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THE NOTION OF ASYMMETRIC TRANSNATIONALIZATION OF WARFARE WITHIN INTERNATIONAL HUMANITARIAN LAW

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ABSTRACT

The law of armed conflict otherwise referred to as international humanitarian law, traditionally evolved to regulate conventional military conflicts between sovereign states' regular armies that operated in sparsely populated areas under similar principles using similar means of warfare. Today, it seems that at a glance, this law is inadequate to regulate seemingly indefinite asymmetric warfare conducted between regular armies and irregular, sub-state militias. The rise of transnational asymmetric conflict coupled with new technologies of warfare prompted a debate on the applicability of international humanitarian law and other contemporary laws of armed conflict on such conflicts. This work evaluates the nature and character of this atypical warfare and the response offered by the international humanitarian law. The work concludes that actors in this conflict have a duty to observe the principles of international humanitarian law as this law covers action perpetrated by parties to this conflict.

Keywords: asymmetric, transnational, international humanitarian law, armed conflict, distinction, non-state actors, Geneva Conventions, Additional Protocols.

INTRODUCTION

The major task of international humanitarian law (IHL) has always been to strike the 'right' balance between military necessity and humanitarian considerations. This task is made more pronounced in the context of asymmetric transnational armed conflicts. Asymmetric transnational armed conflicts occur where an armed conflict exists, in which a state deploys its armed forces against a non–state armed group operating from outside its territory; when the actions of the latter are not attributable to the state from which it operates; and the non–state actor employs tactics that bring about the dynamics of asymmetric warfare.

This nature of armed conflict places severe pressure and challenge on the compliance with basic rules and principles of IHL. This challenge has been felt in the case of Israel on its war with the Hezbollah in Lebanon in 2006, and to a large extent, in operations Cast Lead of 2008–2009 and Protective Edge of 2014 against Hamas in the Gaza Strip. These incidents exhibit the substantive characteristics of asymmetric transnational armed conflicts.

There have been controversies over the tactics engaged by non–state actors which significantly stretches the principles of IHL, especially the principles of distinction between civilians and

combatants. The dynamics of asymmetric transnational armed conflicts give rise to complex problems under humanitarian law. Indeed, non–state actors seldom hold territory in classical sense, and usually, they do not aspire to forcibly take territory from states. Their goals are generally limited to the continuous harassment of armed forces, using guerilla tactics or the terrorization of civilians by launching indiscriminate attacks. If they can survive an attack launched by a state, that is to say, if they can still engage in some level of guerilla action, or attacks on civilians, a few weeks into the operations, by this mere fact, they deny the state its main objective. Due to their decentralized nature and their use of guerilla tactics, physically preventing all activities by a non–state armed group is virtually impossible, at least without acquiring complete effective control over the relevant territory. However, extended military occupation, as is well known, raises a host of problems, and is likely to give rise to further security concerns, resulting in a vicious cycle of occupation, insurgency and counter–insurgency.

Asymmetric transnational armed conflicts give rise to additional and unique challenges, which derive cumulatively from their being both asymmetric and transnational. The traditional under–regulation of such conflicts can result in a responsibility gap concerning non–state actors, which in turn generates a protection gap in relation to the civilian population. For instance, in traditional international armed conflicts, each state party is under obligation to take the maximum feasible precaution to protect its 'own' civilians from the consequences of warfare. In asymmetric transnational armed conflicts, however, the civilian population located in proximity to the operations of the non–state party is caught in a triple –bind: on the one hand, in practice it does not enjoy the full benefits derived from protection duties incumbent on territorial states; on the other hand, because of the nature of asymmetric transnational armed conflicts, it may suffer extensive harm caused by the reactions of states to non–state actors. Again, non–state actors might be incentivized to capitalize on civilian harm, in order to demonize their adversary in the eyes of the local and international public opinion.

It is the contention of this writer that, there exist rules and principles of IHL to regulate asymmetric transnational armed conflict, and that their unique problems can be addressed through interpretation of existing norms. Furthermore, we believe that the strict adherence to the rules and principles of IHL, is the best way to confront such adversaries, this is because in asymmetric transnational armed conflicts, the battle for legitimacy is often more decisive than the battle for the attendant military advantage. This work concluded that the scope of application of IHL would not be overstretched and reject the claim of the demise of IHL in the face of asymmetric transnational armed conflicts.

Meaning and Nature

It is important to note that neither the term 'asymmetric warfare' nor the sometime synonymously employed terms 'fourth – generation warfare' or 'non – linear war' have thus far been concordantly defined. Again, neither the term 'asymmetric' nor 'transnational' are legal terms. Both are terms connoting factual situations that might give rise to complex questions of legal interpretation. The terms are not currently recognized as distinct categories of conflicts in positive international law.

Transnational armed conflicts are sometimes asymmetric but there is no necessary correlation between the terms. Indeed transnational armed conflicts can in theory be symmetric (for instance, when non–state actor across the border operates in scope and methods that resembles regular armed forces of a state; or conversely when both parties, state and non–state actor, employ guerilla tactics); just as

international armed conflicts can be asymmetric (for instance, when a regular army faces decentralized armed resistance during occupation).

The term asymmetric transnational armed conflict can be elusive in comprehension. However it refers to the following situations which may be cumulative in nature:

(a). The existence of an armed conflict in which a state deploys its regular armed forces against a non–state armed group operating from outside the state's territory.
(b). The actions of the non–state actor are not attributable to the territorial state if such a state exists;
(c). The deployment of the forces is not an intervention in an internal armed conflict, conducted with the territorial state's consent; and
(d). The non–state actor, either by choice or on counts of its limited capabilities, employs tactics resulting in a challenge to the traditional IHL concepts of combatant – civilian distinction, or the distinction between military and civilian objects.

In the first condition, we presuppose the existence of an armed conflict, at least at some point in time, which is a precondition for the application of IHL in a specific case. As stated though not within the context of transnational conflicts, by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in the famous Tadic case:

An armed conflict exists
"Whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such group within a state."

The determination whether an armed conflict exists in a specific instance is crucial, since if this is not the case, state actions are regulated strictly by the international law of human rights (IHRL), a body of law which severely restricts the use of lethal force, and which might well apply also to a state's extra – territorial actions. Threshold for the existence of armed conflict must be determined, since otherwise states could always derogate from, or even abrogate, their human rights obligations, by arbitrarily declaring that a certain situation amounts to an 'armed conflict'.

The application of the Tadic case or standard to specific cases, assuming it can be extended to asymmetric transnational armed conflict can encounter difficulties. This is especially true in instances where forcible actions are taken against decentralized transnational bodies such as al – Qaeda (the so – called 'global war on terror'). The question whether such circumstances amount to 'armed conflict', or should be dealt with exclusively as an issue of law enforcement, has generated much controversy. In this study we are concerned with cases in which it is obvious that the threshold of armed conflict has been crossed. Such cases may be found in the fighting between various groups and the US in Afghanistan; the conflict between Israel and Hezbollah in 2006 (assuming Hezbollah's actions were not attributable to Lebanon). The warfare between Turkey and the PKK in Northern Iraq; or perhaps, the conflict between Rwanda and Hutu militias operating in the Democratic Republic of Congo, during certain stages of the Congolese conflict which has taken place intermittently since 1990's.

In the Second Condition, we limit the term only to conflicts against non–state actors where the latter's actions are not attributable to the territorial state. This is since state–attribution necessarily transforms the conflict into an international one. Such transformation can take place when the non–state actor is

directly sent by the territorial state, when it is controlled by the state, either through effective or over control; or, when the state acquiesces to the actions of the non–state actor, while failing to exercise 'due diligence' or 'vigilance' to prevent its actions.

Furthermore, it is worthwhile to note that in international law, situations of occupation transform the transnational conflict into one generally regulated by the legal framework of international armed conflict, regardless of the identity of the parties involved. Since the threshold for the existence of occupation is increasingly seen as low, at least in some international circles, it is expected that more and more asymmetric transnational armed conflicts will shift closer to international ones rapidly.

In condition (C), we disregard instances in which the operations of the state are permitted through the consent of the territorial state, when the latter itself is involved in a conflict against the targeted actor. Without elaborating on this issue, in such instances the conflict is essentially an intervention by a third party in an internal armed conflict. While similar rules of IHL might in fact apply in such situations, we exclude these conflicts from our definition for the sake of conceptual clarity. Finally, condition (D) alludes to the challenges, detailed inour introduction and that asymmetric conflicts come under the application of the basic pillars of IHL.

Challenges for the Regulation of Asymmetric Transnational Armed Conflict

The regulation of asymmetric transnational armed conflict poses both normative and institutional challenges. The normative challenges stem from the fact that the traditional jus in Bello is not sensitive to the power relations between adversaries in asymmetric conflicts and creates perverse incentives for parties. The first normative challenge is posed by the assumption of equality of arms, an unrealistic assumption in most transnational armed conflicts. The laws of war inherently favor the stronger army which is capable of striking the military assets of its weaker adversary, while the adversary is unable to reciprocate in kind. The weaker party is expected to play by the rules that predetermine its defeat. The burden of obeying the rules rests on the shoulders of the weaker side, who is likely to find such law morally questionable and certainly not worthy of compliance, all the more so if, as is often the case, the powerful side happens to be (or is regarded by the weaker opponent as) the aggressor.

This is most acutely demonstrated in the regulation of new weaponry. Usually, it is the stronger technologically advantaged regular army that develops and enjoys the advantage of using new weapons. That party will most likely refuse to outlaw new weaponry it holds exclusively. The weaker party that effectively has no voice in the regulation of new weaponry and has no access to such weapons see the law as the dictate of the strong, designed to ensure its domination.

But the stronger side also has concerns with the traditional norms. Its non – state adversary fights from within urban centers or otherwise abuses the protection that the law grants to civilians. The traditional law on warfare was based on two key premises: that it was possible to isolate military and civilian targets with sufficient clarity and that there was a tangible military objective to be attained from the battle, such as hitting army bases or gaining control over territory. These premises give rise to the expectation that military conflict could be compatible with humanitarian ideals that war would involve inducing concessions from the defeated party by degrading its military capabilities and weakening and disabling its fighters without necessarily killing them. These premises do not apply where regular armies fight irregulars. First, in the asymmetric context there are few purely military targets. This dramatically limits the ability of the regular army to identify arenas where it can legitimately project its

power. Secondly, it has become increasingly unclear what can be considered a military gain, especially since control over enemy resources and territory often proves to be a liability rather than an asset.

The final challenge to the regulation of transnational conflicts is institutional.Rather in asymmetric situations, both parties have strong, incentives to violate the law. The weaker party may resort to perfidy or target non–combatants as the only way to harm its opponent. At the same time, the stronger party is not worried about retaliation. The temptation to strike hard and fast, to respond disproportionately and to end the conflict swiftly is high, and feelings of frustration and anger are prevalent when the weaker party perseveres. The democratic pressure to avoid casualties at all cost also plays out, tempting the army to impose the collateral damages of combat on the opponent even at the price of exposing the other side's civilians to more risk.

The normative concerns of both sides suggest that there is little room for agreement on mutually accepted norms. Both sides seek to dilute in opposite way, their obligations on this new type of war. The institutional challenges indicate that parties to transnational conflict cannot rely on reciprocity to ensure compliance with the law. The conclusion is that the regulation of asymmetric transnational conflicts cannot rely on the traditional norms and institutions of the jus on bello that are designed to address conventional armed conflicts. Transnational warfare is a very different beast and should be regulated by different norms and institutions.

Pure Normative Complexity of Asymmetric Transnational Armed Conflicts

The traditional view of IHL as a tool regulating international and non – international armed conflicts, presents a challenge when attempting to ascertain the normative frameworks that govern transnational armed conflicts. Since such conflicts do not take place between 'two or more High Contracting Parties', (the precondition for the application of the Geneva Convention's laws regarding international armed conflicts), they do not constitute international armed conflicts, in the strict sense. Conversely, since the conflicts are not internal, they do not fall within the traditional understanding of non–international armed conflict, whether these are regulated by Common Article 3 or Additional Protocol II. Indeed, the fact that they are not conducted across an international border is sufficient to subject them to the international law of jus ad bellum; but it is not certain that it is enough to qualify them as internal armed conflicts for the sake of IHL.

The possible answers to these questions are threefold. The first would be that such conflicts exist within a legal void, in which norms of IHL, and specifically Geneva Law and Additional Protocol I, do not apply. A second answer would be to interpret common Article 3 as a residual norm, which 'captures' any type of conflict 'not of an international character', even if it is not a classic 'civil war' situation. The third possible position would be to consider asymmetric transnational conflicts as closer to international ones, and thereby subject to Geneva Law and Additional Protocol I in their entirely. The view that asymmetric transnational armed conflicts exist within a complete 'legal void' has not been generally accepted. The US Supreme Court, as well as most literature preferred the second aforementioned option. The Israeli Supreme Court, conversely, chose the third option; nonetheless, this distinction is not of extreme importance in the light of the convergence of the norms regulating all kinds of conflicts.

The question was addressed by the US Supreme Court in the Hamdan case. Hamdan was captured in Afghanistan in 2001, during the armed conflict between the US and Taliban–ruled Afghanistan, and

was transported to Guantanamo Bay. President Bush sought to try Hamdan for involvement with al–Qaeda before a military commission, rather than a court–martial or a civilian court. The question arose, inter alia, regarding the legality of the military commission. The US government was of the opinion that this question should not be analyzed according to the Geneva Law, which does not apply to detainees captured in the context of the conflict with al–Qaeda, since the latter was neither an international nor an internal armed conflict. The Court, however, rejected this view, ruling that such conflicts fall at least within the confines of Common Article 3. It therefore read Common Article 3 as a residual provision, applicable whenever a conflict 'does not involve a class between nations'. The court noted that an 'important' purpose of Article 3 was to address internal armed conflicts, but emphasized also the commentaries' approach that the scope of application of the Article must be as wide as possible. Thus, the court held that the military commission in Hamdan's case, and precisely because it was unnecessary, violated the requirement under Common Article 3 that sentences be passed by a 'regularly constituted court'.

In another development, the Supreme Court of Israel adopted a different approach. In the context of the conflict between Israel and Hamas–controlled Gaza Strip, neither Hamas nor the Palestinian Authority constitute 'High Contracting Parties', the circumstances are further complicated because Gaza is not an integral territory of any state. In the Targeted Killing Case, the court affirmed that any conflict taking place in an occupied territory amounts to an international armed conflict; however it furthermore, held that the existence of 'belligerent Occupation' is not a precondition for a conflict to be considered international

The Israeli government holds a slightly different view, maintaining that although 'it is not yet settled' which regime applies to such 'sui generis' conflicts, Israel, as a matter of 'policy' applies, regarding the Gaza conflict, the norms of both international and non-international armed conflicts. Importantly, it argued that the classification of conflicts, at least with regard to the law of targeting, is largely of 'theoretical concern', as both types of conflicts are regulated by many similar norms and principles.

The Turkey Commission, appointed by the Government of Israel to investigate the Gaza Flotilla Incident of May 2010 has followed the same route in general, identifying a 'consensus' that the conflict between Israel and Hamas is an international armed conflict, although various actors have different reasons for this conclusion. It went on to conclude that regardless of this distinction, the norms of IHL would apply in any case, even if the conflict would have been considered a non–international one.

International bodies have also viewed the Israel–Hamas conflict as an international armed conflict, albeit, as recognized by the Turkey Commission, for reasons differing from those advanced by Israeli institutions. Contrary to the Israel, according to which the Gaza strip ceased to be occupied following Israel's 2005 disengagement, various international bodies are of the opinion that Gaze remains occupied, and therefore and in accordance with common Article 2 of the Geneva Conventions, the conflict must be an international one subject to the Fourth Geneva Convention. Other documents, such as Goldstone Report, accepted the proposition that the Gaza strip is occupied, adding that, in any case, whatever the distinction of the conflict is, the rules of international and non–international conflicts nowadays converge. The MCGOWEN – Davis report, concluded as a fellow–up to the Goldstone Report, also endorsed the position that the conflicts is of international character, mentioning that both Israel and the Palestinian sides agree to this presupposition; it reiterated too that the norms regulating both types of conflicts are becoming more similar.

Indeed, it is well accepted that in contemporary international law, there is 'growing customary international law' that applies to all conflicts, whether international or non–international, and includes, inter alia, the principles of humanity, proportionality, distinction and necessity. An example of this trend can be found in the opinion of Justice Stevens in the Hamdan's case, where he interpreted the requirements set forth in common Article 3 as containing the provisions of Article 75 of Additional Protocol I. This tendency is applicable not only to the Israel-Hamas situation, but also with regard to any potential conflict between Israel and Hezbollah in Lebanon.

Principles of Distinction in Asymmetric Transnational Armed Conflict in Relation to Targeting of Persons

The principle of distinction, between civilians and combatants is one of the basic tenets of IHL, and is recognized widely as a rule of customary international law. It is expressed in Articles 48, 50, 51, (2) and 52 (2) of Additional Protocol I, and applies both to the distinction between the civilian population and combatants and between civilian and military objects. Furthermore, the principle of distinction requires parties to the conflict to distinguish themselves from the civilians population, at least by carrying arms openly. It also requires parties to take all feasible precautions to protect civilians under their control against effects of attacks (such as construction of shelters). However, Protection is not absolute: civilians enjoy protection from attack 'unless and for such time as they take a direct part in hostilities'.

The application of the 'direct participation in hostilities' standard is central to the contemporary discussion of targeting. In the context of asymmetric conflicts, the principle of distinction is of special importance. In light of the overwhelming technological advantage of modern militaries, non–state armed groups routinely challenge the principle both by their often–ambiguous structure and through their methods of operation. Indeed, the application of the principle of distinction in the asymmetric theater requires a delicate balance. On the one hand, it is imperative that the principles is not diluted, since the protection of civilians remains a central pillar of IHL, regardless of any unlawful acts committed by an armed group that fails to distinguish itself from the civilian population. On the other hand, international law, in order to maintain its credibility, cannot be interpreted in a manner that grants non–state armed groups, which take advantage of the legal limitations placed on state action, significant battle–field advantages.

The question of distinction is especially valid in the context of targeted killings: that is to say, the intentional, often 'preventative' use of lethal force against a specific individual not in custody of the actor. Problems of distinction are experienced all across the asymmetric battlefield. Indeed, in contemporary asymmetric transnational armed conflicts, the line between 'targeted killings' in the narrow sense and more traditional military operations that just happen to be conducted by use of the same mechanisms, such as drones, is often blurred. In such conflicts, hostilities are often manifested in a continuous series of targeted operations against militants, such as when an air force operates against ongoing rocket fire. Whether such operations are 'targeted killings' per se is doubtful. It seems thus that the definition of a targeted killing relies extensively on its temporal aspect: the further the operation is from a specific hostile act conducted by the targeted individual, the more likely it is that the operation will be deemed a targeted killing and raises the dilemmas associated with such actions. These dilemmas also give rise to demands for increased legal scrutiny.

Assuming the existence of an armed conflict, the most challenging question in this context, is the identification of the individuals that can lawfully be targeted, and the related question regarding the status of such individuals. In the past few years, there has been a robust debate of this issue, which can be traced from the 2006 Israeli Supreme Court Targeted killings case, through the 2009 ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities and its subsequent critiques. International reports and the increasing use of drone attacks by the U.S have further invigorated this often polemic debate.

Membership Status

The status of members in a non–state organization involved in asymmetric transnational armed conflicts raises a host of complex questions. On the one hand, the traditional dichotomy between 'combatants' and 'civilians' is a well – established principle of IHL, reflected in Article 43 of Additional Protocol I, which is widely understood to provide that only members of the armed forces of a party are combatants. The term 'party' in Additional Protocol I generally means a state, as the protocol applies to international armed conflicts, thereby excluding non–state actors. However, in practice, asymmetric transnational armed conflicts often involve organized armed groups thus stretching thin the concept of 'civilian', if not breaking it altogether.

In Common Article 3 of the Geneva Conventions, which applies, inter alia, to this type of conflicts, there is indeed a reference to 'armed forces' not belonging to a state which can be interpreted to include members in non–state armed groups. However, it is unclear whether the term 'armed forces' is used in Common Article 3 in a generic–technical sense, or whether it is meant to establish a different legal status for members of such groups, at least for the sake of loss of protection from attack. State practice has not been clear in this aspect.

In essence, there are two different approaches to the legal standing of such fighters. The first is to view them as civilians, and then to assess whether their actions fall within the ambit of the notion of 'direct participation in hostilities', as the term appears in Article 51 (3) of Additional Protocol I, which entails the loss of protection. This was the approach preferred by the Israeli Supreme Court in the Targeted Killing Case. The second option is to construct Common Article 3 as attributing a legal meaning to the term 'armed forces', resulting in the recognition of a different status for members of such armed forces. If the latter route is chosen, there remains a question regarding the relationship between this status and the concept of 'Direct Participation in Hostilities', and whether this status results in complete equality between a state's armed forces and armed groups, in terms of targeting.

Members in Non–State Actors as Civilian Directly Participation in Hostilities 'The Civilian Approach'

The civilian approach emphasizes the civilian–combatant dichotomy, interpreting the latter term as strictly referring to a state's armed forces. It does not recognize any other status. The fact that civilians might directly participate in hostilities, the argument goes, does not in itself, change the status of these persons from civilians to combatants: nor does it create a novel 'third status' of 'enemy combatants', 'unlawful combatants' or any other. The term 'enemy combatants' was used by the US, in its domestic law, to describe specifically persons 'part of or supporting' the Taliban, al Qaeda or associated forces, who were to be detained in Guantanamo Bay and tried by military commissions. The term 'unlawful combatants' is a generic term used to describe civilians that participated directly in hostilities and thereby can be subject to trial and punishment. Both categories are not deemed to have or create a

separate status in international law.

Thus, the civilian approach understands the category of 'civilian' in IHL as a residual one, applying to any person who does not belong to or is afflicted with, the armed forces of a state. The term is therefore defined negatively as encompassing all persons who are not members of a state's armed forces. This was the understanding of the concept of civilians under IHL, as reflected by the Israeli Supreme Court in the Targeted Killing Case, where operatives of armed Palestinian groups were deemed civilians, targetable only when directly participating in hostilities. In sum, individuals engaged in hostilities in the context of asymmetric transnational armed conflicts are civilians, who can be targeted for such time as they take a direct part in hostilities.

Principle of Distinction Relative to Targeting of Objects

IHL requires distinction among persons; it also requires distinction among objects. Just as the law requires parties to armed conflicts to distinguish between persons who may be targeted and persons who may not be targeted, so too does the law requires distinction between so called 'military objectives' and 'civilian objects'. The basic reasoning is the same: Civilians not participating in the conflict should not suffer its horrors. Even when non–participating civilians themselves may not be physically harmed when objects are attacked, damage to the objects, such as buildings, roads, or infrastructure that civilians use has consequences on civilians' lives.

The concept of distinction among objects is rooted in customary law that evolved over the past two centuries. It also has been codified in Additional Protocol I, whose Articles 48 and 56 limit targeting to military objectives only. The basic principle of distinction is set in Additional Protocol I Article 48:

"in order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

This is recognized as customary law.

By consensus, the definition of 'military objectives' in Additional Protocol I, Article 52 (2) is also regarded as expressing customary law. According to the protocol, military objectives are defined as objects 'which by their nature, location, purpose or use make an effective contribution to military action "and" whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage'. A 'Civilian object' in turn, is any object other than a 'military objective'. This dichotomy between 'military objectives' and 'civilian objects', is the fundamental concept.

As for the definition of 'military objective', the provisos of 'effective contribution to military action "and" definite military advantage', limit the objectives that may be sought. In principle, these two phrases set separate standards that must each be met in practice, meeting one standard in most cases implies meeting the other. Consistent with the other aspect of IHL, a party may not target an object merely because it contributes to civilian morale or because its destruction will achieve a political objective.

This concept of distinguishing among objects is, of course, often hard to implement. Discerning whether an object is 'military objective' or 'civilian object' is often not straight forward. This is particularly true for 'dual–use' targets, which often include power plant, bridges and other infrastructure, but can also include any object that meet the criteria for a 'military objective' but also have a civilian function. Some claim it is likewise true for 'war–sustaining economic objects' (that generate funds used to sustain a war effort) and for political and psychological objects (that, while not directly part of providing arms for the fight, can affect the likelihood of a party's success in armed conflict). Finally, parties to an armed conflict confront the question of certainty: how certain a party must be of an object's military nature in order for its targeting to be permissible.

All of these areas have implications for all states involved in conflicts with non–state actors across their borders. The targeting of objects is often one of the most hotly contested arenas for debating the military strategies of regular armies in asymmetric warfare. Increasingly, non–state actors have the trappings of governments, complete with factors and ports ('war–sustaining economic objects') and broadcasting facilities (political and psychological objects). In no area are the actions of regular armies more contested than on the question of dual–use objects, infrastructure that serves both military and civilian needs.

Dual–Use Object

The legality of targeting dual–use objects is of particular resonance in asymmetric transnational conflicts, in which the strategy of the irregular forces is to blur the distinction between civilian and military function. As Schmitt noted more than a decade ago, the gap between technologically advanced parties and their less equipped adversaries would lead the less powerful side to blur distinctions between civilian objects and military objectives, 'driven by the desire to compensate for weakness on the purely military front.' At the same time, militaries in more technologically advanced states would increasingly rely on dual–use infrastructure or objects, due both to the advance of technology and for cost efficiency. For instance militaries increasingly rely on the same mechanisms of information technology, such as the internet, as the civilian sector. States have also identified cost efficiencies in contracting out what had been military work. This 'trend towards militarizing civilian activities and civilianizing military ones' complicates distinction.

Whatever the strategic context, in all cases the target must be a military objective, and the view of the strong majority of sources is that an impact on civilian morale is not a basis for an object to be considered a 'military objective'. As Schmitt explains, 'indeed, actually intending to achieve political, economic, or other non–military ends is acceptable, so long as the targets qualifies as a legitimate military objective on other grounds. The crucial point is that the criteria for 'military objective' must still be met in full (as well as any other applicable IHL principles, such as proportionality).

Jefferson D. Reynolds noted thus:

"while the civilian population should never be the subject of direct kinetic attack, the effects on this center of gravity are largely discomfort, morale and resolve to support their leadership in conflict participation. The primary obstacles to this type of campaign is that Article 52 (2) arguably prohibits Attacking these targets, even though their destruction may reduce the length, cost, damage and casualty rate typically of objects providing a distinctly military advantage. Objects providing a military advantage typically translate into the highest center of resistance and the most difficult to engage, especially when they are commingled among the civilian population in concealment warfare."

The attendant legal questions therefore arise. An analysis of the law of targeting dual–use objects begins with Additional Protocol I itself. As noted earlier, Article 52 of Additional Protocol I stipulates that an object may qualify as military objective due to its 'nature, location, purpose, or use'. 'Dual–Use' objects are not military objectives by virtue of their 'nature'; according to the dominant interpretation, that category includes, primarily, military equipment or bases. The 'purpose' category is an important one in law of targeting of objects, as it requires an inquiry into an adversary's future behavior and how it might use the object at a later time.

This 'purpose' criterion raises the question of how remote a purpose must be for an object to qualify as a military objective. In theory, any element of civilian infrastructure could be converted to military use, such that all civilian infrastructures could be defined as military objectives by 'purpose'. For that reason, the ICRC Commentaries require intent on the part of a party to convert the object to military use in order for the 'purpose' criterion to be met. YoramDistein has adopted a similar standard, explaining that 'purpose is predicated on intentions known to guide the adversary and not on those figured out hypothetically in contingency plans based on a "worst" case scenario'. Schmitt offers more lenient standards regarding an object as military objectives 'if the likelihood of military use is reasonable and not remote in the context of the particular conflict under way'. Applying Schmitt's standard, actual intent would not be necessary, only a showing of reasonable likelihood of use. Objects that are generally civilian objects (houses, schools, places of worship and others) are protected from attack according to the ICRC's Customary IHL Study, 'unless and for such time as they are military objectives."

CONCLUSION

The persistence and prevalence of asymmetric transnational armed conflicts have given rise to two rival claims. At the same time, however, various third parties, including national and international courts, commissions of inquiry and global civil society, converge in an entirely different approach informed by the expectation that with more power comes more responsibility, these third parties expect the more powerful side to gradually ensure the protection of enemy civilian's lives (not only to respect their lives).

This expectation leads to demands for modification of the traditional law in the context of asymmetric transnational warfare in at least three areas: Firstly, the recognition of an obligation to consider alternatives to military action (asking not only whether targets were legitimate military targets, but also whether the decision to use force against them rather than explore the non–forcible or less–forcible alternatives, was justified under the circumstances). Secondly, if there were no available alternatives, the army would be expected to invest significant resources to minimize harm to civilians. Finally, following an attack, the army would be obliged to conduct a transparent and accountable investigation to reexamine its own actions. Third parties may also insist on limiting the discretion of the 'reasonable military commander'.

This work has considered different forms and nature of asymmetric transnational armed conflict that influence the application or interpretation of IHL in contemporary times. Clearly, the most visible influence is that exerted by technological differences in the military power of opposing sides. However, other forms of this conflict also derive the willingness of participants to abide by the norms of IHL, or, perhaps more precisely, deviate from them. The real danger is that violations of IHL by one side

usually lead to corresponding violations by the other thereby initiating a vicious cycle of lawlessness. Recall that the willingness of states to abide by humanitarian law is in part based on the notion of reciprocity. Parties are obliged to agree to limit their actions during hostilities because they will benefit when their opponent does the same, IHL presumes corresponding interest among the belligerents.

While the rise of asymmetric transnational conflicts between states and non – state armed groups has created the situations to which IHL applies have become easier to identify thanks to the recent development of that body of law. Since the Hamdan and Boumediene rulings by the US Supreme Court, it seems universally acceptable that armed conflicts with non–state groups do not constitute a 'law–free zone' or a 'legal black hole', but are subject to IHL or to human rights provided by national and/ or domestic law.

In the meantime, Common Article 3 has developed into a minimum yardstick for any armed conflict. The separate treatment of Article 8(2)(c) and (d) of the Rome Statute suggests as much. With this framework in mind, this article has attempted to show that this type of conflict can indeed be categorized more or less convincingly. We are faced not with a single confrontation with 'terrorism' as such, but with a range of warlike conflicts between states and non–state entities, some of them international (Afghanistan 2001–2002, Iraq, 2003–2004 and Lebanon 2006 after the attacks on government and public facilities), others non–international (US–Taliban and Al Qaeda in Afghanistan/Pakistan since 2002, Gaza 2008–2009, while others were probably not an armed conflict at all (Yemen 2002).

It is particularly important to maintain the equal application of IHL despite the categorization of the parties to such a conflict according to jus ad bellum or domestic law. This is why Article I(4) of Protocol I has turned out to be so problematic. Non – state groups continue to be unable to claim the 'combatants privilege' as lawful belligerents and hence a legal 'right' to use armed force against anybody. The applicability of IHL thus does not depend on 'reciprocity', but only on the binding nature of the IHL for all parties to a conflict.

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