

NOVEMBER 21-23, 2014

IS WINNING POSSIBLE? THE LAWS AND LAWLESSNESS OF ASYMMETRIC WAR

— Janice Gross Stein

In an unintended irony, the laws of war are contributing to the lawlessness of our times. They make asymmetric war more, not less likely.

Asymmetric warfare is the weapon of choice for those who are determined to disrupt the existing order. A big part of that strategy is not only to exhaust the rulers by recurrent attacks against their military forces, but also to undermine the legitimacy of those who govern.

The winners are not simply those who can endure the longest and stay the course. Today, the prize goes to the side that can shape the story and claim legitimacy and, in that struggle, the laws of war are a weapon.

The Hasmoneans fought an asymmetric war against the Roman Empire more than two millennia ago. Not only did they use hit-and-run military tactics against superior armies, they also laced their strategy with stories of miracles and a call for obedience to a higher law. Even then, legitimacy was at the center of the struggle.

The fundamentals of asymmetric war have not changed all that much in the last 2,000 years.

What is new is the source of the laws of war. As the modern state system developed, law no longer came principally from divine inspiration and revealed truth. A core body of principles that governed how wars should be fought developed over time and was codified as law in the last hundred and fifty years.

The most important contribution of the laws of war was to distinguish legitimate from illegitimate ways of fighting among states. It is not legitimate

to kill prisoners-of-war. It is not legitimate to parade captives through the streets. It is not legitimate to kill civilians in numbers that are disproportionate to the value of the target. It is not legitimate to attack places of refuge.

It is that body of law that is now being challenged by the latest round of asymmetric wars, wars that are now far more common than wars between states. In wars by non-state forces against professional militaries, militia leaders have a strong incentive to blur the distinction between active fighters and civilians.

They have a strong incentive to embed fighters, who wear no uniforms, in schools and hospitals. They have a strong incentive to hide military equipment and weapons in civilian structures. They have a strong incentive to erase the distinction between fighters and civilians, a distinction fundamental to all the laws of war, and to place civilians in harm's way.

They do this because they calculate quite correctly that a strike by a professional military that harms innocent civilians provokes international outrage at the violation of the laws of war and erodes the legitimacy of those who cause civilian casualties. Militia leaders use the laws of war as a battering ram to attack the legitimacy of those they seek to disrupt and defeat.

Today, the laws of war that were put in place over a hundred and fifty years have become an unwitting accomplice in the death of civilians. It is no small irony that if there were no laws of war, militia leaders would have far less incentive to put civilians in harm's way.

The politicization of the law is never healthy. If international law is to fulfill its basic mission of protecting civilians, two big challenges must be met. Many non-state militias that have no legal standing reject entirely the relevance of the laws of war, some for religious reasons and others because they see it as victors' or 'Western' law.

What then does international law say to these non-state militias when they embed fighters among civilians and then attack? Silence simply perpetuates the use of law as a weapon.

The laws of war have played a significant role in protecting civilians that are caught in conflict and that role continues to be important, now and into the future. If law is to speak to asymmetric war, the wars that are fought most often today, we must expand and enforce the law among all sides in war.

The laws of war rightly forbid attacks against hospitals and schools. They must be expanded to prohibit explicitly the stationing of fighters and the firing of weapons from hospitals and schools.

The laws of war proscribe attacks against sacred places, mosques, churches, temples, and synagogues. They must be expanded to make illegal the prepositioning of weapons and ammunition in sacred places. And these prohibitions must be enforced against militias as well as militaries.

If the laws of war are to continue to fulfill their most fundamental missions of protecting civilians and civilizing warfare, we must rewrite these laws for the twenty-first century and enforce them against all who fight.

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