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Asymmetric conflict structures

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Abstract

Inequality in arms, indeed, significant disparity between belligerents, has become a prominent feature of various contemporary armed conflicts. Such asymmetries, albeit not at all a new phenomenon in the field of warfare, no longer constitute a random occurrence of singular battles. As a structural characteristic of modern-day warfare asymmetric conflict structures have repercussions on the application of fundamental principles of international humanitarian law. How, for example, can the concept of military necessity, commonly understood to justify the degree of force necessary to secure military defeat of the enemy, be reconciled with a constellation in which one side in the conflict is from the outset bereft of any chance of winning the conflict militarily? Moreover, military imbalances of this scope evidently carry incentives for the inferior party to level out its inferiority by circumventing accepted rules of warfare. This article attempts tentatively to assess the repercussions this could have on the principle of reciprocity, especially the risk of the instigation of a destabilizing dynamic of negative reciprocity which ultimately could lead to a gradual intensification of a mutual disregard of international humanitarian law.

Introduction

With only one remaining superpower and more generally the considerable and predictably widening technological divide, an imbalance in the military capacity of warring parties has become a characteristic feature of contemporary armed

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conflicts. Coupled with a growing involvement of non-state entities, the disparity between belligerents is steadily increasing, and various contemporary armed conflicts appear to be more and more asymmetric in structure. Unlike the geo-strategic set-up that prevailed throughout the cold war period, it is a widely perceived paradox of today's strategic environment that military superiority may actually accentuate the threat of nuclear, biological, chemical and, generally speaking, perfidious attack. Indeed, direct attacks against civilians, hostage-taking and the use of human shields[1] – practices that have long been outlawed in armed conflicts – have seen a revival in recent conflicts in which the far weaker party has often sought to gain a comparative advantage over the militarily superior enemy by resorting to such practices as a matter of strategy. International terrorism, although not necessarily conducted within the context of an armed conflict triggering the application of international humanitarian law (IHL), is often regarded as the epitome of such asymmetry. At the same time militarily superior parties at the other end of the spectrum have had recourse to indiscriminate attacks, illegal interrogation practices and renditions, as well as legally dubious practices such as targeted killings or hardly reviewable covert operations, in order to strike at their frequently amorphous enemy.[2]

Significant inequality of arms, that is a disparate distribution of military strength and technological capability in a given conflict, seemingly creates incentives for adversaries to resort to means and methods of warfare that undermine and are sometimes an outright violation of long-accepted standards of international humanitarian law. The war between the US-led Coalition and Iraq or the war in Afghanistan are clear examples. This tendency is reinforced if belligerents differ in nature, as in the recent conflict between Israel and Hezbollah (''party of God'') – the Lebanon-based Shia Islamic militia and political organization – or if factual asymmetries are combined with a legal asymmetry, that is in a constellation in which one side is accorded little or no legal standing.

To be sure, perfect symmetries have rarely been present in war. However, the patterns of non-compliance displayed in various contemporary conflicts seem to be more structured and systematic than ever before. The present study first seeks to verify this assumption. It considers whether factual and potentially legal asymmetries do indeed constitute an incentive for breaches of international humanitarian law provisions, and, if so, how patterns of contemporary conflicts differ from those of previous conflicts that likewise exhibited discernible asymmetries. In a second step, closer scrutiny is given to the actual patterns of non-compliance in asymmetric scenarios, particularly in the light of the interplay of the principle of distinction and the principle of proportionality.

1 Suicide attacks, on the other hand, are not per se outlawed by international humanitarian law.

2 Generally on asymmetric warfare from an IHL perspective, see Toni Pfanner, ''Asymmetrical warfare from the perspective of humanitarian law and humanitarian action'', *International Review of the Red Cross*, Vol. 87, No. 857, March 2005. See also Colin S. Gray, who comments that ''irregular warfare almost invariably drives the regular belligerent to behave terroristically'', in *Another Bloody Century: Future Warfare*, Weidenfeld & Nicolson, London, 2005, p. 223.

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Neither the term "asymmetric warfare" nor the sometimes synonymously employed terms "fourth-generation warfare" or "non-linear war" have thus far been concordantly defined.[3] It is not the intention of this study to venture into this perhaps impenetrable terrain. Analysis shows, however, that there is a noticeable tendency in contemporary conflicts towards an increasing inequality between belligerents in terms of weaponry. While this is a long-known phenomenon in non-international armed conflicts, evaluation of the effects of military disparity in international armed conflicts continues, as does the debate over the extent to which transnational conflicts involving states and non-state entities should be subject to the laws of war.[4]

In attempting to approach this debate from a somewhat different angle, it is the overall purpose of this study to gauge the long-term repercussions that asymmetric conflict structures may have on the fundamental principles of international humanitarian law and thereby tentatively to assess the degree of asymmetry – that is, the level of military disparity between belligerents – that can still be reconciled with the legal regime applicable in times of war.[5]

To this end the study, in a third step, weighs the traditional concept of military necessity as laid down in the Lieber Code of 1863 against the promulgated necessities in asymmetric conflicts of our time. Even though the fundamental concepts and principles of the laws of war have been designed as prophylactic mechanisms flexible enough to outlast changes in the way in which wars are waged, it is here contended that the concept of military necessity and the principle of distinction presuppose a minimum degree of symmetry and therefore cannot be applied in subordinative constellations akin to human rights patterns, as are commonly seen in the fight against international terrorism.

3 In general see Herfried Münkler, *Der Wandel des Krieges: Von der Symmetrie zur Asymmetrie*, Weilerswist, Velbrück Wissenschaft, 2006; Thazha Varkey Paul, *Asymmetric Conflicts: War Initiation by Weaker Powers*, Cambridge University Press, Cambridge, 1994; Mohammad-Mahmoud Ould Mohamedou, *Al Qaeda's Non-Linear War: Paradigm Shifts in Conflict and Law*, available at <http://www.iued.ch/information/conferences/pdf/conf_2005.11.3_alqaeda.pdf> (last visited 10 August 2006). See also Paul L. DeVito, "Terrorism as asymmetrical warfare is still war", *Officer*, Vol. 78, No. 6, July–August 2002, pp. 33–35. In the past the term asymmetric warfare has most commonly been referred to as a synonym for guerrilla war; see Josef Schröfl et al. (eds.), *Aspekte der Asymmetrie: Reflexionen über ein gesellschafts- und sicherheitspolitisches Phänomen*, Nomos, Baden-Baden, 2004.

4 On the element of transnationality, see, e.g., Fred Schreier, "Transnational terrorism: The newest mutation in the forms of warfare", in Theodor Winkler et al., *Combating Terrorism and its Implications for the Security Sector*, Geneva Centre for the Democratic Control of Armed Forces, and the Swedish National Defence College, Geneva and Stockholm, 2005, p. 46. For different proposals see "Transnationality, war and the law, A report on a Roundtable on the Transformation of Warfare, International Law, and the Role of Transnational Armed Groups", April 2006, available at <http://www.hpcr.org/pdfs/HPCR_-_Transnationality_Roundtable_-_April_2006.pdf> (last visited August 2006).

5 The principle of distinction, the concept of military necessity and the principle of proportionality are applicable irrespective of whether a conflict is international or non-international in nature; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, *Rules*, ICRC and Cambridge University Press, Cambridge, 2005. See Rules 7–14. Thus irrespective of which of these regimes would be applied to a potential new category of transnational armed conflicts, the following findings with regard to the repercussions asymmetric conflicts structures may have on these fundamental principles retain their validity.

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The vantage point for the fourth and final part of the analysis is the principle of reciprocity. As the military mismatch between conflicting parties in numerous modern armed conflicts becomes more marked, the balancing influence of the reciprocity entailed by the traditional concept of symmetric warfare is gradually being undermined.[6] While the deterrent effects of an increasingly effective system of international criminal law and of media coverage and public opinion – although the last two are ambivalent factors that could also be used for the opposite purpose – could arguably help to contain non-compliant behaviour in war, international humanitarian law might thus be simultaneously bereft of its own inherent regulating mechanisms which have traditionally taken effect in the combat zone itself. The destabilizing dynamic of reciprocity could lead to a gradual and perhaps insidious erosion of the protective scope of core principles of international humanitarian law. Repeated violations of, for example, the principle of distinction by one party to a conflict are likely to induce the other side to expand its perception of what is militarily necessary, and hence proportional, when engaging in battle against such an enemy. In the final stage, and admittedly only as a worst-case scenario, an intentional and deceitful deviation from accepted standards regulating the conduct of hostilities carries the considerable risk of starting a vicious circle of ever greater negative reciprocity, in which the expectations of the warring parties are transformed into an escalating mutual non-compliance with international humanitarian law.

A heightened risk of structural non-compliance?

Historically, the majority of laws on international armed conflict have been designed on the basis of Clausewitz's arguably rather Eurocentric conception of war, that is, the assumption of symmetric conflicts taking place between state armies of roughly equal military strength or at least comparable organizational structures. Throughout most of the nineteenth and twentieth centuries the dominant powers engaged in sustained arms races either to maintain a peace-ensuring symmetry or to establish a tactical asymmetry vis-à-vis their opponents as a guarantee of military victory in war.[7] But quite apart from the biblical story of David and Goliath it is evident that asymmetry in the sense of military disparity is no new phenomenon.[8] Nor is it a concept entirely alien to IHL. With the intrinsic disparity of the parties concerned, and even though the threshold criteria of Article 1 of Additional Protocol II to the 1949 Geneva Conventions arguably help to ensure a minimum degree of comparability between those parties,

6 See Hersch Lauterpacht, "The limits of operation of the laws of war", *British Yearbook of International Law*, Vol. 30, 1953, p. 212.

7 Münkler, above note 3, pp. 62 ff. See also e.g. John Ellis, *The Social History of the Machine Gun*, Johns Hopkins University Press, Baltimore, 1986.

8 At the same time it should be borne in mind that symmetric warfare scenarios are far from having become entirely obsolete. Recurring friction between the two nuclear powers India and Pakistan constitutes but one, albeit arguably the most threatening, scenario of potentially symmetric warfare.

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non-international armed conflicts are inherently asymmetric. It was moreover already accepted in the classic concept of symmetric warfare that the structure of conflicts could shift from symmetric to asymmetric, for by the time a conflict drew to its close and one party had gained the upper hand, the initial military balance would be out of kilter. More recently, during the Diplomatic Conference that led to the adoption of Additional Protocol I, states taking part not only acknowledged the persistence of significant disparities in military capacity but accepted that factual disparity between opponents may even lead to differing humanitarian law obligations. For example, with respect to Article 57 of Additional Protocol I on the obligation to take precautions in attack,[9] the Indian delegation pointed out that according to the chosen wording the content of the due diligence obligation enshrined therein – that is, the precise identification of objectives as military or civilian – largely depended on the technical means of detection available to the belligerents.[10] Despite these concerns, the present wording was accepted on the implicit understanding that because of prevailing factual disparities, international humanitarian law obligations may impose differing burdens in practice.[11]

Schwarzenberger has pointed out that the protective scope of the laws of war has historically been the strongest in duel-type wars between comparable belligerents that were fought for limited purposes, such as the Crimean War of 1853–6 or the Franco-German War of 1870–1, whereas in major wars such as the Napoleonic wars or the two world wars of the twentieth century – wars that were fought to the bitter end – the weaker side often tended to seek short-term

9 Even though, with regard to non-international armed conflicts, Article 13 (1) of Additional Protocol II merely requires that "[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations", it would be difficult to comply with this requirement without taking precautions in attack. In the same vein the UN General Assembly resolution of 1968 on respect for human rights in armed conflicts stipulates: "spare civilians as much as possible", UN GA Res. 2444 (XXIII). Moreover, in a resolution adopted in 1970 on basic principles for the protection of civilian populations in armed conflicts, the General Assembly required that "in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations", UN GA Res. 2675 (XXV).

10 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (CDDH), Geneva, 1974–7, CDDH/SR.42, p. 228. See also Claude Pilloud et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1948*, Martinus Nijhoff, Geneva, 1987, p. 682, para. 2199. Obviously, no absolute certainty can be guaranteed in the process of determining the military nature of an objective selected for attack, but there is an obligation of due diligence and acting in good faith; M. Bothe, "Legal restraints on targeting: Protection of civilian population and the changing faces of modern conflicts", IYHR, Vol. 31, 2001, p. 45.

11 According to the wording of Additional Protocol I, Article 57.2(a)(i), State Parties are obliged to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects …" and to (ii) "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life…". It follows that in the event of a technological gap between belligerents, Article 57 of Additional Protocol I binds the high-tech belligerent to significantly higher standards with regard to precautions in attack than its less well equipped opponent. See Michel Schmitt, "War, technology, and international humanitarian law", *HPCR Occasional Papers Series*, Summer 2005, p. 2, available at <http://www.hpcr.org/pdfs/OccasionalPaper4.pdf.> (last visited August 2006).

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advantages by violating the laws of war.[12] Indeed, violations of the laws of war have occurred in nearly every case in which IHL has been applicable,[13] and the risk that one party may order or connive in large-scale violations of the laws of war in order to gain a tempting advantage or stave off in some way an otherwise threatening defeat has always hovered over the legal regime intended to regulate conduct in armed conflicts.[14] However, in symmetric constellations such instances have tended to remain marginal, often limited to the final stages of a war and confined to individual battles in which defeat seemed inevitable, or resort to perfidy or similarly prohibited tactics was perceived as guaranteeing an immediate tactical breakthrough in what was otherwise a military stalemate.

As a result of the evident disparate military capabilities of opponents in certain contemporary conflicts, incentives for violations of IHL seem in comparison to have reached a new height. Non-compliance with the provisions of IHL is no longer a random event, confined to temporally and spatially limited incidents within a conflict, but has become a recurrent structural feature that characterizes many of today's armed conflicts from the outset. The reason is that, faced with an enemy of overwhelming technological superiority, the weaker party *ab initio* has no chance of winning the war militarily. Figures from the recent war against Iraq illustrate this imbalance of power and capacity quite well. While the Iraqi air force reportedly never left the ground, Coalition forces flew rather more than 20,000 sorties, during which only one fixed-wing aircraft and only seven aircraft in all were lost to hostile fire.[15] Evidence of a comparable inequality in the military capability of belligerents will probably become available in the aftermath of the recent conflict in Lebanon. Without anticipating the more detailed analysis below, it should be noted that the Iraqi army's widespread infringements during the international conflict against the US-led Coalition, as well as Hezbollah's indiscriminate attacks, stem to a significant extent from the blatant inequality in weaponry. Practices employed by the Iraqi army included recourse to human shields, abuse of the red cross and red crescent emblems, the use of anti-personnel mines and the placing of military objects in protected areas such as mosques and hospitals. Clearly, there is thus an elevated risk that the militarily inferior party, unable to identify any military weaknesses of its superior opponent, may feel compelled systematically to offset the enemy's superiority by resorting to means and methods of warfare outside the realm of international humanitarian law.

12 Georg Schwarzenberger, *The Frontiers of International Law*, Stevens, London, 1962, pp. 15 ff.

13 See only e.g. "Final declaration of the International Conference for the Protection of War Victims", Geneva, 1 September 1993, para. 2: "We refuse to accept that, since war has not been eradicated, obligations under international humanitarian law aimed at limiting the suffering caused by armed conflicts are constantly violated", available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList246/DCD935D08F1B0044C1256B66005988F8> (last visited September 2006).

14 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Stevens, London, 1968, p. 453.

15 "Operation Iraqi Freedom: By the numbers", 30 April 2003, p. 3, available at <http://www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf> (last visited August 2006). Similarly, during the battle of Fallujah, US Marines killed nearly 1,200 of the enemy while suffering only 50 casualties. Schmitt, above note 11, p. 33.

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At the same time the use of "unthinkable" tactics as well as the tactical circumvention of accepted IHL standards creates a barrier that cannot be readily overcome by military superiority alone. Apart from the ongoing hostilities in Iraq, the tactics employed by the Somali tribal leader Farah Aydid in 1993 are a good example of this. In conventional terms, his forces were no match for heavily armed and technologically sophisticated airborne US troops. However, by using primitive weapons and communication systems – which reportedly varied from cellular phones to tribal drums – and by resorting to "unthinkable" tactics and to "barbaric" acts perpetrated for the benefit of the news media, the militia convinced the leadership of the United States that despite the military backwardness of the Somali forces the price of involvement in Somalia was very high.[16] In the course of the war against Iraq the use of cluster munitions in populated areas, as well as the alleged use of white phosphorus and the continued recourse by US and British forces to "decapitation" strikes that caused high numbers of civilian casualties, partly constituted indiscriminate attacks and arguably a failure to take "all feasible precautions" as required by IHL.

There are thus apparent incentives for both sides to give increasing priority, potentially to the detriment of humanitarian considerations, to the necessities of such a kind of warfare.[17]

Patterns of non-compliance: the interplay between the principle of distinction and the principle of proportionality

Recent conflict patterns suggest that militarily inferior parties, in order to evade attack by an enemy of insurmountable superiority or to level out inequalities in

16 Steven Lambakis, James Kiras and Kristin Kolet, "Understanding "asymmetric" threats to the United States", September 2002, in *Comparative Strategy*, National Institute for Public Policy, Vol. 21, No. 4, 1 October 2002, pp. 241–77, available at <http://www.nipp.org/Adobe/Asymmetry%20%20final%2002.pdf> (last visited August 2006). Tactics reportedly also included the use of women and children as shields and combatants and resulted in several hundred to several thousand Somali casualties. See also Mark Bowden, *Black Hawk Down: A Story of Modern War*, Penguin, New York, 2000, and Martin Libicki, *What is Information Warfare?*, National Defence University Press, Washington, 1995, p. 36, esp. n. 31. In another glaring example of a response that successfully challenged the resolve of the United States, a handful of protesters on the dock at Port-au-Prince in Haiti led to executive recall of the USS *Harlan County* and its load of peacekeepers (1993). For details see Michael Bailey, Robert Maguire and J. O'Neil Pouliot, "Haiti: Military–police partnership for public security", in Robert B. Oakley, Michael J. Dziedzic and Eliot M. Goldberg (eds.), *Policing the New World Disorder: Peace Operations and Public Security*, NDU Press, Washington, 1998, available at <http://www.ndu.edu/ndu/inss/books/policing/chapter7.html> (last visited August 2006).

17 Initially the concept of military necessity was arraigned by the Confederate authorities, who suspected it to be a licence for mischief, and it was indeed developed into a doctrine of *Kriegsräson* in Prussia, which adopted the Lieber Code in 1870; see Burrus M. Carnahan, Lincoln, "Lieber and the Law of War: The origins and limits of the principle of military necessity", AJIL, Vol. 92, 1998, p. 213, at pp. 217 ff. During the Nuremberg trials, too, some defendants invoked military necessity to justify their atrocities against the civilian populations; see, among others, "*In re Von Leeb* (High Command Case)", ILR, No. 15, p. 376, at p. 397. Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthoff, Leiden, 1971, p. 366; Julius Stone, *Legal Controls of International Conflict*, New York, 1954, pp. 351–2; and more generally N. Dunbar, "Military necessity in war crimes trials", BYIL, Vol. 29, 1952, pp. 446–52.

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military power, tend in particular to instrumentalize and intentionally manipulate the principle of distinction. This manipulation may occur in different ways.[18] Similarly, superior parties are likely to lower the barrier of proportionality in response to a systematic misuse of the principle of distinction and their resulting inability to tackle the enemy effectively. The following description of potential strategies that belligerents may feel compelled to adopt when faced with overwhelming odds or systematic deviations from accepted legal rules is merely intended to facilitate understanding of likely patterns of non-compliance and does not claim to be comprehensive. It is part of the very nature of asymmetric strategies that they are impossible to predict.

The principle of distinction

As a defensive strategy when facing a technologically superior enemy it is essential, but ever more difficult, to stay out of reach and conceal one's presence as a combatant. Hiding in mountainous areas, caves, underground facilities and tunnels is one way. However, another means of doing so quickly and efficiently is readily available by virtue of the provisions of IHL themselves. In view of the various forms of protection accorded to civilians, assuming civilian guise is an easy way to evade the enemy and, unlike the more traditional guerrilla-style tactics of hiding underground or in inaccessible areas, it cannot be countered by the development of advanced discovery technologies. Indeed, in order to keep Coalition forces from identifying them as enemies, that is as legitimate targets, many Iraqi soldiers in the recent war reportedly quite often discarded their uniforms.[19] This is not a prohibited tactic, as long as such practices are not used to launch an attack under the cover of protected status; according to Article 4 of the Third Geneva Convention the absence of any fixed distinctive sign recognizable at a distance merely leads to the loss of combatant status and the corresponding privileges.[20] Still, despite its legality such a practice will, if employed as a matter of strategy, create considerable uncertainty about a person's status and thus subtly erode the effectiveness of the fundamental and, in the words of the International Court of Justice (ICJ), intransgressible principle of distinction.[21]

Evidently the notion of distinction, that is, the legally prescribed invulnerability of certain persons and objects, can if manipulated offer manifold loopholes for the evasion of attack.[22] The dividing line between legal tactics and

18 See below.

19 *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, Human Rights Watch, December 2003, pp. 78–9; W. Hays Parks, "Special forces' wear of non-standard uniforms", *Chicago Journal of International Law*, No. 4, 2003, p. 493.

20 Generally, see Knut Dörmann, "The legal situation of "unlawful/unprivileged combatants"", *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, p. 45–74.

21 ICJ Advisory Opinion of 8 July 1996 on the legality of the threat or use of nuclear weapons, *ICJ Report 1996*, para. 79.

22 Generally on the principle of distinction see e.g. Eric David, "Respect for the principle of distinction in the Kosovo war", *Yearbook of International Humanitarian Law*, Vol. 3, 2000, pp. 81–107; Esbjörn Rosenblad, *International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of*

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illegitimate practices is easily crossed. The misuse of protective emblems for the concealment of military objects is a case in point, and the marking of the Ba'ath Party building in Basra with the ICRC emblem is a flagrant example of such tactics.[23] To protect military objects whose nature could not be so readily concealed, weaker warring parties have repeatedly utilized the proportionality barrier: in order to manipulate the adversary's proportionality equation, immobile military objects are shielded by civilians, while mobile military equipment is intentionally sited close to civilian installations or other specifically protected locations. For example, in the recent conflict in the Middle East Hezbollah hid its rockets and military equipment in civilian neighbourhoods, and UN Under-Secretary-General Jan Egeland's statement clearly points to the vicious circle that might be triggered by such a practice.[24]

Similar modes of conduct have been employed with regard to offensive tactics. The reported seizure of ambulance vehicles in order to feign protected status and thus improve the chances of attacking is a typical example, as is the fact that during the battle of Fallujah in November 2004 sixty of the city's one hundred mosques were reportedly used as bases for military operations.[25] It should be noted that, besides violating the principle of distinction, creating the false impression of legal entitlement to immunity from attack and exploiting the enemy's confidence in that status also amount to perfidy and are prohibited as such.[26] Not each and every strategy employed to circumvent superior military power by cunning, surprise, indirect approach or ruthlessness automatically constitutes prohibited conduct; it may, depending on the circumstances, amount to no more than good tactics. However, if unable to identify any military weaknesses of a superior enemy, the weaker opponent may ultimately see no other alternative than to aim for the stronger state's soft underbelly and attack civilians or civilian objects directly, in outright violation of the principle of distinction. The series of terrorist attacks in the aftermath of 9/11, that is, the attacks in Bali, Mombasa and Djerba in 2002, Riyadh and Casablanca in 2003,

Distinction and Related Problems, Henry Dunant Institute, Geneva, 1979; Daniela Kravetz, "The protection of civilians in war: The ICTY's *Galic* case", *Leiden Journal of International Law*, Vol. 17, No. 3, 2004, pp. 521–36; Wolff Heintschel von Heinegg (ed.), *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*, Brockmeyer, Bochum, 1991.

23 Schmitt, above note 11, p. 35.

24 See the Statement of Jan Egeland to the Security Council on the humanitarian situation in the Middle East, 28 July 2006, p. 3: "I urged the Foreign Minister and the Defence Minister of Israel in my meetings to review the conduct of the air strikes and bombardments to avoid excessive use of force that inflicts disproportionate suffering on the civilian population. When there are clearly more dead children than actual combatants, the conduct of hostilities must be reviewed. At the same time, I repeatedly and publicly appealed from within Lebanon that the armed men of Hezbollah must stop their deplorable tactic of hiding ammunition, arms, or combatants among civilians. Using civilian neighbourhoods as human camouflage is abhorrent and in violation of international humanitarian law." Available at <http://ochaonline.un.org/DocView.asp?DocID=4764> (last visited 2 August 2006). See also Kenneth Roth, "Indiscriminate Bombardment", August 2006, available at <http://www.hrw.org/english/docs/2006/08/22/lebano14061.htm>.

25 Schmitt, above note 11, p. 38.

26 Hans-Peter Furrer, *Perfidie in der Geschichte und im heutigen Kriegsvölkerrecht*, Diss. Rechtswiss, Basel, 1988.

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Madrid in 2004, London and Cairo in 2005 and Mumbai in 2006 – to mention only those which have received the greatest media attention – and the constant attacks in Afghanistan and Iraq, shows that this tendency is increasing. Avoiding the risks of attacking well-protected military installations, it enables the weaker opponent to wage an offensive war on the television screens and in the homes of the stronger state and to benefit from the repercussive effects of mass media coverage.[27]

The principle of proportionality

Over time there is a considerable risk that in view of the aforesaid practices, international humanitarian law itself, with its clear-cut categorizations and differentiations between military and civil, may be perceived by a belligerent confronted with repeated violations by its opponent as opening the doors to a kind of war which intentionally does away with such clear demarcations.[28]

However, the more immediate risk is that the adversary, faced with such a misuse of the principle of distinction, could feel compelled gradually to lower the proportionality barrier. Evidently, if the use of human shields or the concealment of military equipment among civilian facilities occurs only sporadically and at random in an armed conflict, humanitarian concerns are likely to outweigh the necessity to attack using disproportionate force, whereas if such tactics are systematically employed for a strategic purpose, the enemy may feel a compelling and overriding necessity to attack irrespective of the anticipated civilian casualties and damage. Indeed, the explanation given by the Israeli government for the mounting number of civilian casualties in its recent military operations against Hezbollah in Lebanon[29] confirms that systematic violation of, for example, the principle of distinction by one side during a conflict is likely adversely to affect the other side's interpretation and application of the proportionality principle.[30]

27 Pfanner, above note 2, p. 153. See also Gerhard Paul, *Bilder des Krieges, Krieg der Bilder: Die Visualisierung des modernen Krieges*, Ferdinand Schoningh Verlag, Paderborn,2004.

28 Carl Schmitt, *Theorie des Partisanen*, Duncker & Humblot, Berlin,1963, p. 37.

29 On the homepage of the Israeli Ministry of Foreign Affairs it is stated that "Israel regrets the loss of innocent lives. Israel does not target civilians, yet is forced to take decisive action against Hezbollah, a ruthless terrorist organization which has over 12,000 missiles pointing towards its cities. Israel, like any other country, must protect its citizens, and had no choice but to remove this grave threat to the lives of millions of innocent civilians. Had Hezbollah not established such a missile force, Israel would have no need to take action, and had Hezbollah chosen to set up its arsenal away from populated areas, no civilians would have been hurt when Israel did what it obviously had to do." The statement is available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Israels+counter+terrorist+campaign+-+FAQ+18-Jul-2006.htm#disproportionateforce> (last visited August 2006).

30 See e.g. Pilloud, above note 10, p. 683: "proportionality in *ius in bello* contributes to the "equitable balance between the necessities of war and humanitarian requirements"". See also the judgment of the trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kupreskic* Case, Case No. IT-95-16-T-14, Judgement, January 2000, para. 524.

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Military necessity in asymmetric conflicts

Although the concept of military necessity is invoked now and then as a separate justification for violations of the laws of war,[31] today there can be no doubt that in contemporary international humanitarian law the element of military necessity must be balanced against the principle of humanity, and that there is no such elasticity in the laws of war that military necessity can be claimed as a reason to deviate from accepted humanitarian standards.[32] Nevertheless, asymmetric conflict arguably entails a certain risk of the emergence of a modern-day *Kriegsräson* because obstacles seen as insurmountable could make both sides feel inclined and ultimately compelled vastly to expand their perception of what is necessary to overcome the enemy. Since military necessity is a component of the *ius in bello* equation of proportionality, to expand or overemphasize the concept of military necessity would impair the protective scope of the proportionality principle.[33]

The principle of military necessity is closely linked to the objectives of war.[34] However, the objectives sought in asymmetric conflicts vary significantly from those sought in the kind of symmetric conflict constellations which the drafting fathers of the principle of military necessity had in mind.[35] Modern authorities on the laws of war continue to refer to the definition of military necessity laid down in Article 14 of the Lieber Code, according to which "Military necessity, as understood by modern civilized nations, consists in the necessity of

31 Despite the unequivocal rejection of any extreme form of military necessity akin to a doctrine of *Kriegsräson* after the Second World War, the concept of military necessity has still sporadically been invoked as a separate ground justifying violations of the laws of war. Von Knieriem concludes from the preamble to the 1899 Hague Convention on Land Warfare that the annexed Regulations were no more than a guiding principle that only needed to be taken into account in so far as "military necessities" would permit. A. von Knieriem, *Nürnberg: rechtliche und menschliche Probleme*, E. Klett, Stuttgart, 1953, p. 321.

32 Kalshoven, above note 17, p. 366; Erik Castrén, *The Present Law of War and Neutrality*, Annales. Academiae Scientiarum Fennicae, Helsinki, 1954, p. 66; E. Rauch, *Le Concept de Nécessité Militaire*, *Revue de droit pénal militaire et de droit de la guerre*, 1980, pp. 214 ff.; Carnahan, above note 17, p. 218; Robert W. Gehring, "Loss of civilian protections under the Fourth Geneva Convention and Protocol I", 90 *Military Law Review*, Vol. 90, No. 49, 1980, p. 14; Morris Greenspan, *Modern Law of Land Warfare*, University of California Press, Berkeley, 1959, p. 314; A. P. V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester and New York, 2004, p. 4.

33 Moreover, military necessity has often been characterized as the source of the requirement that warfare be proportionate; see e.g. Michael Bothe, Karl-Josef Parsch, Waldemar Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, pp. 194–5; Mures McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, Yale University Press, New Haven, 1961, p. 528; Rauch, above note 32, p. 213.

34 Section 3 of the British *Manual of Military Law* defines military necessity as "the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realization of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources, and money …", quoted in Rogers, above note 32, p. 5.

35 Generally see e.g. McDougal and Feliciano, above note 33, pp. 521–2. The principle of military necessity gained international recognition in the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St Petersburg Declaration) of 29 Nov./11 Dec. 1868, available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument> (last visited August 2006).

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those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.''[36] In view of the formulation ''indispensable for securing the ends of war'', the principle of military necessity is commonly understood to justify only that degree of force necessary to secure military defeat and the prompt submission of the enemy.[37] Indeed, the Declaration of St Petersburg states as early as 1868 that ''the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy''[38] and the *US Army Field Manual* stipulates that ''The law of war … requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes'' and defines military necessity as ''*that principle which justifies those measures not forbidden by international law which are indispensable for the complete submission of the enemy as soon as possible*''.[39]

Historically, the rather strict alignment of the concept of military necessity with exclusively military objectives, that is, military defeat and the prompt military submission of the enemy, is due to the fact that the concept was originally designed to restrain violence in war.[40] Although sometimes overlooked today, restrictions on violence in war do not merely stem from balancing the

36 Instructions for the Government of the Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100, 24 April 1863, reprinted in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd edn, Martinus Nijhoff, Dordrecht, 1988, p. 3. The Lieber Code is also available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (last visited August 2006). Generally on the principle of military necessity see Rauch, above note 32, p. 211; Carnahan, above note 17, p. 230; Pilloud, above note 10, p. 392; Jean Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff/Henry Dunant Institute, Dordrecht, Geneva, 1983, p. 62; as well as Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge Studies in International and Comparative Law (No. 35), Cambridge, 2004, p. 681. See also Article 15 of the Lieber Code, according to which ''Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.'' Article 16: ''Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions; it does not admit of the use of poison in any war, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.''

37 Bothe et al., above note 33, p. 195; Carnahan, above note 17, p. 231. See also the *Commanders Handbook on the Law of Naval Operations*, US Department of the Navy, para. 6.2.5.5.2; *US Army Field Manual*, No. 27–10, 1956: ''… only the use of those weapons and means of combat which is necessary to attain the military purposes of war, purposes based on the ultimate goal of overpowering the enemy armed forces, are permitted''.

38 St Petersburg Declaration, above note 35. See also Pictet, above note 36, p. 62.

39 *Field Manual*, above note 37, para. 3 (emphasis added).

40 Carnahan, above note 17, at p. 217.

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principle of military necessity against the principle of humanity.[41] The principle of military necessity in and of itself constitutes an important restrictive factor by prescribing that to be legitimate, violence in war first of all has to be militarily necessary.[42] A gradual, clandestine widening of this concept, or simply a more lenient understanding of the factors that determine military necessity and hence the notion of military advantage, would therefore undermine the restrictive standards imposed on the use of violence in armed conflicts. Such a process seems particularly likely in view of asymmetric constellations which, owing to their complexity and intangibility, escape any military apprehension *stricto sensu*. For example, application of the rule of proportionality as laid down in Articles 51 and 57 of Additional Protocol I is significantly affected, even in traditional armed conflicts, by whether the notion of military advantage is understood to mean the advantage anticipated from an attack considered as a whole or merely from isolated or particular parts of the attack.[43] In asymmetric constellations that elude both temporal and spatial boundaries – in other words, the traditional concept of the "battlefield" altogether – it would seem somewhat difficult to delineate and determine with any degree of precision what is meant by the notion of "an attack considered as a whole".[44]

More generally, as the asymmetry between belligerents increases, the distinction between political and military objectives and necessities becomes more and more blurred. Especially in conflicts such as those against al Qaeda or Hezbollah, that is, conflicts between a state or group of states and a non-state entity, that entity's ultimate aim in using military force will be to exert pressure on the politics of the enemy rather than even attempt to achieve the latter's military submission. Conversely, the superior party is likely to adopt a far more holistic approach, inseparably combining political and military efforts to bring about the entire political eradication or dissolution of the enemy and not just the enemy's military submission – especially if it is battling against a non-state entity it categorizes as a terrorist organization.[45] To be sure, the separation of military and political aims already present in traditional warfare has always been axiomatic to

41 It is generally recognized that modern IHL essentially constitutes "a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity, on the other", Pilloud, above note 10, pp. 392 ff.

42 Rauch, above note 32, p. 209; Carnahan, above note 17, p. 230; Gardam, above note 36, pp. 7 ff.

43 See e.g. para. 5 of the German reservation to Additional Protocol I, which specifies that Germany understands "military advantage" in Articles 51 and 57 of Additional Protocol I to refer to the advantage anticipated from the attack considered as a whole. The text of the reservation is available at <http://www.icrc.org/ihl.nsf/NORM/3F4D8706B6B7EA40C1256402003FB3C7?OpenDocument> (last visited August 2006).

44 "The United States of America is fighting a war against terrorists of global reach. … The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time", National Security Strategy, White House, p. 5. The National Security Strategy is available at <http://www.whitehouse.gov/nsc/nss.html> (last visited August 2006).

45 Rogers in particular has pointed out that "[t]he reference to the complete submission of the enemy, written in the light of the experience of total war in the Second World War, is probably now obsolete, since war can have a limited purpose …"; above note 32, p. 5.

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some extent, given that each and every military operation emanates from both military and political motivations.[46] The so-called Christmas bombing of North Vietnam in 1972 is a typical example: even though solely military objectives within the definition thereof were targeted, its purpose was to induce the North Vietnamese government to proceed with political negotiations.[47] Nonetheless, symmetric warfare with its identifiable battlefields in terms of space and duration did allow, at least in theory, a relatively clear separation of military and political necessities and objectives in the actual conduct of warfare. In asymmetric scenarios, however, the weaker adversary is militarily outmatched from the start, military superiority in itself is no longer a reliable guarantee for winning such conflicts and the very notions of ''victory'' or ''defeat'' thus become more and more indistinct. If these parameters remain undefined or even indefinable, straightforward determinations of what is militarily necessary are impeded. Military necessities have always been subject to change as warfare has developed, and the concept of military necessity has been flexible enough to adapt accordingly as long as that development largely resulted from technological advances in weaponry. Yet it seems doubtful whether asymmetric constellations akin to law enforcement patterns could still be grasped by and measured against the concept of military necessity,[48] for the complexities and intangibility of such scenarios escape its traditionally narrow delimitations. To compromise the concept's very narrowness, however, would mean compromising long-achieved humanitarian protections that flow directly from the concept itself and could shift the focus of the proportionality equation away from humanitarian considerations and towards military necessities.

Disparate military means and objectives in the light of the principle of reciprocity

Irrespective of the ongoing debate as to the precise role and scope of the principle of reciprocity in international humanitarian law[49] – some authors have denied the relevance of reciprocity in the formation of humanitarian law altogether,[50] while others consider it to be a sociological order principle without any direct legal relevance[51] – it is generally accepted that reciprocity remains a powerful force in

46 Carnahan, above note 17, p. 222.
47 Ibid., p. 221; Martin Herz, *The Prestige Press and the Christmas Bombing*, Ethics and Public Policy Center, Paperback, Washington DC, 1972, pp. 6 ff.
48 See Clyde Eagleton, ''Of the illusion that war does not change'', AJIL, Vol. 35, 1941, pp. 659 ff.
49 On the principle of reciprocity, see generally Michel Virally, ''Le principe de réciprocité dans le droit international contemporain'', *Recueil des Cours*, Vol. 122, 1967 III, pp. 1–106; Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Editions A. Pedone, Paris, 1970.
50 René-Jean Wilhelm, ''Le caractère des droits accordés à l'individu dans les Conventions de Genève'', *Revue internationale de la Croix-Rouge*, 1950, p. 561, at p. 579: ''la réciprocité est un élément de l'application effective de ces règles conventionnelles, comme elle l'est pour d'autres parties du droit des gens; elle n'en constitue nullement le fondement''.
51 ''Reciprocity is a *de facto* element which should not be neglected. It can play an important role in the effective application of the rules concerned. To admit this element, which is more of a sociological

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inducing continued compliance with humanitarian norms.[52] Yet it is a Janus-faced concept. While reciprocity may in a positive sense serve as a mitigating and stabilizing force, in its negative form it may ultimately bring about the breakdown of any legal order.[53] Reservations to the 1925 Geneva Gases Protocol, whereby the Protocol *ipso facto* ceased to be binding in the event of violation,[54] graphically illustrate this danger, and reprisals are likewise a typical example of the potentially negative dynamic inherent in the principle of reciprocity.

Historically, reciprocity has played an important if not dominant role in the field of international humanitarian law, the formation and adaptation of which has traditionally been closely linked to vital state interests, namely the desire to ensure military effectiveness in warfare. Prior to the codification of humanitarian norms at the end of the nineteenth century, conduct in warfare was often regulated in cartels – written agreements – drafted on an ad hoc basis by the warring parties in response to the military prerequisites of the moment, that is, of a specific battle, but in terms of practical reciprocity rather than humanitarian concerns.[55] Subsequent early codification efforts were often inspired by rules contained in these cartels,[56] as for instance the original Geneva Convention of 1864, or Article 62 of the Lieber Code according to which troops giving no quarter were entitled to receive none.[57] Moreover, the Hague Conventions of 1907 as well as the Geneva Convention of 1906 contained a so-called *clausula si omnes*, according to which humanitarian conventions became wholly inapplicable if one belligerent engaged in a conflict was not party to them.[58] However, even though the *si omnes* clause was in force throughout the First World War and despite the fact that Montenegro

order, as a principle of international law in the field considered would however be very dangerous", "Reaffirmation and development of the laws and customs applicable in armed conflicts", Report submitted by the ICRC to the XXIst International Conference of the Red Cross, 1969, p. 83.

52 Generally on reciprocity in relation to IHL, see René Provost, *International Human Rights and Humanitarian Law*, Cambridge Studies in International and Comparative Law (No. 22), Cambridge, 2002, pp. 136 ff.; Jean de Preux, "The Geneva Conventions and reciprocity", *International Review of the Red Cross*, No. 244, January–February 1985, pp. 25–9.

53 Bruno Simma, "Reciprocity", in R. Bernhardt (ed.), EPIL, Vol. 4, 2000, p. 32.

54 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare. See e.g. the reservation of the Republic of Serbia, made on ratification on 12 April 1929, according to which "The said Protocol shall cease to be binding on the Government of Serbs, Croats and Slovenes in regard to all enemy States whose armed forces or whose allies do not respect the restrictions which are object of this Protocol." The text of the reservation is available at <http://www.icrc.org/ihl.nsf/NORM/5532AC2C94D0F5A8C1256402003F769B?OpenDocument> (last visited August 2006).

55 P. Bogaiewsky, "Les secours aux militaires malades et blessés avant le XIXème siècle", *Revue générale de droit international public*, Vol. 10, 1903, pp. 202–21. Reciprocity is most visibly manifested in the conclusion and termination stage of a treaty. See Bruno Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge*, Duncker & Humblot, Berlin, 1972, p. 55.

56 In fact the content of subsequent conventions, e.g. the 1864 Geneva Convention, was often inspired by rules contained in cartels. See Provost, above note 52, p. 130; Henri Coursier, "L'évolution du droit international humanitaire", *Recueil des Cours*, 1960-I, Vol. 99, pp. 357, 371.

57 This rule was subsequently incorporated into the US *Rules of Land Warfare*, WD Doc. No. 467, US War Dept., Office of the Chief of Staff, 1914, para. 368.

58 Article 2 of the 1907 Hague Convention IV provides: "The provisions … do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention".

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as one of the belligerents was not party to the Convention, the signatory states heeded their signature. In 1929 the clause was consequently abandoned, since it no longer corresponded to humanitarian needs, and Article 2 (3) of the four Geneva Conventions adopted in 1949 now stipulates that in conflicts in which the belligerents are not all parties to the Convention,[59] ''the Powers who are parties thereto shall remain bound by it in their mutual relations'', thus making the principle of reciprocity work in favour of the extended application of these conventions.[60]

The inter-state aspect of earlier days, that is, the predominant factor for inducing reciprocity, has gradually diminished as the humanitarian component has gained in importance and as humanitarian norms have progressively developed towards public order standards similar to those laid down in human rights norms.[61] The elementary considerations of humanity contained in Article 3 common to the four Geneva Conventions are the most prominent example in that regard, although Articles 73 and 75 of Additional Protocol I as well as most of the provisions of Additional Protocol II and Part II of the Fourth Geneva Convention are arguably likewise devoid of reciprocal considerations.[62] The adoption of Article 60(5) of the Vienna Convention on the Law of Treaties marks another step towards the exclusion of certain humanitarian provisions, relating to the protection of the human person, from the regime of reciprocity entailed by the *inadimplenti non est adimplendum* rule (one has no need to fulfil one's obligation if the counter-party has not fulfilled his own) codified in Article 60(1)–(3) of the Vienna Convention.[63] Ever since the adoption of the Geneva Conventions in 1949, there have in fact been various signs of a progressive decline of the notion of reciprocity in the formation and continued application of international humanitarian law. They include the imposition of an obligation in common

59 The 1929 Convention relative to the Treatment of Prisoners of War stated in Art. 82 that: ''in time of war, if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto''. See Jean S. Pictet, *The Geneva Conventions of 12 August 1949: Commentary*, Vol. III (Prisoners of War), ICRC, Geneva, 1960, p. 21. As stated in the commentary on the 1929 Geneva Convention, ''the facts backed by the signatures of the signatories and by the humanitarian interests of all, outweighed the law''. See also Paul des Gouttes, *Commentaire de la Convention de Genève du 27 juillet 1929*, Geneva, 1930, Art. 25, p. 188, and the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Art. 25, available at <http://www.icrc.org/ihl.nsf/FULL/300?OpenDocument> (last visited August 2006).

60 Schwarzenberger, above note 14, p. 21.

61 Provost, above note 52, p. 137.

62 Common Article 3 and its customary equivalent impose an absolute obligation, completely disconnected from reciprocity, on all parties to an armed conflict; see Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B, p. 94. Robert Craigie, the UK representative, emphasized that ''any civilized government should feel bound to apply the principles of the convention even if the insurgents failed to apply them'', ibid. See also Pictet, above note 59, Vol. IV (Civilians), ICRC, Geneva, 1958, pp. 36–7.

63 See generally Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, Manchester, 1984, p. 188; Bruno Simma, ''Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its background in general international law'', *Österreichische Zeitschrift für öffentliches Recht*, Vol. 20, 1970, pp. 5–81; Mohammed M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* Martinus ,The Hague, 1996, p. 110.

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Article 1 of those Conventions and in Article 1 of Additional Protocol I to ensure respect for the provisions thereof,[64] the ban on contracting parties absolving themselves or any other contracting party of any liability incurred by itself or by another contracting party in respect of grave breaches,[65] and the increasing classification of humanitarian norms as *ius cogens* or as norms that are binding *erga omnes*.[66]

Nevertheless, the potential danger of negative reciprocity may not necessarily hinge on the decline of reciprocity in its positive connotation. Despite the process described above, both the Geneva Conventions and Additional Protocol I contain apparent residual reciprocity requirements, particularly in the actual conduct of hostilities. Moreover, state practice shows that in some areas states regard the abandonment of the notion of reciprocity as somewhat premature. Tellingly, one of the reasons for US opposition to the ratification of Additional Protocol I is the stipulation in Article 44(2) that "violations of the rules of war shall not deprive a combatant of his right to be a combatant".

Surely, for as long as belligerents have parallel interests, that is, while compliance with the applicable law has roughly equal advantages and disadvantages for both sides, overall observance of the legal rules remains likely.[67] As early as the 1930s it was contended that the mutual and parallel nature of interests prevalent in a war waged between two sea powers or between two land powers would constitute a powerful basis for the laws of war, whereas the disparity of interests and positions in a conflict between a land and a sea power would be a significant source of destabilization.[68] Clearly, the disparity of interests between belligerents in many contemporary conflicts now goes far deeper and the readiness to deviate from accepted legal standards in order to gain an immediate advantage is much greater. As the ICRC has rightly pointed out, "It is evident that if one Party, in violation of definite rules, employs weapons or other methods of warfare which give it an immediate, great military advantage, the adversary may, in its own defence, be induced to retort at once with similar measures."[69] This affirmation of a hovering possibility of negative reciprocity is corroborated, for example, by the reservations made by the United Kingdom with regard to Articles 53 and 51–5 of

64 Pictet, above note 59, Vol. III, p. 15: "It is not an engagement concluded on a basis of reciprocity, binding each party to the contract in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations vis-à-vis itself and at the same time vis-à-vis the others."

65 See respectively Articles 51, 52, 131 and 148 of the 1949 Geneva Conventions.

66 ICTY, *Prosecutor* v. *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, Case No. IT-94-1-AR72, Appeals Chamber, p. 30 ff.; *Prosecutor* v. *Kurpeskic* (Lasva Valley case), Decision on Defence Motion to Summon Witness, 8 Feb. 1999, Case No. IT-95-16-T, TC, 3: "all are *erga omnes* designed to safeguard fundamental human values". Simma, above note 55, pp. 173–4.

67 Georg Schwarzenberger, *International Law and Totalitarian Lawlessness*, London, 1943, p. 33, and idem, above note 12, p. 15 ff.

68 Sir Henry Richmond, *Imperial Defence and Capture at Sea in War*, Hutchinson & Co., London, 1932, pp. 167 ff.; H.A. Smith, *Le Développement Moderne des Lois de la Guerre Maritime*, *Recueil des Cours*, Vol. 63, 1938, pp. 18 ff.

69 "Reaffirmation and development of the laws and customs applicable in armed conflicts", report submitted by the ICRC to the XXIst International Conference of the Red Cross, 1969, p. 83.

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Additional Protocol I. It declared that "if the objects protected by this Article are unlawfully used for military purposes they will thereby lose protection from attacks directed against such unlawful military uses."[70]

The effects of negative reciprocity are manifold; although partially evident when violation or rejection of a norm leads to violation or rejection in turn, they are often more subtle. In international armed conflict, the chances are high that if one party opts for military necessity as its sole leitmotiv in combat, the other party will do so too. This need not necessarily result in outright violations of the law. Instead, with regard to the provisions regulating the actual conduct of hostilities, and especially the principle of distinction, the effects are likely to be more subtle because numerous provisions derived from the principle of distinction include special clauses that already *ipso jure* provide for the application of reciprocity. Article 19 of the Fourth Geneva Convention, for instance, provides for the protection of hospitals to be discontinued if they are used to commit harmful acts to the enemy, Article 11(1) of the 1954 Hague Convention on Cultural Property contains a similar provision relating to cultural objects and, more generally, according to Article 51(3) of the Fourth Geneva Convention, civilians enjoy protection only unless and for such time as they do not take a direct part in hostilities.[71] Recurrent alterations of status from civilian to combatant and vice versa, as well as the deliberate use of civilian and specially protected installations for military purposes, are likely to encourage militarily superior states to expand their interpretations of these exceptional clauses – to the detriment of the protective scope of the principle of distinction. The current discussion as to the precise content and temporal scope of the notion of "direct participation in hostilities", especially the notorious revolving-door debate sparked by the exigencies of recent conflicts, is only one example. Similarly, the incentives to expand the notion of what constitutes a legitimate military objective have grown, and the definition in Article 52(2) of Additional Protocol I, which refers to "objects which by their nature, location, purpose or use make an effective contribution to military action", offers considerable leeway in this regard. Moreover, Article 50(1) of Additional Protocol I stipulates that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian. Evidently, when faced with recurrent changes of status from civilian to combatant and vice versa the superior party may be inclined to shift the burden of proof towards the victim. It is quite telling in this regard that already on ratifying Additional Protocol I, France and the United Kingdom expressed their understanding that the presumption formulated in Article 50(1) thereof does not override a commander's duty to protect the safety of troops or to

70 Sub-para. (k) of the UK reservation on Article 53. Sub-para. (m) extends this reservation to Articles 51–55 of Additional Protocol I. The text of these reservations are available at <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (last visited August 2006).

71 Conceptually, these notions are closer in nature to reprisals than to the condition of reciprocity, given that in light of the "unless and for such time as" verbiage in Art. 51 (3) AP I they are limited in time and must stop when the illegal use for military purposes ceases.

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preserve their military situation in conformity with other provisions of Additional Protocol I.[72]

It is worthy of note that prior to the adoption of Additional Protocol II, when the overall feasibility of further regulation of non-international armed conflicts was under discussion, several authors voiced concerns related to the asymmetric nature of such conflicts, which in their view exhibited very weak links of reciprocity and therefore, so they believed, largely evaded regulation.[73] Yet potential areas of reciprocity with regard to prisoners, wounded and sick soldiers, and even battlefield tactics have been pointed out in that type of warfare, despite its asymmetric structure. In the initial draft presented by the ICRC at the 1949 Conference, application of the whole of humanitarian law in a non-international armed conflict was expressly made subject to reciprocity.[74] Moreover, Additional Protocol II itself aims to ensure at least a minimum degree of reciprocity by expressly requiring, as a condition for its application, that the rebel party must possess the capacity to implement its provisions.[75]

Nevertheless, the effectiveness of this legal regime rests predominantly on the strong traditional motivation of non-state parties to adhere – at least formally – to the rules of international humanitarian law in order to acquire legitimacy and become "respectable".[76] Where comparable motivational factors and incentives to abide by the law are lacking, the concerns initially voiced about the incompatibility of asymmetry and reciprocity in non-international armed conflicts again become valid.

Conclusion

In conclusion, factual as well as legal asymmetries are indisputably prevalent in many contemporary conflicts. Historically, such conflict patterns are not

72 The relevant text of the French reservation reads, "Le gouvernement de la République Française considère que la règle édictée dans la seconde phrase du paragraphe 1 de l'article 50 ne peut être interprétée comme obligeant le commandement à prendre une décision qui, selon les circonstances et les informations à sa disposition, pourrait ne pas être compatible avec son devoir d'assurer la sécurité des troupes sous sa responsabilité ou de préserver sa situation militaire, conformément aux autres dispositions du protocole". Available at: http://www.icrc.org/ihl.nsf/NORM/D8041036B40EBC44-C1256A34004897B2?OpenDocument> (last visited August 2006).

73 Richard A. Falk (ed.), *The International Law of Civil War*, The Johns Hopkins Press, Baltimore, 1971, "Introduction", p. 7: "Civil war situations exhibit very weak links of reciprocity under many circumstances."

74 Jean Siotis, *Le droit de la guerre et les conflits armés d'un caractère non-internationaux*, Librairie générale de droit et de jurisprudence, Paris, 1958, pp. 190–3, 203–4.

75 Moreover, Articles 1(4) and 2 of the 1907 Hague Regulations, as well as Articles 13(2)–(6), 13(2)–(6) and 4A2–6 of the 1949 First, Second and Third Geneva Conventions respectively, stipulate as a condition for the applicability of the laws of war to militia, resistance groups and *levées en masse* that they must conduct their operations in accordance with the laws and customs of war. See Henri Meyrowitz, "La guérilla et le droit de la guerre: problèmes principaux", in *Droit humanitaire et conflits armés*, Pédone, p. 185, at p. 197.

76 Major non-governmental parties to internal wars, such as the ANC in South Africa, the PKK in Turkey, UNITA in Angola or the Maoists in Nepal have accordingly given unilateral undertakings that they will abide by international humanitarian law, and the parties to the wars in the former Yugoslavia did likewise in multilateral agreements. See Pfanner, above note 2, at p. 160.

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unprecedented and their side-effects have long been known. Military imbalances in a given conflict have always carried incentives for the weaker belligerent to seek a short-term advantage by circumventing accepted legal standards for the conduct of hostilities.

Such instances of non-compliance have remained a relatively marginal problem in international armed conflicts, in which incentives for compliance have overall outweighed impulsions to the contrary and have usually confined deviations to brief and random occurrences. However, analysis has shown that as the disparity between belligerents grows, the effectiveness of the fundamental principles of IHL is gradually undermined and the compliance-inducing effects of reciprocity are increasingly evaded.

In international armed conflicts the steadily widening technological divide, evidenced for example by the fact that with a total defence budget for 2006 of US$500 billion the United States hugely outstrips the rest of the world,[77] is a strong indication that for weaker parties faced with such overwhelming odds the incentives for compliance could be more and more severely compromised. It may nevertheless be assumed that in such wars compliance-inducing stimuli, stemming from the *ius ad bellum* level and fostered by the pursuit of credibility and legitimacy in the eyes of the world public, will very probably continue to prevail for the superior party, especially because as long as one party is able to bring its greater military superiority to bear, perfidious tactics used by the weaker opponent are perceived as militarily affordable and thus do not have the potential to start a vicious circle of negative reciprocity. Those stimuli are therefore likely to be effective whether the weaker opponent violates accepted legal rules or not, at least for as long as such deviant behaviour does not really alter the overall strategic balance so that it favours the weaker side. Nevertheless, in view of the continuously growing power gap, objective observers and above all the ICRC are urged to watch out for early signs of general changes in interpretation of the protective scope of rules relating to the conduct of hostilities.

Patterns of compliance are far more unstable if the aforesaid factual asymmetries are coupled with legal asymmetries and a profound divergence of interests between the parties involved. As mentioned above, non-international armed conflicts show far weaker links of reciprocity than international armed conflicts, and the question of enhancing compliance with the rules of IHL has consequently remained particularly topical and problematic ever since the scope of application of IHL was extended to that category of armed conflict. While the territorial delineation of non-international armed conflicts has left room for

77 Price Waterhouse Cooper in its recent study, *The Defence Industry in the 21st Century* (p. 9), estimates that by 2006 US military expenditure is expected to equal that of the whole of the rest of the world put together. President George W. Bush sent his 2006 fiscal budget to Congress on 7 February 2005, requesting $419.3 billion, a 5 per cent increase on the previous year. Together with a bill providing for supplemental spending of $80 billion, it thus totals a massive US$500 billion. Ibid., p. 36, available at <http://www.pwc.com/extweb/pwcpublications.nsf/4bd5f76b48e282738525662b00739e22/d0916ea815450f4185256fef0059437d/$FILE/The%20Defence%20Industry_13.pdf#search=%22'The%20Defence%20Industry%20in%20the%2021st%20Century%20Price%22> (last visited August 2006).

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certain compliance-inducing incentives to take effect,[78] the intangibility of trans-boundary conflicts between states and non-state entities renders these stimuli largely inoperative.

Admittedly the above analysis is partly axiomatic in that transnational asymmetric conflicts do not necessarily constitute an armed conflict within the meaning of IHL. It has nonetheless revealed some aspects that caution against any premature over-extension of IHL's scope of application to cover asymmetric constellations akin to subordinative patterns of law enforcement, which therefore lack the minimum degree of symmetry required for the fundamental principles of IHL to be applicable. The legislative history of regulating non-international armed conflicts beyond the provisions laid down in Article 3 common to the Geneva Conventions shows that states intentionally sought to prescribe a minimum degree of symmetry between opponents so as to ensure a level of reciprocity that would in turn guarantee the legal regime's ability to function.

Neither the mere fact that the use of military means is unequivocally included in effective counter-strategies for security threats presented by non-state entities, nor the questionable perception that human rights law may not be suitable to address such a level of violence, automatically indicates the suitability of IHL. Without a minimum of reciprocal interconnections between belligerents or other compliance-inducing incentives, a tendency towards negative reciprocity is very likely to develop. The concept of military necessity, on which the protective scope of the rules regulating the conduct of hostilities largely depends, could potentially be misused to generate such a tendency, since the principle of military necessity cannot readily be reconciled with distinctly asymmetric structures that escape any purely military comprehension and the traditional idea of victory in war. Potentially anything could be justified as necessary when faced with either a militarily unbeatable or an unfathomable foe, and without strong incentives to the contrary there is quite a strong inclination to do so. Any use of coercive force, and *a fortiori* violence, undoubtedly requires regulation. However, if the concept of military necessity is applied to the use of military force in asymmetric constellations akin to law enforcement patterns and without any reciprocal links, this could result in a hardly controllable margin of discretion that would betray the initial aim of regulating the use of violence in such cases.

78 See "ICRC report on improving compliance with international humanitarian law", ICRC Expert Seminar, October 2003, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TAM64/$File/Improving%20compliance%20with%20ihl-Oct%202003.pdf> (last visited August 2006).

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