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Transnational Terrorist Organizations and the Use of Force

Daphne Richemond

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TRANSNATIONAL TERRORIST ORGANIZATIONS AND THE USE OF FORCE

*Daphné Richemond**

INTRODUCTION	1001
I. JUS AD BELLUM: THE APPLICABILITY OF ARTICLES 2(4) AND 51 TO TRANSNATIONAL TERRORIST ORGANIZATIONS.....	1003
A. <i>Article 2(4): The General Prohibition Against the Use of Force in International Relations</i>	1004
B. <i>Article 51: Response to an Armed Attack Emanating from a Non-state</i>	1007
II. JUS IN BELLO: THE LEGAL STATUS OF TRANSNATIONAL TERRORIST ORGANIZATIONS UNDER THE LAWS OF WAR.....	1012
A. <i>The Legal Status of Transnational Terrorism Under the Laws of War</i>	1013
1. <i>The Distinction Between International and Internal Armed Conflict</i>	1014
2. <i>The Inadequacy of the Civilian/Combatant Distinction</i>	1017
3. <i>The Concept of Direct Participation in Hostilities</i>	1021
4. <i>Implications of the Lack of Reciprocity on the Applicability of the Conventions</i>	1025
B. <i>Looking for Purpose: Origins of the Distinction Between Civilians and Combatants</i>	1027
C. <i>Morality: Moral Underpinnings of the Laws of War</i>	1031
1. <i>The Moral Underpinnings of the Distinction Between Civilians and Combatants</i>	1031
2. <i>Moral Desirability of Treating Terrorists as Combatants</i>	1033
CONCLUSION	1034

INTRODUCTION

The rules governing states' conduct in times of war have always been the topic of heated discussion during, or in the wake of, major international conflicts. Such was the case, for example, following the increasingly "modern" and destructive wars of the late nineteenth century

+ Ph.D. Candidate, Tel Aviv University; LL.M., Yale Law School; Diploma in Legal Studies, University of Oxford; Maîtrise de Droit, Université Panthéon-Assas (Paris II).

(which were followed by the adoption of the Hague Conventions)¹ and after World War II (which led to the Geneva Conventions).² In the midst of the current “war on terror”—which is characterized by the emergence of non-state entities as key protagonists—calls are heard, yet again, to reconsider the rules governing warfare.

The urge to revisit the laws of war today stems from the realization that the rules currently in place are based on at least three assumptions that may no longer be valid today. The first assumption is that states wage war against states. Ever since Jean-Jacques Rousseau, the belief that war is waged among states has prevailed.³ Although the assumption that states have a monopoly over the use of force seems out of sync with the “war on terror” and other modern conflicts,⁴ it has become so deeply embedded in the international legal system that we have trouble deviating from it.⁵ The second assumption that may no longer be applicable is that

1. The Hague Conventions of 1899 and 1907 are among the first legal instruments governing the conduct of hostilities. Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention of 1907]; Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter Hague Convention of 1899]. They focus, respectively, on the use of such modern weaponry as asphyxiating gases, hollow point bullets and balloons used to launch explosives (weapons then making their way into use across Europe), and on modern naval warfare. The Geneva Protocol to the Hague Convention, signed in 1925, was designed to prohibit “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices.” Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65. Adopted in the aftermath of World War I, the Geneva Protocol was a direct response to the use of mustard gas and other agents in the recent fighting. *Id.*

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

3. Rousseau’s position became almost axiomatic in the centuries following the publication of *The Social Contract* in 1762. See JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* (Ronald Grimsley ed., 1972) (1762); *infra* note 18 and accompanying text.

4. Consider, for example, recent fighting between Hizbullah and Israel, and the Kurdistan Workers Party (PKK) and Turkey. See, e.g., Sebnem Arsu, *3 Die and Scores Are Hurt in Bomb Attacks in Turkey*, N.Y. TIMES, Aug. 29, 2006, at A10; Steven Erlanger, *The Long-Term Battle: Defining ‘Victory’ Before the World*, N.Y. TIMES, Aug. 3, 2006, at A10.

5. Private military companies are another example of the privatization of the use of force. See generally PETER W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2004); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46

civilians and combatants are clearly distinct groups.⁶ Finally, much of international humanitarian law rests on the belief that states act on the basis of reciprocity—a notion that is seriously challenged by the rise of non-state actors.

This Article offers a few (and preliminary) suggestions on how to approach the more fundamental question of the applicability of the laws governing the use of force (before and during war) to non-state actors, in particular to transnational terrorist organizations.⁷ I will suggest that although the above-mentioned assumptions may at times stand in the way of a straightforward application of these laws to transnational terrorist organizations, the principles underlying enactments such as the Geneva Conventions can be helpful in responding to the legal challenges raised by contemporary terrorism.

In considering the applicability of international law to non-state actors, this Article will examine limited areas of both the *jus ad bellum* and the *jus in bello*. With respect to the *jus ad bellum*, Part I suggests how Articles 2(4) and 51 of the United Nations Charter may be applied to transnational terrorist organizations. With respect to the *jus in bello*, Part II focuses on the applicability of the Geneva Conventions (and accompanying Protocols) to conflicts involving non-state actors.

I. JUS AD BELLUM: THE APPLICABILITY OF ARTICLES 2(4) AND 51 TO TRANSNATIONAL TERRORIST ORGANIZATIONS

Articles 2 and 51 of the UN Charter provide for severe limitations on states' recourse to force. While the former enjoins states from using force,⁸ the latter provides for an exception only in cases of self-defense.⁹ The narrow question considered in this Article is whether these limitations on the use of force apply equally to non-states.

B.C. L. REV. 989, 996-97 (2005). As such, these entities pose another challenge to the traditional laws of war and further cast a shadow on the age-old "state vs. state" principle.

6. Private military companies, whose employees behave like soldiers, wear uniforms and carry arms, also illustrate the weakness of the traditional groupings. See Minow, *supra* note 5, at 996-97; see also Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209, 211-12 (2005).

7. For the purposes of this Article, "transnational terrorist organizations" refers to non-state entities that deliberately harm civilians and spread terror among them through the use of indiscriminate warfare, operate beyond the territorial delimitation of a single state, and draw on international resources for financing, recruiting, or other type of support. They must be distinguished from domestic entities that may also resort to such tactics but fall under the criminal jurisdiction of individual states (such as ETA or the IRA).

8. U.N. Charter art. 2, para. 4.

9. *Id.* art. 51.

A. *Article 2(4): The General Prohibition Against the Use of Force in International Relations*

Article 2(4) embodies what might be described as the foundation principle of the Charter—interstate disputes must be solved peacefully:

*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*¹⁰

The wording is remarkably straightforward, and the purpose clear. But beyond the restriction on force, Article 2(4) reveals a historical and strategic worldview that states wage war against other states—that international relations are defined by interstate relationships.

The understanding that force is legitimate only when expressly authorized by the sovereign can be traced back to the time when pirates and corsairs navigated the seas in search of merchant ships belonging to enemy nations (or, in some cases, even their own country of origin). Unlike pirates, corsairs (also called privateers) used to operate on the basis of a commission or letter of marque granted by a sovereign.¹¹ This letter gave them the right to use force against ships with the express and recognized authorization of the sovereign, and was meant to provide the corsairs with immunity against charges of piracy.¹² The letter of marque, in effect, conferred quasi-official status to these private individuals, who were treated as prisoners of war when captured.¹³ Without it, one was a mere bandit or pirate without any protection.¹⁴

In the sixteenth century, Francisco de Vitoria, a Spanish Dominican priest and philosopher, further shaped the contour of the state's sole authority to wage war. In particular, Vitoria set forth the limits on a private individual's authority to make war:

[T]he difference herein between a private person and a State is that a private person is entitled . . . to defend himself and what belongs to him, but has no right to avenge a wrong done to him, nay, not even to recapt [sic] property seized from him if time has been allowed to go by since the seizure. . . . [W]hen the necessity of defense has passed there is an end to the lawfulness of war. . . .

10. *Id.* art. 2, para. 4 (emphasis added).

11. J. Gregory Sidak, *The Quasi War Cases*, 28 HARV. J.L. & PUB. POL'Y 465, 468 (2005).

12. See Patrick O. Gudridge, *Ely, Black, Grotius & Vattel*, 50 U. MIAMI L. REV. 81, 86 (1995).

13. *See id.*

14. It was only in 1856, with the adoption of the Declaration of Paris, that privateering was abolished. *See Declaration Respecting Maritime Law (Declaration of Paris)*, Apr. 16, 1856, reprinted in 2 COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES 1473, 1474 (Francis Deák & Phillip C. Jessup eds., 1939).

But a State is within its rights not only in defending itself, but also in avenging itself and its subjects and in redressing wrongs.¹⁵

The authority to declare offensive or preemptive war—as opposed to defensive war—therefore rests solely with the state:

Such a State, then, or the prince thereof, has authority to declare war, and no one else.¹⁶

In the same spirit, Hugo Grotius established a distinction between public wars, waged by a sovereign, and private wars, waged by private individuals, and thus unlawful.¹⁷ But it is Rousseau who, in the eighteenth century, consecrated in unambiguous terms the principle that war is waged between states, not men:

War is thus not a relationship between men, but a relationship between states, in which private individuals are only enemies accidentally, neither as men nor as citizens, but as soldiers

Each state can only have as enemies other states not men.¹⁸

Since Rousseau, the principle that war is waged among states has prevailed and has continuously been viewed as one of the tenets of traditional international law.¹⁹ Private force, then as now, is cloaked with the suspicion of illegitimacy.²⁰

15. FRANCISCO DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* (Ernest Nys ed., John Pawley Bate trans., 1917) (1532), *reprinted in* 7 *THE CLASSICS OF INTERNATIONAL LAW* 163, 168 (James Brown Scott ed., 1917).

16. *Id.* at 169.

17. 1 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 384 (Richard Tuck ed., Liberty Fund 2005) (1625).

18. ROUSSEAU, *supra* note 3, at 110-11 (translation provided by author).

19. See, e.g., PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 964 (7th ed. 2002); 2 PAUL GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 315 (1954); 2 OPPENHEIM'S *INTERNATIONAL LAW* 203 (H. Lauterpacht ed., 7th ed. 1948) ("To be war, the contention must be *between States*. In the Middle Ages wars between private individuals, so-called private wars were known But such wars have totally disappeared in modern times. A contention may, of course, arise between the armed forces of a State and a body of armed individuals, but this is not war."); CHARLES ROUSSEAU, *LE DROIT DES CONFLITS ARMES* 3 (1983); see also Dan Belz, *Is International Humanitarian Law Lapsing Into Irrelevance in the War on International Terror?*, 7 *THEORETICAL INQUIRIES LAW* 97, 114 (2006) ("The main limitation is that the laws of war were formulated to regulate the conduct of states, and they prove less applicable when one of the belligerent parties is a non-state actor."). The principle resonates beyond the laws of war: the Westphalian system, born in 1648, is also based on the understanding that states are the main, if not only, players on the international arena and have the monopoly on the use of force. See generally Eric Allen Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 *QLR* 23 (2004).

20. In 2002, the UK issued a green paper dealing with the issue of the privatization of the use of force in the hands of private military companies (PMCs). See FOREIGN & COMMONWEALTH OFFICE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION* (2002), <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf>. According to this study, part of the reason why the use of PMCs is so challenging to international law is that "the monopoly on violence remains essential to our notion of a State." *Id.* para. 39.

Returning to Article 2(4), the state-centric worldview of its drafters is unmistakable. The Article is silent on the right of states to use force against transnational terrorist organizations or other non-state threats to international security.²¹ This silence might also be attributed to the fact that, at the time of the adoption of the UN Charter, those types of threats were not commonplace. Prior to the development of modern technology and weaponry, which greatly enhanced the destructive capacity of the individual militant, non-state actors probably caused internal disturbances more than real threats. Bands of armed attackers from neighboring states—unless organized and equipped by a national government—were a local problem, not a strategic threat.²²

Had the drafters known at the time that non-state entities might be as threatening as states, they probably would have condemned recourse to force by and against non-state entities, since the purpose of the laws of war is to protect citizens when force is being used and the purpose of the law of nations is to eliminate force from international relations. It thus seems fair to say that, had the threat been envisaged by the Charter's drafters, the use of force by and against non-state entities would not only have been addressed but also condemned. In other words, in spite of the clarity of its wording, Article 2(4) should be interpreted as encompassing non-state entities as well.

This interpretation is supported by Article 31 of the Vienna Convention on the Law of Treaties of 1969.²³ Article 31 provides that “[a] treaty shall be interpreted in . . . accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*.”²⁴ Even though the “ordinary meaning to be given to the terms”²⁵ of Article 2(4) is unambiguous, the prohibition set forth in this Article should extend to transnational terrorist organizations. This

This is a point often raised in connection with PMCs since they, too, demonstrate the limits of the traditional assumptions. See Thomas K. Adams, *The New Mercenaries and the Privatization of Conflict*, PARAMETERS, Summer 1999, at 103, 105 (“[T]he UN is an organization of states, and states have always jealously guarded their monopoly on the use of force, especially deadly force. This monopoly has emphatically included the right to create and employ military forces.”).

21. U.N. Charter art. 2, para. 4.

22. Nationalist insurgencies are an obvious exception. The Austro-Hungarian empire, for example, was beset by numerous—and continual—nationalist revolts (notably among the Czech, Hungarian, and Balkan populations). Ultimately, however, its dismemberment came at the hands of World War I's Allied Powers. It should also be mentioned that the major nationalist challenges to the Austro-Hungarian empire (as with other empires in the eighteenth and nineteenth century) were internal, not external. See generally ROBERT A. KANN, *A HISTORY OF THE HABSBURG EMPIRE 1526-1918* (1974).

23. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, S. EXEC. DOC. L, 92-1 (1970), 1155 U.N.T.S. 331.

24. *Id.* (emphasis added).

25. *Id.* art. 31.

follows from the declared object and purpose of the United Nations Charter, namely, “to save succeeding generations from the scourge of war,” “to ensure . . . that armed force shall not be used,” and “to maintain international peace and security”²⁶ through “the removal of threats to the peace.”²⁷ The purpose of Article 2(4) being to prohibit all types of recourse of force, it should be interpreted as covering the use of force by and against non-states.

B. Article 51: Response to an Armed Attack Emanating from a Non-state

Article 51 complements Article 2(4) by providing the necessary exception to the prohibition against the use of force:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs *against* a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.²⁸

Article 51 speaks of attacks *against* member states but does not specify the identity of the attacker.²⁹ An interpretation requiring an attack by a state would not, in my view, be warranted—neither by the plain meaning of Article 51, nor in the light of the object and purpose of the UN Charter.

First, adding a condition pertaining to the identity of the attacker would not be warranted by the plain meaning of Article 51. The right of self-defense, as framed by the Article, is not defined as contingent upon an armed attack *by a state*—as the use of the vague wording “if an armed attack occurs” demonstrates. In fact, the language of Article 51 initially incorporated the words armed “attack *by another state*,” but this wording was later dropped.³⁰ Whether or not the drafters dropped the words “by another state” in order to allow self-defense against non-states is beside the point. What matters is that no state objected to the fact that the new language would *not* prohibit self-defense in response to armed attacks by non-states.³¹

26. U.N. Charter pmbl.

27. *Id.* art. 1, para. 1.

28. *Id.* art. 51 (emphasis added).

29. See Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion (July 9, 2004), 43 I.L.M. 1009, 1079 (declaration of Buergenthal, J.); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT’L L. 52, 58 (2005).

30. Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’L L. 62, 70 (2005) (citing Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663, 693, 695-97, 699-700 (2003)).

31. *Id.*

In addition, if Article 2(4) sets forth a general prohibition against the use of force, its corollary, too, should apply across the board. Articles 2(4) and 51 should mirror each other—they should both be interpreted as applying to states and non-states equally. If they do not, Article 51 could be interpreted as giving non-states a blank check to use force without fear of (lawful) retaliation—definitely not the intended purpose of Article 51.

Secondly, and most importantly, a broad reading of Article 51 would sit well with the overall object and purpose of the UN Charter, which was to prevent and condemn all forms of international violence.³² In Resolution 1368, the Security Council recently endorsed a broad interpretation of Article 51, recognized “the inherent right of individual or collective self-defence in accordance with the Charter” in the context of international terrorism, and legitimized the United States’ response to the attacks of September 11, 2001.³³ In a later resolution, the Council went even further by adopting measures to combat international terrorism under Chapter VII of the UN Charter, and confirmed the view that international terrorism constitutes a threat to international peace and security.³⁴ Although these resolutions do not explicitly cite Article 51, they implicitly acknowledge that a state may claim self-defense in response to an armed attack by a terrorist organization. That the United States was entitled to rely on the exception of self-defense when responding to the 9/11 attacks was also the view taken by NATO.³⁵

Notwithstanding, less than three years later, the International Court of Justice (ICJ) took the opposite stance, namely, that an “armed attack” within the meaning of Article 51 can only emanate from a state. In its advisory opinion, *Legal Consequences of Construction of Wall in Occupied Palestinian Territory* (Advisory Opinion), the ICJ declared the following:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one

32. See Emanuel Gross, *Combating Terrorism: Does Self-Defence Include the Security Barrier? The Answer Depends on Who You Ask*, 38 CORNELL INT’L L.J. 569, 576 (2005).

33. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

34. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

35. Press Release, N. Atl. Treaty Org., Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm> (“The commitment to collective self-defence embodied in the Washington Treaty was first entered into in circumstances very different from those that exist now, but it remains no less valid and no less essential today, in a world subject to the scourge of international terrorism.”). For a discussion on NATO’s reliance upon Article 5 of the Washington Treaty, see Sophie Clavier, *Contrasting Perspectives on Preemptive Strike: The United States, France, and the War on Terror*, 58 ME. L. REV. 565, 575 (2006); Murphy, *supra* note 30, at 67; Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1344 (2004) (stating that both the Security Council and NATO recognized the right of self-defense against non-state actors).

State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. . . .

. . . The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.³⁶

Thus, in the middle of the “war on terror,” the ICJ took the position that Article 51 applies only to armed attacks by states.³⁷

The Advisory Opinion’s take on Article 51’s inapplicability to non-state actors challenges the view taken just a few years earlier by the Security Council.³⁸ As mentioned above, it is also unwarranted by the plain meaning of Article 51, which places the emphasis on the extent of the damage caused by the attack (i.e., that the attack rises to the level of an “armed attack”), rather than on the identity of the attacker.³⁹

On a practical level, by ruling out the right of states to rely on self-defense to protect themselves against international terrorism, the ICJ leaves us wondering what tools remain at the disposal of states to respond to force used by such entities. Given the broad language of Article 51

36. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion (July 9, 2004), 43 I.L.M. 1009, 1050 (emphasis added).

37. The Advisory Opinion was not the ICJ’s first opportunity to consider the matter. In its 1986 *Nicaragua v. United States* decision, the court noted that armed attacks by non-state actors could, in principle, trigger a right of self-defense—provided that the non-state conduct could be attributed to a state. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27). For a discussion of the *Nicaragua* case with regard to self-defense and non-states, see Kathleen Renée Cronin-Furman, *The International Court of Justice and the United Nations Council: Rethinking a Complicated Relationship*, 106 COLUM. L. REV. 435, 450 (2006); Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case*, 16 EUR. J. INT’L L. 963, 940-71 (2005). Note that the restrictive reading of self-defense in *Nicaragua* is also reflected in the more recent decision of the *Oil Platforms*. See *Oil Platforms (Iran v. U.S.)* (Nov. 6, 2003), 42 I.L.M. 1334, 1354-57.

38. See Cronin-Furman, *supra* note 37, at 448 (arguing that the Advisory Opinion contradicts the Security Council, and further discussing the problematic implications for the United Nations system); see also *Oil Platforms*, 42 I.L.M. at 1398 (Kooijmans, J., separate opinion) (criticizing the court for bypassing the Security Council, and considering that the Security Council’s novel interpretation was warranted); *id.* at 1385 (Higgins, J., separate opinion); *id.* at 1406 (Buergenthal, J., separate opinion).

39. Iain Scobbie, *Words My Mother Never Taught Me—“In Defense of the International Court,”* 99 AM. J. INT’L L. 76, 80-81 (2005).

and the ever-increasing use of violence on the part of non-states,⁴⁰ it is surprising that the ICJ chose such an interpretation.⁴¹

Why, then, did the ICJ take the view that an “armed attack” in the meaning of Article 51 can only emanate from a state?⁴² It is difficult to answer this question given the succinctness of the ICJ’s argument on this point.⁴³ Did the court worry that extending Article 51 to armed attacks emanating from non-states would open the door to claims of self-defense in a broader range of circumstances (including in cases of internal insurgencies)? Did the court overlook the wider implications of its position?⁴⁴

40. Michla Pomerance, *The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT’L L. 26, 26 (2005).

41. Cronin-Furman, *supra* note 37, at 452 (“[T]he ICJ has applied a definition of self-defense that does not comport with the one under which the international political arena has been functioning. . . . [T]he Court’s view fails to take account of current political realities.”).

42. To venture in the realm of speculation, the solution adopted by the ICJ in the Advisory Opinion might perhaps be traced back to an article written in 2004 by Gilbert Guillaume, judge and former president of the court at the time of the decision. See generally Gilbert Guillaume, *Terrorism and International Law*, 53 INT’L & COMP. L.Q. 537 (2004). In *Terrorism and International Law*, Judge Guillaume gives much weight to “those . . . authors” who consider that an armed attack in the meaning of Article 51 of the Charter “ha[s] to be attributed not only to private individuals liable to criminal prosecution, but further to a State which exercises effective control over those individuals.” *Id.* at 546. After exposing—without expressly rejecting it, as is expected from a member of the court—the argument that self-defense against a non-state actor is justified based on the United States’ reliance on self-defense and the endorsement by NATO, Judge Guillaume notes:

Certain doubts have been expressed, however, as to the validity of this argument.

It has thus been emphasized that it would be dubious to derive an instantaneous custom from one isolated precedent. It has further been observed that this evolution would amount to such a radical change in international law that it would require a clearer practice and a more constant *opinio juris*.

Id. at 546-47. The apparent caution with which these words were written does not prevent the reader from getting the impression that the author seems rather opposed to a broad interpretation of Article 51.

43. Cronin-Furman, *supra* note 37, at 453 (“[T]he Court’s credibility and efficacy in the exercise of advisory opinion jurisdiction depend entirely on whether states view it as correctly interpreting the law. Dissonance with the Security Council—especially in its role as weathervane of state practice—could threaten its credibility.” (footnote omitted)); Pomerance, *supra* note 40, at 36; Scobbie, *supra* note 39, at 80; Tams, *supra* note 37, at 974 (arguing that the telegraphic nature of the court’s statement “weighs negatively on its authority”). The court’s “telegraphic style” is reminiscent of the judicial decisions of the continental legal systems, where even the highest courts’ judgments are very succinct and provide little in terms of legal reasoning. Here, the court—deliberately or not—adopted an approach that resembles more the civil tradition than the common law tradition. It is worth noting given the general tendency of the international legal system to evolve in the direction of the common law tradition.

44. Robert A. Caplen, *Mending the “Fence”: How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense*, 57 FLA. L. REV. 717, 762 (2005) (arguing that the court’s interpretation of

It is hard to believe that the ICJ would not give the issue the attention it deserves.⁴⁵ In fact, ignoring the argument altogether might have been a better solution—and would not have constituted such a blunt refutation of the 2001 Security Council resolutions.⁴⁶ Perhaps the reason is to be found in the rather competitive relationship between the two United Nations bodies.⁴⁷

The ICJ's restrictive interpretation was greeted with criticism by many scholars, most of whom view Article 51 as allowing states to act in self-defense in response to *any* armed attack, regardless of the identity of the attacker.⁴⁸ Some even argue that this interpretation is inconsistent with state practice.⁴⁹ Whether the restrictive interpretation will withstand the

Article 51 “establishes a dangerous precedent in an era of global terrorism”); Cronin-Furman, *supra* note 37, at 452-53.

45. In the *Oil Platforms* case, the ICJ made a point of addressing the issue of self-defense even though the case at hand did not necessarily call for a finding on this point, thus showing how much importance the court gives to the issue. *Oil Platforms (Iran v. U.S.)* (Nov. 6, 2003), 42 I.L.M. 1334, 1354-57; *supra* note 38.

46. See Alexander Orakhelashvili, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction*, 11 J. CONFLICT & SECURITY L. 119, 126 (2006) (“It seems that by this approach of limiting the right to self-defence to the attacks originating from states, the court avoided some elevation of the further issue of whether, provided that there had been an armed attack justifying the action in self-defence, the action such as the construction of the Wall with far-reaching implications on [the] civilian population could meet the requirements of necessity and proportionality . . .”). Israel had relied on the Security Council resolutions in its submission to the court. See Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT’L L. 435, 450-51 (2005).

47. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 318-19 (4th ed. 2005); Cronin-Furman, *supra* note 37, at 436-48, 452-53.

48. *E.g.*, DINSTEIN, *supra* note 47, at 204; Caplen, *supra* note 44, at 757; Clavier, *supra* note 35, at 572; Gross, *supra* note 32, at 570, 575; Murphy, *supra* note 30, at 62 (criticizing the court for holding that self-defense cannot be claimed in response to attacks by non-state actors); Paust, *supra* note 35, at 1340 (“Armed attacks by nonstate, nonnation, non-belligerent, noninsurgent actors like bin Laden and members of al Qaeda can trigger the right of selective and proportionate self-defense under the U.N. Charter against those directly involved in processes of armed attack . . .”); Tams, *supra* note 37, at 973; Wedgwood, *supra* note 29, at 57 (arguing that the Charter’s language does not link the right of self-defense to the particular legal personality of the attacker). By contrast, rare are those who have defended the court’s treatment of Article 51 in the Advisory Opinion. See, *e.g.*, Pieter H.F. Bekker, *The World Court’s Ruling Regarding Israel’s West Bank Barrier and the Primacy of International Law: An Insider’s Perspective*, 38 CORNELL INT’L L.J. 553, 563-64 (2005); Orakhelashvili, *supra* note 46, at 125-26; Scobbie, *supra* note 39, at 76-77.

49. See Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993, 996-97 (2001); see also Murphy, *supra* note 30, at 67, 69 (arguing that state practice “support[s] the permissibility of responding in self-defense to an attack by a non-state actor,” and citing various incidents involving the reliance of the United States, Israel, South Africa, Senegal, Thailand, and Tajikistan on self-defense in justification for forceful measures taken against non-state actors—terrorists or insurgents—operating in foreign states); Tams, *supra* note 37, at 972; DINSTEIN, *supra* note 47, at 184-85 (arguing that the *Caroline* incident of 1837—which served, and continues to

test of time is difficult to predict. Suffice it to say, for the moment, that the United Nations itself is moving away from a restrictive interpretation of Article 51. The Security Council resolutions of 2001, as well as a later United Nations report encouraging the organization to “achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force”⁵⁰ and recent opinions of ICJ judges, are all characteristic of a change toward an interpretation inclusive of non-state actors.⁵¹

II. JUS IN BELLO: THE LEGAL STATUS OF TRANSNATIONAL TERRORIST ORGANIZATIONS UNDER THE LAWS OF WAR

The laws of war today are enshrined, for the most part, in the Geneva Conventions, which were conceived in the wake of World War II in order to establish limitations on the way states wage war and treat each other’s citizens in wartime. A generation later, in the aftermath of the Vietnam War and at the height of the wars-by-proxy of the cold war era, they were supplemented by the adoption of Additional Protocols I and II (the Protocols).⁵²

The laws of war—also referred to as international humanitarian law (IHL)—rest on three key assumptions: that the authority to wage war rests solely with states;⁵³ that combatants and civilians are easily distinguishable; and that states operate on the basis of reciprocity.⁵⁴ Because the Conventions rest on these somewhat outdated assumptions, they fail

serve, as the example epitomizing a lawful exercise of the right of self-defense—related to an attack by non-state actors. Britain argued that it was entitled to act in self-defense against the *Caroline* because the schooner had been used by rebels who were fighting British control over Canada).

50. U.N. High-level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility*, ¶ 159, U.N. Doc. A/59/565 (Dec. 2, 2004).

51. *Armed Activities on Territory of the Congo (Dem. Rep. Congo v. Uganda)* (Dec. 19, 2005), 45 I.L.M. 271, 357-58 (Kooijmans, J., separate opinion); *id.* at 370 (Simma, J., separate opinion).

52. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

53. While the assumption that the authority to wage war rests primarily, if not solely, with states is discussed at length in section 1, this section will focus on the principle of distinction and the assumption that states operate on the basis of reciprocity.

54. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 706 (2004) (“[T]he Hague and Geneva Conventions presuppose a clear distinction between front lines and battlefields, on the one hand, and civilian areas, on the other; and a correspondingly clear distinction between combatants and noncombatants. Once again, this harkens back to an imagined past in which wars were fought by professional soldiers in elaborate uniforms, clashing on the vast, open fields to the sound of bugles and drums.”).

to provide a complete and satisfactory answer to the issues raised by global terror.⁵⁵ In addition, two key principles of international humanitarian law—which derive from the above mentioned assumptions—further complicate the determination of a legal regime for transnational terrorists under IHL. In the face of such inadequacy, this Article will suggest additional analytical tools that may be used to determine where these entities (should) fit within the laws of war.

A. *The Legal Status of Transnational Terrorism Under the Laws of War*

Notwithstanding their limitations, the Geneva Conventions must be the starting point for any inquiry into the legal status of terrorist organizations.⁵⁶ Under the Conventions, the process of classification begins with the determination of the nature of an armed conflict (internal or international),⁵⁷ as distinct consequences follow from the categorization of a conflict.⁵⁸

55. The failure of the Conventions to address non-state entities can be attributed to the reality on the ground at the time of their adoption. However, the same cannot be said about the Protocols, which constitute more contemporary expressions of these laws and were formulated in the midst of Soviet and United States-backed guerilla campaigns. See Avril McDonald, *The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation in Hostilities 1* (Univ. of Tehran & Harvard Univ. Humanitarian Law Research Initiative on the Interplay Between Int'l Humanitarian Law & Int'l Human Rights Law, Working Paper, 2004), available at http://wihl.nl/documents/cms_ihl_680_1_Direct%20Participation%20in%20hostilities.doc (“[While the] assumption that war fighting is the work and privilege of soldiers and that civilians are generally to be considered as protected persons . . . may have reflected the actuality of armed conflict prior to the adoption of the four Geneva Conventions in 1949, it was already becoming divorced from reality by the time of the adoption of the Additional Protocols to the Geneva Conventions in 1977 and today increasingly seems a quaint and archaic notion, out of step with the reality of today’s wars.”). On the archaic character of these principles, see, for example, A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 12 (2d ed. 2004) (proposing to shift the distinction to military objectives versus civilian objects); Brooks, *supra* note 54, at 755-56.

56. When referring to the Conventions, I include the Additional Protocols.

57. Although “armed conflict” is not defined in the Geneva Conventions, the International Criminal Court for the Former Yugoslavia held that there is an armed conflict “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1999).

58. “Combatancy,” for example, which is not defined under the Conventions, is a concept inherent to international armed conflict; it does not appear in Protocol II dealing with internal armed conflict. See Michael Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, in *NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 75, 91-92 David Wippman & Matthew Evangelista eds., 2005) (“[T]he law applicable to non-international armed conflicts does not provide for combatant status, nor does it define combatants or specify a series of obligations inherent in combatant status. . . . This striking silence in the law applicable to non-international

The analysis below demonstrates that conflicts involving transnational terrorist networks do not fall neatly into either the international or internal armed conflict categories, causing further difficulty in the determination of a terrorist's status under IHL. This section will show that, whatever the characterization of a conflict, transnational terrorist organizations—or any militants, for that matter—cannot be considered civilians because of the *type of activities* in which they engage. This argument is supported by a historical study of the logic and purposes underlying the civilian/combatant distinction, and by a morality-based assessment of noncombatant immunity.

1. *The Distinction Between International and Internal Armed Conflict*

International armed conflict is broadly defined in Common Article 2 and in Article 1(4) of Protocol I to include several specifically enumerated types of conflict.⁵⁹ According to the definition, two types of international armed conflict may involve non-state entities: fights against occupation and fights for self-determination.⁶⁰ Conflicts involving transnational terrorist groups may fall in either category, or none at all. For example, only in limited instances do transnational terrorist organizations operate on *occupied* territory—al Qaeda in Iraq⁶¹ is one such example. A larger number of transnational terrorist organizations are involved in struggles for self-determination⁶² (for example, the Kurdistan Workers Party (PKK) and the Popular Front for the Liberation of Palestine (PFLP)). Other transnational terrorist networks do not aspire to self-

armed conflicts means that any effort to describe a 'combatant engaged in a non-international armed conflict' is an oxymoron.”).

59. Protocol I, *supra* note 52, art. 1(4); Geneva Convention III, *supra* note 2, art. 2. Protocol I applies to international armed conflict defined as (i) a conflict between two or more State parties to the treaty; (ii) cases of partial or total occupation of the territory of a party to the treaty (common Article 2); and (iii) “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.” Protocol I, *supra* note 52, art. 1(4). In addition, as per Article 1(3) of Protocol I, the applicability of the Protocol (and thus the qualification of international armed conflict) is extended to all situations referred to in Common Article 2 of the Conventions, thereby considerably broadening the meaning of “international armed conflict” for those states that have ratified Protocol I (to include occupation and wars of national liberation). *Id.* art. 1(3).

60. *See* Protocol I, *supra* note 52, art. 1(4). Because the definition includes wars of national liberation and struggles for self-determination, a number of countries, including the United States, did not ratify the Protocol.

61. This group is also known as al Qaeda Jihad in the Land of the Two Rivers, or Monotheism and Holy War.

62. *See* G.A. Res. 3103, ¶ 3, U.N. GAOR, 28th Sess., U.N. Doc. A/9412 (Dec. 12, 1973) (“[A]rmed conflicts involving the struggle of peoples against colonial and alien domination and racist régimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions . . .”).

determination or fight against occupation specifically; their objective is to undermine or destroy certain governments or States (these tend to include “ideological” terrorist groups such as worldwide al Qaeda but may also include “mixed bags” such as the religious/nationalist/political Hiz-bullah, depending on one’s reading of the organization). In sum, conflicts involving transnational terrorists do not fall neatly into the rather technical and formalistic categories set forth by the Geneva Conventions.⁶³

The definition of internal armed conflict, too, is problematic. Article 1(1) of Protocol II of the Geneva Convention governs non-international armed conflict, defined negatively as an armed conflict (1) not covered by Article I of Protocol I, and (2) “tak[ing] place in the territory of a [state] between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [a state’s] territory as to enable them to carry out sustained and concerted military operations.”⁶⁴

Two provisions considerably restrict the scope of Article 1(1)’s definition of internal armed conflict. First, Article 1(2) provides that the Protocol does not apply to “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature,”⁶⁵

63. For further examples of conflicts considered international armed conflicts, see Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH. U. L. REV. 759 (2007) (arguing that the wars in Afghanistan and Iraq have been international armed conflicts that trigger the application of the customary laws of war); Marco Sassoli, *La “guerre contre le terrorisme,” le droit international humanitaire et le statut de prisonnier de guerre (The “War Against Terror,” International Humanitarian Law and the Status of Prisoner of War)*, 34 ANNUAIRE CANADIEN DE DROIT INTERNATIONAL 211, 215, 225 (2001) (arguing that, unlike the September 11, 2001 attacks, the United States’ response in Afghanistan can be considered international armed conflict); John Cerone, *Status of Detainees in International Armed Conflict, and Their Protection in the Course of Criminal Proceedings*, INSIGHTS (Am. Soc’y of Int’l Law, Wash., D.C.), Jan. 2002, <http://www.asil.org/insights/insigh81.htm> (noting that the author’s analysis “proceed[ed] on the assumption that the law of international armed conflict applied as between the United States and the Taleban and Al-Qaeda” at least as of October 7, 2001); see also Brooks, *supra* note 54, at 759 (arguing that a new law of armed conflict “would have to resort to standards rather than rules.”).

64. Protocol II, *supra* note 52, art. 1(1) (emphasis added). It must be noted that the Statute of the International Criminal Court defines non-international armed conflicts slightly differently, as “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. The ICC’s definition is broader than the Additional Protocol’s insofar as it does not require exercise of control over territory. The ICC’s definition is thus more likely to apply to acts committed by transnational terror networks in internal armed conflicts since they, unlike rebel groups, often do not exercise control over territory. In addition, it provides for situations of conflicts “between such groups” meaning that state participation in the hostilities is not required, unlike in the Protocol’s definition. *Id.*

65. Protocol II, *supra* note 52, art. 1(2).

which often characterize terrorist acts.⁶⁶ Second, as mentioned above, wars of national liberation are considered international armed conflict under Article 1(4) of Protocol I, and are therefore excluded from the scope of Protocol II.⁶⁷ Because these two provisions considerably restrict the applicability of Protocol II, only a small number of conflicts involving transnational terrorists qualify as internal armed conflict.

The result is a somewhat arbitrary regime. Lebanon's Hizbullah, for example, once claimed to fight against Israeli occupation (and still so claims in spite of Israel's withdrawal from Southern Lebanon in 2000), bringing the fighting into the sphere of international armed conflict.⁶⁸ Its objectives in the war with Israel in the summer of 2006 were less clear, and the conflict's proper characterization is uncertain. One would be hard pressed to argue that it was either a war against occupation or a war of liberation; at the same time, it hardly resembled an internal armed conflict. Were the organization/party/militia to fight against other Lebanese factions or the Lebanese government in the future, the conflict would likely be characterized as internal armed conflict. But if Israel were to seize Lebanese territory as part of the conflagration, and Hizbullah responded in defense of itself and the State of Lebanon, the conflict's character would be open to question.

The main difficulty thus lies in predicting when a conflict involving non-state entities will qualify as *internal* armed conflict.⁶⁹ In *Nicaragua v. United States*, the International Court of Justice viewed the crimes committed by the contras in Nicaragua through the prism of *internal* armed conflict.⁷⁰ By contrast, the International Criminal Tribunal for the Former Yugoslavia held that the acts committed by Bosnian Serbs should be judged according to the rules of *international* armed conflict on the ground that Bosnian Serbs were under the control of the Federal Republic of Yugoslavia.⁷¹ As for the U.S. Supreme Court, it held that Common Article 3 applies to the treatment of a Yemeni national, allegedly affiliated with al Qaeda, captured in Afghanistan, thus equating the war in

66. In addition to the untenable internal/international distinction, there is the oft-cited problem of determining when a conflict has risen from the level of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence," see Rome Statute, *supra* note 64, art. 8(2)(f), to an internal armed conflict within the meaning of Protocol II.

67. Protocol I, *supra* note 52, art. 1(4).

68. *Q & A: Leaving Lebanon*, BBC NEWS, May 23, 2000, http://www.news.bbc.co.uk/2/hi/middle_east/636594.stm.

69. See Brooks, *supra* note 54, at 714-15.

70. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 114 (June 27).

71. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 80, 86-87, 91 (July 15, 1999).

Afghanistan with an internal armed conflict⁷² although it has also been viewed at times as an international armed conflict.⁷³

As the examples show, distinctions between internal and international armed conflicts seem rather artificial in practice.⁷⁴ For the limited purposes of this Article, however, the fact that both Protocols prohibit “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population,” suggests that terrorism is contemplated (and outlawed) in both types of armed conflict.⁷⁵

2. *The Inadequacy of the Civilian/Combatant Distinction*

Long before the adoption of the Conventions, the distinction between combatants and noncombatants had already found expressions in legal (and non-legal) instruments. A number of ancient legal codes required that belligerents exercise care not to kill civilians. Although each ancient civilization expressed this requirement slightly differently, the overarching idea remained the same. The Old Testament was one of the first “moral” codes to enjoin fighters to spare women and children.⁷⁶ In 634 AD, the Muslim Arab Army invading Christian Syria was urged not to mutilate or kill a child, man, or woman.⁷⁷ The Chinese civilization, with Sun Tzu, established a distinction between “soldiers” and “people.”⁷⁸ Around 1500 BC, Hinduism prohibited the killing of “one who is naked, . . . one who is disarmed, [or] one who looks on without taking part in the fight.”⁷⁹ The Hellenes knew “that the guilt of war is always confined to a

72. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795-96 (2006) (adopting the “residual” view that whatever is not an international armed conflict should be considered internal armed conflict).

73. See, e.g., Brooks, *supra* note 54, at 713-14.

74. James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT’L REV. RED CROSS 313, 314 (2003) (suggesting to abolish the distinction between internal and international armed conflict).

75. Protocol I, *supra* note 52, art. 51(2); Protocol II, *supra* note 52, art. 13(2). Note that Article 4(2)(d) of Protocol II explicitly prohibits “[a]cts of terrorism.” Protocol II, *supra* note 52, art. 4(2)(d); see also Hans-Peter Gasser, *Acts of Terror, “Terrorism” and International Humanitarian Law*, 84 INT’L REV. RED CROSS 547, 561-62 (2002).

76. Deuteronomy 20:14; see also JEAN PICTET, DEVELOPMENT AND PRINCIPLES IN INTERNATIONAL HUMANITARIAN LAW 8 (1985).

77. Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT’L L. & POL’Y 117, 118 (1986) (citing MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 102 (1955)).

78. See generally SUN TZU, THE ART OF WAR (4th century BC).

79. Laws of Manu ch. VII, arts. 90-93, available at <http://www.sacred-texts.com/hin/manu.htm> (George Bühler trans.) (“When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire. . . . Let him not strike one who (in flight) has climbed on an eminence, nor a eunuch, nor one who joins the palms of his hands (in supplication), nor one who (flees) with flying hair, nor one who sits down, nor one who says ‘I

few persons and that the many are their friends” and were not to assume that “the whole population of a city—men, women, and children—are equally their enemies.”⁸⁰

The principle of distinction began to truly formalize around the fifteenth and sixteenth centuries, in particular with Francisco de Vitoria, who established that innocent people cannot be killed.⁸¹ In the seventeenth century, Hugo Grotius further laid down the rule that women and children ought to be spared in war.⁸² Early in the eighteenth century, the sentiment began to take hold that certain categories of persons are innocent and ought to be protected.⁸³

Jean-Jacques Rousseau was among the first⁸⁴ to provide a modern formulation of the distinction between the soldier who carries his weapon, on one hand, and the “man” who has laid it down, on the other:

Since the purpose of war is to destroy the enemy State, it is legitimate to kill the latter’s defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.⁸⁵

Then, in 1863, came the first truly *legal* expression of the distinction between civilians and combatants—the Lieber Code, a pamphlet drafted by the jurist Francis Lieber at the request of General Henry Wager Halleck, General-in-Chief of the Union Armies during the American Civil War.⁸⁶

am thine’ *Nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight, nor one who is fighting with another (foe). . . . Nor one whose weapons are broken, nor one afflicted (with sorrow), nor one who has been grievously wounded, nor one who is in fear, nor one who has turned to flight; (but in all these cases let him) remember the duty (of honourable warriors).*” (emphasis added). *Manu* is the equivalent of Adam in Hinduism.

80. 1 LEON FRIEDMAN, *THE LAW OF WAR* 5 (1972) (quoting PLATO, *THE REPUBLIC* (360 BC)).

81. VITORIA, *supra* note 15, at 171 (“we may not turn our sword against those who do us no harm, the killing of innocent being forbidden by natural law.”).

82. 3 GROTIUS, *supra* note 17, at 1439-45 (stating that males who do not bear arms also ought to be spared).

83. Christian penitential canons punished the slaughter of a monk or a cleric more severely than that of a layman. 1 FRIEDMAN, *supra* note 80, at 8 (citing the “Penitential of the Venerable Bede” dating from the early eighth century); *see also* ROGERS, *supra* note 55, at 8-9 (“By at least the eighteenth century, the rule had emerged that non-combatants should not be directly attacked.” (citations omitted)).

84. PICTET, *supra* note 76, at 23 (“Rousseau thus gained the signal honour of having stated, clearly and for all time, the fundamental rule of the modern law of war.”).

85. ROUSSEAU, *supra* note 3, at 111 (translation provided by author).

86. Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863, available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> [hereinafter Lieber Code]. Dr. Lieber was an international legal scholar and professor at Columbia University. Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT’L L. &

Lieber wrote that soldiers should distinguish between “the private individual belonging to a hostile country” and “the unarmed citizen,” who “is to be spared in person, property, and honor as much as the exigencies of the war will admit.”⁸⁷ The Lieber Code also emphasized that the “inoffensive individual” cannot be murdered and should be granted protection.⁸⁸ The Code provides:

The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and is still is with uncivilized people, the exception.⁸⁹

In this excerpt, Lieber stresses what he knew was a novel idea—that civilized people ought to protect “inoffensive citizen[s]” in time of war.⁹⁰ For example, the Code provides that noncombatants, “especially the women and children,” may be removed before the start of a bombardment.⁹¹ However, “[s]o soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”⁹² The distinction between permitted and forbidden killing could not have been spelled out more clearly to General Halleck, who had commissioned the Code precisely because he was confused about who could be considered an “ordinary belligerent,” and worried about the consequences of capture for his own men.⁹³ Lieber’s answer was definite: “[A]ll enemies in regular war are divided into two general classes—that is to say, into com-

FOREIGN AFF. 331, 362 n.170 (2003). See generally R.R. Baxter, *The First Modern Codification of the Law of War*, 3 INT’L REV. RED CROSS 171, 177 (1963); Theodor Meron, *Francis Lieber’s Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT’L L. 269 (1998); Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC’Y INT’L L. PROC. 112, 112-14 (2001).

87. Lieber Code, *supra* note 86, art. 22.

88. *Id.* art. 23.

89. *Id.* art. 24.

90. *Id.* art. 25.

91. *Id.* art. 19.

92. *Id.* art. 57.

93. General Halleck’s request referred to the right of rebels “to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses and to destroy property and persons within our lines.” Letter from Henry Wager Halleck, General-in-Chief of Union Armies, to Francis Lieber (Aug. 6, 1862), in RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 2 (1983). The rebels demanded that “such persons be treated as ordinary belligerents, and that when captured,” they be treated as prisoners of war, otherwise the rebels would “retaliate by executing [the] prisoners of war in their possession.” *Id.*

batants and noncombatants, or unarmed citizens of the hostile government.”⁹⁴

By formulating the distinction in such unambiguous terms, the Lieber Code helped build the foundations of today’s laws of war.⁹⁵ It directly influenced a conference convened in St. Petersburg in 1868, the first of a series of international conferences dedicated to the codification of the laws of war.⁹⁶ Six years later, the delegates of fifteen European states met in Brussels at the Russian Czar’s initiative in order to regulate the use of chemical weapons. The resulting Brussels Declaration is a remarkably progressive statement for the time, providing, among other things, for “[w]ho should be recognized as belligerents, combatants and non-combatants”⁹⁷ as well as guidelines for the treatment of prisoners of war and the sick and wounded.⁹⁸ In word and spirit, the Declaration echoes Lieber’s distinction between participants and non-participants in hostilities.

By the last decades of the nineteenth century, the principle of distinction had become embedded in the corpus of the laws of war.⁹⁹ Surprisingly, the Geneva Conventions of 1949 did not deal in depth with the question of the protection of the civilian population.¹⁰⁰ It was only in

94. Lieber Code, *supra* note 86, art. 155; *see also* Meron, *supra* note 86, at 274 (arguing that the distinction between combatants and noncombatants is one of the main themes developed in the code).

95. Printer, *supra* note 86, at 363; *see also* Meron, *supra* note 86, at 279 (noting Lieber’s uncontested influence).

96. *See* Newton, *supra* note 58, at 77-78. The conference adopted the St. Petersburg Declaration. *See* Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29, 1868, *reprinted in* THE LAWS OF ARMED CONFLICTS 91 (Dietrich Schindler & Jiri Toman eds., 4th rev. ed. 2004)).

97. Project of an International Declaration Concerning the Laws and Customs of War art. 9, Aug. 27, 1874, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 96, at 27 [hereinafter Brussels Declaration]. The criteria, set forth in Article 9 of the Declaration, strikingly resemble those later adopted in the Geneva Conventions of 1949. *See* Printer, *supra* note 86, at 363.

98. Brussels Declaration, *supra* note 97, arts. 11, 17. The Oxford Manual reiterated this principle, stating that “[t]he laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy.” Laws of War on Land art. 4, Sept. 9, 1880, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 96, at 29 [hereinafter Oxford Manual]. Protocol I provides the latest expression of the principle cited above: “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.” Protocol I, *supra* note 52, art. 35.

99. Oxford Manual, *supra* note 98, arts. 1, 7 (stating that there must be “a distinction between the individuals who compose the ‘armed force’ of a State and its other ‘ressortissants,’” and that “[i]t is forbidden to maltreat inoffensive populations.”).

100. Given the failure of the Conventions to address civilian immunity, the ICRC adopted the *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War* in 1956 and 1958 (second draft), *see, e.g.*, INT’L COMM. OF THE RED CROSS, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR (1956), later followed by Resolution XXVIII of

1977, with the adoption of Additional Protocol I, that the distinction between civilians and combatants was finally set out in treaty language.¹⁰¹ Since then, it has repeatedly been blessed by international courts.¹⁰²

3. *The Concept of Direct Participation in Hostilities*

The task of shaping a regime for transnational terrorists is made even more difficult by the centrality within the laws of war of the concept of participation in hostilities. A civilian taking part in hostilities loses his civilian immunity under the Protocols, at least for the duration of this participation, is prosecutable for his actions, and is not entitled to prisoner of war status if captured.¹⁰³

Except where a terrorist actually carries out a bombing or shooting attack (in which case there is little doubt that he or she is taking a “direct part” in hostilities),¹⁰⁴ what constitutes direct participation in situations

the 20th International Conference of the Red Cross in Vienna in 1965, *see* Resolution XXVII, Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare, Oct. 1965, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 96, at 195, and General Assembly Resolution 2675 in 1970 entitled “Basic Principles for the Protection of Civilian Population in Armed Conflicts,” *see* G.A. Res. 2675 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Dec. 9, 1970), all of which reaffirmed the principle of distinction.

101. ROGERS, *supra* note 55, at 225. Article 48 reads as follows: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times *distinguish between the civilian population and combatants and between civilian objects and military objectives* and accordingly shall direct their operations only against military objectives.” Protocol I, *supra* note 52, art. 48 (emphasis added). Rogers also notes that the principle of civilian immunity has been endorsed by the jurisprudence of the International Court for the former Yugoslavia in the *Kupreskic*, *Martić*, *Strugar*, and *Krstić* cases. ROGERS, *supra* note 55, at 227-28 (discussing Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶¶ 521-22 (Jan. 14, 2000); Prosecutor v. Martić, Case No. IT-95-11-R61, Rule 61, ¶ 10 (Mar. 8, 1996); Prosecutor v. Strugar, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, ¶ 10 (Nov. 22, 2002); Prosecutor v. Krstić, Case No. IT-98-33, Judgment, ¶ 481 (Aug. 2, 2001)).

102. *See, e.g.*, Legality of Threat or Use of Nuclear Weapons, Advisory Opinion (July 8, 1996), 35 I.L.M. 809, 827 (“The first [cardinal principle constituting the fabric of humanitarian law] is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 45 (Dec. 5, 2003) (“The Trial Chamber recalls that the provision in question explicitly confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities. The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants . . .” (footnote omitted)).

103. Protocol I, *supra* note 52, art. 51(3); Protocol II, *supra* note 52, arts. 4, 13(3).

104. *See, e.g.*, INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 618 (Jean S. Pictet ed., 1987); NILS MELZER, INT’L COMM. OF THE RED CROSS, THIRD

involving terrorists can be far more complex¹⁰⁵: is the individual driving the terrorist to the site of the attack taking a direct part in hostilities? Is the individual who obtained a fake identity card for the perpetrator of the act of terror? Is the terrorist's friend, who knew of the deadly project, and put him in touch with the "right" people to carry it out?

Efforts to clarify what is meant by "direct participation in hostilities" have only highlighted the lack of consensus on the contours of the concept and the difficulty of applying the concept to modern warfare. While, for example, "hostilities" has generally been interpreted as covering preparations and return from attack (i.e., non-forceful actions),¹⁰⁶ the view has recently been taken that an act must involve the use of force in order to qualify as direct participation in hostilities.¹⁰⁷ Similarly, if actual harm was typically viewed as a prerequisite of direct participation, less direct harm is now more commonly being regarded as sufficient.¹⁰⁸ Even international courts are unable to speak with one voice when it comes to direct participation: whereas they have at times interpreted "direct participation" as including members of the armed forces who have laid down

EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT (2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf); Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT'L L. 71, 79-80 (2004); McDonald, *supra* note 55, at 1, 16 ("[I]t is generally and increasingly considered that there are many activities which involve a more indirect role for civilians . . . yet which are considered as direct participation in hostilities"). See generally Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11 (1995).

105. See Brooks, *supra* note 54, at 731 (highlighting borderline cases in which this determination is more difficult to make).

106. According to the *Commentary on the Additional Protocols*, the expression "hostilities" covers "not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon." INT'L COMM. OF THE RED CROSS, *supra* note 104, at 618-19.

107. Jean-François Queguiner, *Direct Participation in Hostilities Under International Humanitarian Law 2* (Program on Humanitarian Policy & Conflict Research at Harvard Univ., Working Paper, 2003), available at <http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf>.

108. See, e.g., HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (Dec. 14, 2006), para. 33, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (holding that acts that by nature are intended to cause damage to civilians constitute direct participation); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees*, 5 CHI. J. INT'L L. 511, 533 (2005) (considering that an action that a perpetrator knew would harm the enemy in a relatively direct and immediate way amounts to direct participation).

their arms;¹⁰⁹ at others they have rallied themselves to a case-by-case basis approach.¹¹⁰

While it is apparent that the concept of taking a direct part in hostilities is too imprecise to be helpful, the definition of combatant provided by the Conventions¹¹¹ offers little more guidance on where transnational terrorists may fit within the laws of war.¹¹² By definition, transnational terrorists do not belong to the regular forces of a state party—they constitute irregular forces fighting either against or alongside regular armed forces, outside the State's full or direct control. As members of militia or volunteer corps, they would fail to qualify as combatants because they are extremely unlikely to have a fixed emblem recognizable at a distance, as required by Article 4(2)(b) of the Third Geneva Convention; they very often carry arms secretly, unlike what is prescribed by Article 4(2)(c); and, one would imagine, they do not tend to act in accordance with the laws and customs of war, as per Article 4(2)(d).¹¹³

To conclude, it would seem that under the laws of war as they are currently formulated, transnational terrorists are neither civilians nor combatants.¹¹⁴ Regarded by some as a kind of hybrid category, they have at

109. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 582 (Sept. 2, 1998).

110. Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Judgment, ¶ 616 (May 7, 1997); HCJ 769/02 *Pub. Comm. Against Torture in Isr.*, para. 34. The case-by-case basis approach, whereby the determination of an individual's status should be made on a case-by-case basis depending on the activity he was engaged in at the time of attack or capture, is increasingly taking hold. See, e.g., Schmitt, *supra* note 108, at 534. The main challenge with such an approach is that it implies that the status determination be made *ex post facto*. It would be preferable—in order to allow for some predictability and legal certainty—if the decision whether a given individual constitutes a legitimate target could be made *ex ante*.

111. A combatant is defined as a person who falls into one of the following categories: a member of the regular armed forces of a belligerent party, or a member of a militia and volunteer corps fulfilling five cumulative conditions: (1) "be commanded by a person responsible for his subordinates," (2) "have a fixed distinctive emblem recognizable at a distance," (3) "carry arms openly," (4) "conduct their operations in accordance with the laws and customs of war," and (5) be linked to a party to the conflict. See Hague Convention of 1907, *supra* note 1, arts. 1-3. This definition is also used by Article 4 to the Third Geneva Convention to define prisoners of war. See Geneva Convention III, *supra* note 2, art. 4.

112. As noted above, the "combatant," strictly speaking, is only a feature of international armed conflict. For the purposes of this section, I ask the theoretical question of whether transnational terrorists—whatever the type of conflict—could be considered combatants within the meaning of the Conventions.

113. See Brooks, *supra* note 54, at 730-31.

114. See Newton, *supra* note 58, at 84 (claiming that al Qaeda members neither meet the criteria for prisoner of war nor qualify for the protections accorded to civilians); Paust, *supra* note 35, at 1342 (arguing that members of al Qaeda cannot be combatants, much less unlawful combatants, or prisoners of war).

times been characterized as unlawful combatants or unlawful belligerents—concepts that are themselves ill-defined.¹¹⁵

Courts forced to deal with non-state participants in hostilities, too, have struggled with their proper characterization under the Conventions. The Supreme Court in *Ex parte Quirin* held that members of the German forces who had penetrated the United States illegally and in civilian clothing should not be treated as prisoners of war because they could not be characterized as combatants under the Conventions.¹¹⁶ Without a clear frame of reference to rely on, the Supreme Court defined them as “unlawful combatants”¹¹⁷ and denied them both combatant and prisoner of war status. An Israeli Military Court adopted the same terminology with respect to members of the PFLP, finding that they do not conduct their operations in accordance with the laws and customs of war and belong to an organization for which no State is responsible.¹¹⁸ The court found that the Geneva Conventions apply “to relations between States and not between a State and bodies which are not States and do not represent States.”¹¹⁹ However, in late 2006 the Supreme Court of Israel moved

115. It is important to acknowledge here the argument that there would be a third category of individuals, referred to as “unlawful” or “illegal” combatants, namely those civilians who take up arms without being authorized to do so by international law. See Printer, *supra* note 86, at 368; see also Interview with Sir David Frost of BBC Television, 39 WEEKLY COMP. PRES. DOC. 1631-32 (Nov. 12, 2003). Others, however, maintain that there are only two categories of individuals. See ANTONIO CASSESE, EXPERT OPINION ON WHETHER ISRAEL’S TARGETED KILLINGS OF PALESTINIAN TERRORISTS IS CONSONANT WITH INTERNATIONAL HUMANITARIAN LAW para. 26 (2003), <http://www.stoptorture.org.il//eng/images/uploaded/publications/64.pdf> (written at the request of the petitioners in *Public Committee Against Torture in Isr. v. Israel*); see also 4 COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 56 (Jean S. Pictet ed., 1958); Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 324-25 (1951); Charles Garraway, *Interoperability and the Atlantic Divide—A Bridge Over Troubled Waters*, 341 ISRAELI Y.B. ON HUM. RTS. 105, 107-17 (2004) (using the “unprivileged belligerent” terminology); Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RES. J. INT’L L. 227, 229 (2002). On the qualification of “unlawful combatants,” consider the United States government’s decision that the Geneva Conventions apply to members of the Taliban forces detained in Guantanamo but not to members of al Qaeda. Jim Garamone, *Geneva Convention Applies to Taliban, not Al Qaeda*, AMERICAN FORCES INFORMATION SERVICE, Feb. 7, 2002, http://www.defenselink.mil/news/Feb2002/n02072002_200202074.html; see also YORAM DINSTEN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 47-50 (2004); Brooks, *supra* note 54, at 731, 734; Newton, *supra* note 58, at 76; Printer, *supra* note 86, at 368.

116. *Ex parte Quirin*, 317 U.S. 1, 35-37, 48 (1942).

117. *Id.* at 31, 35-37.

118. *Military Prosecutor v. Kassem*, 42 I.L.R. 470, 474-76, 483 (Isr. Military Ct. 1969).

119. *Id.* at 475 (emphasis added). The Israel Military Court refers to members of terrorist organizations who operate in civilian clothing as “unlawful combatants.” *Id.* at 476.

away from the “unlawful combatant” qualification and held that terrorists are civilians taking part in hostilities.¹²⁰

The United States Supreme Court, too, was recently offered the opportunity to clarify its position vis-à-vis individuals who do not belong to a national army but have been captured by the United States as part of an armed conflict. In *Hamdi v. Rumsfeld*, the Court dealt with the case of a U.S. citizen who had been detained in Afghanistan and subsequently transferred to U.S. custody.¹²¹ Designated as an “unlawful combatant” by the Department of Defense, a plurality of the Supreme Court held that, as a U.S. citizen, Hamdi was entitled to more—although the Court did not give much guidance as to the extent of rights.¹²² What is notable, however, is that the Court did not explicitly reject the enemy combatant qualification of the Department of Defense.¹²³ Similarly, in *Rumsfeld v. Padilla*, a U.S. citizen who had been detained as a material federal witness whose testimony might be needed in a related investigation, was designated as “enemy combatant” by the President and kept in custody without being charged of any crime.¹²⁴ Once again, the Court carefully avoided addressing the core question of whether Padilla was appropriately characterized as an enemy combatant.¹²⁵

Taken with the formalistic international/internal distinction, the civilian/combatant divide shows the difficulty of holding on to outdated assumptions and highlights the Conventions’ inability to provide for modern terrorism. Other analytical frameworks, however, can be helpful in shaping an accountability regime for transnational terrorists. But before turning to these complementary frameworks, it is instructive to consider yet another challenge terrorism has been said to pose to the traditional laws of war, namely, the assumption that parties to a conflict act with reciprocity.

4. Implications of the Lack of Reciprocity on the Applicability of the Conventions

International humanitarian law builds on the notion that a state is generally willing to grant another state’s citizens certain protections it wishes to be guaranteed to its own: it is assumed that reciprocity will limit the inhumane treatment of enemies. This assumption is borne out, to some extent, by international armed conflicts between states—particularly in

120. See generally H CJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (Dec. 14, 2006), para. 33, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

121. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509-10 (2004) (plurality opinion).

122. *Id.* at 509.

123. *Id.* at 509-11.

124. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-32 (2004).

125. See *id.* at 451.

the context of the treatment of prisoners of war.¹²⁶ But the concept of reciprocity tends to be absent in conflicts involving non-states.¹²⁷

Divergence of opinion on the implications of the lack of reciprocity in conflict involving transnational terror networks reflects the duality of purpose of the Conventions. On one hand, the Conventions can be viewed as establishing a set of interdependent obligations among states.¹²⁸ According to this line of thought, belligerents cease to be bound when a party violates its side of the bargain. Therefore, proponents of this interpretation regard the absence of reciprocity as fatal to the applicability of the Geneva Conventions.¹²⁹

If, on the other hand, the Conventions are viewed as having been designed primarily to protect civilians from the excesses of warfare, the Conventions must continue to apply even when reciprocity has ceased.¹³⁰ For the sake of civilians, the entire system cannot break down when reciprocity is missing, because it would negate the humanitarian character of the Conventions.¹³¹

Had the drafters wished to emphasize the first purpose (states' expectation to be bound by a uniform set of norms), they certainly would have explicitly conditioned the Conventions upon reciprocity. The reality, however, is quite different. While Common Article 2 to the Geneva

126. See Belz, *supra* note 19, at 118. States may also grant prisoner of war status to non-state actors. Consider the United States' treatment of the Vietcong (as compared to its treatment of al Qaeda) and Israel's treatment of Hizbullah (at times). See *id.* at 118.

127. Insurgents, in particular, are not known for their adherence to the norms of humanitarian law. Consider, for example, the treatment of captured government forces by Algeria's Armed Islamic Group (GIA), the Communist Party of Nepal, and the Philippines' Abu Sayyaf. But states, too, are given to inhumane treatment of insurgents, particularly since insurgent movements tend to be more common in undemocratic countries. See RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 161-62 (2002).

128. PROVOST, *supra* note 127, at 172-73.

129. Belz, *supra* note 19, at 115 (noting that "[r]eciprocity is a vital element" in the utilitarian approach to the laws of war); James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEGAL STUD. 41, 43 (2002) ("Laws of war can be effective only to the extent that the parties can enforce them against one another; they must possess both the ability and the willingness to make the treaty work."); see also II GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT* 452 (1968).

130. In support of the view that the purpose of the Conventions is mainly humanitarian, see PROVOST, *supra* note 127, at 137 (noting that the importance of reciprocity is likely to diminish—but not disappear—as the laws of war become more "humanitarian"); Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism"*, 46 VA. J. INT'L L. 165, 185 (2005); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 56 (1994).

131. PROVOST, *supra* note 127, at 171. This also seems to be the view taken by the commentators of the Conventions. See 4 COMMENTARY, *supra* note 114, at 15 (Jean S. Pictet ed., 1958).

Conventions (which deals with international armed conflict) notes that the Conventions should bind state parties in their “mutual relations,” nothing of the sort is mentioned in Common Article 3 with regard to internal armed conflict.¹³² This discrepancy shows that while the drafters were mindful of the absence of “mutuality of obligations,” such absence was not viewed as affecting states’ obligations.¹³³ In fact, Articles 51, 52, 131, and 148 of the Conventions preclude the parties from excusing any grave breach by another party’s non-execution of its own obligations.¹³⁴

That reciprocity is not vital to the Conventions is further illustrated by Article 1 of the Conventions and Protocol I, which provides that the parties should “undertake to respect and ensure respect” of the Conventions and Protocol.¹³⁵ This undertaking “is not based on any consideration in the form of the creation of similar obligations on behalf of other state parties to the Conventions and Protocol.”¹³⁶ In other words, the absence of reciprocity in conflict involving transnational terror groups and individuals does not in and of itself render the Geneva Conventions—or the laws of war generally—wholly inapplicable to such conflicts.

B. Looking for Purpose: Origins of the Distinction Between Civilians and Combatants

Because the Geneva Conventions appear, in many ways, ill-equipped to deal with individuals resorting to transnational terror, one has to look elsewhere for guidance. I suggest looking back at the reasons that initially brought philosophers and legal scholars to the conclusion that civilians should be spared from attacks.

The principle of distinction that, as noted above, had become embedded into the laws of war long before the adoption of the Geneva Conventions, historically rested on the belief that certain persons, because they are presumed innocent, cannot lawfully be targeted.¹³⁷ As early as the

132. See, e.g., Geneva Convention I, *supra* note 2, arts. 2-3; see also Jinks, *supra* note 130, at 191-92.

133. See Jinks, *supra* note 130, at 192. One cannot really speak of “mutual relations” in internal armed conflicts, as the incentives for reciprocal treatment are largely missing in state/non-state conflicts. See Belz, *supra* note 19, at 98 (“[W]ars between states and non-state actors involve no reciprocity, because terrorist organizations lack all motivation to observe humanitarian law, and states are unwilling to do so unilaterally.”). In addition, non-state groups often lack a commitment to the laws of war or, for that matter, to any laws at all—so one can hardly speak of reciprocity in their regard. See *id.* at 114.

134. PROVOST, *supra* note 127, at 132.

135. E.g., Geneva Convention I, *supra* note 2, art. 1.

136. PROVOST, *supra* note 127, at 137.

137. See GEOFFREY BEST, WAR AND LAW SINCE 1945, at 257 (1994) (“[T]here were categories of nominally ‘enemy’ human beings whom it was possible and desirable not to hurt, persons whose degree of non-involvement in the struggle or whose irrelevance to it commonly led to their characterization as ‘innocent.’”).

sixteenth century, it was considered wrong to kill innocents in wartime. Francisco de Vitoria articulated specific limitations on the conduct of war—including the prohibition against targeting “innocents,” such as women and children:

[I]t is never lawful in itself intentionally to kill innocent persons It follows that even in wars against the Turks we may not kill children, who are obviously innocent, nor women, who are to be presumed innocent.¹³⁸

Vitoria did, however, envisage situations in which an innocent person could become guilty and, as a result, a legitimate target.¹³⁹ The difficulty thus lies in determining when innocence is lost and what it means: what makes a person “innocent” or—to use today’s terminology—what defines a noncombatant? According to Vitoria, the act of taking arms makes one a combatant:

[I]f the hostages would otherwise be *combatants*, for instance if they have already borne arms against us, they may be executed; but if they are *non-combatants*, it is clear from what has been said that they may not.¹⁴⁰

The concepts of innocence and harmlessness continue to resonate in the work of contemporary scholars such as Thomas Nagel,¹⁴¹ Brian Orend,¹⁴² Michael Walzer,¹⁴³ and Daniel Zupan.¹⁴⁴ They, like Vitoria, regard certain categories of persons (children are one example) as harmless no matter what they do, while others can be combatants or noncombatants depending on the circumstances. Applied to transnational terrorists, the concepts of innocence, harmlessness, and the bearing of arms would militate in favor of treating them as combatants.

The principle of distinction also finds its origins and purpose in the just war tradition which legitimizes the killing of civilians by the pursuit of a just war.¹⁴⁵ Thus, the determination of who can or cannot be targeted

138. FRANCISCO DE VITORIA, *On the Law of War*, in POLITICAL WRITINGS 293, 314-15 (Anthony Pagden & Jeremy Lawrance eds., 1991) (1557) (emphasis omitted).

139. *See id.* at 135 (presuming women to be innocent “unless, that is, it can be proved of a particular women [sic] that she was implicated in guilt”).

140. *Id.* at 319 (emphasis omitted).

141. THOMAS NAGEL, *War and Massacre*, 1 PHIL. & PUB. AFF. 123, 140 (1972) (arguing that combatants should be distinguished from noncombatants “on the basis of their immediate threat of harmfulness.”).

142. BRIAN OREND, THE MORALITY OF WAR 107, 110, 113 (2006) (repeatedly using words such as “non-threatening,” “innocent,” “non-harming,” “engaged in harming,” “engaged in harm,” “dangerous,” and “serious external threats”).

143. MICHAEL WALZER, JUST AND UNJUST WARS 146 (3d ed. 2000) (defining innocence as “a term of art which means that [innocent people] have done nothing, and are doing nothing, that entails the loss of their rights”).

144. *See generally* DANIEL ZUPAN, WAR, MORALITY AND AUTONOMY (2004).

145. Saint Thomas Aquinas defined the requirements of a just war:

rests primarily upon the “justness” of a belligerent’s cause, rather than upon the higher moral status of certain segments of the population. As George Mavrodes, a lively proponent of the just war theory, writes:

If one’s cause is unjust then one ought not to kill noncombatants. But that is because of the independent moral prohibition against prosecuting such a war at all, and has nothing to do with any special immunity of noncombatants.¹⁴⁶

Conversely, Mavrodes writes:

If one’s cause is just, but the slaying of noncombatants will not advance it to any marked degree, then one ought not to slay them. But this is just the requirement of proportionality, and applies equally and in the same way to combatants. If one’s cause is just and the slaying of combatants would advance it . . . this is the crucial case.¹⁴⁷

This theory is problematic for a number of reasons. First, it gives precedence to the moral value of the war over the moral status of the targeted individual—who should always remain the primary consideration. In addition, if embraced by both sides to a conflict, this rationalization of combatancy status could have dramatic consequences: both sides, believing they are waging a “just” war, could indiscriminately kill civilians in order to achieve their military objectives. Finally, and this is a problem inherent to the just war doctrine, determining who is a legitimate target would require a difficult and subjective judgment of the morality of a war. For example, where a terrorist’s cause is deemed “just,” the killing of civilians would be allowed. For all these reasons, the articulation of combatancy status under the just war theory provides little guidance on transnational terrorists.

In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. . . .

Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault. . . .

Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil. . . . For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet rendered unlawful through a wicked intention.”

2 THOMAS AQUINAS, *SUMMA THEOLOGICA* 1359-60 (Fathers of the English Dominican Province trans., 1947) (n.d.) (pt. II-II, q. 40, art. 1).

146. George I. Mavrodes, *Conventions and the Morality of War*, 4 PHIL. & PUB. AFF. 117, 129 (1975).

147. *Id.*; see also VITORIA, *supra* note 138, at 316 (“Finally, it is never lawful to kill innocent people, even accidentally and unintentionally, except when it advances a just war which cannot be won in any other way.”).

The circumstances in which killing a noncombatant may be justified have been further rationalized under the principle of double effect (also referred to as the Doctrine of Double Effect, or DDE). The principle was first formulated by Saint Thomas Aquinas;¹⁴⁸ later, the French Jesuit Jean Pierre Gury gave the doctrine its more modern formulation.¹⁴⁹ According to the DDE, it is permissible to perform an action that causes serious harm, if such harm is incident to a positive effect.¹⁵⁰ Because the bad action is brought about merely incidentally or unintentionally, it becomes morally acceptable under the doctrine.

As applied to warfare, the DDE holds that it is morally permissible to kill noncombatants so long as four conditions are met: “(1) the agent’s end must be morally acceptable (*honestus*), (2) the cause must be good or at least indifferent, (3) the good effect must be immediate, and (4) there must be a grave reason” and sufficient proportionality.¹⁵¹ The doctrine thus rests on the fundamental distinction between the intended and the unintended outcomes of actions taken in wartime:

When the errant bomb falls by accident on the civilian house, we are indeed doing wrong, but we are doing right, too, if that bomb had meant to fall on the weapons and war machinery of the evil.¹⁵²

Unlike the absolutist theories, which assert that it is *never* permissible to kill noncombatants,¹⁵³ the principle of double effect sets forth a kind of balancing test between the prohibition against attacking noncombatants and military necessity.¹⁵⁴ It points to the intent behind a specific act as the determinant factor in the unlawful killing of noncombatants—which is acceptable only if their deaths are unintended consequences of an act.¹⁵⁵

148. See 2 AQUINAS, *supra* note 145, at 1471-72 (pt. II-II, q. 64, art. 7).

149. Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527, 528 (1980).

150. See *id.* at 528-32.

151. *Id.* at 528.

152. PETER S. TEMES, *THE JUST WAR* 167 (2003); see also Mavrodes, *supra* note 146, at 130-31.

153. For example, G.E.M. Anscombe and Thomas Nagel contend that it is always morally impermissible to kill noncombatants intentionally—even as an unintended side effect. G.E.M. Anscombe, *War and Murder*, in *NUCLEAR WEAPONS: A CATHOLIC RESPONSE* 45, 48-51, 59-60 (G.E.M. Anscombe et al. eds., 1961); Nagel, *supra* note 141, at 133-43.

154. WALZER, *supra* note 143, at 153.

155. Alternatively stated by Michael Walzer, “it is permitted to perform an act likely to have evil consequences (the killing of noncombatants),” provided that these four conditions are fulfilled. *Id.* Walzer actually offers a restatement of the third condition (that the good effect be immediate) to require not only that the good be achieved, but also that “the foreseeable evil be reduced as far as possible.” *Id.* at 155. What is very interesting about Walzer is that he is trying to find a balance between the risks taken by soldiers and the avoidance of harm to civilians: how far must soldiers go in saving civilians’ lives? *Id.* at

Although the DDE constitutes a valuable framework within which the morality of actions taken by individuals can be assessed, it does not offer insight into the legal status of transnational terrorists.

Like the just war theory, the rationale provided by the DDE is more useful in establishing the illegality of an act of terror *ex post facto* than in determining the legal status of an individual *ab initio*. By contrast, the theory of innocence offers workable criteria (innocence, harmlessness, and the bearing of arms) on which to base a status determination. Under the theory of innocence—which is at the very origin of the laws of war—transnational terrorists would be considered combatants. The following section will test the morality of this normative conclusion.

C. Morality: Moral Underpinnings of the Laws of War

Section A of this Article suggested how a historical analysis of the origins of the distinction between combatants and civilians might provide guidance as to where terrorists fall within the traditional framework. Section B concluded that an argument exists for treating terrorists as combatants under the theory of innocence. This section looks into the moral suitability of this normative conclusion by uncovering the moral underpinnings of the distinction between civilians and combatants.

1. The Moral Underpinnings of the Distinction Between Civilians and Combatants

The complicated relationship between war and morality has fascinated philosophers, jurists and political scientists alike—all of whom have tried to identify the moral values that should guide the conduct of war.

Often, the considerations at the root of military decisions—such as a soldier's willingness to shoot—are grounded in morality more than in law.¹⁵⁶ Michael Walzer attempted to rationalize the considerations that might lead a soldier *not* to shoot the enemy—in spite of his/her right (and duty) to do so.¹⁵⁷ To illustrate his point, Walzer relates stories of soldiers who refrained from shooting because the enemy “looked too funny,”¹⁵⁸ was taking a bath,¹⁵⁹ or was running away holding his trousers with both hands.¹⁶⁰ In these situations, Walzer explains, a restoration of humanity

155-56. He concludes that “civilians have a right that ‘due care’ be taken.” *Id.* at 156. It is about striking a balance between military necessity and the protection of civilians, and Walzer is exposing the problem with a unique concern for practical and real-life situations. *Id.* at 151-59.

156. *Id.* at 139.

157. *Id.*

158. *Id.*

159. *Id.* at 140.

160. *Id.*

occurs by virtue of which the enemy becomes a “man” and regains his previously lost immunity.¹⁶¹

In one of the stories, a soldier reflects as one of the enemy combatants he is supposed to target lights up a cigarette:

This cigarette formed an invisible link between us. No sooner did I see its smoke than I wanted a cigarette myself . . . I knew it was my duty to fire. . . I reasoned like this: To lead a hundred, even a thousand, men against another hundred, or thousand, was one thing; but to detach one man from the rest and say to him, as it were: “Don’t move, I’m going to shoot you. I’m going to kill you”—that was different . . . To fight is one thing, but to kill a man is another. And to kill him like that is to murder him.¹⁶²

Although it would not have been against the rules of war as we currently understand them to shoot the enemy soldier while he was smoking a cigarette or because he looked funny, was taking a bath, holding up his pants, reveling in the sun, or smoking a cigarette,¹⁶³ these stories show that moral considerations do sometimes come in the way of the laws of war. It is precisely for this reason that morality should play a greater role in the determination of who is a combatant.¹⁶⁴ The *nature of the activity* performed by an individual is what should make the difference between a combatant and a man (i.e., a civilian) performing an inoffensive task.¹⁶⁵ In sum, a morality-based assessment of combatancy would suggest a disassociation between the status of the individual, on the one hand, and the activity he performs, on the other hand.

The idea of a disassociation between status and activity can be traced back to Rousseau. Although he did not expressly frame his argument in morality, he did, as mentioned above, refer to the “man” behind the soldier: when the soldier has laid down his weapons, he is no longer an enemy but regains his humanity and ceases to be a legitimate target.¹⁶⁶ This understanding of the meaning of combatant is the one later adopted by the Hague Regulations—that members of the armed forces are either combatants or noncombatants depending on their functions.¹⁶⁷ It was also

161. *Id.*

162. *Id.* at 141-42 (third omission in original).

163. *Id.* at 142.

164. On the general importance of moral considerations in the conduct of war, see MICHAEL I. HANDEL, *MASTERS OF WAR* 85 (3d rev. ed. 2002) (citing CARL VON CLAUSEWITZ, *ON WAR* 184, 213 (Michael Howard & Peter Paret trans., 1976)).

165. WALZER, *supra* note 143, at 145 (noting how we “draw a line between those who have lost their rights *because of their warlike activities* and those who have not” (emphasis added)).

166. See *supra* notes 84-85 and accompanying text.

167. Hague Convention of 1899, *supra* note 1, art. 3, provided that the armed forces consisted of both combatants and noncombatants (chaplains and medical personnel, for example). At the time, it was thought that, depending on his function, a soldier could be

recently validated when international tribunals held that civilians include members of the armed forces who have laid down their arms.¹⁶⁸ Applied to transnational terrorists, a morality-based interpretation of the meaning of combatant would acknowledge that one does not have to be a member of a state's armed forces to be a combatant and that it should depend instead on whether one engages in warlike activities—especially in the eyes of the enemy.

2. Moral Desirability of Treating Terrorists as Combatants

Treating transnational terrorists as combatants would place soldiers and terrorists on the same legal (and moral) footing. The second prong of the moral analysis looks into the moral desirability of this outcome.

Soldiers are usually individuals who share similar values, aspirations, ethics, a great deal of patriotism, and, most importantly, a concern for civilians' lives. Terrorists, on the other hand, use indiscriminate tactics to achieve political ends at best, mere terror at worst. They rarely respect the laws of war and do not value their or others' right to life. The question is whether this type of fighter deserves to be put on the same footing and granted the same protections as members of the regular armed forces. By doing so, are terrorists being upgraded from outlaws to respectable players?

Amos Guiora points to this undesirable effect when he argues that one (unintended) result of the war on terror is that it essentially equates al Qaeda to a state and bin Laden to a head of state, thereby giving both enhanced standing.¹⁶⁹ More generally, it has been argued that codifying war has legitimized its conduct.¹⁷⁰ In the same way, shaping a legal regime for terrorists—so it could be argued—would further legitimize unacceptable uses of force.¹⁷¹

The question of whether more (or fewer) norms are necessary is repeatedly encountered in international law. With respect to unilateral

either a combatant (if he was involved in combat) or a noncombatant (if he was not). Today, this definition seems illogical, since members of the armed forces are now, by definition, combatants.

168. See *Prosecutor v. Strugar*, Case No. IT-01-42-T, ¶ 282 (Jan. 31, 2005); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 582 (Sept. 2, 1998).

169. See Amos Guiora, *Where Are Terrorists To Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805 (2007).

170. See Jochnick & Normand, *supra* note 130 (arguing that the codification and formalization of the laws of war had the effect of legitimizing the conduct of war and atrocities, and did nothing for the protection of civilians); ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 294 (2006) (arguing that the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, whereby non-state actors undertake not to use landmines, “endow[s] the non-state actor with some sort of enhanced moral status”).

171. *Cf. id.*

humanitarian intervention, to take only one example, the argument has been made in some quarters that codifying this exceptional recourse to force would only legitimize it.¹⁷² Domestic criminal law may offer some insight into dealing with this question: the fact is that behaviors such as domestic violence or downloading music or software from the Internet (and even more serious offenses such as rape and murder) have not been rendered morally acceptable by their criminalization. There is no reason why the situation should be any different with transnational terrorism.

To conclude, a study of the original logic and purpose of combatancy status and a morality-based assessment of such status show that there is no serious legal or moral impediment to treating transnational terrorists as combatants—and that any trade-off is well worth it.¹⁷³ In particular, the possibility of granting transnational terrorists prisoner of war status would be outweighed by their being legitimate targets.

CONCLUSION

The substantive law applicable to non-state actors' recourse to force is scarce. This Article has provided some preliminary thoughts on how we might be able to shape a regime governing the use of force by transnational terrorist organizations both *ad bellum* and *in bello*.

With regard to the *jus ad bellum*, I have suggested that Articles 2(4) and 51 of the UN Charter be extended to situations of recourse to force by and against terrorist organizations. In particular, states should be allowed to act in self-defense in response to an armed attack by a terrorist organization.

With regard to the *jus in bello*, this Article dealt with the question of what norms of international humanitarian law govern wars fought against non-state entities such as terrorist organizations and what the status of these entities should be. The answer does not lie only in the somewhat inflexible Geneva Conventions and accompanying Protocols. Rather, this Article tried to show, the answer could be drawn from an introspective questioning on the logic and purpose of such laws, combined with a morality-based assessment of combatancy status. These two analytical

172. See Daphné Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 YALE HUM. RTS. & DEV. L.J. 45, 73-74 (2003) (comparing unilateral humanitarian intervention and euthanasia).

173. The question of whether transnational terrorists should be entitled to prisoner of war status goes beyond the scope of this Article. Technically, treating terrorists as combatants implies that terrorists are entitled to prisoner of war status. However, given the outdated assumptions on which the Geneva Conventions rest, the question of whether transnational terrorists are entitled to prisoner of war status would have to be analyzed in light of this Article's two suggested tools, namely, the study of the historical purpose that guided the development of the prisoner of war regime and a morality-based assessment of the suitability of granting such extended protections to transnational terrorists.

guides (purpose and morality) would point toward a treatment of transnational terrorists as combatants under international humanitarian law—both in international and, to the extent possible, internal armed conflicts. This proposal would be faithful to the spirit of the traditional laws of war, morally suitable, and practically expedient.

In sum, to say that international law is unable to deal with the increased recourse to force by non-state entities is not wrong, but it is inaccurate. International law simply happens to have been built on a number of assumptions that are no longer evident today: (1) that states wage war against states; (2) that civilians and combatants are easily distinguishable; and (3) that reciprocity is a given. This Article's main point was to show that no revolutionary concepts or new norms of international law are necessary to deal with transnational terrorism. Instead, it might even be possible to shape a regime that would complete existing norms in their application to transnational terrorist organizations, while remaining truthful to the principles that guided their adoption in the first place, and acknowledging how today's reality has distorted the old assumptions.

