

Summary

International humanitarian law in asymmetric conflicts

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1. In legal terms, asymmetric conflicts are characterized by the participation of a non-state actor fighting a State adversary. At the time of the creation of modern international humanitarian law (IHL), these asymmetric situations have been considered to be in need of rudimentary regulation only.
2. Besides the classic situations of civil war or insurgency, one of today's most pertinent asymmetric conflicts is the threat posed by terrorist networks.
3. Applicable conventional law, i.e. Common Article 3 of the Geneva Conventions (GC) I-IV of 1949 and Additional Protocol (AP) II of 1977, deals only rudimentarily with non-international asymmetric conflicts and has been continuously complemented by customary international law. However, current IHL was and still is primarily concerned with international armed conflicts.
4. This reluctant attitude of IHL towards asymmetric conflict structures is reflected by the different thresholds of applicability. The higher violence threshold required by non-international armed conflicts has the consequence that extremely asymmetric conflict situations cannot be qualified as "armed conflicts". It is the remaining preoccupation of Governments not to subject "internal affairs" to the international law regime, and consequently conflicts have to pass the "protracted armed violence" test.
5. While the symmetric conflict was characterized by a relatively uncomplicated distinction between combatants and civilians via a case-oriented catalogue, such type catalogues are missing for fighting and non-fighting civilians in asymmetric conflicts. Article 51 para. 3 AP I and its customary equivalent which are applicable in asymmetric conflicts are lacking a comparable intensity of regulation so far.
6. The classification of "unlawful enemy combatant" as a primary status next to civilians and combatants is unknown to IHL. In this respect, the – overdue – abandonment of this term by the new U.S.-American administration is perfectly reasonable.
7. Considering the rudimentary regulation of the law of asymmetric conflicts, existing norms of mitigating nature like Article 51 para. 3 AP I fill the gap between the two prevalent complementary status groups, i.e. combatants and civilians in symmetric conflicts. Civilians directly participating in hostilities as well as civilian premises used for military purposes are suitable military targets.
8. In view of the central relevance of Article 51 para. 3 AP I and the various definitions that have developed over the years, there is much need for clarification on the material and temporal scope of "direct participation in hostilities". The specific acts approach seems to construe most accurately the temporal scope of direct participation and to define the critical moment of the loss of protection while the membership approach is too broad.
9. The presumption contained in Article 52 para. 3 AP I clearly shows that IHL still favours a definition of civil objects based on the normal dedication to civilian purposes. But, the asymmetrically weak actors often fall back on the latter because they are short

of military infrastructure. Thus, for the purposes of targeting the dedication has become considerably less important compared to the actual use of objects.

10. The principle of military necessity is not able any more to fulfil its restrictive function essential to IHL. On the one hand, the asymmetrically weak adversary does not seek military advantages. On the other hand, non-state actors create dual-use targets by their recourse to civil infrastructure and exert considerable constraint on the restrictive effect.

11. Due to its complementary function to the principle of military necessity, the proportionality principle functions as the operative legal principle restricting the conduct of hostilities in asymmetric situations. However, this principle is in itself challenged by typical problems of asymmetric conflicts. Most commonly, one weaker party's unlawful conduct of hostilities may bring the adversary to use disproportionate means itself. The principle of proportionality is thus hindered by a vicious circle of violence and becomes increasingly dysfunctional.

12. The reason for the shortcomings of the restrictive function that the principles of military necessity and proportionality usually fulfil is the lacking reciprocity in asymmetric conflicts. Asymmetric actors are not guided by the expectation of the adversary's rule compliance but rather, there is no such expectation if one party manifestly objects to adhere to the law, as is clearly shown by terrorist acts. The current trend is towards an erosion of the law.

13. Any partial or comprehensive reform of IHL, for instance by an Additional Protocol IV to the Geneva Conventions, is politically not feasible at present and would rather contribute to the further erosion of IHL due to an expectable lack of acceptance.

14. For practical as well as law and policy reasons, the application of the existing law by way of a modifying interpretation is to be preferred to any comprehensive or partial reforms. In this respect, one should strive for the adoption of a standard-setting UNGA resolution that would clarify the scope of Article 51 para. 3 AP I (Article 13 para. 3 AP II), a norm highly important to asymmetrical conflicts.

15. Additionally, the enforcement mechanisms of IHL should be strengthened, particularly in asymmetric conflicts. This purpose could be served by the revival of the International Fact-Finding Commission, by a cooperative approach and by the grant of amnesties under national law.

16. Furthermore, the possibility to try war criminals before the International Criminal Court (ICC) in accordance with Article 8 ICC Statute may become a key instrument to encourage compliance with IHL in asymmetric conflicts. In this regard, it is for the Security Council to use its privilege under Article 13 (b) ICC Statute to refer certain situations to the Prosecutor.

17. Considering the rise of private military companies (PMCs), efforts should be made to develop a code of conduct on the basis of the Montreux Document of 2008 which would address the role of PMCs in armed conflicts (inter alia licensing, registration, civil liability, criminal responsibility) and the role of PMC personnel.

18. The jurisprudence of the US Supreme Court and the Israeli Supreme Court show how crucial national jurisdiction can be for the implementation of IHL and legal unification. In view of the substantial ineffectiveness of implementation, States are to be encouraged to provide local remedies for IHL violations.

19. Today, IHL is challenged by the increasing activity of non-state actors and the emerging “privatization of warfare” at large. It may only cope with these activities by cautious adaptation to demanding threats.

20. The special protection of civilians under the Geneva Conventions and the gradual renunciation of the reciprocity principle in IHL are comparable to the development of general public international law towards an objective legal system by the recognition of peremptory norms. Thus, reciprocity in IHL is not a legal principle but rather a driving State motive to abide by the law which normally functions with symmetric opponents but is generally rejected by asymmetric actors, such as terrorist networks. This reciprocity gap suspends the legal effectiveness of IHL. The aforementioned proposals shall serve as key contributions in order to at least substitute the absent reciprocity.