Asymmetric Warfare as a Challenge for International Humanitarian Law?[1]

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1 Introduction

The Conflict in Syria has brought asymmetrical warfare back to the attention of the wider public - at the same time is the outside view on the conflict no longer limited to what the media chose to report as *Youtube* has become a propaganda tool in this conflict as well. At the same time, the degree of uncertainty with regard to events on the ground is significant. This provides a stark contrast to the way in which the North Atlantic Treaty Organization (NATO) provided information on operations during the 1999 war against Yugoslavia. In a sense, the daily press briefings and in all likelihood unprecedented openness which were utilized by NATO in Operation *Allied Force* helped to create the image of a clean war. This image was aided by the massive involvement of lawyers in the war effort. In a review of *Wesley K. Clark*'s book "*Waging Modern War: Bosnia, Kosovo and the Future of Combat*", in which NATO's former Supreme Commander draws his conclusions from Operation Allied Force, *Richard K. Betts* remarks that "One of the most striking features of the Kosovo campaign, in fact, was the remarkable direct role lawyers played in managing combat operations - to a degree unprecedented in previous wars. [...] The role played by lawyers in this war should also be sobering - indeed alarming - for devotees of power politics who denigrate the impact of law on armed conflict."[3] Although *Clark* saw the origin of the increasing role of lawyers in U.S. law, Operation *Allied Force* serves as a showcase for the effect the demand for compliance with International Humanitarian Law has had on armed forces not only since the beginning of the Balkan Wars but maybe already since the wake of *My Lai*: if one wants to compare NATO's relative openness about military activities conducted in the name of Human Rights to, influenced especially by the European NATO partners,[4] with the U.S.' attitude regarding operations in Vietnam and elsewhere, the influence IHL has had especially in Europe becomes obvious: While in earlier wars cover-ups were the norm, the armed forces of Western Democracies nowadays are subject to more public scrutiny than ever before.

Yet while the renaissance of International Law[5] has created more constraints on the use of force by states, modern conflicts are waged inside national borders more often,[6] which requires a new understanding of the enforcement of IHL. An other aspect requiring a new look on the enforcement of International Humanitarian Law is the fact that wars are more and more often fought not between national armies but between a national army or national armies on one side and guerrillas or terrorists on the other side. National Armies are facing enemy forces which employ asymmetric warfare tactics and strategies, which more often than not rely heavily on violations of International Humanitarian Law by targeting civilians. The lack of preparedness by national armed forces will lead to a situation which Napoleon Bonaparte still considered to be a doctrine of warfare: *On s'engage et puis on voit*.

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[1] This text is in part based on research originally conducted for the author's Diploma Thesis "Towards a culture of compliance". A first updated, shortened, version of this thesis was made available under the title "International Humanitarian Law in Modern Asymmetric Conflicts" at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=757089> last accessed 22 March 2014.

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[3] Richard K. Betts, "Compromised Command - Inside NATO's First War", in: 80 *Foreign Affairs* (2001), Vol. 4, July / August, pp. 126 *et seq.*, at p. 129.

[4] *Ibid.*, at p. 128.

[5] *Cf.* Christina Wagner / Stefan Kirchner, "Das VStGB - Ein Meilenstein in der Durchsetzung des humanitären Völkerrechts", in: 24 *Jura* (2002), pp. 128 *et seq.*

[6] *Ibid.*

– Attack first, make decisions on how to win the war later. While the U.S. approach to the 2003 Iraq War seemed to resemble this Napoleonian style, already the great Chinese military mind *Sun Tzu* suggested the strategies with which Iraqi insurgents answered the American occupation: when facing a superior enemy force attempting to invade your country, let it in and then counter it with small, gradually increasing attacks. Also *Clausewitz* counseled against starting a war if one doesn't know how to end it. Both the U.S. war in Vietnam and the Soviet War in Afghanistan as well as the 2003 Iraq War showed the consequences of rushing in without a plan to get out. The eventual decision by the *Obama* government to withdraw forces from Afghanistan by a specific date however was no longer motivated by military considerations (which would have been the case, had the forces no longer been needed) but by domestic politics and a desire to get out of (rather then end, let alone win) a war which has lost its popularity with the voters. As the withdrawal of foreign forces means victory for those who had been occupied, the two Afghan wars, Vietnam and Operation Iraqi Freedom show that asymmetric warfare can be successful. In fact, from the perspective of the weaker side to an armed conflict, the departure of the occupying force means victory. Asymmetric warfare therefore helps the weaker party to overcome some of its disadvantages. Yet, asymmetric warfare comes at a price. Asymmetric warfare often means not only new tactics and strategies but often also means hiding in the civil population, not being identifiable as fighters, not wearing uniforms, using indiscriminate weapons, attacking civilians who are suspected of collaboration and infrastructure which is used by civilians and enemy forces alike. Asymmetric warfare means snipers in church towers and ammunition depots in mosques. It can also mean a frustrated enemy who is unable to know who is the enemy and who will resort to violence against civilians. While civilians already pay a high toll in armed conflict, this toll can be increased dramatically if one side resorts to asymmetric warfare. This does not have to be the consequence but if history is any guide, the likelihood of an increased direct and indirect damage to civilians increases significantly in case of asymmetric warfare.

In recent years, wars between states have become the exception and intra-state wars have become much more common, often pitting government and "rebel" forces against each other or, as in the case of the Global War on Terror, foreign governments against global terrorists. The Global War on Terror and the internal conflicts in places like Iraq, Syria, Yemen, Libya, Mali and Nigeria, but also Mexico's drug war and of course the continued attacks against Israel, to name just a few, are characterized by terror as the main *modus operandi* of many non-state groups. The new challenges of modern conflicts therefore demand that both the military as well as the legal community adapt to the changed military situation in order to ensure compliance with International Humanitarian Law also in modern asymmetric conflicts.

The question before us is which tools are available for the enforcement of International Humanitarian Law against non-state actors in modern asymmetric conflicts. We will especially have a look at alternatives to courts as a tool of IHL enforcement. Courts, while often serving as a useful tool for IHL enforcement within the context of western armed forces, are an insufficient deterrent for enemies ready to killed innocent civilians with suicide attacks. Yet, contrary to the old adage, the law cannot be silent when weapons speak.[7]

2 Enforcing International Humanitarian Law

2.1 Introduction

[7] Marcus Tullius Cicero, *Pro Tito Annio Milone ad iudicem oratio*, available online at <http://www.thelatinlibrary.com/cicero/milo.shtml> last accessed 22 March 2014, I.11.: "Silent enim leges inter arma."

Enforcing International Humanitarian Law is one of the most difficult aspects of this interesting field of international law. On one hand International Humanitarian Law in a certain sense constitutes a law beyond the law, that is, a set of legal rules which becomes applicable after the prohibition of the use of force, one of the most fundamental tenets of international law, has been breached. On the other hand does International Humanitarian Law apply equally to the attacking as well as the defending party to a conflict. Finally is it illegal to retaliate in kind, once International Humanitarian Law has been violated by one party to the conflict. Both aspects can make it difficult to explain to the general public why respect for International Humanitarian Law is crucial.

In this article we will have a look at the different options available for the enforcement of International Humanitarian Law and how the challenges posed by modern conflicts can be met. *Samuel P. Huntington* predicted such conflicts: International Humanitarian Law, like almost the entire modern system of international law[8] and the idea of human rights, has its roots in the western (legal) cultures, which might make it seem alien and hence inacceptable for others. What might be universalism for some might be imperialism for others.[9] An intentional violation of International Humanitarian Law, such as is the case with attacks against civilians, e.g. in Israel, New York, Madrid, Afghanistan, Iraq or Saudi-Arabia, therefore might be perceived by terrorists as a direct attack against the Western values.

By equating g attacks against military/terrorist targets with attacks against civilians, terrorists attempt to create a degree of legitimacy of violations of International Humanitarian Law. On the other hand will terrorists see a need to violate International Humanitarian Law since the creation of a large military potential that can truly match Western forces would require both time and funds,[10] which in turn will lead terrorists to search alternatives to traditional military power in order to create a counterweight against conventional Western military might.[11] Apart from the danger that terrorists might develop, purchase[12] or steal nuclear, biological or chemical weapons, terrorist attacks against civilians remain the weapon of choice for "non-western weak" actors.[13]

2.2 War, military requirements and International Humanitarian Law

Hostile soldiers are still considered a "ressource" of the opposing forces, the same holds true for supporting civilian institutions, creating a certain incentive for terrorists to attack civilians as well in order to harm the enemy through targeting enemy "ressources":

"In the nineteenth and twentieth centuries, states began to accept, as ancillary principles, codes for how to fight just wars that avoid excessive harm, that protect the rights of the noncombatant, that regulate appropriate behavior during sieges and blockades, that define the proper standards of surrender, and that (with Nuremberg) allow for the punishment of government leaders responsible for war crimes and the crimes of aggressive war and genocide. These are rules of the road, conventions developed over long periods of time, convenient principles of "backscratching". Each sovereign does for the other what it would like to have done for itself over the long run. The actual evolution of these rules was

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[8] With the exception of the principle of *uti possidetis*, the primary intention of which was the avoidance of boundary disputes between Latin American countries by making the former borders between the different provinces of Spanish Latin America the new international borders, *cf.* Christiane Simmler, *Das uti possidetis-Prinzip: zur Grenzziehung zwischen neu entstandenen Staaten*, Duncker & Humblot, Berlin (1999), p. 78.
[9] Samuel P. Huntington, *The Clash of Civilisations*, Simon & Schuster, New York (1996).
[10] *Ibid.*, p. 296.
[11] *Ibid.*, at pp. 296 *et seq.*
[12] As had been attempted by the Republika Srpska, see Barry L. Rothberg, “Averting Armageddon, Preventing Nuclear Terrorism in the United States”, in: 8 *Duke Journal of Comparative & International Law* (1997), pp. 79 *et seq.*, at p. 85.
[13] *Cf.* Huntington, *supra* note 9, at p. 299.

shaped by the fact that were thought generally useful by the monarchs of Europeans the monarchs pursued their own interests, seeking to avoid unnecessary clashes among themselves. (Indeed, these are just the sort of backscratching rules that might be developed by equally ruthless "monarchs", the leaders of organized crime.)"[14]

Yet although initially International Humanitarian Law also benefited states, "This is not to say that rules do not have ethical significance. Rules of the road reduce traffic fatalities. They also can represent acceptable compromises among diverse moralities. They work especially well for issues too unimportant, too unclear, or too dangerous to contest."[15] In practice however, it can be hard to predict how individuals, which are obliged directly to comply with International Humanitarian Law, will react to violations by the opposite force. Despite the fact that armed reprisals are outlawed, violating International Humanitarian Law can start a vicious circle facilitated by the continuous danger in which those obliged to comply with International Humanitarian Law find themselves.

2.3 Difficulties in Enforcing International Humanitarian Law

Fundamental to all difficulties relating to the enforcement of international law is the classical and by now outdated point of view of the Westphalian legal system to the effect that only states (or international organizations of states) can be subjects of international law. In a globalized world, in which non-state actors play a much greater role than in the past, this picture is changing every day.[16]

The principle of non-intervention is the most visible sign of this problem: in contrast to domestic law the international legal system lacks a higher authority independent of states which can exercise the force necessary in order to ensure compliance with the law. This problem comes to light especially when International Humanitarian Law is being violated: not only has the International Criminal Court in The Hague only a limited jurisdiction, military considerations will always play an important role in the decision-making process of those engaged in combat. Furthermore might terrorists want to gain a certain degree of legitimacy for their actions in violation of International Humanitarian Law by jumping on the relativism-bandwagon. Yet unlike for human rights where regional regimes in Europe and the Americas have played a key role in the promotion of human rights, there is no room for any relativity of International Humanitarian Law, since many rules of International Humanitarian Law have become *jus cogens* and humanity has been accepted as a general principle of international law already in the *Corfu Channel* case[17] as well as later in the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.[18] Cultural differences therefore cannot be invoked to explain violations of International Humanitarian Law. Enforcing International Humanitarian Law, though, remains particularly difficult. The least invasive way to try to enforce International Humanitarian Law is through political means.[19]

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[14] Michael W. Doyle, *Ways of War and Peace - Realism, Liberalism & Socialism*, W.W. Norton & Company, New York City (1997), pp. 387 et seq. - footnotes omitted.
[15] *Ibid.*, p. 388 - footnote omitted.
[16] On this development see e.g. Stefan Kirchner, “The Subjects of Public International Law in a Globalized World”, in: 2 *Baltic Journal of Law and Politics* (2009), pp. 83 *et seq.*, at pp. 89 *et seq.*
[17] International Court of Justice, *United Kingdom of Great Britain and Northern Ireland v. Albania*, Judgment of 9 April 1949, I.C.J. Reports 1949, pp. 4 *et seq.*, at p. 22.
[18] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Rep. 1996, pp. 226 et seq., at p. 257.
[19] *Cf.* Evan Luard, *Human Rights and Foreign Policy*, Pergamon Press, Oxford (1981), pp. 26 et seq. and Peter R. Baehr, The Role of Human Rights in Foreign Policy, 2nd ed., Macmillan Press Ltd., Houndsmills, London (1996), pp. 31 *et seq.*

3 Political Means of IHL Enforcement

3.1 Introduction

For the enforcement of International Humanitarian Law the same holds true as for the enforcement of international human rights outside a framework providing for courts and commissions, i.e. that half-hearted political attempts at enforcing legal obligations will most often fail to be successful,[20] since the interests of states will collide with their obligations under international human rights law and International Humanitarian Law, especially in case the own security is concerned.

Post-9/11 developments in the United States and elsewhere, such as introduction of anti-terrorism legislation, increased security requirements for international air travel, online espionage, special renditions and prison facilities outside the regular justice system indicate that governments can feel the need to give up human rights (and International Humanitarian Law(in favor of a perceived increase in security. While such measures also hit persons who are not involved in terrorist activities, violations of international humanitarian law by states only escalates the situation and provides a further incentive (as if any were needed) for non-state actors to disregard the laws of war and human rights. Even if one agrees with the former foreign minister of the Netherlands and former OSCE High Commissioner on National Minorities Max van der Stoel that peace and security have to take precedence over human rights,[21] the same does not apply to International Humanitarian Law. If International Humanitarian Law has become applicable, the peace has already been broken and security has already become endangered, which leads to the conclusion that violations of International Humanitarian Law require an even stauncher political reply than "ordinary" violations of human rights. This reply seems to be missing all too often.

3.2 So called “Silent Diplomacy”

A first step towards a political enforcement of International Humanitarian Law can consist in applying bi- or multilateral diplomatic (i.e. especially financial) pressure on the warring parties. Here as well we can find parallels to the protection of human rights through diplomatic channels. Initially human rights were not considered a legitimate matter of concern in diplomatic affairs.[22] To the contrary, diplomatic questions, it was thought, should be limited to state interests and not enter into the domestic affairs of other countries.[23] Yet since rules of International Humanitarian Law were meant to protect state interests as well, International Humanitarian Law considerations are a legitimate concern in diplomatic relations. Yet the prohibition of intervention into the domestic affairs of an other state - enshrined in Art. 41 (1) of the Vienna Convention on Diplomatic Relations and Art. 2 (7) UN-Charter is still considered a cornerstone of present-day diplomatic relations.[24] The fact that the United Nations can take action in case of gross violations of human rights and international humanitarian law shows that such violations can no longer be considered to be purely an internal affair of the state in question, a position still maintained by the

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[20] *Cf.* Christine M. Chinkin, “Editorial Comments: Women's International Tribunal on Japanese Military Sexual Slavery”, in: 95 *American Journal of International Law* (2001), pp. 335 *et seq.*, at p. 339: "[...] states cannot through their political agreements and settlements ignore or forgive crimes against humanity that are committed against individuals."

[21] Max van der Stoel, “De Rechten van de Mens in de Oost-West betrekkingen”, in: Philip P. Everts / J. L. Heldring, *Nederland en de Rechten van de Mens*, Anthos, Baarn (1981), pp. 75 *et seq.*, at p. 79.

[22] Cees Flinterman / Vincent de Graaf, “Diplomatie en mensenrechten - Van gespannen verhouding naar gearrangeerd huwelijk”, in: Jan Melissen (ed.), *Diplomatie, raderwerk van de internationale politiek*, Van Gorcum, Assen (1999), pp. 90 *et seq.*

[23] *Ibid.*

[24] *Ibid.*, p. 95.

governments of e.g. the People's Republic of China and the North Korea. Adherence to International Humanitarian Law is not merely a domestic matter, not even in cases of internal armed conflict, because International Humanitarian Law obliges and benefits individuals directly. Especially in cases in which one country represents the interests of one of the warring parties, as Switzerland has done e.g. in the Islas Malvinas / Falkland Islands War between Argentina and the United Kingdom, the principle of non-intervention quickly reaches its limitations. In principle, therefore, despite its limitations, diplomacy remains a feasible means of attempting to enforce International Humanitarian Law.

3.3 Negative Sanctions

Negative sanctions, e.g. on regimes harboring terrorists, are also not too likely to yield the results envisaged, since it is never the leadership but ordinary people who will suffer, as has been the case in Iraq, North Korea, Afghanistan and South Africa. The examples of Iraq and North Korea serve as reminders, that the toll paid by the civilian population due to sanctions imposed on the regime under which they live (and more often than not suffer, too) can backfire dramatically. Negative sanctions limited to e.g. UN Security Council-imposed arms embargoes, furthermore only work, if all states participate and the embargo is enforced as well, conditions that will only rarely be met in practice.

3.4 Positive Sanctions

Positive Sanctions with the aim of achieving compliance by a party to a conflict on the other hand appear to be even less feasible, since the sanctioning states would give benefits to a party on an ongoing armed conflict, and one would even create an incentive to violate International Humanitarian Law at least for some time. While positive sanctions during the conflict therefore appear to be less feasible, positive sanctions can play a vital role in the aftermath of armed conflicts when it comes to prosecuting those responsible for atrocities as has been shown by the case of the extradition of *Slobodan Milosevic*, which was linked to substantial financial aid from Western states.

3.5 Interim Conclusions

We therefore have to conclude that political means of enforcement of International Humanitarian Law appear not to be all too promising. Yet as in the Kosovo-Case, political pressure, which in the case of Kosovo found its unsuccessful climax in Rambouillet, can pave the way for more forceful measures of ensuring the compliance of parties to a conflict with International Humanitarian Law.

4 The military Enforcement of International Humanitarian Law

Enforcing International Humanitarian Law through military means cannot mean a retaliation in kind since violations of International Humanitarian Law can never be justified and because all forms of armed reprisals are deemed unlawful under international law. Humanitarian Interventions for the purpose of preventing violations of International Humanitarian Law, although desirable, as well are still illegal under international law, unless justified by the UN Security Council or the UN General Assembly within the spirit of the Uniting for Peace Resolution.

5 Enforcement with the Help of the ICRC and Red Cross/Red Crescent Societies

Such problems lead the attention to the important work of the Red Cross, in particular the ICRC but also the national Red Cross / Red Crescent societies. The ICRC can encourage states to implement rules of International Humanitarian Law on a national level and monitor the behavior of those involved in armed conflicts thanks to its experience and the ICRC's reputation for impartiality. The ICRC can directly contact state authorities, deliver protests and if necessary verify alleged violations of International Humanitarian Law,especially if the ICRC acts.[25] National Red Cross and Red Crescent societies can also play an important, but often underestimated role in the process of disseminating knowledge of International Humanitarian Law with the aim of creating an environment in which International Humanitarian Law is naturally respected.

6 Outlook

The dissemination of knowledge of International Humanitarian Law might turn out to be the key weapon in the fight for a fuller compliances with the laws of war and in particular for the protection of civilians. There can be no retribution in kind against terrorists. To the contrary. Teaching International Humanitarian Law and Human Rights both at home and to young people who could be targeted by terrorist recruiters can have an impact as a legal system which values human life is contrasted with a value system in which ideologies or hatred take the first place.

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[25] For example under under Art. 5 (4) of the 1st Additional Protocol to the Geneva Conventions.

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