INTERROGATING THE PROBLEMS ASSOCIATED WITH THE APPLICATION OF PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW TO ASYMMETRIC ARMED CONFLICTS*

Abstract

The changing nature of warfare in the 21st century poses a multitude of challenges to the application of International Humanitarian Law for both State and non-State actors in contemporary conflicts. These issues, including, but not limited to: ambiguity in the distinction of violent conflict, the changing type of actors involved, issues of asymmetric warfare, challenges of negative reciprocity, and an inhibited ability to engage with all parties to conflict, are detrimental to the overriding purpose of International Humanitarian Law (IHL). Still, as a result of the inefficient nature of the international system, as well as the lack of consensus regarding new legislation, it is obvious that formal changes in International Humanitarian Law to more flexibly reflect the reality of situations will not be developed anytime soon. Therefore, it is in the best interest of all parties to non-international conflicts to aspire to better respect the existing norms of International Humanitarian Law, which can only be attained if States recognise the dire need for inclusive engagement with all types of non-State actors. In addition, practices of positive reciprocity must be carried out by all parties, in order to better serve the ultimate goal of International Humanitarian Law, which is the reduction of human suffering, and the preservation of human dignity in times of violent armed conflict. The applicability of International Humanitarian Law (IHL) must, therefore, be determined according to objective criteria and must not be left to the discretion of the warring parties. The main objective of this Paper is to discuss the legal implications of the use of asymmetric warfare in armed conflicts between states and non-state actors vis-à-vis the existing law and practice of war. The Paper holds the view that, the mandatory stipulation of Common Article 3 to the Geneva Convention notwithstanding, non-state actors in asymmetric armed conflicts often does not feel obliged to obey the fundamental principles of International Humanitarian Law and other rules of engagement in armed conflicts. The Paper, therefore, recommends, among other things, a modification of the traditional law in the context of transnational asymmetric warfare in at least three areas: first, the recognition of an obligation to consider alternatives to military action (asking not only whether targets were legitimate military targets, but also whether the decision to use force against them rather than explore the non-forcible, or less-forcible alternatives, was justified under the circumstances); second, if there were no available alternatives, the army would be expected to invest significant resources to minimise harm to civilians; and finally, following an attack, the army would be obliged to conduct a transparent and accountable investigation to reexamine its own actions.

Keywords: Asymmetry, Armed Conflict, International Humanitarian Law, Warfare.

1. Introduction

The 21st century warfare is no longer restricted to traditional forms of armed conflict where one sovereign state's military battles another sovereign state's military. Indeed, today's armed conflicts hardly resemble the wars described in history books, where two or more states' armies engage one another on a traditional battlefield, and where only the soldiers' abilities and the military leadership stand between victory and defeat. Modern day warfare has changed into a treacherous game in civilian environments where adversaries try to defeat each other by exploiting each other's weaknesses. Wars rarely take place these days between states along a front line, but instead between parties with different legal statuses and considerably different military resources, organisations, and command structures.[1] Sovereign states increasingly find themselves battling non-state actors, such as terrorist groups, organised crime syndicates and militias. Non-state actors employ various means and methods of war different from those of conventional state-on-state actors, thus necessitating non-conventional means and methods of response by state militaries. This shift in the paradigm has caused legal experts and battlefield operators to question the continued relevance of the traditional law of armed conflict (LOAC)[2] to modern warfare. They also question whether international human rights law can successfully interact with the law of armed conflict within a situation of asymmetric armed conflict.

Asymmetric conflicts are conflicts where the parties differ in terms of qualitative and/or quantitative strength. Asymmetric warfare is a broad term capturing situations where a party to an asymmetric armed conflict is using illegal, and not necessarily military, means and methods to overcome a military superior adversary.[3] Such irregular combats that are not limited to geographical areas undeniably lead to civilians being more and more affected by the atrocities of war.[4] Armed conflicts nowadays commonly take place in urban environments, performed by people whose combatancy status can be questioned, and directed towards targets which should be immune from attacks under international humanitarian law (IHL). It will be correct to say that almost all armed conflicts today are asymmetric in nature. This assertion is predicated on the fact that they are carried out between parties with different military resources. For instance, all conflicts to which the U.S. is party will by definition be asymmetric simply because of the military superiority of that state. This is the case when a state is fighting a non-state actor, and for that reason this article will focus on the situation where at least one party to an armed conflict is not a state. This in turn means that the law pertaining to non-international armed conflicts (NIACs) will be of special interest. However, since there is no universal consensus regarding the qualification of asymmetric armed conflicts, the rules governing international armed conflicts (IACs) will be referred to when necessary.

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[1]Jeppsson, *Asymmetrisk krigföring – en aktuell krigföringsform*, 2005, p. 37. Available at *http://www.reuters.com/article/2012/09/01/us-afghanistan-bombing-nato-idUSBRE88002T20120901* published on 1st September 2012 and last accessed on 25th February, 2018.

[2]Also referred to as International Humanitarian Law (IHL) or the law of war.

[3]Jeppson, *Op. Cit*. at 32-33.

[4]*Ibid*. p. 31.

States across the globe have signed up to the laws of armed conflicts aimed at ameliorating human sufferings. Despite the presence of International Humanitarian Law, there have been widespread violations by combatants. The intensity of violation is even more in asymmetric warfare. Notwithstanding growing literature on terrorism, especially since September 11, 2001, when the twin World Trade Centres were attacked by the *Al-Qaeda* sect in America, some of the toughest questions concerning security threats posed by terrorism remain unanswered:

1. How does asymmetry in conflict affect terrorism and anti-terrorism efforts?
2. Why are non-state actors in asymmetric armed conflict not committed to adherence to principles of international humanitarian law?
3. At what point do such non-state actors become liable for breaches of laws of war?
4. Why are such non-state actors not prosecuted for war crimes?
5. What measures need be put in place to compel adherence to the rules of engagement by non-state actors in a situation of asymmetric armed conflict?

Breaking new ground, this article provides insights into these and many other difficult questions. The article looks at the two main ideologies of militant groups that use terrorist means—radical nationalism and religious extremism—and at organisational forms of terrorism at local and global levels, exploring the interrelationship between these ideologies and structures. In spite of the state's continuing conventional superiority—in terms of power and status—over non-state actors, the critical combination of extremist ideologies and dispersed organisational structures give terrorist groups many comparative advantages in their confrontation with states. What is responsible for the successes of these non-state actors, and how can they be made to adhere to the rules of International Humanitarian Law?

2. The Historical Background of International Humanitarian Law and Sources of Law

Under this heading, the development that has led up to today's regulation of IHL is explained. The reader is provided with a background to the rules that will later be examined in further detail and pertaining to civilians and direct participation in hostilities.

Geneva Law

The body of law referred to as International Humanitarian Law (IHL) is commonly separated into two branches: Geneva Law and Hague Law. The former regulates protection of people that are affected by armed conflict, whereas the latter regulates means and methods in warfare, such as the use of certain weapons and conduct of hostilities. The development of Geneva Law and Hague Law is traced here.

Battle of Solferino

A peep into history will reveal that the conduct of hostilities has evolved from being barbaric and unregulated to now being governed by regulations that take into account ethical considerations and compromises between military necessity and humanity. From antiquity to the Middle Ages, warfare was hardly governed by any rules; people and goods coming in the way of a belligerent were treated as war booty and the belligerent could dispose of it as he wished. Only a few rules pertaining to prohibited weapons were considered during the battle.[5] The turning point came in 1859 when French, Sardinian and Austrian armies clashed in the Battle of Solferino, Italy. During this battle, more than 40,000 combatants were deadly injured and left behind without any medical assistance. This striking lack of respect for humanitarian values was observed by Henry Dunant, a Genevan businessman, who decided to take action by publishing a book where he stressed the need for legal protection of the wounded and sick in battle field. He also proposed the establishment of national societies who should operate in peacetime as well as providing assistance to wounded and sick in wartime. This proposal led to the foundation of national Red Cross Societies and the International Committee of the Red Cross (ICRC). Dunant's important contribution further led to the creation of the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field (hereinafter GC I), which laid the foundation for modern International Humanitarian Law.[6]

Development of the Geneva Conventions

Since Geneva Convention I, several treaties within the area of International Humanitarian Law have been adopted. Geneva Convention I was revised in 1906, 1929, and 1949, each time updated with a new convention expanding the scope of IHL. Although now comprising four conventions, the whole set is commonly referred to as 'the Geneva Convention'.[7] GC I[8] deals with the protection of the wounded and sick in armed forces in the field; GC II[9] sick and shipwrecked members of armed forces at sea; GC III[10] prisoners of war; and, as a response to the devastating effects of World War II (WW II), GC IV[11] the protection of civilians. The GC has been almost universally ratified, and is considered to have passed into customary international law in its entirety.[12] The only practical implication of the rules having become customary is thus when a new state has come into existence and is involved in an armed conflict without having had the time to ratify the conventions.

Additional Protocols

[5]Kolb & Hyde, *An Introduction to the International Law of Armed Conflicts*, 2008, p. 37.
[6]*Ibid*, pp. 37-38
[7]The different conventions will hereinafter be referred to as GC, followed by the number of the convention.
[8]Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949).
[9]Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949).
[10]Geneva Convention (III) relative to the Treatment of Prisoners of War (1949).
[11]Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949).
[12]Evans, *International Law*, 2010, p. 816.

As a complement to Geneva Convention, two additional protocols were added in 1977. The Additional Protocol I[13] (hereinafter AP I) addresses protection of war victims and conduct of hostilities in International Armed Conflicts, whereas Additional Protocol II[14] (AP II) applies to Non-International Armed Conflicts. These two instruments have not gained the same acceptance worldwide as GC. As concerns AP II, there has been a great deal of reluctance among states to regulate civil wars, which is mainly because states are not willing to give up their power to decide how to deal with domestic outbreaks of violence. Regulating Non-International Armed Conflicts is thus a controversial area, which is also one reason why AP II contains much fewer articles than AP I. Among the states that have signed but not yet ratified the protocols are Pakistan, Iran, India, and the U.S. These countries all possess significant military power and it is of course notable that they are not yet parties to the protocols. However, many rules in the protocols are now seen to reflect customary law, which makes those rules binding even on non-signatory states.[15] The exact scope of the customary rules is not entirely clear, though, which creates a legal uncertainty in terms of application.[16]

Common Article 3 (CA 3)

In the light of the position above, the rules set out in AP II are not always applicable in armed conflicts. This might be so either because a state is not party to the protocol or because the threshold for application is not met. Whereas AP II applies only in armed conflicts 'which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol', Common Article 3 (CA 3) to the GC will apply to all armed conflicts not of an international character. This article contains minimum rules for the conduct of hostilities and thus constitutes a 'mini-convention' for Non-International Armed Conflicts. CA 3 is recognised as customary international law and is therefore binding on all states. The minimum provisions stipulate humane treatment and care of civilians as well as combatants no longer taking part in hostilities, and prohibit acts that are degrading, violent, and humiliating.

Hague Law

The term 'Hague Law' is commonly used as a generic name for treaties governing means and methods of warfare. This portion of the article will briefly explain the main contents of Hague Law, as well as the Martens Clause which is a fundamental principle governing all conduct of warfare.

The Hague Conventions

The core of the Hague Law is the Hague Conventions (HC) of 1899 and 1907,[17] which govern the conduct of hostilities on land, at sea, and in air. The HC have in large parts been recognised as customary international law, and most provisions are thus binding on all states.[18] The cardinal principles deriving from the HC are that (a) parties do not have an unlimited choice of means and methods in armed conflicts, (b) the causing of superfluous and unnecessary suffering is prohibited, and (c) the only legitimate object of war is to overpower or weaken enemy forces in order to get in control of territory or to enforce a political will, not to kill as many as possible.[19]

Martens Clause

The Martens Clause can be found in the preamble to HC II of 1899 and HC IV of 1907 and connects to (b) above regarding the choice of means and methods in armed conflicts. In the preamble of HC IV of 1907, the Martens Clause has the following wording: '[u]ntil a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience.' The same clause, in a somewhat different wording, has also been incorporated in Geneva Convention and Additional Protocol I. Article 1.2 in Additional Protocol I reads: '[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'[20] The Martens Clause got its name after the professor in international law and delegate at the 1899 Hague Peace Conference, Frederic de Martens, and the (simplified) meaning of the clause is that *what is not explicitly prohibited is not econtrario permitted*. The clause serves the role of filling up any gaps in IHL and puts up restraints on the warring parties to comply with principles of humanity even in cases where regulation is lacking. The Martens Clause thus lays a foundation for analogies whenever needed due to technological or other military progresses.[21]

Other Conventions

[13]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977).
[14]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977).
[15]Fleck, *The Handbook of International Humanitarian Law*, 2008, pp. 29-30.
[16]*Op. cit*, p. 53.
[17]Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1899), and Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907).
[18]*Op. cit*, pp. 28-29.
[19]*Op. cit*, p. 1
[20]The equivalent to this provision can also be found in GC I Art. 63, GC II Art. 64, GC III Art. 142, and GC IV Art. 158.
[21]*Op. cit*., pp. 61-63.

Rules governing means and methods of warfare can also be found in numerous conventions regulating specific areas. Examples of this are the prohibition on the use of poisonous gases etc.,[22] the prohibition on the use of biological weapons,[23] the prohibition on the use of environmental modification techniques for military or hostile purposes,[24] the prohibition on the use of chemical weapons,[25] the prohibition on the use of anti-personnel mines,[26] and, of great importance, the certain conventional weapon convention with its protocols.[27] A conclusion that can be drawn from the historical background given above is that IHL has moved from protecting only those fighting on the field to also protecting others affected by the war. This broader scope of protection came with increased civilian contribution to the war effort. World War II was a turning point in history, where war went from being limited to being total, the latter meaning that whole populations became involved in the war by the performance of compulsory war services. Up until the beginning of the twentieth century, wars were limited 'cabinet wars' fought among kings as a means to achieve political goals or to secure or increase territorial borders. Civilians were not directly targeted and could carry on with their lives as normal, suffering only from shortages or other indirect consequences.[28] The shift towards nationalism accounted for this change from limited to total wars. People tended to identify themselves with the state to a larger extent than before and were willing to serve the state by active and direct contribution to the war effort, with or without serving in the army. This development has led to increased civilian participation in hostilities and hence having created difficulties in determining the status of the people involved in the conflict. Other reasons for the change were the shift towards modern industrialism and the shift in technologies. The effectiveness of the industrial production and the invention of new weapons came to be the difference between victory and defeat, and since this production is mainly being performed by civilians, the limits for what constituted a military objective has become blurred.[29] Even more recently, there has been a development of conducting hostilities in urban environments, which has led to an increased number of civilians taking part in the conflict. The distinction between being a passive by-stander in an armed conflict and actively taking part in hostilities is an important one, since participation may lead to a civilian losing protection under IHL.

Customary International Law

International Humanitarian Law is not only governed by conventions, customary international law also plays an important role in regulating the area. Customary international law is established through a combination of state practice and *opinion juris*. In the *North Sea Continental Shelf* case, the International Court of Justice (ICJ) discussed the process that precedes the emergence of a customary international rule: '[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The requirement for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.'[30] This description makes a good starting point, but there lies some difficulties in establishing whether an IHL rule has become customary international law. To all rules there are exceptions; firstly, states that are persistent objectors will not be bound by the rule in question as long as the rule has not become customary (i.e., there is a possibility to 'opt out'), and, secondly, custom can be local and thereby only binding on the states in a specific region, as in the *Asylum* case.[31] Whether or not a rule is binding on all states is thus dependent on if practice and *opinion juris* could be established in a wider sense. A problem pertaining to these criteria is, e.g., that it could be hard to draw conclusions regarding *opinio juris* based on a certain practice. And it could also be hard to determine to which specific rule the *opinio juris* is connected to. Further, some states could hardly express their view on the matter based on geographical or other circumstances. This would for instance be the case for a landlocked state in relation to a certain maritime rule, or for a state that has never been engaged in any armed conflict. Although the establishment of a customary rule is not dependent on practice of all states of the world, the practice must be widespread and consistent.

In International Humanitarian Law as well as in other areas of international law, it is natural that states have different opinions of the exact scope of which rules have become customary. As an attempt to clarify the contemporary situation, ICRC (in close cooperation with several other actors) undertook to do research on most areas of IHL and has presented its view of what has become customary law in different reports. Some of these reports will serve as a foundation for the discussion in the following parts of this article, and although this expresses the view of ICRC, it is justified by the wide acceptance and thorough knowledge ICRC has gained as an impartial humanitarian actor in armed conflicts. What is to be borne in mind, though, is that it lies in the interest of ICRC that as many rules as possible is considered binding upon states as to fulfill their humanitarian obligations in armed conflicts. However, it naturally also lies in the interest of ICRC that the

[22]Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925).
[23]Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1975).
[24]Convention on the Prohibition of Military or any Other Hostile use of Environmental Modification Techniques (1976).
[25]Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1992).
[26]Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997).
[27]UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980), and protocol I-V on non-detectable fragments (Protocol I); on mines booby-traps and other devices (Protocol II); on incenduary weapons (Protocol III); on blinding laser weapons (Protocol IV); and on the explosive remnants of war (Protocol V).
[28]*Op. cit*., pp. 29-31.
[29]*Ibid*., pp. 30-31.
[30]*North Sea Continental Shelf cases,* Judgment, ICJ Reports, 1969, p. 3, para. 77.
[31]*Asylum*, Judgment, ICJ Reports, 1950. The court concluded that the granting of diplomatic asylum between certain Latin-American countries constituted a regional custom that did not correspond to established practice elsewhere.

reports reflect reality in an accurate and correct way so that parties to armed conflicts can agree upon and are willing to comply with the rules.

3. Armed Conflicts

At inception, International Humanitarian Law was drafted to cover International Armed Conflicts, i.e. armed conflicts between two or more states. However, only a handful of recent conflicts actually fall into the scope of this definition. Most armed conflicts today are fought between actors where at least one party is not a state, and often these conflicts take place within the territory of one single state, but there might also be international elements in these conflicts. Since different sets of rules apply to International Armed Conflicts and Non-International Armed Conflicts, it is important to start by qualifying the conflict at hand.

What Amounts to Armed Conflict?

The starting point in all qualification operations is whether there exists an armed conflict at all. Not all violent acts lead to the applicability of IHL, and different thresholds apply in IACs and NIACs.[32] What complicates the matter is that armed conflict is not defined in any treaty.[33] According to the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case,

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International Humanitarian Law (IHL) applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, [IHL] continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[34]

The statement above shows that there are different thresholds for when IHL comes into application for IACs on the one hand and NIACs on the other. For IACs, it suffices to conclude that states have resorted to armed force,[35] whereas in NIACs the conflict must reach a certain level of intensity and the parties must reach a certain level of organization. And even if established that there is an armed conflict, there are different thresholds in CA 3 and AP II, the latter which not all states are parties to, but in large parts reflect customary international law. Given the scope of this article, main focus in the following part will be on determining when a NIAC exists.

International Armed Conflicts

The main source regarding the definition of International Armed Conflicts (IACs) is Common Article 2 (CA 2) of the Geneva Convention, which regulates armed conflicts between two or more 'High Contracting Parties', i.e. states parties to the conventions. This provision stipulates that there are three different situations where International Humanitarian Law (IHL) applies, namely in cases of (1) effective armed conflict, (2) declared war, or (3) occupation of territory without armed resistance.[36] Not surprisingly, effective armed conflicts between states are today the most common trigger for application of IHL in cases of IACs.[37] As follows from the *Tadić* case above, IHL comes into application when states resort to armed force. The threshold for application is thus rather low. If established that armed conflict is actually taking place, then the whole set of rules within IHL becomes applicable, i.e. both treaty law and customary rules.

Non-International Armed Conflicts

Like International Armed Conflicts, Non-International Armed Conflicts (NIACs) are regulated through both treaties and customary international law. The main difference, however, is that because states have been reluctant to give up their sovereign right to regulate internal matters, there is a higher threshold for application of IHL in NIACs. There are also significantly fewer treaty rules pertaining to NIACs than to IACs. As mentioned above in 3.1.4, CA 3 is a 'mini convention' that provides minimum protection for victims of internal armed violence. The threshold for application of this article is low, but it should be borne in mind that it only covers certain very fundamental rules regarding the conduct of hostilities. Following the *Tadić* case, it is now accepted that there are two main criteria in order for the application of IHL in NIACs to come into force. These are, firstly, that rebel forces must show a minimum level of organization, and, secondly, that the armed conflict shows a certain degree of intensity. The consequence of this is that there might be situations where armed violence takes place, but nevertheless fall beneath the threshold for when IHL comes into application. These are, e.g., internal disturbances and tensions, riots, and sporadic acts of armed violence.[38] That said, it is of course possible that a conflict might change in classification during ongoing hostilities, or that different conflicts take place at the same time in the same area.[39]

Minimum Level of Intensity

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[32]Kolb & Hyde, *An Introduction to the International Law of Armed Conflicts*, 2008, p. 74.
[33]Evans, *International Law*, 2010, p. 819.
[34]*Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Interlocutory Appeal), Case No IT-94-1-AR72, 2 October 1995, para 70.
[35]It is of course subject to interpretation regarding what constitutes 'armed force' between states, something that will not be further discussed here. Although there is a threshold in IACs, it is lower than for NIACs.
[36]Additional protocol I Art. 1(4) regulates wars of national liberation, which is a situation also covered by IHL.
[37]*Op. cit*., p. 77.
[38]*Ibid*., p. 78.
[39]Evans, *International Law*, 2010, p. 820. Compare Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 2005, p. 196.

The term 'protracted armed violence' was introduced by ICTY in the *Tadić* case, and suggests that for an armed conflict to be classified as a NIAC, the hostilities must not only be sporadic. This implied temporal element has created some confusion, since the term 'protracted' is not to be found in either CA 3 or AP II. CA 3 does not contain any intensity criteria, and it might therefore be somewhat difficult to establish when CA 3 becomes applicable in low-intensity conflicts. However, since this is a very broad article serving as a fundamental guarantee for humane treatment, the threshold should not be set too high. As regards AP II, the term protracted is not mentioned, but instead Art. 1.1 speaks of a party's ability to carry out sustained and concerted military operations. Art 1.2 excludes from the Protocol's scope of application the sporadic outbursts of violence and internal disturbances. There have been suggestions that 'protracted' does not mean the same thing as sustained or continuous armed violence, but rather the combination of factors such as time, violence, deaths, and so on.[40] There has also been debate as to whether terrorist attacks carried out by terrorist organisations generally should be seen as reaching the minimum level of intensity or if this instead should be dealt with as criminal acts subject to a domestic law enforcement system.[41]

Minimum Level of Organisation

'Party to the conflict' as contained in Common Article 3 or AP II has not been capable of any definition. The *Tadić* case gives little guidance: ICTY speaks of 'organised armed groups' but does not define it. Instead, the question was further discussed in the *Milošević* case,[42] where it became necessary to evaluate the status of the Kosovo Liberation Army (KLA). If KLA would be found not to have the attributes of an organised armed group, *Milošević* could not have committed war crimes since there would not have been an ongoing NIAC. However, ICTY found that there was 'a sufficient body of evidence pointing to the KLA being an organised military force, with an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.'[43] In the *Limaj* case,[44] ICTY provided further guidance on the question, once again with regard to the status of KLA. Here it was emphasised that the functions carried out by the leaders could lead to a classification of the group as organised, for instance if they were found to be 'speaking with one voice' and carrying out diplomatic negotiations. Also underscored was the ability to recruit, arm, and train members of the group, as well as the ability to carry out effective and large military operations. The types and quantity of weapons used could also give guidance on what level of organization the group in question possesses.[45] Although each armed conflict has its own special characteristics and requires a case-to case evaluation, the *Milošević* and *Limaj* cases provide some guidance on when an armed group reaches the level of minimum organization. In summary, it should resemble a military unit in its structure and have access to military equipment that makes it able to conduct military operations.

4. Asymmetric Warfare

In a sense, all warfare could be labeled as asymmetric since no adversaries will be entirely equal. However, for the purposes of this article, asymmetric warfare is when a weaker party to an armed conflict seeks to defeat a military superior opponent by using methods that are not in conformity with International Humanitarian Law (IHL). This section will briefly explain the forms as well as three types of asymmetric warfare common in contemporary armed conflicts, which all tend to disregard protection of civilians and civilian objects. These are terrorism, guerilla warfare, and insurgency.[46] Main focus will be on terrorism, since also guerillas and insurgents occasionally employ the same means and methods. Before discussing those methods, the theory behind asymmetric warfare, the forms and the concept of fourth generation warfare (4GW) will be explained in further detail.

The Theory behind Asymmetric Warfare

Although today's international community is facing different threats than a century ago, asymmetry in conflicts is in itself nothing new. Parties to armed conflicts have through all times sought to defeat their opponents by striking against the opponent's weakest points. As Sun Tzu described it more than 2000 years ago,

> [T]he nature of water is that it avoids heights and hastens to the lowlands. When a dam is broken, the water cascades with irresistible force. Now the shape of an army resembles water. Take advantage of the enemy's unpreparedness; attack him when he does not expect it; avoid his strength and strike his emptiness, and like water, none can oppose you.[47]

According to Thornton, Asymmetric warfare is as old as warfare itself and as recent as the last terrorist outrage.[48] But even if asymmetry in theory is nothing new, the means and methods in those conflicts have changed to involve the civilian society to a much larger extent than before. Contemporary asymmetric warfare catches situations where a weaker party to an armed conflict chooses methods that are not in conformity with IHL to weaken its stronger opponent. This is very effective for non-state actors, because opponent states normally do not consider themselves able to deviate from the rules in the same manner without facing the risk of serious consequences both in terms of responsibility and reputation. As Barnett puts it: True asymmetry [involves] those actions that an adversary can exercise that you either cannot or will not.[49] The constant race

[40]Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, 2010, pp. 127-133.
[41]Even-Khen, *Can We Now Tell What 'Direct Participation in Hostilities' is?*, 2007, p. 220.
[42]*Prosecutor v. Milošević*, et al., Second Amended Indictment, Case No. IT-99–37-PT, 16 October 2001.
[43]*Prosecutor v. Milošević*, Trial Chamber Decision, Case No. IT-02-54-T, 16 June 2004, para. 23.
[44]*Prosecutor v. Limaj et al.,* Second Amended Indictment, Case No. IT-03–66-PT, 6 November 2003.
[45]*Limaj et al.,* Judgement, Case. No. IT-03-66-T, 30 November, 2005, para. 94-134.
[46]Compare Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-First Century*, 2007, p. 3.
[47]Sun Tzu, *The Art of War*, Ch. IV, Dispositions, § 20.
[48]Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-First Century*, 2007, p. 2.
[49]Barnett, *Asymmetric warfare: Today's Challenges to US Military Power,* 2002, p. 15.

toward new military innovations and world leading technology means that the disparity between weak and strong is ever increasing. Paradoxically, the more equipped and trained strong states get, the bigger the risk becomes for being defeated by weak non-state actors using asymmetric warfare.[50] But with technology comes also opportunities; a military superior party to an armed conflict is today able to defeat a weaker opponent without even physically entering foreign soil.[51] The consequences of asymmetric warfare are not yet clearly evident in terms of IHL contents and application, and more thorough research would therefore be a much-welcomed contribution to literature on IHL.

There is generally large consensus worldwide that casualties should be kept to a minimum in armed conflicts. The history behind IHL and the reasoning behind protection of civilians had earlier been discussed, and most people would agree that the civilian population should be left out whenever hostilities are going on. This could be seen as a 'casualty aversion policy' shared by most states and shaping the conduct of hostilities. For the non-state actor who uses asymmetric warfare as strategy, however, striking against the civilian society is often seen as a necessary method in order to win the war. The non-state actor can benefit from the state's fear of casualties in different ways. Firstly, the casualty aversion policy means that the opponent state will be easily coerced if threats are directed towards its citizens. The state will normally do everything possible to avoid the deaths of innocent people. This puts the non-state actor in a more powerful position than it would otherwise have. Secondly, casualty aversion also means that there are time limits for how long a conflict is justifiable.[52] The non-state actor is usually well aware that the state will only fight for as long as it has support; otherwise, the government runs the risk of not being reelected. Support will be likely to decrease with every single death of an innocent person, regardless of which side fired. This means that as long as the non-state actor avoids open confrontation and is carrying out sustained operations against soft targets such as the civilian population, there is chance of winning the conflict. The non-state actor does of course take the risk of losing support for its own cause when targeting civilians, but generally asymmetric warfare is closely surrounded by propaganda campaigns and strong local support for the non-state actor.

Fourth Generation Warfare

A term that sometimes is used as a synonym to asymmetric warfare is fourth generation warfare (4GW). The U.S. Marine Corps introduced the term 4GW in 1989 after having analysed the contemporary security situation under the lead of William Lind.[53] The conclusion of this analysis is that modern military history can be divided into three different eras, or 'generations' of warfare, and that a fourth generation had begun to crystallise at the time of the analysis.[54] As a result of the interesting contribution the theory makes to the discussion on the development of warfare, it is pertinent to describe it in short here. The first generation of warfare (1GW) started by the Treaty of Westphalia in 1648 and went on until around 1860.[55] At this time in history, the political, economic, and social development in Europe permitted states to set up large armies who clashed on traditional battlefields, using the tactics of line and column.[56] During 1GW, the foundation was laid for many traditions that distinguish military from civilian, such as the use of uniforms, saluting, and gradation of rank.[57] The weapons used were muskets and canons, however, states were not industrialised enough to maintain a steady supply of arms for their armies.[58] There was a second generation of warfare (2GW) that took place during the Industrial Age. At this time in history, states had become even more economically developed and thus had the possibility to mass produce more advanced weapons. Tactics were based on fire and movement, and the state that produced the largest quantity of arms was likely to win the war. Not only were new weapons developed during this time; communication systems and logistics did also contribute to a new and more effective way of fighting.[59] A third generation warfare (3GW) emerged during World War I (WW I). Here, non-linear fighting and use of intelligence to overcome the adversary came to play the crucial parts of warfare. During WW II, the Germans introduced the concept of Blitzkrieg – to quickly overcome the opponent by 'shock operations. The mental part of warfare came to be at least as important as the military equipment.[60] This development led on to what has now come to be called the fourth generation of warfare, or 4GW. The 4G adversaries will almost exclusively use non-linear tactics that are directed against both military and civilian targets. The goal is to obtain a collapse from within and to create as much harm as possible with the smallest possible use of military means.[61] This harm is easiest to attain in civilian environments.[62]

Given the historical background, it could be concluded that traditional armies have a military structure and organization that is well prepared to meet the threats of 2G or 3G adversaries, but when it comes to 4GW they are insufficiently trained both from a physical and psychological point of view.[63] So that the new threats coming from 4G adversaries will be met, it has been suggested that conventional armies must adopt the same way of fighting.[64] The 4G adversaries are reputed for

[50]Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-First Century*, 2007, p. 6.
[51]ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2003, p. 7.
[52]Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-First Century*, 2007, pp. 9-12.
[53]The reason why the U.S. Marine Corps undertook the analysis is probably because they traditionally had been fighting small, low-intensity wars, as opposed to the Army who are trained to fight 'big wars', see Thornton p. 153.
[54]Lind et al., *The Changing Face of Warfare: Into the Fourth Generation*, 1989, preamble.
[55]Lind, *Understanding Fourth Generation Warfare*, 2004, p. 12.
[56]Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-First Century*, 2007, p. 153, and Lind et al., *The Changing Face of Warfare: Into the Fourth Generation*, 1989, p. 23.
[57]Lind, *Understanding Fourth Generation Warfare*, 2004, p. 12.
[58]Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-First Century*, 2007, pp. 153-154.
[59]Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-First Century*, 2007, p. 154.
[60]Lind, *Understanding Fourth Generation Warfare*, 2004, p. 13.
[61]Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-First Century*, 2007, pp. 155-156.
[62]*Ibid*.
[63]*Ibid*., p. 174.
[64]*Ibid*., p. 156.

demonstrating skill at turning their shortcomings to advantages, for instance by operating in small and flexible units as a corollary to lacking in manpower. In fact, according to Lind et al., 'mass may become a disadvantage as it will be easy to target.'[65] In view of that, the big challenge that lies ahead for conventional armies is to adapt to 4GW. It is important to underscore that this is not about using the same means and methods as the 4G adversaries, which today are likely to be terrorist groups, guerilla units, or insurgents. Rather, it is about being more flexible and being able to adjust the operation to the specific environment. Armies are trained to carry out large operations in large units, and if doing this in urban environments, there is always a risk that the civilian population will be disproportionally affected. Excessive use of force against small units will undeniably lead to collateral damage if carried out in densely populated areas.

Forms of Asymmetry

This section explores asymmetry's influence on the law governing methods and means of warfare. International humanitarian law (IHL) and war exist in a symbiotic relationship. Most typically, IHL reacts to shifts in the nature of warfare; indeed, most major humanitarian law treaties arrived on the heels of a major conflict in response to *post factum* concerns over particular aspects thereof. To grasp the normative consequences of asymmetry, it is necessary to conceive of the notion very broadly. Steven Metz and Douglas Johnston of the U.S. Army War College have fashioned a particularly useful definition in this regard. According to Metz and Johnson,

> [I]n the realm of military affairs and national security, asymmetry is acting, organizing, and thinking differently than opponents in order to maximize one's own advantages, exploit an opponent's weaknesses, attain the initiative, or gain greater freedom of action. It can be political-strategic, military strategic, or a combination of the two. It can entail different methods, technologies, values, organizations, time perspectives, or some combination of these. It can be short-term or long-term. It can be deliberate or by default. It can be discrete or pursued in combination with symmetric approaches. It can have both psychological and physical dimensions.[66]

As is apparent, asymmetry has many dimensions. It operates across the entire spectrum of conflict, from the tactical through the operational to the strategic levels of war. For instance, looking at it from the tactical level, troops with lightweight body armour have a distinct advantage over those without advanced protection. At the operational level, on the other hand, a networked force with real-time access to state-of-the-art C4ISR assets has a much better understanding of the battle. This allows it to act more quickly and decisively than does of its enemy. The strategic level of conflict has both military and political dimensions. At the military strategic level, asymmetry may itself become a strategy. Terrorism is the most compelling contemporary exemplar. Political strategies with military impact include the formation of alliances, crafting humanitarian law or arms control regimes, and other efforts to leverage diplomacy, law, information, and economics to enhance one's military wherewithal.

Asymmetry not only acts at different levels; it also takes multiple forms. Most noticeable is technological asymmetry, which occurs when one side of a conflict possesses superior weapon systems and other military equipment (means of warfare).[67] Currently, the U.S. military far outdistances all other armed forces in this regard. Other Western countries, primarily those in NATO, occupy a second tier of technological advantage. The militaries that remain have little hope of reaching such levels. This reality is unlikely to change anytime in the near future, for U.S. investment in research and development dwarfs that of all other nations.[68] Of course, some technology will 'trickle down,' but those who benefit in this way are the least likely to find themselves at odds with the United States. The existing qualitative divide can only be expected to grow. A second form of military asymmetry involves methods of warfare, specifically doctrines.[69] For advanced Western militaries, effects-based operations (EBO) have replaced attrition warfare as the pre-eminent asymmetrical operational concept. Effects-based operations are tactics designed to generate defined effects on an opponent. Terrorism also constitutes an asymmetrical doctrinal concept.[70] Increasingly adopted by low-tech forces to counter the military preeminence of their opponents, it is analogous to, albeit more nefarious than, the guerrilla warfare that was so effective against U.S. technological dominance in Vietnam. Less obvious forms of asymmetry also influence the application of IHL. A conflict can be normatively asymmetrical when different legal or policy norms govern the belligerents. Normative asymmetry may even exist between allies. Conflicts can also be asymmetrical with regard to the participants therein. Although IHL is based on the premise of hostilities between armed forces (or militia and other groups that are similarly situated and meet set criteria), actors in modem warfare increasingly deviate from this paradigm. Finally, belligerents may be asymmetrically positioned by virtue of their *jus ad bellum* status or moral standing, real *or perceived.* Of course, when notions of legal or moral valence infuse the resort to arms, attitudes towards the application of IHL are inevitably shaped accordingly. It is to the impact of such asymmetries on international humanitarian law that we now turn.

Asymmetry and International Humanitarian Law (IHL)

[65]Lind et al., *The Changing Face of Warfare: Into the Fourth Generation*, 1989, p. 23.
[66]Steven Metz & Douglas V. Johnson II, *Asymmetry and U.S. Military Strategy: Definition, Background, and Strategic Concepts* (2001).
[67]Technological asymmetry has become much more significant in modem warfare than numerical ones.
[68]In 2006 global military expenditures reached $1.204 trillion. The United States accounted for 46% of the total, followed by France, Japan, China, and the U.K. at roughly 4-5% each. Stockholm International Peace Research Institute, Recent Trends in Military Expenditure, *www.sipri.org/contents/milap/milex/mextrends.html* accessed on 5th May, 2019.
[69]Doctrine consists of 'fundamental principles by which the military forces or elements thereof guide their actions in support of national objectives.' DOD Dictionary.
[70]Terrorism represents a form of EBO since the true targets are seldom an attack's immediate victims, but rather the attitudes of the population, political leaders, members of the armed forces, international community, and so forth.

Each form of asymmetry already discussed - technological, doctrinal, normative, participatory, and legal or moral standing - exerts measurable influence on the application of international humanitarian law. A disturbing example is mistreatment of detainees by members of the U.S. armed forces.[71]

5. Conclusion

States which face non-state actors in military armed conflict tend to claim that changes to IHL/LOAC are required. This article attempts to show that a proper interpretation of the existing principles of IHL might sometimes provide satisfactory answers to the problems posed by non-state actors. Its main argument involves the principle of proportionality. This principle is best understood as an administrative or institutional principle intended to be based on the reasonable discretion of the commander in the field. This discretion is not unlimited – it is guided by respect for human life and civilian immunity. It should be reviewed in advance to make sure that the proper questions are asked. It should be reviewed after the actions take place in order that mistakes might save future commanders from similar mistakes. Proportionality in international humanitarian law is a complicated principle to apply. However, this does not make this norm unimportant, or inapplicable. This work shows that a proportionality principle, properly defined, could serve as a reasonable and appropriate guiding principle even in asymmetrical wars against terrorist organisations, non-state actors, and all those who do not respect the laws of war. This has been done in the past, and should likewise be done in the future. Asymmetrical conflicts are fought between a state following the laws of armed conflicts or international humanitarian law, and organizations that almost never follow these rules and have very little incentive to do so. While the Geneva Conventions and their protocols were framed in an era of 'classic' military engagements, when wars were fought between nations and by armies that observed the rules of armed conflict, we should examine whether these norms are suited to modern armed conflicts.

In practice there exist two very different approaches to the interpretation of the principle of proportionality: the human rights model, which gives preference to the interests of civilians who might be harmed by military action, and the contractual model, which gives precedence to state interests. Yet a third approach may be more suitable: the administrative model, based on respect for the professional discretion of the commander in the field, with some necessary limitations. The concept of proportionality permits military personnel to kill innocent civilians – provided that the intended targets of the operation are military and not civilians. States involved in these conflicts mostly attempt to follow, or are expected by the international community to follow, IHL as detailed in customary international law, in the Geneva Conventions, and in other sources of applicable international law. However, it has become increasingly difficult to abide by these laws, mainly because of the novel nature of the problems that constantly arise. This brief review will only deal with two of the most prominent of such problems:

> The first is how to apply the rule forbidding indiscriminate attacks on a civilian population when the enemy deliberately operates from within that environment.
> *Direct* attacks against civilians are of course always forbidden. However, what are the appropriate norms that a state should apply when the only possible way of fighting the enemy involves risking the lives of civilians whom the enemy is using for its own protection?
> A second problem arises from the fact that non-state actors are not susceptible to the range of formal and informal sanction which may be used against states. Since international law is not policed effectively, non-state actors may readily assume that their violations of the laws of war, including those mentioned above, will not be punished by law. For example, they may target civilians of the state actor in the knowledge that there exists very small chance that they will be punished for doing so by any international judicial body. Consequently, while one side to the conflict behaves in accordance with IHL, the other considers itself to be free of the limitations imposed by these rules.

Consideration of these and similar issues has motivated some scholars and politicians to call for the redefinition or reinterpretation of the rules of armed conflicts. The Geneva Conventions and their protocols, runs their argument, were framed in an era of more 'classic' military engagements, when wars were fought between nations and by armies that observed the rules of armed conflict. The norms that may have been suitable in such situations are not suited to modern armed conflicts. Changes to IHL may indeed be required, although it will prove very difficult to actually convince states to adopt them. However, before tabling dramatic changes, it might be useful to evaluate the current state of IHL, and ask whether some of the problems discussed above cannot be solved within the *existing* framework, without a need for reconstruction. Though asymmetric operations are prevalent, IHL is still relevant. The Convention (IV) Relative to the Protection of Civilian Persons in Time of War correctly identifies many of the conditions typical of modern armed conflict and remains applicable to contemporary circumstances. The purpose of IHL is to protect people who are not (or are no longer) taking part in hostilities (*hereinafter* non-combatants or protected persons) and to restrict the methods and means of warfare that parties to a conflict may employ. Both of these IHL concepts remain important in contemporary armed conflict. Non-combatants have a right to humanitarian treatment; controlling authorities have a responsibility to provide for the needs of their population; and parties to a conflict must distinguish non-combatants from belligerents and ensure that aid for the protected population is not diverted to support the enemy of the party who is allowing aid to be delivered.

[71]To some extent, mistreatment of Afghan and Iraqi (and other nationality) prisoners was made 'more acceptable' by the unlikelihood that U.S. troops would be taken prisoner and mistreated in return. In other words, reciprocity did not operate as the incentive for compliance it usually acts as in IHL. No U.S. soldiers were taken prisoner in Afghanistan. Nine were seized in Iraq, eight of which were rescued. CNN, War in Iraq, *www.cnn.com/SPECIALS/2003/iraq/forces/pow.mia/*. Accessed on 20th May, 2013.