4.1 INTRODUCTION

Afghanistan is a good case study of application of IHL in several respects. It was invaded by the former Soviet Union in 1979, remained under Soviet control for a decade, when the Soviet Union withdrew before it was itself dissolved. This was followed by an internal war and political crisis leading to a Taliban government to take control of the country. Soon after the terrorist attacks on the World Trade Tower in New York on 11 September, 2001, the United States found evidence of a terrorist group, Al Qaeda, having masterminded the attacks and the Taliban government of Afghanistan having given shelter to the group. This resulted in a joint US-UK self-defence operation against Taliban in October 2001. Soon thereafter, the United Nations authorized a NATO-led UN Peace-Keeping Operation to bring about peace and constitutional governance in Afghanistan.

The Bonn Agreement of 2001 established the Independent Afghan Human Rights Commission to investigate human rights abuses and war crimes. The Afghanistan Constitution of 2004 also calls for an Independent Afghan Human Rights Commission. While the ongoing turmoil, violence and reconstruction efforts often make it difficult to get an accurate sense of what is going on, various reports from NGOs have accused various branches of the Afghan government of engaging in human rights violations.

4.2 OBJECTIVES

After reading this unit, you should be able to:
- describe the law and order situation in Afghanistan in the Post Taliban period;
- discuss the applicable IHL provisions in Afghanistan; and
- evaluate the application of the IHL principles to non-state actors.
4.3 LAW AND ORDER

The National Security Directorate, Afghanistan’s national security agency, has been accused of running its own prisons, torturing suspects, and harassing journalists. The security forces of local militias, which also have their own prisons, have been accused of torture and arbitrary killings. Warlords in the north have used property destruction, rape, and murder to discourage displaced Pashtuns from reclaiming their homes. Child labor and human trafficking remain common outside Kabul. Civilians frequently have been killed in battles between warlord forces. Poor conditions in the overcrowded prisons have contributed to illness and death amongst prisoners; a prison rehabilitation program began in 2003.

In the absence of an effective national judicial system, the right to judicial protection has been compromised as uneven local standards have prevailed in criminal trials.

4.3.1 Freedom of Speech and the Media

The government has limited freedom of the media by selective crackdowns that invoke Islamic law and has encouraged self-censorship. The media remain substantially government-owned. The nominally lesser restrictions of the 2004 media law have been criticized by journalists and legal experts, and harassment and threats continued after its passage, especially outside Kabul.

Self Assessment Question
1) What are the challenges to the freedom of speech in Afghanistan.

4.3.2 Religious Freedom

No registration of religious groups is required; minority religious groups are able to practice freely but not to proselytize. Islam is the official religion, all law must be compatible with Islamic morality, and the President and Vice President must be a Muslim person.

4.3.3 Women’s Rights

One of the major criticisms of the Taliban rule was that women were denied of several human rights. Matters ranging from wearing nail polish to job opportunities were severely restricted. By keeping women indoors, the Taliban claimed to be keeping them safe from harm.

The Constitution promises equal rights for men and women, and women are permitted to work outside the home, to engage in political activity, and the Constitution requires each political party to nominate a certain number of female candidates. However, the Afghan Supreme Court is dominated by Islamic extremists who have issued various rulings and opinions that seem to be attempting to undermine women’s rights; e.g. calling for segregation in schools.

In late March 2009, Afghan President Hamid Karzai signed into law an internationally condemned “Shia Family Law” which condones apparent spousal rape (in Article
132), child marriage and imposes purdah on married Afghan women. Although the offending legislation is said to have been dormant for a year, President Karzai was trying to gain the support of Afghan northern Shia legislators and the neighbouring Islamic Republic of Iran, which is Shia-dominated. According to Britain’s Independent newspaper, the ‘family code’ was not read in the Upper House/Senate, and also enshrines gender discrimination in inheritance law and divorce against women.

4.4 APPLICABLE INTERNATIONAL LAW IN AFGHANISTAN:

Common Article 3 to the 1949 Geneva Conventions applies in the case of an armed conflict of a non-international character occurring on the territory of a state party (see below for the text of the provision). This is the case for Afghanistan (a state party), in which the Government is fighting against a number of non-state armed groups, particularly the Taliban. The conflict is also regulated by other provisions of customary international law (see Note 1).

Afghanistan has become party to 1977 Additional Protocol II, which also deals with non-international armed conflicts (see below for a summary of the provisions). The threshold of violence for the application of the Protocol is higher than it is for common Article 3, but since the Protocol entered into force for Afghanistan (on 24 December 2009), this instrument has applied to the conflict at its current intensity, not only to Afghan government forces, but also to the armed forces of any state that is a member of ISAF and which is also party to the Protocol. (2)

UN Security Council Resolution 1746 (2007) called for “full respect for human rights and international humanitarian law throughout Afghanistan” and called upon “all parties to uphold international humanitarian and human rights law and to ensure the protection of civilian life.” (§§ 18, 25) Afghanistan’s draft Constitution provides that: “The state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.”

Afghanistan has not derogated from any of the provisions in the 1966 Covenant on Civil and Political Rights; accordingly, all of these rights apply throughout the country. There are also other human rights instruments which are applicable, including the Convention on the Rights of the Child (see section on UN resolutions and reports for further information).

Self Assessment Question

2) What provisions of IHL conventions are applicable in Afghanistan.

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4.4.1 1977 Additional Protocol II

Additional Protocol II prohibits attacks on the civilian population and individual civilians, as well as objects indispensable to the survival of the civilian population. It also restricts attacks on works and installations containing dangerous forces, and cultural objects and places of worship, as well as the forced movement of civilians.
The Protocol also strengthens the fundamental guarantees enjoyed by all persons not, or no longer, taking part in the hostilities, and lays down rights for persons deprived of their liberty, providing judicial guarantees for those prosecuted in connection with an armed conflict.

The Protocol protects the wounded, sick and shipwrecked, as well as religious personnel and all medical personnel, units and means of transport, whether civilian or military. Finally, it limits the use of the Red Cross and Red Crescent emblems to those persons and objects duly authorized to display it.

Common Article 3 to the 1949 Geneva Conventions:

Common Article 3 provides as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

4.5 WAR IN AFGHANISTAN – AN ANALYSIS

As noted, the most developed part of international humanitarian law is the law governing armed conflict between states. The hostilities between the forces of the U.S.-led coalition and the Taliban government in Afghanistan fit into this category. The same law governs armed conflict insofar as one government has been joined by
a paramilitary organization that has been integrated into the government’s armed forces. The military portion of al-Qaeda in Afghanistan, sometimes referred to as the 55th Brigade, appears to have such an integrated relationship with Taliban military forces. But what law governs potential U.S. efforts to pursue al-Qaeda or other alleged terrorist groups outside of Afghanistan, particularly if they are not integrated into the military forces of a government?

Quite possibly, besides the traditional human rights law, the Protocol II definition of a Combatant, and the general minimum protection of Article 75 should apply in each case taken in its context.

However, international humanitarian law does apply to certain armed conflicts between states and non-state actors, such as insurgents in a civil war. The International Committee of the Red Cross, in its Commentaries on Article 3 Common to the four Geneva Conventions of 1949, describes the understanding in this regard of the states that negotiated this provision. They believed, according to the ICRC, that a conflict with a rebel group would amount to an armed conflict governed by international humanitarian law insofar as the group is organized, has a responsible command, acts on a determinate territory, and is capable of respecting and ensuring respect for humanitarian law. As a loose network of individuals and groups said to be operating in some sixty countries, al-Qaeda appears unlikely to meet these requirements, at least outside Afghanistan.

Even when military force is used against non-state actors that lack these attributes, Human Rights Watch maintains that the basic principles enshrined in international humanitarian law should still be upheld as a minimum standard. The Commentaries of the International Committee of the Red Cross also state that the fundamental guarantees of Common Article 3 of the 1949 Geneva Conventions would apply even if non-state combatants lacked all the hallmarks of classic rebel forces. Although the ICRC commentary addresses civil wars against insurgents, the same rationale should apply to an international conflict against non-state actors.

4.5.1 IHL and Non-state Actors

The United States and Afghanistan are both parties to the Geneva Conventions of 1949. They are also bound by those provisions of the laws of war that, through wide state recognition and practice, have become customary international law. Many NATO and other possible coalition countries are also parties to Protocol I to the Geneva Conventions. Although neither the United States nor Afghanistan is party to Protocol I, the United States recognizes many of its provisions as reflective of customary international law. In addition, by virtue of having signed (but not ratified) Protocol I, the United States is obligated under international law to avoid actions that would undermine the guarantees of that treaty.

Self Assessment Question

3) What are the challenges post by the non-state actors to the application of IHL principles in Afghanistan?
4.5.2 IHL provisions applicable in Afghanistan

A fundamental precept of international humanitarian law is that of “civilian immunity.” At all times, it is forbidden to direct attacks against civilians; indeed, to do so intentionally amounts to a grave breach of humanitarian law, or a war crime. It is thus an imperative duty to identify and distinguish non-combatants from combatants in every situation and not to rely on inadequate reconnaissance or intelligence. A notable example of inadequate efforts to make this distinction was the NATO bombing of a refugee convoy on the Djakovica-Decane road in Kosovo during the 1999 air campaign in the mistaken belief that it was a military convoy.

Non-combatants include soldiers who are wounded or captured or otherwise removed from a combat role; however, regular combatants are still legitimate targets of attack even when “off-duty.” Civilians lose their protected status when they are engaged in hostilities; however, when they return to civilian life their protection resumes. Political leaders would not be legitimate targets of attack unless their office or direct participation in military hostilities renders them effectively combatants. According to the International Committee of the Red Cross, direct participation in hostilities means “acts of war which by their nature and purpose are likely to cause actual harm to the personnel and equipment of enemy armed forces” and includes acts of defense. Thus, political leaders who are effectively commanders of a state’s forces would be legitimate targets, but absent some unusual circumstance, officials of, say, a ministry of education would not.

It is also generally forbidden to direct attacks against what are called “civilian objects,” such as homes and apartments, places of worship, hospitals, schools, or cultural monuments, unless they are being used for military purposes. Military objects are those that make an “effective” contribution to military action and whose destruction, capture or neutralization offers a “definite” military advantage. Where there is doubt, the object must be presumed to be civilian.

The mere fact that an object has civilian uses does not necessarily render it immune from attack if it meets the above-noted test: it makes an “effective” contribution to military action and its destruction, capture or neutralization offers a “definite” military advantage. However, such “dual use” objects might also be protected by the principle of proportionality, described below.

Even when a target is serving a military purpose, precautions must always be taken to protect civilians. One such precaution is effective warning of an attack where “circumstances permit” (discussed below). Another is taking steps to avoid attacks that threaten disproportionate harm to civilians - that is, “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

The initial information is that the airstrikes of the U.S.-led coalition have targeted, aircraft and air defense systems, military headquarters, military command and communications facilities, military training camps, front-line military positions, and airports. All except for the last are unambiguously military objects which may be lawful targets of attack, so long as the military advantage in destroying or harming them is not outweighed by the prospective harm to civilians. In such cases, civilian damage, if any, is called collateral damage.

Airports, roads and bridges may be dual-use targets, in that they might be used both for military purposes and to deliver humanitarian assistance to civilians. Electrical facilities also may serve both a military and civilian purpose. Although most of the
Afghan population lacks electricity, certain urban facilities for civilians depend on electricity for long-term function, such as hospitals.

When a target is dual-use in nature, the impact on civilians must be carefully weighed against the military advantage served; all ways of minimizing the impact on civilians must be considered, and attacks should not be undertaken if the civilian harm outweighs the definite military advantage.

A corollary to the principle of civilian immunity is the basic prohibition of indiscriminate attacks. An attack is "indiscriminate" when its effect is not or cannot be limited to military targets and so it harms military targets and civilians or civilian objects without distinction. Typical examples would be the carpet-bombing of populous areas where military targets are interspersed, or the laying of anti-personnel landmines, which cannot distinguish between civilian or military feet. Indiscriminate attacks also include those which, as noted above, may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects which would be excessive in relation to the "concrete and direct military advantage" anticipated from the attack. Human Rights Watch considers that the evaluation of whether an attack may cause excessive harm to civilians must be conducted for each attack and potential target, and not with regard to the conflict as a whole.

The law requires precautions and choices where civilians are at risk from attacks. The duty to take all feasible steps to minimize injury to civilians and civilian objects requires commanders to choose the means of attack that will minimize incidental harm to civilians. Where a party to the conflict has precision weapons at its disposal, it is under a duty to use "smart" rather than "dumb" bombs in or near populated areas. Likewise, where various military targets offer a similar military advantage, commanders must choose the target that threatens the least danger to civilian lives and civilian objects. Each party to the conflict also has the duty to provide "effective advance warning" of attacks that may affect the civilian population, "unless circumstances do not permit," such as where the element of surprise is critical to the success of the attack. So, for example, if a bridge or major highway is useful to the military as well as civilians, the opposing military is obliged to determine whether there are alternative targets whose destruction offers a similar advantage but less risk to civilians, or whether warnings are feasible before bombing, or whether there is a time of day for attack that would minimize potential harm to civilians. Finally, where an attack would be indiscriminate, or the target questionable, the attack must be cancelled or suspended.

4.5.3 Legal Constraints on Methods of Attack

Deliberate starvation of the enemy's population is prohibited as a tactic of war, as are any methods designed to cause extremely severe damage to the environment or the destruction of objects on which civilians depend for survival, such as food or water sources. The population of Afghanistan has for years suffered extreme deprivation of food and health care due to political repression and the interrelated effects of war, conflict-related violence, and drought. Now, war-induced fear has exacerbated what was already a crisis, putting thousands of civilian lives at risk as foreign aid workers leave and humanitarian assistance is scaled back. There is no evidence that the U.S. or any of its allies sought to cause such a grim humanitarian consequence. However, attacking forces must still remain conscious of the precarious situation and take it into account when calculating the effect on the civilian population of attacks on any potential military target. For example, certain roads, bridges and airports may ordinarily be legitimate military targets, but if they are also essential to the delivery of humanitarian
relief throughout the winter, their attack may yield more harm to civilians than definite military advantage, and so would be forbidden.

In addition to making military decisions with the fragility of the civilian population in mind, Human Rights Watch believes it is morally incumbent on the U.S. and its allies, as well as the international community at large, to provide humanitarian aid and take other effective and proactive measures to alleviate the prospect of starvation and mass civilian deaths.

A fundamental principle is that weapons and means of warfare must not cause "superfluous injury" or "unnecessary suffering." Dum-dum bullets were an early category of weapon found to violate this principle; blinding lasers are a more modern example. This principle, and the norm against weapons that harm civilians and soldiers indiscriminately, underlie the prohibition of a variety of weapons. Among these are biological and chemical weapons, and weapons such as anti-personnel landmines.

Cluster bombs, employed widely in the Gulf War as well as in the early stages of the NATO air war in Kosovo, present a hazard to civilians similar to anti-personnel landmines. The "bomblets" they release have been shown to have a high initial dud rate, leaving highly volatile explosives on the ground that cannot distinguish between combatants and civilians who might encounter them. The high initial dud rate is magnified by the large number of sub-munitions used. In addition, cluster bombs are difficult to target precisely and thus can also be an indiscriminate weapon if used near populated areas. Human Rights Watch urges the United States and its allies to refrain from using anti-personnel landmines entirely and from using cluster bombs in circumstances where they pose a deadly menace to civilians.

The United States is directly responsible for any forces over which it exercises effective control. In addition, Human Rights Watch has long advocated that no security assistance be given to forces whose conduct displays a consistent pattern of gross violations of human rights and humanitarian law. In particular, Human Rights Watch urges that no such assistance be given to any group or coalition that includes commanders with an unremedied record of serious violations of international humanitarian law standards, including but not limited to General Abdul Rashid Dostum, the head of the Uzbek militia known as the Junbish; Haji Muhammad Muhaqqiq, a senior commander of the Shi’a Hazara party Hizb-i Wahdat; Abdul Rasul Sayyaf, leader of the now defunct Sunni Islamist party, Ittihad-i Islami; and Abdul Malik Pahlawan, a former senior Junbish commander. In addition, we urge the establishment of mechanisms to hold abusers accountable as a way of serving justice and marginalizing these figures from any future Afghanistan government.

**4.6 SUMMARY**

- The Bonn agreement of 2001 established the Independent Afghan human Right commission to investigate humane rights abuses and war crime. The 2004 constitution also makes provisions for the establishment of such commission. The National security directorate and the security forces of local militias have been accused of running it own prisons, torturing suspects and harassing journalists. The Government has limited freedom of the media by selective crackdowns.

- Under the new constitution minority religious groups are free to practice their religion but they can not proselytize it. Islam is the official religion hence all law must be compatible with Islam. The constitution also promises equal rights for men and women.
Common article 3 to the 1949 Geneva conventions and additional protocol 2 applies in Afghanistan. These provisions deal with the non-international armed conflict.

A fundamental precept of international humanitarian law is that of "civilian immunity." At all times, it is forbidden to direct attacks against civilians; indeed, to do so intentionally amounts to a grave breach of humanitarian law, or a war crime. It is thus an imperative duty to identify and distinguish non-combatants from combatants in every situation and not to rely on inadequate reconnaissance or intelligence. A notable example of inadequate efforts to make this distinction was the NATO bombing of a refugee convoy on the Djakovica-Decane road in Kosovo during the 1999 air campaign in the mistaken belief that it was a military convoy.

4.7 TERMINAL QUESTIONS

1) What responsibility does the United States bear if its allies violate these rules of warfare?

2) Discuss the challenges posed to various Human Rights in Afghanistan by the ongoing armed conflict.

4.8 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Sub-section 4.3.1

2) Refer to Section 4.4

3) Refer to Sub-section 4.5.1

Terminal Questions

1) Refer to Section 4.5

2) Refer to Section 4.3