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Asymmetric Warfare: How to Respond?

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Introduction

Demands for a reform of the law of armed conflict are often justified by claiming that the “novel” phenomenon of asymmetric warfare has proven the inadequacy of that body of law. Allegedly, the law of armed conflict is characterized by a post-Westphalian approach, that is, its underlying concept is one of symmetric warfare between belligerents that will abide by its rules only because they expect their opponent to also abide (the principle of reciprocity). In asymmetric warfare reciprocity is said to have become obsolete and the allegedly “new” threats brought about by that “novel” phenomenon call for an adaptation of the law of armed conflict.

It will be shown in this article that asymmetric warfare is far from being unprecedented, and that either the law of armed conflict has been adapted to address past forms of asymmetric warfare or, in other instances, adaptation has been unnecessary despite the asymmetries. Accordingly, the calls for “new” law, if not unfounded, are, at a minimum, premature. It is conceded, however, that it has become increasingly difficult to cope with certain forms of asymmetry; therefore it is of the utmost importance to develop strategies that enable States and their armed forces to adequately respond to asymmetric warfare.

Finally, this article will focus on situations of armed conflict, whether of an international or of a non-international character. Cross-border—or so-called spillover—

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effects in a non-international armed conflict neither change the character of the armed conflict nor pose insurmountable problems.¹ If, for instance, non-State actors engaged in a non-international armed conflict seek refuge in a neighboring State, this does not necessarily mean that they will be immune from attack.

There may be situations, however, that do not qualify as an armed conflict even though armed forces are engaged in military operations against “asymmetric actors.” While the law of armed conflict will not be applicable in such circumstances, this does not mean that public international law is silent on the matter. For instance, counter-piracy operations are governed by the law of the sea or, as in the case of piracy off the coast of Somalia, by applicable UN Security Council resolutions.² Very often international human rights law—though contained in a regional convention—will play an important role.³ Counterterrorism operations may also be based on UN Security Council resolutions or on the inherent right of self-defense.⁴ It needs to be emphasized with regard to the latter, however, that States have not yet agreed upon the criteria that give rise to the right. Because of the variety of regimes that may be applicable, the armed forces deployed to counterterrorism operations all too often lack the legal clarity and legal security that are of vital importance for the success of contemporary military operations.

I. Forms of Asymmetric Warfare

Some of the past efforts to define asymmetric warfare have not been very helpful in identifying the underlying problems. For instance, asymmetric warfare used to be defined as “a conflict involving two states with unequal overall military and economic resources.”⁵ In reaction to the terrorist attacks of 9/11 the definition has been modified. Asymmetric warfare is now defined by one author as “leveraging inferior tactical or operational strength against [the] vulnerabilities of a superior opponent to achieve disproportionate effect with the aim of undermining [the opponent’s] will in order to achieve the asymmetric actor’s strategic objectives.”⁶ While this definition has the advantage of not being limited to inter-State armed conflicts, it has not added much, insofar as almost all armed conflicts have been asymmetric.

Asymmetries in warfare include asymmetries of power, means, methods, organization, values and time.⁷ Asymmetry can be participatory, technological, normative, doctrinal or moral.⁸ In that sense, wars have always been characterized by at least one form of asymmetry. For instance, any armed conflict involving the United States will by definition be asymmetric because of the technological superiority of the US armed forces. The same holds true for any armed conflict involving non-State actors, be they partisans, resistance fighters, rebels or terrorists. Moreover, it

must not be forgotten that in any war or armed conflict there is a considerable element of surprise that makes it impossible to predict its course or outcome. The enemy may employ methods, strategies or tactics not envisaged and that aim at the opponent's vulnerabilities. Asymmetry, therefore, is not a "novel" phenomenon as some would characterize it but an intrinsic characteristic of any war.⁹

It therefore seems that the term "asymmetric warfare," which is by no means a legal term of art, is nothing but a description of a fact of life. In this context, it is, however, important to bear in mind that warfare, particularly in Western societies, is perceived from a post-Westphalian perspective—that is, as armed hostilities predominantly conducted under State control and between combatants in which civilians and civilian objects are largely spared from violence and destruction. From the outset of its development in the middle of the nineteenth century, the modern law of armed conflict has been based on that approach. It must also be noted that, to a certain extent, the law of armed conflict recognizes—or implicitly accepts—the different forms of asymmetry. Still, the law's underlying concept is that of symmetric warfare in which the use of force is limited to lawful targets and is premised on the belief that the parties to the conflict will abide by its rules.

The development of the law of armed conflict has resulted in abolishing the prevalence of military necessity over considerations of humanity ("*Kriegsräson geht vor Kriegsmanier*") by establishing an operable balance between the two that, while placing limits on the means and methods of war, does not make warfare impossible.¹⁰ This approach has been, still is and will continue to be challenged by the conduct of hostilities in contemporary armed conflicts that are characterized by an increasingly structured and systematic deviation from the law. There is a growing "tendency for the violence to spread and permeate all domains of social life. This is because the weaker side uses the community as a cover and a logistical base to conduct attacks against a superior military apparatus."¹¹ Hence, in asymmetric warfare,

the weaker party, recognizing the military superiority of its opponent, will avoid open confrontation that is bound to lead to the annihilation of its troops and to defeat. Instead it will tend to compensate its inadequate arsenal by employing unconventional means and methods and prolonging the conflict through an undercover war of attrition against its well-equipped enemy.¹²

In summary, the term "asymmetric warfare" is to be understood as applying to armed hostilities in which one actor/party endeavors to compensate for its military, economic or other deficiencies by resorting to the use of methods or means of warfare that are not in accordance with the law of armed conflict (or of other rules

of public international law). It is important to stress that the motives or strategic goals of asymmetric warfare, while important to understand, are irrelevant from a legal point of view. Finally, the definition of asymmetric warfare here proposed does not mean that other forms of asymmetries are neglected.

II. Applying the Lex Lata

It needs to be emphasized from the outset that the law of armed conflict has never been modified with a view to compensate for technological dissimilarities between the parties to the conflict. For instance, Russia and the United Kingdom endeavored to outlaw the submarine as a means of naval warfare because it posed a considerable threat to their superior surface forces. Those efforts were in vain.¹³ Developments in weapons technology have at best been an incentive for a modification of the law with a view to meeting humanitarian considerations.¹⁴ (Although there are times when one cannot avoid the impression that humanitarian considerations are a pretextual argument for the true intention of abolishing war through the laws of war (correctly characterized as “lawfare”¹⁵).

On the other hand, the law of armed conflict has been adapted to address certain forms of participatory asymmetries. For instance, many of the atrocities committed during the Second World War were justified as legitimate responses to the conduct of asymmetric warfare by the opposing belligerent, *inter alia*, by partisan attacks. That led to the killing of hostages and other innocent civilians, or to the wanton destruction of villages in territory occupied or under the control of the German *Wehrmacht*. The law of armed conflict has been progressively developed in order to eliminate such conduct in future armed conflicts.

Hence, the law of armed conflict accepts asymmetries in warfare, be they technological or doctrinal, and it reacts to such asymmetries only if there is a necessity of preserving minimum standards of humanity or of “alleviating as much as possible the calamities of war.”¹⁶ Moreover, the law of international armed conflict aims to maintain the public character of warfare by indirectly reserving the right to harm the enemy to a privileged group of actors.¹⁷

Normative and Moral Asymmetries

Normative and moral asymmetries, while sometimes posing considerable political and/or operational problems, are, in principle, irrelevant from the perspective of the law of international armed conflict.

This especially holds true with regard to the legality or illegality of the resort to the use of armed force under the *jus ad bellum*. According to the principle of equal application, the law of international armed conflict applies to every situation

amounting to an international armed conflict irrespective of the political or strategic goals pursued and irrespective of the legality of the resort to armed force by either of the belligerents.¹⁸ Therefore moral or normative asymmetries are, in principle, irrelevant, although they may have considerable political and strategic impact.

This also holds true for a resort to the use of armed force authorized or mandated by the UN Security Council. As emphasized in the 1999 UN Secretary-General's Bulletin, the "fundamental principles and rules of international humanitarian law . . . are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement."¹⁹

Moreover, the causes for a resort to the use of armed force have no impact on the scope of applicability of the law of armed conflict. There have been suggestions that military operations aiming at the protection of human rights are governed by stricter legal limitations than "regular" armed conflicts.²⁰ State practice, such as in the context of the Kosovo campaign, provides insufficient evidence to establish that such suggestions have a basis in existing law.²¹

Other normative asymmetries may have an impact on the law of armed conflict. Such normative asymmetries occur if the parties to an international armed conflict are not bound by the same treaties. As in general international law, law of armed conflict treaties only apply to States parties unless a State not party to a given treaty expressly accepts and applies it.²² Absent such a declaration, the hostilities will only be governed by customary international (humanitarian) law.

Treaties do not, however, become inapplicable if members of an alliance are not bound by the same treaties. The ensuing potential interoperability problems, that is, States within an alliance operating under different legal obligations, are often solved by a "matrix" solution. Thus, if a certain task involves conduct that would violate a treaty obligation of some alliance members, the force commander will entrust that task to units of States not bound by the treaty restrictions. The legality of such conduct has been recognized by Article 21(3) of the 2008 Convention on Cluster Munitions, which provides: "Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party."²³ Finally, States may differ on the interpretation of a treaty by which they are equally bound or of a rule of customary international humanitarian law. Again, the problem of interoperability is very often solved by either national caveats or by other procedural safeguards, such as the "matrix" solution.

Asymmetric Actors (Participatory Asymmetries)

It has been rightly stated that one of the characteristics of asymmetric warfare (as understood here) is that the “dividing line between combatants and civilians is consciously blurred and at times erased.”²⁴ This inevitably results in attacks against the civilian population and individual civilians, or even in conduct amounting to prohibited perfidy. Such conduct is far from new. The existing law of armed conflict is based on the experience of past armed conflicts and has, in principle, preserved the general distinction between protected civilians on the one hand and, on the other hand, persons who, either as combatants or as members of organized armed groups or as civilians, take a direct part in hostilities.

International Armed Conflict

Unfortunately, the adaptation of the law of international armed conflict to the changed realities of war has not always been satisfactory. This especially holds true for Article 44(3) of 1977 Additional Protocol I (AP I), which diminishes the obligation of combatants to distinguish themselves from the civilian population.²⁵ That provision does not constitute customary international law and its scope of applicability is limited to situations of “internationalized armed conflicts” in the sense of Article 1(4) of the Protocol.²⁶ However, it certainly provides a degree of protection to members of organized armed groups who intentionally disregard its minimum requirements.²⁷

Apart from that, the law of international armed conflict is rather clear: persons directly participating in the hostilities who qualify neither as combatants nor as members of any of the other privileged groups²⁸ do not enjoy combatant immunity or, when captured by the enemy, prisoner of war status. As far as civilians are concerned, this has been expressly recognized by Article 51(3), AP I: “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” Of course, the exact meaning and scope of the concept of direct participation in hostilities is far from settled.²⁹ The same holds true with regard to the legal status of civilians directly participating in hostilities. Some continue to consider them as civilians protected under the Fourth Geneva Convention³⁰ who may, however, be attacked (for such time they are directly participating in hostilities) and punished for their conduct.³¹ Others consider them “unlawful combatants” who are protected by neither the Third Geneva Convention on the treatment of prisoners of war nor the Fourth Geneva Convention.³²

The law of international armed conflict provides a rather elaborate set of rules responding to participatory asymmetry and offers an operable solution to most of the problems encountered in recent international armed conflicts. While there is no prohibition of entrusting persons other than combatants with the commission

of acts harmful to the enemy, those persons not enjoying combatant immunity directly participating in hostilities must understand that they enjoy no protection under the law of armed conflict beyond the minimum standards laid down in Article 75 of AP I and in Common Article 3 of the four 1949 Geneva Conventions.

Accordingly, members of organized armed groups that do not belong to a party to an international armed conflict but who directly participate in hostilities do not pose an insurmountable legal problem. They may either be considered as civilians directly taking part in the hostilities, who, for the duration of their direct participation, are liable to attack and who may be prosecuted after capture, or, alternatively, the organized armed group to which they belong is a party to a non-international armed conflict that exists side by side with the international armed conflict. In the latter instance, the members of such a group—at least if and as long as they perform a “continuous combat function” within the organized armed group³³—are legitimate targets who enjoy neither combatant immunity nor prisoner of war status after capture.

Non-international Armed Conflicts

Non-international armed conflicts are asymmetric by nature, particularly if regular armed forces are engaged in hostilities against organized armed groups of non-State actors. Since, however, the concept of “combatant” does not apply to non-international armed conflicts the applicable law is not built on the legal status of the actors. It is important to note in this context that the very existence of a non-international armed conflict presupposes that there exists at least one organized armed group engaging in armed hostilities against the government or against another organized armed group. Hence, members of an organized armed group do not qualify as civilians. This is widely accepted.³⁴

There is, however, one unresolved issue relating to those members of an organized armed group who do not perform a “continuous combat function.” While some prefer to consider them civilians,³⁵ others are unwilling to differentiate according to an individual’s function within the group.³⁶ The least common denominator is that members of an organized armed group performing a “continuous combat function” in a non-international armed conflict do not enjoy general protection and are liable to attack. Of course, the State party to a non-international armed conflict is not prevented from prosecuting them if captured under its domestic criminal law.

In non-international armed conflict civilians enjoy general protection. They may lose that protection, however, if they deliberately decide to take a direct part in the hostilities. Accordingly, Article 13(3) of the 1977 Additional Protocol II provides: “Civilians shall enjoy the protection afforded by this Part, unless and for

such time as they take a direct part in hostilities.” This is declaratory of customary international law.³⁷

Intentional Violations of the Law

Although not without difficulties, as has been shown, participatory and normative asymmetries can be coped with under the existing law; however, the core of the problem posed by asymmetric warfare is intentional violation of the law of armed conflict by asymmetric actors.

General Aspects

Asymmetric actors in armed conflict either intentionally violate the principle of distinction or endeavor to incite their opponent to act in violation of that “intransgressible principle”³⁸ of the law of armed conflict.

The law of armed conflict provides a rather clear response to any form of asymmetric warfare that aims at blurring the principle of distinction, whether by way of disguising as civilians, by abusing civilian objects for military purposes or by direct attacks against the civilian population or individual civilians. Still, the problems in practice persist. If it is not feasible to identify enemy combatants or members of enemy organized armed groups because they appear to be civilians, a decision not to attack may result either in suicide or, even worse, in *prohibited* direct attacks against the civilian population. Of course, combatants who do not distinguish themselves properly when engaged in hostilities do not enjoy combatant immunity or prisoner of war status when captured. While they may be prosecuted for their conduct, this is considered by many military commanders to be an insufficient response to their practical problems.

Similar problems exist with regard to the principle of proportionality. The law of armed conflict does not prohibit attacks that result in the incidental loss of civilian life, injury to civilians or damage to civilian objects. Such “collateral damage” is a violation of the law of armed conflict only if it is excessive (in contrast to “extensive”) in relation to the concrete and direct military advantage anticipated.³⁹ In view of that prohibition, and in view of the media’s attention to any civilian losses in armed conflict, an asymmetric actor will seek either to provoke the opponent into an attack causing excessive collateral damage or to make the public believe that an attack has been disproportionate. Systematic violations of the principle of distinction entail the considerable risk that the opponent applies different standards for the assessment of proportionality. “If such tactics are systematically employed for a strategic purpose, the enemy may feel a compelling and overriding necessity to attack irrespective of the anticipated civilian casualties and damage.”⁴⁰ Still, the prohibition on excessive collateral damage is clear. Considerations of

military necessity do, of course, play an important part, especially with regard to the determination of the anticipated military advantage. However, military necessity as such does not justify a deviation from the well established humanitarian standards of the law of armed conflict.⁴¹

Moreover, asymmetric actors will in many cases deliberately act contrary to their obligation to take feasible precautions in attack, particularly by using civilians or civilian objects as shields or by transferring military objectives into densely populated areas. Despite the obvious illegality of such conduct, the opponent will be prevented from attack if the attack is expected to result in excessive collateral damage. Here the law of armed conflict itself introduces an element of asymmetry by privileging unlawful conduct.

Finally, a further problem exists with regard to the obligation of the attacker to do everything feasible to limit attacks to lawful targets and to avoid, if possible, and, in any event, to minimize excessive collateral damage.⁴² It would go too far to conclude that parties to a conflict that possess advanced weapons systems are under an absolute obligation to only make use of sophisticated and highly discriminating weapons. The fact that such weaponry is available does not necessarily mean that less sophisticated weapons may no longer be employed. Sophisticated and advanced weapons are expensive and they may, therefore, be reserved for attacks on more important targets. It must be recognized, however, that

advanced militaries are held to a higher standard as a matter of law because more precautions are feasible for them. As the gap between “haves” and “have-nots” widens in 21st century warfare, this normative relativism will grow. In a sense, we are witnessing the birth of a capabilities-based IHL regime.⁴³

The consequence is that to a certain extent the standard of feasibility privileges the weaker side of an armed conflict, thus adding another form of normative asymmetry into the law of armed conflict.

Use of Prohibited Weapons

The law of armed conflict and arms control law, which are increasingly merging into a single regime labeled “humanitarian arms control,” provide a well established set of rules that either prohibit the use of certain weapons or restrict their use in certain circumstances.⁴⁴ In asymmetric warfare the weaker party may be inclined to disregard such prohibitions or restrictions and to justify a deviation by citing the superiority of the opponent.⁴⁵ Moreover, as pointed out by the International Committee of the Red Cross, “it is evident that if one Party, in violation of definite rules, employs weapons or other methods of warfare which give it an

immediate, great military advantage, the adversary may, in its own defence, be induced to retort at once with similar measures.”⁴⁶ Such justifications have, however, no basis in existing law. The fact that a party to an armed conflict is confronted with a superior enemy does not justify the use of a means of warfare whose use is prohibited under the law of international and non-international armed conflict. Therefore, the threat of imminent defeat is not sufficient grounds for resorting to the use of prohibited means of warfare.

Unfortunately, the International Court of Justice in its *Nuclear Weapons* advisory opinion held that the use of nuclear weapons is contrary to the law of armed conflict unless the “very survival of a State is at stake.”⁴⁷ It is obvious that this holding may be improperly used to justify a violation of the rules and principles of the law of armed conflict. It needs to be emphasized, however, that the Court’s finding has no basis in the law of armed conflict. If the survival argument has any relevance, it may be to the *jus ad bellum*.

Prohibited Methods of Warfare

One feature of asymmetric warfare is suicide bombings; another is the use of “human shields.” With regard to the former, it is important to note that the law of armed conflict does not prohibit suicide attacks unless they are conducted by resort to perfidious means and/or methods.⁴⁸

The law is different with regard to the use of human shields. Article 51(7) of AP I, in prohibiting the use of the “presence or movements of the civilian population or individual civilians . . . to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations,” reflects customary international law.⁴⁹ The law of armed conflict provides a possible—though not undisputed—solution to cope with the issue of human shields by distinguishing between voluntary and involuntary human shields.

Civilians, whatever their motives, who voluntarily serve as human shields may be considered as taking a direct part in hostilities for the duration of such participation, thereby losing their protected status under the law of armed conflict.⁵⁰ Despite arguments to the contrary, involuntary human shields retain their status as civilians.⁵¹ Accordingly, attacks against a shielded military objective will be prohibited if the incidental losses among involuntary human shields are excessive in relation to the concrete and direct military advantage anticipated.⁵² It needs to be emphasized in this context that

the appraisal of whether civilian casualties are excessive in relation to the military advantage anticipated must make allowances for the fact that, by dint of the large (albeit

involuntary) presence of civilians at the site of the military objective, the number of civilian casualties can be expected to be higher than usual.⁵³

However, the distinction between involuntary and voluntary human shields will, in many cases, not provide an operable solution in practice because it is virtually impossible to determine whether a person has deliberately and freely decided to serve as a human shield or is being forced to so act.

Moreover, while the law of armed conflict may not prohibit a proportionate attack against a shielded lawful target, it will prove a most difficult task to defend the death of a considerable number of civilians politically. In asymmetric warfare, the weaker party often consciously and systematically turns to the practice of using human shields in order to exploit the political and moral dilemma in which the attacker will find itself. Thus, while the law purports to offer a solution, in most instances it will not assist in overcoming those dilemmas.

Preliminary Conclusions

Doubts have been expressed as to whether asymmetric warfare can “still be grasped by and measured against the concept of military necessity, for the complexities and intangibility of such scenarios escape its traditionally narrow delimitations.”⁵⁴ These doubts particularly extend to responses to the actions of non-State actors who intentionally and systematically deviate from well established standards of the law of armed conflict. Their opponents may be induced to reemphasize considerations of military necessity that may result either in a more liberal interpretation of the law of armed conflict or in its irrelevance because it is considered an unfair obstacle to the success of military operations.

Of course, reciprocity is an important factor in maintaining the continued effectiveness of the law of armed conflict. If one party to an armed conflict intentionally and systematically disregards its rules and principles in order to achieve a military or political advantage, the opponent’s readiness to continue to comply with the law may steadily decrease. There are, however, solutions to the problem. On the one hand, the law of armed conflict is flexible enough to respond to an asymmetric actor’s conduct. While it is true that such responses put a heavier burden on the law-abiding party to the conflict, the values underlying the law of armed conflict and the achievements of the past 150 years should not be given up too easily. While it is conceded that the growing asymmetries in warfare have the potential of shaking the very bases of the law of armed conflict, this does not mean that there is a need for an adaptation of the law to the “new realities” of armed conflict.

III. Possible Responses to Asymmetric Warfare

Although it must be admitted that complying with the law has become increasingly difficult, the law of armed conflict provides solutions to the threats posed by the current versions of asymmetric warfare. Moreover, the emergence of international criminal law has added a further and quite powerful enforcement mechanism for ensuring compliance with the law of armed conflict. It may be questioned, however, whether non-State actors will understand that, despite their inferiority in arms and military technology, they would ultimately profit from compliance with the law of armed conflict. If intentional violations of the law are part and parcel of an overall strategy, it would be quite naïve to believe that asymmetric actors would be deterred from such violations by either lawful responses or criminal proceedings.

For that reason, it is also doubtful whether “incentives” to non-State actors would ultimately result in compliance with the law of armed conflict. Proposed amnesties, reconciliation procedures, truth commissions and similar measures have not necessarily proven to contribute to an increased effectiveness of the law of armed conflict during active hostilities. In certain circumstances they may serve as an operable tool to reestablish peace and security in post-armed conflict societies. As reality shows, however, such steps have not prevented egregious atrocities from occurring during armed conflicts. Additionally, the law of armed conflict is far too important to be sacrificed on the altar of political expediency. Any form of impunity would run counter to the very object and purpose of the law of armed conflict—and of international criminal law.

Once faced with the challenge of responding to asymmetric warfare, States must be prepared to invoke the law of armed conflict in two respects.

The first is strict application of the law vis-à-vis asymmetric actors. This includes, but is not limited to, treating them as combatants. For instance, some States respond to asymmetric threats by resorting to “targeted killings” (also labeled “extrajudicial killings”) of individuals suspected of being involved in unlawful attacks against government forces, civilians or civilian objects. It must be borne in mind that under the law of armed conflict there is no general prohibition of targeted killings. If the targeted individual qualifies as a combatant, including as a member of an organized armed group who is “performing a continuous combat function,” or as a civilian directly participating in hostilities, he or she may be attacked. There is, however, disagreement whether there is an obligation to rather capture than kill the individual if that is a feasible alternative.⁵⁵ Of course, the political price to be paid is frequently considered to be too high, creating an unwillingness on the part of many governments to consent (or resort) to targeted killings.

Second and closely related to the first aspect, governments should be proactive in explaining to the general public and to all concerned political actors their understandings of the law of armed conflict, both in general and in its application to a given concrete situation. It is therefore important to have an up-to-date military manual that reflects the current state of the law of armed conflict as it is understood by the government. Given the adoption of new treaties, developments in customary international law and new interpretations of existing treaties, it is not sufficient to simply publish a manual once; it must be updated to reflect changes in the law. For instance, the manual of the German armed forces was published in 1992⁵⁶—nearly two decades ago. Because it does not provide answers to legal questions arising, for instance, in the context of the conflict in Afghanistan, it has become increasingly difficult to identify the German government's position on the current state of the law of armed conflict. Consequently, it is rather easy for certain actors pursuing a political agenda to claim that the German armed forces operating in Afghanistan have violated the law.

In this context, it must not be forgotten that one feature of asymmetric warfare is the use—or rather abuse—of the media and of public opinion. It is therefore crucial to provide prompt and reliable information. The German armed forces, after an attack on Taliban fighters and two tanker trucks in September 2009, had to learn in a quite painful manner that a time-consuming and unstructured investigation will fuel further speculation as to what actually occurred and will only assist the enemy, either directly or indirectly.

The air attack on the trucks and the Taliban fighters who were in the immediate vicinity was conducted in accordance with the law of armed conflict. The fighters were lawful targets because they were members of an organized armed group performing a “continuous combat function.” Because there were reasonable grounds for assuming that the trucks—and the fuel they carried—would be used for attacks against civilians and International Security Assistance Force personnel, they had become lawful military objectives by either their use or intended purpose. At the time of the decision to attack the trucks and the Taliban fighters, the commanding officer rightly relied on the information available to him.

The reconnaissance photographs showed about 70 individuals attempted to free one of the trucks that had become stuck in a river. According to a human intelligence source who had been very reliable in the past, the people surrounding the trucks were Taliban fighters. Recognizing his obligations under the law of armed conflict, the German officer who authorized the attack decided to only use two five-hundred-pound bombs in order to spare a nearby farm and village. Shortly after the attack it was reported in some media reports that as many as 142 people had been killed. In these initial reports, the statuses of the people allegedly killed or

injured was uncertain; some spoke of “Taliban and civilians,” others of “predominantly civilian casualties.” Other reports stated that the majority of civilians killed or injured were innocent persons from the nearby village who were only trying to acquire fuel for their personal needs.

On April 16, 2010, the Office of the Public Prosecutor decided to dismiss all criminal proceedings against the German officers involved. The report on which that decision was based reveals that at the time of the attack there had been reasonable grounds to assume that the individuals surrounding the trucks were Taliban. While the public prosecutor could not rule out the presence of civilians, the report indicated that if some were civilians, at least some of those had directly participated in the hostilities. In any event, there was no convincing evidence of a large number of civilian casualties. Even if there had been civilian casualties, the report continues, there would be no violation of the law of armed conflict because the incidental losses and injuries were not excessive in relation to the military advantage anticipated. Unfortunately, the report was classified because it contained sensitive military information. It was not until October 2010 that an unclassified version was made available to the public. By that time public opinion had already been influenced by unfounded allegations of violations of the law of armed conflict. The general perception has not been altered since the release of the report because neither the Office of the Public Prosecutor nor the Federal Ministry of Defence has proactively disseminated it.

It is, of course, understood that thorough investigations are important in order to be credible and in order to protect the members of the armed forces allegedly involved in a violation of the law of armed conflict. Still, the media field should not be left to those who, in disregard of their lack of information (and all too often expertise), pursue their political ends by claiming violations of the law. A delayed government response will often be considered as evidence of secrecy.

History has shown that reports of national authorities entrusted with the investigation of alleged violations of the law of armed conflict by their own forces will in many instances be received with suspicion; therefore States engaged in military operations should be prepared to entrust investigations to an independent fact-finding entity whose functions are to conduct a thorough investigation and provide reliable and trustworthy information to government decisionmakers and the public. In that regard, governments, whether Additional Protocol I formally applies or not, should be encouraged to make use of the fact-finding commission under Article 90, AP I, or, alternatively, agree on another investigatory body composed of members of high political reputation.

Conclusion

Asymmetric warfare clearly constitutes a challenge to the international legal order and to its underlying values. While it does not justify a deviation from the well established rules and principles of the law of armed conflict, it is necessary to strengthen that law by all means available. Because asymmetric actors will not abandon the options opened by a deliberate violation of the law of armed conflict, incentives to non-State actors to bring about compliance will very often prove futile. Despite the potential political implications, the application of military force *in accordance with the law of armed conflict* is the first way to respond to the threats posed by asymmetric warfare. This, however, must be accompanied by a proactive and credible information policy. Additionally, thorough investigation/fact-finding by a neutral and respected international commission of the actions of the non-State actors would be an effective step that could contribute to repressing such conduct.

A further step is criminal prosecution, under either domestic or international criminal law, of those who violate the law. While some may object, often citing the frequently heard cliché that “one man’s terrorist is another man’s freedom fighter,” holding accountable those who violate the law is the only promising approach to deterring those who choose to violate the law. Amnesties or reconciliation efforts may have proven successful in limited instances; it is doubtful, however, whether they have had—or will have—a lasting effect. Rather, they may prove to be an incentive for asymmetric actors to continue to pursue or even increase their unlawful conduct.

These conclusions do not, however, relieve States from their obligation vis-à-vis their armed forces to clarify the applicable law for situations not amounting to an international or non-international armed conflict. Moreover, governments ought to thoroughly scrutinize and evaluate the challenges posed by asymmetric warfare and take the necessary measures to reduce their vulnerabilities. Vulnerabilities—whatever their nature—will always be an interesting target for asymmetric actors, whether they are enemy States or non-State actors, e.g., terrorists.

Notes

1. See, e.g., YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27 (2d ed. 2010).
2. Cf. Tullio Treves, *Piracy, Law of the Sea, and the Use of Force: Developments off the Coast of Somalia*, 20 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 399 (2009); Wolff Heintschel von Heinegg, *Repressing Piracy and Armed Robbery at Sea – Towards a New Legal Regime?*, 40 *ISRAEL YEARBOOK ON HUMAN RIGHTS* 219 (2010).

3. See, e.g., Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 141, 152 *et seq.* (2010).
4. Cf. Christian J. Tams, *The Use of Force against Terrorists*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 359 (2009); Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 JOURNAL OF CONFLICT AND SECURITY LAW 245, 248 *et seq.* (2010).
5. THAZA V. PAUL, ASYMMETRIC CONFLICTS: WAR INITIATION BY WEAKER POWERS 20 (1994).
6. Kenneth E. McKenzie Jr., *What Is Asymmetric Warfare?*, in THE REVENGE OF THE MELIANS: ASYMMETRIC THREATS AND THE NEXT QDR 2 (2000), available at <http://www.au.af.mil/au/awc/awcgate/ndu/mcnair62.pdf>.
7. Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action* INTERNATIONAL REVIEW OF THE RED CROSS 149, 151 (2005).
8. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 11, 16 (Wolff Heintschel von Heinegg et al. eds., 2007).
9. On the element of surprise, see CARL VON CLAUSEWITZ, ON WAR 198–201 (Michael Howard & Peter Paret trans. and eds., Princeton Univ. Press 1984) (1832); on ruses, see *id.* at 202–3.
10. See DINSTEIN, *supra* note 1, at 4 *et seq.*
11. Herfried Münkler, *The Wars of the 21st Century*, 85 INTERNATIONAL REVIEW OF THE RED CROSS 7, 20 (2003).
12. Pfanner, *supra* note 7, at 153.
13. See Wolff Heintschel von Heinegg, *The International Legal Framework of Submarine Operations*, 39 ISRAEL YEARBOOK ON HUMAN RIGHTS 331, 340 *et seq.* (2009).
14. In this regard, consider the Convention on Cluster Munitions, Dec. 3, 2008, 48 INTERNATIONAL LEGAL MATERIALS 357 (2008), or the Ottawa Convention on Anti-Personnel Mines (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211).
15. For an analysis of lawfare, see Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), available at <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.
16. St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29–Dec. 11, 1868, reprinted in 1 AMERICAN JOURNAL OF INTERNATIONAL LAW 95 (Supp. 1907).
17. Under the law of international armed conflict, there is no prohibition of employing other than combatants; however, the privileges (prisoner of war status and combatant immunity) are reserved to combatants proper.
18. Cf. DINSTEIN, *supra* note 1, at 3.
19. The Secretary-General, Bulletin on the Observance by United Nations Forces of International Humanitarian Law §1.1, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999).
20. Daniel Thürer, *Der Kosovo-Konflikt im Lichte des Völkerrechts: Von drei – echten und scheinbaren – Dilemmata*, 38 ARCHIV DES VÖLKERRECHTS 1, 11 (2000).
21. See Christopher Greenwood, *The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign*, in LEGAL AND ETHICAL LESSONS OF NATO'S

KOSOVO CAMPAIGN 35 (Andru E. Wall ed., 2002) (Vol. 78, U.S. Naval War College International Law Studies).

22. See, e.g., Convention No. IV Respecting the Laws and Customs of War on Land art. 6, Oct. 18, 1907, 36 Stat. 2227 [hereinafter Hague Convention No. IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 96(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

23. This has also been recognized in PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE Rules 161–64 (2009) [hereinafter COMMENTARY ON THE HPCR MANUAL].

24. Pfanner, *supra* note 7, at 153.

25. See Yves Sandoz, *Article 44 – Combatants and prisoners of war*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 1697–1724 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

26. Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 79, 89 *et seq.* (Dieter Fleck ed., 2d ed. 2008).

27. Stefan Oeter, *Comment: Is the Principle of Distinction Outdated?*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES, *supra* note 8, at 53, 59 *et seq.*

28. See Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV, *supra* note 22, art. 1; Convention Relative to the Treatment of Prisoners of War art. 4A(1)–(3), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

29. See NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 41–64 (2009), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf [hereinafter INTERPRETATIVE GUIDANCE]; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 511 (2004–2005); DINSTEIN, *supra* note 1, at 146 *et seq.*; COMMENTARY ON THE HPCR MANUAL, *supra* note 23, sec. F.

30. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC-IV].

31. INTERPRETATIVE GUIDANCE, *supra* note 29, at 65–68.

32. Yoram Dinstein, *The System of Status Groups in International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES, *supra* note 8, at 145, 149.

33. INTERPRETATIVE GUIDANCE, *supra* note 29, at 33–36.

34. See, e.g., MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 1.1.2 (2006), reprinted in 36 ISRAEL YEARBOOK ON HUMAN RIGHTS (2006) (Special Supplement).

35. INTERPRETATIVE GUIDANCE, *supra* note 29, at 20–26.

36. For that and other reasons, a number of experts who had participated in the process withdrew their names from the list of experts.

37. See COMMENTARY ON THE HPCR MANUAL, *supra* note 23, at 117.

38. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8) [hereinafter Nuclear Weapons Advisory Opinion].

39. Additional Protocol I, *supra* note 22, art. 51(5)(b).

40. Robin Geiß, *Asymmetric Conflict Structures*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 757, 766 (2006).

41. A.P.V. ROGERS, LAW ON THE BATTLEFIELD 4 (2d ed. 2004).

42. Additional Protocol I, *supra* note 22, art. 57(2).
43. Schmitt, *supra* note 8, at 42.
44. For an in-depth analysis, see WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 41 *et seq.* (2009).
45. Geiß, *supra* note 40, at 758.
46. INTERNATIONAL COMMITTEE OF THE RED CROSS, REAFFIRMATION AND DEVELOPMENT OF THE LAWS AND CUSTOMS APPLICABLE IN ARMED CONFLICTS 83 (1969).
47. Nuclear Weapons Advisory Opinion, *supra* note 38, ¶97.
48. Schmitt, *supra* note 8, at 32.
49. *See also* GC-IV, *supra* note 30, art. 28 (“The presence of a protected person may not be used to render certain points or areas immune from military operations”).
50. *See* DINSTEIN, *supra* note 1, at 153.
51. Schmitt, *supra* note 8, at 27.
52. Additional Protocol I, *supra* note 22, art. 51(5)(b).
53. DINSTEIN, *supra* note 1, at 155.
54. Geiß, *supra* note 40, at 770.
55. *See* INTERPRETATIVE GUIDANCE, *supra* note 29, at 77–82. *See also* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 394 *et seq.* (2008).
56. FEDERAL MINISTRY OF DEFENCE (Germany), HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL (1992).