

## THE ETHICS OF ASYMMETRIC WARFARE

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### ABSTRACT

*With the rise of terrorism after the events of 9/11, and considering the conflicts and aftermath of the global war on terror, the international community has seen a surge in the use of nonstate actors (NSAs), mercenaries, private military companies (PMCs), and asymmetric warfare tactics, at the hands of both weak/victim states and powerful/aggressor states. In modern times, for example, NSAs and mercenaries are being used in the Syrian war, the Yemeni conflict, Afghanistan, and Iraq, in the form of rebel groups, insurgencies, terrorist organizations, and so on. So why has there been a sudden surge in the use of NSAs? Is it due to their efficiency during armed conflicts? Or is it something else entirely? Terrorists and weak states, for example, use asymmetric warfare because it equalizes the battlefield between the strong and the weak. But why do strong Western states use NSAs or mercenaries? Typically, powerful governments use NSAs because it is cheaper to employ NSAs on a contractual basis rather than use conventional armed forces. They also use NSAs because in international law, if an aggressive state uses NSAs to attack another victim state, the victim state cannot act in self-defense, until it proves the effective control of the aggressive state over the NSA. This lacuna in the international legal system is exploited by aggressive and powerful states to destabilize target states in pursuit of their national political interests, while avoiding attribution and retribution. Accordingly, aside from legality in international law and the reasons for employing NSAs, this article intends to explore the morality inherent in the use of NSAs, mercenaries, and PMCs, to discuss and ascertain whether their use is morally right and acceptable. To determine this, the paper will undertake a scrutiny of the foremost moral arguments in favor of or against the use of NSAs, including mercenaries and PMCs during international armed conflicts.*

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## I. INTRODUCTION

With the rise of terrorism after the events of 9/11, and in the conflicts and aftermath of the Global War on Terrorism, the international community has seen a surge in the use of nonstate actors (NSAs), mercenaries, private military companies (PMCs), and asymmetric warfare tactics, at the hands of both weak/victim states and powerful/aggressor states.<sup>1</sup> For example, in modern times, NSAs and mercenaries are

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<sup>1</sup> DAVID RODIN, *The Ethics of Asymmetric War*, in THE ETHICS OF WAR: SHARED PROBLEMS IN DIFFERENT TRADITIONS 153, 154 (Richard Sorabji & David Rodin eds., 2006) [hereinafter RODIN].

being used in the Syrian war,<sup>2</sup> the Yemeni conflict,<sup>3</sup> Afghanistan,<sup>4</sup> and Iraq,<sup>5</sup> in the form of rebel groups, insurgencies, terrorist organizations, and so on.<sup>6</sup> Why has there been a sudden surge in the use of NSAs? Is it due to their efficiency during armed conflicts? Or is it due to something else entirely?

Terrorists and weak states use asymmetric guerrilla tactics because they equalize the battlefield between the strong and the weak.<sup>7</sup> NSAs are usually considered the weaker parties in a war, whereas lawful combatants, such as armed forces of a country are considered strong parties, mainly due to differences in military powers and armament supplies. But, why do strong Western states use NSAs or mercenaries? Powerful governments use NSAs because they are cheaper to employ contractually than standing conventional armed forces are.<sup>8</sup> But there is more: international law allows the use of force only in instances of self-defense or under UN Security Council (UNSC) authorization.<sup>9</sup> According to the International Court of Justice's (ICJ) in *Nicaragua v. US*, there is no justified self-defense against an armed attack by NSAs, until it is proven that a government is in effective control of those NSAs.<sup>10</sup> In order to use defensive force, a victim state must prove that a government is responsible for the attack by NSAs.<sup>11</sup> This law creates a lacuna in the international legal system of using force. If an aggressive state uses NSAs as a clandestine means to attack a victim state, the victim state cannot act in self-defense until it

<sup>2</sup> VIOLENT NON-STATE ACTORS AND THE SYRIAN CIVIL WAR: THE ISIS AND YPG CASES (Özden Zeynep Oktav, Emel Parlar Dal, & Ali Murat Kurşun eds., 2018) [hereinafter Oktav et al.].

<sup>3</sup> CONGRESSIONAL RSCH. SERV., R43960, YEMEN: CIVIL WAR AND REGIONAL INTERVENTION (2019) [hereinafter CRS REPORT].

<sup>4</sup> Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, *International Law and Armed Non-State Actors, in Afghanistan*, 93 INT'L REV. OF THE RED CROSS, 881 (2011) [hereinafter Bellal et al.].

<sup>5</sup> Faaliza Rashid, *Iraq: The Challenge of Non-State Actors*, 13 LEHIGH REV. 55 (2005) [hereinafter Rashid].

<sup>6</sup> See Oktav et al., *supra* note 2; see also, CRS REPORT, *supra* note 3; Bellal et al., *supra* note 4; Rashid, *supra* note 5.

<sup>7</sup> See RODIN, *supra* note 1, at 154.

<sup>8</sup> SEAN MCFATE, THE NEW RULES OF WAR: VICTORY IN THE AGE OF DURABLE DISORDER 124–34 (2019) [hereinafter MCFATE].

<sup>9</sup> U.N. Charter art. 39–51.

<sup>10</sup> See Effective Control Test, *in Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 105–15 (June 27) [hereinafter *Nicaragua Case*].

<sup>11</sup> *Id.* ¶¶ 105–15.

proves the effective control<sup>12</sup> of the aggressive state over the NSAs. This lacuna in the legal system is exploited by aggressive or powerful states to destabilize the targeted states in pursuit of their national political interests, while avoiding attribution and retribution as a form of hybrid warfare.<sup>13</sup> For instance, the U.S. government—when asked to explain its support by the use of arms and finance to the Syrian NSA/rebel groups against the Assad regime—stated that its support for the Syrian rebels was to further the national interests of the U.S.,<sup>14</sup> and not in self-defense, nor with UNSC authorization.

Accordingly, aside from the legality in international law and the reasons for employing NSAs, this article intends to explore the morality of the use of NSAs, mercenaries, and PMCs, to discuss and ascertain whether their involvement is morally right and acceptable. In doing so, this article will scrutinize the foremost moral arguments in favor for or against, the use of NSAs, including mercenaries and PMCs during international armed conflicts.

This article is divided into two sections. Section 1 will discuss the morality of asymmetric warfare, and Section 2 will discuss the morality of the use of mercenaries and PMCs. Section 1 is further divided into eight subsections. Subsection A will analyze whether asymmetric warfare is the weapon of the weak or the strong, and Subsection B will discuss the morality of asymmetric warfare. Then, Subsections C and D will explain the moral reasons of *fairness* and *exceptionalism* with regard to the use of asymmetric tactics. Afterwards, Subsections E and F will list and discuss the moral reasons of asymmetric warfare's de-escalation potential, efficiency, and advantages. Then, Subsection G will discuss the element of rightful authority with regard to the use of NSAs in asymmetric warfare; and Subsection H will discuss the moral

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<sup>12</sup> *Id.*

<sup>13</sup> Andrés B. Muñoz Mosquera & Sascha Dominik-Bachmann, *Understanding Lawfare in a Hybrid Warfare Context*, 37 NATO LEGAL GAZETTE 5, 10 (2016) [hereinafter as NATO]; Jean-Michel Baillat, *Hybrid Warfare, a New Challenge to the Law of Armed Conflicts?*, 37 NATO LEGAL GAZETTE 24, 25 (2016); see also Brigadier General Nadeem Ashraf, *The Pursuit of Hybrid Warfare: Muddling Towards Clarity and Implementation* 7 (2017) (unpublished strategy research paper) (on file with the U.S. Army War College) [hereinafter Ashraf]; see also European Commission Press Release IP/16/1227, Security: EU Strengthens Response to Hybrid Threats (April 6, 2016) [hereinafter European Commission].

<sup>14</sup> Tara McKelvey, *Arming Syrian Rebels: Where the US Went Wrong*, BBC (Oct. 10, 2015), <https://www.bbc.com/news/magazine-33997408> [hereinafter McKelvey].

need for military forces to wear uniforms during international armed conflicts.

Similar to Section 1, Section 2 is also divided into five subsections to discuss the morality of mercenaries. Subsection A will discuss the criminalization of the use of mercenaries, and Subsection B will discuss the morality of using PMCs. Then, Subsection C will explore the morality of mercenary terrorists and Subsection D will discuss the moral issues faced when using mercenaries and PMCs. Finally, Subsection E will discuss the major arguments in favor of the use of PMCs.

## II. ASYMMETRIC WARFARE

One of the central notions in the morality of a war is the principle of distinction, which obliges armed forces to differentiate between combatants and noncombatants, in order to avoid any harm to non-combatant and innocent civilian lives during armed conflicts.<sup>15</sup> Yet, asymmetrical warfare tactics are often used to deliberately put civilian and innocent lives in harm's way.<sup>16</sup> Therefore, the purpose of this section is to analyze the relationship between asymmetric warfare and morality, discussing whether fighting asymmetric warfare serves the balance of justice and whether asymmetric warfare is thus morally acceptable.

The tactics of fighting wars are changing due to various factors; however, the exact nature of the change varies in different contexts. For instance, the events of 9/11, are the nodal point of modern change in warfare tactics,<sup>17</sup> after which a global war on terrorism was planned and systematically executed.<sup>18</sup> Contrary to its aims, the efficiency and effectiveness of this war can be challenged: after spending trillions of

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<sup>15</sup> International Committee for the Red Cross, *Rule 1. The Principle of Distinction Between Civilians and Combatants*, CUSTOMARY IHL DATABASE, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> [hereinafter *Rule 1. The Principle of Distinction*] (last visited Oct. 24, 2020).

<sup>16</sup> See Protocol Additions to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 12, 1977, 1125 U.N.T.S. 3. To see discussion on the use of human shields by asymmetric warfare, see WOLFF HEINTSCHEL VON HEINEGG, *Asymmetric Warfare*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW THEMATIC SERIES, THE LAW OF ARMED CONFLICT AND THE USE OF FORCE 97, 103 (Frauke Lachenmann & Rüdiger Wolfrum ed., 2017) [hereinafter HEINEGG].

<sup>17</sup> ROBERT J. BUNKER, NON-STATE THREATS AND FUTURE WARS 191 (Robert J. Bunker ed., 2002).

<sup>18</sup> TODD A. DAVIS, THE GLOBAL WAR ON TERROR: 9/11, IRAQ, AND AMERICA'S CRISIS IN THE MIDDLE EAST (2008) [hereinafter DAVIS].

dollars fighting terrorism in the Middle East,<sup>19</sup> millions of civilians have been affected, displaced, and killed.<sup>20</sup> As such, terrorism has increased within these states, as opposed to the planned extermination of terrorism.<sup>21</sup>

Some of the factors that contribute to the changed tactics of modern warfare will be discussed in this section as they relate to the morality of fighting wars. The most significant factor, which often leads to increased terrorism in modern warfare, is the fact that superpowers and their allies, aid and use mercenaries, NSAs, and rebel groups, to fight their wars/proxy wars.<sup>22</sup> For instance, Syrian rebels were used to overthrow the Assad government in Syria. This aid to rebels and mercenaries, in the form of financial assistance and arms, ends up in the hands of terrorists, which increases terrorism in the host countries and destabilizes the whole region.<sup>23</sup> These irregular tactics of wars are used by powerful states to thwart target states as a form of hybrid warfare, so that the perpetrator cannot be identified or blamed.<sup>24</sup> At the same time, terrorists and NSAs also use these unconventional techniques of warfare to fight powerful enemies. This is known as asymmetric warfare.<sup>25</sup>

Kenneth McKenzie defines asymmetric warfare as “leveraging inferior tactical or operational strength against [the target’s] vulnerabilities to achieve disproportionate effect with the aim of undermining [the target’s] will in order to achieve the asymmetric actor’s strategic

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<sup>19</sup> To see the figure of 4.4 trillion dollars’ expenditure on the war on terror, up to 2015 alone, see Mehdi Hassan, *Reality Check: The failure of the ‘war on terror’*, ALJAZEERA (Sept. 12, 2015), <https://www.aljazeera.com/programmes/up-front/2015/09/reality-check-failure-war-terror-150911151414017.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Terrorism increased by 4500%.

<sup>22</sup> Waseem Ahmad Qureshi, *Applying the Principle of Proportionality to the War on Terror*, 22(3) RICHMOND PUB. INT. L. REV. (2019) [hereinafter Qureshi]. See also, U.S. Dep’t of The Army, FM 3-24: Counterinsurgency (2006), B-15 [hereinafter FM 3-24]; Mallory Shelbourne, *Study Shows US Weapons Given to Syrian Rebels Ended Up in ISIS Hands*, THE HILL (Dec. 14, 2017), <https://thehill.com/policy/defense/364917-study-shows-us-weapons-given-to-syrian-rebels-ended-up-in-isis-hands> [hereinafter Shelbourne].

<sup>23</sup> See Qureshi, *supra* note 22. See also FM 3-24, *supra* note 22, at B-15; Shelbourne, *supra* note 22.

<sup>24</sup> See NATO, *supra* note 13; see also Ashraf, *supra* note 13; European Commission, *supra* note 13.

<sup>25</sup> See RODIN, *supra* note 1, at 154.

objectives.”<sup>26</sup> This definition depicts a picture of terrorists fighting America, where “weak” terrorists employ unorthodox methods to fight a powerful target (i.e. America).<sup>27</sup> However, asymmetric warfare is also aptly related to the use of NSAs and mercenaries to change or destabilize a country at the hands of powerful states, where NSAs, including terrorists and rebels, are used to secretly fight a victim country by targeting its vulnerabilities without having to worry about attribution or retribution,<sup>28</sup> or without having to spend many resources. McKenzie identifies information war, weapons of mass destruction, chemical weapons, guerrilla tactics, targeting of noncombatants and their property, and terrorism as “weapons of asymmetrical warfare.”<sup>29</sup> It is understandable that in considering asymmetrical warfare, guerrilla tactics, terrorism, and NSAs are often used by “weak” enemies or, by parties that do not want to be identified.<sup>30</sup> However, the inclusion of weapons of mass destruction is also seen as an asymmetric weapon by McKenzie,<sup>31</sup> because one comparatively weaker party to a conflict can employ nuclear weapons against a formidable enemy to overcome the asymmetry in powers, as the U.S. did by using nuclear weapons in Hiroshima and Nagasaki against the Japanese.<sup>32</sup>

As further elaborated by McKenzie, the means and tools of asymmetric warfare can diverge,<sup>33</sup> but there remains a strategic need to subvert a conventional military paradigm of using firepower, air power, and military ethics and morality.<sup>34</sup> This subversion in the paradigm of

<sup>26</sup> Kenneth F. McKenzie, *The Revenge of the Melians: Asymmetric Threats and the Next QDR*, 62 INST. FOR NAT’L STRATEGIC STUDIES, MCNAIR PAPER 2 (2000) [hereinafter McKenzie]; See also, RODIN, *supra* note 1, at 154.

<sup>27</sup> See McKenzie, *supra* note 26, at 2. (McKenzie discusses asymmetric warfare to understand non-conventional uses of force from an American perspective, where asymmetric ways are employed to exploit American vulnerabilities).

<sup>28</sup> See NATO, *supra* note 13. See also Ashraf, *supra* note 13; European Commission, *supra* note 13.

<sup>29</sup> See discussion on *A Typology of Asymmetry: What, Who, and When?*, in McKenzie, *supra* note 26, at 19–54. See also David Rodin, *Terrorism Without Intention*, 114(4) ETHICS 752 (2004) [hereinafter Rodin, *Terrorism*]; RODIN, *supra* note 1, at 154.

<sup>30</sup> See NATO, *supra* note 13. See also Ashraf, *supra* note 13; European Commission, *supra* note 13.

<sup>31</sup> See McKenzie, *supra* note 26, at 2. See also RODIN, *supra* note 1, at 154.

<sup>32</sup> See McKenzie, *supra* note 26, at 10,11, 26.

<sup>33</sup> See discussion on *A Typology of Asymmetry: What, Who, and When?*, in McKenzie, *supra* note 26, at 19–54. See also Rodin, *Terrorism*, *supra* note 29; RODIN, *supra* note 1, at 154.

<sup>34</sup> See RODIN, *supra* note 1, at 154.

military use is inherently moral in nature,<sup>35</sup> disregarding the moral duties to not target civilians, to not cause excess destruction, to be proportional, and to punish war crimes. The asymmetric use of force by NSAs, terrorists, rebels and so on, spurn these moral duties.<sup>36</sup>

Though the term “asymmetric warfare” was recently used after the events of 9/11—particularly to define the irregular tactics employed by terrorists against powerful targets, which intentionally put civilian lives in harm’s way<sup>37</sup>—such tactics had been used by Western powers long before they came into the focus of the global community.<sup>39</sup> Similarly, although asymmetric warfare is often understood narrowly as unconventional warfare by terrorist groups to fight Western countries,<sup>40</sup> it is also extensively employed by Western countries to destabilize targeted states.<sup>41</sup> For instance, jihadi groups and NSAs, together that are today known as the Taliban, were initially established by the U.S., to fight the Soviet Union in the 1980s.<sup>42</sup> Similarly, the U.S. and its allies, currently use mercenaries, NSAs, and rebel groups in the Middle East to overthrow undesirable leaders, such as the Assad regime in Syria and the Gaddafi regime in Libya, by creating unrest and rebellion in the targeted nation.<sup>43</sup> Funds and arms given to NSAs by Western powers also end up in the hands of terrorist groups, so they flourish and the country is destabilized.<sup>44</sup>

#### *A. Asymmetric Warfare as a Weapon of the Weak or the Strong*

Asymmetric warfare and its unconventional means are primarily linked to weak and powerless parties to a conflict, where weak parties use unorthodox methods to overcome the imbalance in firepower, technology, and military might, to obtain desired military outcomes. If the conflict were fought with conventional means, it would therefore translate into a swift defeat at the hands of a powerful adversary.<sup>45</sup> For

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<sup>35</sup> *Id.*

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>39</sup> Robert D. Billard, Jr., *Operation Cyclone: How the United States Defeated the Soviet Union*, 3.2 UNDERGRADUATE RES. J. AT COLO. SPRINGS (2010) [hereinafter Billard].

<sup>40</sup> *See* RODIN, *supra* note 1, at 154.

<sup>41</sup> *See* Qureshi, *supra* note 22.

<sup>42</sup> *See* Billard, *supra* note 39.

<sup>43</sup> *See* Qureshi, *supra* note 22.

<sup>44</sup> *See id.*; *see also* FM 3-24, *supra* note 22, at B-15; Shelbourne, *supra* note 22; NATO, *supra* note 13.

<sup>45</sup> *See* RODIN, *supra* note 1, at 154–55.



instance, the U.S. possesses unmatched military might, which is why Rodin argues that the U.S.'s enemies use asymmetric means to overcome their weakness and powerlessness.<sup>46</sup>

It is true that one party uses asymmetric means of warfare by implementing unconventional means to obtain a desired outcome of a conflict, therein avoiding conventional confrontation and balancing the asymmetry in powers.<sup>47</sup> However, the idea that asymmetric means are only limited to the powerless and weak is debatable. This article contends that the most powerful states—even the U.S.—also resort to asymmetric means of warfare to avoid conventional confrontation in cases where direct confrontation is deemed unjustified or unlawful, avoiding attribution and retribution. This means that, in situations where the desired outcome of policies cannot be obtained by lawful means of warfare, even powerful states can resort to the use of unconventional and unlawful means to attack a targeted state to avoid attribution and retribution.<sup>48</sup> For instance, when the international law of using force forbids the use of force, in situations where there is no justified need for the use of self-defense or without the authorization of the UNSC.<sup>49</sup> Therefore if the strategic policies demand the ouster of a country's leader, the use of force to intervene in the politics of the other country and the use of aggression, which is strongly forbidden under the international law of using force—is deemed unlawful.<sup>50</sup> For instance, the U.S. government has admitted its support to Syrian NSAs to change the Assad regime's own national interests.<sup>51</sup> But the international law of using force does not allow the U.S. to use force to do so.<sup>52</sup> Therefore, the U.S. secretly funded and armed rebel groups in Syria by using asymmetric means to replace the Assad regime.<sup>53</sup> This only shows that powerful states can resort to the use of asymmetric

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<sup>46</sup> *See id.* at 155.

<sup>47</sup> *See id.* at 154-155.

<sup>48</sup> *See* Qureshi, *supra* note 22; *see also* FM 3-24, *supra* note 22, at B-15; NATO, *supra* note 13; Shelbourne, *supra* note 22; Ashraf, *supra* note 13; European Commission, *supra* note 13.

<sup>49</sup> U.N. Charter art. 39-51.

<sup>50</sup> U.N. Charter art. 2, ¶4.

<sup>51</sup> *See* McKelvey, *supra* note 14.

<sup>52</sup> U.N. Charter art. 2, ¶4.

<sup>53</sup> *President Assad accuses US of "destabilizing" Syria*, BBC (July 9, 2012), <https://www.bbc.com/news/world-middle-east-18763672>; *see also* Mara Kramlin, *After 7 Years of War, Assad Has Won in Syria. What's Next for Washington?*, BROOKINGS (Feb. 13, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/02/13/after-7-years-of-war-assad-has-won-in-syria-whats-next-for-washington/>.

warfare as a form of hybrid warfare<sup>54</sup> if the resort to the conventional use of force in a situation is deemed unlawful or morally unacceptable.

In addition to the preservation of sovereignty of a state, the underlying morality—of “the prohibition on the use of force” and of “the principles of proportionality and distinction”—demands that the lives of civilians and innocent people are not put in harm’s way.<sup>55</sup> The Syrian state did not aggressively attack the U.S., and the UNSC did not authorize U.S. intervention in Syria. Therefore, U.S. intervention, which used armed forces in Syria to change the Assad regime, can be deemed morally<sup>56</sup> and legally wrong.<sup>57</sup> This intervention not only violated the sovereignty of Syria, but also resorted to unconventional

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<sup>54</sup> See Qureshi, *supra* note 22; see also FM 3-24, *supra* note 22, at B-15; NATO, *supra* note 13; European Commission, *supra* note 13; Ashraf, *supra* note 13; Shelbourne, *supra* note 22.

<sup>55</sup> See Rule 1. *The Principle of Distinction*, *supra* note 15; see also, *Proportionality in Attack, Rule 14*, CUSTOMARY IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14) (last visited Jan. 20, 2020). Codified under, Protocol Additions to the Geneva Convention of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, 51(5) June 8, 1977, 1125 U.N.T.S. 3; PAUL CHRISTOPHER, *THE ETHICS OF WAR & PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES*, 160-67 (Prentice Hall Inc., 2 ed. 1999).

<sup>56</sup> Behzad Yaghmaian, *Selective Morality and Syria: A Case Against the U.S Attack in Syria – and a Path Forward*, THE GLOBALIST (Aug. 30, 2013), <https://www.theglobalist.com/selective-morality-syria/> (last visited Sept. 24, 2020) (Because “U.S. attack on Syria will not protect the Syrian people from the violence of the civil war. It will escalate the war, turning it into a more destructive regional conflict. While Assad will not be weakened, the Saudi-backed Jihadist and Al-Qaeda will be the most likely beneficiaries of the attack.”).

<sup>57</sup> See Thomas Reese, *What moral theologians say about getting involved in Syria*, NAT’L CATHOLIC REPORTER (Sept. 3, 2013), <https://www.ncronline.org/news/world/what-moral-theologians-say-about-getting-involved-syria> (“Nerve gas is a terrible weapon . . . [but] there is no moral justification for intervention: ‘Syria isn’t attacking the United States.’ Self-defense would be the only justification for the use of force.”) (“Under the just war theory, war is the last resort after diplomatic and other means have failed. Many moralists do not believe all other options have been exhausted in Syria.”).

war tactics,<sup>58</sup> and deliberately affected civilians and innocent people.<sup>59</sup> The moral question inherent in this intervention is, therefore, whether a country can decide to deliberately affect the lives of millions of innocent people entirely for the sake of a regime change. The definite and logical answer, without any other possible interpretation, has to be that a state should not be allowed to affect the lives of millions of people without just cause.<sup>60</sup> Of course, it can be argued that in certain extreme cases, deciding to change a regime can be justified. For instance, changing the Nazi regime to stop German aggression could be considered a justified cause to try and oust Hitler. Similarly, plotting regime change, for humanitarian purposes, against a similar draconian dictator, who had been massacring innocent people, can also be deemed a morally right decision.<sup>61</sup> However, if the peace and security of the world is threatened, UNSC authorization<sup>62</sup> should be sought, rather than resorting to asymmetric warfare, which further destabilizes a region. In Syria, for example, the U.S. did not justify its intervention to save the Syrian people, nor to stop Syrian aggression. Instead, it was claimed that this intervention was to purely serve particular U.S.

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<sup>58</sup> The U.S. employment of non-state actors and mercenaries in form of support and aid to anti-Syrian-state rebellion groups, and U.S objective to change Assad regime, can be considered as unconventional tactics of warfare. To see U.S support to rebellion armed bands in Syria, see McKelvey, *supra* note 14.; see also *Obama Signs Secret Order to Aid Syria Rebels*, AL JAZEERA (Nov. 18, 2013), <https://www.aljazeera.com/news/middleeast/2012/08/20128264510724249.html>; To see U.S goal to change Assad regime, See *A Look at US Involvement in Syria*, NATIONAL (Apr. 14, 2018), <https://www.nbcboston.com/news/politics/us-involvement-in-syria/1943387/>; see also Scott Wilson & Joby Warrick, *Assad Must Go, Obama Says*, WASH. POST (Aug. 18, 2011), [https://www.washingtonpost.com/politics/assad-%20must-go-obama-says/2011/08/18/gIQAelheOJ\\_story.html?utm\\_term=.cd5b98800339](https://www.washingtonpost.com/politics/assad-%20must-go-obama-says/2011/08/18/gIQAelheOJ_story.html?utm_term=.cd5b98800339).

<sup>59</sup> Al Marshad, *The Syrian Situation – International Humanitarian Law Violations and the Call for Justice a Summary*, AL MARSHAD, <http://golan-marshad.org/wp-content/uploads/The-Syrian-Situation-International-Law-Violations-and-the-Call-for-Justice-A-Summary.pdf> (last visited Jan. 24, 2020) [hereinafter Al Marshad]; see also Joëlle Garriaud-Maylam, *The War in Syria and Iraq: Humanitarian Aspects*, GENERAL REPORT, NATO PARLIAMENTARY ASSEMBLY, COMMITTEE ON THE CIVIL DIMENSION OF SECURITY 1–9 (Oct. 7, 2017) [hereinafter Maylam].

<sup>60</sup> Just cause, self-defense and last resort, see Reese, *supra* note 57.

<sup>61</sup> Wing Commander J. E. Linter MA, RAF, *Humanitarian Intervention: Legitimizing the Illegal?*, 5 DEFENCE STUDIES J. 271-294 (2005).

<sup>62</sup> See U.N. Charter art. 39-50.

national interests.<sup>63</sup> The Syrian state and the Syrian people were the only victims of U.S. aggression and intervention.<sup>64</sup> If the U.S. truly believed that it was fighting for a justified cause in Syria, to change the Assad regime, then considering the military superiority of the U.S., the country should have been able to oust Assad using conventional means and to swiftly win the war, without having to spend many resources and without affecting innocent civilian lives. The fact that the U.S. used unconventional and asymmetric means in Syria,<sup>65</sup> which destabilized the region and affected millions of innocent people,<sup>66</sup> is proof enough that the U.S. did not believe with moral conviction that changing the regime in Syria was a justified cause.<sup>67</sup>

Weak parties, on the other hand, such as insurgents, rebels, victim states, and terrorist groups, use asymmetric warfare such as suicide bombing and guerrilla tactics to overcome an imbalance of power.<sup>68</sup> Terrorist groups intentionally target civilians, such as innocent

<sup>63</sup> National Security & Defense, *A Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, THE WHITE HOUSE (Apr. 8, 2017), <https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate/>. See also McKelvey, *supra* note 14.

<sup>64</sup> See Syrian economy and governance as a victim of Syrian war in *The Economic and Social Consequences of the Conflict in Syria*, WORLD BANK (July 10, 2017), <http://bit.ly/2A6nTgx>; see also Syrian people as victims of Syrian war in Jasmine M. El-Gamal, *Innocent victims of a brutal war, Syria's "lost generation" can still be saved*, THE ATLANTIC COUNCIL (Jul, 2, 2019), <https://www.atlantic-council.org/blogs/syriasource/innocent-victims-of-a-brutal-war-syria-s-lost-generation-can-still-be-saved/>.

<sup>65</sup> See McKelvey, *supra* note 14.

<sup>66</sup> See Al Marshad, *supra* note 59; see also, Maylam, *supra* note 59, at 1–9.

<sup>67</sup> The U.S lacks moral conviction to argue that changing a regime in Syria is a justified cause to use force in Syria; because, instead of issuing a straight forward statement that “U.S is using force in Syria to change Assad regime for political interests”, it relies on justifications of ‘using force to protect oil’, and ‘ the use of force to fight terrorists.’ To see U.S justifications of protecting oil and fighting terrorists, See Peter Beinart, *Striking the Syrian Regime Is Not Legitimate: The Trump administration may say it wants a humanitarian intervention. But the strikes it's considering fail to meet the criteria that would justify it*, THE ATLANTIC (APR. 13, 2018), <https://www.theatlantic.com/international/archive/2018/04/syria-is-not-a-humanitarian-war/557897/>; see also *Remarks by President Trump on the Situation in Northern Syria*, THE WHITE HOUSE (October 23, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-situation-northern-syria/>.

<sup>68</sup> See Rodin, *supra* note 1, at 154–56.

children, in their attacks<sup>69</sup> to bring powerful states to their knees. If terrorist organizations were to use conventional methods of warfare, by respecting *jus in bello*, that is, the ethics of the conduct of warfare, they would instantly face defeat. So, to avoid this arguably inevitable result and to overcome the imbalance of power, these networks use unconventional warfare.<sup>70</sup> For instance, terrorist groups attacked the World Trade Center and targeted innocent civilians in the U.S. in 2001<sup>71</sup> because they were unable to create a bigger impact against the U.S., or achieve their desired goals of wounding a superpower by using conventional warfare. Even in non-international armed conflicts, terrorists engage in acts such as targeting schools filled with innocent children<sup>72</sup> to create a desired impact, to push a state toward their illicit demands, or to satisfy their political interests. For example, the Taliban attacked a public school in Peshawar, Pakistan, that killed 141 innocent children<sup>73</sup> in order to force Pakistani authorities to stop military operations against terrorists.<sup>74</sup> conventional confrontation between the terrorist organization and the Pakistani military was asymmetric in power and the terrorists were losing in the conventional military confrontation.<sup>75</sup>

### B. *Morality of Asymmetric Warfare*

This section will explore whether using asymmetric means of warfare, such as guerrilla tactics and employment of mercenaries, is morally acceptable. If not, why is asymmetric warfare considered a moral wrong? Is it acceptable under contemporary international law of using force?

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<sup>69</sup> *Pakistan Taliban: Peshawar School Attack Leaves 141 Dead*, BBC (Dec. 16, 2014), <https://www.bbc.com/news/world-asia-30491435> [hereinafter Peshawar Attack].

<sup>70</sup> See RODIN, *supra* note 1, at 154–56.

<sup>71</sup> *September 11 Terror Attacks Fast Facts*, CNN (Nov. 13, 2019), <https://edition.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html> [hereinafter 9/11 Attack].

<sup>72</sup> See Peshawar Attack, *supra* note 69.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Umbreen Javaid, *Operation Zarb-e-Azb: A Successful Initiative to Curtail Terrorism*, 30 SOUTH ASIAN STUDIES: A RESEARCH JOURNAL OF SOUTH ASIAN STUDIES 43–58 (2015); see *3,400 militants killed in Operation Zarb-e-Azb: ISPR :DG ISPR says phenomenal success has been achieved in the last 18 months*, TRIBUNE (Dec. 12, 2015), <https://tribune.com.pk/story/1008791/3400-militants-killed-in-operation-zarb-e-azb-ispr> (last visited Sept. 25, 2020).

The most fundamental characteristics establishing the morality of asymmetric warfare, are whether the tactics put civilian lives in danger or whether noncombatants and innocent civilians are deliberately targeted.<sup>76</sup> For example, the most notorious instance of asymmetric tactics is arguably the 9/11 attack by terrorists on the U.S., which killed almost three thousand noncombatants.<sup>77</sup> Similarly, the terrorist attack on a public school in Peshawar deliberately targeted and killed 141 innocent children.<sup>78</sup>

The consequentialist school of thought on morality sees asymmetric warfare as justified, owing to its improved efficiency, low cost, better results, and lower casualties.<sup>79</sup> Consequentialists quote the example of a truck bomb in 1983, that was used to attack a U.S. base in Beirut, which later resulted in the retraction of U.S. forces.<sup>80</sup> However, if we are to compare the results of conventional warfare and the underlying ethics with asymmetric warfare, this comparison would be unreasonable. For a justifiable comparison, we should use examples where the asymmetric means deliberately targeted innocent people, and then compare those results with conventional wars. For instance, the 9/11 attacks likely incurred a lower cost than a fully-fledged war. However, the subsequent war on terror and the resulting costs, which the Middle East had to pay—and is still paying—in terms of loss of life, property loss, economic damage, and destabilization, as the consequence of 9/11, and are disproportionate to the costs of a conventional just war.<sup>81</sup> This shows that asymmetric warfare, or a morally unjustified attack, can increase and incite more violence and war costs, rather than pacifying a situation, which means that the consequentialist argument that asymmetric warfare is more efficient is arguably fallacious.

The other moral problem with the tactics of asymmetric warfare is that it does not respect the international law of *jus in bello*, especially the principle of distinction, which grants civilians and innocent

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<sup>76</sup> See RODIN, *supra* note 1, at 156.

<sup>77</sup> See 9/11 Attack, *supra* note 71.

<sup>78</sup> See Peshawar Attack, *supra* note 64.

<sup>79</sup> See RODIN, *supra* note 1, at 156.

<sup>80</sup> See *id.* at 156.

<sup>81</sup> In terms that the 9/11 attack did not achieve something material out of the attack. Instead, it costed an initiation of series of wars. So, if we are to talk about the efficiency of asymmetric warfare in terms of cost, then we should also add the overwhelming destruction caused in the after-effects of an asymmetric attack. This cost surpasses the costs of conventional use of force traditions, because, in conventional standoffs, innocent people are not deliberately targeted, so the risk of escalation of an armed conflict is comparably low.

people immunity from being directly targeted.<sup>82</sup> For instance, asymmetric warfare deliberately targets civilians and innocent people,<sup>83</sup> which violates the principle of distinction under international humanitarian law (IHL).<sup>84</sup> By contrast, under *jus in bello* in just war theory, civilians and innocent people are granted immunity from being directly targeted, and only military targets are considered just targets during a war.<sup>85</sup> Asymmetric guerrilla tactics not only put civilian and innocent lives in danger by using them as human shields;<sup>86</sup> they also become direct and deliberate targets.<sup>87</sup> Apart from international legal obligations, and morally speaking, no innocent human being must be directly targeted, even during wars.<sup>88</sup> In a similar way to other asymmetric means, the use of weapons of mass destruction in asymmetric warfare also violates the principle of distinction by disproportionately killing innocent people.<sup>89</sup> However, under international law, the use of nuclear weapons is only allowed in cases where the existence of a state is under threat.<sup>90</sup> Likewise, the use of information warfare in asymmetric warfare also targets civilians, by attacking public systems such as transport services, as opposed to highly defended military targets,<sup>91</sup> and violates the principle of distinction under international law.

### C. *Asymmetric Warfare for Fairness*

David Rodin argues that the use of asymmetric warfare by weak parties to a conflict is justified to ensure a fair contest, and to equalize the chances of success, just as in the game of chess, because weak parties have no other means to defend themselves against aggression.<sup>92</sup> Suppose there is a superpower, such as the U.S., that is aggressively attacking a Middle Eastern country for no apparent or justifiable

<sup>82</sup> See Rodin, *supra* note 1, at 156.

<sup>83</sup> See Peshawar Attack, *supra* note 69.

<sup>84</sup> Wolff Heintschel von Heinegg, *Asymmetric Warfare: How to Respond?* 87 INT'L L. & THE CHANGING CHARACTER OF WAR 463 (2011). See also Rodin, *supra* note 1, at 158.

<sup>85</sup> See Rule 1. *The Principle of Distinction*, *supra* note 15.

<sup>86</sup> See RODIN, *supra* note 1, at 158.

<sup>87</sup> See 9/11 Attack, *supra* note 71. See also Peshawar Attack, *supra* note 69.

<sup>88</sup> RICHARD SHAPCOTT, INTERNATIONAL ETHICS: A CRITICAL INTRODUCTION 170 (2010) [hereinafter SHAPCOTT].

<sup>89</sup> See RODIN, *supra* note 1, at 158.

<sup>90</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. 226, ¶¶ 96–97 (July 8).

<sup>91</sup> See RODIN, *supra* note 1, at 158.

<sup>92</sup> See *id.* at 154–59.

reason. In this example, assume that the nation under attack, has no military strength to counter the aggression of a technologically and materially superior force. Therefore, for Rodin to address this high inequality in military strengths, a derogation from *jus in bello* principles is justified for the weak parties in a conflict.<sup>93</sup> He argues that we cannot expect the forces of a victim country to face superior forces, because this will only translate into its certain demise.<sup>94</sup> This also means that forces of a nation under attack are justified in exposing their civilians to disproportionate harm by using individuals as human shields for the sake of survival and to overcome the imbalance of military strength as a strategy of warfare.<sup>95</sup> Rodin believes that *jus in bello* is just the rules of the game, whereas *jus ad bellum* dictates the just causes to start a war, and just war theory, sees war as a remedy to an injustice, such as waging war for self-defense. He adds that, if just war theory is a procedure to right a wrong, then fairness calls for providing a weak party that has been wronged with an equal chance of success.<sup>96</sup> For him, when faced with a situation of aggression, just war theory is not enough to provide a weak party with a fair and just chance to defend itself; therefore—in situations where *jus ad bellum* is violated—a derogation from *jus in bello* is justified.<sup>97</sup> So, the argument of the supporters of asymmetric warfare is that the *jus in bello* rules must be relaxed for the weak, so that a level field for combat is achieved, and an equal chance of success is given to both parties.<sup>98</sup>

Here, Rodin's main moral argument revolves around the need to strengthen a weak party to overcome an imbalance of military strength to achieve an overall chess-like situation of fairness, where each party has same chance of success for the sake of justice.<sup>99</sup> However, there are practical concerns to achieving such an equalized state, because the military strengths and weapons technologies differ from country to country. Even if a rule is made to employ the same arms with the same number of soldiers on plain ground to confront each other with equal forces, the chess game cannot occur on the battlefield: the health and training of each soldier, the terrain, the weather, and all of the

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<sup>93</sup> *See id.*

<sup>94</sup> *See id.* at 159.

<sup>95</sup> *See id.* at 158–59.

<sup>96</sup> *See id.* at 159.

<sup>97</sup> Saul Smilansky, *Terrorism, Justification, and Illusion*, 114(4) ETHICS 790–805 (2004). *See also* RODIN, *supra* note 1, at 160.

<sup>98</sup> Smilansky, *supra* note 97. *See also* RODIN, *supra* note 1, at 159.

<sup>99</sup> *See* RODIN, *supra* note 1, at 153, 159–161.



other natural factors will also differ. So, trying to achieve a chess-like equality among rivals on the battlefield is a fool's errand. It would be understandable, however, if Rodin was only trying to promote a weak party to a conflict in a situation where it is wronged or is the victim of a strong state's aggression.<sup>100</sup> But, even then, allowing the weak party a derogation from *jus in bello* for the sake of fairness is unreasonable and impractical for two reasons. First, international law cannot allow one party to abide by some rules while creating an exception from the same rules for another, because it would be unfair to allow one party to attack innocent people, which is a moral wrong.<sup>101</sup> Second, one side of every conflict must be a weaker party in one way or another, owing to the imbalance in military strengths in every nation.<sup>102</sup>

To give an appropriate answer to this problem of defending a weak state, war theory makes it clear that using force in aggression is not allowed,<sup>103</sup> and the use of force is only allowed in either self-defense or with the authorization of the UNSC.<sup>104</sup> According to these rules, in every conflict, one party fights for a just cause and the other, for an unjust cause.<sup>105</sup> The UNSC, its allies, and NATO can help weak parties to defend themselves in the face of unjust use of force. However, there exist situations in which a powerful state has waged a war against a weak state for unjust causes, and the whole international community and other powerful nations are on the side of the aggressor. An example includes the U.S. intervention in the Middle East, which was initially thought to have been fought for just causes, but was later

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<sup>100</sup> Hypothetically speaking, it would have been understandable if Rodin's idea to achieve a chess like situation was to avenge a wrong done by a powerful state, but his idea was not about this hypothetical situation. Instead he yearns to equalize military strengths in armed conflicts. To see that Rodin desires a Chess like situation See, Rodin, *supra* note 1, at 159.

<sup>101</sup> See SHAPCOTT, *supra* note 88, at 170.

<sup>102</sup> Every situation of war outside a chess boardgame will always have difference in strength; because, armed forces training, weapons technology, armaments capacity, military strength, and warring capabilities of every nation differ when compared to other nations.

<sup>103</sup> U.N. Charter art. 2, ¶ 4.

<sup>104</sup> U.N. Charter art. 39-51.

<sup>105</sup> See Diego Panizza, *Theory and Jurisprudence in Gentili's De IURE BELLI: The Great Debate Between Theological and Humanist Perspectives from Vitoria and Grotius*, THE ROOTS OF INTERNATIONAL LAW / LES FONDEMENTS DU DROIT INTERNATIONAL: LIBER AMICORUM PETER HAGGENMACHER 211, 219, n.12 (Randall Lesaffer ed., Koninklijke Brill NV, 2013) ("If it is agreed that both parties have right and justice on their side, they cannot lawfully fight each other, either offensively or defensively.").

revealed to have been fought under false pretenses, particularly for regime change to obtain oil.<sup>106</sup> What does the practicality of just war theory say in such situations? And how can a weak party to a conflict that is a victim of aggression by a powerful state defend itself and its people? The principles of just war theory do not allow aggression or the use of force for unjust causes.<sup>107</sup> Of course, there can be situations where the international laws and principles of just war theory are violated, and aggressors get away with such violations. But this does not mean that just war theory or international law is morally wrong. It only means that there are cunning ways within the system to avoid the just war tradition principles and international laws of using force, whose enforcement can be looked into by the international community. For these reasons, allowing violations of humanitarian law by weak parties, just because they are weak or victims of war, is morally unreasonable.

Rodin also believes that, apart from the assignment of fault in a conflict, moral reasons of fairness demand that there be an equal chance of success for both parties, and for that reason weak parties should be allowed to subvert from their obligations under humanitarian law.<sup>108</sup> Let us consider what it means to violate humanitarian law and what it would look like to allow a weak party to violate IHL. The relaxation to weak parties from the principle of distinction in a conflict means that a weak party is allowed to undertake terrorist attacks on innocent people peacefully residing in schools, hospitals, and mosques. Similarly, a relaxation from the principle of proportionality to a weak party means that it is capable of destroying a whole city in response to the deaths of ten people. In both situations, more innocent people will die, and the only affected people are innocents and civilians. In moral terms, killing innocent people is unacceptable, even during wars.<sup>109</sup> Therefore, allowing relaxation from IHL to weak parties during armed conflicts and wars is morally inappropriate.

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<sup>106</sup> *Cheney Blasts Media on al Qaeda-Iraq Link*, CNN (Jun. 18, 2004), <https://edition.cnn.com/2004/ALLPOLITICS/06/18/cheney.iraq.al.qaeda/>; see also Andy McSmith & Charlie Cooper, *Chilcot Report: Blair didn't tell truth about WMDs, the deal with Bush or the warnings of fallout – how Britain went to war in Iraq*, THE INDEPENDENT (Jul. 6, 2016), <https://www.independent.co.uk/news/uk/politics/chilcot-report-inquiry-tony-blair-iraq-war-weapons-of-mass-destruction-evidence-verdict-a7122361.html>.

<sup>107</sup> U.N. Charter art. 2, ¶ 4.

<sup>108</sup> See RODIN, *supra* note 1, at 158–61.

<sup>109</sup> See SHAPCOTT, *supra* note 88, at 170.

#### D. *Exceptionalism*

An improvement of this argument: the notion of exceptionalism can help the weak for the sake of fairness. Fritz Allhoff, a proponent of exceptionalism, argues that, because guerrilla tactics and terrorism are used as efficient techniques by NSAs, military forces or state actors should also be allowed to violate humanitarian law or human rights law as an exception to be able to efficiently fight terrorists.<sup>110</sup> With regard to respecting international law, Christopher Coker, former Professor of International Relations at the London School of Economics and Political Science asks, “will the other party play by the same rules?”<sup>111</sup> Terrorists do not respect international law, and military forces do. Allhoff believes that terrorists are benefitted by it, and military forces are disadvantaged by it.<sup>112</sup> Therefore, military forces must also be allowed to violate international law as an exception.<sup>113</sup>

Allhoff uses the language of necessity to justify torture, indefinite detention, violation of the due process of law, and assassination, while noting that these processes are strictly prohibited within international law.<sup>114</sup> In *Temporal Exceptionalism*, for example, he argues that, depending on the necessity or circumstances, certain laws can temporarily be bent or violated.<sup>115</sup> He quotes the example of the outbreak of a deadly virus or disease, where people are held or confined without the commission of any crime. He adds that people can argue that patients’ freedom to move, or their right to privacy, is violated by such confinement.<sup>116</sup> But it is necessary and ethically right, for the greater good, to confine them on a temporary basis.<sup>117</sup> Allhoff uses this example of a virus or disease outbreak to justify indefinite or illegal confinement of suspected terrorists during the war on terror. He believes that, in the temporary war on terror, the indefinite confinement of suspected terrorists is morally justified in order to gain intelligence.<sup>118</sup> But this example and such justifications lack any moral justification for “wrong

<sup>110</sup> Fritz Allhoff, *The War on Terror and the Ethics of Exceptionalism*, in ROUTLEDGE HANDBOOK OF ETHICS AND WAR 203-10 (Fritz Allhoff, Nicholas G. Evans, & Adam Heschke eds., 2013) [hereinafter Allhoff].

<sup>111</sup> CHRISTOPHER COKER, *HUMANE WARFARE* 65 (2001); see also, KATERI CARMOLA, *PRIVATE SECURITY CONTRACTORS AND NEW WARS* 146 (2010).

<sup>112</sup> See Allhoff, *supra* note 110, at 203–10.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* at 203–215.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Allhoff, *supra* note 110, at 203-15.

cases.” For instance, is the confinement of patients or the public for an indefinite period ethically justified if subjects have not tested positive for a disease? Is it morally justified when the protocols for identification of such a deadly virus outbreak were not even considered? What if 500 people were confined by doctors in a building without one iota of proof that the patients were infected subjects, and in fact they were detained for ulterior motives? Would it then be justified? Of course not.

Confining patients or suspected terrorists for longer durations in specific events is not problematic. In fact, it is allowed in grave situations.<sup>119</sup> The problem arises with the disrespect and violation of “the protocols or the due process of law.”<sup>120</sup> Where suspects are not identified properly nor provided due process, innocent people are put behind bars indefinitely. This was the case in the Abu Gharib prison, where numerous prisoners were illegally held without due process, and were later found to be innocent.<sup>121</sup>

Allhoff’s other argument for the relaxation from international laws is to allow an exception for a group of people based on its suspected terrorist activities and the threat that is posed by it.<sup>122</sup> Firstly, he classifies all the bad examples of grouping, such as the concentration camps that facilitated Jewish genocide during the Holocaust, as well as the forced slavery of African men, women, and children.<sup>123</sup> He then mentions college grades, SAT scores, and age limits for voting as morally right examples of *group exceptionalis*.<sup>124</sup> He suggests that, similarly to good group exceptionalism, criteria relating to terrorists and the serious threat posed, can also be used to define groups and justify torture and assassination.<sup>125</sup> He acknowledges that a clear objection to such group exceptionalism is the example of an innocent person mistakenly suspected of a threat, or terrorism, and wrongly

<sup>119</sup> Illegal rather than problematic. (To see restraint and isolation of patients in grave situations, see examples of restraining of COVID-19 patients in isolated centers. To see the restraining and isolation of terrorists, see examples of imprisonment sentences for terrorists).

<sup>120</sup> Ifeoma Ajunwa, “*Bad Barrels*”: *An Organizational-Based Analysis of the Human Rights Abuses at Abu Ghraib Prison*, 17.2 AJUNWA BAD BARRELS FORMATTED.DOCX (2014), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1165&context=jlasc>.

<sup>121</sup> Tara McKelvey, *I Hated Myself for Abu Ghraib Abuse*, BBC (May 16, 2018), <https://www.bbc.com/news/44031774> [hereinafter McKelvey, *I Hated Myself*].

<sup>122</sup> See Allhoff, *supra* note 110, at 203–15.

<sup>123</sup> See *id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

subjected to confinement, assassination, or torture. His response is that such a situation is unlikely, so it is conceivable for him.<sup>126</sup> But the truth is that numerous people tortured and confined in the Abu Gharib prison were in fact innocent people picked up in random raids.<sup>127</sup> Further, for every militant killed by a drone strike in Afghanistan, on average ten innocent people are killed.<sup>128</sup> So, it is not only possible that suspected prisoners or targets may be innocent; it is also highly probable in this modern age. Nevertheless, it is reasonable for a state to want to assassinate a known terrorist for the acts of terrorism, that he has committed. Such was the case of Osama bin Laden, who was killed by the U.S. government in Pakistan.<sup>129</sup> It would have certainly been better to capture him alive, to understand through his confessions why he did what he did, and who else was involved politically in his plans. But such actions should also respect international humanitarian law, including the principles of distinction, necessity, and proportionality.<sup>130</sup> For these reasons, a relaxation from the prohibitions on torture, indefinite confinement, and assassination in international law under exceptionalism is morally unacceptable.

#### *E. Asymmetric Warfare to De-escalate Situations*

Another argument in favor of asymmetric warfare is that it can defuse situations and avoid war, as evidenced by the truck bomb in Beirut.<sup>131</sup> However, practically speaking, if a terrorist group attacks and kills a thousand innocent people, what are the probable consequences? Would an all-powerful state, such as the U.S., with military might and technological advancement stand down its guard and admit defeat? Or would it respond with a retaliatory attack on the perpetrators of such an attack? It turns out, as the 9/11 events proved, that the

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<sup>126</sup> *Id.*

<sup>127</sup> See McKelvey, *I Hated Myself*, *supra* note 121.

<sup>128</sup> NETA CRAWFORD, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR FOLLATERAL DAMAGE IN AMERICA'S POST-9/11 WARS 209–211 (2013) (Crawford provides the example of 50 innocent people put to death to kill one militant, to illustrate the disproportionate impact relative to the military advantage gained).

<sup>129</sup> Aleem Maqbool, *Osama Bin Laden, al-Qaeda leader, Dead - Barack Obama*, BBC (May 2, 2011), <https://www.bbc.com/news/world-us-canada-13256676>.

<sup>130</sup> Scott D. MacDonald, *The Lawful Use of Targeted Killing in Contemporary International Humanitarian Law*, 2 J. OF TERRORISM RES. L. SPEC. ED. 126 (2011), [https://www.researchgate.net/publication/282822291\\_The\\_Lawful\\_Use\\_of\\_Targeted\\_Killing\\_in\\_Contemporary\\_International\\_Humanitarian\\_Law](https://www.researchgate.net/publication/282822291_The_Lawful_Use_of_Targeted_Killing_in_Contemporary_International_Humanitarian_Law).

<sup>131</sup> See RODIN, *supra* note 1, at 158–61.

U.S. would respond with a disproportionate response, e.g. launching a global war on terror.<sup>132</sup> Contrary to the widespread assumption that asymmetric warfare can de-escalate situations, the 9/11 events proved that it can do the opposite, instead increasing violence and inducing war.<sup>133</sup> More violence in the world and more wars, translate into more civilian and military casualties. By contrast, according to Hugo Grotius, a famous Dutch jurist and scholar, moral considerations demand “peace, justice, and safeguards of sovereignty.”<sup>134</sup>

#### F. Efficiency and Advantages of Asymmetric Warfare

Rodin argues that asymmetric warfare tactics—more specifically guerrilla warfare tactics—are more efficient than conventional warfare techniques, for weak parties.<sup>135</sup> It is true that guerrilla tactics of using human shields and the deliberate targeting of innocent people can be advantageous for weak parties in a conflict, such as terrorist and rebel groups.<sup>136</sup> But we need to also consider their overall efficiency and moral justification to see their viability of becoming an accepted international principle for using force. The efficiency of a warfare tactic is also measured by its effect on civilians and innocent people. According to the moral duties of using force in international law, it is forbidden to deliberately target or harm civilians or innocent people.<sup>137</sup> And, if asymmetric warfare uses civilians as human shields and deliberately targets civilians, it brings with it, more harm on innocent people and causes more civilian casualties than conventional means of warfare, which prohibit the direct targeting of the innocent.<sup>138</sup> As evidenced by terrorist attacks, such as those on schools where innocent children study,<sup>139</sup> asymmetric warfare is not efficient in safeguarding the lives of innocent people, which is morally

<sup>132</sup> Qureshi, *supra* note 22.

<sup>133</sup> To see wars such as War on Terror as the aftermath of 9/11, see DAVIS, *supra* note 18.

<sup>134</sup> STEVE VINER, *The Moral Foundations of the Jus ad Bellum/Jus in Bello Distinction*, in ROUTLEDGE HANDBOOK OF ETHICS AND WAR: JUST WAR THEORY IN THE TWENTY-FIRST CENTURY 57 (Fritz Allhoff, Nicholas G. Evans, & Adam Heschke, eds., 2013).

<sup>135</sup> See RODIN, *supra* note 1, at 156.

<sup>136</sup> See Rodin, *supra* note 1, at 158-61.

<sup>137</sup> See SHAPCOTT, *supra* note 88, at 169.

<sup>138</sup> See Rule 1. *The Principle of Distinction*, *supra* note 15.

<sup>139</sup> See Peshawar Attack, *supra* note 69.

unacceptable,<sup>140</sup> and theoretically unjustifiable. If the goal of using asymmetric warfare is to provide a chance of fairness to weaker fighting groups (which is practically impossible),<sup>141</sup> then what about the provision of fairness to innocent people? Even if, for the sake of argument, a weak group is wronged or subject to aggression by a powerful enemy, then how can it justify a wrong committed by a weak party on innocent people?

Rodin only discusses the advantageous characteristics of asymmetric warfare to justify it, and he sees the nature of efficiency as only a warfare tactic for weak groups.<sup>142</sup> But, this efficiency is not enough to justify relaxation from all IHL requirements, because there needs to be moral justification as well. To better understand this, let us use an example. Suppose an individual living in poverty needs money to buy a home or food. The acceptable norm available to him is to work and earn money to then buy his needed supplies. However, he may opt to steal, which could be advantageous for him, because therein his needs are satisfied without having had to spend much time or effort. In this example, would stealing—being an efficient and advantageous way to provide necessities—be morally acceptable or justified? If not, why is it unacceptable? It is unjustified because by stealing, this weak and impoverished person is doing wrong by the established social standards—likely robbing another innocent person and taking something that is not rightfully his property? The situation is similar in dealing with asymmetric warfare: killing civilians by asymmetric means can be advantageous to weak groups, but it is also a moral wrong because it causes harm to innocent people.<sup>143</sup>

### G. Rightful Authority in the Use of NSAs

Another problem with using asymmetric warfare techniques—such as the use of NSAs—is the evaluation of the criterion of the rightful authority.<sup>144</sup> Should anyone, including terrorist groups, be allowed

<sup>140</sup> See SHAPCOTT, *supra* note 88, at 169.

<sup>141</sup> Fairness to non-state actors is impossible because Rodin's notion of fairness hinges upon achieving a chess like leveled-field in wars. To see that Rodin desires a Chess like situation See, Rodin, *supra* note 1, at 159.

<sup>142</sup> See RODIN, *supra* note 1, at 158–62.

<sup>143</sup> See RODIN, *supra* note 1, at 156 (deliberately targeting civilians or by violating principle of distinction).

<sup>144</sup> CARON E. GENTRY, EPISTEMIC BIAS: LEGITIMATE VIOLENCE & POLITICALLY VIOLENT, THE FUTURE OF JUST WARS: NEW CRITICAL ESSAYS (*Non-State Actors*, in Caron E. Gentry & Amy E. Eckert, eds., 2014).

to use force not only in domestic cities, but also in the sovereign territory of other states with or without authorization of their state? Most modern international armed conflicts are escalating because of the use of force by NSAs,<sup>145</sup> which is not acknowledged by the respective states in the sovereign territory of victim states. For instance, the Al Qaeda terrorist organization attacked the U.S., which may have started the global war on terrorism.<sup>146</sup> Similarly, the Houthis of Yemen attacked Saudi Arabia by launching missiles,<sup>147</sup> and the Syrian rebels used force against the Syrian government/the Assad regime.<sup>148</sup> In these situations or conflicts, it is unclear whether the NSAs were acting on behalf of the political will of other countries or were independently motivated to use force.

One argument is that most of these NSAs are independent, hence their terminology, and any use of force by these NSAs without the agency of a state is unlawful. This is known as the effective control test.<sup>149</sup> The *Nicaragua* case of the ICJ, established that any use of force in self-defense against a state in response to an attack by the NSA is not justified until it can be proven that the NSA was under the effective control of a state.<sup>150</sup> As stated, however, this creates a big lacuna in the international justice system. If one state uses NSAs such as terrorist organizations and rebel groups to attack another state as a proxy war, is there no way for a victim state to defend itself? This explains

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<sup>145</sup> Jason Thomas, *The New Era of Non-State Actors: Warfare and Entropy*, SMALL WARS JOURNAL (Jan. 28, 2020), <https://smallwarsjournal.com/jrnl/art/the-new-era-of-non-state-actors-warfare-and-entropy>.

<sup>146</sup> See Rodin, *Terrorism*, *supra* note 29.

<sup>147</sup> *Saudi Arabia, UAE Slam "Houthi" Missile Attack in Yemen's Marib: Key Players in Yemen War Condemn Saturday's "Terrorist" Attack that Killed Over 100 Soldiers and Blame It on Houthis*, AL-JAZEERA (Jan. 20, 2020), <https://smallwarsjournal.com/jrnl/art/the-new-era-of-non-state-actors-warfare-and-entropy>.

<sup>148</sup> *Syria's civil war explained from the beginning*, AL-JAZEERA (Apr. 14, 2018), <https://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>.

<sup>149</sup> *Control Matters: Ukraine & Russia and the Downing of Flight 17*, OPINIOJURIS (July 23, 2014), <http://opiniojuris.org/2014/07/23/control-matters-ukraine-russia-downing-flight-17/>; see Djemila Carro, *When is a conflict international? Time for new control tests in IHL*, 98 (3) INTERNATIONAL REVIEW OF THE RED CROSS, 1019-41 (2016), <https://international-review.icrc.org/sites/default/files/irrc-903-16.pdf>; see also *Nicaragua Case*, *supra* note 10, ¶ 105-15.

<sup>150</sup> See *Nicaragua Case*, *supra* note 10, ¶ 105-15.



why modern warfare (such as the wars in Iraq, Yemen, and Syria) has numerous NSA groups fighting for different political commitments.<sup>151</sup>

Which brings us to our second argument, that NSAs are not entirely independent. Instead, terrorist and rebel NSAs work on behalf of other countries for nefarious political purposes for the sake of monetary and power benefits, acting as mercenaries and proxy fighters, unconcerned with respect for humanitarian law, just cause, the increase in violence, and the destabilization of regions.<sup>152</sup> For example, the U.S. later acknowledged that it was backing Syrian rebels with arms and finances to change the Assad regime, which would benefit U.S. national interests.<sup>153</sup> NSAs, such as terrorists, are also used to attack innocent people in targeted countries for political reasons,<sup>154</sup> to garner people's support to invade a country, which in reality are for other unjustified reasons.<sup>155</sup>

Is there no way to fix this legal lacuna of using NSAs and mercenaries in the sovereign territory of other countries? The international law of using force clearly forbids the aiding and abetting of NSAs, including rebel or insurgent groups, in foreign territories for unjustified reasons.<sup>156</sup> It also outlaws the use of state military forces without uniform,<sup>157</sup> and grants monopolies<sup>158</sup> of violence only to states. Arguably, any use of force by NSAs is forbidden in the international law of

<sup>151</sup> See use and employment of mercenaries as non-state actor proxies in modern warfare in: Dr. Waseem Ahmad Qureshi, *Fourth- and Fifth-Generation Warfare: Technology and Perceptions*, 21 SAN DIEGO INT'L L.J. 187 (2019).

<sup>152</sup> See Özden Zeynep Oktav, *Understanding Iran's Approach to Violent Non-state Actors: The ISIS and YPG Cases*, in *Violent Non-state Actors and the Syrian Civil War: The ISIS and YPG Cases* 193 (Özden Zeynep Oktav et al. eds., 2018). See also Waseem Ahmad Qureshi, *Applying the Principle of Proportionality to the War on Terror*, 22 Rich. Pub. Int. L. Rev. 379 (2019); Kateri Carmola, *Private Security Contractors and New Wars* 134, 138 (2010).

<sup>153</sup> See McKelvey, *supra* note 14.

<sup>154</sup> See Billard, *supra* note 39.

<sup>155</sup> Qureshi, *supra* note 22, at art. 4, 396-7; Waseem Ahmad Qureshi, *Applicability of International Humanitarian Law to The Non-State Actors*, 17 (1) SANTA CLARA J. OF INT'L LAW 7-8 (2019).

<sup>156</sup> See Nicaragua Case, *supra* note 10.

<sup>157</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 44(7), June 8, 1977, 1125 U.N.T.S. 3; See also, Toni Pfanner, *Military Uniforms and the Law of War*, 86(853) RICR MARS IRR 93-124 (2004) [hereinafter Pfanner].

<sup>158</sup> ANNE SCHWEKENBECHER, *Rethinking Legitimate Authority*, in *ROUTLEDGE HANDBOOK OF ETHICS AND WAR: JUST WAR THEORY IN THE TWENTY-FIRST CENTURY* 161-62 (Fritz Allhoff, Nicholas G. Evans, & Adam Heschke, eds., 2013) [hereinafter SCHWEKENBECHER].

using force.<sup>159</sup> But how about situations where civilians without uniforms use force to defend themselves during a foreign invasion, in order to defend themselves and their families? The international law of using force in such response outlaws all direct targeting of civilians; only military objects can be targeted.<sup>160</sup> By contrast, if human rights such as the right to life are threatened, any use of force in self-defense is justified,<sup>161</sup> but this retaliatory force must not target civilians and innocent people.<sup>162</sup>

For these reasons, the just war criteria for the use of force demands that it must have rightful authority, which is examined by five factors: (1) support and representation of people; (2) effective control of territory; (3) monopoly on the use of violence; (4) adherence to international laws; and (5) striving for peace.<sup>163</sup> Under this governing perspective of just war theory, any use of force by NSAs without the agency of a lawful state or government is unacceptable.<sup>164</sup> It is also not allowed for good moral reasons. For example, allowing anyone to use force without people representation, effective control, and monopoly on violence means chaos and violence;<sup>165</sup> any group of people could use force for any reason, without being held responsible. An agent of violence must respect other nations and people, and must have the right intention, just cause, and respect for the principles of distinction and proportionality.<sup>166</sup> Unlike NSAs, states have monopolies on violence, people representation, governing laws and rules,<sup>167</sup> and they can be held responsible for any violation of people's rights.

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<sup>159</sup> Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28(2) THE EUR. J. OF INT'L L. 563-85 (2017) [hereinafter Lanovoy].

<sup>160</sup> See Rule 1. *The Principle of Distinction*, *supra* note 15.

<sup>161</sup> See JAN ARNO HESSBRUEGGE, HUMAN RIGHTS AND PERSONAL SELF-DEFENSE IN INTERNATIONAL LAW (2017) [hereinafter HESSBRUEGGE] (providing examples of personal self-defense in domestic law, natural law, international law, criminal law, humanitarian law, and human rights law).

<sup>162</sup> See Rule 1. *The Principle of Distinction*, *supra* note 15.

<sup>163</sup> See SCHWEKENBECHER, *supra* note 158, at 161-62.

<sup>164</sup> See Lanovoy, *supra* note 159, at 563-85.

<sup>165</sup> A.J. COATES, THE ETHICS OF WAR 123-25 (1st ed., 1997); see also SCHWEKENBECHER, *supra* note 158, at 165-67.

<sup>166</sup> See SCHWEKENBECHER, *supra* note 158, at 165-66.

<sup>167</sup> See *id.* at 161-66.

### H. Uniforms and Independent Fighters

The question of how to define NSAs is yet another problem of using them. In the Syrian war, for example, numerous groups are fighting each other, and many are considered terrorists by other states, owing to their disrespect for international law of war and to their use of force for unjustified reasons.<sup>168</sup> Under international humanitarian law and the customary international law of just war theory, using force by NSAs without the uniform of armed forces is not allowed.<sup>169</sup> Therefore, for identification reasons, the use of force by NSAs without uniforms is unlawful.<sup>170</sup> Morally, this prohibition is to encourage a distinction between armed forces and civilians, so that the principle of distinction can be respected.<sup>171</sup> If NSAs are not properly dressed in uniforms, they can be easily mistaken for civilians. For instance, in asymmetric and guerrilla war, NSAs such as rebel, mercenary, and terrorist organizations routinely dress as civilians to use innocent people as human shields and to hide in plain sight.<sup>172</sup> This, in turn, puts innocent people in harm's way and makes it difficult for enemy forces to fight them without violating international humanitarian law.<sup>173</sup> For these moral reasons, all state forces must be dressed in uniforms to use

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<sup>168</sup> For NSA use for unjustified reasons *see* Qureshi, *supra* note 22, at art. 4, 396-7 (such as the use of NSA for a regime change); *see also* ARMIN KRISHNANL, WHY PARAMILITARY OPERATIONS FAIL 235 (Springer 1st. ed. 2018) (such as the NSA's use as proxies in illegal cyber-attacks to avoid retribution). For disrespect of IHL by NSA, *see* Qureshi, *supra* note 155, at 7-8.

<sup>169</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 44(7), June 8, 1977, 1125 U.N.T.S. 3; *see also* Pfanner, *supra* note 157, at 93-124.

<sup>170</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 44(7), Aug. 6, 1977, 1125 U.N.T.S. 3, ¶24; *see also*, Pfanner, *supra* note 157, at 93-124.

<sup>171</sup> *See* Pfanner, *supra* note 142, at 93-124.

<sup>172</sup> BASEM ALY, THE USE OF STRATEGIC BOMBING AGAINST NON-STATE ACTORS IN THE MIDDLE EAST. OBJECTIVES AND LIMITATIONS OF AIR POWER IN THE CASES OF HEZBOLLAH, HOUTHIS AND ISIS 21 (Anchor Academic Publishing, 2017).

<sup>173</sup> *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, Aug. 6, 1977, 1125 U.N.T.S. 3, ¶26 (prohibition on the use of human shields); *see also* Heinegg, *supra* note 16, at 103 (discussing the use of human shields by Asymmetric Warfare).

force.<sup>174</sup> And what about situations where noncombatants take arms to defend themselves during an unlawful invasion? Can an individual take arms without uniform to defend his family and himself during an unlawful invasion or massacre?<sup>175</sup>

The moral judgment of this article contends that such a person should be allowed to defend himself. The human nature of survival instincts forces individuals to fight to survive, and every human has a legal right to defend their life using all necessary means against illegal targeting or illegal threat to life. Therefore, this article contends that the use of force by independent NSAs to defend their family life is morally justified.<sup>176</sup> But this response must also respect the principles of proportionality<sup>177</sup> and distinction<sup>178</sup> by not deliberately targeting innocent people and by not using excessive force.

### III. ETHICS OF USING MERCENARIES

Paid mercenaries are private contractors tasked to do politically driven and often dirty work; they are effectively employed as proxy fighters during war to transfer the risk of war and to reduce costs.<sup>179</sup> Rebels and other armed groups fighting in Syria to change the Assad regime, backed by U.S. political will,<sup>180</sup> can also be considered mercenaries. Terrorists and security agencies like Blackwater are also examples of mercenaries.<sup>181</sup> They are mainly used for two purposes:

<sup>174</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 44(7), Aug. 6, 1977, 1125 U.N.T.S. 3, ¶24; *see also* Pfanner, *supra* note 157, at 93-124.

<sup>175</sup> *See generally* HESSBRUEGGE, *supra* note 161 (discussion on personal self-defense).

<sup>176</sup> *See id.*

<sup>177</sup> *Rule 14. Proportionality in Attack*, CUSTOMARY IHL, ICRC DATABASE, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (last visited Jan. 20, 2020) (Codified under Articles 48, 51(5) of Additional Protocol I to the Geneva Convention, 1977.).

<sup>178</sup> *See Rule 1. The Principle of Distinction*, *supra* note 15.

<sup>179</sup> *See* CARMOLA, *supra* note 104, at 134.

<sup>180</sup> *See* McKelvey, *supra* note 14.

<sup>181</sup> To see use of mercenaries as terrorists *see* U.N. Secretary-General, *Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, U.N. Doc. A/70/150 (Aug. 19, 2015); *see also* Press Release, General Assembly, *Mercenaries Often A Presence In Terrorist Attacks, Special Rapporteur Tells Third Committee As It Begins Discussions on Self-Determination*, U.N. Press Release GA/SHC/3650 (Oct. 31, 2001), <https://www.un.org/press/en/2001/gashc3650.doc.htm>. To see Black waters are

reducing the military costs and avoiding attribution and retribution for their actions. Employing contractually based irregular mercenaries is much cheaper than maintaining standing armies, with their health and retirement benefits.<sup>182</sup> Mercenaries are not given all the monetary benefits enjoyed by military forces, and mercenaries are not employed all of the time, whether or not there is a conflict. Instead, mercenaries are only contracted for specific goals and objectives for defined periods, where the agreed money is used to hire the required personnel and buy arms needed to do a defined job.<sup>183</sup>

Further, with regard to retribution, employing mercenaries is advantageous because, while the unlawful or unjustified use of force by uniformed military forces of a state may cause a reaction by a victim state, or bring discontentment among the general public, the unjustified use of force by proxy mercenaries dressed as civilians is not attributable to a state, which efficiently avoids retribution;<sup>184</sup> in most cases mercenaries are not readily identified as being backed by a state. For these two main reasons—cost efficiency and avoidance of attribution and retribution—modern warfare heavily employs paid mercenaries, such as rebel groups, terrorist organizations, and private security contractors, to affect the political will and dirty work of aggressors.<sup>185</sup> Whether the nation is weak, such as Syria and Yemen, or powerful, such as the U.S. and Russia, all sorts of countries are employing mercenaries in modern warfare.

#### A. Criminalization of Mercenaries

Although the use of mercenaries is effective in getting the job done, their moral standing in the international community is arguably despicable. They are considered morally hazardous and precarious by many,<sup>186</sup> and according to Avant, their use undermines democratic

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considered mercenaries *see* JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY* (1st ed., 2011).

<sup>182</sup> *See id.* at 124–34.

<sup>183</sup> HELENA TORROJA, *PUBLIC INTERNATIONAL LAW AND HUMAN RIGHTS VIOLATIONS BY PRIVATE MILITARY AND SECURITY COMPANIES* 60 (2017) [hereinafter as TORROJA].

<sup>184</sup> *See* NATO, *supra* note 13; *see also* Ashraf, *supra* note 13; *see also* European Commission, *supra* note 13.

<sup>185</sup> *See* use and employment of mercenaries and rebels as non-state actor proxies in modern warfare in Dr. Waseem Ahmad Qureshi, *supra* note 151, at 187.

<sup>186</sup> *See, e.g.*, P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 216 (2007); *see also*, CARMOLA, *supra* note 104, at 135.

control over the international use of force.<sup>187</sup> In international law, the Kellogg–Briand pact,<sup>188</sup> the UN Charter<sup>189</sup> and the Geneva Conventions<sup>190</sup> and their Additional Protocols,<sup>191</sup> require that states retain a monopoly on the use of force, which excludes granting prisoner of war (POW) status to mercenaries.<sup>192</sup> In 1976, an Angolan court handed down the death penalty to U.S. mercenaries for their involvement in the Angolan liberation movement, for their crimes against peace and for being mercenaries, as was classified by UN resolutions.<sup>193</sup> In 1977, the Organization of African Unity, which included representatives from thirty-seven countries, adopted the Convention for the Elimination of Mercenaries to eliminate the use of mercenaries.<sup>194</sup> For these reasons, *jus ad bellum* under Article 47 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989 criminalizes the use of mercenaries,<sup>195</sup> to affirm that the monopoly of using legitimate force belongs only to states.<sup>196</sup>

### B. Private Military Companies

Despite the criminalization of the use of mercenaries, or the stigma attached to their use, modern warfare heavily employs mercenaries. However, to avoid any criminalization, litigation, or stigma attached to the term mercenaries, modern mercenaries changed their name from “private military companies” (PMCs) to “private security companies” and later to “private security providers.”<sup>197</sup> Such organizations include the International Peace Operations Association

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<sup>187</sup> See D. Avant & L. Seligman, *What Does Private Security in Iraq Mean for Democracy at Home*, in CARMOLA, *supra* note 104, at 135.

<sup>188</sup> The Kellogg–Briand Pact arts. I, II, & II (1928) (High Contracting Parties: State Governments).

<sup>189</sup> U.N. Charter art. 2(4) (All members: States).

<sup>190</sup> Geneva Convention, 1949, at preamble (is signed and contracted with State Governments: Sovereigns or Heads of States of the signatory Powers).

<sup>191</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

<sup>192</sup> See TORROJA, *supra* note 183, at 61.

<sup>193</sup> G.A. Res. 3102 (XXVIII) (Dec. 12, 1973); G.A. Res. 2548 (XXIV) (Dec. 11, 1969); G.A. Res. 2395 (XXIII) (Nov. 29, 1968); G.A. Res. 2465 (XXIII) (Dec. 20, 1968); See TORROJA, *supra* note 183, at 62.

<sup>194</sup> See TORROJA, *supra* note 183, at 62.

<sup>195</sup> International Convention against the Recruitment, Use, Financing and Training of Mercenaries art. 47, Dec. 4, 1989, 2163 U.N.T.S. 75.

<sup>196</sup> See TORROJA, *supra* note 183, at 62.

<sup>197</sup> See *id.* at 66.

(IPOA), the British Association of Private Military Companies (BAPSC), and many other PMCs working for the U.K., the U.S., Australia, Sweden, Switzerland, and Canada.<sup>198</sup> The widespread use of mercenaries can be estimated by the number of dollars spent on mercenaries by the U.S. For instance, in 2014 alone, the U.S. Pentagon spent about 285 billion dollars on paid mercenaries.<sup>199</sup> Western countries use mercenaries pervasively, because the U.S., the U.K., and Western states that employ PMCs and paid mercenaries for war, do not believe that their use of mercenaries fit the definition of mercenaries under Article 47 of ICARUFTM 1989.<sup>200</sup> The use of mercenaries however, has routinely violated humanitarian law and the international laws around the use of force. For instance, a Swiss PMC known as Aegis, was found to be involved in a coup attempt in Equatorial Guinea; similarly, a South African PMC was found in violation of humanitarian law while providing security to the Swiss embassy in Baghdad, Iraq.<sup>201</sup>

PMCs can be used for secret operations, intelligence, military operations, espionage, and training; such PMCs include Academi (formerly Blackwater), Aegis Defense Service (formerly Sandline), DynCorp, Garda World, and Avant Garde Maritime Services (AGMS).<sup>202</sup> Academi, for example, had directors that had previously been executives in the CIA, whereas American MPRI or L-3, included a U.S. Army chief and vice chief among its directors. Similarly, G4S employed former U.K. Home and Defense Secretaries. Mercenaries under PMC contracts have very vague objectives and are repeatedly contracted to subcontractors.<sup>203</sup> The subcontractors hire mercenaries from the Third World because they are financially cheaper.<sup>204</sup> It has been noted that a vast number of ex-military officers and former members of intelligence agencies are hired by most PMCs.<sup>205</sup>

By changing their name, avoiding the term mercenaries, and by adopting codes of conduct that do not regulate, supervise, monitor, or hold mercenaries accountable, states that use mercenaries opportunistically vitiate the requirements of criminalizing the use of mercenaries.<sup>206</sup> For

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<sup>198</sup> *See id.*

<sup>199</sup> *See id.* at 65.

<sup>200</sup> *See id.* at 65–6.

<sup>201</sup> *See id.* at 66.

<sup>202</sup> *See* TORROJA, *supra* note 183, at 67, 74.

<sup>203</sup> *See id.* at 67.

<sup>204</sup> *See id.* at 72–73.

<sup>205</sup> *See id.* at 67.

<sup>206</sup> *See id.* at 76.

instance, Blackwater was used by the U.S. in Pakistan to conduct secret operations to avoid accountability.<sup>207</sup> There is an urgent need for the adoption of an international convention to regulate the actions of mercenaries, PMCs, and NSAs.<sup>208</sup>

### C. Mercenary Terrorists

In addition to the employment of military officers and intelligence members, terrorists have also been known to employ mercenaries to do their “dirty work” and effect the political will of aggressive states. Individual contractors and terrorist organizations are also hired as mercenaries for states to carry out terrorist attacks in victim states, by killing and deliberately targeting innocent people,<sup>209</sup> while violating all laws of the international use of force and humanitarian law. Russia, for example, noted that the U.S. uses mercenaries, including loyal terrorist militants from YPG, to guard oilfields in Syria.<sup>210</sup> KRG officials also claim that the U.S. has been using YPG terrorists as mercenaries in Syria.<sup>211</sup> The U.S. mercenaries are also used as paid assassins in Yemen and other Middle Eastern states to target political rivals.<sup>212</sup> Similarly, during the years 2013 to 2017, the CIA also aided, supported, trained, and armed the Syrian rebels, through the “Train and Equip Program,” who were known for their violations of humanitarian law, war crimes, and links with terrorist organizations who (alongside Al Qaeda and ISIS) fought the Assad regime and ISIS, which resulted in the deaths of hundreds of thousands of Syrian armed

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<sup>207</sup> *See id.* at 68.

<sup>208</sup> *See* TORROJA, *supra* note 183, at 78.

<sup>209</sup> *See* examples of Carlos the Jackal, Sabri al-Banna or Abu Nidal, Nidal Organization, Hamant Lkahn as freelance contractor used as mercenary terrorists. JAMES CIMENT, *WORLD TERRORISM: AN ENCYCLOPEDIA OF POLITICAL VIOLENCE FROM ANCIENT TIMES TO THE POST-9/11 ERA* 674–76 (2d ed., Routledge 2015).

<sup>210</sup> *Russia says US replacing troops in Syria with mercenaries*, TRT WORLD (July 18, 2019), <https://www.trtworld.com/middle-east/russia-says-us-replacing-troops-in-syria-with-mercenaries-28337>.

<sup>211</sup> *US used YPG as mercenaries in Syrian conflict, KRG Official Says*, DAILY SABAH, <https://www.dailysabah.com/politics/2019/11/21/us-used-ypg-as-mercenaries-in-syrian-conflict-kr-official-says> (last updated Dec. 20, 2019, 1:50 A.M.); *see also* MCFATE, *supra* note 8, at 124–134 (“More than 50% of U.S combatants in Iraq and Afghanistan wars were mercenaries, specifically they were 50% in Iraq and 70% in Afghanistan.”).

<sup>212</sup> Aram Roston, *A Middle East Monarchy Hired American Ex-Soldiers To Kill Its Political Enemies., This Could Be The Future Of War*, BUZZFEED NEWS (Oct. 16, 2018), <https://www.buzzfeednews.com/article/aramroston/mercenaries-assassination-us-yemen-uae-spear-golan-dahlan>.



forces members, the massacre of Kurds, and the increased violence in Syria.<sup>213</sup>

Nevertheless, there are exceptions. For example, one PMC tried to market itself as an ethical security company by the name of “Blue Sky Group International Security Company,” by providing humanitarian and guarding services, and by declining services in dangerous regions, such as Iraq. But they soon went out of business by stating that the “current climate did not allow them to conduct business.”<sup>214</sup>

#### D. Moral Problems

Michael Walzer, Professor Emeritus at the Institute for Advanced Study at Princeton University, is of the view that the greatest moral problem in the use of PMCs is that there is no accountability for their use.<sup>215</sup> He added that “[t]he state is the only reliable agent of public responsibility that we have. Of course, it often isn’t reliable, and it often doesn’t represent a democratic public. Still, there isn’t any agency other than the state that can authorize and then control the use of force—and whose officials are at times, accountable to the rest of us.”<sup>216</sup>

Although the morality of using mercenaries, as well as the morality of the means mercenaries employ, are criticized by many, the states that use them as agents who do their dirty work and are equally blameworthy. Americans have admitted that their desired political objectives require ethically questionable means.<sup>217</sup> It is naïve to believe that mercenaries are a necessary evil, or a lesser evil used for a greater good. Therefore, mercenaries can be seen as Walzer’s problem of “dirty hands,”<sup>218</sup> because the very nature of mercenaries can be described as dirty.<sup>219</sup> Proponents of the use of mercenaries, according to Walzer and Weber, employ the language of *necessity*, *the lesser evil*,

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<sup>213</sup> Mehdi Hassan, *Everyone Is Denouncing the Syrian Rebels Now Slaughtering Kurds. But Didn’t the U.S. Once Support Some of Them?*, THE INTERCEPT (Oct. 26, 2019), <https://theintercept.com/2019/10/26/syrian-rebels-turkey-kurds-accountability/>.

<sup>214</sup> See CARMOLA, *supra* note 104, at 135.

<sup>215</sup> Michael Walzer, *Mercenary Impulse*, THE NEW REPUBLIC (Mar. 12, 2008), <https://newrepublic.com/article/62864/mercenary-impulse>. See also CARMOLA, *supra* note 104, at 136.

<sup>216</sup> Walzer, *supra* note 215. See also CARMOLA, *supra* note 104, at 136.

<sup>217</sup> See CARMOLA, *supra* note 104, at 136.

<sup>218</sup> See generally Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2(2) PHIL. & PUB. AFF. 160-180 (1973) [hereinafter Walzer, *Political Action*].

<sup>219</sup> See CARMOLA, *supra* note 104, at 137.

*lack of military resources and political will* to justify the employment of mercenaries, while conveniently ignoring all of the wrongs and consequences attached to mercenaries themselves.<sup>220</sup>

Moreover, there are a number of moral problems attached to the use of mercenaries. One problem is that mercenaries disproportionately violate humanitarian law and do not respect the international law of using force.<sup>221</sup> Another problem with the employment of mercenaries is their diffused responsibility. Many hands are involved in the contracts with mercenaries, which conveniently diffuses the problem of accountability and attribution. This problem is known as the problem of *slippery hands* or the problem of *many hands*, which brings us back to the principal agent conundrum.<sup>222</sup> The use of *many faces and hands* of mercenaries was employed in Iraq and Afghanistan, where it was difficult to identify what groups of people were fighting with whom, and who was to ultimately be held responsible, without a distinguishable chain of command.<sup>223</sup> Another problem is the peripheral forces problem, where the right hand does not know what the left hand is doing. Floyd Abrams puts it this way: democracies need the ability “to do things off the books and below the radar” of accountability for the sake of survival, but such things should never be legalized.<sup>224</sup> A diversion from ethically approved practices or the permission of roguish behavior is allowed by democracies to achieve certain political objectives that are otherwise inconceivable for the necessary good.<sup>225</sup> This is how most intelligence agencies behave and work. Intelligence agencies also employ unlawful means to get political jobs done. These jobs are executed by clandestine means, because either using such techniques is unlawful or using lawful means is ineffective. So, the problem with the unleashing of the left hand by the right is that, if the left hand is allowed to work below the radar and off the books, then

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 137-8.

<sup>222</sup> *Id.* at 138.

<sup>223</sup> *Id.*

<sup>224</sup> Alan M. Dershowitz, *Torture Reasoning*, PBS, <http://www.pbs.org/inthebalance/pdf/dershowitz-tortured-reasoning.pdf>, at 26, (last visited Sept. 3, 2020); *See*, Alan M. Dershowitz, *Torture and Democratic Accountability: An Oxymoron*, cited in DEAN REUTER & JOHN YOO, *CONFRONTING TERROR: 9/11 AND THE FUTURE OF AMERICAN NATIONAL SECURITY* 107 (2011); *see also*, Alan M. Dershowitz, *There Is a Need to Bring an Unfortunate Practice Within the Bounds of Law*, cited in STUART GOTTLIEB, *DEBATING TERRORISM AND COUNTERTERRORISM: CONFLICTING PERSPECTIVES ON CAUSES, CONTEXTS, AND RESPONSES* 336 (2014); *see also*, CARMOLA, *supra* note 104, at 138.

<sup>225</sup> *See* CARMOLA, *supra* note 104, at 139.

how can the chain of command in the right hand hold the left responsible?<sup>226</sup> This case is applicable to both the use of agencies and the use of mercenaries.

### *E. Proponents of PMCs*

Proponents of the ethics of using PMCs see the use of mercenaries as the global privatization of the business of security.<sup>227</sup> For instance, Frost assumes that every person is both a citizen of a state and a citizen of a cosmopolitan global society.<sup>228</sup> Therefore, anyone can hire security personnel in other territories while enjoying these citizenships as long as the mercenaries do not abuse anyone else's rights:<sup>229</sup> in a global cosmopolitan world, everyone has a right to do his business anywhere in the world so long as they do not abuse anyone's rights. To condemn illegal activities that violate the rights of a state or people, Frost uses examples of Aegis as a PMC to explain that, if a PMC's actions are deemed crimes of terrorism and treason, its actions are undermining the PMC business.<sup>230</sup> He admits that an ideal PMC business is only conceivable without state borders, and without the violation of any international laws or domestic laws, but in practicality an international PMC business is bound to create ethical problems.<sup>231</sup> As major uses of PMCs during armed conflicts are international in nature, the ideal use of PMCs as an efficient replacement for armed military forces that does not violate international or domestic law and people's rights, does not exist.<sup>232</sup>

Site-specific security can obscure the larger ethical problems of using PMCs. For instance, Baker is a proponent of the use of PMCs. He uses an example of a bouncer and a girl in a dangerous neighborhood: "believing that her chances of being attacked are high. Jane enters into a contractual arrangement with a bouncer at a nightclub she happens to pass, who agrees to protect her walk through the

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<sup>226</sup> *Id.*

<sup>227</sup> MERVYN FROST, *Regulating Anarchy: The Ethics of PMCs in Global Civil Society*, in PRIVATE MILITARY AND SECURITY COMPANIES: ETHICS, POLICIES AND CIVIL-MILITARY RELATIONS (Andrew Alexandra, Deane-Peter Baker & Marina Caparini eds., 2004), at 142-64 [*hereinafter as FROST*]; *see Also Carmola, supra* note 104, at 142.

<sup>228</sup> FROST, *supra* note 227, at 142-64; *see also, CARMOLA, supra* note 104, at 142.

<sup>229</sup> *See FROST, supra* note 227, at 142-64; *see also, CARMOLA, supra* note 104, at 142.

<sup>230</sup> *See FROST, supra* note 227, at 143; *see also, CARMOLA, supra* note 104, at 143.

<sup>231</sup> *See FROST, supra* note 227, at 143; *see also, CARMOLA, supra* note 104, at 143.

<sup>232</sup> *See FROST, supra* note 227, at 143; *see also, CARMOLA, supra* note 104, at 143.

neighborhood for an agreed fee.<sup>233</sup> As it happens, Jane is attacked, and her companion does intervene to save her. Do we think that Jane's companion is in some sense unethical? No."<sup>234</sup> Of course, this example raises no ethical concern, unless questions of accountability and violations of rights are raised. For instance, what if the bouncer instead robs and rapes Jane on foreign soil? What if the bouncer protects Jane, but robs someone else during or after his job? What if Jane asks the bouncer to rob someone for money in foreign territory? Or, worse, what if Jane asks the bouncer to kill people illegally with clandestine means? The illegal use of force in a foreign land by a bouncer, mercenaries, or agencies, is not at all ethical. Hiring PMCs or mercenaries to do dirty jobs in foreign territory violates international laws of using force and of sovereignty.<sup>235</sup> For a bouncer not to violate any laws, including domestic laws or humanitarian laws, in a foreign country, is perfectly fine. But problems arise when a bouncer or mercenaries violate humanitarian law or the laws of using force or domestic laws in foreign lands.

On the other hand, militaries, conventional armed forces, and police forces have clear chains of command and legal systems, and they can easily be held responsible in the event of such violations or misconduct. But private contractors, mercenaries, or such bouncers in foreign lands lack an equivalent legal system, chain of command, and consequently any accountability mechanism. If Jane had contracted the police or the official armed forces, these forces would have social and public responsibilities in addition to their private contract with Jane, which is a more comprehensible relationship, with additional attached attainability.<sup>236</sup> PMCs or mercenaries can provide security to people in foreign lands, but they cannot provide justice because they are ethically problematic, owing to their social impact even in instances where they do not violate any laws. Without the possibility of accountability, mercenaries are not merely providing security

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<sup>233</sup> DEANE-PETER BAKER, *Of 'Mercenaries' and Prostitutes: Can Private Warriors Be Ethical?*, in PRIVATE MILITARY AND SECURITY COMPANIES: ETHICS, POLICIES AND CIVIL-MILITARY RELATIONS 30, 39 (Andrew Alexandra, Deane-Peter Baker & Marina Caparini eds., 2008); *see also*, CARMOLA, *supra* note 104, at 145.

<sup>234</sup> DEANE-PETER BAKER, *Of 'Mercenaries' and Prostitutes: Can Private Warriors Be Ethical?*, in PRIVATE MILITARY AND SECURITY COMPANIES: ETHICS, POLICIES AND CIVIL-MILITARY RELATIONS 30, 39 (Andrew Alexandra, Deane-Peter Baker & Marina Caparini eds., 2008); *see also*, CARMOLA, *supra* note 104, at 145.

<sup>235</sup> Dr. Waseem Ahmad Qureshi, *supra* note 151.

<sup>236</sup> *See* CARMOLA, *supra* note 104, at 145.

services; instead, they are employed to use unlawful or unjustified force to avoid retribution and attribution.<sup>237</sup>

#### IV. CONCLUSION

McKenzie has identified information wars, weapons of mass destruction, chemical weapons, guerrilla tactics, targeting of noncombatants and their property, and terrorism as weapons of asymmetrical warfare.<sup>238</sup> The underlying idea remains focused on the strategic need to subvert the conventional military paradigm of using firepower, air power, and military ethics and morality.<sup>239</sup> This subversion in the paradigm of military use is inherently moral in nature,<sup>240</sup> disregarding the moral duties not to target civilians, not to cause excess of destruction, to be proportional, and to enforce war crimes. These tactics were used by Western powers long before they were the focus of the global community.<sup>241</sup> Although asymmetric warfare is often understood narrowly to be unconventional warfare used by terrorist groups to fight Western countries,<sup>242</sup> it is also extensively employed by Western countries to destabilize targeted states.<sup>243</sup> For instance, Jihadi groups and NSAs, today known as the Taliban, were created by the U.S. to fight the Soviet Union in the 1990s.<sup>244</sup> Similarly, the U.S. and its allies currently use mercenaries, NSAs, and rebel groups in the Middle East to overthrow undesirable leaders such as the Assad regime in Syria and Gaddafi in Libya, by creating unrest and rebellion in the targeted nation.<sup>245</sup> Funds and arms given to NSAs by Western powers also end up in the hands of terrorist groups, so they flourish, while the whole region is destabilized.<sup>246</sup>

Under the international law of using force, a victim state—to be able to use defensive force—must prove the effective control of NSAs

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<sup>237</sup> See NATO, *supra* note 13. See also Ashraf, *supra* note 13. See also, European Commission, *supra* note 13.

<sup>238</sup> See McKenzie, *supra* note 26, at 19–54, for a discussion of *A Typology of Asymmetry: What, Who, and When?*; see also RODIN, *supra* note 1.

<sup>239</sup> See RODIN, *supra* note 1.

<sup>240</sup> See *id.*

<sup>241</sup> See Billard, *supra* note 39.

<sup>242</sup> See RODIN, *supra* note 1.

<sup>243</sup> See Qureshi, *supra* note 22.

<sup>244</sup> See Billard, *supra* note 39.

<sup>245</sup> See Qureshi, *supra* note 22.

<sup>246</sup> See Qureshi, *supra* note 22; see also FM 3-24, *supra* note 22, at B-15; see also Shelbourne, *supra* note 22; see also NATO, *supra* note 13.

by a government.<sup>247</sup> This lacuna in the legal system is exploited by aggressive or powerful states that destabilize target states in pursuit of their national political interests, as a form of hybrid warfare.<sup>248</sup> To avoid attribution and retribution, powerful states avoid conventional confrontation in cases where direct confrontation is deemed unjustified or unlawful. Powerful governments also use NSAs because they are cheaper to employ on a contractual basis than maintaining conventional armed forces.<sup>249</sup> By contrast, the weak parties in a conflict use unorthodox methods to overcome the imbalance in firepower, technology, and military, which might obtain desired military outcomes, that if fought with conventional methods, could turn into a swift defeat at the hands of the powerful.<sup>250</sup>

The elemental characteristics in the morality of asymmetric warfare are that it puts civilian lives in danger and deliberately targets noncombatant and innocent people.<sup>251</sup> The consequentialist school of thought in morality is of the view that asymmetric warfare is justified by its improved efficiency, low costs, better results, and lower casualties.<sup>252</sup> By contrast, and contrary to the widespread assumption that asymmetric warfare can de-escalate situations, the events of 9/11, proved that it creates the opposite effect, by increasing violence and war, which means that the consequentialist argument that asymmetric warfare is more efficient is arguably fallacious.

Another moral problem with asymmetric warfare is that it does not respect the international law of *jus in bello*, especially the principle of distinction, which grants civilians and innocent people immunity from being directly targeted.<sup>253</sup> Apart from international legal obligations, morally speaking, no innocent human being may be directly targeted, even during wars.<sup>254</sup> But asymmetric guerrilla tactics not only put civilian and innocent people lives in danger by using them as human shields,<sup>255</sup> they also directly target them.<sup>256</sup>

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<sup>247</sup> See Nicaragua Case, *supra* note 10, ¶¶ 105–115.

<sup>248</sup> See NATO, *supra* note 13; see also Ashraf, *supra* note 13; see also European Commission, *supra* note 13.

<sup>249</sup> See MCFATE, *supra* note 8, at 124–134.

<sup>250</sup> See RODIN, *supra* note 1, at 154–155.

<sup>251</sup> See *id.* at 156.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> See SHAPCOTT, *supra* note 88, at 170.

<sup>255</sup> See RODIN, *supra* note 1, at 158.

<sup>256</sup> See 9/11 Attack, *supra* note 71; see also, Peshawar Attack, *supra* note 69.

David Rodin argues that, just as in chess, weak parties are justified in using asymmetric warfare in a conflict in order to obtain a more fair contest and equalize their chances of success.<sup>257</sup> Therefore, according to Rodin, weak parties in a conflict are justified in derogating from *jus in bello* principles, in order to remedy the substantial inequality in military strength.<sup>258</sup> Supporters of asymmetric warfare therefore argue that the *jus in bello* rules must be relaxed for the weak, to achieve a level playing field, so that both parties receive an equal chance of success.<sup>259</sup> However, the problem with this kind of effort and argument is that achieving a chess-like level field in practical terms is impossible, because each country's military strengths and weapons technologies differ. Therefore, allowing weak parties to violate humanitarian law, just because they are weak, is morally unreasonable. Rodin also argues that asymmetric warfare tactics—more specifically guerrilla war tactics—are more efficient than conventional warfare techniques for weak parties.<sup>260</sup> Efficiency is not enough to justify derogation from IHL, because derogation needs a moral justification as well. If the goal of using asymmetric warfare is to provide weak fighting groups a fairer chance of success (which is practically impossible), then what about fairness for innocent people? Even if, for the sake of argument, a weak group is wronged or subjected to aggression by a powerful enemy, how can that justify the wrong committed by weak parties against innocent people, who have committed no wrong?

An improvement of the fairness argument to help the weak is the notion of exceptionalism. Fritz Allhoff argues that, because NSAs use guerrilla tactics and terrorism as efficient techniques, military forces or state actors should also be allowed to violate humanitarian or human rights law in order to efficiently fight terrorists.<sup>261</sup> Allhoff uses the language of necessity to justify torture, indefinite detention, violation of due process of law, and assassination, while noting that these processes are strictly prohibited in international law.<sup>262</sup> Confining suspected terrorists for longer periods of time following a specific event is not problematic, and is allowed in grave situations. The problem is evident however when reviewing the disrespect and violation of “the

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<sup>257</sup> See RODIN, *supra* note 1, at 154–159.

<sup>258</sup> *Id.*

<sup>259</sup> See RODIN, *supra* note 1, at 159.

<sup>260</sup> See *id.* at 158–61.

<sup>261</sup> See Allhoff, *supra* note 110, at 203–10.

<sup>262</sup> See *id.* at 203–15.

protocols or the due process of law.”<sup>263</sup> If suspects are not identified properly, and the due process of law is not followed, innocent people are put behind bars for indefinite periods of time and wrongly subjected to assassination and torture.

Furthermore, under asymmetric warfare, PMCs and mercenaries are used for secret operations, intelligence, military operations, espionage, and training, and they are notorious for violations of international law.<sup>264</sup> In addition to the employment of ex-military officers and intelligence members, terrorists are also seen to be employed as mercenaries to do the dirty works and effect the political will of states.<sup>265</sup> *Jus ad bellum* under Article 47 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989 explicitly criminalizes the use of mercenaries,<sup>266</sup> to affirm the monopoly of using legitimate force belongs only to a state.<sup>267</sup> Nevertheless, subcontractors hire mercenaries from the Third World countries because they are cheaper, and the main motivation for hiring mercenaries is for financial benefit.<sup>268</sup> Employing mercenaries is also advantageous because, while the unlawful or unjustified use of force by uniformed military forces of a state may cause retaliatory action by a victim state, or bring discontentment among the general public, the unjustified use of force by proxy mercenaries dressed as civilians is not attributable to a state, which efficiently avoids retribution.<sup>269</sup>

Proponents of the use of mercenaries, according to Walzer and Weber, employ the language of *necessity*, *the lesser evil*, and *lack of military resources and political will* to justify the employment of mercenaries, while conveniently ignoring all the wrongs and consequences attached to mercenaries.<sup>270</sup> For instance, a derogation from ethically approved practices or the permission of roguish behavior is allowed by democracies to achieve certain political objectives that are otherwise inconceivable for the necessary good.<sup>271</sup> The moral problem with the employment of mercenaries is the diffusion of responsibility.

<sup>263</sup> Ajunwa, *supra* note 112.

<sup>264</sup> See Torroja, *supra* note 183, at 67 & 74.

<sup>265</sup> See use and employment of mercenaries and rebels as non-state actor proxies in modern warfare in: Dr. Waseem Ahmad Qureshi, *supra* note 138.

<sup>266</sup> G.A. Res. 44/34, art. 4 (1989) (entered into force Oct. 20, 2001).

<sup>267</sup> See Torroja, *supra* note 183, at 62.

<sup>268</sup> See *id.* at 72–3.

<sup>269</sup> See NATO, *supra* note 13; See also Ashraf, *supra* note 13; see also European Commission, *supra* note 13.

<sup>270</sup> See CARMOLA, *supra* note 104, at 137.

<sup>271</sup> See *id.* at 139.



Many hands are involved in the contracts with mercenaries, which conveniently diffuses the problem of accountability and retribution. Another problem in the use of mercenaries during wartime is the peripheral forces problem, where the right hand does not know what the left hand is doing. Mercenaries can be seen as an example of Walzer's problem of dirty hands,<sup>272</sup> because the very nature of mercenaries can be described as dirty.<sup>273</sup> Therefore, Michael Walzer is of the view that the greatest moral problem with the use of PMCs is that there is no accountability.<sup>274</sup>

Though the morality and means used by mercenaries are criticized by many, the states that use them as agents of their dirty work are equally blameworthy. PMCs or mercenaries can provide security to people in foreign lands, but they cannot provide justice, because they are ethically problematic owing to their social impact, even in instances where they do not violate any laws. Without the possibility of accountability, mercenaries are not merely used to provide security services; instead, they are employed to use unlawful or unjustified force to avoid retribution and attribution. Therefore, there is an urgent need for the adoption of an international convention to regulate the actions of mercenaries, PMCs, and NSAs.<sup>275</sup>

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<sup>272</sup> See Walzer, *Political Action*, *supra* note 218, at 160-80.

<sup>273</sup> See CARMOLA, *supra* note 104, at 137.

<sup>274</sup> See Walzer, *supra* note 215; see also CARMOLA, *supra* note 104, at 136.

<sup>275</sup> See Torroja, *supra* note 183, at 78.