity is fueling the kill-capture mindset deeply embedded in the military thinking. Unfortunately, this is neither the most effective nor the most humane way to conduct counterinsurgency.

3.3.4. Direct Participation in Hostilities

This section illustrates that when IHL is interpreted by military affiliated jurists and high level officers, it can be very permissive in matters of targeting, underlining how the kill capture paradigm is inherently embedded in IHL, but also deeply impeded in the mindset of individuals in the military.

In an effort to address the trends towards increased civilian participation in hostilities IHL has, in both additional protocols to the Geneva Conventions, provided the rule that civilians benefit from protection against direct attack "unless and for such time as they take a direct part in hostilities"[216]. In the light of the changing nature of warfare that has come to entail what the ICRC describes as a "marked shift in the conduct of hostilities into civilian population centers, including cases of urban warfare characterized by unprecedented intermingling of civilians and armed actors[217]" the ICRC has attempted to explain the additional protocols notion of "direct participation". This task has been undertaken by the ICRC because, as they say "*Today, more than ever, it is of the utmost importance that all feasible measures be taken to prevent the exposure of the civilian population to erroneous or arbitrary targeting based, among other things, on reliable guidance as to how to the principle of distinction should be implemented in the challenging and complex circumstances of contemporary warfare*"[218].

Examples of the critique revolves around questions as, who is a civilian for the purpose of the principle of distinction and, therefore is entitled to protection against direct attack? What conduct amounts to direct participation in hostilities and, therefore entails the loss of that protection? What precise modalities govern the loss of protection[219]?

The ICRC's guidance has been widely criticized among scholars and military personnel. Opponents to the guidance have advocated that IHL allow for a more permissive targeting regime than the one purposed in the interpretive guidance. According to Nils Melzer, it seems that especially military

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[216] Melzer 2009, *supra note* 194, foreword.
[217] Melzer 2009, *supra note* 194, foreword.
[218] Melzer 2009, *supra note* 194, foreword.
[219] Nils Melzer, "Keeping the Balance Between Military Necessity and Humanity: A Response to four critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities", *The New York University Journal of International Law and Politics*, Vol. 42, Issue 3 (2010), p. 833.

affiliated jurists argues that IHL allow for a more permissive targeting regime than proposed by the ICRC[220].

Concerning the first question the ICRC guidance suggest that in the context of NIAC "all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (continues combat function*)"[221]. Brigadier General Watkin however, argues that the interpretive guidance defines membership in organized armed groups (OAG) too restrictively which limits the loss of membership to an unrealistically narrow group of persons. Watkin proposes that the concept of membership in an OAG, and thereby the continuous lack of protection because of the continuous combat function, should be extended not only to fighting personnel of OAG who are taking a direct part in hostilities, but should entail essentially all persons who could be regarded as performing a combat function, a combat support function or even combat service support function. This means that unarmed cooks and administrative personnel would be legitimate targets, because according to Watkin if they are not it creates an unfair bias against the state's armed forces[222].

Schmitt provides a critique of the ICRC's answer to the second question, namely the constitutive elements of "direct participation in hostilities". In order to qualify as direct participation in hostilities, following the ICRC guidance, acts or operations must meet three cumulative criteria. According to the ICRC guidance, "firstly, the harm likely to result from the act or operation must reach a certain threshold (threshold of harm). Secondly, there must exist a direct link between the act and the expected harm (direct causation). Thirdly, the act must be specifically designed to support a belligerent party to the detriment of another (belligerent nexus)[223]. Furthermore, the guidance requires that all possible precautions should be undertaken when determining if the targeted person qualifies as civilian and whether the person is directly participating in hostilities and in case of doubt, it must be assumed that the person is not directly participating and thus remains protected against direct attack[224].

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[220] Melzer 2010, *supra note* 219, p. 835.
[221] Melzer 2009, *supra note* 194, p. 16.
[222] Melzer 2010, *supra note* 219, p. 848 851.
[223] Melzer 2009, *supra note* 194, p. 46.
[224] Melzer 2010, *supra note* 219, p. 857.

Schmitt in principle agrees with the three constitutive elements but contends that the interpretive guidance defines the three constitutive elements too restrictively essentially because it excludes support activities not directly causing harm to the enemy. Furthermore, in contrast to the ICRC guidance, Schmitt proposes that in any cases of doubt, a civilian should be presumed to directly participate in hostilities and should not be entitled to protection against direct attack[225].

The ICRC guidance also interpreted the question of when direct participation in hostilities, entailing loss of protection against direct attack, begins and ends. The guidance argues that direct participation in hostilities includes the immediate execution phase of acts and operations that qualifies as direct participation, but also actions undertaken as part of the preparatory phase to execution and the deployment and return from the location of execution. However, Air Commodore William Boothby argues that this interpretation of IHL on this notion, is too restrictive. Boothby goes to suggests that the phrase "unless and for such time as they take part in hostilities" should be interpreted to include loss of protection not only throughout the engagement of a civilian in hostile acts which includes, preparation, deployment, execution and return as argued by the ICRC guidance, but also in the intervals between these acts[226].

Colonel (ret.) W. Hays Parks has also criticized the Interpretive Guidance. Park focuses on Section IX of the interpretive guidance, which outlines the restraints imposed by IHL on the kind and degree of force used against targets that are deemed legitimate military targets. Section IX of the guidance essentially argues that within the frame of IHL's more specific provisions pertaining to the conduct of hostilities, military necessity and humanitarian considerations functions as guiding principles when determining the kind and degree of force permissible against legitimate military targets[227]. Park however, finds that the ICRC's interpretation of IHL on this area comprises numerous errors and are based on a flawed interpretation of IHL[228]. In essence, Park believes that armed forces should not be required to capture rather than kill an enemy combatant or civilian directly participating in hostilities, even when the circumstances are such that they could easily do so without any additional risk[229].

According to Melzer, these proposals, that almost exclusively focus on the military necessity and not humanity, even when applied in good faith, allow for an extremely permissive targeting regime

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[225] Melzer 2010, *supra note* 219, p. 857.
[226] Melzer 2010, *supra note* 219, p. 913.
[227] Melzer 2010, *supra note* 219, p. 904.
[228] Melzer 2010, *supra note* 219, p. 897.
[229] Melzer 2010, *supra note* 219, p. 904.

prone to an unacceptable degree of error and arbitrariness[230]. The win-the-population strategy as set forth in the COIN manual categorically reject these propositions because, the counterinsurgent does not gain any advantages by using destructive violence to kill and capture the enemy. These interpretations of direct participation are therefore very unfit to new wars and COIN operations. The problem with the suggested approaches is that when following the COIN strategy, the military will have no self-interest in using excessive force. A strict focus on military advantage is unfit because killing insurgents will in the long run not result in a stable and secure situation. Following the suggested interpretations of IHL will most likely lead to an exaggerated valuation of kinetic military operations, which will cause outrage and resentment among the local population whose trust is needed to reach long lasting peace and stability. Conducting counterinsurgency in the context of new wars should not be focused on kill-capture operations. Even if the butcher and baker are potentially targets, it is of utmost importance to understand that it might not strategically beneficial to kill them. Killing the baker in a military operation has the potential of backlashing by creating resentment and fuel the insurgency even more, because to put it very simple, if there is no baker there is no bread[231] .

3.4. Conclusion of chapter

To conclude this chapter the laws of war are premised on a strategic foundation that is not applicable to new wars. The cardinal points of IHL are problematic for the age of counterinsurgency as they inherently allow for and even encourage a kill-capture approach. The kill-capture paradigm, implies old war thinking and a strategy for victory rooted in inflicting as much damage on the enemy as possible. So, even though the laws of war are fundamentally trying to lessen human suffering during conventional warfare, it has proven problematic in the context of counterinsurgency, where the military is using it as a tool to analyze how much damage is legally acceptable and to justify targeting of individuals with principles such as direct participation. This is inherently inappropriate in the context of new wars that should be resolved by following the COIN manual that aims to ensure security and stability by winning over the population. In this context, collateral damage should not only be assessed against what the military gain is, but rather on the basis of how that military action would affect the counterinsurgency mission. Providing humanitarian relief strengthens the counterinsurgents posture with the public, which is ultimately what is needed to win the war.

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[230] Melzer 2010, *supra note* 219, p. 913.
[231] Sitaraman, *supra note* 86, p. 32.

The disconnect between the laws of war and counterinsurgency strategy raises important practical and conceptual questions: Should the laws of war be revised and if so how? This chapter has pointed to specific rules of IHL that appear to be disconnected from the underlying strategy of counterinsurgency. In counterinsurgency, IHL have not been able to pressure a change in military mindset, enabling humanitarian considerations. The categories of distinction, proportionality and military necessity has left civilians injured as a result of collateral damage. Military affiliated jurists and high level officers are able to interpret IHL in a manner that is completely disconnected from the strategy of counterinsurgency, which aims at providing humanitarian relief to strengthen the counterinsurgents position among the public. Considering the operational reality of new wars and the imperatives of the COIN manual in dealing with these situations, Watkins interpretation of what constitutes membership of an OAG becomes immensely problematic. In a counterinsurgency context soldiers might encounter men and women carrying weapons to insurgents, local villagers and teenagers functioning as lookouts, criminals and smugglers working for the insurgents and local villagers supplying insurgents with food. This is often involuntarily, as they might not have any other option, and it would be outright counterproductive and a major setback in winning the hearts and minds of the population to target locals performing such functions.

Schmitt's interpretation of the constitutive elements as being too restrictive is fundamentally problematic. The constitutive elements are what prevents punishment of individuals engaging merely in what might qualify as criminal activities, that does not lead to death, injury or destruction on the military, e.g. when locals are supplying food to insurgents, housing insurgents or functioning as lookouts. In a counterinsurgency context, these criminals should be handled through law enforcement methods arresting rather than targeting them. This will give the counterinsurgents legitimacy and prevent resentment from the population.

4. Human Security as a Response to New Wars

In Afghanistan, ISAF fought a conflict in which they won almost every single battle, but because of high-salience kinetic operations, they engendered sentiments of discontent and resentment amongst the population. The COIN doctrine could benefit hugely from incorporating aspects of human security into its strategic approach, even though both concepts share the fundamental idea of creating security for individuals, they have two completely different goals for doing so. Counterinsurgency is looking to protect the civilian population as part of a strategy to achieve the ultimate goal that is to win wars. In contrast, the ultimate goal of human security is to enhance the focus on individual security, as it has humanitarian benefits to do so. The issue we engage with in this part of the thesis is whether it would be useful to incorporate critical aspects of human security into the COIN doctrine to overcome the problems identified in the previous chapter. This chapter will thus analyze what human security is, what principles it holds, and how it is useful to use in this thesis. Furthermore, it will discuss how incorporating it into the COIN manual, will pave the way for a more humane and thus more effective COIN strategy.

4.1. What is Human Security?

Human security is a concept that offers a fundamentally different way of thinking security and development. Traditionally, security policies have focused on threats to the state, and the response has often been the use of the military. This means that quite often security issues have been dealt with separately from issues of development and humanitarian assistance. This separation is, however, an ineffective solution to the problems occurring in new wars, where a holistic approach is needed, and the exclusive focus on traditional hard security issues can be counterproductive[232]. Human security is disposing of the state focused security, and instead focusing on the security of individuals and their communities. It combines human rights and development with security aspects that the military have traditionally dealt with. The first promulgation of the human security concept was articulated in the Human Development Report by the United Nations Development Programme (UNDP)[233]. The report lists seven threats that human security should especially focus on; economic, food, health, environmental, personal, community and political security[234]. Some threats are part of what is traditionally labeled development, and some are part of security. However, the report argues

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[232] Kaldor 2007, *supra note* 11, p. 182-183.
[233] United Nations Development Programme, "Human Development Report 1994", *UNDP*, 1994, (available at http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf).
[234] United Nations Development Programme, *supra note 233, p. 24-25.*

that it is crucial to combine the two as they are mutually constitutive for the basis of peace. This means that without security there may be no development, but without development, peace is at risk[235].

Mary Kaldor later developed a new approach to human security that, by acknowledging the various forms of security, has a focus on the security of individuals and which argues that combining security and developmental elements is crucial to find a solution to problems associated with new wars[236]. To do so, human security needs to be adapted to the specific context that it operates in. This means that it has to be tailored to each situation, and it should not merely be a concept forced down on a conflict from above. Human security is a logic closely linked to new wars, but it also holds a practical strategy that attempts to end violent conflicts. The instruments used are directed towards individuals and communities rather than states. There is an emphasis on human rights, due process, top down and bottom up approaches and implementation on all levels: international, regional, national and local[237]. The human security approach is thus a holistic approach, integrating developmental issues into the realm of security.

4.1.1. The Principles of Human Security

Kaldor's version of human security entails a set of critical principles that establishes what human security is and how it is different from other forms of security. These principles should cover both the 'how' and the 'why', or the means and the ends of operationalizing human security. As not all of the principles are useful in a counterinsurgency context, this thesis will focus on the following; the primacy of human rights, enhanced civilian-military cooperation and operating under civilian leadership. This does not imply that other principles of human security are not useful in other contexts, but merely that they are not applicable to this thesis.

The primacy of human rights. It is important to underline that human rights entail both economic and social rights, but also political and civil rights. This principle emphasizes that unless absolutely necessary, and within the applicable laws, killing should be avoided. Collateral damage is unacceptable, as the primary goal for the military should be the protection of civilians. Linking it to counterinsurgency, defeating insurgents should therefore only be a means to an end, namely to

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[235] S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN – A Critical History*, 2006, p. 145.
[236] Kaldor 2007, *supra note* 11, p. 183-186.
[237] The Berlin Report of the Human Security Study Group, "From Hybrid Peace to Human Security: Rethinking EU Strategy towards Conflict", *The London School of Economics and Political Science*, 2016, p. 15.

protect civilians[238]. In this regard, the human security model offers a new legal framework that clarifies when international interventions are legal, and under which regime they should operate. This framework combines the legal regimes existing in domestic law of the host state, domestic law of the sending state, international criminal law, human rights law and international humanitarian law. This legitimizes the intervening forces, and help them provide security through law-enforcement models, rather than through conventional warfighting[239]. This is much more suitable for the emerging challenges of new wars, as it is easier to win over the trust of the civilian population. We argue that changing the law applicable to counterinsurgency in new wars will enable an enhanced focus on the primacy of human rights which is strategically wise for COIN operations.

Civilian-military cooperation. In new wars, enhanced civil-military cooperation is needed to accommodate the challenges that the population is facing. The military should ensure the security and safety of the population and the human security personnel. In turn, the human security personnel, consisting of civilian workers, should deliver humanitarian assistance, support reconciliation and help reconstruct the society[240]. As the international society are helping to provide basic public services, it will be easier for the local political authority to be embraced as legitimate by the population. In these cases, human security personnel should work together with military and police forces, aiming at protecting the people and providing them with basic services. This entails that the military should, whenever possible, arrest criminals and not kill them, acting more in the lines of policing. This will give the military credibility and enable them to work closer together with civilian institutions to reconstruct social services, justice institutions and create security. Institutions such as the military, the police, human security personnel and civilian counterparts, would need to work together to provide security and construct legitimate forms of governance to provide public services at all levels[241].

Operating under civilian leadership. To make human security work, operations have to be under civilian leadership. To give legitimacy to the operation, this civilian leader has to be appointed through legal procedures, and he/she has to be respected by both the host and the sending state. The

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[238] Kaldor 2007, *supra note* 11, p. 186.
[239] Kaldor 2007, *supra note* 11, p. 192-193.
[240] Beebe and Kaldor, *supra note 120, p. 119-120.*
[241] The Berlin Report of the Human Security Study Group, *supra note* 237, p. 14.

military is often associated with violence and death, and operating under a civilian leader would, therefore, make it easier for the civilian population to trust the operation and the political authority offered later in the process[242]. In order to establish a legitimate political authority during a violent conflict, agreements on all levels are needed, and public goods, such as security, economy, social conditions and justice should be addressed as the primary focus of attention[243]. Human Security entails that the authority in charge should provide for the basis of the rule of law and the respect of human rights and argues that this holistic task is administered more effective if undertaken by a civilian rather than a military professional. This settlement on the person in charge has to be inclusive, involving acceptance of the local, national, regional and international actors participating in the conflict[244].

4.1.2. Critiques of the Human Security Approach

Incorporating issues that has traditionally fallen under development into security, has proven to be an effective way to rally political coalitions to promote human security aspects. The human security term has been praised for its attempt to construct a new way of thinking security, and the establishment of the ICC stands as a testimony to the enhanced awareness toward individual security and accountability[245]. But the concept has also been criticized from a variety of angles and actors. Roland Paris sees positive and negative elements in the construction of the concept, which he argues has been constructed vaguely, so that it would be an effective campaign slogan to use. This is in fact what makes the concept powerful and weak at the same time. Its power lies in the effectiveness of rallying support for security issues related to individuals. The ethical foundation of the concept is hard to disagree with, and it is therefore becoming a powerful slogan. The vagueness has, however, had the consequences of diminishing the concepts usefulness as an analytical and policymaking tool. It has been widely criticized for being too broad, in that it can mean whatever you want it to mean[246]. A negative aspect of the concept is that by treating economic and social problems as issues of security, the human security concept fails to deal with more serious problems such as political and criminal violence[247]. Similarly, Yuen Foong Khong argues that, proponents of human security tend not to prioritize security issues against each other, leaving the issues within the

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[242] Beebe and Kaldor, *supra note 120,* p. 135-136.
[243] Louise Arbour, "Economic and Social Justice for Societies in Transition*", NYU Journal of International Law and Politics*, vol. 40, No. 1 (2007), p. 2-3.
[244] Kaldor 2007, *supra note* 11, p. 189-190.
[245] Roland Paris, "Human Security: Paradigm Shift or Hot Air?", *International Security*, Vol. 26, No. 2 (2011), p. 88.
[246] Paris, *supra note* 245, p. 92-93.
[247] Mary Kaldor, "Human Security", *Society and Economy*, vol. 33, no. 3 (2011), p. 446.

realm of human security without any hierarchy. This causes problems, as issues of economy becomes just as important and urgent as issues of political violence, and the result is therefore a kind of paralysis. By prioritizing everything and everyone, human security actually ends up prioritizing nothing and no one[248]. Edward Newman substantiates this by saying "If individual security is the dependent variable, then it is possible to identify and codify every physiological threat. But this would be of little use, as it would generate an unmanageable array of variables."*[249]*. What Newman is arguing, is that by having too many variables, in this case security issues, none of the variables are really dealt with. The amount of security issues that has to be dealt with, is simply unmanageable. This still leaves human security as a great concept for gathering political support in order to change the policy towards aspects of security, but fundamentally it makes it difficult to use as an analytical and practical policymaking tool. As a counterargument, proponents of human security have pointed to the fact that bringing economic and social factors into the realm of security, has brought greater attention and enhanced the focus on these issues. Macfarlane and Khong underlines that this is not necessarily a positive aspect, as it only produces false hope. The conceptual overstretch, as they put it, is too broad a definition and it makes the concept meaningless and analytical useless[250].

These critiques indicate that the human security concept, as altruistic as it might seem, is incapable of being operationalized because of its vagueness. In this thesis, the human security concept is used in a new war scenario, examining how it can be useful to implement individual security and to incorporate developmental aspects into counterinsurgency. This implies implementing strategies and overarching ideas to an already existing tactical and strategic framework, namely the COIN manual. Operationalizing specific elements of human security is therefore not an operationalization of the concept as a whole, but instead an attempt to incorporate critical principles from the concept into the COIN manual, to create a solution to new wars via counterinsurgency.

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[248] Yuen Foong Khong, "Human Security: A Shotgun Approach to Alleviating Human Misery?", *Global Governance*, Vol. 7, No. 3 (2001), p. 232-233.
[249] Edward Newman, "Critical Human Security Studies", *Review of International Studies*, Vol. 36, (2010), p. 82.
[250] MacFarlane and Khong, *supra note 232,* p. 237-247.

5. Strengthening COIN by Merging it with Principles of Human Security

This chapter sets out to discuss which elements of human security would be beneficial to incorporate into the COIN manual. The COIN manual has not yet been a successful strategy for winning new wars. However, we argue that incorporating relevant principles from the human security approach, will enable us to refine and ameliorate the way counterinsurgency is being operationalized.

Handling new wars demands a more diverse role than usually demanded by actors in classic conventional warfare. Actors engaged in new wars should be capable of state building, training the locals, acting as law enforcement, provide civil administration and humanitarian assistance. The military should thus be capable of taking on roles that have traditionally been expected to be the responsibility of civilian organizations. These competencies require that the practitioners have an understanding of the political, legal and cultural complexities in the context of the conflict, as this is an essential part of building a relationship between the armed forces and the population. The mindset that is required for counterinsurgency is different from conventional military thinking and it is imperative that practitioners of COIN understand that the goal is not military victory through coercion, but rather to secure stability and peace through a strategy of winning over the population. Building a relationship between the military forces and the civilian population will decrease the incentive to use force, and increase the populations incentive to support and help the counterinsurgents. In the end, counterinsurgency is a military strategy, but it should not be operationalized through a classic military mindset, as it can only be effective if it aims at protecting civilians. In this regard, civilian control is a much necessary factor in facilitating a paradigm change, as it will secure that the population is at the top of the agenda. This is obviously what the COIN strategy is trying to implement, but this is being challenged by strategic narratives of killing and capturing the enemy. In the interviews conducted with Danish soldiers, we found that when Danish soldiers operate under the control of the Danish police force, they find it more natural to think in the lines of protecting civilians, thus moving away from operating and thinking within the kill-capture paradigm. An example of soldiers operating under civilian leadership outside a domestic context, is the NATO forces in Kosovo who General Klaus Reinhardt put under the command of the United Nations special representative to Kosovo. Operating under civilian leadership is an advantage because the civilian in charge has both legal and political legitimacy, as he/she is appointed through a legal procedure, is trusted by the sending nations, and is thereby easier accepted by the local

population. An important point is that the civilian in charge is less likely to be affected by the kill-capture paradigm, as it is a paradigm that is found within the military. Building on this notion, it is likely that the civilian, who will be responsible for keeping the operation within applicable laws, will have a more strict and humanitarian interpretation of the law than military professionals as illustrated in chapter three, where Boothby, Schmitt and Watkin all argue that IHL allows for a very permissive targeting regime[251]. Applying a stricter interpretation of the law, will minimize the possibilities for the military to cause collateral damage, ultimately increasing the protection of civilians. This will not only be an advantage for the civilian population, but also for the military, as the operation will be much more effective, when trying to win the hearts and minds of the population. Taking Afghanistan as an example, the war started as a conventional military conflict, but quickly turned into a new war. In this situation, it was a significant challenge that the actors that started the war against the Taliban, were the ones that were obliged to transform their approach from conventional warfare into a counterinsurgency operation. Changing the fundamental approach to the war was difficult, if not impossible, for the military leadership who had been conducting conventional war since the beginning of the invasion in 2001. Operating under civilian leadership, when implementing counterinsurgency, would in this situation have allowed changing the kill-capture mindset that followed the conventional military approach, introduced by the military leadership in the beginning of the conflict.

A majority of the soldiers we interviewed, pointed out the strength of the police's approach when engaging with civilians. By approaching civilians as individuals whom they should serve and protect, the police are able to gain their trust and respect. This is directly applicable to counterinsurgency, that prescribes the military to operate in the same way. What we propose is that the rules of engagements in counterinsurgency should be based on human rights, resembling the rules soldiers operate under in the domestic sphere. This means that the military should operate under the same rules of engagement as the police does domestically, and that IHL will not be applicable to counterinsurgency operations in new wars. This line of thought might be easy to agree on academically, but it is not an easy task for soldiers in the midst of war. However, if the local population is not treated as though their security is just as important as the security of the soldiers, the counterinsurgency operation will fail. It is therefore imperative that soldiers are specifically educated and trained to conduct counterinsurgency operation, enabling them to appreciate how it

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[251] Melzer 2010, *supra note* 219, chapter 3.

will ultimately be beneficial for their own security. In our interviews, we found that, despite the soldiers being aware that success is achieved through winning the hearts and minds of the population, they perceived civilian protection as subordinate to force protection. One of the Danish soldiers, who is currently on a protection mission guarding a synagogue in Denmark, illustrated this by saying that while being on guard duty in Kosovo, he could be rougher with civilians, than when engaging with civilians in Denmark[252]. This illustrates the difference between operating under domestic law and IHL, but it also illustrates the importance of cultural and local knowledge. When operating under domestic law, in a cultural context that the soldier is familiar with, he is able to engage with civilians in a more respectful manner. When operating under IHL and in a cultural context that is relatively unknown to the soldier, he is 'rougher' when approaching civilians. The respectful approach will be a much more effective way to win hearts and minds in counterinsurgency, and is therefore preferable. The acquisition of cultural and local knowledge requires a more thorough training and education before being deployed, something that will be addressed later on in the thesis.

To effectively implement our proposals, security needs to be centered around the protection of individuals, and actions in new wars should, therefore, be categorized as crimes and be subject to human rights and domestic law. The use of force needs to be exclusively centered around the protection of civilians, and killing should only be acceptable in self-defense. This entails that the rules of engagement must be different from those that tend to be considered appropriate for warfighting.

The use of drones is an example of the double standards applied when evaluating the life of Afghans and the lives of civilians in Copenhagen. In this context, we found that to succeed in establishing peace, armed attacks carried out by drones should be completely unacceptable. The use of armed predator drones is completely unthinkable in a domestic context, and it should be so in counterinsurgency operations as well. As prescribed by the human security approach terrorists should be arrested rather than killed, and sound police work, rather than traditional military skills, should lay the groundwork for gathering intelligence.

The COIN manual builds on previous experience with counterinsurgency and includes a vast empirical set of data. This makes it convincing evidence for what might be an effective military

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[252] Interview with Soldier 5 from the Danish Army, 15 Mar. 2018

strategy. However, it lacks theoretical considerations, and this is where Kaldor and Chinkins human security approach becomes useful, to deal with the challenges apparent in the logic of new wars. By combining elements from both of the concepts we argue that it is possible to develop a new and more effective approach, to deal with contemporary conflicts reflected as new wars.

5.1. The Difference Between Human Security and Counterinsurgency

The COIN manual, published in December 2006, turned out to be a powerful critique of the conventional warfighting tactics applied in Iraq and Afghanistan. General Petraeus, the main author of the manual, has previously argued that human security and counterinsurgency, as presented in the COIN manual, share several similarities[253]. Although this is to some extent true, there are some significant differences. Human security advocates for the primacy of human rights, which implies that protecting civilians is the primary task, and everything else are means to achieve this end. This is based on the underlying reasoning inherent in the human security approach, which is ultimately altruistic and based on humanitarian considerations. The COIN manual, however, has a different centre of gravity. Although also encouraging the protection of civilians, it is based on a strategic consideration that doing so will eventually lead to a victorious outcome. This is closely linked to the COIN manual being a military strategy and therefore permeated by the kill-capture mindset. This thesis argues that by building on the wrong mindset, the COIN manual has failed to be successfully operationalized. This has caused the focus on winning over the population to be subordinate to force protection, which is preventing the success of the COIN strategy. Instead, applying the altruistic mindset of the human security approach is the only way to ensure that counterinsurgents will in fact do everything possible to protect the civilian population, which is what will result in winning their hearts and minds.

Another significant difference between human security and the COIN manual is what law regime they believe should govern new wars. Human security is advocating for a law regime that resembles that of domestic law and IHRL. This implies that individuals who commit human rights violations should be treated as criminals, rather than enemies, and the aim is to arrest perpetrators and bring

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[253] Mary Kaldor, "New Wars", *The Broker*, 28 May 2009, (available at http://www.thebrokeronline.eu/Special-Reports/Special-report-Who-is-the-enemy/New-wars).

them to justice rather than to kill them[254]. This means that human security operations will resemble law enforcement rather than classic warfighting. In contrast, the Coin manual is first and foremost, a military doctrine seen through a military prism. In particular, the rules of engagement in counterinsurgency are determined by IHL rather than by domestic law or IHRL, as is argued for in the human security approach. This entails that attacking a legitimate military target justifies civilian casualties is a legally accepted procedure. This leads back to the most significant difference between the two, namely the underlying mindset.

The COIN manual is a strategy developed to win wars whereas human security is a strategy developed to lessen human suffering. This also becomes evident in the mindset of the soldiers in counterinsurgency operations. Winning over the population by protecting them is a means to an end, rather than the end itself. So, the starting point for soldiers is how to identify targets that destroys the insurgency network. This means that military personnel, engaged in counterinsurgency, are more prone to use force, which will merely contribute to an escalation of the conflict. Contrary, when operationalizing the human security approach, it is possible that situations may arise in which using force becomes unavoidable, but it will only be in cases of self-defense and self-defense on behalf of a third party. Targeting the enemy is not part of human security, as the goal is not to win the war but to protect the civilian population. The starting point, when considering to use force, is therefore different from that of COIN, because it should only happen in an attempt to save the lives of the civilian population or in self-defense. Even though the main author of the COIN manual, General Petraeus, insists that counterinsurgency equal population security, it does not overcome the major implication that the goal is to defeat the enemy and that population security is merely a means to that end. Paradoxically, this thesis argues that by not having victory as the end goal the military will be able to change the kill-capture mindset, and this will eventually help counterinsurgents 'win' new wars.

The human security approach, that follows from a new wars analysis, prioritizes population security, by treating Afghan civilians as human beings and not as civilians of the enemy. In order to provide effective security, it might be necessary to defeat attackers by force, but arresting them would be preferable. The priority of the human security approach is always to end the violence rather than to win the war. In contrast, the logic of counterinsurgency relies on the old war mindset,

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[254] Kaldor and Chinkin, *supra note* 21, p. 521.

where ending a war is done through defeating the enemy. This is normally not possible in a new war context, since the actors are so dispersed and the violence is so integrated in the civilian population, that killing insurgents will merely lead to a prolongation of the war. Following this, acting under the rules of IHRL leads to another fundamental change when operationalizing counterinsurgency. Operating under IHRL entails that the military will only be allowed to use force in instances of self-defense. As discussed above, the COIN manual builds on the logic that winning the war is the end goal, and population security is a means to that end. This logic can be altered through a change in the legal regime governing COIN operations in new wars. Since IHRL will not allow for collateral damage, unlike IHL which allows for it through its principles of proportionality and necessity, operating under IHRL the counterinsurgents will not be able to reproduce the kill-capture mindset.

In the human security approach, the military is a tool to create security, which in turn protects civilians. The principle of proportionality, under the human security approach, has its point of departure in the innocent civilian's right to life, and under this approach the deprivation of civilian life is only acceptable as an unintended consequence of the use of force that is absolutely necessary to defend threatened human lives. The human security approach therefore puts emphasis on the right to life, which in turn rules out strikes, that might cause collateral damage, against insurgents. Using the logic of human security in counterinsurgency is thus useful, especially if operating under the legal regime of IHRL.

5.2. Human Security - A Response to New Wars

Since the beginning of the conflicts in Iraq and Afghanistan, a revitalization of counterinsurgency has taken place. Counterinsurgency, as elaborated in the COIN manual, has been under the loop of military strategists, soldiers, historians, and policymakers. Despite it being a comprehensive approach, there seems to be a lack of focus on how the law can be used to support the overall strategy of COIN. Even though COIN emphasizes non-military operations, it is paramount to understand that killing and capturing still takes place. Counterinsurgency is still war[255], and protecting the population from violent insurgents, through a robust defense is still needed. At the same time, protecting the population from the counterinsurgents and the effects followed by their actions is also needed. In this regard, the COIN manual seems to be falling short of creating a

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[255] Sitaratman, *supra note* 86, p. 23.

comprehensive strategy that successfully deals with new wars. Therefore, the following section will analyze critical points of the human security approach, to discuss whether incorporating its particular changes of focusing on the primacy of human rights and on civil-military cooperation, can be incorporated into COIN, to create a more effective approach that will facilitate winning the hearts and minds of the population.

5.2.1. The Primacy of Human Rights - The Right to Life

This section argues that adopting the human security trajectory of operating under IHRL, will result in less collateral damage and thereby less resentment in the population, ultimately assisting the counterinsurgents in winning the hearts and minds of the population.

Human security attempts to create a secure and stable environment by providing safety and stability, through the focus on human rights. In human security, this focus is paramount, and it should be perceived as the strategic foundation from which all other activities should follow[256]. Like the COIN manual, human security operates from the idea that in areas of insecurity people worry about the violence. When people live in fear of getting randomly killed, captured or tortured, they are more prone to turn to strongmen for protection[257]. In new wars, the protection of civilians from violence is, therefore, necessary and a critical task. Mary Kaldor articulates that the predominant principle of human security is human rights especially the right to life, which is in complete opposition to the traditional warfighting strategy[258]. Techniques for adequate protection of civilians entails the establishment of safe havens, humanitarian corridors and the disarmament of militias and armed groups. This is similar to the tactics of the COIN manual, which argues that the establishment of safe areas will eventually ensure that other areas become secure as well[259]. However, if the goal is to bring about sustainable peace and security, the protection of individuals cannot stand alone. Safe havens should be created with the aim of providing a foundation for establishing the monopoly of violence, and to create institutions of law and order. In human security, the monopoly of violence means that the military and the police are the only institutions that have the exclusive right to use force. This is a significant difference between counterinsurgency and

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[256] Kaldor 2007, *supra note* 11, p. 185-187.
[257] Beebe and Kaldor, *supra note* 120, p. 90-91.
[258] Beebe and Kaldor, *supra note* 120, p. 91.
[259] Beebe and Kaldor, *supra note* 120, p. 91.

human security, whereas counterinsurgency operates under IHL, human security operations are based on human rights[260].

Borrowing a COIN term, Mary Kaldor argues that the strategy of sowing 'fear and hate' adopted by many belligerents in new wars, including insurgents, must be countered by a strategy of capturing 'hearts and minds'[261]. Human security, however, argues for another strategy to achieve the goal of winning the hearts and minds of the population. A central tenant in the human security approach is that the overarching principles of IHL; distinction, necessity, and proportionality, as legitimating principles for violence, are unacceptable. The participating actors in new wars should operate under IHRL, which means that in human security operations, military personnel will come to act more like police forces aiming at protecting people in conflict. Capturing insurgents and placing them before a judge will thus be preferred, instead of attacking and killing them as is traditionally the way conventional war has been conducted.

5.2.1.1. International Human Rights Law

The foundations of modern international human rights law are to be found in the post-World War II developments, that sought to make sure that individuals hold legal rights such as equality, freedom from arbitrary killings and the right to life. This is especially evident in the UN charter preamble, which explicitly sets out to "reaffirm faith in fundamental human rights"[262], and was later reflected in the GA resolution 217, as the Universal Declaration of Human Rights (UDHR). In 1966, the two treaties, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESCR) were agreed. They came into force in 1976, but until that point, human rights, as they are reflected in the adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), were predominantly a European idea. Since then, the UDHR has been reinforced through its incorporation into national constitutions and different human rights instruments inherent in international and regional institutions[263]. Since the collapse of the Soviet Union and the fall of the Berlin wall, human rights have become the forefront of international politics and democracy. Human rights, together with the rule of law, became the popular mantra for peace processes in the 1990's and become an integral aspect of international politics and law. In this context, the Vienna World Conference on Human Rights in 1993, stated that efforts towards "a universal respect for,

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[260] Kaldor 2007, *supra note* 11, p. 185-187.
[261] Kaldor 2012, *supra note 1*, p. 121.
[262] United Nations, *Charter of the United Nations*, preamble, San Francisco, 24 October 1945, preamble.
[263] Kaldor and Chinkin, *supra note* 21, p. 267.

and observance of human rights… contribute to the stability and well-being necessary for peaceful and friendly relations among nations, and to improve conditions for peace and security as well as social and economic development" [264].

5.2.1.2. How is IHRL Different From IHL?

Both IHL and IHRL are complementary bodies of international law, setting out to protect the lives, the health and the dignity of individuals, although from different angles. IHRL is a set of international rules, established by treaty and custom, from which individuals and groups can expect and/or claim certain behavior or benefits from governments. Human rights are inherent entitlements which belong to every person solely as a consequence of being human[265].

The difference between IHL and IHRL is apparent in that, IHL applies exclusively to armed conflict where IHRL in principle applies at all times. The cardinal point of all international conventions dealing with civil and political rights is that they aim to protect the inherent right to life. In article 6 of the ICCPR from 1966, the right to life is explicitly referred to as an inherent right[266]. By classifying this right as inherent and non-derogative, the deprivation of life is unacceptable, even in times of emergency. This does not mean that killing is never legal, it rather means that the arbitrary deprivation of life is prohibited. The ECHR has a different approach, as article 2(1) states that "no one shall be deprived of his life intentionally"[267], and this is followed by article 2(2) that states, "deprivation of life shall not be regarded as a violation of the right to life when it results from the use of force which is no more than absolutely necessary in three cases which are, the defense of any person from unlawful violence, effecting a lawful arrest or preventing the escape of a person lawfully detained and action lawfully taken for the purpose of quelling a riot or insurrection"[268]. According to David Kretzmer, the deprivation of life under the law enforcement model can never be regarded as necessary, unless it is evident that there was no other possibility of protecting the victim[269]. This means that the use of force would only be legal in situations where the threat is so imminent that trying to apprehend the perpetrator would make it possible for him/her to carry out

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[264] United Nations, World Conference on Human Rights, *Vienna Declaration and Programme of Action*, A/CONF. 157/23, (12 July 1993), para. 5 & 6.

[265] UN General Assembly, resolution 217 A, *The Universal Declaration of Human Rights,* A/RES/3/217 (10 December 1948), (available at http://www.un-documents.net/a3r217a.htm).

[266] UN General Assembly, resolution 2200 A, *International Covenant on Civil and Political Rights, A/RES/2200 (23 March 1976), article 6, (available at http://www.un-documents.net/iccpr.htm).*

[267] Council of Europe, *European Convention for Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, article 2(1).

[268] Council of Europe, *European Convention for Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, article 2(2).

[269] Kretzmer, *supra note 79*, p. 178.

the threat. Thus, under this law enforcement model a state may not prevent criminal acts by killing potential perpetrators, as the only prevention allowed is arrests of those engaged in or planning the criminal act.

This is in stark contrast to IHL, which makes actions in conflict areas legal, even when they are otherwise illegal. The killing of combatants and the destruction of enemy property is in this regard, two major elements of IHL. The categories of IHL provides privileges but in return requires responsibility. Combatants in armed conflict have the right to participate in the hostilities and kill enemies, but as a consequence of having that privilege combatants are also legitimate targets of other combatants[270]. Furthermore, IHL is exclusively applicable to IAC and NIAC, whereas the categorization of the conflict becomes extremely important, compared to IHRL which is applicable at all times. IHL is therefore not a legal regime aimed to enhancing long-term security and stability but is instead focused on controlling violence during armed conflicts. As we have seen, new wars are long and complex conflicts, so defining when IHL is applicable, and when it might stop being so, becomes very difficult[271].

5.2.1.3. IHRL as a Complimentary Regime to IHL

The traditional understanding of the two legal regimes, IHL and IHRL, is that IHL applies in the case of an IAC and/or NIAC, while IHRL applies in peacetime[272]. That is however not the reality, as IHRL does in fact, apply at all times, even in armed conflicts, but is subordinate to IHL under the rule of *lex specialis[273]*. This has been especially evident when IHRL has had a complementary role to IHL during NIACs and IACs[274]. IHRL is therefore applicable at all times, unless a more subject-specific law, like IHL, applies, then it is subordinate to that. There are exemptions to when human rights treaties should apply, like the ICCPR, which explicitly provides that states are allowed to derogate from provisions of the treaty in times of public emergency which "threatens the life of the nation" [275]. It is recognized that situations of armed conflict are situations of public emergencies, that may permit a state to derogate from some of its obligations under a human rights treaty. In this context article 15 of the European Convention on Human Rights (ECHR) provides that: "*In time of*

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[270] International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, article 43 (2).
[271] Kaldor and Chinkin, *supra note* 21, p. 270.
[272] ICRC 2003, *supra note 13*.
[273] ICRC 2003, *supra note 13*.
[274] Kaldor and Chinkin, *supra note* 21, p. 271.
[275] UN General Assembly, resolution 2200 A, *International Covenant on Civil and Political Rights, A/RES/2200 (23 March 1976),* article 4.

war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law"[276]. This indicates that IHRL is a general law, that is applicable at all times unless it is subordinate to a more specialized law or there is a 'public emergency threatening the life of the nation'.

The rule of lex specialis makes the applicability of IHRL somewhat difficult in armed conflicts. A number of bodies have sought to clarify how and when to apply IHRL to armed conflicts, and how it should be complementary to IHL in the process. The ICJ, although limited in their jurisdiction to settling legal disputes between states, has made some important statements on the issue, in the Legality of the Threat or Use of Nuclear Weapons Case. In this case, it was asserted that resorting to nuclear weapons would unavoidably involve violation of the right to life, protected under Article 6 of the ICCPR. However, it was argued that nuclear weapons would be utilized during war, which means that IHL and not the ICCPR would apply, and article 6 of the ICCPR was therefore not to be considered applicable. The ICJ rejected this argument since the ICCPR does not cease to apply in times of war:

"The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by the operation of article 4 of the covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life also applies in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities"[277].

Thus, IHRL does apply in armed conflicts, but the two legal regimes are complementary to each other. The ICJ further repeated this understanding in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, where the ICJ

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[276] Council of Europe, *European Convention for Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, article 15.
[277] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ, 8 July 1996, para. 25.

stated that the two legal regimes might apply simultaneously[278]. The UN Human rights Committee has also explicitly confirmed the applicability of the ICCPR to armed conflict. This does create some practical difficulties, where some issues are matters of IHL while others are matters of IHRL, and then again some are possibly matters of both. Understanding which legal regime applies at what time, and in what cases is extremely difficult and this can cause some confusion.

As described earlier, the human security approach entails operating under IHRL rather than IHL. Legal scholar David Kretzmer have also wrestled with the applicable legal regimes governing NIACs and concludes that we will eventually end up in an either-or situation. Either we adopt what Kretzmer categorizes as the law enforcement model, or we adopt the armed conflict model[279]. According to Kretzmer's analysis, the law-enforcement model is however not suitable when the scale of violence has reached that of a non-international armed conflict, which is typically the case for new wars. Instead, he suggests a mixed model, in which there is an interplay of international human rights standards and international humanitarian law[280]. The mixed model somewhat resembles what Kaldor and Chinkin suggest in their book International Law and New Wars, by combining elements of IHRL with IHL. However, what Kaldor suggests in her books Human Security and The Ultimate Weapon is no Weapon is not similar to Kretzmer's approach or the approach taken by Kaldor and Chinkin in International Law and New Wars. In Human Security and The Ultimate Weapon is no Weapon, Kaldor wishes not only to compliment IHL with IHRL but rather to bring about an ethical approach grounded in the rights of individuals. This will entail that the rights of individuals supersede the rights of states, and international law that applies to individuals, like human rights law, overrides the laws of war. This means that IHRL should be superior to IHL, at least when dealing with civilians, as Kaldor argues, "*jus in pace* cannot be suspended in wartime in favor of *jus ad bellum* or *jus in bello*"[281].

Obviously, this has profound implications for the rules of engagement soldiers operate under, because the rules of engagement in human security will come to be shaped by a combination of IHRL and domestic law rather than IHL[282]. When operating under this kind of law, soldiers will have the right to self-defense and self-defense on behalf of a third party, but the concepts of military

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[278] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 9 July 2004, Para. 105.
[279] Kretzmer, *supra note* 79.
[280] Kretzmer, *supra note* 79, p. 201.
[281] Kaldor 2007, *supra note* 11, p. 154-155.
[282] Beebe and Kaldor, *supra note* 120, p. 93.

necessity and proportionality cannot be utilized to justify killing the enemy or causing collateral damage[283]. This approach therefore entails trying to arrest enemies rather than killing them. Conducting operations in support of this approach might be more risky than traditional offensive war fighting, as soldiers will be forced to prioritize civilian protection over force protection. This will require that the actions of the soldiers will come to resemble the work of firefighters and police officers, whom are risking their own lives in order to save others. In the human security approach, there is thus still a role for the military, but it is a rather atypical one. COIN operations have adopted an approach to win the hearts and minds of the population, but as illustrated in the chapter about Afghanistan, when operationalized, the task of protecting civilians has been secondary to the task of defeating the enemy and protecting the armed forces. Contrary to this, in human security the use of military operations is a means to an end, namely the protection of civilians. One major encouragement for the counterinsurgents to follow the imperative of protecting civilians, is that the process might give the possibility to gather more and better intelligence from the civilians. In this context, it is important to emphasize that warfighting is still allowed if it occurs, but only in an effort to save civilian lives or in self-defense. To strengthen the argument, Kaldor refers to the situation when British forces defended the United Nations safe haven of Goradze in the last stages of the war in Bosnia-Herzegovina. The British forces shelled Serbian forces in order to prevent the Serbs from overrunning the town. This made it possible to negotiate safe passage for civilians, giving the British forces legitimacy and credibility[284]. However, it is important to reiterate that the starting point for action must be the protection of civilians, rather than classical war logic of defeating the enemy.

5.2.2. Enhanced Civilian Military Cooperation.

This section argues that the human security imperative of operating under IHRL will enhance civilian-military cooperation, making it easier to implement a holistic approach, which will help create legitimacy to win the hearts and minds of the population.

Both the human security approach and the COIN manual are strategic concepts that emphasize the importance of civil-military cooperation, coordination, and integration if complex operations in new wars are to be effective[285]. According to the directives of the COIN manual, political, social and

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[283] Beebe and Kaldor, *supra note* 120, p. 93.
[284] Alan Johnson, "New Wars and Human Security: An Interview with Mary Kaldor", *Democratiya*, Vol. 11 (Winter 2007), p. 33.
[285] The U.S. Army Marine Corps, *supra note* 5, p. 53-54.

economic programs are more important than conventional military operations, when dealing with, and trying to solve, the fundamental causes of conflict. Ideally, COIN operations consist of personnel with a variety of different backgrounds, including military personnel, diplomats, police officers, politicians, humanitarian aid workers, civilian contractors and local leaders, who should all be part of the decision-making processes[286]. The military's primary function in COIN is protecting the local population, but this is not only achieved by employing military force. Quite on the contrary, the use of force frequently undermines reaching the political goals, that leads to success. Therefore, the COIN manual argues for a more thorough emphasis on non-military initiatives[287]. Nevertheless, these efforts often lack an appreciation of why, where, and how such integration and coordination should take place – something that became clear during the interviews conducted and which will be discussed in chapter 6. Problematically, this civil-military cooperation often meets one major obstacle. As a result of the kill-capture paradigm, soldiers are inherently focusing on eliminating the enemy as a way to win the war. This creates tension in the civil-military cooperation, because when civilian partners become associated with the military, they become potential targets. As previously discussed, operating under IHRL would result in less killing and fewer incidents of collateral damage, which will eventually lead to the military being associated with stability, law and order rather than arbitrary killings of innocent people. This will make it more plausible and more attractive for civilian actors to work with military forces. However, changing the applicable law regime is not all that is needed. If soldiers do not understand and appreciate what can be beneficial from civil-military cooperation, it will not be successful. Therefore, soldiers should be educated in the strengths of civil-military cooperation, so they appreciate what it contributes with in COIN operations.

Counterinsurgency campaigns have never been won through purely military action. According to the COIN manual, the far-reaching and complicated aims of counterinsurgency operations require a more systematic involvement of more diverse actors from both the military and the civilian sphere. This means that Western armed forces, in the ideal situation, are likely to operate in contexts that involve a wide range of actors, such as civilian government departments and agencies, international organizations, private security companies, non-governmental organizations, as well as host government agencies and security forces[288]. A counterinsurgency campaign should thus pursue a

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[286] The U.S. Army Marine Corps, *supra note* 5, p. 54.
[287] The U.S. Army Marine Corps, *supra note* 5, p. 54.
[288] The U.S. Army Marine Corps, *supra note* 5, p. 69-76.

comprehensive political objective, which would require a high level of civil-military cooperation. The current NATO doctrine for Civil-Military Cooperation (CIMIC), which emerged from the 1990s, is however founded on an outdated peacekeeping doctrine, and is closely linked to a conventional kill-capture mindset. CIMIC's focus is on supporting military objectives rather than enabling the military to make a coherent contribution to political objectives. This makes CIMIC unfit for the operational challenges that have been identified in new wars. Since the mid-1990s, NATO has struggled to integrate civil-military cooperation into military operations. The primary debate has been centered around the question of whether CIMIC should have a support function, facilitating military operations, or if it was supposed to carry out military activities in the civilian domain. The question is, should the military engage in state-building including civil administration, humanitarian relief, political and infrastructural reconstruction and public security?[289].

According to NATO's doctrine on civil-military cooperation (AJP-9), interaction between alliance forces and the civilian environment in which they operate is essential to the success of operations. The doctrine further argues that the purpose of tactical level civil-military cooperation is "to establish and maintain the full cooperation of the NATO commander and the civilian authorities, organizations, agencies and population within a commander's area of operations in order to allow him to fulfill his mission"[290]. This might be one of the reasons that NATO has marginalized CIMIC to an operational support role, rather than integrating civil-military cooperation as a central principle in its military doctrine for peace operations. As a military alliance, NATO has been unable to construct a civilian organization of administrators and policemen, to work parallel to its military units. It is important to realize that in the 1990s, NATO had only just engaged in a few complex peace operations and its forces were still primarily focused on, and trained for, conventional combat and territorial defense. Unsurprisingly, it latched on to what it knew – the principles of conventional warfare. This was exemplified by Soldier 3 during our interviews "CIMIC, which is civilian and military cooperation, is a very small unit. The rest of the military sees this as a small and annoying unit, which is set aside for the 'more important' military task of securing the area and the soldiers, and then the softer tasks of rebuilding will have to wait. This is something that we need to turn around, so that force protection becomes a smaller part of the mission, and the population

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[289] Thijs W. Brocades Zaalberg, "Countering Insurgent-terrorism: Why NATO Chose The Wrong Historical Foundation For Cimic", *Small Wars and Insurgencies*, Vol. 17, No. 4 (December 2006), p. 403.
[290] NATO, "NATO Civil-Military Co-Operation (CIMIC) Doctrine", *NATO*, June 2003, (available at https://www.nato.int/ims/docu/AJP-9.pdf).

experiences progress in their lives"[291]. Thus, civilian-military cooperation is not a new concept in NATO operations. However, it is perceived as a 'small and annoying unit', which is not carrying out the primary military task, namely winning the war and protecting the armed forces while doing so. When contemplating on the imperatives of the COIN manual, this seems contradictory, as a civilian-military unit would be very useful when trying to win the hearts and minds of the population, and should therefore not simply be treated as a subordinate aspect of COIN operations.

As previously mentioned, one of the fundamental problems in bringing about effective cooperation between the military and the civilian institutions is that humanitarian agencies often argue that it is vital for them to keep a distance to the military. These agencies are somewhat reluctant to be involved in civil-military cooperation because they fear becoming targets if they are associated with the military[292]. An example of this is found in Afghanistan where provincial reconstruction teams (PRTs) were created with the aim of creating cooperation between the military and civilians. At the same time, the PRTs were created as a means to stretch the reach while enhancing the legitimacy of the central government in the distant provinces. The PRTs consisted of 50 to 300 persons, including soldiers and representatives from multinational developmental and diplomatic agencies. However, these teams never really became a success, because it was almost impossible for the civilian workers to do development work while the military part of the teams found themselves being engaged in a shooting war[293]. This created an unlucky association where civilian agencies were no longer only perceived as focusing on providing humanitarian relief, which made it difficult for the humanitarian agencies to do developmental work afterward.

Another example of how the tactical part of military thinking has dominated humanitarian projects is the Human Terrain System (HTS), used in Afghanistan and Iraq. The program's building blocks were the human terrain teams that consisted of five-persons which were a combination of regional studies experts and social scientists. The HTS was a military-led operational concept that placed civilians, the social scientists, on the front lines of the coalition's counterinsurgency operations. The goal was to give a human face to the coalition forces by presenting the counterinsurgents as gentle and kind. Scientists were chosen to collect information relevant to understanding food security, local health, and to gain general local knowledge of the people whom the counterinsurgent force

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[291] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018
[292] Beebe and Kaldor, *supra note 120,* p. 120. For further reading on this discussion see also Nicolas De Torrenté, "Humanitarian NGOs Must Not Ally With Military", *Doctors Without Borders*, 1 May 2006, (available at https://www.doctorswithoutborders.org/news-stories/op-ed/humanitarian-ngos-must-not-ally-military)
[293] Beebe and Kaldor, *supra note 120*, p. 120.

was operating amongst. Furthermore, the goal was to identify opportunities for economic development and education[294]. The information gathered through HTS was meant for local development and protection purposes, but the information was shared with the military intelligence community and subsequently utilized in targeting identified insurgents. A critic of the HTS, the anthropologist Robert Gonzales, describes the HTS as a way to gain support for counterinsurgency operations by covering lethal tactics with social science. Instead of functioning as support for aid and development the HTS came to assist the military, gathering critical information which enabled it to kill more effectively[295].

To preserve their humanitarian space, the International Red Cross developed the humanitarian principles of impartiality and neutrality, where victims could be relieved regardless of what side they belonged to[296]. However, in new wars, thinking about humanitarian spaces is a problem because it relates to the traditional notion of war, entailing two sides fighting each other, while at the same time respecting the rules of warfare. Since the actors in new wars are dispersed, diverse and usually do not adhere to the applicable rules, humanitarian spaces in new wars are a rarity. The only zones that are safe are military bases, and since the military is so focused on the enemy and the kill-capture paradigm, it becomes complicated for civilian agencies to operate from those bases.

5.2.3. Operating Under Civilian Command

This section argues that following the human security imperative, of operating under civilian leadership, will give the operation a more "humanitarian appearance" and enhance the legitimacy of the actors participating in counterinsurgency.

For human security operations to be successful they have to be civilian-led, and the civilian leadership has to have legitimacy[297]. As previously mentioned, General Klaus Reinhardt was in charge of the NATO forces in Kosovo but chose to put his force under the command of the United Nations Special Representative to Kosovo. This had the advantage of giving the operation both legal and political legitimacy, as the representative was appointed through a legal procedure and accepted by the UN.

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[294] Robert J. Gonzales, "Human Terrain Past Present and Future Application", *Anthropology Today,* Vol. 24, No. 1 (February 2008), p. 22-23.
[295] Dan G. Cox, "Human Terrain Systems and the Moral prosecution of Warfare", *Army War College*, (Autumn 2011), p. 29.
[296] Beebe and Kaldor, *supra note* 120, p. 120.
[297] Beebe and Kaldor, *supra note* 120, p. 135.

One of the challenges to enhanced civil-military cooperation is their different and at times incompatible aims, philosophies, and organizational cultures. Traditionally governmental development aid agencies and the military tend to work for the same political aims of ensuring peace and security, however, they apply different instruments to accomplish this. Therefore, we suggest, in lines with the human security approach, to place all civilian and military actors within one chain of command, led by a single operational civilian commander. A successful COIN operation includes a variety of participating organizations, and the complex diplomatic, informational, economic and social context of new wars suggests that a military leader being in charge of all elements would be insufficient. Within the contemporary strategic context of counterinsurgency applied in new wars situations, an integrated approach is more likely to provide a structure and culture of civil-military relations performing with the desired effect during operations. Firstly, integrated structures will provide a more correct and updated interpretation of the operational imperatives. This means that it will be easier for the different actors to work together and this will ensure a holistic approach. Secondly, the impact of integrated structures provides a more inclusive command and control structure at the strategic level, which means that all relevant actors in the complex operation are coordinated through integrated planning and execution – providing what is often referred to as comprehensive or integrated approaches, to important level of operational chain of command. The civil-military interface must be organized to provide efficient strategic and operational-level command centers, capable of advanced planning, as well as quick analyses, taking operational decisions on behalf of all actors involved. This can only be provided by integrated civil-military institutions[298]. Inspired by Mary Kaldor and Shannon Beebe the civilian person in charge has to have sophisticated diplomatic skills and experience in dealing with the politics of different international agencies and participating nations, in addition to communications skills capable of addressing the local population and the global public[299]. The civilian in charge also has to be highly visible in his or her role, as the official face of the mission. Furthermore, the civilian commander is responsible for articulating the goals of human security in a civilian language and in a manner, that everyone can understand in order to create conceptual coherence[300].

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[298] Robert Egnell, "Civil-Military Aspects of Effectiveness in Peace Support Operations", *Swedish research Defence Agency*, February 2008, p. 244.
[299] Beebe and Kaldor, *supra note* 120, p 136.
[300] Beebe and Kaldor, *supra note* 120, p 136.

5.3. Conclusion of Chapter

Incorporating the following principles from human security into the COIN manual would be highly beneficial to create a more effective counterinsurgency approach.

1. Operating under IHRL, will reduce collateral damage and facilitate winning the hearts and minds of the population. When operating under IHL, proportionality is based on balancing military necessity against humanitarian considerations. Problematically this means that Art. 51 of Additional Protocol I, which entail the duty to refrain from exaggerated harm to civilians, is based on balancing conflicting values and interests. Under IHRL, the probability that hostilities will threaten someone is taken into account differently, as the use of force must be strictly proportionate to the aim of protecting persons against unlawful violence. In IHRL, no military opportunity could therefore justify a disregard for the lives of civilians. This understanding should be the concept accepted by the actors participating in COIN operations. A human security approach can facilitate this because the point of departure in the analysis of proportionality, under the human security approach, is always the innocent civilians' right to life. The deprivation of civilian lives, following human security, is only acceptable as an unintentional result of a use of force that is vital in the defense of human lives. Furthermore, the use of lethal force, even on insurgents, would be completely unacceptable, unless it was necessary to defend the lives of others or yourself. In other words, operating under IHRL means that the use of force is only allowed in cases of self-defense or self-defense on behalf of third party. The legal part of the human security model is therefore highly appropriate to incorporate into the COIN doctrine, as it will minimize the risk for collateral damage, which will facilitate winning the hearts and minds of the population.

2. It is crucial to **integrate civilian and military efforts** to create an effective counterinsurgency operation. A successful counterinsurgency operation is not about using force, quite on the contrary, it is about implementing a strategy where the aim is to use the least amount of force possible. The COIN manual also emphasizes non-military initiatives focusing on the political, social and economic sphere that is associated with the expertise of civilian organization[301]. So far, the much needed and crucial integration has not yet taken place in full effect. Since the military are operating under IHL they have a propensity to use force against insurgents, causing collateral damage. Civilian organizations are therefore reluctant to cooperate with the military, because they fear becoming targets themselves if they get associated with the armed forces. Operating under IHRL is

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[301] The U.S. Army Marine Corps, *supra note* 5, p. 54.

the key to enhancing military-civilian cooperation, and as underlined by Kaldor, enhanced military and civilian cooperation are only really possible through applying the human security approach. Operating under IHRL will restrict the military's possibility of using excessive force and enable civilian organizations to cooperate with the military. This way the civilians can handle the political, social and economic problems, which are essential elements in bringing sustainable security and stability to new wars, and is the key to win the hearts and minds of the population. Meanwhile, the military can facilitate this by securing the population and civilian workers against immediate dangers.

3. The human security approach also entail **operating under civilian leadership,** under one civilian commander. Incorporating this part of the human security model into the COIN manual will offer greater legitimacy to the operation in general because the civilian in charge is to be elected by both the local population and the states participating in the operation. The local population will participate in electing the civilian commander, which will be a crucial part of winning their hearts and minds. This will also secure that the civilian population do not seek to support the insurgents, as they will feel included in the peace process. Furthermore, a civilian in charge will make sure that thinking in lines of civilian expertise areas such as, social, economic and political issues will penetrate the strategy of the mission. This will ensure that military tactics are following the strategic imperatives of the mission, preventing the military from targeting insurgents by encouraging them to solve issues through non-coercive means.

6. Soldiers Response to the Human Security Imperatives

6.1. Challenges Identified by Soldiers

Through our research, we have found some logical changes that would enhance the effectiveness of counterinsurgency, making the operations more humane in the process. The research has evolved around academic work and experiences and observations from practitioners in the military. One of the fundamental suggestions we propose is to change the laws governing counterinsurgency operations. The military should move away from IHL in COIN operations and instead apply IHRL, resembling the laws that police forces in Western right based societies commonly operate under. We argue that this would facilitate a change in the mindset of the military, moving away from the kill-capture paradigm, instead focusing on the security and safety of civilians. COIN is a strategy that is currently being used by the military, but has not yet been taken seriously enough. This becomes evident when analyzing the approach the military have had in their counterinsurgency operations in recent years. In our proposals, conducting counterinsurgency in new wars requires an entirely new mindset, operating under a new legal regime, cooperation with civil institutions and organizations, and a new type of leadership. In order to test the feasibility of implementing these changes to counterinsurgency operations, we chose to conduct several interviews with soldiers, to see what challenges may arise in connection to our refined COIN model. Common to all the interviewees is that they have all been deployed to foreign countries, and thus operated under the rules of IHL and under military command. Furthermore, they have also all been on domestic missions, helping the Danish police guarding Jewish institutions in Copenhagen. All of the interviewees have thus also operated under the rules of IHRL and domestic law under civilian command. Because they have been working under both IHL and IHLR, and they have also cooperated with civilians and operated under civilian leadership, they possess valuable experience, which can be used to evaluate how our proposals could be operationalized and what challenges may arise from that. In this regard, the interviews were also a possibility for us to examine the soldiers' kill-capture mindset, and how that affected the way they believed counterinsurgency should be conducted.

This chapter is divided into subsections, which are constructed on the basis of the most common and interesting observations provided by the soldiers.

6.1.1. Force Protection – "I Would Definitely Sacrifice Ten Civilians if That Meant That Me and The Boys Could Safely Travel Home"

One of the fundamental principles in military operations is that at the tactical level, force protection has primacy over all other security issues. This has led to an understanding in the military that, securing your forces is a predominant part of conducting successful operations. We propose that soldiers should not secure their own safety first, but rather that the security of the civilian population should be the ultimate goal. Even though this goes against a very foundational part of military thinking, it would be an extremely effective tactic when conducting COIN operations. However, this can be difficult to implement since it goes against what soldiers think and perceives as a logical and fundamental part of their training, as underlined by Soldier 3, "Soldiers have the mindset that says, I have a task, and I want to go home… We do our task, but our primary focus is to protect our self while doing it."[302]. The idea of force protection is so deeply embedded in the military mindset, that soldiers think that completing their task is less important than protecting themselves. In some cases, this might also be the most logical solution, but in COIN operations it is simply counterintuitive. Successfully protecting civilians will enable the soldiers to win the hearts and minds of the population. By doing so, the civilians will stop supporting the insurgents and instead support the counterinsurgency. This will make operations safer for the soldiers, and will ultimately increase their chances of getting home safely.

Soldier 1 considers the subordination of force protection a big operational challenge. He compares the protection of himself and his colleagues to the logic of securing his own oxygen mask in a plane crash, before rescuing others; "I cannot help others if I am dead. It is the same as when flying, you have to put the oxygen mask on yourself before helping others. If you do not protect yourself first, you have misunderstood your task and mission, that is just the way it has to be."[303]. Soldier 1 does bring a valid claim, that if he dies he will not be able to help others, and thereby not be able to contribute to a successful operational outcome. But this line of thinking is not just something that Soldier 1 is displaying. It is part of how the military trains and educates their soldiers, and in this case, it is causing Soldier 1 to see no other viable solution to force protection than its current form. As became evident in most of the interviews we conducted, force protection and the security of own forces is an essential part of the soldier mindset. The interviewees therefore saw this part of our proposals as quite problematic. An important note is off course that even though soldiers have

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[302] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.
[303] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.

voluntarily taken a job with a high risk of getting injured or killed, that does not mean that they are willing to increase that risk. Fundamentally, soldiers are also just humans who have a natural desire to come home to their loved ones. However, that might seem emotionally sensible but protecting yourself and your colleagues, before protecting civilians, is not an effective way to conduct counterinsurgency. Instead, winning the hearts and minds of the population will require greater risks for the soldiers on the short term, but it will increase their safety on the long term. In this regard, Soldier 1 elaborates on his perception of the increased short-term risks versus the increased long-term security, "It might look good on a piece of paper, but in reality, I have to sell the idea to my wife, that it is part of a long-term plan that I might not come home again, that might be hard"[304]. The human aspect of the soldiers involved is an important element to remember and recognize. Soldiers have to be willing to conduct COIN operations in a way that puts the security of civilians first and their own security second. In order to do so, soldiers have to change their perception of what a successful COIN operation requires and entails. This change should happen through more specific counterinsurgency education and more dedicated commands from the military leadership. It should be clear that protecting civilians is the primary goal of the operation, and that this will in return create a more secure environment for soldiers to operate in. After all it is up to the soldiers conducting the COIN operation to win the hearts and minds of the population, and to accomplish that, soldiers need to accept the strategic rationale and understand that it is also beneficial for themselves to follow it.

It is essential that the civilian population feel safe and trust the counterinsurgents, knowing that the soldiers are there to help them. This also needs to become part of the soldier's mindset and education. Again, the deliberations of Soldier 1 become interesting, "I would definitely sacrifice ten civilians if that meant that me and the boys could safely travel home."[305]. It is important to underline that it is not the intent of Soldier 1 to kill any civilians. However, if the choice is between him and his colleagues or civilians, then the choice is apparently quite obvious. This is a perfect example of the problems occurring when the military has an excessive focus on force protection. In urgent and dangerous situations, the soldier on the ground is ultimately the one making the decision. If his/her mindset is trained to think that force protection has primacy, over protecting civilians, then winning the hearts and minds of civilians will inevitably become very difficult. Ironically, the focus on force protection and the subsequent failure to win over the population, will not create a safer environment for the civilians nor the soldiers.

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[304] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[305] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.

Building on this leads us to another point, namely the option of conducting almost risk-free operations through the use of advanced technology. This can be illustrated through several examples, such as the first gulf war where only 200 coalition fighters died from Iraqi fire, compared to the tens of thousands of losses suffered by the Iraqi army. The same applies to the war in Kosovo, where NATO suffered no combat deaths, while its air campaign killed at least a few hundred Yugoslav army troops and more than a thousand civilians. Another example is the Israeli Operation Cast Lead, where the Israeli Defense Force suffered ten deaths while they killed hundreds of Hamas fighters and more than a thousand civilians in Gaza[306]. These are all examples of how the use of superior technology and weaponry can minimize the risk for your own troops. Soldiers who has the support and advantage of superior equipment are normally better protected and consequently safer. The use of advanced technology is therefore naturally comforting for the soldiers on the ground, as articulated by Soldier 6, "As a soldier, it is also about having the reassurance that you can always be helped by airstrikes, taking that away creates a larger pressure on the soldiers"[307]. It is off course positive to be able to protect your own forces, but it does usually come with a cost. In Kosovo, NATO chose to protect its own forces as much as they could, by bombing from high altitude to eschew the risk of anti-aircraft fire. As a result, the aerial bombings were less precise, resulting in a higher number of civilian casualties than would have been the case with riskier low-altitude bombing[308]. Following the military campaign in Kosovo the dilemma arose between risk exposure to the armed forces and risk exposure to civilians, and where to draw the line. The trade-off between military security and civilian risk becomes even more distinct in new wars like Afghanistan, where intervening states, with advanced technology, conducts counterinsurgency against insurgents who live, work, and fight among the civilian population.

6.1.1.1. Possible Solutions – Force Protection

The inherent focus on force protection do create some challenges for the implementation of a COIN doctrine, which primary focus is the protection of civilians. This undersection will therefore give some possible solutions to the challenges advanced by the interviewed soldiers. First, we suggest that the focus away from force protection and towards the protection of civilians should happen as a top-down mechanism. Secondly, we suggest taking skills and qualifications that the police force possess and transfer them to the soldiers conducting COIN operations. Lastly, we suggest that

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[306] David Luban, "Risk Taking and Force Protection", in *Reading Walzer*, (Itzhak Benbaji & Naomi Sussman eds. forthcoming), 2011, p. 5-6.
[307] Interview with Soldier 6 from the Danish Army, 15 Mar. 2018.
[308] Luban, *supra note* 306, p. 5-6.

changing the governing law regime in new wars, from IHL to IHRL, will cause a change in the mindset of the military and the soldiers, driving them to make the protection of civilians the top priority.

It is evident that soldiers prioritize their own, and their colleagues' safety before the safety of the civilian population. However, that decision could be taken out of the hands of the soldier, by ordering it via higher ranks. In order to diminish the number of civilian casualties in Afghanistan, General McChrystal issued some guidelines for ground commanders conducting COIN operations, demanding greater caution and less use of advanced warfare technology. Subsequently, the use of aircraft bombings and advanced artillery diminished, which caused a significant drop in the number of killed civilians in the name of force protection. What McChrystal did was to create some rules of engagement that was more focused on protecting civilians than on force protection. This implied a strict top-down approach, where the general laid out the rules for the soldiers and their commanders to follow. In this regard, it is important to note how extremely difficult it would be for the individual platoon leader to expose his own troops to greater risk, especially in the chaos and stress that is a natural part of war. To make the transition from force protection to the protection of civilians possible, it is therefore much more sensible to apply a top-down approach, and thereby let the rules of engagement be non-negotiable. The military is an extremely hierarchical institution, and soldiers are used to execute orders without questioning them. A general and his staff have the possibility to lay out a strategy in a calm and safe environment, giving more space for rational strategic considerations. Decisions taken from the top of the hierarchy would limit the possible actions that the soldier could chose autonomously. Or to put it in another way, it will not be up to the individual soldier whether he focuses on protecting himself or civilians, as it would be part of the strategic rules. This underscores the point that the changes have to come from above. In this regard, it is argued that soldiers have what philosophers call "first-personal reasons", which means that soldiers instinctively focus on self-preferences. Placing the decision in the hands of a third party removes the first-personal reasoning out of the equation, putting it on a structural level instead[309].

Another element that could ameliorate the exaggerated focus on force protection, is that soldiers learn from the softer approach applied by the police. Soldier 1 explained that in matters of force

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[309] Luban, *supra note* 306, p. 5-6.

protection, the police prioritize differently than the military, "they even sometimes prioritize a soft approach over their own safety"[310]. Soldier 1 believed that this made the tactical mindset of the police very limited, and went on to underline how the military operates, "We have a way stricter tactical approach, as we are taking our own safety seriously."[311]. What Solider 1 defines as a lack of tactical knowledge and skill, might in this regard be very useful. By approaching the civilian population in a 'soft' and respectful manner, the police are often able to negotiate some kind of settlement, as opposed to coercing civilians into following their instructions, as the military tend to do. This creates a sense of mutual respect and trust between the police and the civilian population, creating a good relationship. It would be a huge strategic advantage, if counterinsurgents were able to develop such a relationship with the civilian population in their mission areas. Being able to transfer skills from the police to the military would require closer civilian-military cooperation, learning soldiers to prioritize the protection of civilians over force protection. Employing such an approach towards civilians do also require something else, that soldiers are currently not adequately equipped to do. Soldier 7 points to the fact that, "… a police officer is more used to take his/her own decisions, than we are, in certain circumstances."[312]. As part of their education, police officers are trained to act in different ways depending on the situation. Police officers do not need to be micromanaged, as they can evaluate the situation by themselves, on-site. This is not to postulate that soldiers do not have the ability to change behavior depending on the situation, but rather that they are trained to follow strict instructions and follow their briefings. Adjusting to the situation would be a powerful skill to have in counterinsurgency situations, as they could help de-escalate difficult situations. This proposal can seem contradictory to implementing strategic guidance via a top-down approach, but that is not the case. Soldiers should still operate within the strategic guidance they are given, but they should take tactical decisions based on a combination of that guidance and the evaluation of the specific situation. It is off course also notable that the situations the police meet in their work are often less dangerous and arguably less stressful, than soldiers in armed conflicts. However, that does not change the fact that these skills would be very useful in COIN operations.

IHL provides no legal guidance to the question of force protection because the law does not explicitly address the question of how much risk soldiers must assume to minimize collateral

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[310] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[311] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[312] Interview with Soldier 7 from the Danish Army, 15 Mar. 2018.

damage. However, IHL does require soldiers to do everything feasible to avoid unintended civilian casualties, but then again it does not define "feasible". This is one the most significant obstacles of subordinating force protection to the protection of civilians. As long as civilian casualties is an acceptable side-effect of protecting your armed forces, the military leadership and the soldiers will be able to justify killing civilians as a natural part of warfare, also in new wars. This means that to diminish the number of civilian casualties in new wars, soldiers participating in COIN operations should be operating under IHRL rather than IHL. Making it illegal to kill civilians in COIN operations applied in new wars, except in cases of self-defense, will create the wanted change. Soldiers and their leaders will no longer have the possibility of legally justifying the primacy of force protection, and civilian casualties will thereby be unacceptable. As a result, in the long-term, this will make COIN operations much more effective, and safer for everyone involved.

6.1.2. Operating Under a Civilian Leader – "Civilian Led Military Missions Would Give Some Advantages in The Mindset"

COIN was developed as a military strategy, implemented and executed by soldiers. However, following the human security approach, it becomes clear that the military should not be the central component in the strategy, but rather function as a part of a holistic civilian strategy. Under civilian leadership, counterinsurgency operations will be able to put civilians at the top of the agenda, which the COIN operations so far have failed to do even though it will create a much more effective strategy. That is because the COIN strategy has been implemented within a strategic narrative of killing and capturing the enemy, which has ultimately caused the strategy to fail. So, to implement what the COIN manual sets out to, namely winning the war through winning hearts and minds, there is a need to move away from the kill-capture paradigm. We believe that this is a process that involves changing the mindset and the rules governing counterinsurgency, and one of those changes needs to happen by operating under civilian command. In the interviews we conducted, it became clear that when the Danish soldiers came under the civilian command of the Danish police, they found it more natural to move from the kill-capture mindset towards a mindset where the primary task is protecting civilians. Soldier 7 elaborates, "The police have another approach to security than we do, and that is not necessarily bad"[313]. Soldier 7 is referring to the way the police deals differently with situations than the military, as they have more experience and training to deal with situations through negotiations in the eye level of the civilian. On missions, soldiers operate in a mindset that is focused on protecting themselves, and this creates some very strict and rigid

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[313] Interview with Soldier 7 from the Danish Army, 15 Mar. 2018.

operational rules. A soldier will follow the guidelines of his task very strictly, whereas a police officer will have a tendency to deal with the issue based on a personal evaluation of the situation. As argued earlier, following the way the police operate will make it easier to win the hearts and minds of the population. This means that soldiers should, to some extent, change their approach in COIN missions, to operate more like police officers. This change would be easier facilitated by operating under civilian command. Soldier 7 elaborates, "We have another way of dealing with security than the police, and when we come under their command, the approach also change."[314]. Soldier 7 personally prefers the way the military deals with missions, but he does point to the fact that operating under civilian command naturally changes the way soldiers operate on missions. This implies that soldiers move away from the focus of killing and capturing, and towards protecting civilians instead, which is exactly why changing from military to civilian command would be beneficial.

The idea of soldiers operating under civilian command provoked a lot criticism among our interviewees. Soldier 1 was very positive about the cooperation with the police and being under civilian command when guarding Jewish institutions in Copenhagen. However, he was very skeptical when confronted with the idea of operating under civilian command during military missions in areas of armed conflict, "I believe that civilians are bad at risk management. It costs pawns to play chess, and somebody has to be the first on the ground and the first to attack. As I see it, the parliament, whom I see as our civilian leadership, are not willing to do that. So that is why COIN, SOF (special operations forces red.) and planes are so modern because they believe it can solve everything. That is not the case, the battle has to be won by infantry who are willing to go through the door and take the risk"[315]. This argument implies that risk management is closely tied to the amount of risk you are willing to take. According to Soldier 1, civilians are less willing to risk the lives of soldiers, and they will therefore not be able to conduct successful operations. This argument is inevitably linked to the difficulties in developing an effective COIN doctrine for dealing with new wars. We argue that soldiers, and their commanders, have to be willing to risk their own safety more than they normally would, by willingly protect civilians before your own forces. It is true, that in order to conduct counterinsurgency successfully, there needs to be boots on the ground, and infantry is therefore needed, to create security and win the trust of the civilian population. However, that is not what the military have done in their past and current COIN

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[314] Interview with Soldier 7 from the Danish Army, 15 Mar. 2018.
[315] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.

operations. They have been willing to put boots on the ground and lose some 'pawns' in the process of war. Problematically, the soldiers on the ground have operated in the kill-capture mindset, where their primary concern was force protection. So even though the military have been willing to put boots on the ground, they have not been willing to take the necessary risk with those boots. This means that the soldiers deployed in COIN missions have not followed the right instructions. Rather, they have used an excessive amount of firepower to protect themselves. Following this, Soldier 1 might have a point in that civilians are not as willing to risk soldiers as the military, but so far, the experiences with COIN operations under military command have been ineffective, not as a result of the unwillingness to invest soldiers, but as a result of not following the strategic imperatives.

When discussing the significance of the operational command structure in conflict areas, Soldier 1 argues that "A lot of people say that the current conflicts in the Middle East are consequences of the way we have conducted warfare since 2001, and I completely agree. But I have trouble seeing the implementation of civilian led missions in practice. But I am on a manual level, and somebody is definitely brighter than me, so they might see the idea of it."[316]. Soldier 1 acknowledges that the way contemporary wars in the Middle East have been dealt with, has been flawed and ineffective and that there is a need to change how Western allies engages in new wars. However, he does not believe that the solution is to put the mission under civilian command, as he considers "Civilian led military missions on a tactical level would be, to put it mildly, fucking retarded."[317]. Without having a concrete solution to deal with the challenges of new wars, which is of course very acceptable considering the complexity of these challenges, Soldier 1 displays the classical soldier mindset. He wants leadership that has experience and are trained in killing and capturing, or in other words classical military leadership. As discussed previously it is essential to have the soldiers on board, as they are the ones carrying out the strategy in practice. Soldier 1 points to the fact that strategies and rules are given by higher ranking members of the military, and soldiers are merely following orders. He is not willing to argue against 'brighter' people than himself' if they see it fit to let the mission operate under civilian command. This brings us back to the proposal, that the refined COIN doctrine should be implemented into the military system through a top-down approach.

Soldier 3 has been deployed twice, first as an infantry soldier and later as a sniper. He discusses how, based on his experienced, civilian leadership is an advantage in matters of facilitating a

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[316] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[317] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.

mindset that is more appropriate in conflicts such as Afghanistan. He argues that, "Civilian led military missions would give some advantages in the mindset of the mission… (I)f we get a task of building a well in a village, we do our task, but our primary focus is to protect our self while doing it. We don't necessarily care about the well, that is just a task. If we have civilians leading the mission, then the mindset is more holistic, as the police is doing"[318]. According to Soldier 3, the military's focus on force protection is coming from the institution itself. Creating a more holistic approach, considering social and societal aspects too, could be materialized via civilian leadership. He points out that civil-military cooperation is already existing in the form of CIMIC, but it needs to be re-conceptualized, as it is under-prioritized. The population needs to experience some kind of progress in their lives, and according to Soldier 3, this will require the involvement of civilian organizations[319]. Currently, civil-military cooperation is neither effective nor broad enough. Rebuilding the society at hand, has to be an integral part of COIN, and that will be easier to achieve through civilian leadership. If the population experiences progress, they will trust the counterinsurgents and provide them with intelligence. Furthermore, the civilian population will be less likely to join one of the insurgent groups, and the counterinsurgents will therefore be able to operate more safely.

6.1.3. Operating Under IHRL – "My Muscle Memory Aims to Kill"
IHL was constructed as a way to limit human suffering during armed conflicts, and it stands as one of the great achievements of international cooperation and law. However, as we have discussed throughout this paper, IHL has also facilitated a kill-capture paradigm, which is the backbone of soldiers' mindset. Through the categories of IHL, soldiers have been able to justify collateral damage as a necessity in their missions. In COIN operations, counterinsurgents have to be prohibited from using killing as a tool to defeat the insurgents. This means that the soldiers involved will have to change their approach to the missions, which is extremely difficult within the framework of IHL. Operating within the legal framework of IHRL instead, would limit what soldiers are able to do during counterinsurgency. Operating within the law is an essential part of the soldier's mindset, so changing the law, making killing and collateral damage illegal, would be a natural part of changing the paradigm. During the interviews, we asked the soldiers whether operating under a legal regime resembling the one they operate under in Copenhagen, would change their mindset in missions. Soldier 1 was very aware of the different consequences following

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[318] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.
[319] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.

unlawful acts, depending on whether he was guarding a synagogue in Copenhagen or while being deployed abroad. He argued, "I feel like I can get away with more in the south without being punished…acting in the domestic context I am afraid of the potential legal consequences if I make a mistake"[320]. This illustrates how Soldier 1's mindset is closely linked to what he believes is lawful. If he keeps his actions within the parameters of the law, he can justify those actions personally by arguing that they are legal. Operating under a stricter set of laws would limit the legal actions of the soldier, but it would also change what the soldier perceives as morally acceptable. Soldier 1 elaborates on the differences between the laws of war and the law in domestic situations, "If we were under the same ROE (rules of engagement red.) as the police during employment, my mindset would have been quite different… the consequences are completely different abroad than domestically. There are several soldiers who, by accident, have killed civilians and thrown grenades, and are still working in the army. I would probably not get away with shooting a little girl in Ole Suhrs Gade in Copenhagen"[321]. Soldier 1 touches upon two important aspects of operating under different set of laws in different missions. First of all, he argues that killing civilians in a mission area abroad, is not necessarily career ending, and it might even be legally and morally justifiable. This is, however, not the case with civilian casualties in a domestic context operating under IHRL and domestic law. Killing a girl in the streets of Copenhagen would not only be career ending, it would lead to criminal prosecution. And since the legality of actions are often connected to whether the actions are perceived as being morally right or wrong, a soldier can more easily morally justify any collateral damage occurring in areas of armed conflicts, when the categories of IHL makes it legally acceptable.

Changing the legal regime from IHL to IHRL, is meant to change the behavior of the soldiers on the ground. Unfortunately, several of our interviewees saw this change as problematic. Soldier 3, argued that, "There is a problem in educating soldiers in conventional warfare, and in the laws of war, and then just moving them to police-like missions (COIN missions red.) in conflict areas. Even in the current police mission, which is relatively easy, we have had a three-week course covering the law and the mindset"[322]. Soldier 3 stipulates that COIN operations are 'police-like' and that IHL might be inadequate to deal with that. Even though it might be problematic, Soldier 3 acknowledges the potential advantages that are to be gained from operating in a more restrictive manner "it makes

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[320] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[321] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[322] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.

great sense to use less force in COIN. When talking conventional warfare, you should use the capabilities that you possess, in order to defeat the enemy. That includes grenades, planes etc. But employing the same tactics and tools when the population and the combatants are mixed is different. Soldiers are trained to use these tactics, it is part of their DNA through education, experience and so on. I do not believe that is cost-beneficial in relation to COIN. I have been part of eliminating between one and three Taliban members in an area with houses, which resulted in treatment of three women and six children as they had been hit by fragments. I do not think that either them nor their families and friends were especially pro ISAF after that incident"[323]. However, Soldier 3 does not see the law as the main issue in the failure of counterinsurgency operations. Instead, he refers to the lack of more specialized training and education. According to Soldier 3, a behavioral change will not happen through changing the law, but instead through more extensive training and refined tactics and strategies. Soldier 2 pointed out the same problem, arguing that the way his training is structured has given him a mindset as a combat soldier, which might be hard to fit in to an operation that is governed by IHRL. He believes that changing the law regime in COIN operations might be problematic because of the training soldiers have received. If a situation, where he would be forced to use his weapon, arose in Copenhagen, he would stick to his training and not to what he believed was lawfully right or wrong. He elaborates, "Even though the police want us to aim for arms and legs, I am a trained soldier, so my muscle memory aims to kill. If an urgent situation arises, we do not have the time to think, but we simply have to act, then we do not shoot to pacify, that is just the way it is. If they don't want that to happen, then they can find others to guard the synagogue"[324]. Soldier 2 is convinced that in pressured situations, it will not be the law or rules governing him, but instead he will rely on his training. He then goes on to describe how training with the police did actually give him some tools that were useful when operating under IHRL, "Yes, in the police course we took before the policing mission, we were trained in thinking how to position our self when we shoot, in relation to having the least amount of risk of collateral damage"[325]. Once again this indicates that the training soldiers receive is crucial in how they operate on the ground. Problematically, soldiers are trained for conventional warfare and are then automatically expected to be able to navigate a strategy like COIN. Unfortunately, this has caused COIN operations to follow an operational trajectory that resembles conventional warfare, ultimately preventing the missions to be successful.

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[323] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.
[324] Interview with Soldier 2 from the Danish Army, 15 Mar. 2018.
[325] Interview with Soldier 2 from the Danish Army, 15 Mar. 2018.

Operating under the rules of IHL gives leeway to some possibilities. Categories like military necessity and proportionality, can make it legally acceptable for soldiers to kill insurgents from armed groups. This is clearly a problem for COIN operations, since the strategy of the operation is not to kill anyone. But soldiers perceive these categories within IHL as being very important to their own safety. Soldier 7 explains that he would be reluctant to work under the rules of IHRL in conflict areas, "I would not be willing to go on patrol only using self-defense - That would be the equivalent of not taking my weapon with me"[326]. According to Soldier 7, being able to act exclusively in self-defense, would be the equivalent of not being able to protect himself. That does not necessarily sound very rational, but for the soldier, the categories inherent in IHL gives him the possibility to act in order to protect himself. The soldier needs reassurance that his actions are not dependent on whether he is being shot at or not, but rather whether it is a military necessity to act. Following the kill-capture paradigm, force protection also becomes part of the necessity narrative. This means that it is a military necessity to protect your own armed forces, also at the expense of the safety and security of others, including civilians. This is underlined by Soldier 4, "Afghanistan is not the same as Copenhagen, and I also have a family to come home to. So, I would not want to die because I had to operate under very strict rules which are not safe."[327]. He emphasizes that his own protection is important, as he has an obligation to come home to his family. At the same time, he also insinuates that getting killed is an occupational hazard that he accepts, but only under acceptable rules. According to Soldier 4, operating under the strict rules of IHRL, only using force in self-defense, is "not safe". This is once again linked to the kill-capture mindset that is such an integral part of military thinking. Clearly, we argue otherwise in our proposals to refine the COIN strategy, as we are convinced that operating within the parameters of IHRL will increase the trust and respect between counterinsurgents and the civilian population, ultimately making it safer for soldiers to operate on the ground.

Analyzing the interviews, do bring a clear indication that the soldiers perceive the right to use force as a military necessity, and as a tool to protect themselves. Operating under IHRL, would not take away the right of soldiers to use force to protect themselves, but it would take away the right to do so, as part of a preemptive action that is considered a military necessity. In this regard, counterinsurgency demands features that are in sharp contrast to the classical warrior ethos. The

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[326] Interview with Soldier 7 from the Danish Army, 15 Mar. 2018.
[327] Interview with Soldier 4 from the Danish Army, 15 Mar. 2018.

constraints on the rules of engagement, which can be seen as a restriction to the ultimate trump card, namely the use of lethal firepower, is challenging to implement as a convincing strategy. COIN, therefore, requires that the counterinsurgents adopt some un-warrior like qualities such as empathy towards the opponent, tolerance, and patience. These are all attributes that at first glance seems to undermine the warrior ethos, on which soldiers believe success in war depends on. This makes soldiers, working as counterinsurgents, highly uncomfortable with their roles as counterinsurgents and this might be what makes them resist the cultural change that is needed in COIN[328]. The old war thinking, linked to the kill-capture paradigm and the classical warrior ethos, becomes evident in the interviews when Soldier 7 stated very directly that he would not be willing to go on patrols only using self-defense. Likewise, Soldier 1 was convinced that COIN 'looks good on a piece of paper, but in the end, the battle is to be won by infantry who are willing to go through the door and take the necessary risks'. These arguments are a result of an, in relation to new wars, outdated way of thinking. The old war mentality is something that we see in classical theoreticians like Clausewitz, who is still very much dominating the contemporary military educational systems. The following quote, by Clausewitz, illustrates how war is perceived, not only by him, but by the whole military system, as he is the theoretical godfather of war: "Kind hearted people might of course think that there was some ingenious way to disarm or defeat an enemy without bloodshed and might imagine this is the true goal of the art of war. Pleasant as it sounds it is a fallacy that must be exposed. If one side used force without compunction, undeterred by the bloodshed it involves, while the other side refrains, the first will gain the upper hand[329]". This might be true for the warfare of old wars, but in a new war context it is simply not true. As we have argued throughout the whole thesis, disarming or defeating the enemy without bloodshed is not only kind-hearted but also strategically wise.

6.1.4. Collateral Damage is Unavoidable – "It Costs Pawns to Play Chess"
As previously argued, the categories of IHL permits the possibility of collateral damage. Even though collateral damage is not permissible per default, it is acceptable if the attack is proportionate in relation to the military advantage gained from the attack. This section illustrates how and why soldiers justify killing and collateral damage in war. It is largely a product of the way IHL has been constructed, and how it has been used, and it has become an integral part of how soldiers perceive war and how they are supposed to be fought. When conducting COIN operations in new wars, it is

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[328] John Kiszely, "Post-modern challenges for modern warriors", *The Shrivenham Papers*, Number 5 (December 2007), p. 11.
[329] Clausewitz, *supra note 10*, p. 13.

paramount that the counterinsurgents kill as few as possible. The overall strategy is to win the hearts and minds of the population, and doing so requires avoiding collateral damage. It is therefore vital that soldiers deployed on COIN missions are aware of the strategic considerations, and that they understand that if they want their mission to be successful, collateral damage has to be avoided. As earlier argued, a considerable part of this process is changing the law regime that governs COIN operations in new wars. However, that might not be enough. This section will, therefore, show how integrated the idea of collateral damage is among soldiers, and how they justify it as an inevitable part of war.

Soldiers are convinced that collateral damage is an unfortunate, but unavoidable part of war. One proverb that several soldiers used during our interviews, was that 'it costs pawns to play chess'. This referred to the soldiers' 'indisputable' fact that war involves killing and that collateral damage is sadly a natural and unavoidable part of it. In this regard, Soldier 1 argued that causing collateral damage in armed conflicts is both a natural and legal part of war. Contrary, operating in domestic situations prohibits soldiers from causing any collateral damage, because there are possible legal consequences[330]. For Soldier 1 the consideration of when he gets punished for doing something unlawful, is affecting which actions he chooses to perform. This could lead to the apparent conclusion of simply changing the law regime they operate under. However, creating a counterinsurgency strategy that will be successful in obtaining sustainable peace, security and stability, requires a more comprehensive set of changes. Soldier 1 is also pointing to the fact that soldiers are convinced that fighting wars requires the use of force, and collateral damage is thereby inevitable. Killing civilians is a tragic but unavoidable part of killing your enemy, and killing your enemy is necessary as it is the only way to win the war. This logic needs to be changed, if COIN is to be successful. In this regard, soldiers have to understand and accept the premises they are operating under, and simply changing the law, would not be enough. This problem becomes even clearer when Soldier 4 explains which caveats he has in relation to working under stricter rules when deployed, "If I was given a really strict ROE, I would just pass on that mission. Because if I was being deployed in an area where IED's (improvised explosive devices red.) were lying around, and the enemy was hiding among the civilian population, I would want to be able to protect myself."[331]. Soldier 4 points out the problem of asymmetric warfare in counterinsurgency. If the insurgents do not follow the rules, why should the armed forces. He believes that operating under

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[330] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[331] Interview with Soldier 4 from the Danish Army, 15 Mar. 2018.

IHL sets up restrictions for the armed forces, while also leaving some room for attacking the insurgents. As the armed insurgents do not follow any rules, the armed forces should not be subject to stricter rules, than they already are. He points out that he wants to be able to protect himself, even though operating under IHRL clearly means that soldiers are still allowed to protect themselves in self-defense. This goes to show how integrated the notion of defending themselves by attacking the enemy, is in the military. Attacks on the enemy are what causes collateral damage, and for soldiers it is therefore an unfortunate part of defending themselves. Within this logic collateral damage is an inseparable part of war. Soldier 7 recognizes that winning the hearts and minds of the population is an essential part of the counterinsurgency strategy, but his mindset is still well within the boundaries of old war thinking and the kill-capture paradigm, "I acknowledge the idea of hearts and minds, but war is war and collateral damage is inevitable, so there is a limit to how much we can limit war."[332]. COIN operations have found its foothold in the military, while the understanding of how to execute it has not. Acknowledging the validity of the hearts and minds strategy as a way to win a war, is insufficient if soldiers do not accept the premise that waging war is possible without actively killing enemies.

By focusing on protecting themselves, soldiers miss the strategic point that is inherent in the COIN doctrine, that killing eventually creates a more unsafe environment, from where insurgents can recruit new members. Killing civilians, even as a side effect of war, will always be problematic and need some kind of justification. So, as soldiers are strongly convinced, that using force is the only way they can protect themselves, they are able to justify their violence by labelling it unavoidable and necessary. By following the laws of IHL, collateral damage is indeed a legally accepted part of war, and yet another way for soldiers to justify their actions. Soldier 2 describes what following the rules means to a soldier, and how the procedures are, "I always try to follow the rules. Information on a potential terrorist is gathered in one file, which is sent to legal advisors. Then they can grant a kill/capture of that person, if it is within the law… So, I stick closely to the rules, so I won't be blamed, or blame myself."[333]. When using force, it is normal procedure to confer with a legal advisor, to make sure that no legal issue arises. Soldier 2 underlines the importance of following the rules and the law at all time. Not only as a protection against legal remedies, but also as a way of justifying his actions to himself. Changing the law would therefore have a huge effect on what soldiers believe is a 'natural' and justifiable part of warfare. COIN operations will only be able to

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[332] Interview with Soldier 7 from the Danish Army, 15 Mar. 2018.
[333] Interview with Soldier 2 from the Danish Army, 15 Mar. 2018.

successfully create sustainable peace and security if counterinsurgents stop killing civilians, and gain the trust and respect of the population. This is only be possible if soldiers become aware of a different way of waging war, by understanding that collateral damage is actually avoidable and that killing is strategically counterproductive.

6.1.5. No Reciprocity – "That Would be an Unfair War"

An important concern that became apparent among the interviewed soldiers, was the asymmetrical way insurgents are waging war. Insurgents are renowned for exploiting the laws to their own advantage. They hide amongst civilians, pretend to be allies and hide their weapon, all tactics that are illegal under IHL. The asymmetry is therefore linked to the advantage that insurgents gain by not following the law, and at the same time knowing that the armed forces are obliged to do so. This is arguably morally wrong, but it gives the insurgents a huge tactical advantage. At the same time, it leaves soldiers with the perception that even though they follow the laws and rules applicable to the conflict, there will be a lack of reciprocal behavior. Operating under IHRL would therefore give soldiers additional problems, as they would feel that they are fighting an even more asymmetric war than they were under IHL. And this is a valid point, because if insurgents are not even respecting the current rules of IHL, which does give leeway to kill enemies and accepts collateral damage as part of a military necessity, then how can we assume that they will respect and adhere to the much stricter rules of IHRL. Following this trajectory, Soldier 4 completely dismisses the possibility of operating under IHRL in a conflict zone, "That would be an unfair war, as they hide amongst the civilians."[334]. Adhering to the existing rules can be difficult against an opponent that is not following any rules at all. So, it is understandable that soldiers think adhering to stricter rules would be completely unreasonable. Soldier 2 explains why he believes that COIN has not been successful, "COIN is already difficult because we have too many rules, and the adversary do typically not follow any rules."[335]. If one side have to follow rules, and the other do not, then it makes it extremely difficult to carry out the mission successfully. Soldier 2 thus underlines the problems of asymmetric warfare, and argues that part of the failure is due to the rules governing COIN operations. Actually, a majority of the interviewed soldiers were in agreement that operating under a stricter set of laws would only benefit the insurgents. Extending the legal framework, they had been operating under in Copenhagen, made little sense to them, as they saw the missions as incomparable. Soldier 5 made his mind clear about operating under IHRL in Afghanistan, "I would

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[334] Interview with Soldier 4 from the Danish Army, 15 Mar. 2018.
[335] Interview with Soldier 2 from the Danish Army, 15 Mar. 2018.

not like that, because in Afghanistan, contrary to Copenhagen, everybody has a weapon."[336]. The two missions are simply not comparable to him, so he cannot see the point in using the same legal regime. This is off course problematic if COIN is to work properly. In general reciprocity continues to form a critical component of IHL, as it functions as a major incentive to adhere to the law. As an example, in 2002, the United States explicitly referred to the Taliban as an example of the lack of reciprocity in the decision to adhere to the laws of war[337]. In counterinsurgency the mindset, the strategy and the law need to work together, as they are inter-dependable. To conduct successful counterinsurgency in new wars, therefore has to be a holistic approach that takes all the relevant aspects of the operation into consideration.

The problem of asymmetric warfare is not a new one, and the arguments, that operating under IHRL is not beneficial because it lacks reciprocity from insurgents, could just as easily have been said about IHL. Getting reciprocal behavior from the enemy is always difficult when dealing with non-state actors. According to the principle of reciprocity, states should be subject to equal rights and duties. This equivalence and mutuality are, in the end, what enables states to cooperate in an otherwise anarchic and self-interested world[338]. The principle of reciprocity has thus traditionally been a desired part of the laws of war[339]. However, the goals and nature of counterinsurgency entail a significant disconnect between the underlying type of conflict and a legal regime premised upon reciprocity. In its essence, the asymmetric nature of counterinsurgency undermines the assumptions and theoretical foundation of compliance because reciprocity is absent. Instead, we propose to replace the incentive of reciprocity with the strategic advantage gained from following the principle of exemplarism which entails that the counterinsurgents act in accordance with the law regardless of the behavior of the insurgent. Following the principle of exemplarism as an incentive to follow stricter rules unites lawfulness and strategic self-interest rather than placing them in opposition to each other[340]. The principle of exemplarism is examined further in chapter 7.1.3. 'Strategic Self-interest in Following Stricter Rules'.

6.1.6. Enhanced Civilian Military Cooperation - "The Police do not Always Expect to Use Force"

Fighting insurgents requires a holistic approach, dealing with both military and developmental issues. Therefore, the integration of civilians into the work of the military is an essential aspect of

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[336] Interview with Soldier 5 from the Danish Army, 15 Mar. 2018.
[337] Sean Watts, "Reciprocity and the law of war", *Harvard International Law Journal,* Vol. 50, No. 2 (Summer 2009), p. 367.
[338] Sitaraman, *supra note 86*, p. 57.
[339] Watts, *supra note 337*, p. 365-366.
[340] Sitaraman, *supra note 86*, p. 57.

our proposals to COIN. However, through our interviews, it became apparent that soldiers do not value the work of civilians in military missions, as they believe that civilians are generally not a good fit for war. A majority of the interviewed soldiers argued that the military should be dealing with hard security issues and the civilian organizations should rebuild the society afterward. However, this is a huge misperception, which will cause problems for the conduct of COIN operations in the future. As we have analyzed and discussed earlier, the challenges of new wars are complex and are not simply limited to dealing with hard security issues. It is therefore blindsided to believe that dealing with new wars, and in particular counterinsurgency, solely through military means is sufficient when trying to secure peace, security, and stability. Being aware of a wide variety of problems, from socioeconomic to security issues, requires a comprehensive and holistic approach, involving both civilian and military institutions. To achieve this, the soldiers involved, and the military in general, have to change the way they perceive wars, or more specifically new wars and counterinsurgency. Cohesive civil-military cooperation is needed and the military needs to understand and accept that development and security are to sides of the same coin, equally important for achieving the political goals of the intervention. This section will look at how the interviewed soldiers evaluate the idea of enhanced civil-military cooperation in COIN operations.

The police have an entirely different way of dealing with security challenges than the military. Throughout the interviews, the soldiers constantly reminded us that soldiers and police officers comes from two very different institutions. Despite that notion, the interviewees were generally positive about the police's contribution to the assignment of guarding Jewish institutions in Copenhagen. Several soldiers pointed to specific aspects of police work, that they could learn from in their own work. Especially interesting was how the soldiers noticed the way the police engaged with civilians, in a calm and polite manner. This is entirely different from how soldiers are used to approach civilians during operations. Unlike the military, the police do not see civilians as potential enemies but rather as individuals that they should actually serve and protect. This is underlined by Soldier 2, who believes that soldiers have a lot to learn from working together with the police, "The advantages of having the police present is their approach to civilians, which is much softer, whereas a soldier's approach is often based on commands. So, they (the police red.) can create some relations to individuals"[341]. The police have a softer approach towards civilians, which makes it easier for them to create a relationship to civilians. Creating good relations to the civilian

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[341] Interview with Soldier 2 from the Danish Army, 15 Mar. 2018.

population is a fundamental part of the COIN strategy, and soldiers should therefore use those skills when deployed on COIN missions. Soldier 1 agrees, and notes that applying this 'softer approach' could be beneficial for soldiers, "The Danish police is extremely skilled at 90% of what they are doing. Their approach towards civilians is very good, especially talking to reason. That is not our way of doing things. If we have been instructed that nobody may enter this perimeter, then nobody enters, even if somebody approaches with their kids on fire. In that regard, the police are way better at evaluating on a case by case basis. It could probably be something that could be used in the military as well, in relation to the hearts and minds principle"[342]. Soldiers are used to follow commands, and they do not deviate from them. This creates a very hierarchical system, where the only knowledge the soldiers on the ground need to have is his overall instructions. Police officers, on the other hand, are used to getting an assignment, and then evaluate and assess what is needed when they arrive on-site. This is what Soldier 1 is pointing to, when arguing that the military could apply the approach used by the police to win the hearts and minds of the civilian population. Approaching civilians with the aim of negotiating, to reach an agreement, would also be beneficial in COIN operations. The problem is that the military mindset is not structured that way. What drives the soldier's tactical approach is force protection, and this does generate some complications in incorporating the softer police approach. Soldier 1 explains, "The police have a completely different approach to challenges, they have a lot of different tools before drawing their weapon, where we start out by having our weapons drawn…We are down-scaling the violence, starting with our weapons drawn and they are up-scaling, starting with other tools than weapons".[343]. Soldiers, and the military in general, operate by having their weapons drawn, and by perceiving every civilian as a potential enemy. This creates a very defensive and protective approach, and makes it problematic to create a good relationship to the civilian population. On the contrary, the police, when dealing with a situation, begins by solving the issue with non-coercive measures. Then, if the situation escalates and gets dangerous, they can apply the amount of force they find necessary. Soldier 3 contributes to that understanding, "The difference between soldiers and the police is that the police do not always expect to use force, they have a variety of other tools they want to exhaust first. In addition to this the police officer have a more holistic approach to the individual whereas the soldier is trained to maintain his/her primary task through coercion"[344]. Soldier 3 substantiates that soldiers are more rigid and violent in their approach. Furthermore, he is pointing to the holistic

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[342] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[343] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[344] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.

approach of the police, which entails that the police take all kinds of things into consideration before taking a decision on how to act. This is problematic for soldiers to do, as they are so focused on executing their orders, and they are simply not trained to deviate from them. Having such a rigid command structure makes it difficult for soldiers to conduct COIN operations using a police-like approach. This is where cooperating with civilians, in this case the police, becomes extremely useful. As Soldier 1 puts it, "The police have done a great job changing our mindset and showing us other tools than coercion."[345]. This is exactly what the soldiers are supposed to gain from cooperating with civilian institutions, and this is also what is needed for the military strategy of COIN to be successful and bring sustainable peace and security to new wars.

Some of the interviewed soldiers expressed concern when discussing whether the use of police officers in armed conflicts would be beneficial. They argued that the police would not be able to adapt to conflict areas the same way that soldiers are able to adapt to domestic situations. Soldier 5 points at precisely that challenge, when discussing how the use of police officers in conflict zones would work, "That would be problematic because the military is more capable of adapting to change than the police is."[346]. This is unavoidably linked to the mindset of soldiers, which is focused on killing and capturing as an essential and inevitable part of war. Police officers do not have the competencies to operate in conflict areas, because operating in situations of war requires killing. According to Soldier 5, war is more difficult to adapt to than domestic situations and soldiers are therefore more capable of handling policing tasks than vice versa. This comes down to some of the differences in training and experiences, and arguably also to the fact that police officers do not possess the 'right' mindset for war. Soldier 1 explains, "The police are just civilians, like ordinary civilians. Their mindset is different, they are not thinking offensive and tactical, as we do."[347]. Soldier 1 points out that police officers are practically like ordinary civilians and therefore not suitable for war. Soldier 2 contributes to this line of thought, making his preferences in warfare very clear, "I know I might sound like a brainwashed soldier, but in war we are the specialists, then the others (civilians red.) can come after and rebuild"[348]. The prioritization of hard security issues, and solving them through classical military means, is not uncommon to the interviewees. Unfortunately, a significant majority argued that warzones is not a place for civilians, and that the

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[345] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.
[346] Interview with Soldier 5 from the Danish Army, 15 Mar. 2018.
[347] Interview with Soldier 1 from the Danish Army, 15 Mar. 2018.
[348] Interview with Soldier 2 from the Danish Army, 15 Mar. 2018.

work of the military was by far the most important part of counterinsurgency. This is unfortunate, since we believe that counterinsurgency is only successful following a holistic and comprehensive approach, combining the strengths of both the military and civilian institutions and organizations. The soldiers' argumentation goes to show that a lot of internal change is needed in the military, if a COIN strategy is to be successful. Even though the interviewed soldiers believed that the police were doing a great job in Copenhagen and that they had a lot to learn from them on that account, they could generally not see the potential of applying the softer approach in a war zone. As Soldier 7 pointed out, "Teaching soldiers to use softer approaches would probably affect their ability to use harder methods. I don't want to be in doubt when on patrol."[349]

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[349] Interview with Soldier 7 from the Danish Army, 15 Mar. 2018.

7. A Refined COIN Doctrine Appropriate for New Wars

The COIN doctrine entails a vast set of imperatives that should be followed when Western forces intervene in new wars. However, the current training and mindset of modern militaries seem to go against what is needed to succeed with counterinsurgency, namely to win the hearts and minds of the population. Soldier 3, the commanding officer of the military section guarding the synagogue in Ole Suhrs Gade, added that "The current training undertaken before engaging in counterinsurgency is constructed around defeating the enemy, and that is not what COIN is about. We cannot win in Afghanistan by shooting everyone, that would just produce more insurgents. So, we need a new type of soldiers who are trained and educated for COIN purposes. It starts with a doctrine, but it then needs to influence the whole military system"[350]. Soldier 3 argues that the current training and mindset of soldiers are irreconcilable with conducting COIN operations. In this regard, Soldier 3 is correct in that COIN operations can only be successful if the strategy is followed more thoroughly, and that soldiers understand the imperatives behind it. In this chapter, we offer several proposals which should be included in a refined COIN doctrine. These proposals consist of traits from the COIN doctrine, the human security approach, and reflections offered by the interviewed soldiers. The proposals are not an attempt to replace the current COIN doctrine, but rather to refine it, making it more humane and more effective.

7.1. The Establishment of a Human Security/Coin Doctrine Appropriate for New Wars

7.1.1. Operating Under IHRL Rather Than IHL

Based on our findings, we argue that a paradigm change is needed. This includes changing the mindset of the soldiers, their training and the law governing the operations. Therefore, we suggest incorporating the human security notion, of operating under IHRL, into the COIN doctrine. Building on the findings in the thesis, we have concluded that because of the current military imperative of force protection, it will not be beneficial to ask the individual platoon leader to conduct his military trade in a more restrictive manner, as McChrystal did in Afghanistan. Doing so, while operating under IHL, might be interpreted as if the platoon leader is exposing himself and his soldiers to higher risk in the stress of combat. As soldiers engaged in combat, has what philosophers call "first-personal reasons", basically looking out for their own self-preferences, they will utilize all available tools to optimize the security for themselves and their colleagues[351]. By following a

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[350] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.
[351] Luban, *supra note 306*, p. 5-6.

strict set of rules of engagement stemming from IHRL, the current first-person reasoning is taken out of the equation, leaving the decisions on a structural level. As IHL enables the platoon commander and the soldiers to assess whether or not they should use force, force protection will remain the primary point of consideration during COIN operations. Changing the applicable law to IHRL will make it illegal to kill, unless in instances of self-defense. This means that the structures, in this case, the law, governing COIN operations would encourage soldiers to protect civilians by not using excessive force. This takes the personal level out of the equation and gives more weight to the structural level.

We are aware that this is a very ambitious agenda, but nevertheless, it would be required to initiate the needed changes. The fundamental difference between our proposals and the COIN manual is that in the manual population security and reconstruction are a means to an end, namely neutralizing the enemy. Instead, we propose to incorporate the human security notion of emphasizing population security as a goal in itself, and we completely rule out the utilization of strikes on insurgents, on the notion that collateral damage is entirely unacceptable. Insurgents should not be killed either, as doing so have proven to be an effective way for the insurgent groups, to recruit new civilian members to their cause. Insurgents should rather be arrested, as this would serve as a symbol for the developmental process of establishing a rule-based society with legitimate judicial processes. Our logic is therefore not only humanitarian, but it also builds on the fact that every successful strike against the insurgents, even when it does not cause collateral damage, only results in more insurgents. In its essence, the justification for adhering to stricter rules during COIN operations in new wars serves the counterinsurgents self-interests. The justification for operating under IHRL is, therefore, neither humanitarian nor reciprocal, but first and foremost a strategic advantage. Success in COIN operations is tied to the behavior of the counterinsurgents, more than it is to the behavior of the insurgents, and a legal regime providing a standard for that behavior, is, thus, enforcing the strategic goal of the counterinsurgency operation. Success and legitimacy of the counterinsurgents build on the behavior of the counterinsurgents themselves rather than their ability to kill or capture the enemy.

At its core, IHL represents a balance between military necessity, which functions as the justification of measures necessary to achieve the military goal, and humanitarian considerations. We argue that disposing of IHL in favor of IHRL will contribute to the paradigm change that is needed, to follow the cardinal points of COIN. As new wars have become ever more present, wars and warfare have

changed, which means that it is no longer only classic warfare which lays the foundation for how the rules governing armed conflict should evolve. This has caused new military doctrines and strategies to be carried out, in an attempt to accommodate the contemporary challenges of new wars. However, these new initiatives are being operationalized within the framework of IHL, which is a precondition that is hampering strategies like counterinsurgency. We have therefore reached the conclusion that the law also needs to change, to establish a solid foundation for tackling the challenges of new wars. The law reflects what is morally acceptable, which means that changing the law will also change what soldiers find morally acceptable. This can affect the mindset of soldiers when conducting counterinsurgency in new wars. Therefore, if collateral damage becomes illegal, even when it is a military necessity, soldiers will at some point also find it morally unacceptable.

One specific principle of human security that we want to incorporate into the COIN doctrine is the protection of the civilian population by operating under IHRL, and thereby restraining the amount of force used by the military. However, this protection is not only guaranteed by means of legal definitions. It also requires clear and credible guidance to be provided to those tasked with carrying out the counterinsurgency operation. We believe that facilitating a paradigm change requires extensive training before deployment, in part undertaken by the domestic police force and by attaching police officers to military groups in the field. The next section will suggest how training and education can facilitate a better and more effective COIN doctrine.

7.1.2. Civilian/Police training and Education

Building on the interviews, we believe that there is an excessive focus on conventional warfare in the current education and training of soldiers, even for soldiers who are supposed to operate in COIN missions. We suggest that a specialized counterinsurgency education, for military professionals before engaging in new wars, should be obligatory. In addition to country-specific cultural learning, military professionals should be educated in the strategic imperatives of the COIN manual can be achieved by applying principles of the human security approach. By educating soldiers in the importance of restricting violence, and the imperatives of protecting civilians, the COIN imperatives will become part of the soldiers' mindset. As argued by Soldier 3, "A new line of soldiers trained for COIN is needed, and the number needs to be significant enough to change the conflict. So maybe half of the army should be trained for COIN. I suggest that the politicians, when deploying soldiers, decides whether it is a COIN operation or not, and the ROE would then

follow"[352]. Creating COIN specific training and education would create better chances of successful COIN operations. This would facilitate a change in the mindset, the knowledge and the skillset of the soldiers, which would solve one of the fundamental problems that COIN is encountering, namely that the military perceives COIN as conventional warfare.

For COIN operations to result in stable peace, security, and stability, the laws governing counterinsurgency needs to be changed. In addition, the military leadership needs to order a doctrinal change from the top, taking the strategic decision-making power regarding the use of force, out of the hands of soldiers and commanders on the ground. However, what is also needed is that soldiers throughout the entire military, understand and accept the premises of COIN. The purpose of educating soldiers in COIN, is to develop the capacity for making sound decisions in relation to the overall strategy. Being well prepared requires the soldiers to be well-educated, which entails that they should possess an in-depth understanding of the importance of restraining violence, which is vital if COIN operations shall secure peace, security, and stability.

The suggestion that soldiers should undergo multidisciplinary training is also touched upon by Mary Kaldor and Shannon Beebe in their argument for employing human security[353]. As was also identified by the majority of our interviewees, Kaldor and Beebe point to the problem that military training is, in most countries, overwhelmingly focused on combat. Take the US as an example, even though there has been an increased focus on irregular warfare and the importance of cultural understanding after the implementation of the COIN manual, the primary focus is still on identifying enemies. Combat, therefore, remains the predominant element of the military training, as stated by Major General Robert H. Scales "the military spends millions to create sites designed to train soldiers how to kill an enemy in cities. But perhaps equally useful might be smaller home-station sites optimized to teach small units how to cultivate trust and understanding among peoples inside cities"[354]. The current training programs and military exercises seem to be reflected on old wars and therefore not adaptable to the challenges of new wars[355]. This is, of course, problematic for COIN operations in new wars. The current complexity of COIN operations, demands that soldiers are aware of the importance of applying a multidisciplinary and comprehensive approach, combining political, diplomatic, security, economic and social aspects into one holistic strategy.

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[352] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.
[353] Beebe and Kaldor, *supra note* 120, p. 122.
[354] Robert H. Scales, "The Second Learning Revolution", *Military Review*, January 2006, p. 40.
[355] Beebe and Kaldor, *supra note* 120, p. 122.

And a purely military learning environment does not meet these requirements. Counterinsurgents should complete at least some of their education alongside representatives of the civilian organizations, whom they are going to work with when deployed. This will increase the understanding of the different institutional cultures they will be involved with in future operation. Since COIN operations are about winning the hearts and minds of the population, they require a holistic strategy. Working with military and civilian institutions and gaining in-depth knowledge of the culture and the population, are therefore all essential parts of accomplishing this strategy.

Bringing about a paradigm change might be particularly challenging when dealing with soldiers who see themselves strictly as combat soldiers, not wanting to act in the line of police officers. This is an even bigger challenge when dealing with combat soldiers who gained their experience from conducting counterinsurgency in Iraq and Afghanistan, and whose understanding of counterinsurgency is more in lines of kinetic warfare. Modern combat soldiers do not necessarily think highly of strategies that entails winning the hearts and minds of the population, as long as there is an enemy to fight. However, we found in the interviews that the soldiers were generally open to the idea of conducting an extensive training and educational program, undertaken by civilian authorities, before engaging in counterinsurgency operations. During the interviews soldier 2 elaborated that "if a potential threat arises then the soldier has to react fast and if he attacks a civilian which later proved not to be a threat, then it is the soldier who is blamed even though his actions were simply based on his training and his possibilities in the situation. The police officer might act in a different way, as he has a different education"[356]. Educating soldiers, so they attain some of the skill-set police officers possess, would be beneficial in COIN operations, as it would change their 'natural' reaction to potential threats, hopefully creating a more balanced and civilian-friendly approach. Soldier 3 was also very positive about an extensive training and education conducted by the police, as a way to change the soldier's mindset, more suitable for counterinsurgency, "As of now, it would not be possible to take a military unit and make them operate under more restrictive rules of engagement. The current training and the mindset of the soldier is constructed around defeating the enemy, and that is not what COIN is about. We cannot win Afghanistan by shooting everyone, we know that, that would just produce more insurgents. So, we need a new type of soldiers who are trained and educated for COIN purposes. It starts by a

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[356] Interview with Soldier 2 from the Danish Army, 15 Mar. 2018.

doctrine, but it then needs to influence the whole military system"[357]. Soldier 3 makes it abundantly clear that conducting counterinsurgency successfully is not possible with conventional troops. COIN specific education and training is therefore needed to create a military force that is able to successfully implement the strategic imperatives of COIN. Soldier 3 goes on, elaborating that "before being deployed to a COIN operation, your training is concentrated around conventional warfare, against an adversary who is capable of approximately the same things as you, and have the same capabilities. Then, maybe three-weeks before deployment, you change with the notion that now you are educated in everything else, hence you can now also do COIN, and then you maybe have a couple of weeks or maybe even just a couple of days of actual COIN training"[358]. The exaggerated focus on conventional warfare, is causing the military to be under-educated in COIN specific strategy. COIN is not the same as conventional warfare, and it is a huge misconception that when soldiers are trained in conventional warfare, they are practically trained for COIN operations as well. Soldier 3 further explains what the current training programs focusses on and what consequences this has for COIN operations, **"In conventional warfare, soldiers are educated to own an area by having visual oversight. This means that military camps in Afghanistan are placed on high grounds with huge visual overview. This way, if the Taliban appears we can send troops, grenades, planes etc. out to destroy them. But this does not work, as we cannot identify the Taliban. Not even right in front of the camp, is it possible to identify the Taliban, so the military does in reality not own any terrain. You should be among the population, you should live in their cities, you should speak their language and understand their culture – like the police is doing. This would, of course, be more dangerous, and the duration of this is hard to tell, as there is no one who have tried it"[359]. As argued by Soldier 3, the skills the soldiers possess stems from conventional warfare strategies, and are not very useful in COIN situations. Since soldiers are not educated in COIN specific strategies, they will find themselves in situations that are not part of their training. This means that when soldiers should act in accordance with imperatives of the COIN strategy, they are simply not capable, as they lack the experience and the training, and therefore also the knowledge. Extensive COIN training, and COIN specific education, has also been suggested by counterinsurgency expert Kilcullen. He suggested that before engaging in counterinsurgency in Iraq and Afghanistan officers should study the topography, people, religion, history and culture of the

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[357] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.
[358] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.
[359] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.

country in question[360]. However, this was never realized by the military, who are still convinced that counterinsurgency is under an overall strategic umbrella of conventional warfare.

Cultural awareness should also be an essential part of a soldiers training. Soldier 3 underlines the amount, or rather the lack, of cultural awareness in the soldiers' training. He points to the technicalities that makes COIN different to conduct than conventional warfare, "COIN is easier as you do not have to react in relation to planes or heavy machinery. So purely military tactical, a COIN mission is easier, as you do not have the same number of things to be aware of. But COIN is however not easier if we look at the cultural part of it. The obligatory cultural part of the education is a course for one day, that's it. Then there is an expectation that you understand Afghan culture, as a 20-year-old Danish soldier. It might be here that we have the problem resulting in the failure of COIN"[361]. It is obviously very problematic to assume that a 20-year old soldier, with a minimal amount of education in Afghan culture, should be able to form a trustful relationship to the local population. Cultural awareness training is almost shockingly absent, and is off course a fundamental part of why COIN is failing. Soldier 3 was asked to give specific examples of what problems the lack of cultural knowledge might result in, and drawing on his own experience from working in a domestic context, he elaborated, "Something that is completely different is that domestically you know the population, you know the normal situation, you know official and unofficial rules. So, as an example, if a car moves towards you at a slightly higher speed than wanted, I could feel threatened, but as I am myself from Copenhagen and I therefore know that you can sometime speed up to get a free parking spot before someone else takes it, then I might not be as worried as if I were in Afghanistan and a car came towards me at a high speed. This has resulted in unfortunate situations where a car is shot to pieces, and the driver was driving his mother to the hospital, and that was the reason behind his high speed through a checkpoint"[362]. Accidents like these are, according to Soldier 3 results of a combination of lack of cultural awareness and the very stringent kill-capture mindset of soldiers. Knowing the culture of the country, can help the soldiers carry out the COIN strategy successfully, as it will enable them to interact with the local population through a softer and calmer approach. This softer approach, resembles the one used by police officers in domestic situations, and should arguably also be part of the extended COIN training. Soldiers

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[360] David Kilcullen, "Twenty-Eight Articles: Fundamentals of company-level counterinsurgency", *Military Review*, Vol. 86, No. 3 (2006), p. 134–39.
[361] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.
[362] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.

should learn to approach civilians in a way that can win their hearts and minds, and being educated in the approaches used by the police would be an excellent way to do so.

Police officers are used to working in a different set-up than soldiers, something that Soldier 3 here elaborates on, "Soldiers are used to following very specific orders. The police are used to be informed of a situation and based on their competencies they can react in relation to what is happening. That might be a result of another training and education. The police are much more able to act on own decisions, where soldiers are used to acting upon orders" [363]. The rigidness of the military can cause some problems in COIN missions. The ability to analyze and evaluate each situation individually provides better possibilities of gaining the trust of the civilian population. The police are used to interact with civilians, and they are trained to keep law and order through mutual respect. These are all skills that soldiers in COIN operations would benefit hugely from, and it should, therefore, be part of their training.

These observations make it evident that to further refine the COIN doctrine, a more ambitious approach to training is needed. Obligatory interdisciplinary education with a focus on human dignity and understanding the importance of respect for the local populations should be included in the educational program. An example of how this could be carried out in practice is that instead of exclusively utilizing military training environments, such as small cities in the terrain originally designed to practice close quarter combat, hands-on facilities could immerse individual soldiers in a simulated Middle Eastern environment. These facilities could be replicating a mosque or a busy marketplace, where the soldiers would be confronted by various crises precipitated by role players seeking to incite a local mob to violence. These exercises should be inter-institutional and thus include the presence and participation of military professionals, civilian institutions, NGO's, experienced cultural experts and academics designing and evaluating the actions.

Throughout this section, we have shown that what facilitates a shift in the kill-capture mindset, in addition to operating under IHRL, is approaching civilians in the same way as the police, operating under civilian leadership and to implement extensive COIN specific training in addition to cultural learning programs.

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[363] Interview with Soldier 3 from the Danish Army, 15 Mar. 2018.

7.1.3. Strategic Self-Interest in Following IHRL

This chapter argues that the asymmetry of counterinsurgency contests the fundamental requirements of reciprocity as an incentive for adhering to the law. We argue that it is in the strategic interest of the counterinsurgents to operate under stricter rules due to the strategic advantage gained from showing the population that safeguarding their security is the most important goal. This implies that counterinsurgents should not following the rules on account of anticipated reciprocal behavior from the insurgent, but rather because exemplary behavior is improving the humanitarian aspects, and is in their strategic interests.

One of the fundamental incentives for adhering to the laws of war is an expectation of reciprocity between the conflicting parties[364]. However, new wars entail the involvement of a vast variety of actors, hereunder non-state actors, which makes the preconditions for reciprocal behavior almost absent. Nevertheless, counterinsurgency may in itself propose an alternative to reciprocity as an incentive for adhering to stricter rules, namely the strategic advantages gained from restricting the use of force. In counterinsurgency, the principle of exemplarism may facilitate a self-enforcing basis for adhering to the laws of war, even for legal provisions that are commonly justified as humanitarian and are usually not highest on the military agenda[365]. COIN's emphasis on political considerations creates the possibility of a new co-existence between military doctrines and humanitarian considerations. In this regard, the military strategies and doctrines need a critical examination of the persistence of reciprocity as an incentive for adhering to the laws of war. As counterinsurgency is not just a military strategy, but instead a holistic and integrated strategy between civilian and military institutions, reciprocity as the incentive for following the rules should no longer prevail[366].

Reciprocity is a fundamental incentive of adhering to the laws of war, however, reciprocity is hard to apply to COIN operations. The first premise of reciprocity is that both conflicting sides see an advantage in using the same amount of force to destroy the other, but at the same time both sides are aware that they can reduce their costs if they collectively limit certain behavior. This means that by adhering to the law, actors will limit their own behavior, and so will their opponent. This will lead to a disadvantage if one of the sides chooses not to follow the law anymore. Thus, reciprocity

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[364] Watts, *supra note 337*, p. 367.
[365] Sitaraman, *supra note 86*, p. 3.
[366] Watts, *supra note 337*, p. 433.

builds on the idea that by following laws and rules that limit your own behavior, so will your opponent. But if one side decides to stop following the law, then the other side will stop following the law as well. These premises should however be rejected in the context of counterinsurgency, where the ultimate goal is to win over the population. The counterinsurgents will never gain an advantage by using destructive violence, even though that might be the strategy of the insurgents. The counterinsurgents can only win over the population by proving that they are the better alternative, by providing the population essential services, the establishment of governmental structures and securing a functioning infrastructure. The incentive for the counterinsurgents to restrict its own actions is therefore not an expectation of reciprocal behavior, but rather a strategic consideration that will give them an advantage. The essential point is therefore, that the behavior of the insurgents should be irrelevant to the counterinsurgents. So, whatever strategy the insurgents choose to follow, be it cruel tactics, lawful operations or even humanitarian actions, it should not matter in regard to the tactics utilized by the counterinsurgents. Considering the goal of winning over the population, the asymmetry stemming from the insurgents' refusal to follow the law and to act humanitarian responsibly, might actually prove to be an advantage for the counterinsurgents, because if the counterinsurgents adheres to the law they will be considered a better alternative than insurgents who are acting ruthless and cruel[367]. An insurgency that spreads fear and terror, which is a fundamental part of the tactics in new wars, might alienate the local population, where counterinsurgents that behaves humane and lawful will gain legitimacy and support because they are associated with law and order rather than arbitrary killings[368]. In order to prove itself as a better alternative the counterinsurgents should seek legitimacy, which will stem from its adherence to the law and its humanitarian behavior. Therefore, in counterinsurgency, the asymmetry is not undermining the self-interest based reason for following the law, but might in fact be supporting it. The reasons for following a restrictive set of rules is thus not based on reciprocity, but on a strategic advantage gained from showing the good example. The counterinsurgency approach is thus, essentially rejecting the classical tension between acting humanitarian and being military efficient and replacing it with the notion that encouraging humanitarian behavior is actually needed to gain military success.

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[367] Sitaraman, *supra note 86*, p. 60.
[368] Sitaraman, *supra note 86*, p. 60.

Ganesh Sitaraman provides a more profound apprehension of what the principle of exemplarism is, and how it works[369]. According to Sitaraman, exemplarism is essentially asymmetric, and a party can easily adhere to the law, even though other parties do not. If so, the exemplarist party gains prestige, legitimacy, and power, by acting exemplary[370]. This notion is fundamentally based on the unilateral interest of the party in question who gains legitimacy in the view of the population. Following this idea, exemplary behavior will lead to victory by creating a completely self-interested justification for following the rules of conflict. It thereby undermines the humanitarian and reciprocal justifications for adhering to the rules. Sitaraman develops this argument further, building on the idea that some of the earliest restraints on combat, manifested in military manuals and codes of conduct, had no reciprocal elements. Instead, the early military manuals afforded greater internal discipline and limited damage to facilitate the return to normality after the end of the conflict[371]. These measures were thus ultimately building on a strategic advantage, and not on humanity or reciprocity. In its essence, exemplarism offers completely self-interested reasoning for following restrictive rules, because any harm to the population will fuel the insurgency, thus increasing and prolonging the conflict.

The idea about exemplarism can also be traced among military personnel. As pointed out by the U.S. Army Lieutenant Colonel Eliot Cohen, retired Lieutenant Conrad Crane, U.S. Army Colonel Jan Horvath, and U.S. Army Lieutenant Colonel John Nagl, security under the rule of law should be the cornerstone in any COIN effort, and trying to bring security to the civilian population is an absolute imperative. To do so, all security activities must move away from the "realm of combat operations" and into the realm of law enforcement[372]. Like Sitaraman, these military authors argue that following a stricter set of rules, by moving from warfighting to law enforcement, entails a vast amount of advantages. Insurgents seen as criminals will likely lose their public support if a legal system handles them in accordance with local culture and practices, and this will enhance the legitimacy of the host government and the counterinsurgents[373]. Kaldor substantiates this claim, "those who violate the law are individual criminals rather than collective enemies."[374]. She argues that by arresting those responsible for criminal acts, instead of killing them, the enemy, and its

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[369] Sitaraman, *supra note 86*, p. 61.
[370] Sitaraman, *supra note 86*, p. 61.
[371] Sitaraman, *supra note 86*, p. 61.
[372] Eliot Cohen, Conrad Crane, Jan Horvath, John Nagl, "Principles, Imperatives and Paradoxes of Counterinsurgency", *Military Review*, March-April 2006, p. 51.
[373] Cohen, *supra note 372*, p. 51.
[374] Kaldor 2007, *supra note 11*, p. 176.

cause, is delegitimized by treating them as lawbreakers and not as political enemies. She turns to an example in Sierra Leone, where the British forces chose to arrest members of the 'West Side Boys', who were looting and pillaging villages. By arresting and not killing them, the British forces delegitimized the status of the group, and at the same time enhanced their own credibility[375].

IHL might act as an obstacle to this exemplarist approach as staying under IHL will make it hard for soldiers to break with the kill-capture paradigm and move into the realm of law enforcement. Under IHL, killing the enemy combatant will be just as legitimate as arresting him, and might even be desired by military personnel because it mitigates the risk to your own troops. This is why we suggest that to make it possible to live up to the exemplarist approach the rules governing COIN operations should be IHRL.

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[375] Kaldor 2007, *supra note 11*, p. 176.

8. Conclusion

In this thesis, Mary Kaldor's concept of new wars has functioned as the theoretical frame for conceptualizing contemporary wars and conflicts. New wars, is a reconceptualization of how wars are understood and perceived. The significant change from old to new wars is the change in the logic inherent in the wars. Previous wars were, according to Clausewitz, fought as a contest of wills, trying to subdue the enemy to your will[376]. New wars are different, as they function as a mutual enterprise, from which the warring parties have more to gain from the state of war than they have from reaching a state of peace.

In conventional warfare, the success is premised on being more powerful than your enemy and victory is achieved by inflicting damage to your enemy until he surrenders. This strategy is however completely inadequate in the context of new wars. Therefore, the preferred Western solution to new wars has been counterinsurgency, as manifested in the U.S. Army Marine Corps COIN manual. The COIN manual prescribes a strategy based on victory achieved through winning the hearts and minds of the civilian population. The strategy builds on the idea that if the counterinsurgents gain the trust and respect of the local civilian population, they will also gain credibility. This will ensure that the civilian population will support the counterinsurgents, making it significantly more difficult for the insurgents to recruit new members and to hide among ordinary civilians. Furthermore, the population will be more willing to share intelligence with the counterinsurgents, because they are perceived as the better alternative. In practice, COIN is operationalized through several strategies and tactics. The most significant one being the imperative of reducing the number of civilians killed during the conflict. This notion rules out the strategy of employing overwhelming force as a means to achieve quick and clear victory, because it causes collateral damage that alienates the local population from the counterinsurgents, increasing the armed resistance. The fundamental points of the COIN manual are thus, to use less force, to improve the cultural knowledge of military personnel and to increase the focus on solving potential threats to human security by supporting developmental and reconstruction projects.

Studying the imperatives of counterinsurgency and analyzing how it was carried out in Afghanistan from 2009 when the COIN manual was operationalized, has led us to some significant conclusions. The underlying premise for carrying out COIN, hereunder the disconnect between COIN strategy and IHL, have in this regard been a substantial problem. In Afghanistan, the commanding officer of

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[376] Clausewitz, *supra note 10*, p. xxvi.

ISAF, General McChrystal, had good intentions when he ordered significant restrictions on the use of force, in an attempt to win the hearts and minds of the Afghan population. However, the strategic military advantages, of using less force and causing less collateral damage, was not appreciated and did therefore not penetrate the entire military system. The rigidity of sticking to the old understanding of war and the kill-capture paradigm, despite the instructions offered in the COIN manual, have prevented a successful COIN operation in Afghanistan. The US administrations eagerness to use drones in operations, precisely because they believed it was well within the parameters of what is legal following IHL, serves as a testimony to this.

IHL has been the law governing armed conflict for the past 70 years, and IHL correspondingly governs COIN operations in new wars. In this thesis, we have shed light on how the categories of military necessity and proportionality inherent in IHL are problematic for counterinsurgency. We have found that by accepting the death of civilians, as a result of collateral damage if the military advantage gained from the attack is considered high enough, IHL directly works against the cardinal points of the COIN strategy. IHL supports a kill-capture paradigm, where killing or capturing the enemy is the primary criteria for success in war. However, the kill-capture strategy has not been successful in new wars, such as Afghanistan, where massive antipathy towards the counterinsurgents has spread among the Afghan population as a result of civilian casualties. The death of civilians has not only been seen as unnecessary but also dishonorable. In Afghanistan, the counterinsurgents utterly failed to understand how collateral damage should not only be weighed against the military advantage, as prescribed by IHL, but rather on the basis of how using lethal force would affect the counterinsurgency mission in general.

COIN Operations Under IHRL
Building on this, we conclude that counterinsurgency requires a higher degree of caution than provided for by IHL and that when analyzed in relation to counterinsurgency operations in new wars, the rules of IHL are insufficient to facilitate the desired strategy as presented in the COIN manual. IHL does not offer the amount of restriction on the use of force, that is needed to win the hearts and minds of the civilian population, and in addition to this, it keeps soldiers' mindset well within the kill-capture paradigm that IHL has evolved from. The findings in this thesis make us conclude that because human security has the protection of civilians as its ultimate goal, rather than military necessity and force protection, new wars should be handled by a counterinsurgency

approach that includes the human security trajectory of operating within the rules of IHRL instead of IHL. This entails that no collateral damage is acceptable. Human rights, which are an inherent part of the human security approach to new wars, are more suitable to counterinsurgency since IHRL has its ultimate focus on the protection of the individual. Actions compatible with the human security approach entails that the overarching principles of IHL; distinction, necessity, and proportionality, cannot act as legitimization for violence when considering if and when to apply force. This will save civilian lives, and it, therefore, serves a humanitarian purpose. However, in addition, changing the law will be exceedingly beneficial for the COIN strategy. Law does more than merely constrain actors, it provides pathways for actions and can thereby support strategies like COIN. An overwhelming majority of the interviewed soldiers iterated that when they operate in a domestic context, their mindset is different from when they are deployed abroad and operate under IHL. When operating in the domestic context, the soldiers were acutely aware that they had to act differently towards civilians. In addition to this, almost every soldier was impressed by the police's approach towards civilians in domestic situations. So, from a utilitarian point of view, acting in accordance with IHRL, rather than IHL, will disrupt the consensus of accepting collateral damage, which is the main obstacle to win the hearts and minds of the populations. This will ultimately bring an end to the conflict and pave the way for peace, stability, and security.

A significant challenge of making military professionals operate under IHRL, as identified in the interviews, is the requirement of reciprocity as the incentive for following the law. To prove themselves as a better alternative, the counterinsurgents should seek legitimacy, stemming from its adherence to the law. Therefore, in the case of counterinsurgency, asymmetrical warfare is not undermining the self-interest based reason for following the law, but in fact supports it. This implies that in a counterinsurgency context, the reasons for following a restrictive set of rules is not based on reciprocity, but on the strategic advantage gained by proving to be a better alternative than the insurgents. This means that the counterinsurgency approach is essentially rejecting the classical tension between humanitarian considerations and military efficiency, and replaces it with a strategy that prescribes that humanitarian behavior is needed to gain military success. Rather than following the laws of IHRL on the grounds of reciprocity, counterinsurgents should thus follow the law in accordance with the principle of exemplarism, an approach that unites the strategic self-interest of the military with humanitarian ends. Thus, operating under IHRL is not only desirable because it is more humane but because by acting exemplary, by adhering to a stricter set of laws,

counterinsurgents will set an example of good behavior, which will support them in winning the hearts and minds of the population. Militaries need to learn that operating under a legal regime, that allows for collateral damage in counterinsurgency, equals working against their own strategic doctrine. Operating under IHRL might not offer the counterinsurgents the reciprocal behavior they wish for, but by following stricter laws, they will eventually gain a strategic advantage and realize that killing the enemy is not the most effective way to defeat him.

Enhanced Civilian-Military Cooperation

It is well established that counterinsurgency campaigns are not won purely through military action. Therefore, we propose to incorporate the human security imperative of strengthening military-civilian cooperation. According to the COIN manual, the far-reaching and complicated aims of counterinsurgency operations require a more systematic involvement of more diverse actors from the military and the civilian sphere. This entails that Western armed forces are likely to operate in environments that involve a wide variety of actors, such as civilian governmental agencies, international organizations, private security companies, non-governmental organizations, and the agencies and security forces of the host government.

One of the fundamental problems in bringing about effective cooperation between civilian agencies and the military is the humanitarian agencies' desire to keep autonomy and distance to the military. Humanitarian agencies are reluctant to be involved in civil-military cooperation because they fear becoming targets if they become associated with the military. This is because the military, operating under IHL, tend to use force against insurgents and cause collateral damage. Making soldiers operate under IHRL is, therefore, the key to enhance military and civilian cooperation. In that regard, we agree with Mary Kaldor that, enhanced military and civilian cooperation is only possible through applying the human security approach. Operating under IHRL will restrict the military's possibility of using excessive force and enable civilian organizations to cooperate with the military.

Operations Should Be Civilian-Led

Operating under civilian command is another essential part of the human security approach, which we want to incorporate into the COIN doctrine. Following the human security approach, the civilian in charge is to be elected by both the local population and the states participating in the operation. This will offer greater legitimacy to the operation in general, because the local population will be able to influence who is leading the operation, which will be a crucial point in winning their hearts and minds. This approach will also help secure that the civilian population does not support the

insurgents, as they feel included in the peace process, and the counterinsurgents do therefore seem like the better option. Furthermore, civilian leadership, rather than military leadership, will guarantee that thinking about the civilian areas of expertise such as social, economic and political issues, will penetrate the mission and have the wanted impact. This will ensure that the military part of the operation, who are traditionally prone to target insurgents and solve issues through the application of force, changes their operational measures, so they are better suited for counterinsurgency.

COIN Specific Training and Cultural Awareness

During the interviews, we learned that even though cultural awareness and in-depth understanding of cultural norms have long been argued to be cardinal points of counterinsurgency, it is still very underdeveloped in the current COIN training programs. We suggest that to refine the COIN doctrine, an extensive cultural learning program undertaken by civilian authorities should be obligatory to soldiers deployed in COIN missions. This will help minimize accidents, like the ones identified by the interviewees, happening as result of cultural misunderstandings.

COIN specific education for military professionals should be an obligatory part of training before engaging in COIN operations. Soldiers should be educated in the strategic imperatives of the COIN manual, and how these strategic imperatives are most effectively achieved by applying principles of human security. By educating soldiers in the strategic advantage of protecting civilians, a new paradigm might emerge which emphasizes that using force is not always the most effective way to defeat the enemy.

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