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## FIGHTING IRREGULAR FIGHTERS

# Is the Law of Armed Conflict Outdated?

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Sibylle Scheipers

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**ABSTRACT:** The law of armed conflict has often been described as outdated and ill suited to military conflicts in the twenty-first century. Both academics and practitioners have argued that today's wars tend to be asymmetric conflicts between states and nonstate actors, whereas the law of armed conflict was made with a view to symmetrical interstate war. This article challenges that notion.

The law of armed conflict—from the Lieber Code to the Additional Protocols to the Geneva Conventions—was drafted precisely as a response to challenges posed by irregular fighters. The problems with applying the law to irregular warfare stem from two aspects: first, that the drafters of the law repeatedly chose a negative approach to irregular fighters. They neither provided an explicit definition of an irregular fighter nor did they spell out principles for their lawful treatment. The second aspect is that the aims of western military interventions differ considerably from earlier forms of anti-irregular fighting: in today's anti-irregular wars, political stabilization and societal reconciliation are the main political objectives. Thus, the central question facing both academics and practitioners is how the law of armed conflict can be applied in a way that furthers these political aims.

The terror attacks of 9/11 and the military operations in their aftermath sparked a debate over the status and applicability of the law of armed conflict in the wars of the twenty-first century. Policymakers on both sides of the Atlantic were quick to assert that the law itself, most of which was drafted during the twentieth century, was inapplicable on the battlefields of the twenty-first century. The argument that the law of armed conflict was ill suited for the new paradigm of what would become known as the War on Terror was decisive for the Bush administration's decision in February 2002 not to apply the Geneva Conventions to al Qaeda and Taliban fighters captured in Afghanistan.<sup>1</sup> Although most Europeans like to think of themselves as having consistently opted for a rule-of-law approach to terrorism, senior officials in Europe echoed the argument.<sup>2</sup>

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1 President's Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, "Humane Treatment of al Qaeda and Taliban Detainees" (Washington, DC, 7 February 2002). The memorandum states: "By its terms, Geneva applies to conflicts involving 'High Contracting Parties,' which can only be states. Moreover, it assumes the existence of 'regular' armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war, but thinking that should be nevertheless consistent with the principles of Geneva."

2 John Reid, "Twenty-First Century Warfare —Twentieth Century Rules," *RUSI Journal* 151, no. 3 (2006): 14-17.

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The assumption on which this assessment is based is that the law of armed conflict was drafted with a view to symmetrical interstate wars, whereas wars in the twenty-first century will be asymmetric conflicts in which regular state forces are fighting against a variety of actors such as terrorists, rebels, insurgents, militias, mercenaries, pirates, and so on, who are usually lumped together under the notion of nonstate actors. Symmetry implies reciprocity, meaning all parties to a conflict will abide by the same rules. The concept of belligerent reprisals, which were a legitimate means of war until the drafting of the Geneva Conventions in 1949, reflects this assumption of reciprocity: if one party to a conflict systematically breaks the law of armed conflict, the opponent is entitled to retaliate in kind or in another punitive way to ensure the law is upheld.

In asymmetric conflicts—and it is important to note that the notion of asymmetric warfare predates the War on Terror and encompasses not only terrorism but also conflicts in the peripheries of the international system variously labeled new wars, low-intensity conflict, military operations other than war, or fourth generation warfare—reciprocity is by definition undermined.<sup>3</sup> The concept of asymmetric warfare implies that a weaker opponent with fewer military capabilities and resources is pitted against a powerful state actor. Weak opponents will use almost any means at their disposal to achieve their aims in war; they will use terrorist tactics, attack civilians, plant roadside bombs, and kill prisoners if they happen to capture any.<sup>4</sup> However, weak opponents, although not abiding by the law, will challenge any perceived transgression on the part of the state actor and exploit it in the court of international public opinion. They will even provoke such transgressions by using human shields around high-value targets. This vulnerability of the stronger side to allegations of violations of the law of armed conflict has been referred to as “lawfare.”<sup>5</sup> Hence, in this perspective, championing the law means all sorts of pain, but no gain, for the stronger side in an asymmetric conflict.

The common conclusion to this type of analysis is that the law of armed conflict is outdated, that it needs to be either suspended or revised, and that we should not be surprised to see new moral and legal norms on the use of armed force arising and becoming institutionalized. The question rarely asked is whether the law was really drafted with a view to symmetrical interstate war—that regulative ideal that scholars, commentators and policymakers alike seem to grasp to understand the unruly and confusing battlefields of the twenty-first century.

### From Lieber to Additional Protocol I

One of General Henry W. Halleck’s first acts as General-in-Chief of all the Union armies was to commission a legal memorandum from

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3 For a general overview on asymmetric warfare, see Rod Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-First Century* (Cambridge: Polity, 2007). On the alleged global transformation of warfare more generally, Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford, CA: Stanford University Press, 2007); Martin van Creveld, *The Transformation of War* (New York: Free Press, 1991). On fourth generation warfare, see T.X. Hammes, *The Sling and the Stone: On War in the Twenty-First Century* (St Paul, MN: Zenith Press, 2006).

4 Michael L. Gross, *Moral Dilemmas of Modern War: Torture, Assassination and Blackmail in an Age of Asymmetric Conflict* (Cambridge: Cambridge University Press, 2010). For a critique of this narrow reading of reciprocity, see Mark Osiel, *The End of Reciprocity: Terror, Torture and the Law of War* (Cambridge: Cambridge University Press, 2009).

5 See, for instance, Charles C. Dunlap, “Lawfare amid Warfare,” *The Washington Times*, August 3, 2007.

Francis Lieber on the problem of guerrilla warfare. Halleck, who had a background in law, was animated by the desire to prevail in the struggle with Confederate leadership over the legitimacy of the use of irregular fighters which had developed alongside the actual military confrontation on the battlefields of the American Civil War. On 28 April 1862, the Confederate Congress adopted the Partisan Ranger Act, which stipulated the president could authorize bands of partisan rangers to operate against Union forces behind enemy lines. Halleck was adamant this was a breach of the customs of war and hoped Lieber would back him up with an authoritative legal opinion. However, the resulting text entitled *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862) must have been a disappointment for Halleck. Lieber produced a remarkably detailed and nuanced legal assessment of irregular fighters, distinguishing among six different categories: freebooters; brigands; partisans and free corps; spies, rebels, and conspirators; war rebels; and the spontaneous rising *en masse*.<sup>6</sup> Of these six categories of irregulars, only the partisans and free corps and the rising *en masse*, even without uniforms, were lawful belligerents in Lieber's eyes. The guerrilla oscillated between the brigand, the partisan, and the rising *en masse*, which, according to Lieber, made it particularly difficult to determine his or her legal status.<sup>7</sup>

This was clearly not what Halleck had expected. For Halleck, even partisans, meaning regular units that operated independently from their command and, hence, the most regular of all irregular fighters were to be considered unlawful belligerents and shot, not to mention risings *en masse* or guerrillas. Halleck's disappointment may have been the reason for his reluctance to support Lieber's more ambitious project, which would become known as the Lieber Code.<sup>8</sup> Lieber's treatment of irregular fighters in the Code, written in 1863, is less nuanced. He retained the distinction between the lawful partisan and other unlawful types of irregular fighters, thus insisting on this difference of opinion with Halleck. However, he did not mention the rising *en masse*, nor did he discuss the problematic question of the legality of the guerrilla.<sup>9</sup>

Given Halleck's opinion on the problem of irregular fighters, it is not surprising that much of Lieber's writing on the issue was lost on Union commanders and troops in the field. However, there was a section in the Lieber Code that was much more closely followed by Union officers, and that was the section on "Insurrection—Civil War—Rebellion." Lieber has often been credited with trying to codify protections for civilians in war.<sup>10</sup> But that is only partly accurate. In fact, Lieber was rather ambivalent when it came to protecting civilians from the effects of war. He did not conceptualize the civilian as a protected group of persons as such; he used the term "unarmed citizens." More importantly, the

6 Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent Publishing, 1983), 34-39.

7 *Ibid.*, 40

8 When Lieber wrote to Halleck in November 1862, suggesting a more comprehensive set of rules for the conduct of the war, Halleck replied brusquely, "I have no time at present to consider the subject." It was only due to Lieber's perseverance the code was finally adopted; Mark Grimsley, *The Hard Hand of War: Union Military Policy towards Southern Civilians, 1861-1865* (Cambridge: Cambridge University Press, 1995), 149.

9 Hartigan, *Lieber's Code*, 60.

10 See, for instance, Theodor Meron, "Lieber's Code and the Principles of Humanity," *Columbia Journal of Transnational Law* 36, no. 22 (1997): 269-81.

Lieber Code contained two contrasting approaches to the treatment of what we would call “civilians” today. On one hand, Lieber stated the “unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”<sup>11</sup> On the other, in the section on “Insurrection—Civil War—Rebellion,” Lieber wrote:

The military commander of the legitimate government, in a war of rebellion, distinguishes between the *loyal citizen* in the revolted portion of the country and the *disloyal citizen*. The *disloyal citizen* may further be classified into those *citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy* without being bodily forced thereto. . . . The commander will throw the burden of war, as much as lies within his power, *on the disloyal citizens*, of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war. . . . he may *expel, transfer, imprison, or fine* the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.<sup>12</sup>

Lieber’s legal approach to a war of rebellion made protections for civilians dependent on their behavior and even their political *Weltanschauung*. It effectively put all civilians in enemy territory under general suspicion. Hence, the Lieber Code “erected very few strong barriers against severe treatment” of civilians.<sup>13</sup> This approach was closely followed because Lieber had, in fact, taken his inspiration for this section from the prevailing practice in the field. The three-tier approach distinguishing between loyal, passively disloyal, and actively disloyal citizens had been developed in 1862 by local Union commanders in Missouri and had later been approved by Halleck himself.<sup>14</sup> Lieber only mirrored what was already common practice in the field.

Soon after the end of the American Civil War, the question of how to deal with irregular fighters became pressing once again, though this time on the European side of the Atlantic. In 1870, the Prussian army had defeated the French forces and all but captured Paris when the French government, now under the leadership of the republican Leon Gambetta, made a last ditch attempt to stave off defeat. In October 1870, Gambetta called his fellow citizens to resist the German occupation forces as *francs-tireurs* (literally “free shooters”) and to attack their lines of communication. The Prussian leadership was enraged. Despite the French government’s insistence that *francs-tireurs* were lawful belligerents, the Prussian headquarters issued an order according to which *francs-tireurs* were not to be treated as prisoners of war, but to be executed on capture. This order was later amended and the new decree stipulated ten years of forced labor rather than immediate executions. However, German forces treated most *francs-tireurs* as prisoners of war when captured. Yet, civilians had to endure harsh treatment by the German forces, in particular in those areas where *francs-tireurs* were active. Just as the Union forces in the American Civil War, the Germans chose a punitive approach based on the assumption that it was ultimately the local population that was responsible for the *francs-tireurs* problem.

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11 Ibid., 49.

12 Ibid., 71, emphasis added.

13 Grimsley, *Hard Hand*, 150.

14 For a more detailed account, see Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford: Oxford University Press, forthcoming 2014), chapter 2.

The defining feature of both the American Civil War and the Franco-Prussian War was that the opponents had divergent ideas of who was a lawful belligerent. It was no wonder, then, that contemporaries felt the need to clarify the laws of war and, in particular, the definition of irregular fighters. On the American side, the Lieber Code served that purpose, although Union commanders honored its provisions on irregular fighters more in the breach than in the observance. In Europe, the Franco-Prussian War sparked efforts to negotiate and codify the laws of war. Without doubt, it was the experience of the *francs-tireurs* problem that provided primary impetus. Negotiations in Europe were heavily influenced by the Lieber Code, which formed the basis of several draft proposals debated at the Brussels conference in 1874.

The conference failed to produce anything acceptable to all parties involved; hence, no law was adopted. The question of the lawfulness of irregular fighters had become so entangled with issues of military and political power as well as with ideological differences that no agreement was possible among the major European powers. However, the attempts at legal codification opened the definitional battlefield and clarified different positions within it. Political cleavage lines soon became clear: Germany and Russia, both of which possessed large regular armies, intended to keep the definition of lawful belligerency highly restrictive, hence not allowing for a defensive *levée en masse* or even militia forces. In contrast, smaller states that relied on militias for their national defense were opposed to this restrictive proposal. They were supported by Britain and France. The Brussels conference broke up after one month of negotiations, and no legal text was adopted. Only a declaration was issued. However, international lawyers were apparently not discouraged by this outcome. In 1880, the Oxford Institute of International Law published its own manual entitled *The Laws of War on Land*.

The Brussels declaration and the Oxford Manual were similar with respect to structure and content. Both texts were more inclusive than the Lieber Code regarding the question of the lawfulness of irregulars. Articles 9 and 10 of the Brussels declaration stipulated that regular armies, militia forces, volunteer corps, and a spontaneous rising *en masse* against invasion were lawful forms of national defense.<sup>15</sup>

The fact that neither the Brussels declaration nor the Oxford Manual garnered widespread acceptance demonstrated that the question of the definition and treatment of irregular fighters was still undecided. Consensus on the definition of lawful belligerency was only reached in the 1907 Hague Convention on the Rules and Customs of War on Land. The Hague Convention retained the provisions on the lawfulness of the defensive rising *en masse* in nonoccupied territory, although it did not mention other military organizations included in the Oxford Manual, such as national guards, landsturm, and free corps.<sup>16</sup>

In sum, the history of the law of armed conflict from Lieber to the Hague Convention shows, first, that codification efforts were triggered by the experience of irregular fighting in the American Civil War and the

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15 "The Laws of War on Land," *Institute of International Law at Oxford*, 9 September 1880, <http://www1.umn.edu/humanrts/instree/1880a.htm>

16 Annex to the Convention "Regulations Respecting the Laws and Customs of War on Land," Section I, Chapter I, Art 1-2, in *Documents on the Laws of War*, ed. Adam Roberts and Richard Guelff (Oxford: Oxford University Press, 2000), 73.



Franco-Prussian War. Second, it demonstrates that the reimits of lawful belligerency were contested between major political actors. Finally, it shows that, due to this contestation, the legal definition of the irregular was achieved *ex negativo*, and there were no provisions on the treatment of this category of persons. While Lieber had initially started with a detailed list of defined categories of irregular fighters, the Hague Convention defines only lawful belligerency. Hence, according to the Hague law, irregular fighters are all combatants who do *not* qualify as lawful belligerents and who do *not* enjoy legal protections such as prisoner of war status.

While much nuance and detail was thus lost from Lieber's initial texts on the issue of defining irregular fighters, the tendency to blame civilians for the activity of irregulars and to make them liable to punitive measures was carried forward to the early European texts. Both the Brussels declaration and the Oxford Manual stipulate that occupying powers can levy fines on the population.<sup>17</sup> The Oxford Manual is more explicit when it comes to the protection of civilians—although it must be kept in mind that the legal texts at the time still neither used nor defined this category—and states, “It is forbidden to maltreat inoffensive populations.”<sup>18</sup> At the same time, it makes clear that “The inhabitants of an occupied territory who do not submit to the orders of the occupant may be compelled to do so.”<sup>19</sup> Hence, the upshot of the early attempts at codifying the laws of war is that the civilian population only warrants protection if it fully subjects itself to the occupying forces. This approach to the laws of war was as much about humanizing war and protecting local populations against wanton cruelty as it was about disciplining civilians. Its outlook on civilians was always potentially punitive, and the reason for this harsh posture was the civilians' potential links with irregular fighters: they could aid them or take up arms themselves. So if the line between the regular and the irregular was unclear at the end of the nineteenth century, the boundaries between the irregular and the civilian were even more questionable. This tendency was carried forth in the Hague laws.<sup>20</sup> The atrocities German forces, imbued with a fear of *franc-tireurs* that amounted to paranoia, committed in Belgium and northern France during the first months of World War I, were proof that the punitive approach had become even more significant in military operations on the ground.<sup>21</sup>

Changes in the law would only come with the 1949 Geneva Conventions, which provided more thorough protections for civilians in occupied territory. This was once again precipitated by a transformation in the perception of the irregular fighter. The Second World War is mostly remembered as a classical example of symmetric interstate war, but it had

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17 “Project of an International Declaration Concerning the Laws and Customs of War,” Art 36-48, Brussels, 27 August 1874, <http://www.icrc.org/ihl/INTRO/135>; “The Laws of War,” Art 43-60.

18 “The Laws of War,” Art 7.

19 *Ibid.*, Art 48.

20 Karma Nabulsi, “Evolving Conceptions of Civilians and Belligerents: One Hundred Years after the Hague Peace Conferences,” *Civilians in War*, ed. Simon Chesterman (Boulder, CO: Lynne Rienner, 2001), 9-24.

21 John Horne and Alan Kramer, *German Atrocities, 1914: A History of Denial* (New Haven, CT: Yale University Press, 2002).

large irregular aspects.<sup>22</sup> While resistance groups fighting against Nazi occupation in Europe and Japanese occupation in Asia may not have had a decisive strategic impact, the experience of irregular resistance and appalling Axis countermeasures left an important legacy for the development of the law of armed conflict after the war. It was difficult to uphold the image of the irregular fighter as the unlawful rebel given that the war had vindicated the moral cause of the resistance movements.

The uncomfortable truth was that the potentially punitive approach towards civilians in occupied territory embodied in the Hague law had done little to reign in the genocidal excesses of the German occupation forces on the eastern front and, to a lesser extent, in occupied western Europe. Of course, the Hague law had neither envisaged nor condoned the killing of millions of eastern European Jews, but the punitive perspective towards irregular fighters and their alleged civilian supporters had probably played a certain part in making the actions of the German occupation forces justifiable in the minds of some German officers and troops.<sup>23</sup> Hence, it was logical to tackle the question of protections for civilians in occupied territory as one of the most pressing issues in the 1949 Geneva Conventions. The Fourth Geneva Convention, the Civilians Convention, accordingly represents the most important legal innovation achieved in Geneva. It demarcates the civilian as a separate category of persons entitled to specific protections in war and breaks with the potentially punitive approach to civilians by prohibiting civilian reprisals, fines, and the taking of hostages.<sup>24</sup> It also symbolically separates the civilian from his or her alleged links with irregular fighters.

At the same time, the Geneva Conventions made little progress with respect to the definition of and the provisions for irregular fighters. The articles on lawful belligerency are essentially taken from the Hague rules. Again, this decision boiled down to political considerations. The French delegation to the Geneva Conference, which included many former members of the resistance, had lobbied for the inclusion of provisions on conditions for lawful acts of resistance against occupying forces, but the United States and the United Kingdom delegations had no interest. In the end, France had to realize that it had switched sides: it was no longer occupied, but part of the Allied occupation forces in Germany.<sup>25</sup>

However, in one important respect, the Geneva Conventions did introduce new provisions for irregular fighters: Common Article 3 spells out minimum protections to apply in armed conflicts “not of an international character.” These include the prohibition of torture and degrading treatment and the prohibition of executions “without previous judgment

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22 Jonathan E. Gumz even makes the case for reconceptualizing the Second World War “as a series of unbounded insurgencies in that they were not solely confined to professional militaries alone, but rather involved various ideological and nationalized groups”; “Reframing the Historical Problematic of Insurgency: How the Professional Military Literature Created a New History and Missed the Past,” *Journal of Strategic Studies* 32, no. 4 (2009): 553-88.

23 However flimsy their statements in defense of their actions might have been, some officers at the SS-Einsatzgruppen trial in Nuremberg argued that the executions they carried out had been lawful, as “those who were killed had been found guilty of partisan warfare and robbery.” Hilary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law and History* (Cambridge: Cambridge University Press, 2009), 144.

24 Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Part I, Art 4, 13, 33 and 43, in *Documents*, ed. Roberts and Guelff, 302, 306, 312.

25 Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford: Oxford University Press, 1999), 14; Geoffrey Best, *War and Law since 1945* (Oxford: Clarendon Press, 1994), 118.



pronounced by a regularly constituted court.”<sup>26</sup> Not surprisingly, colonial powers, foremost the United Kingdom, were alarmed by the broad remit of the article. At the time of the Geneva Conference, British forces were fighting a communist insurgency in Malaya and feared that Common Article 3 was “possibly restrictive to the operations.”<sup>27</sup> Both Britain and France attempted to tackle the problem of possible restrictions on military operations in the colonies that Common Article 3 entailed by insisting the wars in Kenya and in Algeria, for instance, were domestic emergencies that did not amount to armed conflicts of a noninternational character.

Given these strong political interests, it is not surprising legal innovations regarding irregular fighters were developed only after the major European powers lost their colonies. The rationale for the Additional Protocols (API and II) of 1977 once again arose from historical hindsight: the wars of decolonization had shown that irregular fighters sometimes do fight morally defensible wars, albeit with methods that are difficult to square with the requirements of lawful belligerency as spelled out in the Hague and Geneva laws. Yet their shortcomings may be excusable in the light of their situation: due to colonial oppression, many of them were unable to conform to the requirements for lawful belligerency, and punishing them would have perpetuated the oppressive regime they were fighting. The solution was to narrow the conditions for lawful belligerency by stipulating that lawful combatants are members of any armed forces, units, or groups commanded by a person responsible to a party to the armed conflict in question, “even if that Party is represented by a government or authority not recognized by an adverse Party.”<sup>28</sup> As a procedural requirement, AP I stipulates that combatants have to carry their arms openly while engaged in an attack or in a military operation preparatory to an attack.<sup>29</sup>

In spite of this innovation, the law of armed conflict retained its negative approach to the problem of irregular fighters. AP I does lower the requirements for combatant privilege, and hence increases the variety of persons who qualify for prisoner of war status. At the same time, it fails to address the question of how to categorize persons who fail the privileged combatancy test, either because they violate the organizational or procedural requirements set out in Articles 43 and 44, or because they are civilians who take up arms against occupying forces. Various legal memos issued by subsequent US administrations, as well as academic discourse, have used the term “unlawful combatants” as a label for individuals who are neither privileged combatants nor “peaceful” civilians.<sup>30</sup> Others have vehemently argued that the term unlawful combatants is not a category of the law of armed conflict.<sup>31</sup> Even if we

26 Common Article 3 to the Geneva Conventions, *Documents*, ed. Roberts and Guelff, 198.

27 Army Council Secretariat brief for Secretary of State for War, 1 December 1949, quoted in Hugh Bennett, *Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency* (Cambridge: Cambridge University Press, 2013), 68.

28 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Section II, Art 43 (1), in *Documents*, ed. Roberts and Guelff, 444.

29 *Ibid.*, Section II, Art 44 (3), in *Documents*, Roberts and Guelff, 444.

30 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 30ff.

31 International Committee of the Red Cross, “Report on the Second Expert Meeting on the Notion of Direct Participation in Hostilities,” *The Hague*, 25-26 October 2004, 17.

leave aside the question of labels, the problem remains that there are very few legal provisions on the treatment of such persons.<sup>32</sup> Moreover, major international actors such as the US and Israel have not ratified Additional Protocol I, and are hence only bound by those provisions on irregular fighters that have become customary international law (Articles 43 and 75 in particular).

### Twenty-First Century Conflicts

The history of the codification of the law of armed conflict shows that it was not exclusively drafted with a view to symmetrical interstate war. On the contrary, it was the experience of problems posed by irregular fighters which propelled the law step by step from its early stages to the Additional Protocols of 1977. One important flaw of the law of armed conflict was corrected along the way: the idea that civilians were liable for punishment if irregular fighters had operated in their territory. Another major shortcoming is its negative approach to the definition of irregular fighters and its lack of provisions for this status, which continued through the different codification stages.

So those scholars and legal practitioners who argue the United States (and other nations) did not have much to go on in terms of the law regarding the question of how they should treat al Qaeda suspects and other irregular fighters in recent operations were not entirely wrong, though the reason for this was not that the law is outdated.<sup>33</sup> Rather, it is related to the fact that major international actors in successive rounds of the law's codification had no interest in spelling out a detailed definition of unlawful belligerency and in stipulating provisions for the treatment of persons who would fall into this category. The law's exclusionary approach towards irregular fighters made it all too easy to marginalize them simply because they were perceived as an anomaly for which the law did not provide.

This perspective has given the debate on irregular fighters an unfortunate twist in that it has prevented the most relevant question from being asked: how should the West treat irregular fighters to further its strategic aims in military operations? Instead, it has led to legal(istic) extremes. Two extreme positions on a spectrum of different opinions on the legal treatment of irregular fighters emerged. Both share the view that the law is outdated, but come to opposite conclusions on the way forward. At one end of the spectrum are those who aim to create more explicit rules and add new restrictions; on the other end are those who argue the law of armed conflict does not apply to irregular fighters and they are, hence, without any legal rights or protections. Both positions are fraught with difficulties.

Regarding the first position, it is an oft-repeated observation among critical international lawyers, commentators, and activists that the

<sup>32</sup> Article 45 of the Additional Protocol stipulates that those who are denied prisoner of war status for failing to meet the requirements of lawful belligerency are entitled to a review of their status "before a judicial tribunal." Even if they are not granted prisoner of war status, they must be treated in accordance with Common Article 3 and Article 75 AP I, which is regarded as customary international law; all printed in *Documents*, Roberts and Guelff, 446, 198, 463.

<sup>33</sup> See, for instance, Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin, 2008); John B. Bellinger III, "Legal Issues Related to Armed Conflict with Non-state Groups," in *Prisoners in War*, ed. Sibylle Scheipers (Oxford: Oxford University Press, 2010), 251-62.

West's approach to irregular fighters in the War on Terror, and in particular to their detention and interrogation, has been characterized by the creation of legal "black holes, vacuums" and the exploitation of legal "loopholes."<sup>34</sup> The call for more law seemed to be a logical conclusion. However, it is not entirely correct that the most disastrous aspects of the treatment of irregular fighters in recent conflicts stemmed from the absence of law or legal reasoning. On the contrary, the numerous legal memos on irregular fighters issued since 2001 were written by lawyers and used legal arguments and concepts.<sup>35</sup> Against this background, it is hard to see how the default option of more law should have provided viable safeguards and solutions. Moreover, the fact that there is a range of concepts and ideas on how the law of armed conflict should be updated to regulate the treatment of irregular fighters suggests that arriving at a new internationally binding consensus would be difficult and time-consuming. Limited attempts at formulating preliminary rules such as the *Copenhagen Process on the Handling of Detainees*, in which the North Atlantic Treaty Organization (NATO) and its member states, the United Nations, and the International Committee of the Red Cross (ICRC) are involved, are under way.<sup>36</sup> While these preliminary debates are laudable and useful, even such limited attempts will take time to produce results that could be taken as firm guidance in operations on the ground.

On the other end of the spectrum are those who assume that the law of armed conflict does not apply. However, as discussed above, Common Article 3 to the Geneva Conventions and Article 75 API, offer minimum protections for all categories of persons in armed conflict, hence also for irregular fighters. These sources comprise prohibitions against murder, torture, and inhumane and degrading treatment; of enforced prostitution; of the taking of hostages; of collective punishments; and of threats of any of those acts. Furthermore, they spell out some basic procedural rules for prosecuting individuals for penal offences.<sup>37</sup> They do allow for the detention or internment of individuals who may pose a threat to the security of states involved in an armed conflict. What they do not clarify is first, what kind of evidence such detention has to be based on, second, what the criteria and procedures for continued detention or, alternatively, release are.<sup>38</sup>

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34 To a certain extent, this charge is also leveled against the practice of targeted killing. Although the legal discourse on targeted killing is related to the issues discussed here, I cannot cover it in this context for reasons of space limitations. For a useful legal starting point, see Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008).

35 Most of the memos issued by the Bush administration in the years 2002-04 were collected and published in Karen J. Greenberg, Joshua L. Dratel, and Anthony Lewis, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005). Later memos by US administrations as well as legal memos by other NATO states that are relevant for the treatment of irregular fighters remain classified.

36 "Copenhagen Process on the Handling of Detainees in International Military Operations," *Udenrigsministeriet Ministry of Foreign Affairs of Denmark*, <http://um.dk/en/politics-and-diplomacy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/>; on the debate on new legal rules on detention, see also Adam Roberts, "Detainees: Misfits in Peace and War," in *Prisoners in War*, ed. Sibylle Scheipers (Oxford: Oxford University Press, 2010), 276f.

37 In addition, some parts of international human rights law may apply as well in specific situations. However, human rights protections would probably not go substantially beyond the principles spelled out in article 75 AP I, although specific principles such as the non-refoulement rule (covering the prohibition of transferring detainees to a state that may torture them) would have an effect on operations.

38 Roberts, "Detainees," 270.

In the absence of new legal rules, political and strategic solutions to these issues need to be found. The basic challenge is to gear the treatment of irregular fighters in theaters comparable to Afghanistan and Iraq towards the aim of political stabilization and societal reconciliation. Asymmetric conflicts and the dilemmas related to the treatment of irregular fighters are not new. What is new, however, is the emphasis on sustainable pacification—stabilization is the current buzzword—as the ultimate goal in these wars. Against this background, it is questionable whether a purely exclusionary approach is the way forward. Political stabilization requires societal reconciliation and the reintegration of irregular fighters into the social and political system of the target state in question. The negotiations with Taliban leaders, which started in June 2013 in Qatar, bear witness to the West's (belated) acknowledgment of reconciliation and reintegration as a vital component of long-term stabilization.

This perspective applies in particular to those individuals whose allegiance is first to the local insurgency, that is, fighters who are not involved in global terrorist operations. The question of their treatment is most usefully discussed from the perspective of war's end: how ought fighters be treated to enable their successful reintegration into society at the end of the war? How will their treatment during the conflict impact on the chances of post-conflict reconciliation and hence the achievement of a lasting peace?<sup>39</sup> Supposedly more enlightened commentators, in particular on the European side of the Atlantic, often suggest that treating them as criminals rather than gratifying them with combatant status is the way forward when it comes to treatment of irregular fighters. However, there are indications from historical cases, in particular the United Kingdom's experience with the Irish Republican Army in the 1970s and 1980s, that acknowledging some kind of combatant status of detained irregular fighters and local terrorists can open the road to long-term political solutions.<sup>40</sup> On the other hand, criminal prosecutions would be the preferable solution for those who have been suspected of involvement in the planning or implementation of terrorist attacks of a global nature. The fact these prosecutions have failed seems to have little to do with principle obstacles. Rather, the two greatest inhibiting factors were, first, that the military commissions initially charged with putting this group of individuals on trial were based on rules and procedures that were so flawed they proved almost impossible to correct. Secondly, parts of the evidence to be used against these suspects was based on torture and hence inadmissible in any lawful trial.<sup>41</sup> These complications could have been avoided had the minimum protections stipulated in Article 75 AP I been implemented.

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39 For a more detailed discussion of this issue, see Sibylle Scheipers, "Conclusion: Prisoners and Detainees in Current and Future Military Operations," in *Prisoners in War*, 313-20.

40 While the Thatcher government never officially accepted the IRA's claim that imprisoned IRA fighters were POWs, it did tacitly concede to most of the IRA hunger strikers' demands, which principally aimed at removing the stigma of criminalization from IRA prisoners. These concessions occurred at a time when the IRA's engagement with the political system increased. The treatment of IRA prisoners had at the very least a stabilizing effect on the IRA's nonviolent political engagement. See also Richard English, *Armed Struggle: The History of the IRA* (London: Macmillan, 2003), chapters 5 and 6.

41 Roberts, "Detainees," 272.

## Conclusion

The law of armed conflict is a peculiar field of law as it refuses to regulate a phenomenon that repeatedly provided the main impetus for its progressive codification: irregular fighters. Rather than providing definitions and rules on the treatment of irregular fighters, successive generations of lawmakers chose a negative approach to the phenomenon: the irregular is he (or she) who does not qualify for privileged combatancy and the attendant privileges and protections. This peculiarity of the law gave rise to claims that the established legal rules as laid down in the Hague and the Geneva conventions are outdated and inapplicable to wars in twenty-first century.

However, what these claims overlook is that the law was influenced by considerations of political power and military expediency at all stages of its codification. Halleck rejected Lieber's ideas on the treatment of irregular fighters, as he found them too lenient and feared their implementation might endanger Union victory in the American Civil War. Neither Germany nor Russia had an interest in considering small state militias as lawful belligerents. And while the Allies after World War II perceived it as both ethical and useful to enhance protections for civilians in war, France and Britain, in particular, were wary of codifying the law in such a way that it might endanger their colonial authority. In all these instances, powerful states had a strong interest in excluding irregular fighters from the remits of the law of armed conflict.

International law, including the law of armed conflict, is mainly made by states, and it is neither surprising nor entirely reprehensible that it bears the mark of state interest. What is important, however, is to be aware of the fact that at the beginning of the twenty-first century, the outright exclusion of irregular fighters may not be in the West's strategic interest. As we have seen, asymmetric conflicts are not new. Irregular fighters have existed at all times in the history of war. What is new, however, are the West's strategic and political aims of stabilization in conflicts against irregular fighters. In the twenty-first century, western states are facing the challenge of bringing the law of armed conflict in line with the strategic aim of stabilization or, rather, to apply it in a way that does not undermine this aim.