

Demarcation between Military and Humanitarian Activities in Afghanistan and the Role of Law

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Abstract

Recent trends towards closer integration of military and humanitarian aspects of post-conflict reconstruction have raised questions as to the legal regime regulating such operations. The lack of a guiding framework has in practice resulted in suboptimal division of labour between military and humanitarian actors, even when common political and humanitarian interests can be identified.

Afghanistan has in recent years seen significant involvement of international political actors in both military and humanitarian spheres. A new form of joint military-civilian operation carried out by so-called 'Provincial Reconstruction Teams' (PRTs) has been trialled since 2003. These operations have prompted concerns regarding the dangers of blurring the distinction between military and humanitarian operations in a context of ongoing political instability. Although the clear identification of (unarmed) humanitarian resources is embedded in the law of armed conflict, the applicable law in a post-conflict setting is far less clear.

This paper begins by outlining the humanitarian and security context of Afghanistan, the background to the PRT concept and the difficulties it has faced. The militarization of humanitarian activities for 'hearts and minds' purposes is found to impact negatively on broader humanitarian and stabilisation goals. This effect can be mitigated by greater targeting of military endeavours in areas of military comparative advantage.

Potentially applicable legal and paralegal frameworks for regulating and encouraging such targeting are then examined, and in particular their adequacy in translating previous lessons learned into operational benefits for the actors and populations concerned.

Existing legal and institutional structures are generally found to address the issue only peripherally. Soft-law United Nations (UN) guidelines and codes, despite their high degree of relevance, have had particularly little impact due to their lack of serious compliance mechanisms. In the present case, political dominance over the post-conflict context has acted to marginalise the 'lessons learned' represented by these soft-law instruments. The suboptimal outcomes of this approach, even when measured by the criteria of the political actors themselves, demonstrate that the practical dominance of political elements can ultimately act against the interests of the same actors wielding the political power.

The increasing global political focus on effective counter-insurgency suggests that political structures are increasingly likely to be the means through which the humanitarian/military interface will be addressed in the future.

1. Introduction

Following the invasions of Afghanistan and Iraq, humanitarian assistance and reconstruction has increasingly been seen as a key means by which to consolidate a new government and improve overall stability in a post conflict context.¹ High profile military

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involvement in reconstruction can be seen as an effective way of winning 'hearts and minds' to a new regime. Moreover, the bundling of reconstruction and security functions in the military can be seen as a pragmatic solution in situations where insecurity limits the access of more traditional humanitarian and development actors. Despite these attractions however, the 'all-in-one' approach to reconstruction and security has the potential to backfire with consequences detrimental to both humanitarian and 'stability' goals.

The reconstruction efforts of the United States-led Coalition, the North Atlantic Treaty Organisation (NATO) and the international donor community in Afghanistan since 2002 are illustrative of these dilemmas. Despite an apparent commonality of interest with the humanitarian sector, many military 'hearts and minds' reconstruction efforts have been criticised by humanitarian agencies.² Of particular concern has been the tendency for military 'humanitarianism' to blur the lines between military and humanitarian activity, impacting the security of humanitarian agencies and the services they are able to provide.

Although legal obligations exist for occupying forces and governments, the subtleties of military interaction with the humanitarian sphere are not the focus of any branch of international law. Even in cases where clearer delineation of military and humanitarian functions serves a common political/humanitarian interest in achieving 'stability', there remains a paucity of legal and paralegal structures to facilitate this outcome. The adequacy of existing legal and institutional frameworks is here considered through the lens of Afghanistan, which provides a modern example where even situations of apparent humanitarian complementarity have been to some extent undermined by a lack of an accepted framework for a military/humanitarian division of labour.

2. Afghanistan

The humanitarian situation in Afghanistan is uncontroversially among the worst in the world.³ The 2004 United Nations Development Programme (UNDP) Afghanistan National Human Development Report (hereinafter Afghanistan NHDR) estimates that its ranking in such basic indicators as life expectancy, education and 'standard of living' places it around 173rd of 178 countries surveyed.⁴ Only twenty-three per cent of the population have access to safe drinking water.⁵ Forty-nine per cent of children under five are underweight for their age.⁶ Afghanistan ranks among the worst countries in the world

¹ The London Conference on Afghanistan, 'The Afghanistan Compact', Jan. 2006, <http://www.fco.gov.uk/Files/kfile/20060130%20Afghanistan%20Compact%20Final%20Final,0.doc>, at 3; see also: Brahimi (chairman), Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, A/55/305-S/2000/809, 21 Aug. 2000 para 37, and US Department of Defense (DoD) Provincial Reconstruction Team (PRT) website, <http://www.defenselink.mil/home/articles/2004-10/a100107b.html>

² For example, see 'Provincial Reconstruction Teams in Afghanistan, Position Paper Adopted by Interaction's Afghanistan Reconstruction Working Group', 2003 http://www.interaction.org/files.cgi/1541_FINAL_PRT_POSITION_PAPER.pdf

³ UNDP, 'Afghanistan National Human Development Report' 2004, at 18.

⁴ Ibid.

⁵ Ibid., at 17.

⁶ Ibid., at 25.

in terms of child and maternal mortality,⁷ with poor education, water supply and sanitation being major contributing factors.⁸

The overall security situation in Afghanistan is poor and deteriorating.⁹ Insecurity in regional Afghanistan has had serious repercussions for humanitarian agencies¹⁰ and has significantly increased the costs of reconstruction efforts.¹¹ Nearly half of Non-governmental Organisations (NGOs) surveyed in early 2005 had curtailed or modified planned projects due to the security situation in the past year.¹² A prominent example was Médecins Sans Frontières (MSF), an international NGO that had successfully operated in Afghanistan for the previous twenty-four years, which was forced to withdraw from Afghanistan following the targeted murder of five of its staff in 2004.¹³

Security difficulties have arisen not simply due to the chronic political instability in the country, but have changed qualitatively over recent years. The killing of NGO staff in Afghanistan has approximately doubled in each of three consecutive years from 2002-2004 from a baseline of around two per year in the five previous years.¹⁴ Particularly noticeable has been the clear change in the nature of these deaths. During the decades of civil war up until 2002, deaths of NGO staff were almost exclusively of the nature of accidental death or 'collateral damage'. Since that point fatalities have almost entirely resulted from targeted killings.¹⁵ To the extent that comparative statistics are available and with the possible exception of Iraq, the NGO fatality rate in Afghanistan is believed to be the world's highest in a conflict or post-conflict context.¹⁶

3. Actors and Strategic Goals

Afghanistan's humanitarian and security difficulties are seen as interrelated by the main international actors involved in both sectors. The single most authoritative formal statement of the intentions and shared goals of the Afghan Government and its external supporters can be found in the 'Afghanistan Compact'.¹⁷ This document was a product of the 2006 London Conference on Afghanistan and has been signed by Afghanistan,

⁷ Ibid., at 27. 257 deaths under 5 per 1,000 live births, 1,600 maternal deaths per 100,000 live births. Only Sierra Leone has higher figures. See UNDP, 'Human Development Report 2005, International cooperation at a crossroads: Aid, trade and security in an unequal world'.

⁸ Afghanistan NHDR, n.3 above at 58.

⁹ Report of the Security Council Mission to Afghanistan, 11 to 16 Nov. 2006, S/2006/935 (2006), Swiss Peace Foundation, 'Semi-Annual Risk Assessment', 22 Dec. 2006, http://www.swisspeace.org/uploads/FAST/updates/FAST%20Afghanistan%202_2006%20final.pdf; Report of the Secretary-General, 'The Situation in Afghanistan and its Implications for International Peace and Security', Mar. 2006, UN Doc. A/60/712-S/2006/145, at 10. There is a more mixed view in Afghanistan NGO Safety Organization (ANSO) and CARE, 'NGO Insecurity in Afghanistan', May 2005 http://www.care.org/newsroom/specialreports/afghanistan/20050505_ansocare.pdf.

¹⁰ Save the Children UK, 'Provincial Reconstruction Teams and Humanitarian-Military relations in Afghanistan', 27 Sept. 2004, at 2 http://www.savethechildren.org.uk/SCUK_cache/SCUK/cache/cmsattach/2029_PRTs_in_Afghanistan_Sep04.pdf

¹¹ B. Stapleton, 'NATO: New Tasks and Responsibilities' NATO -WIIS conference, July 2005, at 3

¹² Ibid., at 6

¹³ Fabrice Weissman, MSF, 'Military Humanitarianism: a Deadly Confusion', 16 Dec. 2004, http://www.msf.org/msfinternational/invoke.cfm?component=article&objectid=762E8B7B-2F5F-448A-8EC26F2039794E54&method=full_html

¹⁴ ANSO n.9 above. Afghan staff represent approximately 90% of the total deaths.

¹⁵ N. Downie, Head of Mission, Afghanistan NGO Safety Organization (ANSO), Personal interview, May 2005.

¹⁶ ANSO n.9 above, at 2

¹⁷ See n.1 above.

fifty other states and a list of organisations including the UN, the World Bank, NATO, the European Union (EU) and the European Commission.

The Compact identifies 'three critical and interdependent areas or pillars of activity'¹⁸ for the next five years: Security; Governance, Rule of Law and Human Rights; and Economic and Social Development. This succinctly reflects the priorities expressed in other public policy statements from the Afghan government and the most influential foreign actors in Afghanistan.

The avowed priorities of the Afghan Government can be seen in the first lines of the (Afghan) 'President's Message' in the key document presented to the 2004 Afghan Development Forum: 'A stable Afghanistan is a precondition for regional stability and global security. Investing in securing Afghanistan's future is an investment in both political stability and expansion of economic opportunity.'¹⁹ The bi-directional link between development and security is also recognised at the national level.²⁰

The Afghan Government is a heavily dependent actor in both security and development. Only eight per cent of government expenditure is financed through domestic sources and only twenty-six per cent is even administered by the government, the rest being part of the 'External Budget' administered directly by donors.²¹ External military and financial support is provided by a similar group of states. At the London Conference on Afghanistan, eighty-four per cent of development funds pledged by individual states were from those with a military involvement in Afghanistan.²² The remaining state-based pledges are mostly from states that have either since sent troops (Australia) or that have peculiar obstacles to sending troops (Japan, Pakistan, Iran).²³ The vast bulk of both financial and military support is provided by the US, EU states and, since 2006, the World Bank and the Asian Development Bank.

The link between 'reconstruction'/assistance and security has been unambiguously and prominently repeated by the United States President,²⁴ the United States Agency for International Development (USAID)²⁵ and, less explicitly, by the

¹⁸ Ibid., at 2

¹⁹ 'Securing Afghanistan's Future: Accomplishments and the Strategic Path Forward, A Government / International Agency Report' Afghan Development Forum, 2004, <http://www.af/resources/mof/recosting/SECURING%20AFGHNAISTANS%20FUTURE.pdf>

²⁰ The UN Assistance Mission in Afghanistan (UNAMA) has emphasised the need for a stronger focus on development and governance in order to counter the present insurgency. Press briefing by Chris Alexander, Deputy Special Representative of the Secretary-General, 8 Jan. 2007, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/YSAR-6X9NQS?OpenDocument&rc=3&cc=afg>

²¹ World Bank, 'Afghanistan: Managing Public Finances for Development', Dec. 2005 http://siteresources.worldbank.org/AFGHANISTANEXTN/Resources/305984-1137783774207/afghanistan_pfm.pdf

²² These figures do not include funds from non-state entities. Significant contributions were pledged by the World Bank and the Asian Development Bank and smaller but meaningful amounts from the EC, UN and Islamic Development Bank. Financial information from <http://www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1132599286676>. PRT information as of Jan. 2006 from US Dept. of State, <http://www.state.gov/r/pa/prs/ps/2006/60085.htm>

²³ Ibid. For up to date details on troop contributors see http://www2.hq.nato.int/ISAF/structure/structure_structure.htm

²⁴ President Bush specifically mentions 'electricity and water ... new schools, roads, and medical clinics' as 'essential to our own security', 7 Sept. 2003, <http://www.whitehouse.gov/infocus/nationalsecurity/rebuildingafghanistan.html>

²⁵ 'USAID/Afghanistan Strategic Plan 2005-2010', at 1. Starts: 'Beyond the engagement of the United States and its allies to eliminate the terrorist networks that found shelter in Afghanistan prior to September 2001, another equally important campaign is being waged in the fight against terrorism and tyranny. This is the struggle to reconstruct, rehabilitate and reintegrate Afghanistan into the world community, so that it

European Commission (EC).²⁶ There is a notable difference between the perspective of USAID, whose contribution is unequivocally portrayed as part of the 'war on terror', and that of its European counterpart, the European Commission Humanitarian Aid department (ECHO). The ECHO website makes no mention of security or terrorism.²⁷

3.1 Working Together

The potential contribution of humanitarian efforts to post-conflict Afghan stability was recognised by Colin Powell when he famously called NGOs '[our] force multipliers' and 'an important part of our combat team' in October 2001.²⁸ Lakhdar Brahimi, subsequently the head of the UN Assistance Mission in Afghanistan (UNAMA), similarly recommended that UN Peace Support Operations (PSOs) use 'quick impact projects' 'aimed at real improvements in quality of life, to help establish the credibility of a new mission'.²⁹ In Afghanistan, USAID has emphasised 'symbolic projects' of which 'visible impact gains interest and support for longer term capacity building'.³⁰

These projects have been carried out in Afghanistan by a new form of humanitarian/military unit, the 'Provincial Reconstruction Team' (PRT). These PRTs have been defined as 'joint civil-military units'³¹ tasked 'to provide both improved security and to facilitate reconstruction and economic development throughout the country'.³²

As of January 2007, there were twenty five PRTs in Afghanistan operating through both Operation Enduring Freedom and NATO/ISAF (International Security Assistance Force). Twelve of these are led by US forces, ten by European states and one each by Canada, New Zealand and Turkey.³³ At the time of writing, eight PRTs with similar mandates have recently been established in Iraq.³⁴

PRTs are militarily weak,³⁵ consisting of 50 to 150 members with only a small civilian component, typically 5-10 per cent.³⁶ They vary considerably in their operational approaches and activities according to regional contexts, individual commanders and national policies of the contributing state.³⁷ In particular the difference in approaches between US and UK PRTs has resulted in significant variations in their operational impact. These differences derive less from differences in the formal mandate of the individual PRTs but rather from its interpretation.³⁸ The US model of operation is considered first, with the UK alternative discussed in more detail below.

never again becomes a haven for terrorism or a threat to its neighbours. USAID is a critical partner in this effort.' http://www.usaid.gov/locations/asia_near_east/afghanistan/Afghanistan_2005-2010_Strategy.pdf

²⁶ European Commission, 'Country Strategy Paper, Afghanistan 2003-2006' at 3 http://europa.eu.int/comm/external_relations/afghanistan/csp/03_06.pdf

²⁷ http://europa.eu.int/comm/echo/field/afghanistan/index_en.htm

²⁸ Colin Powell, 'Remarks by Secretary of State Colin L. Powell to the National Foreign Policy Conference For Leaders of Non-Governmental Organizations', 26 Oct. 2001, quoted in David Reiff, *A Bed for The Night, Humanitarianism in Crisis*, (New York: Simon & Schuster, 2002) at 236

²⁹ Brahimi, n.1 above.

³⁰ USAID Strategic Plan n.25 above, at 2

³¹ USAID, 'Provincial Reconstruction Teams', http://pdf.usaid.gov/pdf_docs/PDACG280.pdf

³² US Dept. of State, Fact Sheet, Office of the Spokesman, 31 Jan. 2006 <http://www.state.gov/r/pa/prs/ps/2006/60085.htm>

³³ http://www2.hq.nato.int/ISAF/media/pdf/placemat_isaf.pdf

³⁴ http://iraq.usembassy.gov/iraq/20060223_prt_fact_sheet.html

³⁵ Their capacity to 'reach back' for air support can greatly enhance their military value in some situations.

³⁶ Save the Children n.10 above, at 25

³⁷ *Ibid.*, at 5

³⁸ For example, the UK foreign office website contains a PRT factsheet produced by USAID (http://www.fco.gov.uk/Files/kfile/PRT_jan-06.pdf, referenced 9 June 2007). The official ISAF website refers very generally to the role of the PRTs as 'to assist the local authorities in the reconstruction and maintenance of security'. (http://www.nato.int/ISAF/mission/mission_role.htm, referenced 9 June 2007)

According to USAID, the duties of US PRTs include:

- To establish and maintain good working relationships with key government, tribal, military, religious, NGO and UN leaders in the provinces.
- To monitor and report on critical political, military and reconstruction developments.
- To provide security support and share current security information with the assistance community.
- To assist in the deployment and mentoring of Afghan national army and police units located in the provinces.
- To counsel adversaries, refereeing disputes, and brokering agreements between factions.
- To conduct needs assessments and helping to prioritise reconstruction and development efforts.
- To implement assistance projects, with a focus on geographic areas that civilian agencies cannot reach.
- To provide temporary logistical and security support to allow assistance personnel to travel to areas considered unsafe or inaccessible.³⁹

This broad list combines security, intelligence, and reconstruction activities. The relative priorities of these objectives and the means by which they are operationalised are not defined and in practice vary significantly between PRTs.⁴⁰ In particular, there is no consistent understanding as to the extent and in what conditions PRTs should engage in intelligence gathering and in relief activities.⁴¹ Nor is a clear distinction made between 'reconstruction', 'development' and 'assistance' activities. Humanitarian literature, in contrast, distinguishes between military performance of 'direct' assistance (running a health clinic, distributing food etc.), 'indirect assistance' (transport and logistic support), and infrastructure (building roads, power generation etc.).⁴²

While the PRT role may be ambiguously defined, the public portrayal is less so. Analysis of information released by the US Central Command shows a heavy emphasis on relief/reconstruction work ahead of security. In the first five months of 2004, forty-five per cent of news releases mentioning US PRTs did so in the context of reconstruction efforts, thirty-eight per cent relating to other 'public relations' activities (attending school openings and other public events) and only four per cent in relation to security.⁴³

3.2 Humanitarian Impact

The practical merger of the military and the 'humanitarian' as represented by PRTs has resulted in serious negative consequences for the humanitarian working environment,⁴⁴ compensated for by few 'hearts and minds' victories. The PRTs' greatest achievements have generally occurred when they have instead constrained themselves to a primarily military or infrastructure development role.

Without exhausting the criticism of PRTs, the focus here is limited to three specific issues:

- (1.) that PRTs decrease the security for humanitarian actors by blurring the lines between military and humanitarian activity;

³⁹ USAID 'PRTs' n.31 above, at 34

⁴⁰ Save the Children n.10 above, at 5

⁴¹ Ibid., at 23-25

⁴² 'Guidelines on the Use of Military and Civil Defense Assets To Support United Nations Humanitarian Activities in Complex Emergencies' (hereinafter: MCDA Guidelines) March 2003 <http://ochaonline.un.org/DocView.asp?DocID=426>

⁴³ Save the Children n.10 above, at 25

⁴⁴ The effect on humanitarian actors is relevant here insofar as it ultimately impacts the humanitarian and stability goals of the strategic actors.

- (2.) that the low quality of PRT relief work done outside its core competencies damages the reputation of both military and humanitarian actors;
- (3.) that PRTs do work that could be done more cost-effectively by humanitarian actors.

3.2.1 Security implications for NGOs

A major concern of NGOs has been the potential negative security impact caused by PRTs conducting relief or development work, due to the 'blurring of the lines' between civilian and military actors.

The breadth of the PRT 'mandate' and the variety in its implementation has led to some confusion as to the intended role of the PRTs.⁴⁵ NGOs have consistently called for PRTs to focus on security.⁴⁶ This view is apparently endorsed by the US State Department in its statement that 'A PRT is not, and has never pretended to be, a uniformed NGO'.⁴⁷ In reality, US PRTs have focussed less on security or even infrastructure development, and more on 'quick impact projects' of schools, clinics and wells.⁴⁸ An Italian PRT Colonel explicitly stated at an NGO coordination meeting that, 'We don't "do" security ... We are just like an NGO. We only have uniforms and arms because those are our rules'.⁴⁹

The ambiguous nature of PRTs has been exacerbated by known cases in which armed PRT military personnel have travelled out of uniform or in unmarked, NGO-style vehicles. Voices generally supportive of the PRT concept have acknowledged that such activities are ultimately counter-productive to the security situation.⁵⁰ Further confusion is caused when aid is made conditional on provision of intelligence.⁵¹

MSF explicitly linked this phenomenon to NGO security after their security-related departure from Afghanistan:

[T]he only protection humanitarian actors have is the clarity of their image. It must reflect their position as outsiders to the conflict and the transparency of their intentions. Both coalition forces and the majority of aid actors have seriously abused this image in Afghanistan, thus perpetuating a deadly confusion between humanitarian organizations and political-military institutions.⁵²

It is difficult to show conclusively the relationship between PRTs and the dramatic increase in the targeting of NGO staff since 2003.⁵³ For their part, MSF leave little doubt as to their belief in the causal link.⁵⁴ In a context in which security is one of the most significant constraints on NGO operations such a perception is damaging in itself.

3.2.2 Uneven Quality

⁴⁵ This was not greatly improved by the issuing of 'Working Guidelines' by the US Ambassador in Kabul in 2003. Save the Children n.10 above, at 19

⁴⁶ Ibid., at 34

⁴⁷ US Department of Defense Factsheet n.32 above, at 43.

⁴⁸ B. Stapleton, 'Presentation on Afghanistan', Copenhagen Seminar on Concerted Planning and Action of Civil and Military Activities in International Operations, June 2005, at 2

⁴⁹ NGO Coordination Meeting, Herat, May 2005, personal minutes.

⁵⁰ P.V. Jakobsen, 'PRTs in Afghanistan: Successful but not Sufficient', Danish Institute for International Studies, 2005-6, at 37

⁵¹ Save the Children n.10 above, at 45.

⁵² Weissman n.13 above.

⁵³ For example, in May 2005 only 5% of NGOs nominated 'blurring of lines' as a major factor in deteriorating the security situation. This low figure is less significant than it may appear however. 11% nominated 'a worsening perception of NGOs', which is a broader and including concept, while other important security influences such as elections, poppy eradication and DDR efforts are often more immediately apparent. ANSO n.9 above, at 5

⁵⁴ '[T]he confusion between occupation forces and humanitarian organizations undoubtedly has encouraged acts of violence against aid agencies.' Weissman, n.13 above.

It is unsurprising that a primarily military body will not approach relief and/or development work with the same expertise and experience as specialist NGOs. PRTs have been guilty of numerous examples of 'bad practice' in relief and development work, involving a range of unsustainable or otherwise inappropriate projects or practice.⁵⁵ The effect of a bad project can be worse than no project at all when raised popular expectations are ultimately frustrated.⁵⁶

A distinction in this regard can be made between 'reconstruction' and 'relief' actions. Engineering construction work, such as roads, bridges, buildings and other infrastructure can be recognised as within the military 'core competence'.⁵⁷ There is a significant difference, however, between building a medical clinic, and establishing a medical clinic.

3.2.3 Cost Efficiency

Although precise figures are unavailable, official US Department of Defence sources estimate that relief functions are on average ten times more expensive if carried out by the military.⁵⁸ While the military's unique capacity allows it to provide services in insecure or remote areas or in cases of emergency,⁵⁹ there have been many examples of PRTs performing or even limiting themselves to work that could equally be carried out by humanitarian or development actors.⁶⁰ It is largely the same governments funding both military and humanitarian efforts, raising questions of accountability of donor governments towards their own taxpayers for any suboptimal use of resources.

3.3 Another Model

The difficulties outlined above do not arise inevitably from the necessities of the situation. It is unlikely to be in the immediate interests of military and political goals to undermine the work of the mainstream humanitarian and development NGOs. Indeed the common interest in stability and security in Afghanistan indicates that, over time, problems for one sector are likely to imply problems for all.⁶¹ Many of the difficulties can ultimately be traced to more mundane explanations, such as ignorance, communication failures and the characters of particular institutional cultures.

The 2004 study by Save the Children UK into the effects of PRTs concluded that 'most of the positive effects of PRT activities on humanitarian security come from activities in the areas of security, reconstruction and expanding central authority' while the biggest negative impacts are from relief activities and 'quick-impact projects'.⁶² The core goals of PRTs, namely strengthening central government, improving local security and winning 'hearts and minds' would thus appear to be compatible with a focus on their key competencies as military/engineering units.

In this regard it is interesting to look at the operations of the UK-led PRT in Mazar-e-Sharif. Operating without any clearly distinct mandate, this PRT operated from

⁵⁵ For example, a 'health camp' set up in Saripul in 2003 was notorious for its irresponsible approach to medical care. See Save the Children n.10 above, at 27. For a more general description see United States Institute of Peace, 'The U.S. Experience with Provincial Reconstruction Teams in Afghanistan, Lessons Identified', Oct. 2005, at 9.

⁵⁶ Interaction n.2 above, at 2.

⁵⁷ For example, Danish Committee for Aid to Afghan Refugees (DACAAR), 'DACAAR's position on relations to PRTs in Afghanistan', June 2005 at 4

⁵⁸ 'US Joint Doctrine for Civil-Military Operations' 3-57, 8 Feb. 2001, IV-6

⁵⁹ DACAAR n.57 above, at 4.

⁶⁰ For example in Kandahar, Save the Children n.10 above, at 24.

⁶¹ This is not to imply that the strategic goals of the military and political actors are or were the same as those of the humanitarians, rather that in this case humanitarian interests formed a genuine, functional subset of the broader military/political strategy.

⁶² Save the Children n.10 above, at 34

2003 to early 2007 focussing primarily on improving security, and particularly on training and supplying the police.⁶³ It has been praised for its policy of outreach through small, lightly armed patrols to remote areas⁶⁴ and has been successful in its cultivation of relationships and dialogue with local commanders.⁶⁵

After some early efforts at humanitarian relief, including a much-criticised 'health camp' in December 2003,⁶⁶ the UK Mazar PRT moved its 'reconstruction' emphasis towards activities more directly aimed at strengthening the provincial presence of the central government, such as training and equipping various government ministries⁶⁷ and rebuilding court houses and police stations.⁶⁸ After 2003, this PRT became a notable exception in its willingness to consult with NGOs⁶⁹ and largely avoided duplicating their work.⁷⁰ The UK donor agency, the Department for International Development (DfID), explicitly emphasised its intention to maintain a clear distinction between PRT and NGO activities.⁷¹

The UK Mazar PRT further benefited from inheriting the British military tradition of officially encouraging 'community engagement', a form of 'hearts and minds' more dependent on troops' behaviour than on financial incentive. This has been manifested by symbolic acts such as wearing berets instead of helmets and troops playing impromptu street football.⁷²

This approach is in direct contrast to that short-term 'hearts and minds' approach of 'quick impact projects' and instead represents an approach shown to be the most effective use of PRT capacities.⁷³ It has been well received by humanitarian agencies. In 2003 UNAMA, together with a group of NGOs, lobbied unsuccessfully for the UK model of PRTs to be accepted nationally.⁷⁴

4. Limitations of the Law

Approaching six years on from the United States' invasion of Afghanistan, the country's deteriorating stability would not suggest the implemented strategies have met with great success. While overall results in this endeavour depend on many variables, the contribution of military involvement in humanitarian activities must be examined critically. If it is accepted that funding of both military and humanitarian operations is largely driven by a common objective of the stabilisation of Afghanistan, and further that the military involvement in 'quick-impact projects' – as opposed to infrastructure - results in suboptimal outcomes, it is left to identify what failure has led to this allocation of resources.

⁶³ Ibid., at 26

⁶⁴ Stapleton, n.11 above, at 5.

⁶⁵ It was able to use these relationships to broker a ceasefire between two factions in 2003. Save the Children n.10 above, at 26

⁶⁶ Ibid. at 27

⁶⁷ Ibid.

⁶⁸ Stapleton, n.48 above, at 2.

⁶⁹ Ibid., at 5

⁷⁰ Ibid.

⁷¹ Save the Children n.10 above, at 26.

⁷² See for example Press Release 29 Nov. 2003, 'Military Put the Boot In', http://www.operations.mod.uk/telic/pn_29nov_rmp.pdf or British Military internal newsletter, 16 Apr. 2003, <http://www.operations.mod.uk/telic/sandy6.pdf>, at 13. This is no doubt an easier policy to follow in the more stable northern areas than it would be in the south and east of the country.

⁷³ Save the Children n.10 above, at 34

⁷⁴ Stapleton, n.48 above, at 2

A lack of field-level communication and coordination between the various actors is a likely contributing factor. The greater dialogue of the UK-led PRT in Mazar-e-Sharif, for example, resulted in fewer of these problems. At another level, however, these difficulties can be seen as a predictable result of a lack of guidance from existing institutional mechanisms.

Barbara Stapleton, Advocacy Coordinator for the Agency Coordinating Body for Afghan Relief (ACBAR), has described the problem: 'NGOs have nothing in writing, no proper detailed mandate or guidelines with teeth. Until personality-based relationships in the field are augmented by a detailed mandate NGOs cannot trust that practices agreed today may not change tomorrow.'⁷⁵ The military have an equal need for a definition of their role. There are various sources of law to which to turn.

The mandate of the International Security Assistance Force (ISAF) in Afghanistan is contained in UN Security Council resolutions 1386 and 1510.⁷⁶ The text of these resolutions mentions only security functions, specifically emphasising the provision of a 'secure environment' for civilian personnel 'engaged, in particular, in reconstruction and humanitarian efforts'. The direct performance of reconstruction activities can only be found indirectly in the mandate. The ISAF force is established 'as envisaged in Annex 1 to the Bonn Agreement', which considers it 'desirable' that the UN mandated force 'assist in the rehabilitation of Afghanistan's infrastructure'.⁷⁷ Even this would not appear to include either indirect or direct humanitarian assistance in the form of 'quick impact projects'.

There is no reason to believe that the Security Council is not well aware of ISAF's ongoing activities. Nevertheless, it has chosen to periodically extend ISAF's mandate.⁷⁸ The issue then becomes that of the Security Council's accountability to the rest of the UN system, a recognised difficulty with no need for elaboration here.⁷⁹

Coalition forces in Afghanistan have no explicit Security Council mandate and operate instead by invitation of the Afghan government.

A second source of legal guidance is the international law of armed conflict (ILAC). ILAC has great potential as a relevant legal regime in the present context as it explicitly concerns itself with the issue of 'blurring of lines' between military and humanitarian actors. Moreover, the context of occupation is perhaps the most common situation in which foreign military units have historically coexisted with humanitarian need and thus the relevant law might be expected to be most developed in this area.

On the other hand, the question of the applicability of ILAC to the specific Afghan situation is far from straightforward. A number of complex issues need to be considered, such as the delineation of the end of an occupation, the applicability of international conventions to Security Council-mandated forces, the blurring of international and non-international conflicts and the participation of Afghan forces.⁸⁰

⁷⁵ *Ibid.*, at 5

⁷⁶ SC res. 1386 20 Dec. 2001, SC res. 1510, 13 Oct. 2003.

⁷⁷ 'Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions', <http://www.afghangovernment.com/AfghanAgreementBonn.htm>, para 4.

⁷⁸ SC res. 1386, 20 Dec. 2001; SC res. 1413, 23 May 2002; SC res. 1444, 27 Nov. 2002; SC res. 1510, 12 Oct. 2003; SC res. 1563, 17 Sept. 2004; SC res. 1623 13 Sept. 2005; SC res. 1659, 15 Feb. 2006; and SC res. 1707, 12 Sept. 2006.

⁷⁹ See generally I. Oosterdahl, 'The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council', (2005) 10 *Journal of Conflict and Security Law* 1

⁸⁰ In particular, at what point did the coalition forces cease to be a 'hostile army'. See F. Hampson, 'Detention, the "War on Terror" and International Law' in Hensel (ed), *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Aldershot: Ashgate, 2005) 131-170 at 139

Moreover, the current role of ISAF and Coalition forces in Afghanistan is particularly difficult to reconcile with that of an Occupying Power.

These complexities militate against attempting to apply ILAC de jure to the situation at hand.⁸¹ Nevertheless, if in abstract, ILAC, when applicable, could be shown to provide clear guidance on such issues, the larger problem would reduce to that of demonstrating the applicability of ILAC. Thus in surveying the potential of the various legal frameworks to regulate a context such as that found in Afghanistan, it remains useful to examine the utility of ILAC as a legal regime potentially applicable in similar circumstances. In particular, the ILAC treatment of occupation is worthy of consideration even if it cannot be applied in the Afghan case.

An Occupying Power is required to ensure the food and medical supplies of the population 'to the fullest extent of the means available'.⁸² This obligation is extended in Additional Protocol I (AP I) to include 'clothing, bedding, means of shelter' and 'other supplies essential to the survival of the civilian population' and that these supplies be provided 'without any adverse distinction'.⁸³ An Occupying Power is free to choose the method by which it fulfils these obligations,⁸⁴ however it remains bound by an obligation of result.⁸⁵

An Occupying Power is independently required to facilitate relief schemes undertaken by 'impartial humanitarian organizations' to inadequately supplied segments of the population 'by all the means at its disposal'.⁸⁶ The definition of 'impartial' is not a key concern for the present purposes.⁸⁷

Acts that predictably result in a deteriorated security context for humanitarian actors may fail the test of 'facilitating relief schemes' and their legality could be questioned purely on this ground. Moreover, if the net humanitarian impact on the population is negative and provision of 'essential' supplies is inadequate,⁸⁸ this would appear to breach the requirement of Geneva Convention IV Article 55 and AP I Article 69 to use the means available 'to the fullest extent'. In a similar vein, directing limited funds to military rather than humanitarian relief could be questioned on grounds of cost-effectiveness. Finally, any conception of aid being conditional on the provision of intelligence is presumptively in violation of provisions prohibiting 'any adverse distinction' in relief distribution.

The failures above would not, however, constitute 'grave breaches' of the Geneva Conventions,⁸⁹ and thus their enforcement is delegated to individual parties,⁹⁰ which are

⁸¹ In addition, Additional Protocol I has not been ratified by either Afghanistan or the United States and would thus apply only to the extent that it codified customary law

⁸² Geneva Convention IV (GC IV) art. 55

⁸³ AP I art. 69. This, of course, may well not be Customary International Law

⁸⁴ Pictet Commentary GC IV art. 55

⁸⁵ Pictet Commentary AP I art. 69

⁸⁶ GC IV art. 59

⁸⁷ 'Impartial humanitarian organization' is a phrase used multiple times in the GCs and AP I. There has however, been no attempt to justify the negative security implications for NGOs arising from PRT activities by alleging 'partiality' on their part, nor have PRTs seriously claimed to be 'impartial' in this sense. The Pictet commentary to GC IV art 59 indicates that relief action undertaken by states qualifies only if the States themselves are 'neutral', hardly the case of PRTs.

⁸⁸ Note that there is no requirement that the 'PRT' impact must be the decisive factor in this inadequacy.

⁸⁹ Defined in GC I, art. 50, GC II, art. 51, GC III art. 130, GC IV, art. 147, AP I art. 85. An interesting approach would be to consider them as 'serious breaches' as defined in Protocol I of 1977, art. 90(2)(c)(i). While the consequences may indeed be 'serious' their indirect cause may create difficulties, see F. Hampson, 'Liability for War Crimes', in P. Rowe (ed.), *The Gulf War 1990-91 in International and English Law* (London: Routledge, 1993) 241-260 at 243-244.

⁹⁰ GC I art. 49, GC II art. 50, GC III art. 129, GC IV art. 146. Internal military systems are examined more closely below.

required to 'take measures necessary for the suppression of all acts contrary to the provisions' of the Conventions.⁹¹

If a state fails to fulfil this obligation, further means of effectively holding it accountable are limited. Formal measures are unlikely to be pursued for an issue of this nature. Countermeasures or reprisals are clearly inappropriate and indeed the 'victim' State may well be cooperating or, alternatively, deposed.

International Human Rights Law (IHRL) is another potentially relevant legal regime. The applicability of the International Covenant on Economic, Social and Cultural Rights (ICESCR) will be explored as an example illustrating the limitations of this approach.

Afghanistan is a party to the ICESCR, as are all PRT-leading nations other than the United States. The ICESCR requires states parties to 'take steps' 'to the maximum of [their] available resources' to achieve progressively the full realisation of the convention rights.⁹² It is uncontroversial that a large majority of the Afghan population do not fully enjoy these rights.⁹³ It could be argued that clear suboptimal allocation of scarce resources would be thus a breach of even this heavily qualified obligation.⁹⁴

ESC rights are also to be 'exercised without discrimination of any kind as to ... political or other opinion',⁹⁵ seemingly prohibiting the Afghan government from allowing aid to be conditioned on the provision of intelligence.⁹⁶

The obligations of the Afghan government may, however, be limited to the extent to which it is in actual control of the resources in question. Obligations of donor governments may arise through extraterritorial application of ESCR, as has been contemplated by the Committee on Economic, Social and Cultural Rights (CESCR).⁹⁷ The extent of these obligations remains controversial, as can be seen by the caution with which the subject is treated by the CESCR even in the extreme case of sanctions.⁹⁸

Ultimately however, enforcement of human rights law is reliant on the threat of public exposure.⁹⁹ The subtlety of this issue and the unlikelihood of public opprobrium arising from acts of relief and reconstruction, no matter how delivered, fatally weaken human rights law as an instrument of pressure in this case.

Also potentially relevant is the 1994 UN Convention on the Safety of United Nations and Associated Personnel. Article 7 requires States Parties to 'take all appropriate measures to ensure the safety and security of UN and associated

⁹¹ GC I art. 49, GC II art. 50, GC III art. 129, GC IV art. 146

⁹² ICESCR, art. 2(1)

⁹³ Afghanistan NHDR, n.3 above, ch. 3

⁹⁴ Specifically if even the 'minimum core' obligations remain unfulfilled, CESCR, General Comment 3, para 10.

⁹⁵ ICESCR, art. 2(2)

⁹⁶ Save the Children, n.10 above, at 39

⁹⁷ CESCR, General Comment 8 relating to sanctions

⁹⁸ *Ibid.* The confusion regarding the issue is characterised by the position of the CESCR itself within a single General Comment. Despite asserting that the ICESCR remains applicable during the consideration of sanctions (para. 7), that 'sanctions will inevitably diminish the capacity of the affected State to fund or support some of the necessary measures' (para 10), and that a sanctioning state 'unavoidably assumes a responsibility to do all within its power to protect the economic, social and cultural rights of the affected population', the CESCR is unable to voice the logical implication that sanctions themselves necessarily violate the ICESCR (para 12-14). To avoid this conclusion, the Committee finds itself referring to a novel form of proportionality between the suffering of the population and the political aim of the sanctions (para 14), a device with no obvious basis in the ICESCR itself.

⁹⁹ N. Rodley, 'International Human Rights Law and Machinery for Monitoring its Implementation in Situations of Acute Crisis', in *Report on Conference on The Promotion and Protection of Human Rights in Acute Crisis* (1998) <http://www.essex.ac.uk/rightsinacutecrisis/report/rodley.htm>

personnel'.¹⁰⁰ It could be argued that knowingly acting in such a way as to endanger the security of relief agency personnel is not in conformity with this article. The effect of the Convention is, however, significantly less than this.

Firstly, the only NGO staffs protected by the convention are those 'deployed ... under an agreement with the Secretary-General of the United Nations or with a specialised agency or with the IAEA'.¹⁰¹ This excludes the large number of independent humanitarian NGOs with no UN relationship.

Secondly, there exist significant uncertainties surrounding the applicability of the Convention and the key definition of a 'UN Operation'.¹⁰² An additional layer of ambiguity exists in a case such as Afghanistan, in which a UN civilian mission exists alongside a multinational force authorised by the Security Council but presumably not 'UN controlled'. Is this one UN operation and a separate UN-authorized operation? Or does the lack of UN control over the military component also exclude the applicability of the Convention from the civilian component?

Finally, enforcement of the relevant part of the Convention¹⁰³ is through standard mechanisms of state responsibility,¹⁰⁴ which are likely to suffer the same difficulties enumerated in the context of ILAC above.

Hard law, in sum, is not of great help in regulating the undertaking by military forces of humanitarian activities. In order to exhaust the possibilities, however, it is necessary to examine the potential impact of other instruments, such as soft-law guidelines or intra-institutional regulations.

A set of soft-law UN guidelines exists that specifically relate to the use of military assets in disaster response.¹⁰⁵ Drafted by UN bodies and States' representatives, these documents take a generally humanitarian perspective and contain little discussion of independent military or political considerations. They are, however, particularly clear and consistent in what they advocate and it is possible to summarise key common points.

- Humanitarian assistance should be given on the basis of need only, and should not be conditional on political or intelligence support.
- A clear distinction between military and humanitarian actors is essential to maintaining a safe working environment for humanitarian organisations¹⁰⁶

¹⁰⁰ 'UN Convention on the Safety of United Nations and Associated Personnel' 1994 (hereinafter: the UN Convention) art. 7

¹⁰¹ Ibid., art. 1(b)(iii)

¹⁰² See Hampson, 'The Protection of "Blue Helmets" in International Law' (1997) XXXVI Military Law and Law of War Review 203-210 at 206-208

¹⁰³ UN Convention n.100 above, art. 7

¹⁰⁴ The articles relating to individual criminal responsibility except, for no obvious reason, art. 14, explicitly limit themselves to the crimes defined in art. 9.

¹⁰⁵ Three main documents are considered here: The MCDA Guidelines (n.42 above) were drafted by a group of nine States' representatives and five UN Agencies and reviewed by a larger group; UN Office for the Coordination of Humanitarian Affairs (UN-OCHA) 'Civil-Military Relationship in Complex Emergencies, An Inter-Agency Standing Committee (IASC) Reference Paper', June 2004 http://ochaonline.un.org/humanitariannegotiations/Documents/References/UN%20chapter%203/Reference_Paper_Civil_Military_Relations.pdf; and: Deputy Special Representative of the Secretary General, United Nations Assistance Mission in Iraq (UNAMI), 'Guidelines for Humanitarian Organisations on Interacting with Military and Other Security Actors in Iraq', Oct. 2004, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/HMYT-66BQU7?OpenDocument>. Also see 'Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief', 1994 ('Oslo Guidelines') at 3, <http://ochaonline.un.org/mcdu/guidelines>

¹⁰⁶ The MCDA Guidelines describe this distinction as 'the determining factor' in creating a safe operating environment, MCDA Guidelines, n.42 above, at 3

- Military support of humanitarian operations must be exceptional and employed only as a last resort.
- Military units that are belligerents in a conflict should not be involved in humanitarian operations.¹⁰⁷
- The military should not be involved in provision of direct assistance but should be limited to indirect (logistical) or infrastructure support.

Specific implementations of the PRT concept in Afghanistan have violated all of these principles.¹⁰⁸ It is not clear, moreover, that adhering to them would threaten either the immediate goals of the PRTs or the broader objectives behind civil-military cooperation in general.

Being non-binding, the guidelines' impact is heavily dependent on the extent to which the ideas they represent are incorporated either formally into laws or codes, or informally into the 'mentality' or culture of the relevant actors.

In the debate over PRTs in Afghanistan, these guidelines were referenced in a detailed report by Save the Children UK,¹⁰⁹ but otherwise have not been a major part of the dialogue, either from the humanitarian or the military side. Notably, there are no references to any of the above guidelines on the UNAMA or ISAF websites,¹¹⁰ or in the relevant Security Council resolutions mandating ISAF.¹¹¹

It is perhaps not surprising that PRT planning has not been driven by non-binding UN guidelines, but its alternative inspiration is unclear. Was the PRT model a logical evolutionary creation from military doctrine or other formal military sources? Or was it rather an ad-hoc solution to a specific problem?

5. Military Code & Doctrine

A further place to look for guidance as to military behaviour is the disciplinary code. In the US Military Code there is no offence obviously applicable to the concept of 'inappropriately offering humanitarian assistance'.¹¹² As an example, the closest match may be 'wilfully or recklessly wast[e] ... property ... of the United States'.¹¹³ Adducing that performing 'quick impact projects' is not an effective long-term winner of 'hearts and minds', and is thus 'wilful or reckless wastage' is not an easy task. The military disciplinary code, by its detailed nature, is not well suited to guiding issues of higher-level decision-making.

Even if it were possible to apply a military code to the issues at hand, it would need to be the military contingents themselves that applied the code. Even in 'blue helmet' operations, the UN as such does not have disciplinary power over the national contingents.¹¹⁴

Doctrine forms a broader basis for decision-making and promises to be a more helpful guide to higher-level decisions than the military codes. A useful starting point for understanding the doctrinal influences on US PRTs is the 2004-2006 US Army Interim Field Manual on Counterinsurgency Operations.¹¹⁵ This manual considers NGOs and civilian

¹⁰⁷ The UNAMI Guidelines allow humanitarian action by belligerent military as a last resort.

¹⁰⁸ For example, see Save the Children n.10 above.

¹⁰⁹ Ibid.

¹¹⁰ <http://www.unama-afg.org/> and <http://www2.hq.nato.int/ISAF> Searched with Google.

¹¹¹ n.76 above

¹¹² US 'Uniform Code of Military Justice' art. 109

¹¹³ Ibid., art. 109

¹¹⁴ For a general discussion see P. Rowe, 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents' (2000) 5 *Journal of Conflict and Security Law* 45. This specific point is only made by implication.

¹¹⁵ US Army, Counterinsurgency Operations Interim Field Manual, Oct 2004 - Oct 2006, FMI 3-07.22, 2-12

humanitarian agencies - insofar as they are considered at all - principally in the twin roles as (1.) a source of information¹¹⁶ and (2.) an actor to be 'coordinated'.¹¹⁷ NGOs are recognised as likely to have a greater knowledge about the people, culture and places due to their longer history in the area. Good contacts and 'intelligence'¹¹⁸ give them the 'potential to establish good will'¹¹⁹. They should be invited to coordination meetings 'to ensure their actions are integrated and deconflicted with military and [Host Nation] plans'. The goal being 'a single, controlling agency to direct all efforts with one person in charge of all military and US agency operations'.¹²⁰

Notably, in 182 pages on counter-insurgency there is little development of the concepts of reducing the base of an insurgency by winning hearts and minds either through relief efforts or simply by improving popular standards of living.¹²¹ Although it is acknowledged that 'some NGOs do not want to be seen as cooperating or associating with US military forces',¹²² there is no consideration as to why this might be. It is, however, recognised that 'gaining [NGO] support and coordinating operations can be a difficult and frustrating task'.¹²³ A number of articles on counterinsurgency have since emphasised the two-way link between relief/development and stability.¹²⁴

An alternative source of military doctrine is the older and broader US Joint Doctrine for Civil-Military Operations.¹²⁵ This document conveys a significantly different perspective and one considerably closer to that of the humanitarian and development communities. According to this document:

- NGOs and other civilian institutions share the goal of a peaceful, stable and prosperous society.¹²⁶
- Military operations should be synchronised with inter alia NGOs, and should be mutually supportive.¹²⁷
- The military should not dictate what will happen but should coordinate a team approach to problem resolution.¹²⁸
- The military should accept that civilian tasks often constitute the main operational effort and that military tasks are in support of this effort.¹²⁹
- Civilian agencies possess comparative operational advantages for emergency relief work; military costs average ten times the cost of civilian agencies to perform the same relief functions.¹³⁰

In the specific case of PRTs in Afghanistan, these points, if implemented, would provide a solid basis from which to address the humanitarian concerns elaborated earlier.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid. 2-13

¹²¹ Ibid. Civil-military operations are emphasised at 3-2. Under 'Psy-Ops' 5-5 there is a half-page list of unobvious forms of these considerations, advocating inter alia conditional assistance.

¹²² Ibid. 2-11

¹²³ Ibid.

¹²⁴ See for example D.H. Petraeus, 'Learning Counterinsurgency: Observations from Soldiering in Iraq' (2006) Jan-Feb Military Review 2-12 at 5 and A. Roe, 'To Create a Stable Afghanistan: Provisional Reconstruction Teams, Good Governance, and a Splash of History', (2005) Nov-Dec Military Review 20-26 at 21,23.

¹²⁵ 'US Joint Doctrine for Civil-Military Operations', 3-57, 8 Feb. 2001, http://www.dtic.mil/doctrine/jel/new_pubs/jp3_57.pdf

¹²⁶ Ibid. I-18

¹²⁷ Ibid. IV-1

¹²⁸ Ibid. IV-12

¹²⁹ Ibid. IV-7

¹³⁰ Ibid. IV-6

The distance of this doctrinal perspective from (some) current PRT-thinking can be illustrated by reviewing an example of recent US army PRT-related literature.

The major reference to PRTs in the last three years in the US Department of Defense (DoD) magazine 'Military Review' was by Major Andrew M. Roe.¹³¹ Roe acknowledges the important contribution of humanitarian relief to stability,¹³² that lack of security is hampering relief,¹³³ that association with PRTs makes humanitarian actors targets¹³⁴ and that attacks against aid agencies have increased.¹³⁵

For Roe, however, the solution is not less integration but more. Rather than recognising the comparative advantage of NGOs and limiting military operations to supporting roles as recommended by the relevant doctrine, he proposes instead that 'PRTs should also coordinate regional educational and medical support as part of a wider reconstruction campaign'.¹³⁶ In response to security threats, PRTs should 'convince the local population that aid and assistance will be withdrawn should they fail to warn of or prevent attacks.'¹³⁷

This point of view is symptomatic of the apparent disconnection between the (US) PRT implementation and the US Civil-Military Operations doctrine. A serious inquiry as to how internal military training and coordination systems have allowed this gap to exist is beyond the scope of this essay. It can, however, be said that the size of doctrinal documents,¹³⁸ their need to be broad enough to apply to a range of situations and the position of this issue at the periphery of traditional military concern, all mitigate against the likelihood that the relevant doctrine will be precisely followed in the field.

It is interesting to note in this regard some more recent US Government publications which foresee the growing importance of 'stability' operations and a clearer integration of the 'reconstruction' element. The US Government Draft Planning Framework for Reconstruction, Stabilization, and Conflict Transformation declares that 'Assistance programs are an ideal tool for expanding the reach and influence of local partners who share our vision and goals'.¹³⁹ Although NGO programmes are 'generally pursued as a matter of humanitarian concern rather than policy', they may nevertheless be supportive of US policy. The US should thus 'seek opportunities to collaborate with these organizations [...] when appropriate'.¹⁴⁰

The US Department of Defense has also recently issued a top-level directive in this area emphasising that 'Integrated civilian and military efforts are key to successful stability operations'¹⁴¹ and that 'Military-civilian teams are a critical U.S. Government stability operations tool'.¹⁴² Despite this move towards integration, there is recognition that '[m]any stability operations tasks are best performed by [...] civilian professionals'.¹⁴³ Importantly, the functions

¹³¹ Roe, n.24 above.

¹³² Ibid., at 23

¹³³ Ibid., at 21

¹³⁴ Ibid., at 24

¹³⁵ Ibid., at 22

¹³⁶ Ibid., at 24

¹³⁷ Ibid.

¹³⁸ The US Joint Doctrine for Civil-Military Operations 3-57 for example, is 195 pages long.

¹³⁹ US Government 'Draft Planning Framework for Reconstruction, Stabilization, and Conflict Transformation', Dec. 2005 at 34, http://www.dtic.mil/doctrine/training/crs_pam051205.pdf. This document is the second of three related documents written in response to a Presidential request.

¹⁴⁰ Ibid.

¹⁴¹ US Department of Defense Directive 3000.05, 'Military Support for Stability, Security, Transition and Reconstruction (SSTR) Operations', 28 Nov. 2005 at 3

¹⁴² Ibid.

¹⁴³ Ibid., at 2

of military-civilian teams are described as: '... ensuring security, developing local governance structures, promoting bottom-up economic activity, rebuilding infrastructure, and building indigenous capacity for such tasks.'¹⁴⁴

Conspicuously absent is the concept of direct relief and such 'quick impact projects' as health, wells and schools, the most problematic of the activities of the US PRTs. The list of tasks is instead remarkably similar to the limited 'reconstruction' functions carried out by the UK PRT in Mazar-e-Sharif.

6. Conclusion

The undoubted humanitarian need and difficult security situation in Afghanistan, combined with the specific political context, has led to the adoption of an integrated civil-military approach. Despite the wider apprehension in the humanitarian sector of political 'co-optation',¹⁴⁵ there remain moments when political and humanitarian objectives have considerable overlap even if motives may not.

In this concordant case, and in the absence of any strong alternative coordination system, there arises a special responsibility on the part of the law and legal mechanisms to harmonise the labour of the different actors and help avoid the repetition of past mistakes.¹⁴⁶ In the highly-politicised Afghan context, the relative weakness of regulatory measures has permitted an inappropriate military involvement in 'quick impact projects' and similar humanitarian endeavours, generating an unnecessarily negative humanitarian and stability impact. Ironically, the results of such regulatory weakness have predictably run counter to the interests of the dominant political actors themselves.

The potential of existing hard law regimes to regulate this issue appears limited. Human Rights Law and International Humanitarian Law are insufficiently specific and inadequately enforced to be able to ensure an effective partition of responsibilities, even when the underlying objectives are similar.

The situation of existing soft-law guidelines is similar. Even in cases when they are clear in their content, such guidelines suffer from their non-binding nature and are in general not able to find voice to be effective. Neither their words nor their spirit are to be found in the mandates or task descriptions of the PRTs. It must be asked where they are to be applied, if not in Afghanistan.

While the evasion of non-binding UN guidelines may be expected, the ease with which UN mandated forces have openly and without sanction exceeded their mandate underlines the peculiar legal status of the Security Council.¹⁴⁷

Military codes alone and without further guidance are generally too specific to constrain higher-level decision-making. Military doctrine shows more promise by addressing the issues at the appropriate level. Nevertheless, even when the content of doctrine is compatible with a humanitarian perspective, this is not necessarily mirrored by practice. In the case of Afghanistan, even though US Civil-Military doctrine contains instructions relatively attuned to humanitarian guidelines, this doctrine has been largely disregarded. Military decisions are products of a military framework in which the humanitarian context has rarely been of direct concern.

¹⁴⁴ Ibid.

¹⁴⁵ See generally Donini, Minear & Walker, 'Between Cooptation and Irrelevance: Humanitarian Action After Iraq', (2004) 17 *Journal of Refugee Studies* 260 and Hampson, 'Nongovernmental Organizations in situations of conflict: the negotiation of change' in M.N. Schmitt and L.C. Green (eds) *The Law of Armed Conflict: Into the Next Millennium* (Newport: Naval War College International Law Studies vol. 71, 1998) at 233-262

¹⁴⁶ The IASC and MCDA documents can be seen as representing 'lessons learned', n.105 above and n.42 above.

¹⁴⁷ 'The Security Council will always be inconsistent, but it will make law', Osterdahl, n.79 above.

It is for this reason that the greatest chance for more effective coordination in this area lies with the increasing importance of 'stabilization operations' in world affairs and thus the greater political interest in its effectiveness. The recent US DoD Directive on this issue and the US 'Draft Planning Framework for Reconstruction, Stabilization, and Conflict Transformation'¹⁴⁸ are strong evidence of this refocusing and raise the probability of greater coherence between the relevant doctrine and practice in the future. While civil-military integration is emphasised in these documents and humanitarian concerns remain subsidiary to military objectives, they nevertheless reflect a heightened emphasis on 'infrastructure' and governmental reconstruction over direct relief. Moreover, these political documents note that 'stability' may be enhanced directly through the meeting of humanitarian needs, independent of an attribution of 'humanitarian credit' to any particular actor,¹⁴⁹ thus perhaps unconsciously reflecting an early understanding of the benefits of demarcation.

The need for political input is, however, a poor reflection of the coordination mechanisms of the respective legal and para-legal instruments as they exist today.

Unless otherwise specified all websites referenced 1-10 January 2007

¹⁴⁸ Draft Framework for Reconstruction, n.139 above.

¹⁴⁹ DoD Directive 3000.005, n.141 above.

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