To a fanatical savage, a bomb
dropped out of the sky on the
sacred temple of his omnipotent God
is a sign and a symbol that that
God has withdrawn his favour.[1]

It's War, Jim, But Not As We Know It:
A 'Reality-Check' for International Laws of War?

Elizabeth Chadwick

1. Introduction.

Assuming, for purposes of argument, that war is employed to pursue an economic agenda, as is often the case, the rationale for the use of force can be something as straightforward as access to or control of territory. At this point, the twin motives of war and economics are joined by their helpmeets 'liberation-rhetoric' and 'terrorism'. Justificatory liberation-rhetoric is rarely very far away in economics-grounded warfare, and it is little surprise that the most common type of armed conflict since 1945 has been that for national liberation in one form or another. The impulse for these and other 'mixed' (internal-external) wars in the post-1945 era has been the struggle of peoples for self-determination,[2] the principle of which is found within an U.N. Charter system which (a) prohibits inter-state armed

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[1] E. Colby, 'How to Fight Savage Tribes' [1927] 21 A.J.I.L.279, 287.

[2] U.N. Charter, Articles 1(2), and 55. See, e.g., R. Norton-Taylor and O. Bowcott, 'Deadly cost of the new warfare', The Guardian, 22 October 1999, p. 3; R. Norton-Taylor, 'US sells half the world's arms exports', id., 20 October 2000, p. 19 (80% of the world's weapons are sold by the U.S., Britain, and France).

aggression,[3] and (b) envisages a smooth transition into independence or self-government of former colonial or trust territories.[4]

The purpose of this discussion, however, is to explore the extent to which a greater reliance on terror-war risks the collapse of 'rules' of war. An interesting aspect of modern armed conflicts is the importance increasingly given to the use of terror as a type of weapon, as new technologies permit considerations of efficiency-in-result[5] to outweigh more traditional wartime guidelines of proportionality and military necessity.[6] There is also abundant evidence that any sense of shared values in relation to the conduct of terror-war may be more illusory than real. For example, the internet simultaneously quickens the speed of communications, and lessens the importance of state territory. The changed nature of warfare produced by early twentieth century industrialisation effectively removed much protection for civilian workers, who became those first targeted; the communications revolution similarly places in some doubt the degree to which perceptions of legitimacy regarding 'lawful' means and methods of warfare still exist. The terrorist attacks of 11 September 2001 on the World Trade Center in New York, and on the Pentagon in Washington, D.C., illustrate well the consequences of the mis-use of any new

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[3] U.N. Charter, Article 2(4)

[4] U.N. Charter, Chapters XI, XII, XIII. See, e.g., E.A. Laing, 'The Norm of Self-Determination, 1941 – 1991 [1993] 22 C.W.I.L.J. 209. However, the fact of wars to achieve the self-determination of peoples points rather to the short-sightedness of such an approach.

[5] The desirability of an 'effectiveness test' is put forth by D. Meltzer, Lecturer in Law, University of Kent, in an abstract of a presentation paper delivered Spring 2002, in the possession of the author.

[6] As codified in the four Geneva Conventions of 1949: for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention), for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Second Convention), Relative to the Treatment of Prisoners of War (Third Convention), and Relative to the Protection of Civilian Persons in Time of War (Fourth Convention. See also the 1977 Protocols 1 and 2 additional to the Geneva Conventions of 1949 and relating to the protection of victims of international, and non-international, armed conflicts, respectively, and the residue of Hague law, from the Conventions of 1899 and 1907.

technology, the sheer openness of access to which now must give much cause for concern.[7]

To what extent can a 'war on global terror' be a 'war' at all? The origins of today's laws and/or rules of war lie predominantly in the nineteenth century, in the period somewhat after the occurrence of several Western national liberation wars.[8] The entrepreneurial spirit unleashed via such wars[9] sought then to systematise warfare, in the sense of ensuring in advance certain levels of predictability of action. Steady industrialisation led to increasing calls in the West for the curtailment or restraint of the new economic competition in armaments, and the new ways of waging war such weaponry facilitated.[10] Inter-governmental conferences were held to negotiate the prohibition of certain weapons and to ensure minimal levels of humanitarian treatment during war.[11] While this encouraged the outbreak of war, if only because certain rules of play were now agreed in advance, such negotiated reciprocity did work to the ultimate benefit of industrialised states by helping to ensure the material survival of each. For example, and as noted in the Preamble of the 1868 St. Petersburg Declaration to renounce the use of exploding projectiles under 400 grammes weight,[12] 'the only

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[7] In relation to the attacks of 11 September 2001, see, e.g., U.N.S.C. Resolutions 1377, 1373 and 1368 (2001), 1333 (2000), 1269 and 1267 (1999).

[8] For a discussion of the 'nation in arms' as tribal warfare, see G. Best, War and Society in Revolutionary Europe 1770 – 1870 (Stroud: Sutton Publishing, 1998), pp. 252 – 256.

[9] Cf. the discussion on this point by L.I. and R.H. Rudolph, 'The Modernity of Tradition', in The Developing Nations: What path to modernization? (F. Tachau, ed.) (Chicago: Harper & Row, 1972), pp. 41, 44.

[10] See, e.g., E. Chadwick, 'Neutrality's Last Gasp? The Balkan Wars of 1912 – 1913' in Traditional Neutrality Revisited: Law, Theory, and Case Studies (The Hague: Kluwer Law International, 2002), at p. 59.

[11] Professor Trainin notes that between 1815 and 1910, there were 148 different international meetings to codify the laws and customs of war. Ninety of these meetings were held in the first ten years of the twentieth century. I.P. Trainin, 'Questions of Guerrilla Warfare in the Law of War' [1946] 40 A.J.I.L. 534, 536 n. 2.

[12] Reprinted in A. Roberts and R. Guelff (eds.), Documents on the Laws of War (Oxford: O.U.P., 3d ed. 2002), at p. 54.

legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy'. This is a very limited war objective, indeed.

What is also striking, although perhaps less so, in the early development of rules of war is a heavy emphasis on contractual relations. For example, the participation, or si omnes, clause found in Hague Convention IV of 1907, Article 2, on the Laws and Customs of War on Land, states that '[t]he provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention'.[13] Moreover, the early instruments to codify restraint during armed conflict rest upon two basic premises: proportionality, and military necessity.[14] The protection of civilians and other non-combatants is perhaps the most noticeable fringe benefit of such confines.

In contrast to this original reciprocity in agreement, and the utilitarian approach to limited war aims, evidence is available increasingly of a fracturing of shared values in relation to war and the waging of war. New war aims have left the limited objectives of 1868 far behind in time and spirit. The expectation of a terror element today needs addressing now, for as one commentator has remarked, 'terrorism is total war: the end justifies all means'.[15] While naturally a sense of solidarity exists among the world's states in relation to the 11 September attacks

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[13] For example, Hague Convention IV of 1907 was technically without binding force during World War 1 because signatories Serbia and Montenegro had not ratified it. All the belligerents were bound to Hague Convention II of 1899 until 8 August 1917. G. Werner, 'Les prisonniers de guerre' [1928] 21 Recueil des Cours 5, 96 n. 3, citing the Bulletin International des Societes de la Croix-Rouge [1918], pp. 25 – 26.

[14] J. Strawson, 'International law at ground zero' [2001] 34 S.L.R. 52 (strict adherence to the four Geneva Conventions of 1949 required).

[15] H.-P. Gasser, 'Prohibition of terrorist acts in international humanitarian law' [July-August 1986] 68 (253) I.R.R.C. 200 (offprint, page 5). Of interest, the Vienna-based U.N. Terrorism Prevention Branch, a branch of the U.N. Office for Drug Control and Crime Prevention, researches and investigates such trends in terrorism.

on the U.S., laws of war are effective only when they rest upon reciprocal restraint,[16] and the perpetration of terrorist acts upends this foundation. There is also on-going controversy regarding a satisfactory definition of 'terrorism' or 'terrorist'.[17] It can of course be difficult to distinguish between 'licit', and 'illicit' violence during a war,[18] but any 'shared' sense of human values in relation to the precise way in which a present-day or future war against 'terror' must, or should, be waged, is difficult to discern. The pursuit of power through force is where the danger of the breakdown in consensus in relation to restraint in warfare in general becomes clearest.[19]

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[16] However, see infra notes 56 and 65, and accompanying text.

[17] The formula frequently adopted by the U.N. rests along the lines of the following: 'deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms ...'. See, e.g., U.N.S.C. Resolution 1044 (31 January 1996), S/RES/1044 (1996). However, see also Council of the European Union, Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), in which 'terrorist act' is defined in Article 3, and the perpetrators identified in the Annex; I. Black, 'EU signs deal to freeze assets', The Guardian 29 December 2001, p. 12. Cf. M. Wells, 'World Service will not call US attacks "terrorism"', id., 15 November 2001, p. 9 (a 'subjective term').

[18] H.-P. Gasser, supra note 15, p. 6. See A. Roberts, 'Crisis at Kunduz', The Guardian, 24 November 2001, p. 20 (the war in Afghanistan 'is an internationalised civil war'); R. Willing, K. Johnson, and M. Kasindorf, '"Poor fellow" can expect little sympathy', USA TODAY, 20 December 2001, p. 10A (choices in jurisdiction for the trial of American Taliban member John Walker Lindh).

[19] It was quickly argued that '[t]he events of 11 September have set in motion a significant loosening of the legal constraints on the use of force'. Comment, Byers, 'Terrorism, the Use of Force and International Law After 11 September' [2002] 51 I.C.L.Q. 401, 414. Cf. C.J. Chivers and D. Rohde, 'Afghan Camps Turn Out Holy War Guerrillas and Terrorists', New York Times (online), accessed at http://www.nytimes.com/2002/03/18/international/asia/18DOCU.html ('a co-ordinated mix of firepower is one mark of a capable military force'); E. Hobsbawm, 'War and peace', The Guardian (Saturday Review), 23 February 2002, p. 3 ('the past 100 years changed the nature of war').

Drawn together through religion, ideology, and/or a sense of shared grievance, the 'new enemy' is 'stateless' in the sense of geographical localisation.[20] The emergence of new technologies permits their world-wide link-up.[21] Modern communications systems facilitate the pooling of resources, the exchange of information, and the co-ordination of violence. Such qualitative advantages are in turn easily contrasted with the more traditional approach to waging war reflected in the Geneva instruments. The so-called 'new enemy' is characterised moreover by a readiness to utilise anything to hand, such as a civilian aircraft, to destroy chosen targets and to inflict widespread psychological terror. Not for the 'new enemy' the laws and customs of traditional warfare, the Geneva Conventions, or human rights, nor the confines of state sovereignty, constitutional-democratic regulation, or market rules.[22]

As so-called 'new enemies' emerge,[23] therefore, the international laws of war may prove increasingly inadequate, or inappropriate. Similarly, gaps exist in the piecemeal approach adopted through offence-specific anti-terror codifications.[24] It

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[20] Cf. L. Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' [1991] 16 Yale J.Int'l. L. 177. See G. Galloway, 'Harbingers of death in the Gulf', The Guardian, 20 November 2001, p. 18 (the network of Islamist terrorists are said to 'be ensconced in 50 countries'); 'How bin Laden network spread its tentacles', The Observer, 20 January 2002, p. 5 (al-Queda links from Brighton to Bolton).

[21] See, e.g., P. Eedle, 'Terrorism.com', The Guardian (G2), 17 July 2002, p. 4 (al-Queda website, run by the Centre for Islamic Studies and Research, is part of its 'strategy of total war with America').

[22] See A. Gresh, 'The rules of war', Le Monde Diplomatique/The Guardian Weekly, September 1999, p. 1 (the importance of the relationship between war, law and morality).

[23] M. Bishara, 'L'ere des conflits asymetriques', Le Monde Diplomatique, October 2001, p. 20. Cf. M. Freedman, 'Face it – there is a war on', The Observer, 18 November 2001, p. 9 (dangers to multi-national corporations of asymmetric warfare tactics).

[24] For example, U.N. treaties against international terrorism include: the Tokyo Convention of 1963 on Offences and Certain Other Acts Committed on Board Aircraft, The Hague Convention of 1970 for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention of 1971 for the Suppression of Unlawful Acts

is thus intended in this discussion to explore the dynamics which today underpin the use of war for economic purposes, the rhetoric in support of which encourages a reliance on terror for advantage. The structure of this discussion is as follows. First, a short general background is given to the laws of armed conflict. Emphasis is placed on the economic advantages of reciprocity. A contemporary environment in which terror is employed by globally-based groups to undermine previously-agreed limits is the next step of inquiry. It remains a point of conjecture throughout that the emergence of a new approach to war raises a double-faced, and ghastly spectre: the spread cost of terror-war risks the collapse of restraint in relation both to war, and peacetime civilian governance, alike.[25]

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against the Safety of Civil Aviation and the Montreal Protocol of 1988 for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the New York Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the New York Convention of 1979 against the Taking of Hostages, the Vienna Convention of 1980 on the Physical Protection of Nuclear Material, the Rome Convention of 1988 for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Rome Protocol of the same year for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, the Montreal Convention of 1991 on the Marking of Plastic Explosives for the Purpose of Detection, the New York Convention of 1997 for the Suppression of Terrorist Bombings, and the New York Convention of 1999 for the Suppression of the Financing of Terrorism. The Legal Committee of the U.N.G.A. has been working on a convention for the suppression of acts of nuclear terrorism and a comprehensive convention on the elimination of terrorism.

[25] See, e.g., E. Chadwick, 'Terrorism and the law: Historical contexts, contemporary dilemmas, and the end(s) of democracy' [1996/97]26(4) Crime, Law and Social Change 329; Editorial, 'Eavesdropping plan opens door to government abuses', USA TODAY, 26 December 2001, p. 10A; G. Monbiot, 'The Taliban of the west', The Guardian, 18 December 2001, p. 15; P. Beaumont, 'Straw attacks Mugabe for threats to journalists', The Observer, 25 November 2001, p. 11 (Mugabe engineers a state of emergency); M. Woollacott, 'The world six months on', The Guardian, 11 March 2002, p. 13 (world-wide passage of draconian anti-terrorist laws); B. Ackerman, 'Don't Panic', London Review of Books, 7 February 2002, p. 15; M. Engel, 'US court balks at new spy powers', The Guardian, 24

2. War Laws – A Brief Overview.

Assuming an armed conflict is characterised by open violence and the use of the military, it becomes self-evident that the laws of war are applicable to a systematic campaign of terrorist acts carried out by an ascertainable group of non-state actors.[26] While it is well beyond the scope of the present discussion to outline the subject and detail of the operative laws of armed conflict,[27] the contractual basis of reciprocal rules of restraint is of prime importance to their effectiveness.

A. The Regulation of 'Industrial' War.

The community of nations which formulated the early customs and principles of the modern laws of armed conflict consisted mainly of nineteenth century 'civilised' Western states. One notable exception was Japan, which was nonetheless a state with a samurai, or warrior code, tradition.[28] An overview of the European origins of the laws and customs of western warfare thus must be taken into account, and is succinctly given in the British Military Manual of 1914, as follows:

August 2002, p. 17 (little-known U.S. foreign intelligence surveillance court rejects justice department application to loosen government controls governing searches and wiretaps).

[26] See Article 2 common to the four Geneva Conventions of 1949, and Article 3 of Protocol 1. See also O. Burkeman, 'U.S. considers assassination squads', The Guardian, 13 August 2002, p. 2 (senior U.S. army advisers view missions to assassinate al-Queda leaders as "'preparation of the battlefield" in a war against terrorism that has no boundaries because the September 11 terrorist attacks in effect initiated a world-wide state of armed conflict').

[27] A good source for the texts of the relevant treaties is A. Roberts and R. Guelff (eds.), supra note 12. Additional documents may also be found in D. Schindler and J. Toman (eds.), The Laws of Armed Conflict (Leiden: Sijthoff, 1973).

[28] E.g., Japan acceded to the 1856 Paris Declaration Respecting Maritime Law on 30 October 1886, and fully participated in the Hague Conferences of 1899 and 1907.

> In antiquity and in the earlier part of the Middle Ages no such rules of warfare existed: the practice of warfare was unsparingly cruel and the discretion of the commanders was legally in no way limited. During the latter part of the Middle Ages, however, the influences of Christianity as well as of Chivalry made themselves felt and gradually the practice of warfare became less savage ... .[29]

The development of rules of war resulted from the slow accretion of practical, and ad hoc, agreements made between the participants in particular wars. Dating roughly from the discovery of the New World, attention began to focus gradually on the regulation of war rather than on the reasons for its occurrence, or its 'justness'.[30] In time, this was reflected in a contractual approach to the codification of certain rules, particularly those applicable to particular weapons, or military practices. For example, armaments were mutually prohibited by the St. Petersburg Declaration of 1868, and Hague Declarations 2 and 3 of 1899. Army and/or navy practices were harmonised by the Armed Neutralities of 1780 and 1800, the Paris Declaration Respecting Maritime Law of 1856, and various of the 13 Hague Conventions of 1907.

The respective conferences involved tough negotiation, and what certainly had emerged by the early twentieth century was a new scepticism regarding the 'humanitarian' purpose of the new codifications; allegations of 'sentimentality' permitted only a limited progress.[31] In turn, the approach taken in construing these agreements was strict. Each codification had to be agreed upon by the Powers,[32] could be subsequently denounced, and was applicable only in a war in

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[29] J.E. Edmonds and L. Oppenheim, Land Warfare: An Exposition of the Laws and Usages of War on Land, for the Guidance of Officers of His Majesty's Army (London: H.M.S.O., 1914), Paragraph 1.

[30] See, e.g., E. Castren, The Present Law of War and Neutrality (Helsinki: Academia Scientiarum Fennica, 1954), p. 12; J. von Elbe, 'The Evolution of the Concept of the Just War in International Law' [1939] 33 A.J.I.L. 665.

[31] For a discussion of this point, see I.P. Trainin, supra note 11, pp. 544 – 550.

[32] For example, the British Military Manual of 1914, Paragraph 6, notes: '[i]f one Power had not agreed to a particular article of any convention, that article would

which all engaged belligerent states were parties to it. This contractual approach to the obligations contained in international laws of war was not, therefore, without controversy. For example, neo-Hegelian views in vogue in Germany by the late nineteenth century rather undermined what had been perceived as consensus regarding treaty obligations. As discussed by Carty, the underlying premise was that

> States did not need to seek objective standards of behaviour outside themselves. Self-determination means that the State as a subject determines its conduct from values within itself. The German jurist was convinced that the convergence of theory and practice was complete in modern German history. The theoretical groundwork for the overthrow of a European public law based on treaties came from Ranke and Hegel. Bismarck put it into practice.[33]

What was in issue was the theoretical unsustainability of any analogy between the obligations inherent in municipal law contracts and international treaties. International restrictions such as those applicable during war could not plausibly be characterised as law, the thesis ran. Coupled with a superficial reading of the Clausewitzian view of war as 'a mere continuation of (peace-time) policy by other means',[34] the resulting dialectical theory of war escalation proved encouraging to those who disparaged laws of war as of sentimental value only. Individual state contracts (e.g., treaties) could be based neither on a higher law, nor provide the foundation for any universal law, as such law simply did not exist. States' rights instead were actualisable only through the individual will of each. A state which could not harmonise its individual political will with that of other states must settle

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not be binding on the other belligerents although they might have contracted to accept it'. J.E. Edmonds and L. Oppenheim, supra note _29.

[33] A. Carty, The Decay of International Law? (Manchester: M.U.P., 1986), p. 76 (citations omitted). This passage is taken from a discussion of Kaufmann, Des Wesen des Volkerrechts und die Clausula rebus sic stantibus (1911), and other related works.

[34] C.M. von Clausewitz, On War (1832) (Harmondsworth: Penguin, 1968, A. Rapoport, ed.), Book 1, Ch. 1, Paragraph 24, p. 119.

the matter by war. In this way, war could change the law.[35] The effect of this was to make the obligations contained, e.g., in Hague law and military usage somewhat a matter of self-regulation, and hence, of political self-interest.[36] This viewpoint, coupled with a strict approach to the participation, or si omnes clause found in Hague Convention IV of 1907, effectively undermined even the spirit of reciprocity in restraint – a result fully in evidence during World War 1.

It can also be said that the laws of war have always been, to some extent, controversial in regard to their actual content, as

> The laws of war consist partly of customary rules, which have grown up in practice, and partly of written rules, that is, rules which have been purposely agreed upon by the Powers in international treaties. Side by side with these customary and written laws of war there are in existence, and are still growing, usages concerning warfare. While the laws of war are legally binding, usages are not, and the latter can therefore, for sufficient reasons be disregarded by belligerents. Usages have, however, a tendency gradually to harden into legal rules of warfare, and the greater part of the present laws of war have grown up in that way.[37]

This nineteenth century world in which the laws and customs of warfare evolved was, moreover, characterised by the evolution of laissez-faire capitalism and imperialism. The corresponding monopolisation of the twin forces of production and capital implicated concurrent developments in arms technology as well as efforts to codify humane measures of restraint in the means and methods of warfare; 'the increasing inter-dependence between these states, and the escalation of warfare, created an objective need for written rules common to the whole

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[35] A. Carty, supra note 33, p. 77, citing H. von Treitschke, Politik, Band 2 (1900), pp. 544 - 547. Carty also notes that these views rested on Romantic concepts of identity, and the idea of states existing in a state of nature.

[36] This view is to be contrasted with an equally contemporaneous view of international law as 'the empirically identifiable product of the political will of states'. Book Review, Reisman, 'Lassa Oppenheim's Nine Lives' [1994] Yale J.Int'l.L. 255, 264.

[37] J.E. Edmonds and L. Oppenheim, supra note 29, Paragraph 2.

community'.[38] Reciprocity in restraint was to the ultimate benefit of industrialised states, and it is therefore not entirely surprising that the more long-term interests of state survival among industrialised states should be reflected in the Hague and Geneva instruments. Generally viewed as beginning with the 1868 St. Petersburg Declaration,[39] the codifications negotiated before World War 1 were drafted by those 'civilised' capitalist states which possessed a degree of parity in (industrialised) armaments, and focused largely on specific weapons, or modes of military behaviour.[40]

B. 'Civilised'/'Uncivilised' Enemies.

As for developments after World War 1, the argument was variously made[41] that the war deterrence and collective security provisions contained in the Covenant of the League of Nations[42] had not obviated the rationale for up-dating the laws of war. On the other hand, and as noted by Kunz, two basic arguments were put against this position: '[t]he first group of arguments consists in saying that laws of war are impossible; war can only be abolished, not regulated. Further, they are valueless, for they will be broken'.[43]

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[38] A. Rosas, The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts (Helsinki: Suomalainen tiedeakatemia, 1976), p. 82. See also id., pp. 2, and 28.

[39] Customary practice was reflected in Lieber's Code, which was promulgated by U.S. President Lincoln, and adopted by the U.S. War Department on 24 April 1863, as a written code of land warfare for the Northern, or Union, troops, during the American Civil War.

[40] See, e.g., the list of agreements considered relevant to the military forces in 1914, in J.E. Edmonds and L. Oppenheim, supra note 29, Paragraph 4.

[41] See, e.g., J.L. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision', [1951] 45 A.J.I.L. 37, 38 – 40, 43 – 44, 46 – 49, 51 - 52.

[42] League of Nations Covenant, as amended, [1919] 225 C.T.S., at p. 195. Nineteen out of twenty-six articles in the Covenant were devoted to the new 'peace programme'.

[43] J.L. Kunz, supra note 41, p. 44.

The result was that conferences continued, views were aired, and agreements such as they were[44] remained on a contractual footing. As every law student soon finds out, however, municipal law contracts have a number of formal requirements, one of which is that there must be the requisite intent, or 'meeting of the minds'. Further indicative of the notional contractual analogy in relation to the laws and customs of warfare was an acknowledged non-applicability of these rules to 'uncivilised' peoples. This non-applicability is stated in the 1914 British Military Manual baldly, as follows:

> It must be emphasised that the rules of International Law apply only to warfare between civilised nations, where both parties understand them and are prepared to carry them out. They do not apply in wars with uncivilised states and tribes, where their place is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case.[45]

This statement is expanded upon by Colby, in pertinent part, as follows:

> [I]t is a fact that against uncivilised people who do not know international law and do not observe it, and would take advantage of one who did, there must be something else. The "something else" should not be a relaxation of all bonds of restraint. But it should be a clear understanding that this is a different kind of war, ... Ferocity and ruthlessness are not essential; but it is essential to recognise the different character of the people and their usual

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[44] See, e.g., the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, in force 8 February 1928. Earlier treaties prohibiting the use of gases were the 1899 Hague Declaration, the 1919 Treaty of Versailles, Article 171, and the 1922 Washington Treaty, Article 5. D. Schindler and J. Toman (eds.), supra note 27, p. 109.

[45] [Emphasis added.] J.E. Edmonds and L. Oppenheim, supra note 29, Paragraph 7.

> lack of discrimination between combatants and non-combatants, in their own as well as in enemy personnel.[46]

Colby further remarks that 'the distinction is not one of Christianity and paganism. It is a distinction of warfare',[47] justified on the basis that 'excessive humanitarian ideas should not prevent harshness against those who use harsh methods, for in being over-kind to one's enemies, a commander is simply being unkind to his own people'.[48]

In short, early developments in the laws of war reflect an objective acknowledgement that 'civilised' states needed to observe practical restraints on a reciprocal basis in order to guarantee their mutual survival. As remarked by G. Abi-Saab,

> The si omnes clause reflects a certain search for symmetry in restraints imposed on parties to a conflict, to avoid any tampering with the military balance, i.e., disadvantage as a result of being a party to the instrument. In other words, the instruments were based on the assumption of reciprocity between all the parties to the conflict and applied only as far and as long as this reciprocity was operative.[49]

Those rules which were developed were based in turn on agreements which did not, and could not, provide for every contingency. As stated in the Preamble of Hague Convention IV, of 1907,

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[46] E. Colby, supra note 1, p. 287. Cf. T. Shanker, 'NATO must attack terrorists before they hit, Rumsfeld says', New York Times (online), 6 June 2002, accessed at http//www.nytimes.com/2002/06/06/international/06CND-NATO.html (NATO 'must take the war on terrorism to the terrorists by pre-emptive attacks on shadowy networks or hostile states').

[47] E. Colby, supra note 1, p. 283.

[48] Id., p. 285.

[49] G. Abi-Saab, 'The specificities of humanitarian law', in Studies and essays on international humanitarian law and Red Cross principles (The Hague: Martinus Nijhoff, 1984), pp. 265, 266.

> It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice; ...
>
> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.[50]

However, and as noted earlier, even when some level of consensus was achieved, agreed restraints could be renounced, observed in piecemeal fashion, and applied only if all the participants in a particular war were party to the particular codification.[51] Naturally, the unwritten customs and usages of warfare often provided gap-fillers of substantial benefit to the perceived dictates of restraint and humanity, and transgressions could always be met by reprisals. Thus, reciprocity in the observance of rules of wartime restraint provides the key to their applicability: only in wars in which there was, or could be, a 'meeting of the minds' was there evidence of the form, if not the substance, of applicable rules.

C. A Meeting of Minds?

Accordingly, the issue of reciprocity-in-fact provides further answers in relation to those wars in which rules of war will, or even can, apply. For example, the emergence of a 'different kind of war', such as that in Chechnya, or more recently,

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[50] [Emphasis added.] Also called the 'Martens Clause', this is modified in Protocol 1 of 1977 as follows: 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'. [Emphasis added.]

[51] The general participation clause was modernised in Geneva law in 1949. Article 2(3) common to the four Geneva Conventions of 1949 states in pertinent part: '[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations'.

against the Taliban/al-Queda in Afghanistan, must affect the observance of rules of wartime restraint. In practical terms, a 'different kind of war' meant traditionally that the gloves came off, and there certainly could be no requirement to observe rules of war in relation to 'less advanced' cultures, at least until or unless some level of reciprocity-in-fact was in evidence. However, this basic premise – which naturally goes to the heart of more organic developments in the laws of war – was provided against, if only in a spirit of humanitarianism, by Geneva law in 1864, 1906, 1929, 1949, and in 1977.[52] Specifically, the reciprocity reflected in the participation, or si omnes clause was modernised in Article 2(3) common to the four Geneva Conventions, in order to make humanitarianism universal. As noted in The Commentary (I), reciprocity had now been discarded as a pre-condition:

> Treaties of humanitarian law do not constitute an engagement concluded on a basis of reciprocity, binding each party to the contract only insofar as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties.[53]

It is also of interest that the up-dating of Geneva law in 1977 in relation to Protocol 1 was due in large part to the phenomenon of wars of national liberation, or for the self-determination of peoples.[54] There was perceived a real need in particular to

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[52] See also, inter alia, the lists of prohibited weaponry in so-called Hague law.

[53] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Commentary (J.S. Pictet, ed.) (Geneva: I.C.R.C., 1952), p. 25.

[54] Protocol 1, Article 1(4), applies to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination ...'. At the time, this was viewed conservatively as applying only to South Africa and Israel. See, e.g., J. Gardam, 'Protocol 1 to the Geneva Conventions: A Victim of Short-Sighted Political Considerations?' [1989] 17 Melbourne U.L.R. 107. See also 'Conference on Yugoslavia Arbitration Commission Opinions 1 – 10 on Questions arising from the Dissolution of Yugoslavia [11 January and 4 July 1992], Opinions 2 and 3', reprinted in [1992] 31 I.L.M. 1488, 1497 – 1498, and 1499 – 1500, respectively. Cf. U.N.G.A. Resolution 46/88, 16 December 1991, accessed at

bring such armed conflicts within the 'grave breaches' regime of Geneva law, in order that atrocities could be prosecuted anywhere.[55] As stated in The Commentary on the Additional Protocols,

> Thus reciprocity invoked as an agreement not to fulfil the obligations of humanitarian law is prohibited, but this does not apply to the type of reciprocity which could be termed "positive", by which the Parties mutually encourage each other to go beyond what is laid down by humanitarian law.[56]

Nevertheless, in the present 'war on global terrorism' a fundamental dilemma has been exposed. The international laws of war apply in relation to international armed conflicts engaged in by the High Contracting Parties, or in 'all cases of partial or total occupation of the territory of a High Contracting Party'.[57] While there is general consensus that members of the Taliban captured in Afghanistan do qualify for prisoner-of-war status, there has been great controversy regarding the precise status of captured members of al-Queda,[58] particularly as the al-Queda

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http://www.un.org/documents/ga/res/46/a46r088.htm, which '[r]e-affirms [...] the universal realisation of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination ...'. [Emphasis added.] Protocol 1 also supplements and expands on more traditional rules regarding new weaponry, the proportionality of the use of force, and those persons entitled to use it.

[55] First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146; Protocol 1, Article 85(1).

[56] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Y. Sandoz, C. Swinarski, and B. Zimmerman, eds.) (Geneva: Martinus Nijhoff, 1987, p. 37.

[57] Article 2 common to the four Geneva Conventions of 1949. Protocol 1 makes reference to Common Article 2, and merely adds, in Article 1(4), an additional type of armed conflict – that of the self-determination of peoples. This is however construed conservatively. See supra note 54, and accompanying text.

[58] See, e.g., P. Beaumont, 'American cant', The Observer, 13 January 2002, p. 25 (Bush advisers say captured al-Queda 'are men who fought without uniforms. They bore their weapons in secret for a criminal organisation without a formal legal command. They are criminals, "unlawful combatants", and therefore are not

cult is 'stateless' to the extent it is 'globally' based. The extent to which members of al-Queda can be viewed as lawful combatants to which the protections of Geneva law can attach is thus highly problematic.[59] With consistent U.S. opposition to the recognition of 'terrorists' as lawful combatants,[60] and fears of a new American 'unilateralism' emerging,[61] it is to be doubted to what extent, if any, an organisation such as al-Queda could ever qualify as a group to which the laws of war can attach.[62]

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covered by the protections of the Geneva Conventions'). Contra A. Roberts, supra note 18; Editorial, 'Captive injustice', The Guardian, 29 December 2001, p. 17; A. Gillan, 'Mother loses Guantanamo Bay court challenge', id., 16 March 2002, p. 8. Cf. Protocol 1, Article 43. The U.S. has never ratified Protocol 1.

[59] However, Article 1 common to the four Geneva Conventions of 1949 states: '[t]he High Contracting Parties undertake to respect and to ensure respect for the Convention in all circumstances'.

[60] H.-P. Gasser, 'Agora: the U.S. Decision not to Ratify Protocol 1 to the Geneva Conventions on the Protection of War Victims', [1987] 81 A.J.I.L. 912; Comment, Meron, 'The Time Has Come for the U.S. to Ratify Geneva Protocol 1' [1994] 88 A.J.I.L. 678.

[61] See, e.g., N.A. Lewis, 'U.S. rejects all support for new court on atrocities', New York Times (online), 7 May 2002, accessed at http//www.nytimes.com/2002/05/07/international/07TRIB.html (the Bush administration has formally renounced support for the International Criminal Court, and indicated its intention 'to relieve the U.S. of obligations under the Vienna Convention on the Law of Treaties' of 1969). See also M. Byers, 'The World according to Cheney, Rice and Rumsfeld', [21 February 2002] London Review of Books 14.

[62] In Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.), Merits, I.C.J. Reports 1986, Paragraph. 220, the Court notes that the U.S. was obliged to 'respect and ensure respect' for the Geneva Conventions, which obligation is derived 'from the general principles of humanitarian law to which the Conventions merely give specific expression'. See R. Abi-Saab, 'The "General Principles" of humanitarian law according to the International Court of Justice' [July-August 1987] I.R.R.C. (offprint).

This potential non-applicability in fact, if not strictly speaking in theory, reflects not only a recognition that a 'different kind of war', a 'stateless' war, is existent. What is also reflected is a changed nature of waging a war driven by a technologically sophisticated 'new enemy'.[63] This in turn gives rise to a further issue: that, despite the real progress made throughout the twentieth century in achieving consensus to prohibit aggression, and to outlaw particular modes of attack and weaponry, what may be termed 'the larger objectives of war'[64] have begun once again to outweigh previously-agreed 'mutual survival compacts'. In other words, any shared sense that war must, or should, be waged 'humanely' in all circumstances appears to be crumbling.[65] Such rules as have been developed are no longer 'understood', mutually, by all the participants in these new 'stateless' wars. The question whether or not 'their place is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case',[66] then becomes something of a moot point, particularly as reciprocity is no longer a legal pre-condition. Rather, more and more armed conflicts[67] are termed struggles against 'terrorists', at which point domestic criminal laws are much more likely to be applied.[68]

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[63] M. Bishara, supra note 23. See, e.g., J. Borger and E. MacAskill, 'Black market means bin Laden may already have a "dirty" nuclear bomb', The Guardian, 7 November 2001, p. 3.

[64] E. Colby, supra note 1, p. 284.

[65] For the I.C.R.C.'s view of the words 'in all circumstances', see The Commentary on the Additional Protocols of 8 June 1977, supra note 56, pp. 37 – 38. A bare minimum of humanitarian rules is provided in Article 3 common to the four Geneva Conventions. Strictly speaking, common Article 3 applies 'in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.

[66] J.E. Edmonds and L. Oppenheim, supra note 29, Paragraph 7.

[67] Assuming, once again, that an armed conflict is characterised by open violence and the use of the military.

[68] The danger then becomes differential treatment, and where convicted, different sentencing practice. See M. Engel, supra note 25 (U.S. 'Patriot Act' provides loophole 'to switch information collected under loose rules that govern the war on terrorism to normal criminal cases'). Of interest, see C. Silverman, 'An Appeal to the U.N.: Terrorism Must Come Within the Jurisdiction of an International

3. An Economic Rationale.

Professor Trainin, writing after World War 2 on the reform of international laws of war, notes, first, that such laws undoubtedly exist. Secondly, and more precisely, he adds: 'attention should be directed to a clarification of what that law represents, what constitutes its economic base, and the interests and wishes of what class or group within that class are reflected in that law'.[69] Such an analytical approach, while belonging perhaps to an older era and formed from within a different political context, is of particular interest nonetheless when considering the extent to which international laws of armed conflict can or should be applied in a 'war on global terrorism'. For example, if viewed from the perspective of what the laws of war represent, the answer is relatively clear – the laws of war represent a political attempt to harmonise concepts of proportionality and military necessity in order to ensure certain outcomes, or, at least, guidelines, of predictability in the use of armed force. As stated in the Preamble of Hague Convention IV in the context of the Martens Clause,[70] '... the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgement of military commanders'.

Of course, the laws of war still reflect the period of history in which they were initially drafted. Wars were deemed 'legal' for all intents and purposes at the time. Moreover, as the politics of industrial laissez-faire expansionism facilitated alterations in social structures, the masses began to participate more in public life; pressure increased on governments to pursue measures of 'Christian' restraint. In turn, this produced a two-tiered approach when assessing the economic basis of, or background to, laws of war. First, and in relation to laws agreed by 'civilised' peoples, there was the need for 'contractual' reciprocity, in order to prevent the complete destruction of an industrialised enemy; limited war aims reflected a

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Criminal Court' (1997), accessed at gopher://gopher.igc.apc.org/00/orgs/icc/ngodocs/terrorism_silverman.txt (a comparison of U.S., Iranian, and Cuban criminal justice systems in relation to air piracy and hijackers).

[69] I.P. Trainin, supra note 11, p. 535.

[70] Supra text accompanying note 50.

fundamental concern that complete destruction would prove counter-productive in relation to the gains to be acquired through victory. On the other hand, the position in relation to 'civilised' peoples stands in contrast to the treatment meted-out to 'savages', regarding which the British Military Manual of 1914,[71] as quoted above, was so succinct – the commander in the field was to use his own discretion. In other words, the use of field discretion in relation to the 'uncivilised' reflected a 'different kind of war', and hence, a different economic rationale to the laws of war. Ultimate governmental control and responsibility was required only when dealing against another 'civilised' state.

There is naturally a self-protective function in the distinction just highlighted, as was noted earlier.[72] An army would be foolish to observe non-reciprocated legal niceties, but also exposed is an attitude that subjugated, colonial peoples, for instance, were potentially of less 'worth' than their Christian cousins – a distinction which carries with it both economic and political undertones. The economic worth of the 'uncivilised' was generally to be found in vast stores of raw materials; their political worth, for the most part, was in the material acquisition. This leads, in turn, to a consideration of the final step in Professor Trainin's approach: the class interests and wishes reflected in the law. Put another way, 'in whose interests and for the sake of what it (the war) was fought'.[73] This juxtaposition elicits a certain choice in response. Taking the given economic and political considerations into account, the laws of war, as initially developed, could be said to reflect capitalist and Christian value systems. An alternative point of view can be gleaned from a lingering distinction between 'just' and 'unjust' wars, though the conclusion would no doubt be much the same: the class interests of the industrial-financial elites of the day – capitalist, acquisitive – combined to promote levels of restraint in industrial warfare which proved sufficiently congruent with perspectives of Christian 'justness' for limited political accommodations to be pursued.

Nonetheless, such approaches do not yet address adequately the 'who' and 'why' of the question. If the focus switches instead to a perusal of the 'industrial-financial

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[71] Paragraph 7, supra text accompanying note 45.

[72] Supra note 48.

[73] I.P. Trainin, supra note 11, p. 554.

elites',[74] a different framework emerges which proves relevant to traditional laws of war and more recent developments alike.. As noted by Mandel, albeit in reference to a different era,

> In the final analysis it is the industrial-financial balance of forces, in conjunction with the weight of political-social factors, which decides the outcome of any conflict for a re-division of the world into colonial empires and/or imperialist spheres of influence. Wars are precisely a mechanism for adjusting or adapting the military and political balance of forces to the new industrial-financial one ... .[75]

In other words, the elites which negotiated to limit their war aims inter se were fully mindful of the material and human losses which otherwise could occur to make the acquisition of a post-war asset less valuable. Their 'class interests', for want of a better phrase, ensured that they approached their industrialised wars in an utilitarian fashion.[76] Where atrocities did occur, the 1907 Hague Convention IV on the Laws and Customs of War on Land provided for the payment of compensation in Article 3, as follows:

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Thus, political responsibility was engaged in relation to the 'civilised'. As for the 'uncivilised', this seemed less appropriate, if only in terms of different balance-in-outcome rewards; 'discretion', as noted earlier, was left to field commanders.

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[74] A phrase used by E. Mandel, The Meaning of the Second World War (London: Verso, 1986), p. 48.

[75] Id., citing statistics in H.C. Hillman, 'Comparative Strength of the Great Powers', in Survey of International Affairs 1939 – 1946: the World in March 1939 (Toynbee and Ashton-Gwatkin, eds.) (London, 1952).

[76] Cf., however, Professor Trainin's description of German opposition to the letter and spirit of the Hague Conventions. I.P. Trainin, supra note 11, pp. 546 – 551.

In contrast, the four Geneva Conventions of 1949 instituted a system of 'grave breaches'[77] in which individual responsibility is engaged. While no doubt the product of the atrocities of World War 2, it could also be speculated that new provisions for individual liability produce the perverse effect of better shielding a political elite from ultimate responsibility. Be that as it may, Protocol 1 of 1977 extends the international laws of war even further, to struggles for the self-determination of peoples, as previously stated.[78] Simultaneously, it codifies new rules of restraint in relation to the treatment of enemy personnel and of the means and methods of warfare. These new rules are made applicable in full to what might once have been viewed as 'less civilised' groups, for example non-state actors who resort to less conventional modes of fighting, e.g., terrorist tactics. Specifically, 'within the scope of international humanitarian law, terrorism and terrorist acts are prohibited under all circumstances, unconditionally and without exception'.[79] Nevertheless, doubts remain regarding the overall effectiveness of the new extensions in coverage, as guerrilla fighters are in many cases simply unable to reciprocate humanitarian treatment.[80]

Assuming the 'new enemy' is highly sophisticated as well as 'stateless', what has in fact emerged is a new type of industrial-financial elite. For example, bin Ladin is described in the American press not only as a political force, but also as a member of a new cosmopolitan Islamic elite.[81] 'Stateless' groups such as al-Queda have access to a world-wide resource base and offer 'integrated services', which nonetheless engage state territory, e.g., for training, and in which to bank. Their internal structure, like that of the modern multi-national corporation, is known to be diffuse. Terrorist 'headquarters' can take advantage of 'convenient'

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[77] As defined in Article 50, First Convention, Article 51, Second Convention, Article 130, Third Convention, and Article 147, Fourth Convention. See also Protocol 1, Articles 11(4), and 85.

[78] Article 11(4) of Protocol 1 supplements the definition of grave breaches in the four Geneva Conventions of 1949.

[79] H.-P. Gasser, supra note 15, p. 15.

[80] On this point, see generally E. Chadwick, Self-Determination, Terrorism and the International Humanitarian law of Armed Conflict (The Hague: Martinus Nijhoff Publishers, 1996).

[81] M. Bishara, supra note 23.

jurisdictions, such as the grey zones of 'failed states', which facilitates in practical terms the reduction of any notional 'global accountability' to zero.[82] The visages of actors which can both utilise and threaten the manifold structures of state sovereignty are reflected in short-circuited approaches to 'war'. This must by definition have consequences for the observance and application of laws of war to which, as non-state actors, the 'new enemy' does not appear to subscribe in any case. In short, global terror groups - as a new force acting in the margins of international regulation - may make inevitable 'lawless' wars, i.e., wars in which no international laws can be made effective, even if theoretically applicable.

4. Terrorism As War.

Regardless of whether any putative logic exists behind the recent attacks by al-Queda on New York and Washington, D.C.,[83] the fact remains that global terrorism, as a social, economic, and/or political phenomenon, cannot be defined outside of the triangular structure in which particular acts are perpetrated. In other words, 'terrorism' – whatever its definition – generally takes the form of 'A' attacking 'B' to achieve some objective at or with 'C'. As noted by one commentator, 'terrorist acts are often directed at outsiders who have no direct influence on or connection with what the terrorists seek to achieve'.[84] However, if in fact ideology-driven terrorism constitutes a type of 'total war', it is as a war strategy that the contextualisation of terrorism, as a 'new kind of war', becomes crucial.[85] Put alternatively, if in fact 'terrorism ... raises not old questions about

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[82] Cf. the points made by Sikka in relation to 'global' accountancy firms. P. Sikka, "'Global" dodge lets big firms off hook', The Observer (Business), 28 July 2002, p. 3. Bishara, too, makes a connection between the practice of multi-national firms and new terrorist actors. Bishara, supra note 23.

[83] See, e.g., P. Eedle, supra note 21 (the al-Queda website has 'laid out seven grounds in Islamic law on which it is permissible to kill "sacrosanct infidels" – essentially civilians').

[84] H.-P. Gasser, supra note 15, p. 5.

[85] See, e.g., Book Review, Wessely, 'Weapons of mass hysteria', The Guardian (Saturday Review), 20 October 2001, p. 8 (Soviet war plans to use biological weapons 'as the second stage of a strategic conflict').

new kinds of combat but new questions about all the old forms of war',[86] it is appropriately examined in relation first to rules regarding the means and methods of warfare, and secondly in relation to status.

A. Means and Methods.

In war, the systematic terrorising of whole populations is often a strategy, and tactic, of choice.[87] Of interest, Walzer notes that

> [T]errorism in the strict sense, the random murder of innocent people, emerged as a strategy of revolutionary struggle only in the period after World War 2, that is, only after it had become a feature of conventional war. In both cases, in war and revolution, a kind of warrior honour stood in the way of this development, especially among professional officers and "professional revolutionaries". The increasing use of terror by far left and ultra-nationalist movements represents the breakdown of a political code first worked out in the second half of the nineteenth century and roughly analogous to the laws of war worked out at the same time. Adherence to this code did not prevent revolutionary militants from being called terrorists, but in fact the violence they committed bore little resemblance to contemporary terrorism. It was not random murder but assassination, and it involved the drawing of a line that we will have little difficulty recognising as the political parallel of the line that marks off combatants from non-combatants.[88]

The distinction, which Walzer argues has broken down, lies, as in the laws of war, between justifiable, and unjustifiable uses of violence; in the passage just quoted, targeted assassination is made the point of reference. Similarly, the laws of war

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[86] J.T. Burchael, 'Framing a Moral Response to Terrorism', in International Terrorism: Characteristics, Causes, Controls (C.W. Kegley, Jr., ed.) (University of South Carolina, 1990), p. 213. Burchael adds: 'terrorism, like the many enlargements of savagery before it, is a lineal descendant of traditional warfare. It can best be understood and evaluated by analogy with conventional conflict'. Id.

[87] See M. Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (Basic Books, 2d ed. 1992), pp. 197 - 198.

[88] [Emphasis added.] Id., p. 198.

distinguish between licit and illicit violence. To be licit, the use of force must be kept within humanitarian confines, it must be proportional, and militarily necessary. Civilians must not be made the object of attack. In turn, the predictability which flows from such mutually-agreed restrictions works more to the benefit of an utilitarian approach to economic war aims than does any 'total war' strategy.

Today, the breakdown of much of the traditional consensus in relation to the lawfulness of particular means and methods of warfare is increasingly obvious.[89] This is so for several reasons. The prohibition of inter-state aggression found in the U.N. Charter disregards economic co-ercion.[90] The changed nature of warfare has simultaneously produced increasing levels of 'regulation', in the sense of war and war's effects,[91] yet a blurring of the legal concepts of proportionality and military necessity is also in evidence. [92] The combined result arguably resembles flip-sides of the same coin. When again coupled with the asymmetry apparent in many recent wars - the quantitative differences in equality of arms, and the balance of material resources generally - a shift occurs in focus away from the 'moral' or

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[89] See, e.g., R. Norton-Taylor, 'Taliban hit by bombs used in Vietnam', The Guardian, 7 November 2001, p. 4 (use of 'daisy cutter' bombs).

[90] See, however, the discussion of economic sanctions, and U.N. Charter, Articles 41 and 42 by R. McLaughlin, 'United Nations Mandated Naval Interdiction Operations in the Territorial Sea? [2002] 51 I.C.L.Q. 249.

[91] See, e.g., the 1998 Rome Statute of the International Criminal Court, reprinted in [1998] 37 I.L.M. 999 – 1019, in force 1 July 2002. Jurisdiction extends to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Rome Statute, Article 5(1).

[92] Doctrinal disagreement persists over the legal prioritisation of specialised laws of war, which incorporate parameters of military necessity and proportionality, and the more general prohibition against the use of force except in self-defence, which arguably encourages escalation. For an overview of this debate, see W.H. von Heinegg, 'The Current State of International Prize Law', in International Economic Law and Armed Conflict (H.H.G. Post, ed.) (Dordrecht: Martinus Nijhoff, 1994), pp. 5, 21 – 25.

humanitarian[93] to the economic rationale for the use of particular weaponry. The fact that the 'new enemy' seems willing to employ any weapon to hand to kill any member of the opposing community provides sufficient evidence, then, to conclude that the original framework in which laws of war were developed may no longer be of much relevance in a terror-war.

Rules must (or should) be fit for their purpose. When they are constantly disregarded, they are either implicitly/explicitly discarded, or improved. Rule-strengthening requires agreement. The effectiveness of rules of war requires mutual respect for those rules. While post-war prosecutions for war crimes or grave breaches can and do of course occur,[94] the damage has already been done. In other words, the prosecution of individuals guilty of wartime atrocities, while producing a valuable post-war sense of justice at one level, cannot bring back to life those persons slaughtered, or restore the material resources destroyed by parties to an armed conflict which neither respect nor observe the restraining laws of war.

The contemporary world is well-aware of terrorist tactics employed during armed conflicts due to their exposure in the media. Further, new developments in modern weaponry carry with them heightened and as-yet un-ascertained dangers (e.g., biological and chemical weapons).[95] So far, so similar to the late-nineteenth century inasmuch as technological developments then were also leading to changes in war planning. However, another parallel with that period also becomes apparent. The late-nineteenth and early-twentieth centuries were marked by greater social mobility within industrialised societies, yet the industrial-financial

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[93] See Legality of the Threat or Use of Nuclear Weapons [1996] I.C.J. 66, p. 226. The W.H.O. and the U.N.G.A. requested advisory opinions in 1993 and 1994. In response to the U.N.G.A., the Court held that there was nothing in customary international law or in conventional law which authorises or prohibits the use of such weapons.

[94] As occurred with the International Military Tribunals (Nuremberg and Tokyo) from 1946 to 1948, the U.S. in relation to the Vietnam War, and the establishment of the War Crimes Tribunals for the former territory of Yugoslavia, and Rwanda.

[95] See, e.g., A. Gillan, 'Biological weapons link to al-Queda', The Guardian, 16 October 2001, p. 5 (FBI seeks evidence to connect Iraq with anthrax attacks).

elites still contained members of the former 'warrior classes', as in Germany with its Prussian Junkers and, of course, elsewhere as well.[96] Nevertheless, a shift in power and influence from the 'old' elite to the 'new' is noticeable, and the 'limits of the possible' in relation to rules of war are revealed by the results of co-operation between the two. Disregarding the politics of class envy once again, it is of interest that in Germany in particular a new industrial middle class was able to influence the way in which World War 1 was waged. The product both of new schools of military thought and of new industrial weaponry, the politics of 'total war' became current, stimulated by an uneven synergy between those whose personal histories had no such 'warrior' or chivalric tradition, and those who did. With new weaponry, considerations of efficiency emerged pre-eminent. Treaties were abandoned, concepts of 'necessity' enlarged, and war made more ruthless, or 'total'.

Curiously, various members of the 'new enemy' appear to share many of these 'nouveau riche' characteristics. As noted above, bin Laden is viewed simultaneously as a political figure and as a member of an emerging elite, yet his family's wealth is reputedly self-made. In an insightful essay on post- or non-colonial, 'new', non-western intellectual elites, Benda makes the following observation:

> [N]on-western intelligentsias, insofar as they are politically active - ... - tend to be social revolutionaries whose ideological aims as often as not militate against the status quo. Since, by definition, most of these aims are western-derived and transplanted to a social environment inherently still far more conservative than is true of the more advanced industrial societies of the west, the task of social engineering becomes far more radical ... .[97]

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[96] As noted above, text accompanying note 88, 'revolutionary terrorists' also developed their own 'code of honour', with limited revolutionary aims such as the assassination of individuals, e.g., the assassination of the Austrian Archduke Ferdinand in Sarajevo in 1914, on the 525th anniversary of the battle of Kosovo Polje in 1389, rather than today's stray bombs tossed in shopping districts.

[97] H.J. Benda, 'Elites', in F. Tachau, ed., supra note 9, pp. 105, 107 – 108. Cf. A. Rashid, 'Bloody trail of the world's most wanted terrorist', The Daily Telegraph, 21 December 2000, p. 12.

He adds:

> In opposing the status quo of traditional non-western societies, most of the "new" intellectuals also tend to oppose the status quo of a world which either directly or indirectly can be held responsible for the internal social and political conditions that form the prime target of the intelligentsia's attack. Thus "feudalism" as well as colonialism – rule by entrenched native classes or rule by foreigners – can be blamed on the political, military and economic preponderance of the western world.[98]

The reasons for rules of restraint in warfare are presumably not within the interests of bin Ladin and his ilk, while the efficient achievement of their goals presumably is. However that may be, a competing Islamic presence also entails economic competition for the control of world resources – be they oil, money, or wider geo-strategic assets. A political-economic agenda which is then fore-grounded by the occasional, erratic use of random violence anywhere, in which all available means or methods of attack are employed, simply must be stopped. Such violence wreaks widespread and indiscriminate terror. That is all. Its purpose is irrelevant. Any prior consensus, in the sense of 'lawful' confines for mutually-agreed restraints on the use of force and violence, for purposes of reciprocal survival, cannot be sustained in the face of such a phenomenon. There is no possibility of a fundamental, utilitarian 'meeting of minds', for purposes of practicable humanitarian restraint within a framework of 'modernised' international humanitarian law, and it is at this point that terrorism loses its political context, to be viewed simply as a criminal act. However, once terrorist acts are left to be dealt with under domestic state criminal justice systems, differential prosecutions renew political contexts. If only for this reason alone, international laws of war have needed to define combatant status in increasingly broad terms, as is now discussed.

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[98] H.J. Benda, supra note 97, p. 109. See also T. Garton Ash, 'First, the biography ...', The Guardian, 10 November 2001, p. 16 ('[d]oes bin Laden really want to destroy the west, to purify Islam, to topple the Saudi royal house – or merely to change the Saudi succession?').

B. Status.

The laws of war rest for their effectiveness on delineating status. Preliminarily, there are rungs of differential treatment depending upon combatant status, as in that between officers and the rank-and-file.[99] A disciplined military is essentially non-egalitarian and hierarchical. The rules are clear, and not likely to raise any definitional problems in relation to international law. Secondly, and rather more controversially, there is the distinction between lawful and unlawful combatants. The international laws of war are designed to protect certain people: prisoners of war and non-combatants in the power of the adverse party are cases in point. Captured members of the Taliban in Afghanistan have generally been afforded prisoner of war treatment. Those states[100] which are party to the humanitarian instruments are also obliged to seek out and prosecute alleged offenders against the prohibition of the perpetration of terrorism during an armed conflict.[101] In contrast, captured members of al-Queda have not generally benefited from various protections otherwise afforded by international law. They are instead being dealt with under the domestic laws of capturing forces.

The 'new enemy' exists in interdependent cells,[102] which fact illustrates well the extent to which events have outstripped former boundaries, and the fact that the 'limits of the possible' in the evolution of international laws of war in relation to status may have been surpassed. Put another way, the core distinction in status between combatant and non-combatant arguably has been stretched beyond

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[99] Third Geneva Convention of 1949, Articles 16, 43 - 45.

[100] Between 1969 and its accession in 1989 to the 1949 Geneva Conventions, the Palestinian Liberation Organisation declared its intention to abide by Geneva law on a number of occasions. See Recent Publications, Meyer, 4 Interights Bulletin 13 (1989).

[101] First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146; Protocol 1, Article 85(1). Cf. 'Military Tribunals to Resemble Courts-Martial', New York Times (online), 20 March 2002, accessed at http://nytimes.com/aponline/national/AP-Military-Tribunals.html.

[102] For a broad-ranging discussion of the many faces of 'terrorism', including those which lead to an increase in governmental surveillance, see generally Le Monde Diplomatique, August 1996.

sustainable limits. Professor Trainin describes well the early controversy which ensued during the Hague Conferences of 1899 and 1907 when the time arrived to determine the 'lawfulness' of militia and volunteer corps which participate alongside their state's regular armies. Ultimately, such irregular troops were 'permitted', provided the following conditions were met: they were (1) to be commanded by a person responsible for his subordinates; (2) to have a fixed distinctive emblem recognisable at a distance; (3) to carry arms openly; and (4) to conduct their operations in accordance with the laws and customs of war.[103] Moreover, protection was likewise afforded to participants in a levee en masse, at the first approach of a belligerent, 'if they carry arms openly and if they respect the laws and customs of war'.[104]

The modernisation of the Geneva Conventions in 1949 expanded on this initial list,[105] by including (1) members of regular armed forces belonging to a party to the conflict not recognised by the detaining power, (2) authorised camp followers, and (3) the crew of the merchant marine and civil aircraft. There is also provision made for equivalent prisoner of war treatment. Protocol 1, Article 43, however, takes a different approach – and by so doing fully exhibits an appreciation of new forms of warfare:

> 1. The armed forces of a Party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
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> 2. Members of the armed forces of a Party to a conflict (..) are combatants, that is to say, they have the right to participate directly in hostilities.

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[103] Regulations annexed to Hague Convention IV of 1907, Article 1.

[104] Regulations annexed to Hague Convention IV of 1907, Article 2.

[105] First Convention, Article 13; Second Convention, Article 13; Third Convention, Article 4A.

> 3. When a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Protocol 1, Article 44(1), adds that 'all combatants are obliged to comply with the rules of international law applicable in armed conflict'.[106] Article 44(3) requires combatants merely

> [T]o distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Clearly, Protocol 1 expands on the horizontal applicability of laws of war, and an attempt is made to restrain as many active participants in international armed conflicts as is possible.[107] This constitutes further recognition that laws of war in relation to status delineations are essentially a function of military necessity rather than of sentiment.

Such a premise sits nonetheless within an assumption that wars occur in order to achieve limited, or at least predictable, objectives. Once such objectives are secured, the logic goes, a war ends. Total destruction is not typically what is or should be sought in war, particularly in the sense of intentional destruction so complete as to reflect an utter disregard of post-war consequences. In contrast, however, stands 'total war', which of course is not new to the twentieth century. The prime characteristics of 'total war' are war aims which are more or less

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[106] [Emphasis added.]

[107] Note, however, the continuing refusal of some states, most notably the U.S., to ratify Protocol 1.

unlimited, in the sense of 'the possibly total destruction of the enemy's economy, greater and greater devastation'.[108] As noted by Kunz, '[t]otal war is the result of the combination of technological progress in arms with a changed manner of waging war, of the combination of unlimited use of highly destructive weapons for unlimited war aims'.[109] In turn, these elements are in fact reflected in the broad approach taken in Protocol 1 to combatant status, and the attempt is made once again to encourage humanitarian restraint.

The problem remains the relevance of status distinctions in relation to a 'total war', as

> The new thing is the unlimited war aims ... . Such type of total war makes it necessary on all sides to indoctrinate each belligerent nation with a deadly hatred of the enemy, to make the enemy infamous down to the roots of his national, historical and cultural character and history. Total war must be fought in ideological terms; it is no hazard that the word "crusade" is again fashionable; ... world-wide wars of annihilation, where nothing but unconditional surrender, total conquest, economic ruin, permanent crippling of the enemy will do. ... . And this reversion to barbarism naturally will make itself felt, too, in times of so-called peace ... .[110]

This point is as crucial today as it was at the time of writing. Whether or not a 'war on global terror' constitutes a type of 'crusade', it certainly can be argued that changes in the nature of warfare have made the distinction-in-application between 'civilised' and 'savage' states or groups once again relevant. Assuming for present purposes that this is so, the effective application of laws of war to 'barbaric' conflicts is placed increasingly in doubt, if only because to do so would necessitate multiplying political fictions. Colby, once again, takes a realistic approach:

> When combatants and non-combatants are practically identical among a people, and savage or semi-savage peoples take advantage of this identity to

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[108] J.L. Kunz, supra note 41, p. 41

[109] Id., p. 40, citing B.H. Liddell Hart, The Revolution in Warfare (New Haven, 1947).

[110] Id., pp. 41 – 422. See also I.P. Trainin, supra note 11, pp. 549 - 550

> effect ruses, surprises, and massacres on the "regular" enemies, ... the mind must approach differently all matters of strategy and tactics, and, necessarily also, matters of rules of war.[111]

Combine this point with issues raised earlier about the effects of societal change on the uses to which new technology is put, factor-in the competing (economic) interests of those who pursue a 'new kind of war', and a re-focused level of clarity occurs. The lingering spectre of new theories of war necessity which characterised German aggression throughout the first half of the twentieth century were as much the product of societal change as they were of a desire to test new war inventions and theories.[112] Adolf Hitler, who Craig characterises as 'a force without a real historical past',[113] was notorious also for 'tremendous resources of patience',[114] 'his ability to attract the masses and win their allegiance',[115] his abilities in the field of visual propaganda,[116] and his 'unconditionality, his utter ruthlessness in action'.[117] More tellingly, perhaps, Hitler understood the power of violence and terror: 'in the early days of the party he became convinced that a bloody affray in the streets was a better advertisement for the party than a dozen pamphlets'.[118]

As noted by Kunz, '[i]t is fundamental to understand that technological developments make total war only technically possible, but not inevitable'.[119] International laws of war remained effective during World War 2, even though they were violated on a massive scale by all the belligerents: the predictability aimed for through 'rules' for waging war was perverted into the predictability of on-going

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[111] E. Colby, supra note 1, p. 279.

[112] For a discussion of the German military build-up prior to World War 2, see E. Chadwick, '"Doves and Fireballs": German-Soviet Neutrality, Collective Security, and the League of Nations', in Traditional Neutrality Revisited, supra note 10, at p. 89.

[113] G.A. Craig, Germany 1866 – 1945 (Oxford: O.U.P., 1981), p. 543.

[114] Id., p. 545.

[115] Id.

[116] Id., p. 547.

[117] Id., p. 548.

[118] Id.

[119] J.L. Kunz, supra note 41, p. 41.

savagery. As such, the means and methods for waging war altered, and the Geneva Conventions, subsequently modernised. If, therefore, the fact of a 'new kind' of total war, in the sense of unlimited means, methods, and targets of destruction, has emerged, the interplay of war, economics, liberation-rhetoric and terrorism locks. If it is also assumed that modern war is ideology-driven, yet led by leaders who have little or no concept of a restraining warrior or chivalric code, the rationale for status gradations and any other distinctions found still in codified laws of war cannot any longer serve their intended purpose. Heightened predictability is the very outcome the 'new enemy' in asymmetric warfare will wish to avoid. Expectations of further savagery, on the basis of prior performance, then become only a self-perpetuating recipe for continuing disruption, with predictable effects on civil society.[120]

5. Conclusion.

There is always widespread incomprehension when an atrocity occurs. There are also many differences in legal approach to nineteenth and twentieth century armed conflicts. On the one hand, war was legal, while more recently, the aggressive use of inter-state force is prohibited. The fact remains, however, that all the international laws of war in place at any particular point in time have had as their purpose the political regulation of technological inventiveness, and of those persons who employ 'licit', as opposed to 'illicit', violence. Entrepreneurialism thus has constantly been confined within multiple, and competing, political-economic agendas. In turn, any resulting agreements reached have been achieved through processes involving tough negotiation, which, in essence, constituted a minimalist approach to international regulation:[121] protection has been provided at the most basic level of international co-operation – during times of war – to combatants, non-combatants, and those finding themselves in occupied territory.

Traditional wartime guidelines of proportionality and military necessity have similarly had to adapt within these minimalist confines to the changing face of warfare, albeit while reflecting a tacit agreement that war aims should be limited in

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[120] Supra notes 24 and 25.

[121] A point made by G. Willemin and R. Heacock, International Committee of the Red Cross, Vol. 2 (Lancaster: Martinus Nijhoff, 1984), p. 167.

some way, or to some extent, in order to assure ultimate survival. If only for this reason alone, international laws of war should not be viewed solely from an aspirational vantage point of humanitarianism. To do so would represent the despised 'sentimentality' which nearly led to the destruction of rules of war during World War 1. Instead, a better view is that rules of reciprocal restraint remain a function, first, of military necessity, and secondly, of proportionality, in the sense, once again, of variably limited war aims. Some sense of bilateral reciprocity is required, and must be seen to be pre-eminent. Protocol 1 of 1977, for example, recognises guerrilla bands fighting in modern wars of national liberation as lawful combatants if, put simply, they are organised and commanded by a responsible authority, and are seen to comply with the rules of international law applicable in armed conflict.[122]

However, has the time arrived to 'reality-check' the international laws of war? As noted earlier,[123] doctrinal disagreement persists over the legal prioritisation of the general prohibition of the use of force except in self-defence, and older laws of war which incorporate parameters of military necessity and proportionality within a much more specialised set of rules. While in most cases the better view supports the pre-eminence of international rules of law over the general law for the duration of an armed conflict, the very existence of tension between the two levels of law is of note. On the one hand, an early, and fundamental distinction existed between those rules made applicable to equal enemies, and those applied in other situations, such as to 'savages' or, more controversially, to 'equal' enemies who did not respect the rules. Rules of restraint were either reciprocated, or they were not observed. A framework of military escalation in relation to the reciprocity shown by one's enemies was a simple, but rather elegant solution to what otherwise would have been viewed as a political impossibility – one capable moreover of preventing what little agreement there was. In contrast, developments in the post-1945 era have shown that there is potentially more to be gained from humanitarian treatment 'in all circumstances', than not, and reciprocity is no longer a legal pre-condition.

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[122] Protocol 1, of 1977, Article 43(1).

[123] Supra note 92, and accompanying text.

Be that as it may, the point remains that any attempt at a utilitarian approach to the use of force must be re-assessed on a continuing basis. War aims must change as the intensity and duration of violence require. Any utilitarian calculus of war objectives – humanitarian or otherwise - will reflect this reality, and be modified accordingly. Clearly, any contract based on mutual understandings can be altered over time through custom and practice. In contrast, the respect afforded to humanitarian principles 'in all circumstances' is an admirable albeit competing requirement. Humanitarian coverage was much improved, first, in 1949 when the participation, or si omnes, clause was modernised.[124] Protocol 1 of 1977, in which the 'grave breaches' system was enlarged to include additional categories of 'lawful' combatant, wider categories of means and methods of attack were prohibited, and civilian protections were improved, represented a great leap forward in the cause of universal restraint in the use of armed force. Nevertheless, the words 'in all circumstances' arguably permit sufficient flexibility still to governments and commanders in the field alike when the time arrives to employ force to counter force.

Reciprocal, mutually-respected rules of wartime restraint have saved many lives, left undisturbed many material resources, and ensured high levels of battlefield predictability. Regulation, and good surveillance of battlefield tactics, have each improved compliance in many instances. The institution of war tribunals to try those accused of atrocities can only provide further assurances that impunity will not go unpunished. Much progress has been achieved, even though the scope and content of some rules remain uncertain,[125] and the precise status of those collectively utilising armed force in particular circumstances remains in some doubt. However, such rules as exist rest on an assumption that war aims are limited. The reappearance of the tactics of 'total war', in the sense of an utter disregard for the destruction that may ensue from the use of particular means and methods of warfare, signals the emergence of a competing economic force, and thus the need for realistic rules.

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[124] Supra note 53, and accompanying text.

[125] As in the 'lawfulness' of nuclear weaponry, and the recognition of 'terrorists' as lawful combatants.

Significantly, the appearance of a so-called 'new enemy', who operates violently from the 'grey zones' of international political and economic life, threatens many of the heretofore ascertainable frameworks of analysis. With access to important industrial-technological-economic resources, the 'new enemy' is a 'wild card', with utilitarian objectives all its own. The use of armed force for economic purposes, the rhetoric in support of which encourages a reliance on terror for advantage signals an underlying calculus which does not rest on any assumption of humanitarianism. Terrorism is inherently political; its definition, its perpetration, its prosecution – all are political. The problems the use of terror-war creates are not amenable to contexts of literalism, by which is meant a neutral approach to finding solutions. Moreover, there is little if any predictability possible when civilian objects, such as commercial aircraft or sports shoes, become methods of random attack. Where resources are then expended to forestall or prevent further such random attacks, in a perverse search for 'new' predictability, the terrorist has succeeded. Whether a 'war' against 'global terror' is a 'war' to which international, restraining, reciprocal rules of war can attach must remain very much in doubt.