

Selected articles on international humanitarian law

Asymmetrical warfare from the perspective of humanitarian law and humanitarian action

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Abstract

Warring parties are increasingly unequal and the principle of equality of arms does not apply to them. This asymmetry in warfare has many ramifications. The militarily weaker party is tempted to have recourse to unlawful methods of warfare in order to overcome the adversaries' strength. The expectation of reciprocity as a fundamental motivation for respecting the law is often illusory and replaced instead with perfidious behaviour; covert operations substitute for open battles, "special rules" are made for "special situations". The fight against international terrorism seems to constitute the epitome of this kind of warfare. "Elementary considerations of humanity" as enshrined in article 3 common to the 1949 Geneva Conventions however constitute universally binding rules for all — even unequal and asymmetrical — parties to any situation of armed violence. Furthermore, attacks on humanitarian organizations have showed that humanitarian relief may be contrary to belligerents' interests, or, even worse, that attacks on humanitarian workers may be part of their agenda. Humanitarian actors must be aware of these facts and adapt their working methods so as to be able to continue to provide impartial assistance, based solely on the needs of the victims of armed violence.

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The attack on the World Trade Center in New York and the Pentagon in Washington drastically altered the geopolitical set-up. It also constituted a challenge to the International Committee of the Red Cross (ICRC) and in many respects has affected the very nature of its field of activity throughout the world.

The fateful events of 11 September 2001 epitomized a situation that confronts the ICRC in its work in many conflict zones all over the world, namely asymmetrical warfare. A handful of men armed with box-cutters humiliated the sole great power with all its highly sophisticated weaponry in front of live cameras, killed thousands of people in next to no time and graphically demonstrated the vulnerability of the United States and the entire western world.

The series of terrorist strikes in Russia in the second half of 2004 were as great a traumatic experience for the Russians as the 9-11 attacks were for the Americans. The hostage-taking and ensuing massacre in the North Ossetian town of Beslan by Chechen suicide attackers demonstrated that militarily weaker opponents want to influence confrontations, this time with a diabolic target choice in a marginal war zone, potentially drawing other areas into a spiral of violence.

This article deals with the phenomenon of asymmetrical warfare. In asymmetrical wars the parties are unequal and the principle of equality of arms no longer holds true. The belligerents have disparate aims and employ dissimilar means and methods to pursue their tactics and strategies.

The aforesaid terrorist attacks are only one exceptional, albeit extremely brutal, epoch-making variant of such warfare. Violent acts of terrorism designed to achieve political ends by spreading horror are nothing new. Suicide bombings have been carried out in all wars. Terrorist acts have been perpetrated by State bodies and individuals and have often triggered war, or have left their mark on a country even in peacetime.

A new phenomenon?

The Old Testament¹ recounts how King Saul's army, terrified of fighting the great and seemingly invincible Philistine armies with their thundering giants, had been unable to beat them. Since no soldier was willing to face the Philistine champion, the giant Goliath, the young shepherd David took up the challenge. Raising his sling, he threw a smooth stone at the giant's forehead and Goliath fell face down onto the ground. David ran over to him, drew the giant's sword from its sheath, stabbed him with it and then lopped off his head, whereupon the Philistine soldiers fled in panic.

The biblical story shows that asymmetrical warfare is not new. The equality of warriors was called into question, a civilian — a youngster — engaged in combat and the shocking act of beheading the adversary spread panic and allowed victory to be won. Asymmetrical warfare favours certain behaviour, but

1 Old Testament, *The story of David and Goliath*, 1 Samuel, Chapters 16–18.

contrary to the story of David and Goliath, the apparently weaker warrior does not necessarily win the battle, much less the war.

Today the really new and essentially different factor is that acts of terror are an integral part of asymmetrical warfare.² In extreme cases, like that of al-Qaeda, this type of action becomes the main war strategy. It has three salient features. First, traditional military and legally accepted methods of fighting are deliberately rejected in favour, for example, of the hijacking of airliners and their perfidious deployment against civilian objects and civilians. Secondly, the probable future aim of this strategy will be to cause even greater loss of human life and to inflict non-military and above all economic damage, possibly through the use of prohibited devices, in other words biological and chemical weapons.³ Thirdly, the strategy is no longer confined to a particular territory, for terrorist acts can be committed anywhere and at any time.

The fundamental aim of asymmetrical warfare is to find a way round the adversary's military strength by discovering and exploiting, in the extreme, its weaknesses. Weaker parties have realized that, particularly in modern societies, to strike "soft targets" causes the greatest damage. Consequently, civilian targets frequently replace military ones.

Nor have the United Nations and humanitarian organizations been left unscathed: the deliberate bombing in Baghdad of the UN headquarters in August and of the ICRC office at the end of October 2003 showed that they too were part of the "soft under-belly", to paraphrase Churchill's term.⁴

These unprecedented attacks make it necessary to analyse the environment in which they were carried out. In doing so, I will attempt to outline some of the effects that asymmetrical warfare is having on international humanitarian law and the activities of the ICRC.

Asymmetrical warfare

In a sense, all warfare is asymmetrical as there are never identical belligerents. Asymmetric warfare can be fought at different levels and can take different forms. There is an operational level (including ruses, covert operations, perfidy, terrorism, etc.), a military strategic level (guerrilla warfare, massive retaliation, Blitzkrieg, etc.) and a political strategic level (moral or religious war, clash of cultures).⁵ The different forms include asymmetry of power, means, methods, organization, values and time.⁶

2 See Herfried Münkler, *Die neuen Kriege*, 6th ed., Rowohlt Verlag, Reinbeck bei Hamburg, 2003, pp. 63ff.

3 See Walter Laqueur, *Krieg dem Westen. Terrorismus im 21. Jahrhundert*. Propyläen-Verlag, Berlin 2003.

4 At the Casablanca Conference (14-24 January 1943) Winston Churchill and Theodore Roosevelt decided to continue with operations in the Mediterranean once they had driven the Germans and Italians out of North Africa. This decision was in accordance with Churchill's preference for an attack through the "under-belly of the Axis" instead of a more direct approach through northwest Europe into Germany in 1943 (often misquoted as: "the soft under-belly of the Axis").

5 See Steven Metz, "La guerre asymétrique et l'avenir de l'Occident", *Politique Étrangère*, 1/2003, pp. 26-40, p. 30.

6 Metz, *ibid.*, pp. 31-33.

The term “symmetrical warfare” is generally understood to mean classic armed conflict between States of roughly equal military strength.⁷ The wars that took place in the eighteenth and nineteenth centuries — i.e. after the Peace of Westphalia — in which evenly matched government troops confronted and fought each other in open battles have sometimes been called a thing of the past, for in the twentieth century wars became more complex and more unequal. Furthermore, most wars nowadays are internal, although they frequently have international ramifications. They are as diverse as they are numerous and the way in which they are conducted varies according to the type of conflict.

International wars

Symmetrical wars between States are risky, as it is impossible to anticipate which party will be victorious and the costs usually outweigh the anticipated benefits. Conflicts closely approximating this model, such as the war between Argentina and Great Britain over the Falkland/Malvinas Islands, the war between Iraq and Iran in the eighties or the conflict between Eritrea and Ethiopia just before the turn of the century, have become rare. Threatening scenarios, like those staged by the atomic powers India and Pakistan, are reminders of a potentially destructive symmetry that still exists at the strategic level. Yet even here, enormous resources have to be invested in an endeavour to create asymmetry so that, if need be, a war could be fought and if at all possible won.

Even international armed conflicts are generally asymmetrical. When a great military power (today this term applies especially to the USA) goes to war, asymmetry is virtually inevitable, because the stronger military power's opponent is less well armed.⁸ The Gulf War in the early nineties was an example of

7 See especially a series of articles on asymmetrical warfare with regard to the idea of a revolution in military affairs (RMA) in the US post-Cold War policy debate. *Asymmetric Warfare* (RMA Debate in Project on Defense Alternatives), available online at: <<http://www.comw.org/rma/fulltext/asymmetric.html>> (visited on 6 July 2004). From the abundant (US) literature on the subject see in particular: Roger W. Barnett, *Asymmetrical Warfare: Today's Challenge to US Military Power*, Brassey's Inc., Virginia, 2003; Barthélemy Courmont and Darko Ribnikar, *Les guerres asymétriques*, Presse Universitaire de France, Paris, 2002; Jacques Baud, *La Guerre asymétrique ou la défaite du vainqueur*, Ed. du Rocher, Paris, 2003; Anthony H. Cordesman, *Terrorism, Asymmetric Warfare, and Weapons of Mass Destruction; Defending the U.S. Homeland*. Praeger, Westport, 2002; *The Four Thrusts Meet Asymmetric Threat, Attack Database, Achieve Interoperability, Revitalize Work Force*, Defense Intelligence Agency, Washington, 2001, available online at: <<http://www.dia.mil/This/Fourthrusts/index.html>> (visited on 6 July 2004); *The First War of the 21st Century: Asymmetric Hostilities and the Norms of Conduct*, Strategic and Defence Studies Centre, Working Paper No. 364, Australian National University, Canberra, 2001; Paul Rogers, *Political Violence and Asymmetric Warfare*, Brookings Institution, Washington, 2001, available online at: <<http://www.brook.edu/dybdocroot/fp/projects/europe/forumpapers/rogers.htm>> (visited on 6 July 2004); Josef Schröfl and Thomas Pankratz (eds), *Asymmetrische Kriegführung — ein neues Phänomen der Internationalen Politik?*, Nomos Verlagsgesellschaft, Baden-Baden, 2003; Laurent Muraviec, *La guerre au XXI^e siècle*, Paris 2001; Pierre Conesa (éd.), “La sécurité internationale sans les Etats”, *Revue internationale et stratégique*, No. 51, Autumn 2003.

8 Even Chinese military officers are trying “to propose tactics for developing countries, in particular China, to compensate for their military inferiority vis-à-vis the United States during a high-tech war”. Qiao/Liang/WangXiangsui, *Unrestricted Warfare*, Beijing, 1999 (cited in Herfried Münkler, *op. cit.* (note 2), p. 276, in footnote 21). On the same subject see also Arthur Bruzzone, “Asymmetrical warfare cuts both ways”, *American Daily*, 3 January 2004, available on line at: <<http://www.americandaily.com/article/1837>> (visited on 6 July 2004).

this. Since Iraq did not shun open confrontation, it suffered devastating defeat by the US-led Coalition.

Many aspects of the hostilities in the new Iraq war are a particularly impressive illustration of asymmetry. While the stronger military side strives to secure a rapid, decisive victory on the battlefield through the massive use of force, the weaker party, recognizing the military superiority of its opponent, will avoid open confrontation that is bound to lead to the annihilation of its troops and to defeat. Instead it will tend to compensate for its inadequate arsenal by employing unconventional means and methods and prolonging the conflict through an undercover war of attrition against its well-equipped enemy.⁹

The purpose of the frequent recourse to acts of terrorism is to wage war on the television screens and in the homes of the mightier State, rather than on the battlefield. The weaker party's weapons, namely spectacular terrorist attacks and acts that are regarded as treacherous and "below the belt", enable the weaker opponent to conduct an offensive war by going for the militarily stronger State's "soft underbelly".

Striking at the ICRC demonstrated that no mercy would be shown even to neutral relief organizations. The aim of such aggression is probably not so much to hinder relief operations as deliberately to shock and to wage a savage war where no concessions are made to neutrality. Random attacks in civilian populated areas also showed that, in contrast to guerrilla warfare, those responsible for these bombings did not need the population's approval to continue their fight.

In order to offset comparative disadvantages resulting from its cumbersome military apparatus, the stronger adversary is likewise tempted to employ asymmetrical tactics and unconventional means and methods.

The dividing line between combatants and civilians in asymmetrical wars of this kind is consciously blurred and at times erased. During the latest war in Iraq, the Iraqi army retreated whenever it could before the overwhelming strength of the enemy. Even in the earliest phase of the war, the Iraqi army — understandably — did not want to expose itself to bombardment. For this reason, its members — impermissibly — mingled with the civilian population and ultimately took off their uniforms, thus calling into question the most important principle of the law of war, namely that a distinction must be drawn between combatants and civilians.

Internal wars

Asymmetry usually exists in internal armed conflicts, owing to the fact that governments are mostly fighting a non-governmental armed group. In this type of conflict, which is to be found in most of the areas where the ICRC works, inequality between the belligerents and their weaponry is the rule rather than the

9 See also "Asymmetric Warfare", The USS Cole, and the Intifada, *The Estimate*, Vol. XII, Number 22, 3 November 2000, available at <<http://www.theestimate.com/public/110300.html>> (visited on 30 January 2005).

exception. The conflicts in Chechnya¹⁰ (Russian Federation), Aceh (Indonesia), Darfur (Sudan) and many other African regions fall into this category.

The context of conflicts has altered, especially since the end of the Cold War and the “proxy wars” in which the adversaries were supported symmetrically by the United States and the former Soviet Union. The government side is usually fairly well organized and has more firepower at its disposal than the rebel movements, although it may be unable to retain control of the whole country and to neutralize the armed opposition groups. In such a situation, rebel movements will tend to resort to the same means as those employed in the aforesaid international asymmetrical wars and, in particular, to guerrilla tactics, where fighters melt into the civilian population and rebels disclose their identity as combatants merely by the fact that they engage in offensive operations.

Ironically, in internal wars where the rules of war are least heeded, there may be a certain amount of symmetry. Wars between organized armed groups are taking place with increasing frequency in countries where there has been a partial or complete breakdown of law and order and government structures. An example of this is Somalia, a State without a government where the fighting in the early nineties sometimes lapsed into anarchy and at other times followed rigid clan rules.

There has been a perceptible increase in the privatization of war in many parts of Africa, for example in Sierra Leone and Liberia, but the same phenomenon is also seen in Afghanistan, Chechnya, Myanmar and Columbia. Such wars are driven not so much by politics as by economics.¹¹ The belligerents become war enterprises. The motives for war are economic and links with organized crime, illegal trade and drug trafficking often make them even more lucrative. Furthermore, many of these conflicts transcend national borders.

Transnational wars and international terrorism

Private wars frequently overlap with new forms of transnational violence and international terrorism in particular aimed not necessarily at securing military victory, but above all at politically undermining or defeating the enemy by destroying capital, making it unsafe to exploit resources or forcing economic players to withdraw from areas which become increasingly dangerous.

Such wars are of a special nature. They are asymmetrical because a group of armed individuals linked to varying degrees and sharing vaguely

10 Ivan Safranchuk, *Chechnya: Russia's Experience of Asymmetrical Warfare*, available online at <<http://www.saag.org/papers7/paper619.html>> (visited on 6 July 2004).

11 Paul Collier and Hanke Hoefler (Greed and Grievances in Civil War, 2001, published in *Oxford Economic Papers*, Vol. 56, 2004, pp. 563–595) examine the distinction between greed and grievance as the two main motivations for civil wars. The grievance aspect (including inequality, lack of political rights, and ethnic or religious divisions) is well known and is covered in numerous political science studies. In Collier and Hoefler's statistical investigation of civil wars from 1960 to 1999, they find that greed-related explanations (access to finance, including the scope for extortion of natural resources, but also other opportunity factors such as geography) have a greater explanatory power than grievance and economic viability appears to them to be the predominant systematic explanation of rebellion.

similar ideas face powerful military structures. The means and methods of the State party and the non-State armed groups differ widely. Open armed battles rarely break out, for it is clearly not in the strategic interests of the non-State actor to allow matters to come to such a pass — it would lose. Instead spectacular, horrific and perfidious isolated acts, often countered by covert operations coupled with repressive measures, replace continual hostilities. The scene of action shifts constantly, for an attack can take place at any time and in any country. There is no geographically circumscribed battlefield. Wars of this kind transcend State borders, although they are not wars between States. The worldwide network of terrorist organizations' supporters is secret and shrouded in mystery.

Unlike classic guerrilla movements, such terrorist organizations do not even tactically depend on the population's support, tacit or otherwise, because many of their acts are carried out with the utmost secrecy in the adversary's hinterland. The struggle against such groups is therefore more reminiscent of the battle against organized crime than of a classic war.

After the first bloody assassinations carried out by organizations like al-Qaeda, nobody immediately thought of a "war" and no connection was made between attacks in various countries.¹² Geopolitically and strategically speaking, but not necessarily legally, one can argue that a state of war exists since organizations operating globally can threaten and shatter the foundations of the world order through the sheer scale and the effects of their violent acts. The potential use of weapons of mass destruction, which could claim thousands or hundreds of thousands of lives, is a strategy as well as a crime.¹³ The United Nations Security Council also deemed the events of 11 September 2001 to be armed attacks threatening world peace, thereby implying the existence of a situation similar to a war.¹⁴

Moreover, both the attackers of the World Trade Center and the Pentagon and the attacked United States spoke of war and perceived it as such. On both sides there is an *animus belligerendi*, an intention to create a state of war between itself and its opponents. The US National Commission asserted

12 See in particular *The 9-11 Commission Report. Final Report of the National Commission on Terrorist Attacks upon the United States*, official government edition, available online at <<http://www.gpoaccess.gov/911/>> (visited on 27 July 2004) (*The 9-11 Commission Report*), especially Chapter 2 ("The foundations of new terrorism"), pp. 48–70.

13 In an annual report on threats to the United States, Porter Goss, director of central intelligence, told the Senate intelligence committee: "It may be only a matter of time before al-Qaeda or other groups attempt to use chemical, biological, radiological or nuclear weapons." *International Herald Tribune*, 17 February 2005.

14 See United Nations Security Council Resolution 1373 of 28 September 2001, UN Doc. S/RES/1373 (2001); Christopher Greenwood, War, Terrorism, and International Law, pp. 505–530, in: *Current Legal Problems* 2003 Volume 56, February 2004, agreeing with the resolution (pp. 516–518). The argument can also be made from an effects perspective ("gravity", "significant scale"), like that adopted by the International Court of Justice (ICJ) Military and Paramilitary Activities in and against Nicaragua (*Nicaragua. v. United States.*), Merits, 27 June 1986, ICJ Reports 1986, para. 195. The attacks by non-state actors can trigger the right to self-defense under the Charter, but do not create a state of war in a legal sense (see Jordan J. Paust, "Use of armed force against terrorists in Afghanistan, Iraq and beyond", *Cornell International Law Journal*, Vol. 35, No. 3, 2002, sections 534–539).

that there was a war going on which should be treated as such and that it was not primarily a criminal conspiracy.¹⁵

From al-Qaeda to al-Qaedaism?

One of the characteristic features of transnational wars and international terrorism is that they are unpredictable and that it is generally difficult to discern the beginning and the end of these hostilities. Only when separate acts of violence form part of a series of massive attacks that can be attributed to a well-structured organization can they be termed armed conflicts.¹⁶ At least before the attacks on the United States in New York and Washington, al-Qaeda was a well structured organization. In the words of the 9-11 Commission of the United States it was “a hierarchical top-down group with defined positions, tasks and salaries.”¹⁷ The organization of al-Qaeda has certainly been affected by post September 11 counter-terrorism measures, although it is probably only dispersed and driven underground rather than defeated. Following the armed conflicts in Afghanistan and Iraq and in the framework of anti-terrorist measures, the operational bases of al-Qaeda are more difficult to maintain. Many protagonists of al-Qaeda have been arrested or have had their movements restricted, financial transactions blocked and communication supervised.

The al-Qaeda structure was not only a centralised organization, but it also encouraged bottom-up initiatives and decentralisation. The organization has promoted a global “*jihad*”, seeking to motivate individuals and cells or existing groups worldwide to join its “just war” and to define their local “*jihad*” as part of a universal fight. Groups, such as the Algerian “Groupe salafiste pour la prédication et le combat” are publicly claiming to be part of the organization. Cells operating secretly in Muslim and non-Muslim countries fighting for the advent of the caliphate were sponsored by al-Qaeda and/or were acting under the umbrella of al-Qaeda when launching spectacular terrorist attacks in all corners of the world, in the United States, Indonesia, Kenya, Tunisia, Pakistan, Turkey, Spain, Saudi Arabia and Russia, to name only the most well-known cases. Iraq has become a point of crystallisation of Islamic terrorism. Even

15 “Calling this struggle a war accurately describes the use of American and allied armed forces to find and destroy terrorist groups and their allies in the field, notably in Afghanistan. The language of war *also* (emphasis added) evokes the mobilization for a national effort.” (*The 9-11 Commission Report* (footnote 12), p. 363).

16 Art. 1(2) Protocol II Additional to the Geneva Conventions (applicable to non-international armed conflicts) defines “isolated and sporadic acts of violence and other acts of similar nature” “as not being armed conflicts”. Difficulties to determine the threshold of applicability of humanitarian law apply in many other situations. Covert operations in international armed conflicts are difficult to attribute to a State in international armed conflicts and in non-international armed conflicts according to Art. 3 of the Geneva Conventions, the organisational level of the parties to a conflict may widely vary in time and there is rarely a single event which indicates the beginning or end of hostilities.

17 *The 9-11 Commission Report*, (footnote 12), p. 67: “Most in the core group swore fealty (or bayat) to bin Laden. Other operatives were committed to Bin Laden or to his goals and would take assignments for him.” See also p. 55 (on recruitment of new adherents) and pp. 145 ff. (on the enterprising al-Qaeda). The German Bundeskriminalamt estimated that around 70,000 fighters were trained and educated in al-Qaeda camps in Afghanistan (cf. Case against *Munir al-Motassadeq*, cf. *Reuters*, 4 January 2005).

individual fighters claim to be operating under the leadership of Osama bin Laden and his organization.¹⁸

The way al-Qaeda established itself in Afghanistan was an exception which gave it a territorial context. Today, its supporters are scattered throughout the world and try to hide among the multitudes in order to strike the militarily stronger opponent through carefully targeted action.

However, most of the Islamic militant groups had and still have a territorial approach, mostly with the objective of replacing a secular regime in their country and establishing a State based on Islamic prescriptions. Indeed, most current conflicts in the world, including those taking place in Arab and Muslim countries, have their own roots dating back long before the so-called “global war on terror”. Nevertheless, many of those conflicts now present a global dimension that supplements, but does not replace their local and historical dimension. Suicide attacks by Palestinians on civilians in Israel as well as the hostage taking in Beslan in Russia ended in tragedies which were influenced by the new paradigm inaugurated by al-Qaeda: martyrdom operations seeking to inflict mass civilian casualty.

Conversely, States often describe insurrections as part of terrorist endeavours, readily labelling all opponents as terrorists. Additionally, the “global war on terror” insinuates that the international community as a whole is engaged in a war-like situation. Seen from this perspective, a global confrontation is taking place between the international community of States and both a network of transnational as well as local organizations resorting to terror. Nationalistic armed opposition groups are seen or portrayed as part of a wider network which gives the impression of an enhanced potential threat and allows for an ever stronger repression of their activities.

The mixing of different types of war and violence

In most of the more recent wars, changing combinations and amalgamations of players have interacted in a bewildering mosaic of all types of warfare. The present phase of the hostilities in Iraq offers a graphic lesson in international networking, as local activists join forces with groups pursuing totally different interests. It would seem from investigations conducted by the Iraqi police that, in many of the car bomb attacks on American targets, it was probable that supporters of Saddam Hussein picked each target, al-Qaeda related groups planned the operation meticulously in the light of its experience with suicide bombings in Africa and Saudi Arabia, Ba’athists took charge of the financial and logistical side and procured vehicles, weapons and explosives, and then mercenaries or Arab “*jihadis*” who were prepared to commit suicide were entrusted with the actual implementation.¹⁹ The

18 E.g. the Jordanian Abu Mussab al-Zarqawi fighting with the Tawhid wal-Jihad Group in Iraq has pledged allegiance to Osama bin Laden and al-Qaeda (see Reuters, *Iraq-Phantom Zarqawi in marriage of infamy with bin Laden*, 18 October 2004).

19 George Tenet who headed the US-Central Intelligence Agency testified in April 2004 that militant *jihadi* groups operate in no fewer than 68 countries (up from 40 in 2001). In Iraq alone may pursue what they consider as *jihad*, see <<http://fpc.state.gov/fpc/31428.htm>> (visited on 15 November 2004). According

growing involvement of Shiite groups in the Iraq war also suggests that the already complex spiral of violence could take another twist.

Asymmetrical war and international humanitarian law

Asymmetrical wars do not fit in with either Clausewitz's concept of war between basically equal parties or the traditional concept of international humanitarian law. It is debatable whether the challenges of asymmetrical war can be met with the current law of war. If wars between States are on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well. An even more fundamental consideration, which could be raised in view of the growing privatization of wars today, is whether the State-based model enshrined in the Peace of Westphalia, which was designed to put an end to the privatization of wars in the seventeenth century, is not losing its relevance. On a more modest level I am trying to compare certain basic tenets of international humanitarian law, to which the martial term the "law of war" is again being applied with greater frequency, alongside current trends in warfare.

Asymmetry in the legality of war

International law basically premises a distinction between the reasons for waging war and warfare itself. This distinction was made in the late Middle Ages and the two areas of law were called *jus ad bellum*, the right to wage war, and *jus in bello*, the law governing the conduct of war. Today this distinction is still a crucial and decisive factor, without which there would be no chance of securing respect for international humanitarian law.²⁰

The United Nations Charter and customary international law²¹ lay down the rules regarding the first series of questions. The current debates about the legitimacy of self-defence in the case of Afghanistan (2001) and the lack of UN Security Council legitimization for the use of force against Iraq (2003) are still fresh in our memories.²²

to *The Economist* (8 July 2004, quoting Adnan Karim), there are some 36 different Sunni groups owing alliance to the Salafis, Sufis, Muslim Brothers or tribal sheiks and a half a dozen Shia rebel groups operating in Iraq.

20 See François Bugnion, "Guerre juste, guerre d'agression et droit international humanitaire", *International Review of the Red Cross*, Vol. 84, No. 847, September 2002, pp. 523–546.

21 See ICJ Nicaragua cases (Merits), *op.cit.* (footnote 14), para. 73.

22 See e.g. Madeleine K. Albright, "United Nations", *Foreign Policy*, September/October 2003, pp. 16–24; Mats Berdal, "The UN Security Council: Ineffective but indispensable", *Survival: The IISS Quarterly*, Vol. 45 No. 2, Summer 2003, pp. 7–30; Michael Bothe, "Terrorism and the legality of pre-emptive force", *European Journal of International Law*, Vol. 14, 2003, pp. 227–240; Terry D. Gill, "The eleventh of September and the right of self-defense", in: Wybo P. Here (ed.), *Terrorism and the Military, International Legal Implications*, TMC Asser Press, The Hague, 2003, pp. 23–37; Christopher Greenwood, "War, terrorism and international law", *op.cit.*, pp. 515–523; Albrecht Randelzhofer, "Article 51", in: Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford University Press, Oxford, 2002, p. 802; Abraham Sofaer, "On the necessity of pre-emption", *European Journal of International Law*, Vol. 14, 2003, pp. 209–226; Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules*, Penguin 2005; Michael N. Schmitt,

In purely factual terms, the greater the inequality of the warring parties, the more asymmetrical the lawfulness of having recourse to armed force naturally becomes. The higher the legal standing of one party is, the more it will be able to plead legal grounds justifying the use of force. A permanent Security Council member has greater weight when determining the lawfulness of recourse to arms than an ordinary State. In an internal armed conflict, a State will deny that national groups are entitled to engage in an armed struggle and will aver that it is the State structures that have the monopoly over force against individuals. Therefore, the militarily stronger party's entitlement to use force will usually be recognized.

In parallel, the concept of a "just war" with no holds barred is returning, underpinned by moral arguments.²³ The weaker party will search for extra-legal legitimation and proclaim that it has moral or religious motives for waging war, thus also engaging in a "just war" discourse. It is symptomatic that concepts of "crusade" and "jihad" are increasingly used.

However, the rules of the law of armed conflicts should apply to any armed conflict, irrespective of whether it is lawful or not.²⁴ The purpose of this sharp distinction between the reasons to make war and rules governing the war is to avoid any warring party being permitted on legal, moral or religious grounds to flout agreed minimum humanitarian rules and wage all-out war in order to achieve what it considers lofty aims.

Asymmetrical legitimacy of the belligerents

Until now the Rousseau-Portalis doctrine has governed the law of war. Its conclusion, imbued as it is with the spirit of Rousseau's work *Du Contrat Social*, maintains that "(War) is not (...) a relationship between man and man, but between State and State."²⁵

The idea that it is the sovereign's prerogative to wage war still pervades almost all international treaties concerned with war. The relationship between States rests essentially on equality between them. In principle, the opponents acknowledge their similarity and this recognition forms the basis of the current international law on war that potential adversaries have worked out and adopted.

Whereas in wars between States the opponent is deemed to possess lawfulness and legitimacy, in internal conflicts, and particularly in the "war" on terror, non-State parties are said not to have these attributes. Be this as it may,

"Deconstructing October 7th: A case study in the lawfulness of counterterrorist military operations", in: *Terrorism and International Law, Challenges and Responses*, International Institute of Humanitarian Law, and George C. Marshall, European Center for Security Studies, 2003, pp. 39–49; Shashi Tharoor, "Why America still needs the United Nations", *Foreign Affairs*, September/October 2003.

23 See for example Michael Novak, *Asymmetrical Warfare & Just War: A Moral Obligation*, February 2003, available online at <<http://nationalreview.com/novak/novak021003.asp>> (visited on 6 July 2004).

24 See paragraph 5 of the preamble to 1977 Additional Protocol I to the Geneva Conventions of 1949.

25 Jean-Jacques Rousseau, *The Social Contract*, translated by Christopher Betts, Oxford University Press, Oxford and New York, 1994, Book I, ch. IV, p. 51 (original French edition, *Du Contrat Social*, 1762).

the rules of international humanitarian law on non-international armed conflicts draw attention to the fact that compliance with these rules should have no bearing on the legal status of the parties to the conflict.²⁶

The non-State party's desire to acquire political and even legal legitimacy is, however, one motive behind its often only ostensible promotion of respect for international humanitarian law. Major non-governmental parties to internal wars, such as the ANC in South Africa, the PKK in Turkey, UNITA in Angola, the *Mujahedin* in Afghanistan or the Maoist in Nepal, have 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. The belligerents' innumerable pledges of compliance with the law, even in wars like that in Liberia in 2003, often contrast sharply with actual practice and in many cases are aimed solely at becoming "respectable".

The ICRC must, however, grasp these opportunities to improve the plight of war victims and endeavour to ensure that the promises made do not remain mere lip service. Especially towards the end of wars, when both sides are growing weary, such promises can and may smooth the path towards peace negotiations and the legitimization of the non-State party.

The less equal the belligerents are, the less they will be prepared to treat the adversary as legitimate. Groups classified as "terrorists" will probably be denied any legitimacy and will be considered criminals. The opposite side is not regarded as an equal; the epithets "uncivilized", "criminal" or "terrorist" indicate that it should be denied equality at all costs. Its members will be treated as outlaws and will be ruthlessly pursued, if necessary by unconventional or illegal means.

Extending the principles of international humanitarian law enshrined in Article 3 common to the Geneva Conventions, which relates to armed conflicts not of an international character, to the non-State parties to a war can easily be misunderstood as an attempt to legitimize them. Yet its provisions are purely humane. It stipulates that all parties to an armed conflict must distinguish between persons engaging in hostilities and persons who are not, or no longer, taking part in them. The latter must be dealt with humanely and, in particular, they must not be maltreated, taken hostage or summarily sentenced or executed. The sick and wounded must be cared for.

Asymmetrical interests in the application of international humanitarian law

International humanitarian law rests on a balance of humanitarian and military interests.²⁷ In order to prevent the parties sliding into an all-out war ending with

²⁶ See Article 3 (4) common to the Geneva Conventions of 1949.

²⁷ On the balance between freedom and security, see Michael Ignatieff, *The Lesser Evil. Political Ethics in an age of Terror*, Princeton University Press 2004 and Philip B. Heymann, Juliette N. Kayyem, *Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism*, National Memorial Institute for the Prevention of Terrorism (MIPT), December 2004, <<http://www.mipt.org/Long-Term-Legal-Strategy.asp>> (visited on 30 January 2005).

the complete destruction of the enemy, their choice of the means and methods of warfare is restricted. In particular, persons not or no longer taking part in hostilities, such as civilians or wounded or captured soldiers, must be spared.

Humanitarian and military interests do not necessarily clash. It is undoubtedly in the interests of an army to treat prisoners of war well and to expect the enemy to do the same. Similarly it may be advisable to refrain from bombing towns so as not to expose one's own population to a similar fate. Like most legal rules, both precepts have grown out of custom and the conviction that this practice ought to be legally valid. For this reason many rules of international humanitarian law are essentially designed to cover the belligerents' own best interests, so they should really be keen to comply with them. At the same time, the adversary is expected to have the same basic interests. Customary law and the whole body of treaty law contained in the Geneva Conventions protecting war victims have developed from the concurrence of these interests.

Reciprocity is of paramount importance in political terms and even the bulk of international humanitarian law thus rests on the expectation of reciprocity.²⁸ In international armed conflicts this is reflected, for example, in the traditional definition of armed forces and in the demand that their members respect the laws and customs of war when fighting.²⁹ It is therefore assumed that the enemy, that is to say the members of the enemy's armed forces, will behave in the same or at least a similar manner. In Lauterpacht's terms "it is impossible to visualize the conduct of hostilities in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from them without being bound by them."³⁰

The resemblance to a classic duel or tournament in which both sides had an equal chance of winning or survival is not fortuitous. The concomitant chivalry in battle is in fact still demanded by many provisions of international humanitarian law.

In asymmetrical wars, the expectation of reciprocity is basically betrayed and the chivalrous ethos is frequently replaced by treachery.³¹

Open confrontation between armed forces is avoided and generally never takes place. Sham civilians illegally using protected emblems and uniforms abuse the trust of the other side. By definition, suicide bombers do not expect reciprocity. In the extreme case of international terrorism, al-Qaeda has never promised to adhere to the law of war, but on the contrary rejects it. In his "Letter

28 However, reciprocity invoked as an argument not to fulfil the obligations of international humanitarian law is prohibited.

29 See Article 4.A.2 (d) of the Third Geneva Convention of 1949, and also Toni Pfanner, "Military uniforms and the law of war", *International Review of the Red Cross*, Vol. 86, No. 853, March 2004, p. 109.

30 Hersch Lauterpacht, *The Limits of Operation of the Laws of War*, *British Yearbook of International Law*, Vol. 30 (1953), p. 212.

31 This is valid especially for the so-called "Hague Law", see W. Michael Reisman, "Aftershocks: Reflections on the implications of September 11", *Yale Human Rights & Development Law Journal*, Vol. 6, 2003, p. 97: "The implicit ethic of the Hague law is that conflict should be symmetrical and that an adversary that does not fight accordingly is not entitled to the protection of the laws of war".

to America”, published in 2002, Osama bin Laden declared that the American people are guilty of not seizing the opportunity to engineer a change in policy through democratic means and of paying taxes to finance repressive policy in Palestine and the occupation of Arab countries in the Gulf. “The American army is part of the American people (...) the American people are the ones who employ both their men and their women in the American forces which attack us. That is why the American people cannot be innocent of all the crimes committed by the Americans and the Jews against us. Allah, the Almighty, legislated the permission and the option to take revenge. (...) And whoever has killed our civilians, then we have the right to kill theirs.”³² Not only is the fundamental distinction not made between combatants and civilians, but it is systematically used for the very purpose of placing the adversary at a disadvantage.

In such cases, the other side begins to feel that it might be more in its interest not to consider itself bound by the law of war. In international armed conflicts, this is reflected first and foremost by the withholding of prisoner-of-war status, which, as a matter of principle, provides members of the armed forces with immunity from prosecution for participating in hostilities. This issue is of acute importance for all the internees in Guantánamo who are denied that status, although no detailed examination has yet been carried out to determine, for example, the status of members of the Taliban armed forces. It was not until the recent decision of the Supreme Court of the United States in the *Hamdi case*³³ that the Department of Defense issued an “Order establishing combatant status review tribunal.”³⁴ However, a federal judge declared the special trials not to be in accordance with the Geneva Conventions and unlawful.³⁵

Not only is the status of captives being called into question, but it is claimed that members of government forces are being unduly fettered in a war against opponents who do not comply with or who do not consider themselves bound by any of the legal rules.³⁶ To level the battlefield, the military-wise

32 See “A letter from Osama bin Laden to the American people”. The letter appeared first on the Internet in Arabic on 17 November 2002 and was subsequently translated into English. Available online at <<http://observer.guardian.co.uk/worldview/story/0,11581,845725,00.html>> (visited on 6 July 2004).

33 US Supreme Court, *Hamdi v. Rumsfeld* 124 S. Ct. 2633 (28 June 2004), available on-line <<http://a257.gakamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-6696.pdf>> (visited on 15 November 2004) and Jenny S. Martinez, *Hamdi v. Rumsfeld*, *American Journal of International Law*, Vol. 98 No. 4, October 2004, pp. 782–788. See also the Supreme Court’s decision *Rasul v. Bush* 124 S. Ct. 2686 (28 June 2004) (cf. David L. Sloss, *American Journal of International Law*, Vol. 98 No. 4, October 2004, pp. 788–798).

34 See <<http://www.defenselink.mil/releases/2004/nr20040707-0992.html>> (visited on 15 November 2004).

35 The federal judge ruled that the military commissions set up to try detainees at the US naval base in Guantánamo are not in accordance with the Geneva Conventions and should be stopped, “unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention (...)”, see *Hamdan v. Rumsfeld*, Civil Action No. 04-1519, US District Court, District of Columbia, 8 November 2004, available at <<http://www.dcd.uscourts.gov/04-1519.pdf>> (visited on 15 November 2004). According to the *Washington Post* (9 November 2004), military officers halted commission proceedings in the light of the ruling. The administration announced that it will ask a higher court for an emergency stay and reversal of the decision.

36 See as examples the papers on the laws of war by David B. Rivkin Jr., Lee A. Casey and Darin R. Bartram, available at <<http://www.fed-soc.org/lawsofwar>> (visited on 15 November 2004), Alan Dershowitz, “The laws of war weren’t written for this war”, *Wall Street Journal*, 12 February 2004.

stronger party is tempted to resort as well to unconventional warfare and covert operations.³⁷

Asymmetry can indeed place a warring party at a disadvantage if it, unlike the other side, abides by the rules of the law of war. It might then at least entertain the thought that the use of torture just might yield information about the adversary and its intentions, that it would be quicker and easier to take an alleged civilian terrorist out of circulation by deliberately killing him than by putting him on trial and, similarly, that a huge military strike which also hits the civilian population indiscriminately, wiping out not only combatants but also their families and other possible sympathizers, might undermine the morale of a movement.³⁸

But despite their origin and evolution, most rules of international humanitarian law are now provisions which, because of their fundamentally humanitarian character, are binding on all parties of an armed conflict. One of the civilizing achievements of the nineteenth century was that legal norms which were formerly only utilitarian came to demand a minimum level of humanity irrespective of reciprocity.

The ban on reciprocity in international humanitarian law, as codified in the Vienna Convention on the Law of Treaties,³⁹ is rooted in this way of thinking. In our context, this means in practice that the response to torture cannot be torture and bloody attacks on the civilian population, or that terrorist raids cannot be answered in kind. Nevertheless, traces of reciprocity do still exist in today's humanitarian law, in that the ban on reprisals against civilians or the civilian population has not yet gained full acceptance in customary law.

Universally valid rules for asymmetrical parties to conflict

The International Court of Justice highlighted the legal trend away from reciprocity when, in the well-known “Nicaragua Judgment”,⁴⁰ it called the precepts contained in Article 3 of the Geneva Conventions — which apply to

37 E.g. a new organization, called the Strategic Support Branch, designed to operate without detection and under the defense secretary's direct control, deploys small teams of case officers, linguists, interrogators and technical specialists alongside newly empowered special operations forces (cf. “The Secret Unit Expands Rumsfeld's Domain”, *Washington Post*, 23 January 2005). The creation of a new unit was confirmed in a statement from Pentagon spokesman Lawrence DiRita (on Intelligence Activities of the Defense Department), 23 January 2005, cf. <<http://www.defenselink.mil/releases/2005/nr20050123-2000.html>> (visited on 30 January 2005). On counterterrorism, see also Jonathan Stevenson, *Counter-terrorism: Containment and Beyond*, *Adelphi Paper* 367, International Institute for Strategic Studies, 2004.

38 See e.g. Anthony Dworkin, *Law and the campaign against terrorism: The view from the Pentagon*, 16 December 2002, <<http://www.crimesofwar.org/print/onnews/pentagon-print.html>> (visited on 6 July 2004).

39 Article 60.5 of the 1969 Vienna Convention on the Law of Treaties.

40 See ICJ, *Nicaragua v. United States*, Merits, *op.cit.* (footnote 14), para. 218. (“Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’ (ICJ, *Corfu Channel*, Merits, *ICJ Reports* 1949, p. 22; paragraph 215 above”). See also the confirmation in ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 157.

internal conflicts — a “mini convention” applicable in all situations of armed violence, and likewise qualified the principles of international humanitarian law as “elementary considerations of humanity”. The detailed rules applicable to international conflicts are generally considered as constituting *ius cogens*, binding on all parties to a conflict.

For the ICRC, these binding humanitarian rules and principles are of primary importance when it is faced with asymmetrical warfare, since they offer an alternative to reciprocity based arguments which in such situations often result in events taking a turn for the worse, rather than the better, and in no one feeling any further obligation to abide by the rules.

Humanitarian law already has built-in barriers to such developments, because a balance between humanitarian, military and security interests has already been struck in the Conventions and a framework for waging war is provided. In particular, threats to State security may not be used as an opportunity to tear up the very rules created for dealing with such an eventuality.

Especially in wars between States, the rules on warfare and the protection of victims generally still offer an adequate response to contemporary events in theatres of war, even in conflicts where there is no equality of arms. The overlapping of the aforementioned types of war in one and the same theatre does not, however, make it any easier for legal experts to find simple solutions. In the more recent international wars in Afghanistan and Iraq, international, internal, private and transnational armed confrontations often take place simultaneously. Despite that, they all follow different legal rules.

Restricted area of applicability

In internal armed conflicts, we must start our search for solutions by trying to identify the fundamental area of application of international humanitarian law. It applies only when a conflict occurs between “armed parties”. This presupposes a certain amount of hierarchical organization.⁴¹ If the area of applicability is interpreted in a relatively restrictive manner and if the parties are more or less equal or symmetrical, the law of war offers realistic solutions. Conversely, the rules of those conventions will be rather fictitious and most will be violated if every conceivable violent act is regarded as being subject to the law on armed conflicts.

In particular, the law of war cannot take effect if one party is absolutely unable or unwilling to comply with its basic tenets. In the first instance, the operative prerequisites for applicability (it must be an organized armed group and thereby able to enforce compliance) are probably lacking. In the second instance, the party’s actual aim is systematically to infringe the rules

41 The International Criminal Tribunal for the former Yugoslavia (ICTY), has defined “armed conflict” as existing “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.” *Prosecutor v. Tadic*, No. IT-94-1, Decision on the Defense, Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

of international humanitarian law and to do away with the essential distinction between combatants and civilians. By analogy with treaty law, it could be argued that a party cannot accede to a treaty if it does not agree with its basic object or purpose.

The scope of application of international humanitarian law should not be overstretched. Even when, strategically and geopolitically speaking, certain acts must be treated as acts of war on account of their scale and nature, they do not necessarily amount to an “armed conflict” within the meaning of the law of armed conflicts.⁴² This is particularly true of international terrorism whose hazy beginning, unforeseeable end and worldwide territorial context, coupled with controversy surrounding the attribution of responsibility for given acts to any one party, can result in the whole world being placed on a war footing, at any moment, indefinitely. “To speak of a war on terrorism in this *jus in bello* sense, is to distort the whole meaning and purpose of the laws of war by trying to make them applicable to a situation to which they were never intended.”⁴³

The content of the international law of armed conflicts may provide some answers to what happens in the most markedly asymmetrical wars. But they are only partial answers and the reply as a whole may be wrong. And partial answers are an invitation to abuse through pick-and-choose tactics, especially when the issue is not addressed in its entirety.⁴⁴

International humanitarian law therefore has to walk a tightrope between overuse, misuse or irrelevance, either because it is not applicable to many of today’s asymmetrical confrontations, or because it is inconsistent with the perceived interests of the warring parties. In particular, the terrorist acts being perpetrated, outside situations of armed conflict, in various parts of the world are criminal acts that should, *inter alia*, be dealt with by applying domestic and international human rights law.⁴⁵ In practice, that is primarily the legal framework being relied on. On the other hand, international humanitarian law continues to offer suitable answers to most international and internal armed conflicts, which still account for the majority of wars today.⁴⁶

42 Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., Manchester University Press, — Manchester, 1999, p. 70. See also Kenneth Roth, “The law of war in the war on terror, Washington’s abuse of enemy combatants”, *Foreign Affairs*, January/February 2004, p. 2; Gabor Rona, “Interesting times for international humanitarian law: Challenges from the ‘war on terror’”, *Fletcher Forum of World Affairs*, Vol. 27, 2003, p. 57.

43 Christopher Greenwood, *op.cit.* (footnote 14), p. 529.

44 See also Anthea Roberts, Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11, *European Journal of International Law*, Vol. 15, September 2004, pp. 742.

45 See Marco Sassòli, Use and Abuse of the Laws of War in the “War on Terror”, *Law & Inequality: A Journal of Theory and Practice*, Vol. XXII No. 2, Summer 2004, pp. 195–221, and Kenneth Watkin, “Controlling the use of force: A role for human rights norms in contemporary armed conflict”, *American Journal of International Law*, Vol. 98, No. 1, January 2004, pp. 1–34.

46 For an institutional view of the ICRC on related issues see the ICRC’s report on “International humanitarian law and the challenges of contemporary armed conflicts”, submitted to the 28th International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 2003, published in *International Review of the Red Cross*, Vol. 86, No. 853, March 2004, pp. 213–244.

Humanitarian action in an asymmetrical war

In times of war, the ICRC is concerned not only with the observance of international humanitarian law, but also and above all with protecting and assisting the victims of such situations.⁴⁷ As it is present in the midst of the fighting, it must take a critical look at the various aims and forms of warfare so that it can gain access to the victims and carry out its humanitarian activities as effectively as possible.

The diversity of asymmetrical wars makes it impossible to deal with all the issues linked to specific forms of war. Tellingly, considerations similar to those relating to international humanitarian law, which is closely connected with the operational activities of the ICRC, hold good. The fact that certain new manifestations of war-like situations are barely covered by international humanitarian law does not mean that the institution must look on idly.

The mission of the ICRC is to help and protect victims of war and of similar acts of violence as far as possible. The organization has in particular to face the main humanitarian consequences of asymmetrical warfare, namely the fate of civilians affected by indiscriminate or even targeted attacks and the threat to dignity and integrity of persons detained in such contexts. “Elementary considerations of humanity” have to be respected and the legal standards upheld even in the worst circumstances.

It is crucial for the institution’s planning to determine whether, in asymmetrical wars, it can perform those tasks in keeping with the basic principles governing humanitarian relief, according to which its good offices must be available impartially and without discrimination to all the victims of hostilities. Humanitarian action is affected by the global trends in warfare in that it has an impact on the ways that risks and potential dangers are managed and communication is carried out in order to preserve humanitarian space in the interest of the victims. The analysis of the local situation must go hand in hand with a broader analysis at a regional and global level. It implies therefore the adage “think globally and act locally.”⁴⁸

The difficulty and necessity of establishing contact with all parties

In order to gain access to war victims, the ICRC must negotiate with the various warring parties. Although the Geneva Conventions give the ICRC the right to carry out certain activities in international armed conflicts,⁴⁹ such as visiting prisoners of war, in practice it has to obtain the respective party’s consent to do so.

47 See Toni Pfanner, *Le rôle du CICR dans la mise en oeuvre du droit international humanitaire*, *Law in Humanitarian Crises*, Official Publications of the European Communities, 1995, Vol. I, pp. 177–248.

48 See Jean-Luc Blondel, *La globalisation : approche du phénomène et ses incidences sur l’action humanitaire*, *International Review of the Red Cross*, Vol. 86 No. 855, Septembre 2004, p. 502.

49 See in particular Article 126 of the Third Geneva Convention (visits to prisoners of war) and Article 143 of the Fourth Geneva Convention of 1949 (visits to civilian internees).

Whereas it is relatively easy to make contact with established government bodies, it is harder to reach non-governmental entities. Indeed, some people even find it suspicious that in such cases the ICRC has to hold talks with prohibited or “criminal” organizations. Contacts with rebel movements may be prevented in order to avoid any form of recognition. But in giving this order the party doing so, which is usually the government side, relinquishes the opportunity to start talks or reach an understanding with the rebels, at least on humanitarian matters. Such contact has often to be sought in a roundabout way or through intermediaries before closer relations can be established in conflict areas.

With increasing asymmetry, the lack of lawfulness and legitimation make it all the more difficult to establish contact.⁵⁰ If groups or movements are classified as downright criminal and without any right to engage in armed conflict, such as is the case in the “fight against terrorism”, contact with them is not only often illegal but can jeopardize a delegation’s safety. Yet contacts with all actors are essential in order to be able to operate in such areas unimpinged. The ICRC can at best obtain an indirect hearing through general public relations or cautious contacts with sympathizers, as the possible perpetrators tend to be shadowy figures. It frequently has access to them only once they have been captured, in other words when visiting prisoners.

In asymmetrical situations the ICRC therefore frequently has to guess from indirect contacts and incomplete information whether it has the assent of the belligerents and fairly safe access to the victims of hostilities. It cannot carry out humanitarian action without such minimum assurances and access to the victims.⁵¹ By its very nature, humanitarian relief cannot be forced upon a belligerent against its will without the humanitarian organization itself becoming part of the war machinery.

Humanitarian action at odds with the aims of war

Humanitarian organizations can offer help and protection only if this is compatible with the aims of the warring parties or at least does not conflict with them. As already mentioned above, *de jure* and *de facto* consent has to be obtained. The belligerents mostly withhold it when a given operation does not square with the parties’ stated or real purposes. At worst, the murder of a delegate or

50 See Kenneth Anderson, Humanitarian Inviolability in Crisis: The meaning of Impartiality and Neutrality for U.N. and Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts, *Harvard Human Rights Journal*, Vol. 17 (2004), pp. 41–74, especially on contacts with organizations classified as terrorist organizations. No peace or accommodation, but “the hard won practical wisdom” imposes such contacts (pp. 63–66). A possible strategy to negotiate with or at least to bind in organizations such as al-Qaeda is outlined by Helmuth Fallschelle, *Soll man mit al Quaida verhandeln? Anmerkungen zu einem Tabu*, available online at <<http://www.freitag.de/2003/07/03071601.php>> (visited on 6 July 2004); see also Bruno S. Frei, *Dealing with Terrorism — Stick or Carrot*, Edward Elgar, Cheltenham (UK) and Northampton (USA) 2004.

51 Pierre Krähenbühl, The ICRC’s approach to contemporary security challenges: A future for independent and neutral humanitarian action, *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 505-514, in particular p. 508.

pillaging of a delegation makes it crystal clear that consent does not exist or has been withdrawn at least by one conflict party. A tragic example of this was the murder of six of ICRC staff in eastern Congo in 2002.

In an all-out war or in “identity wars” of an ethnic or religious nature aimed at expelling or exterminating the enemy, humanitarian action will have little prospect of success. The situation is even more dangerous when delegates engaged in humanitarian operations are seen as “soft targets” and become the object of attacks, as has happened, for example, in Iraq. In such cases even humanitarian organizations are regarded as enemy civilians.

Belligerents’ interest in humanitarian action

Often the militarily stronger party’s consent to the protective activities of the ICRC has nothing to do with reciprocity and is not necessarily contingent upon it. The target audience is that party’s own nation and the international community. The message is that this consent is humanitarian in nature and that even the enemy is going to be given humane treatment, sometimes also in the hope that the enemy and its sympathizers might ultimately be convinced that it is worth respecting fundamental humanitarian norms.

In asymmetrical wars, the ICRC is often allowed to act only for humanitarian and not for legal reasons, so that no legitimacy can seem to be conferred on the adversary. The weaker parties to a conflict usually welcome humanitarian relief, as long as they do not perceive it as an instrument of the opposite, generally governmental party. Nevertheless humanitarian assistance can be instrumentalized by the weaker party, too, or become essential to their survival. On the one hand, a relief operation provides the needy civilian population with hope that the international community is not completely indifferent to its fate and that there is light at the end of the tunnel; on the other, insurgents try to elicit legitimation from the presence of foreign staff members in international aid agency teams. Lastly, not even the best possible supervision during the handing out of relief supplies can guarantee that warring parties do not benefit, at least indirectly, from those supplies.

The time-frame for humanitarian action

Humanitarian relief in asymmetrical conflicts is subject to the same laws as in all other conflicts; depending on the background, purpose and point in time, this relief may be seen as desirable, undesirable or somewhere in between. Assistance that fails to take the victims’ interests into account can also prove to be counterproductive. Protection of victims must be closely allied with relief operations if effective assistance is to be provided in a war.

In any conflict, humanitarian relief activities can sometimes be incompatible with tactical war aims or with safety considerations regarding humanitarian staff. Hostilities are seldom fully or partly suspended in order to permit humanitarian action. Moreover, such cease-fires are fundamentally different from the situation encountered in highly asymmetrical wars.

To a great extent, the art of asymmetrical warfare lies in the dissimilar speed at which the parties wage war on one another.⁵² Asymmetry arising from strength is usually aiming at accelerating hostilities and outpacing the adversary. Weaker parties tend to slow the war and protract it.

Consequently the time-frame for humanitarian action can also vary. In the short early phase of a war, the massive deployment of weapons and rapidly altering needs make it difficult to provide such relief, as for example in the initial phase of the Iraq war. Although there was a great necessity for ICRC action, the heavy bombardment meant that the organization's ability to deliver it was limited for security reasons. In the seemingly interminable second phase, the open conflict has turned into a covert war and a war of occupation. At the same time, reconstruction of the widely destroyed infrastructure has begun. For now at least, such reconstruction seems inconsistent with the aims of what is so far the militarily inferior party. This again shows that war aims extend beyond military action and that the purely military notion of war is beginning to unravel. For this reason, humanitarian relief operations can sometimes be incompatible with the political aims of one of the parties and therefore practically impossible to carry out.⁵³

Humanitarian protection and especially the visiting of prisoners of war and internees are the ICRC's main task at this stage. Naturally, it is focused on the militarily stronger party that has the necessary facilities. Reciprocity can scarcely be expected in asymmetrical wars, as the weaker party is usually neither able nor willing to take prisoners.

In the delicate and often very difficult transition period following the end of an open armed conflict or the actual or official end of an occupation, the situation of the most vulnerable members of the population often deteriorates and the need for security in view of the threats posed by former combatants and generally hazardous conditions increases. Addressing the manifold needs of the population after such a conflict raises a variety of questions at the policy level.⁵⁴ The uncertainty or the absence of agreement as to a clear legal framework does not facilitate protection activities, even less so if a regime change is being effected at the same time. Humanitarian work is confronted by the continuing problem of security, the lines between short and longer term aid become even more blurred and the already difficult transition from emergency aid to development work is impeded.

Emphasis on independence

Because, and even despite, the fact that the ICRC must be in close dialogue with the militarily more powerful party to a conflict, it must take care to remain

52 See Herfried Münkler, "The wars of the 21st century", *International Review of the Red Cross*, Vol. 85 No. 849, March 2002, pp. 7–22.

53 Similarly Kenneth Anderson, *op. cit.* (footnote 50), on reconstruction and neutrality (p. 58), Anderson makes a distinction from immediate relief (p. 74).

54 See Marion Harroff-Tavel, "Do wars ever end? The work of the International Committee of the Red Cross when the guns fall silent", *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 465–496.

visibly independent. Such independence is vital to ensure that humanitarian action is not used by the stronger adversary as an instrument to promote its own interests.⁵⁵ The sole obligation of the ICRC is towards the victims of hostilities, and the sole purpose of its cooperation with all parties to the conflict is to get humanitarian relief through to victims in an impartial and non-discriminatory manner.

The increasing militarization of humanitarian activity and the combining of military and humanitarian assistance constitute big problems for relief organizations, because these trends threaten the independence of their action — or at least the perception of its independence.⁵⁶ If humanitarian organizations are associated with military forces, there is a great risk that they will no longer be perceived as being impartial and independent of political control, and if the dividing line between humanitarian and military action is blurred, the very idea of humanitarian action — of impartial help to the victims — may be undermined. This is perhaps the institution's main concern, for it can dilute the concept of humanitarian action in the eyes of the belligerents, and can appear to compromise the independence of its activities and threaten the security of humanitarian workers if associated with the enemy.⁵⁷ This concern is due less to the limits of military humanitarian action per se than to the “contagious” impact it may have on civilian humanitarian action and for the victims of armed confrontations.⁵⁸

As a matter of principle, the ICRC therefore excludes recourse to armed protection of its humanitarian operations.⁵⁹ Only in very exceptional circumstances and when it is considered indispensable to defend its staff or its infrastructure against common law criminality is armed protection allowed. The imposition of humanitarian services against the will of a party to conflict is, however, not accepted by the ICRC. Furthermore, the ICRC always insists on

55 Contrary to governmental humanitarian action or so-called “NGO's of Wilsonian tradition” with close identification with the policy of the respective government, see Abby Stoddard, *Humanitarian NGO's: challenges and trends*, *Humanitarian Policy Group Report*, No. 14 July 2003 (Joanna Macrae and Adele Harmer, Eds.), pp. 25–35.

56 Beat Schweizer, *Moral dilemmas for humanitarianism in the era of “humanitarian” military interventions*, *International Review of the Red Cross*, Vol. 86 No. 855, September 2004, pp. 547–564. Fiona Terry, *Condemned to Repeat? The Paradox of Humanitarian Action*, Cornell University Press, Ithaca NY, 2002 rejects “the traditional concept of neutrality as on the one hand morally repugnant and on the other hand unachievable in the complex political emergencies of the post-Cold War period”, (pp. 20–23).

57 See Raj Rana, *Contemporary challenges in the civil-military relationship: Complementarity or incompatibility?*, *International Review of the Red Cross*, Vol. 86 No. 855, September 2004, pp. 565–587, and Meinrad Studer, *The ICRC and civil-military relations in armed conflict*, *International Review of the Red Cross*, Vol. 83, No. 842, June 2001, pp. 367–391.

58 On the integration of politics and humanitarian action see in particular Nicolas de Torrente, *Humanitarian Action Under Attack: Reflections on the Iraq War*, *Harvard Human Rights Journal*, Vol. 17 (2004), pp. 1–29 (warning of the dangers of co-opting humanitarian action by States) and Paul O'Brian, *Politicized Humanitarianism: A Response to Nicolas de Torrente*, *Harvard Human Rights Journal*, Vol. 17 (2004), pp. 31–37, who doubts about the apolitical character of humanitarian action.

59 See Resolution 4 adopted by the 26th International Conference of the Red Cross and Red Crescent “Principles and actions in international humanitarian assistance and protection”, in particular para. G.2 (c), published in: *International Review of the Red Cross*, Vol. 36, No. 310, January/February 1996, pp. 74–75.

complete logistic independence from all parties to a conflict, thereby emphasizing that it has its own distinctive identity.

Neutrality as operational instrument

In international law, the neutrality of States means not interfering in a war (principle of non-intervention), not giving one adversary a military advantage over another (principle of prevention) and treating all adversaries equally (principle of impartiality). Already reduced by the United Nations Charter, neutrality has largely continued to lose its significance owing to the rising number of internal conflicts, although it is still important in classic international humanitarian law.

For the ICRC, the neutrality of humanitarian organizations however is every bit as important as their independence from political actors. In order to gain the trust of parties to conflict, this principle requires not only that the ICRC should not take part in hostilities, but also that it should not intervene in political, religious or ideological controversies.⁶⁰ Neutrality is therefore not to equate with neutrality of States under international law: for the ICRC it is neither an end in itself, nor a philosophical principle, but rather an operative means of reaching those in need. Humanitarian organizations do not necessarily have to be neutral, nor did the International Court of Justice demand in the above-mentioned Nicaragua Judgment that humanitarian assistance must be neutral in all circumstances. Under the Statutes of the Red Cross and Red Crescent Movement,⁶¹ the ICRC is, however, obliged to abide by the principle of neutrality as understood by the Red Cross and Red Crescent Movement.

For the ICRC and international humanitarian law, the questions of lawfulness and, more generally, of the reason for an actual war do not influence the action of the ICRC on behalf of the persons affected by the conflict and the applicability of the law. The aim is solely to protect and assist war victims, regardless of the political, religious or ideological reasons for the war or whether a resolution of the United Nations Security Council allowed it.

Naturally, delegates in the field must closely analyse the reasons for a war in order to tailor their humanitarian action to local circumstances, if only to ensure their own safety by not consciously or unconsciously thwarting the aims and intentions of the warring parties. In the interests of war victims, the ICRC and its delegates must insist that a clear conceptual distinction be drawn between the lawfulness of a war and the law governing the conduct of hostilities.

In asymmetrical wars, the ICRC struggles to have its neutrality and independence accepted by the parties.⁶² The frequent tendency in such conflicts to

60 See Denise Plattner, "The neutrality of the ICRC and the neutrality in humanitarian assistance", *International Review of the Red Cross*, Vol. 36, No. 311, March-April 1996, pp. 161–180, and Larry Minear, "The theory and practice of neutrality: Some thoughts on the tensions", *International Review of the Red Cross*, Vol. 81 No. 833 March 1999, pp. 63–71.

61 See the preamble and Article 1.2 of the Statutes of the International Red Cross and Red Crescent Movement.

62 See Chris Johnson, "Afghanistan and the war on terror", *Humanitarian Policy Group Report*, No. 14 July 2003 (Joanna Macrae and Adele Harmer, Eds.), pp. 49–62; Larry Minear, *The Humanitarian Enterprise*, Kumarian, Bloomfield, CT, 2002, pp. 189 ff. (on terrorism and humanitarian action).

proclaim a just (or holy) war and deny the adversary any legitimation whatsoever does not facilitate the task of the ICRC to provide humanitarian assistance for all victims, regardless of which side they belong to. It is hard to reconcile neutrality with the demand usually made in such situations by both parties that the organization should take sides. Moreover, neutrality is seen by some as morally reprehensible because no decision is taken as to the lawfulness or unlawfulness of the war.

In glaringly asymmetrical situations the notion of neutrality is usually scorned, especially when the adversary is treated as a criminal. On the contrary, merely taking up contact with the enemy is regarded as approval of, or even branded as complicity in, its aims and deeds. The very idea of the ICRC having a role as a neutral intermediary under international humanitarian law, albeit only in humanitarian matters, is more easily dismissed.

If any acts by the parties are criticized or denounced as violations of international humanitarian law, this too is seen as a breach of neutrality. If the weaker adversary seriously infringes international law and even resorts to acts of terrorism, any criticism of the militarily stronger party's acts will very readily be viewed in that light. Conversely, the weaker party will quickly take criticism as indicating bias in favour of the stronger party. As the militarily weaker party must turn to internationally outlawed means of countering military asymmetry, it will soon suspect that criticism is designed to rob it of its last chance of standing up to its more powerful enemy.

Nonetheless, the ICRC considers that in the interests of victims it is duty bound to make contact with all parties, even when it disapproves of means or methods of warfare and has to make this plain. The chief purpose of neutrality is to enable the ICRC to assist war victims.⁶³ In the various conflict situations action must be planned in such a way that in a given context it is — and is seen to be — as neutral as possible. Thus the ICRC may be required to adopt different strategies in various conflict scenarios and cultural contexts, without harming its overall identity.

Perception of neutrality

Neutrality could have the passive connotation of doing nothing or standing on the sidelines; the above-mentioned vital trust of the warring parties must be earned actively not only through deeds, but also through perceptions. It rests on a whole range of measures, phenomena and symbols and on endeavours to convince and negotiate with all parties to a conflict.

The parties to asymmetrical conflicts often belong to a variety of political, religious or ethnic groups, and if they think that the ICRC is taking sides, this will not only impede or prevent humanitarian action, but will cause security problems. In some contexts, the ICRC must also bear in mind its delegates'

63 Jakob Kellenberger, Speaking out or remaining silent in humanitarian work, *International Review of the Red Cross*, Vol. 86 No. 855, September 2004, pp. 600-601 calls the access to the victims the ICRC's top priority.

nationality, religion or ethnic origins when deciding on the area to which they are to be assigned, in order to reduce the security risk to its staff and ensure that it can reach the victims.

The western origins of the ICRC, its financial structure based on substantial contributions from developed countries including the United States, and its resources which, though vital, often seem lavish in comparison with local circumstances, all undoubtedly combine to give the impression of a western, Christian, organization, an impression accentuated by the Red Cross emblem. Although the ICRC, like other humanitarian organizations, does not allow these attributes to influence its work, many people probably have a sneaking suspicion that in certain situations the institution is not neutral. Such perceptions are hard to overcome. The ICRC must strive to be classified on the whole as neutral in its activities throughout the world. This requires consistency, patience, stamina and a lot of hard work, especially to convince those parties which reject the ICRC. The aim is to win acceptance of the ICRC and above all acceptance of its impartial humanitarian relief in these new war situations.

Conclusion

Asymmetrical wars fit in neither with Clausewitz's concept of war nor with the traditional concept of international humanitarian law. As the warring parties are increasingly unequal and the principle of equality of arms does not apply to them, they have disparate aims and employ dissimilar means and methods to achieve their goals. Whereas classic international armed conflicts between States of roughly equal military strength are becoming the exception, internal wars are mostly fought between adversaries that are unequal in many respects. The militarily weaker party to such an asymmetrical war may be tempted to employ unlawful methods in order to overcome the adversary's strength and exploit its weaknesses. International terrorism — which can amount to a war-like situation since it disrupts societies and even the world order — epitomizes this kind of asymmetrical warfare.

Asymmetry has ramifications with regard to the legality of war, the legitimacy of the belligerents and the interests at stake in the application of international humanitarian law. "Just war" considerations are again gaining ground, enemies are being criminalized and sometimes labelled "terrorists" — even if such qualification is not always justified — and denied equality even under international humanitarian law. The expectation of reciprocity as a fundamental motivation for respecting the law is often misplaced and honourable fighting is replaced by perfidious behaviour; covert operations are becoming the substitute for open battles.

International humanitarian law should not be overstretched. It cannot be extended to situations other than those it is intended to cover without giving wrong directives. This is particularly relevant for the fight against international terrorism, which despite many warlike aspects does not necessarily amount to an "armed conflict" in the current sense of the law of war.

This does not mean, however, that the most marked asymmetrical confrontations take place in a lawless international domain. Apart from the possible applicability of international human rights law and international criminal law, the “elementary considerations of humanity” as enshrined in Article 3 common to all four Geneva Conventions of 1949 remain the yardstick for all situations of armed violence, as they constitute universally binding rules for all, even unequal and asymmetrical, parties to any situation of armed violence.

Similarly, humanitarian action is often challenged in asymmetrical warfare. Recent attacks on humanitarian organizations, including the ICRC, both in Iraq and in Afghanistan have shown that humanitarian relief may be contrary to the belligerents’ interests or, even worse, that attacks on humanitarian workers may foster their agenda. A humanitarian organization such as the ICRC can only strive to ensure that it strictly adheres to and, equally important, is seen to adhere to, its principles of independence from political and military protagonists and neutrality with regard to the cause or outcome of the conflict. It must remain focused on one objective alone: to provide impartial assistance, without discrimination and based solely on the needs of the victims of armed violence.