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## PROLOGUE TO A VOLUNTARIST WAR CONVENTION

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ROBERT D. SLOANE

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## PROLOGUE TO A VOLUNTARIST WAR CONVENTION

Robert D. Sloane\*

*This Article attempts to identify and clarify what is genuinely new about the “new paradigm” of armed conflict after the attacks of September 11, 2001. Assuming that sound policy counsels treating certain aspects of the global struggle against modern transnational terrorist networks within the legal rubric of war, this Article stresses that the principal challenge such networks pose is that they require international humanitarian law, somewhat incongruously, to graft conventions—in both the formal and informal senses of that word—onto an unconventional form of organized violence. Furthermore, this process occurs in a context in which one diffuse “party” to the conflict both (1) repudiates a predicate axiom of international humanitarian law and (2) exhibits an organizational structure at odds with the one presupposed by the inherited conventions of war.*

*In particular, modern transnational terrorist networks, unlike most nonstate actors of concern to international humanitarian law in the past (including, for example, francs-tireurs, insurgents, and national liberation movements), characteristically repudiate the conventional, “amoral” conception of noncombatant immunity and the triad of core international humanitarian law principles—necessity, proportionality, and distinction—that follow from it. Furthermore, the diffuse, decentralized structure of modern transnational terrorist networks—in contradistinction to the hierarchical, linear structure of professional state armies and cognate private armies of past eras—makes them ill-suited for compliance with international humanitarian law. It also renders deterrence and negotiation—the principal historical mechanisms by which states neutralized threats from nonstate actors—frequently ineffective. Coupled with the increasing availability of catastrophic weapons on illicit markets, these features vastly complicate efforts to adapt*

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\* Associate Professor of Law, Boston University School of Law. This Article is a revised and expanded version of a talk given at the *New England Journal of International and Comparative Law*'s February 23, 2007, symposium on “Modern Warfare: The Role of the Non-State Actor.” I owe thanks to the organizers of that symposium and to Robert G. Bone, Daniela Caruso, Robert M. Chesney, Anthony J. Colangelo, Kris Collins, Geoffrey S. Corn, F. Andrew Hessick III, Pnina Lahav, Gary Lawson, David Lyons, Allan Macurdy, Daniel G. Partan, W. Michael Reisman, David Seipp, Kenneth W. Simons, Andrew Willard, and David Wippman. I acknowledge with gratitude the excellent research assistance of Renan Beyati, Benjamin Brockman-Hawe, and Sepehr Shahshahani. Errors are mine.

*the inherited war convention to contemporary circumstances—a periodic ritual that has followed major wars and crises since the advent of modern international humanitarian law in the nineteenth century.*

*For these reasons, international humanitarian law must begin to work out the contours of a voluntarist war convention to govern what is likely to be a prolonged state of episodic armed conflict with this particular genre of twenty-first-century nonstate actor. The conventional regimes governing internal and international armed conflicts should be augmented—but not, in my judgment, displaced—by conventions designed for what may be characterized as transnational armed conflict. Several factors, however, counsel Burkean caution and multilateral deliberation before introducing innovations: the continuing vitality of certain instrumentalist rationales for international humanitarian law, its synergy with international human rights law, and the manifest potential for abuse. I therefore conclude that, in the meantime, (1) any proposed modifications should be incremental, transparent, tentative, and subject to revision as the genuine scope of military necessity becomes clear; (2) the burden of persuasion should be on those who urge such modifications; and (3) insofar as existing law does not clearly govern, sound policy rationales generally continue to commend adherence to the inherited conventions of war.*

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#### INTRODUCTION

Until their first contact with Europeans in the 1940s, the Tsembaga, a primitive society of about 200 people comprising one of a score of Maring clans residing in the territory now known as New Guinea,<sup>1</sup> engaged in two stages of warfare. In the first, the “nothing fight,” belligerents lined up “within easy bow shot” to fire arrows at one another while protecting them-

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1. ROY A. RAPPAPORT, PIGS FOR THE ANCESTORS 8–14 (1968).

selves by huddling behind large shields.<sup>2</sup> Because “the unfledged arrows of the Maring seldom kill[ed],” neither clan sustained many casualties.<sup>3</sup> Nothing fights at times lasted for four or five days.<sup>4</sup> They operated in practice “to suppress rather than to encourage hostilities,” which could otherwise escalate into the far more brutal and protracted “true fight.”<sup>5</sup> Nothing fights generally ended “when both sides agree[d] that the number of deaths [wa]s sufficient for the present.”<sup>6</sup>

The point of this anthropological anecdote, and countless others that could be told, is to emphasize a fact that is too easily lost in the labyrinth of modern rules and regulations of the law of war: all war is, by definition, a social phenomenon governed by conventions. Strange though it may seem,

What is war and what is not-war is in fact something that people *decide* . . . . As both anthropological and historical accounts suggest, they can decide, and in a considerable variety of cultural settings they have decided, that war is limited war—that is, they have built certain notions about who can fight, what tactics are acceptable, when battle has to be broken off, and what prerogatives go with victory into the idea of war itself.<sup>7</sup>

The extensive codification and intricacy of the modern law of war tends to obscure its conventional nature. In the lexicon of international law, as well as ordinary speech, a convention often denotes a treaty.<sup>8</sup> And conventions in this formal sense prescribe the bulk of the positive law of war. But a convention also refers generally to a “practice or procedure widely observed in a group, especially to facilitate social intercourse; custom.”<sup>9</sup> For its efficacy, authority, and legitimacy, the contemporary law of war relies as much, if not more, on this latter type of convention.

The term international humanitarian law (“IHL”), in contrast to older appellations such as the law of armed conflict or the law of war, connotes a shift in the emphasis of the modern “war convention.” By this, in the singular, I mean not only positive international law but the complete “set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgments of military conduct.”<sup>10</sup> Broadly speaking, this shift has been *from* a network of customary law and treaties—enforced by a variety of political

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2. *Id.* at 121.

3. *Id.*

4. *Id.* at 121–22.

5. *Id.* at 123–25.

6. James G. Peoples, *Individual or Group Advantage? A Reinterpretation of the Maring Ritual Cycle*, 23 CURRENT ANTHROPOLOGY 291, 292 (1982); see also RAPPAPORT, *supra* note 1, at 130.

7. MICHAEL WALZER, *JUST AND UNJUST WARS* 24–25 (3d ed. 2000) (emphasis added).

8. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 291 (William Morris ed., 1975).

9. *Id.*

10. WALZER, *supra* note 7, at 44.

dynamics that obtain between the professional armies of nation-states, including reciprocity, reputation, and military discipline within a hierarchical command structure<sup>11</sup>—to an increasing reliance on norms of human dignity and individual rights that IHL shares with and derives in part from international human rights law.<sup>12</sup> Hence, substantial authority suggests that modern IHL now prohibits, for example, reprisals, which were once a lawful means to enforce the laws of war.<sup>13</sup>

Conventions need not be written, still less codified in any legally binding form.<sup>14</sup> But just as a contract generally requires an exchange of promises between two or more parties and a “meeting of the minds,”<sup>15</sup> a convention about the conduct of organized violence generally cannot survive or function very effectively as a unilateral commitment—or so it would seem at first blush. In the context of modern IHL, however, this analogy is too simple and proves misleading, in part for the reason already suggested: informal conventions, which cannot be understood as bilateral or contractual in any straightforward sense, underwrite the formal conventions that prescribe the bulk of the positive law of war. These two meanings of convention, as well as their relationship to the modern war convention, broadly conceived, should inform any effort to adapt the law of war to contemporary technological and geopolitical circumstances—a periodic ritual that has followed major wars and crises since the advent of modern IHL in the nineteenth century.

Since the attacks of September 11, 2001, a fierce debate has raged over whether it is accurate—or prudent (a distinct question)—to treat the global struggle against modern transnational terrorist networks typified by al-Qaeda within the legal rubric of war or, by contrast, whether that struggle

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11. See Adam Roberts & Richard Guelff, *Introduction to DOCUMENTS ON THE LAWS OF WAR* 15 (Adam Roberts & Richard Guelff eds., 1982).

12. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶¶ 518–19 (Jan. 14, 2000). See generally Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000). Throughout this Article, I will generally use the expressions “law of armed conflict,” “*ius in bello*,” “law of war,” and “international humanitarian law” interchangeably, although at times I will use one appellation rather than another to stress relevant changes in the nature of this body of law since its inception.

13. See *Kupreškić*, Case No. IT-95-16-T, ¶¶ 527–36; Transcript at 134, Prosecutor v. Martić, Case No. IT-95-11-R61 (Mar. 8, 1996), 1996 WL 33657119 (asserting that customary international law now prohibits reprisals in all armed conflicts).

14. Before the rise of the nation-state in Europe, codes of chivalry and shared cultural conceptions of the warrior’s honor restrained the means, methods, and targets of armed conflict. See, e.g., THEODOR MERON, *Medieval and Renaissance Ordinances of War: Codifying Discipline and Humanity*, in WAR CRIMES LAW COMES OF AGE 1 (1998); Robert C. Stacey, *The Age of Chivalry*, in THE LAWS OF WAR 27 (Michael Howard et al. eds., 1994). Comparable codes and conventions evolved in non-Western cultures. See, e.g., L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 20–25 (2d ed. 2000); ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 10, 15 (1947); *THE LAW CODE OF MANU* 113 (Patrick Olivelle trans. 2004); 1 *THE LAW OF WAR* 3 (Leon Friedman ed. 1972).

15. Anglo-American law recognizes certain forms of unilateral contracts. RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981); KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 77 (1990).

must—or should—be treated exclusively within the rubric of criminal law.<sup>16</sup> Yet the distinction between terrorism as crime and terrorism as war is not ultimately qualitative. It is, like the question of war itself, “something people decide.”<sup>17</sup> War has no Platonic form. To suggest that as a matter of international law, a terrorist network by definition cannot be a party to an armed conflict in the twenty-first century<sup>18</sup> strikes me as both inaccurate and anachronistic,<sup>19</sup> although it would be equally implausible and ill-advised to begin treating all or even most acts of terrorism within the rubric of war.<sup>20</sup>

That is one reason why the phrase “global war on terrorism” is so unfortunate<sup>21</sup>: it crudely lumps together diverse phenomena within a single legal framework, obscures relevant differences, and mistakenly implies that the

16. For a characteristic exchange illuminating the consequences of the debate, compare Kenneth Roth, *The Law of War in the War on Terror: Washington's Abuse of "Enemy Combatants"*, FOREIGN AFF., Jan.–Feb. 2004, at 2, Ruth Wedgwood, *Fighting a War under Its Rules*, in Ruth Wedgwood & Kenneth Roth, *Combatants or Criminals?*, FOREIGN AFF., May–June 2004, at 126. See also William H. Taft, IV, *War Not Crime*, in THE TORTURE DEBATE IN AMERICA 223 (Karen J. Greenberg ed., 2006); 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, 715–20 (2004).

17. WALZER, *supra* note 7, at 24.

18. E.g., HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 249–54 (2005) (concluding that the conflict with al-Qaeda cannot be described legally as an “armed conflict” for purposes of IHL because al-Qaeda lacks the traditional characteristics of either a state or nonstate party to armed conflict); Michael Howard, *What's in a Name?: How to Fight Terrorism*, FOREIGN AFF., Jan.–Feb. 2002, at 8; Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326–28 (2003).

19. I express no view here on whether the global war on terrorism constitutes a state of war for purposes of U.S. constitutional law, *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 519–21 (2004) (eliding the question by focusing on the continuation of hostilities in Afghanistan), except to say that I see no reason why the definition of war in Article I, Section 8, of the U.S. Constitution, and various assertions of executive power under it, need be precisely coterminous with its definition in international law when it comes to assertions about the applicability *vel non* of IHL. The historical meaning of war in the Constitution, for example, is clearly not equivalent to “armed conflict” under Common Article 2 of the Geneva Conventions. Compare Campbell v. Clinton, 203 F.3d 19, 37–39 (D.C. Cir. 2000) (Tatel, J. concurring), with Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. On the constitutional issue, compare, for example, Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004), with Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

20. “Although the policy decision to view the ‘war on terror’ as a literal war is legally plausible, the potential implications of this policy decision are staggering.” Brooks, *supra* note 16, at 719. Such implications include vastly expanding the contingencies for the use of lethal force and obviating the criminal due process rights of those apprehended in such a “war.” *Id.* at 719–20; see also Roth, *supra* note 16.

21. Or “global war on *terror*.” Because the Bush administration and others regard this as a literal war rather than a metaphor, see DUFFY, *supra* note 18, at 250 & n.175, the phrase “war on terrorism” strikes me as preferable to “war on terror.” Terror, like fear, is an emotion, and “war on terror” would seem to imply a rhetorical struggle, comparable to the “freedom from fear” included in President Franklin D. Roosevelt’s “Four Freedoms” speech. See Franklin D. Roosevelt, President, United States of America, The Annual Message to the Congress (Jan. 6, 1941), in 1940 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663–72 (Samuel I. Rosenman ed., 1941). Terrorism, by contrast, at least refers to a strategy or means of conducting war. For the sake of style and convenience, I will hereinafter refer to the “global war on terrorism” without quotation marks. But I stress that this and similar phrases tend, in my judgment, to be imprecise, unhelpful, and often counterproductive from both a legal and a political perspective.

military instrument should be the primary strategy to address the threats posed by modern transnational terrorist networks typified by al-Qaeda.<sup>22</sup> We will surely lose the global war on terrorism if literal war becomes its strategic centerpiece; transnational cooperation in intelligence, financial controls, law enforcement, diplomacy, and ideological strategies will be indispensable to any ultimate “victory.”<sup>23</sup> In the final analysis, however, defining the proper characterization of and response to diverse kinds and degrees of terrorism calls for policy judgments. While the use of force, as well as its conventions, has been abused recently, the military instrument, too, has its place in addressing the threat of transnational terrorism. IHL must acknowledge this reality and adapt to it.<sup>24</sup>

\* \* \* \*

On January 25, 2002, Alberto R. Gonzales, then counsel to the president, wrote that “the war against terrorism is a new kind of war”—as distinct from “the traditional clash between nations adhering to the laws of war”—and that “this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”<sup>25</sup> The phrase “new paradigm,” like the phrase “global war on

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22. Cf. Samuel Scheffler, *Is Terrorism Morally Distinctive?*, 14 J. POL. PHIL. 1, 10–11 (2006) (“One of the many unsettling features of the Bush administration’s post-9/11 moral discourse, with its frequent references to ‘evildoers’ and ‘bad guys,’ is that it uses moral categories to inhibit rather than to promote moral understanding.”). The U.S. House Armed Services Committee recently proposed banishing the phrase “global war on terror” and similarly imprecise designations from the 2008 defense budget. Rick Maze, *No More GWOT, House Committee Decrees*, MIL. TIMES, Apr. 4, 2007, [http://militarytimes.com/news/2007/04/military\\_gwot\\_democrats\\_070403w/](http://militarytimes.com/news/2007/04/military_gwot_democrats_070403w/) (last visited Sept. 2, 2007).

23. See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 363–64 (2004) (embracing the propriety of the war label but stressing that “long-term success demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense”) [hereinafter 9/11 COMM’N REPORT]; High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 148, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter High-Level Panel, *A More Secure World*] (articulating the elements of a proposed “comprehensive strategy that incorporates but is broader than coercive measures” for addressing transnational terrorism). See generally 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY 158–61 (1992) (articulating “the basic instruments of policy—diplomatic, ideological, economic, and military” available to decision makers and recommending their “integrated employment” in international law).

24. See Brooks, *supra* note 16, at 761 (“Reinventing the law of armed conflict in the age of terror will not be easy, but it is better to face the challenge directly than to pretend it does not exist.”). Even those who argue that terrorism cannot legally be deemed a form of armed conflict under international law would surely prefer that, so long as states insist on treating it that way, they operate under clear principles of IHL rather than in an alleged “no law” zone. Cf. Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorism”*, 46 VA. J. INT’L L. 165, 171 (2005) (“[O]pposition to the ‘war model’ is a bad reason to oppose application of the [Geneva] Conventions.”).

25. “Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al-Qaeda and the Taliban” Memorandum from Alberto R. Gonzales, counsel to the president, Office of Counsel to the President, to George W. Bush, president of the United States (Jan. 25, 2002), reprinted in THE TORTURE PAPERS 118, 119 (Karen J. Greenberg & Joshua L. Dratel eds.) (2005)[hereinafter Gonzales Memorandum]; see also Memorandum on Humane Treatment of



terrorism,” is rhetorically dangerous insofar as it can be abused to justify violations of clear law and to aggrandize political power.<sup>26</sup> It also has troubling antecedents in the history of the law of war, which offer cautionary lessons.<sup>27</sup> During World War II, for example, General Wilhelm Keitel, among other Nazi elites, described the conflict between Germany and the Soviet Union, which Hitler labeled “Bolshevist terrorism,” in eerily similar terms: as a new kind of ideological warfare that rendered the 1929 Geneva Convention on the Treatment on Prisoners of War obsolete.<sup>28</sup>

But here, as elsewhere in law, it is vital to differentiate between descriptive and normative claims. The existence of circumstances that may be described as a new paradigm must be distinguished from policy measures adopted in response to it—and certainly from its cynical exploitation as a means to aggrandize power or justify expedient violations of clear law. We may face a new paradigm, but the obsolescence of the inherited war convention does not necessarily follow: whether a new paradigm exists and whether it renders the old one obsolete are analytically distinct questions.

I agree that certain aspects of the global war on terrorism, while hardly without antecedents, can be characterized as a new paradigm if treated within the rubric of armed conflict. (Whether it is prudent or wise to so characterize them is a distinct question.) But what precisely does that mean?

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Taliban and Al-Qaeda Detainees from George W. Bush, president of the United States, to Richard B. Cheney, vice president of the United States, et al. (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, *supra*, at 134.

Recent journalism establishes that David S. Addington, who at that time served as legal counsel to Vice President Richard B. Cheney, in fact wrote the Gonzales Memorandum. *See* Barton Gellman & Jo Becker, *A Different Understanding With the President*, WASH. POST, June 24, 2007, at A1 (“A White House lawyer with direct knowledge said Cheney’s lawyer, Addington, wrote the memo.”). More generally, most of the memoranda that guided the key, controversial decisions made by the Bush administration relative to the global war on terrorism were prepared principally by David S. Addington, Timothy E. Flanigan, and John C. Yoo. *See* Barton Gellman & Jo Becker, *The Unseen Path to Cruelty*, WASH. POST June 25, 2007, at A1.

26. *E.g.*, Geoffrey S. Corn, *Filling the Void: Providing a Framework for the Legal Regulation of the Military Component of the War on Terror Through Application of Basic Principles of the Law of Armed Conflict*, 12 ILSA J. INT’L & COMP. L. 481, 485 (2006) [hereinafter Corn, *Filling the Void*] (“[Assertion of ‘new paradigm’] is a subterfuge for those who seek to dispense with the constraints that result from good faith application of [law-of-war] principles, and adopt an unlimited definition of military necessity—an idea that was flatly rejected following the Second World War.”); Joshua Dratel, *The Curious Debate*, in THE TORTURE DEBATE IN AMERICA, *supra* note 16, at 113 (critiquing the idea that the claim of a new paradigm excuses torture); *see also* Geoffrey S. Corn, Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict, 40 VAND. J. TRANSNAT’L L. 295, 323 (2007) [hereinafter Corn, *Regulation of Hostilities*]. On rhetorical abuse of the “global war on terrorism,” *see* Richard Jackson, *Security, Democracy, and the Rhetoric of Counter-Terrorism*, 1 DEMOCRACY & SECURITY 147, 148 (2005) (arguing, based on an empirical analysis of Bush administration speeches, that “[t]he language of the ‘war on terrorism’ is not a neutral or objective reflection of policy debates and the realities of terrorism and counter-terrorism,” but “a very carefully and deliberately constructed—but ultimately artificial—discourse that was specifically designed to make the war seem reasonable, responsible, and ‘good,’ as well as to silence any forms of knowledge or counter-argument that would challenge the exercise of state power”). *See generally* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007).

27. *See* Scott Horton, *Through a Mirror, Darkly: Applying the Geneva Conventions to “A New Kind of Warfare”*, in THE TORTURE DEBATE IN AMERICA, *supra* note 16, at 136.

28. *Id.* at 136, 138–42.

What is actually new about the new paradigm of armed conflict? Appreciating how a war waged against a modern transnational terrorist network such as al-Qaeda differs from familiar international and internal paradigms is a prologue—hence the title of this Article—to designing an appropriate, humane, and effective war convention to govern it.

At an abstract level, the principal challenge posed by the asserted new paradigm is that it seems to call for IHL to graft conventions—in both the formal and informal senses—on to an unconventional form of organized violence in circumstances in which one “party” to the conflict repudiates them. I put party in quotation marks because a diffuse, transnational terrorist network, unlike a state or insurgent group, cannot accurately or profitably be conceived as a monolithic party. This characteristically decentralized structure disrupts IHL. Modern transnational terrorist networks use organized violence systematically. But they do not resemble professional state armies—or even past nonstate actors, such as militias, paramilitaries, and insurgent groups—insofar as they lack, among other things, the hierarchical structures of authority, discipline, and organization that characterize the latter.<sup>29</sup> Without these structures, which can enforce the rules of war through education, indoctrination, and a chain of command, it is doubtful that such networks could, even if they wished, attain a general level of compliance with IHL.

Repudiation of the inherited war convention by modern transnational terrorist networks extends not just to particular formal conventions, such as the treaties governing war on land, although it almost surely includes them.<sup>30</sup> More troublingly, it extends to the central informal conventions and social norms that underlie modern IHL: first, that “the only legitimate object . . . [of] war is to weaken the military force of the enemy,”<sup>31</sup> and second, that noncombatants should be protected from the harms of war to the greatest extent compatible with military necessity.<sup>32</sup> The network structure, as well as the ideological or psychological predispositions of at least some members of modern transnational terrorist networks, also renders them less susceptible

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29. ROHAN GUNARATNA, *INSIDE AL QAEDA* 54 (2002). *But cf.* Mariano-Florentino Cuéllar, *The Untold Story of al Qaeda’s Administrative Law Dilemmas*, 91 MINN. L. REV. 1302, 1310 (2007) (“[A]lthough circumstances have forced terrorist networks to adopt a measure of decentralization, those networks have often sought to build administrative procedures and law-like hierarchical arrangements to strike a balance between flexibility and control and to mitigate the recurring organizational problems associated with managing painfully scarce resources.”).

30. *Cf.* U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Final Report on the Situation of Human Rights in Afghanistan Submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in Accordance with Commission on Human Rights Resolution 1996/75*, ¶ 31, U.N. Doc. E/CN.4/1997/59 (Feb. 20, 1997) (quoting the attorney general of the Taliban to the effect that human rights treaties and other conventions deemed to conflict with Islamic law would not be respected).

31. St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *adopted* Dec. 11, 1868 [hereinafter St. Petersburg Declaration], *reprinted in* 1 AM. J. INT’L L. 95 (Supp. 1907).

32. *E.g.*, DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE* (FIELD MANUAL NO. 27-10) ¶¶ 2–3 (1956).

than past nonstate actors to the principal control strategies in the arsenals of states: deterrence and negotiation.<sup>33</sup>

For these reasons, the emergence of modern transnational terrorist networks, like previous developments that prompted revisions to the laws of war,<sup>34</sup> will require changes to the inherited war convention. But far more than in the past, adapting the war convention to new circumstances will be a unilateral exercise. By unilateral, I do not mean that it can or should be accomplished by one state. The unilateralism in the interpretation and application of IHL that has characterized the Bush administration's approach to the global war on terrorism is, in my judgment, often misguided and counterproductive. Any effort to revise the inherited war convention should surely be multilateral, for it will benefit from transnational cooperation between like-minded states. Unlike with past war conventions, however, only one of the opposing parties to this war will determine its precepts. It will be unilateral, roughly speaking, in the sense that a party enters into a unilateral contract. That does not mean—any more than for a unilateral contract—that a unilateral war convention is or should be nonbinding; nor does it imply that no benefits accrue to the party that follows the convention. To avoid the unintended and mostly negative connotations of the term unilateral, I will refer instead, perhaps more precisely, to the need for IHL to develop a voluntarist war convention.<sup>35</sup>

Part I of this Article appraises the inherited structure of the law of war and stresses IHL's traditional reliance on interstate political dynamics and status categories.<sup>36</sup> Part II reflects on the lessons of history and emphasizes that, in certain significant respects, the allegedly new paradigm is not so new: many of the debates about the global war on terrorism that rage today were aired previously in the controversy over the merits and demerits of Protocol I.<sup>37</sup> Yet commentators have largely neglected this precedent in arguing about the appropriate military response to post-9/11 geopolitical

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33. By mentioning "psychological predispositions," I stress that I do not mean to say or subscribe to the belief that terrorists are irrational or psychopathic. As one expert wrote, "Like many myths, this one is easy to believe yet is almost always completely untrue." Andrew Silke, *Becoming a Terrorist*, in *TERRORISTS, VICTIMS AND SOCIETY—PSYCHOLOGICAL PERSPECTIVES ON TERRORISM AND ITS CONSEQUENCES* 29, 29 (Andrew Silke ed., 2003); see also John Horgan, *The Search for the Terrorist Personality*, in *TERRORISTS, VICTIMS AND SOCIETY*, *supra*, at 3, 6; cf. ROBERT A. PAPE, *DYING TO WIN* 4 (2005) (arguing, based on a statistical analysis of suicide terrorism, that such attacks tend to be organized, not random, and directed at a particular strategic objective, most commonly, "to compel modern democracies to withdraw military forces from territory that the terrorists consider to be their homeland").

34. See Hersh Lauterpacht, *The Problem of the Revision of the Law of War*, 29 *BRIT. Y.B. INT'L L.* 360 (1952); see also David Wippman, *Introduction: Do New Wars Call for New Laws?*, in *NEW WARS, NEW LAWS?* 1, 1–3 (David Wippman & Matthew Evangelista eds., 2005).

35. I am grateful to David Lyons for this suggestion.

36. See Derek Jinks, *The Declining Significance of POW Status*, 45 *HARV. INT'L L.J.* 367 (2004) [hereinafter Jinks, *Declining Significance*]; Derek Jinks, *Protective Parity and the Laws of War*, 79 *NOTRE DAME L. REV.* 1493 (2004) [hereinafter Jinks, *Protective Parity*].

37. 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].

circumstances. These debates included (1) Protocol I's alleged legitimization of terrorism, (2) its likely effect on the incentives of certain nonstate actors and overall compliance with IHL, and (3) the normative and strategic advisability of conferring lawful combatant status on such actors. These debates have not been resolved so much as obsolesced by time and three decades of experience with Protocol I, but they offer lessons for contemporary efforts to adapt IHL. Part III contrasts the paradigmatic nonstate actors of Protocol I with modern transnational terrorist networks and clarifies two principal features of the latter that complicate efforts to adapt the inherited war convention: their repudiation of the conventional conception of noncombatant immunity and their network structure.

Briefly, I argue that modern transnational terrorist networks with ideologies and structures typified by al-Qaeda cannot readily be integrated into the global war system, created by and for states, or its associated war convention.<sup>38</sup> This is because a sine qua non of the war convention is a particular conception of noncombatant immunity and the triad of IHL principles—necessity, proportionality, and distinction—that follow from it.<sup>39</sup> But noncombatant immunity is not a principle of natural law. Nor, contrary to popular belief, does it follow from the moral innocence of civilians relative to the causes or harms of war.<sup>40</sup> It is neither more nor less than a convention in the informal sense,<sup>41</sup> namely, a practice adopted by certain political communities to govern a particular (violent) form of social intercourse.

To say that noncombatant immunity does not follow logically from the moral innocence of civilians is not to say that it lacks a moral *purpose*. To the contrary, a paramount rationale for the convention of noncombatant immunity is that it reduces the aggregate human suffering and destruction caused by war. But whatever its rationale, transnational terrorist networks typified by al-Qaeda characteristically reject this particular convention of war. The statements of Osama bin Laden and his deputies, for example, suggest that they view noncombatant immunity as a defeasible principle that can and should be discarded in circumstances where the enemy, in their perception, bears moral guilt for the grievances that constitute their *casus belli*.<sup>42</sup> This kind of moral conception of noncombatant immunity is directly at odds with the conventional, “amoral” conception of noncombatant immunity at work in the war convention. It also conflicts with the axiom that insists on the analytic independence of judgments of *jus ad bellum*, the law

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38. See generally W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1 (1973).

39. The principle of distinction, for example, which requires that soldiers distinguish between combatants and civilians, has long been recognized as indispensable to efforts to temper the scope and brutality of war. Lester Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 AM. J. INT'L L. 680, 680 (1945).

40. See *infra* notes 149–151 and accompanying text.

41. George I. Mavrodes, *Conventions and the Morality of War*, in INTERNATIONAL ETHICS 75 (Charles R. Beitz et al. eds., 1985).

42. See Michael Moss & Souad Mekhennet, *The Guidebook For Taking A Life*, N.Y. TIMES, June 10, 2007, § 4, at 1; see also *infra* notes 159–160 and accompanying text.

governing resort to war, and *jus in bello*, the law governing the conduct of hostilities.<sup>43</sup>

Repudiation of the conventional conception of noncombatant immunity might not be such an intractable problem for IHL were it not for the increasing availability of catastrophic weapons to nonstate actors and two other conspicuous characteristics of modern transnational terrorist networks. First, unlike the state-sponsored terrorist groups that predominated in the twentieth century, modern transnational terrorist networks cannot easily be deterred.<sup>44</sup> Among other obstacles, they lack a readily ascertainable “return address,”<sup>45</sup> as the botched strikes in retaliation for the 1998 U.S. embassy bombings attest.<sup>46</sup> Second, again unlike state-sponsored terrorism, because of their diffuse network structure and ideological views, modern terrorist networks cannot readily be neutralized by negotiation. I do not mean to suggest that negotiation and deterrence, broadly conceived, will not work and should be abandoned in the global war on terrorism: my point is only that the conventional manifestations of those strategies will be inadequate relative to some of the most threatening terrorist networks that we confront today.

International law must therefore begin to work out a voluntarist war convention to govern what is likely to be a prolonged state of episodic armed conflict with a particular genre of twenty-first-century nonstate actors: transnational terrorist networks typified by al-Qaeda. Al-Qaeda is the paradigm, but not the sole manifestation, of a modern transnational terrorist network: similar networks will likely continue to evolve and threaten world public order.<sup>47</sup> Several factors, however, counsel Burkean caution and multilateral deliberation before introducing innovations: the continuing vitality of certain instrumentalist rationales for the inherited conventions of IHL, IHL’s contemporary foundation in and synergy with shared norms of human

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43. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 406–08 (1963); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 4–5 (2004).

44. BRUNO S. FREY, *DEALING WITH TERRORISM—STICK OR CARROT?* 29 (2004); Robert A. Pape, *The Strategic Logic of Suicide Terrorism*, 97 *AM. POL. SCI. REV.* 343, 346 (2003). *But see* Richard Matthew & George Shambaugh, *The Limits of Terrorism: A Network Perspective*, 7 *INT’L STUD. REV.* 617, 618 (2005) (“[A]lthough deterrence is not effective against an entire network, it can be effectively used in a more targeted manner against nodes within a network.”); Robert F. Trager & Ddessislava P. Zagorcheva, *Deterring Terrorism: It Can Be Done*, *INT’L SECURITY*, Winter 2005–06, at 87, 88.

45. Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 *CHI. J. INT’L L.* 1, 9 (2003); *see also* W. Michael Reisman, *Editorial Comment: Assessing Claims to Revise the Laws of War*, 97 *AM. J. INT’L L.* 82, 86 (2003) (“Nor can deterrence operate without an address to deter.”).

46. *See* Michele L. Malvesti, *Bombing bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, *FLETCHER F. WORLD AFF.*, Winter/Spring 2002, at 17; Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Legal Regulation of Use of Force*, 93 *AM. J. INT’L L.* 161 (1999).

47. High-Level Panel, *A More Secure World*, *supra* note 23, ¶ 146 (“Al-Qaida is the first instance—not likely to be the last—of an armed non-State network with global reach and sophisticated capacity.”); Brooks, *supra* note 16, at 718; *cf.* MOISÉS NAÍM, *ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* 55–56 (2005).

dignity and international human rights law, and the manifest potential for abuse. I therefore conclude that, in the meantime, (1) any proposed modifications to IHL should be incremental, transparent, tentative, and subject to revision as the genuine scope of military necessity becomes clear; (2) the burden of persuasion should be on those who urge such modifications; and (3) insofar as existing law does not clearly govern, strong policy rationales nonetheless generally commend adherence to the core of the inherited war convention. Its central precepts should be preserved, though for reasons partially distinct from their pedigree and rooted far less in a bilateral view of reciprocity.

### I. THE STRUCTURE OF THE INHERITED WAR CONVENTION

Throughout history and across cultures, conventions of war have evolved from and reflected some admixture of three principal rationales:<sup>48</sup> (1) military prudence, that is, issues of strategy, including an appreciation of the value of internal discipline and reciprocity; (2) virtue ethics, that is, culturally specific conceptions of the warrior's honor;<sup>49</sup> and (3) humanism, that is, some conception of human dignity.<sup>50</sup> With the rise of the modern state, chivalry and *noblesse oblige*, which together animated the bulk of the medieval *jus in bello*,<sup>51</sup> gradually gave way to conventions operationalized largely by the political dynamics between states. This is not to suggest that humanitarian sensibilities played no role in the development of the laws of war. Grotius devoted the third book of his magisterial *De Jure Belli ac Pacis* to the concept of *temperamenta belli*, moderation in war,<sup>52</sup> and the rhetoric of modern IHL pervades the preambles to most of the treaties that established the early laws of war.<sup>53</sup> But law of war conventions of the late nineteenth and early twentieth centuries unquestionably relied on interstate political dynamics and incentive structures that obtained between the professional armies of states—and, by necessary implication, on a strict,

48. See GREEN, *supra* note 14, at 20–25; NUSSBAUM, *supra* note 14, at 10, 15.

49. See generally MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR* 109–64 (1998).

50. Cf. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 521–22, 522 n.1 (1961) (“[I]t is commonly stated in the learned literature that three basic principles underlie the more detailed prescriptions of combatant law: the principle of military necessity, the principle of humanity, and the principle of chivalry.”).

51. Stacey, *supra* note 14, at 29; see also James Turner Johnson, *Just War and the Restraint of War* at xxiii, 128–29 (1981); G.I.A.D. Draper, *Grotius' Place in the Development of Legal Ideas About War*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 177, 184–85 (Hedley Bull et al. eds., 1990).

52. 3 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Richard Tuck ed., Liberty Fund 2005) (1625).

53. E.g., Convention Respecting the Laws and Customs of War on Land pmbl., Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention]; Convention With Respect to the Laws and Customs of War on Land pmbl., Jul. 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention]; St. Petersburg Declaration, *supra* note 31, pmbl.

hierarchical system of internal discipline that states were to indoctrinate and enforce within their armies.<sup>54</sup>

Article I of the Hague Conventions of both 1899 and 1907, Respecting the Laws and Customs of War on Land, requires states parties to “issue instructions to their armed land forces which shall be in conformity with the . . . present Convention,” and Article II provides that the regulations set forth only bind the states parties in wars between them.<sup>55</sup> Furthermore, the Hague Conventions apply only to certain nationals of the states parties,<sup>56</sup> namely, lawful combatants—a category first defined by criteria enumerated in the 1874 Declaration of Brussels.<sup>57</sup> The Brussels criteria appear, verbatim or substantially unchanged, in the 1899 and 1907 Hague Conventions and in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.<sup>58</sup> Yet “[t]he distinction between combatant and noncombatant,” which the Brussels criteria enable and operationalize, “is not an ancient one in the history of war, for until the Middle Ages it was the conception of war to treat all inhabitants of the states at war, including women and children, as actual enemies, subject to being slaughtered.”<sup>59</sup>

By the late 1940s, according to the Nuremberg Tribunal, the regulations established by the 1907 Hague Convention had become custom, rendering obsolete the “general participation” clause contained in Article II.<sup>60</sup> This development, however, did not presage any dramatic movement away from reliance for the enforcement of IHL on reciprocity,<sup>61</sup> the political dynamics between states, and the structural features of their professional armies. The Third Geneva

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54. Roberts & Guelff, *supra* note 11, at 15; *see also* McDUGAL & FELICIANO, *supra* note 50, at 532. Prosecution of violations of the laws of war under international criminal law by international institutions is a distinctly modern development, and its efficacy as a means of directly enforcing IHL is, at least so far as anecdotal evidence indicates, marginal. *See* Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 *STAN. J. INT'L L.* 39, 71–77 (2007).

55. 1907 Hague Convention, *supra* note 53, arts. 1–2; 1899 Hague Convention, *supra* note 53, arts. 1–2, 11.

56. 1907 Hague Convention, *supra* note 53, Annex, arts. 1–3; 1899 Hague Convention, *supra* note 53, Annex, arts. 1–3 (setting forth the criteria for lawful combatancy and POW status).

57. Declaration of Brussels, Aug. 27, 1874, art. IX, *reprinted in* 1 *THE LAW OF WAR*, *supra* note 14, at 194, 196.

58. Convention Relating to Prisoners of War art. 1, July 27, 1929, 47 Stat. 2021, 2 Bevans 932; 1907 Hague Convention, *supra* note 53, Annex, art. 1; 1899 Hague Convention, *supra* note 53, Annex, art. 1; *see also* Howard S. Levie, *The 1977 Protocol I and the United States*, 38 *ST. LOUIS U. L.J.* 469, 473 (1993).

59. Nurick, *supra* note 39, at 681.

60. *In re Goering*, 13 Ann. Dig. 203, 212 (Int'l Mil. Trib. 1946), *full opinion reprinted in* 41 *AM. J. INT'L L.* 172, 248–49 (1947). General participation clauses, common in early law of war treaties, provided that the enumerated constraints would apply only as between the states parties to the treaties and only if all belligerents were states parties. *E.g.*, 1907 Hague Convention, *supra* note 53, art. 2.

61. McDUGAL & FELICIANO, *supra* note 50, at 532 (“[T]he prospects of effectively securing the limitation of violence sought by the basic policies of military necessity and humanity and by their divers[e] specifications in the rules of warfare are contingent upon reciprocity, should be fairly obvious, [for] in a war of any substantial duration between belligerents having the same or similar means and weapons, reciprocal treatment tends to develop.”).

Convention of 1949 retains the Brussels criteria substantially unchanged. To qualify as a prisoner of war (“POW”), and by implication a lawful combatant,<sup>62</sup> the army to which a soldier belongs must meet four criteria:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.<sup>63</sup>

The Geneva Conventions of 1949, while innovative elsewhere, therefore remain conservative in this regard. They reiterated, and indeed reinforced,<sup>64</sup> the conventional distinction between combatants and noncombatants. This distinction presupposes the paradigm of armed conflict between states because, in practice, it is virtually impossible for nonstate actors to meet the criteria for lawful combatancy;<sup>65</sup> hence the “private-army rule” of international law, which purports to prohibit “the use of force by entities not associated with or operating under delegation from a nation-state.”<sup>66</sup>

Consistent with this rule, the Geneva Conventions established a system that deliberately excluded nonstate actors in two ways. First, Common Article 2 restricts the scope of the Conventions, with the notable exception of Common Article 3, to wars between states.<sup>67</sup> Second, Article 4 of the Third Geneva Convention, as emphasized in the preceding paragraph, specifies criteria that delimit the types of combatants other than professional state soldiers that may qualify as lawful and therefore enjoy the full panoply of enumerated rights and privileges.<sup>68</sup> Far from relaxing the requirements for combatant status, the Conventions rigidified them. They also reinforced the *de facto* requirement that a lawful combatant establish some nexus to a

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62. Strictly speaking, the Geneva Conventions adopt these criteria for POW status, but states understand them to be coterminous with the criteria for lawful combatancy. FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 52 (3d ed. 2001).

63. Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)]. While an acontextual reading of the text may suggest otherwise, most commentators agree that not only “[m]embers of other militias and members of other volunteer corps,” to whom Article 4(A)(2) expressly applies, but also the regular armed forces of states referred to in Article 4(A)(1) must satisfy these four conditions to qualify as lawful combatants. *See, e.g.*, 3 INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 63 (Jean S. Pictet ed., 1960). *But see* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 718–28 (2006) (recounting and analyzing the Convention’s *travaux* on this issue, which suggests, though not conclusively, an alternative construction).

64. DINSTEIN, *supra* note 43, at 36.

65. *Id.* at 41.

66. Reisman, *supra* note 38, at 4.

67. *E.g.*, Geneva Convention (III), *supra* note 63, art. 2.

68. *Id.* art. 4.



state,<sup>69</sup> albeit not one that need be recognized by other state parties to the Conventions—an important innovation at the time.<sup>70</sup>

Consequently, despite postwar innovations such as Common Article 3, which for the first time promulgated explicit rules for noninternational armed conflicts, much of IHL continues to depend, above all, on a single convention, in the informal sense, created by and for states to govern their hostilities *inter se*. That convention stipulates that certain individuals affiliated with a state and defined by conventional criteria, namely, lawful combatants, may deliberately kill other combatants but not civilians.<sup>71</sup> This is the “combatant’s privilege.” As Telford Taylor explains succinctly, it consists in a robust form of legal immunity:

War consists largely of acts that would be criminal if performed in time of peace—killing, wounding, kidnapping, destroying or carrying off other peoples’ property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors.<sup>72</sup>

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69. The Conventions accomplished this, in effect, by adding two new conditions to the four traditional criteria: (1) that nonstate armed forces (however characterized, for example, as guerrillas, militias, insurgents, or otherwise) be “organized,” *id.* art. 4(A)(2), meaning that they “act within a hierarchic framework, embedded in discipline, and subject to supervision by upper echelons of what is being done by subordinate units in the field,” DINSTEIN, *supra* note 43, at 39; and (2) that they “belong[] to a Party to the conflict,” Geneva Convention (III), *supra* note 63, art. 4(A)(2), meaning that they manifest some relationship to a state party. DINSTEIN, *supra* note 43, at 39–40. Pictet similarly notes:

The solution now adopted [to the “grave problem of the treatment of ‘partisans’ falling into enemy hands”] is to put organized resistance movements on the same footing as militia and volunteer corps who, without forming part of the regular armed forces of the belligerent, depend nevertheless on him and fulfill the conditions laid down in the Hague Regulations [for lawful combatancy].

Jean S. Pictet, *The New Geneva Convention for the Protection of War Victims*, 45 AM. J. INT’L L. 462, 472 (1951). Even the Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)], which for the first time extended explicit protection to civilians, covers only “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not *nationals*.” *Id.* art. 4 (emphasis added).

70. See Pictet, *supra* note 69, at 468.

71. INT’L COMM. OF THE RED CROSS, *supra* note 63, at 48–49; DINSTEIN, *supra* note 43, at 27; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (citing distinction between combatants and noncombatants as a “cardinal principle” of humanitarian law).

72. TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 19 (1970); see also Geneva Convention (III), *supra* note 63, arts. 87, 99; Protocol I, *supra* note 37, art. 43(2); *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002); Gen. Order No. 100: Instructions for the Government of the Armies of the United States in the Field (Lieber Code), art. 57 (Dep’t of War Apr. 24, 1863), reprinted in 1 THE LAW OF WAR, *supra* note 15 at 169; McDUGAL & FELICIANO, *supra* note 50, at 712; Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, 85 INT’L REV. RED CROSS 45, 45 (2003).

Noncombatants, by contrast, may neither contribute directly to organized violence nor, conversely, be its deliberate target.<sup>73</sup> And an unlawful combatant, despite all the confusion generated by this designation recently, is simply one who participates in hostilities without the combatant's privilege.<sup>74</sup>

The distinction between combatants and noncombatants has long been understood as indispensable to the efficacy of IHL. The core principles of IHL include distinction, which requires combatants to distinguish between military and nonmilitary targets, and proportionality, which requires all force to be proportional to a legitimate military objective. In the formulation of Protocol I, state military officials must "[r]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>75</sup> In practice, it would not be possible to operationalize these principles were belligerents unable to identify combatants and distinguish them clearly from civilians; hence the vital role of legal "status categories" in the traditional "protective schemes in the law of war."<sup>76</sup> The conventional law of war therefore divided noncombatants into civilians, the wounded or sick on land, the wounded or sick at sea, and prisoners of war, and it supplied explicit rules to govern the treatment of persons falling within each category. The law's ability to limit superfluous suffering and destruction in the midst of hostilities depends on the ability and right of belligerents to classify enemies and regulate their conduct accordingly; it depends, in a phrase, on the principle of distinction.<sup>77</sup> Again, I stress, as just war theorists have long recognized, that this principle is not a moral one: it is not necessarily the case<sup>78</sup> that combatants bear moral guilt for wars while

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73. See *Ex parte Quirin*, 317 U.S. 1, 39 (1942); Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 93, 103–04 (1988).

74. George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 892 (2002); Dörmann, *supra* note 72, at 46. See generally Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323 (1951). Unprivileged participation in armed conflict may be a crime, but it is not a war crime under customary international law. Dörmann, *supra* note 72, at 70. The United States has nonetheless indicted Omar Ahmed Khadr before a military commission for, among other things, the crimes of attempted and actual "murder by an unprivileged belligerent." John R. Crook, *Further Development Involving the U.S. Detention Facility at Guantánamo Bay, Cuba*, 100 AM. J. INT'L L. 239, 240 (2006). Of course, to say that the formal definition of an unlawful combatant is simple is not to say that determining who qualifies as a lawful combatant is simple, particularly in noninternational armed conflicts. Hence, the Third Geneva Convention provides that, in circumstances of doubt, "persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Geneva Convention (III), *supra* note 63, art. 5.

75. Protocol I, *supra* note 37, art. 57(2)(a)(iii).

76. Jinks, *Protective Parity*, *supra* note 36, at 1493; accord Terry Gill & Elies van Sliedregt, *Guantánamo Bay: A Reflection On The Legal Status And Rights Of 'Unlawful Enemy Combatants'*, 1 UTRECHT L. REV. 28, 29 (2005).

77. DINSTEIN, *supra* note 43, at 29; Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912, 919 (1987).

78. It may have been, however, in some historical contexts. Cf. *The Paquete Habana*, 175 U.S. 677, 690–91 (1900).

civilians remain morally innocent relative to them.<sup>79</sup> The distinction, rather, rests on a convention between the parties to armed conflicts, which, in the formative period of IHL, were states.

Postwar IHL developments have diminished the significance of status categories, culminating in substantial overlap and convergence among the associated protective regimes established by IHL for each category. Some argue that these status categories have outlived their utility.<sup>80</sup> But they remain central to existing IHL,<sup>81</sup> and two further points should be emphasized in this context.

First, it is a mistake to suppose that IHL does or could rely to any appreciable extent on rational-actor incentives at the individual level, especially vis-à-vis nonstate actors. Humanitarian protection, the “carrot,” and either its denial or the threat of criminal prosecution, the “stick,” operate almost entirely at the organizational level.<sup>82</sup> Rank-and-file combatants unschooled in the *jus in bello* and not subject to an effective military hierarchy capable of enforcing its rules internally will be highly unlikely to engage in rational calculation of this sort with respect to positive law. Recall that the private-army rule purports to prohibit “the use of force by entities not associated with or operating under delegation from a nation-state.”<sup>83</sup> While, from one perspective, this rule may be a self-serving defense of the asserted state monopoly over the legitimate use of force,<sup>84</sup> sound policy considerations underwrite the private-army rule in the IHL context. With few exceptions, only professional state armies will be indoctrinated in the laws of war and

79. See, e.g., WALZER, *supra* note 7, at 144–46; Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 695 (2004); Thomas Nagel, *War and Massacre*, in INTERNATIONAL ETHICS, *supra* note 41, at 53, 69. For further discussion, see *infra* Section III.A.

80. Jinks argues, for example, that a new regime guaranteeing “protective parity” to all participants in armed conflict regardless of their compliance with the formal criteria for lawful combatancy would be both more consistent with the increasingly humanitarian emphasis of IHL and, combined with an enforcement regime based on international criminal law, more effective. Jinks, *Declining Significance*, *supra* note 36, at 440–42; Jinks, *Protective Parity*, *supra* note 36, at 1494, 1524–28; see also Brooks, *supra* note 16, at 757 (“It would be far better to make combatant status a purely functional question, one that hinges not on technicalities, but on the degree to which a person is directly, actively, and primarily involved in knowingly or intentionally planning or carrying out acts of violence.”); cf. Larry May, *Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants*, ETHICS & INT’L AFF. DEC. 2005, at 39 (questioning the plausibility and moral salience of the conventional criteria for distinguishing combatants from civilians).

81. See Dinstein, *supra* note 43, at 115–16.

82. But cf. Jinks, *Protective Parity*, *supra* note 36, at 1497 (“[P]rotection is offered as a carrot to encourage rule-regarding and rule-promoting conduct at the organizational and individual level.”).

83. Reisman, *supra* note 38, at 4.

84. *Id.* at 2. The classic statement of this view, which has become accepted dogma, appears throughout the work of Max Weber. E.g., 1 MAX WEBER, *ECONOMY AND SOCIETY* 56 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968) (“The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous operation.”). Even before the rise of the modern state, analogous entities, such as princes or lords with a territorial dominion, arrogated to themselves the ostensibly exclusive right to engage in “legitimate” war. See Stacey, *supra* note 14, at 32; see also THEODOR MERON, *Shakespeare’s Henry the Fifth and the Law of War*, in WAR CRIMES LAW COMES OF AGE, *supra* note 14, at 11, 23.

subjected to an effective internal disciplinary system that can credibly guarantee a high level of compliance. I have argued elsewhere that “[p]rincipal responsibility for controlling, judging, and punishing the conduct of individuals during times of war and other serious widespread violence must remain in the first instance on the highly organized, and often well-disciplined collective entities—states, armies, and their cognates,” which can enforce norms of international law by education, the inculcation of internal discipline, and norm internalization as well as by the threat of external sanction. IHL, like international criminal law, therefore “benefits from and indeed relies on the ‘dual positivization’ of its legal norms,” for “the best guarantor of compliance with the laws of war . . . is not international law and institutions; it is a functioning state.”<sup>85</sup>

Second, law does not only regulate behavior; it expresses and shapes social meanings.<sup>86</sup> In the context of IHL, for example, Protocol I disclaimed that its application signified any change in “the legal status of the Parties to the conflict.”<sup>87</sup> But it perforce conferred a degree of normative legitimacy on a particular genre of nonstate actor: “peoples . . . fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.”<sup>88</sup> When President Reagan explained his decision not to recommend that the Senate advise and consent to Protocol I, for example, he emphasized that “[t]he repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups *legitimacy* as international actors.”<sup>89</sup> Efforts to revise IHL must consider not only the probable effect of proposed new rules on incentive structures but also their expressive dimensions. Offering equal protection, privileges, and rights to members of transnational terrorist networks might confer on them—or be perceived by relevant communities to confer—a degree of normative legitimacy that they presently lack under

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85. Sloane, *supra* note 54, at 52 (citation omitted); see also Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1864 (2003).

86. See generally Elizabeth H. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

87. Protocol I, *supra* note 37, art. 4.

88. *Id.* art. 1(4).

89. Message to the Senate Transmitting a Protocol to the 1949 Geneva Convention, 1 PUB. PAPERS 88 (Jan. 29, 1987) (emphasis added). President Reagan also expressed the view that ratification of Protocol I would “give recognition and protection to terrorist groups” and that rejecting it “den[ies] these groups legitimacy as international actors.” *Id.* But cf. Gasser, *supra* note 77, at 917 (“*Humanitarian law never legitimizes any recourse to force.*”). It may be true that Protocol I did not, as Gasser argues, legitimize *recourse* to armed force per se. But Article 1(4)’s recognition of what came to be called wars of national liberation as “international” armed conflicts inevitably implied a legitimacy for such wars that other organized violence perpetrated by nonstate actors lacked. The implication of designating wars of national liberation as international is that a would-be state that merits legitimacy and recognition is fighting against an extant state that does not, at least insofar as the latter purports to govern an erstwhile colonial territory. Under contemporary international law, after all, no “colonial,” “alien,” or “racist” state is legitimate. Cf. Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT’L L. 109, 125–26 (1986) (arguing that the recognition of national wars of liberation as international armed conflicts would set back the effort to develop concrete and practical rules of war).

international law.<sup>90</sup> For both of the foregoing reasons, to decide how IHL should be adapted to the challenge of modern transnational terrorist networks, it is instructive to consider the analogous debate that took place in the 1970s and 1980s in connection with Protocol I.

## II. PROTOCOL I REVISITED

Notwithstanding globalization and the advent of the individual as a direct subject of international law, IHL operates within and depends upon an international legal and political system that continues to treat states as the principal actors: the holders of rights and duties and the agents who bear primary responsibility for enforcing its norms. Because the law of war traditionally prohibited nonstate actors from using force, its codification has, with few exceptions, deliberately avoided the tacit sanction of such unauthorized force that might be inferred were nonstate combatants given explicit rights or privileges. Hence, for example, the axiom that *jus in bello* applies equally and uniformly to all combatants, whatever the justice or legality of their *casus belli*,<sup>91</sup> did not originally apply to nonstate actors, for they did not qualify as (lawful) combatants at all.<sup>92</sup>

In postwar as in prewar IHL, nonstate actors could not claim the full panoply of rights and privileges afforded to combatants and POWs: they could only claim, for the first time, an entitlement to humane treatment<sup>93</sup> pursuant to Common Article 3 of the Geneva Conventions.<sup>94</sup> To reiterate, the most significant legal consequence of the distinction between lawful combatants and unlawful combatants—apart from the “quaint” matters of postal

90. 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, 1342–43 (2004) (cautioning against expanding the ambit of war rules to non-state actors such as al-Qaeda and citing certain undesirable consequences that would, in his view, follow from this, such as “legitimizing various . . . combatant acts and immunizing them from prosecution.”).

91. See, e.g., Hersch. Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT’L L. 206, 215–20 (1953); see also sources cited *supra* note 44.

92. The Hague Conventions recognized only one exception: the *levée en masse*, a now obsolete legacy of the Franco-Prussian War of 1870. KALSHOVEN & ZEGVELD, *supra* note 62, at 40. See 1899 Hague Convention, *supra* note 53, Annex, art. II; 1907 Hague Convention, *supra* note 53, Annex, art. II. The 1907 Convention noted as follows:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with [the four criteria for lawful combatancy], shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

1907 Hague Convention, *supra* note 53, Annex, art. II. Delegates could not reach agreement, by contrast, on the treatment of *francs-tireurs*, “detached bodies of men who harassed the enemy from within, without using guerilla tactics.” Lester Nurick & Roger W. Barrett, *Questions of Guerilla Forces Under the Laws of War*, 40 AM. J. INT’L L. 563, 573 (1946).

93. KALSHOVEN & ZEGVELD, *supra* note 62, at 41, 60; see also Geneva Convention (IV), *supra* note 69, art. 5.

94. See George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT’L L. 42, 58 (2000).

privileges, sports opportunities, monthly pay advances,<sup>95</sup> and so forth to which Gonzales presumably referred in his January 25, 2002, memorandum<sup>96</sup>—is that the latter may be prosecuted for participating in armed conflict. Belligerents failing to conform to the Article 4 criteria, though no longer subject to extrajudicial killing, may be tried as criminals for murder, assault, and other acts characteristic of war.<sup>97</sup>

In what is surely an understatement, Yoram Dinstein remarks that “it is not easy for irregular forces to comply cumulatively with” the criteria for lawful combatancy.<sup>98</sup> The reason is that these criteria derive from and reflect the private-army rule and the paradigm of war between professional nation-state armies.<sup>99</sup> From a state-centric perspective, of course, this is not a problem: it is as it should be. But the overwhelming majority of postwar conflicts have not been between states.<sup>100</sup> Furthermore, as the old law of war (classically based on the international political dynamics between states) evolved into modern IHL (with its explicit synergy with the proliferating corpus of international human rights law),<sup>101</sup> the virtually blanket exclusion of nonstate actors that had been deliberately entrenched by the postwar system began to seem intolerable or unjust to many.

In 1968, the United Nations General Assembly adopted Resolution 2444, entitled “Respect for Human Rights in Armed Conflicts,” an emblem of the synergy between modern IHL and international human rights law.<sup>102</sup> After World War II, international law also quickly came to embrace the right of all peoples to self-determination in the context of decolonization.<sup>103</sup> This lent legitimacy to the increasing number of armed struggles being waged by the inhabitants of territories still under colonial administration: hence, for

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95. Geneva Convention (III), *supra* note 63, arts. 38, 72, 60.

96. Gonzales Memorandum, *supra* note 25.

97. *E.g.*, TAYLOR, *supra* note 72, at 22.

98. DINSTEIN, *supra* note 43, at 41.

99. See George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 769 (1981) (noting that the POW requirements specified in Article 4(A)(2) of the Third Geneva Convention appear to contemplate full-time soldiers); see also Brooks, *supra* note 16, at 706, 730.

100. Steven R. David, *The Primacy of Internal War*, in INTERNATIONAL RELATIONS THEORY AND THE THIRD WORLD 77, 77 (Stephanie G. Neuman ed., 1998); Kenneth J. Keith, *Rights and Responsibilities: Protecting the Victims of Armed Conflict*, 48 DUKE L.J. 1081, 1089 (1999).

101. G.I.A.D. Draper, *Wars of National Liberation and War Criminality*, in RESTRAINTS ON WAR 135, 143 (Michael Howard ed., 1979) (“[The Protocols of 1977] displayed the close nexus, in juridical terms, between the international law regimes of Human Rights and the new Humanitarian Law of Armed Conflicts . . .”).

102. Respect for Human Rights in Armed Conflicts, G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7433 (Dec. 19, 1968).

103. See, e.g., G.A. Res. 1541, Annex, Principle VI, at 29, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 15, 1960); G.A. Res. 1514, at 66, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960); Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31–36 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21).

example, the United Nations demanded that liberation fighters in Portuguese, French, and other colonies be treated as POWs.<sup>104</sup>

In the context of decolonization (and beyond), the private-army rule came under stress for two principal reasons. First, private armies raise the global expectation of unauthorized violence and destabilize world public order because they operate outside the interstate political constraints of the traditional laws of war, including reciprocity. Yet within the emerging legal and normative regime of international human rights law, “insistence on non-violence and deference to all established institutions in a global system with many injustices [seemed to] be tantamount to confirmation and reinforcement of those injustices.”<sup>105</sup> Apartheid-era South Africa offered a paradigmatic example of this predicament. Second, the inherited laws of war presume the stability of states, including both their authority—that is, effective and plenary control over their territory—and legitimacy—in the sense of popular normative acquiescence or support. Because the stable identity of many states is a fiction,<sup>106</sup> so too—at least to this extent and in this regard—is the rationale for the private-army rule.

These issues came to a head during the decolonization era, when the authority, legitimacy, and identity of many states fluctuated. States also recognized at the time—in the popular, if anachronistic, terminology used today—that “failed states” could seriously threaten international peace and security.<sup>107</sup> From an IHL perspective, it also made little sense to treat a former private army that fortuitously managed to seize control of the state as thereafter the rightful claimant to a state monopoly on organized violence and, by extension, the sole entity with the right to have its soldiers treated as lawful combatants. Conversely, effective control of the apparatus of the state allowed the new regime to brand the combatants of other organized militias as criminals, subject to prosecution for participation in war without the combatant’s privilege. In short, the private-army rule seemed, and continues to seem, arbitrary in contexts in which both the efficacy and legitimacy of states fluctuate.<sup>108</sup>

The inherited law of war, which vested the combatant’s privilege almost exclusively in state actors, therefore proved both unworkable and, in some circumstances, normatively intolerable. It essentially made criminals of all

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104. KALSHOVEN & ZEGVELD, *supra* note 62, at 13, 31.

105. Reisman, *supra* note 38, at 6; *see also* George J. Andreopoulos, *The Age of National Liberation Movements*, in *THE LAWS OF WAR*, *supra* note 14, at 191.

106. KONRAD G. BÜHLER, *STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS* 18 (2001); *see also* Reisman, *supra* note 38, at 5–6 (“A significant number of the nominal states of the world do not exercise anything approaching plenary power within their borders; they are treated as nation-states because of the tacit or express agreement or the coincidental disinterest of the effective global elites.”); *cf.* LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8–13 (1995) (deconstructing the idea of state sovereignty).

107. *See* Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 *U. CHI. L. REV.* 1159, 1160–61 (2005).

108. Reisman, *supra* note 38, at 4. Strictly applied to such contexts, the private-army rule “becomes an international confirmation of effective power; in other words, a private army is unlawful if it is not winning.” *Id.* at 5.

but a few nonstate actors who sought to participate in armed conflict, whatever the normative force of their *casus belli*. From a modern IHL perspective, in which one of the law's paramount objectives is to reduce human suffering and destruction in war to the greatest extent practicable, the inherited law also began to seem counterproductive. George Aldrich, the chief U.S. delegate to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva, 1974–1977, stressed that the conventional rule requiring that an insurgent “distinguish himself at all times from the civilian population will simply make him an outlaw: he cannot respect it and hope to survive.”<sup>109</sup> The criteria for lawful combatancy entrenched by the inherited law of war were, Aldrich and others argued, impracticable if not suicidal for nonstate combatants:

By adopting standards of distinction that are impossible to respect and by providing escape clauses through which the occupying power can deny PW status to captured guerillas, the 1949 Convention virtually assures that guerillas in occupied territory will disguise themselves as civilians and that the civilian population will suffer as a result.<sup>110</sup>

Consequently, at the 1974–77 Diplomatic Conference, delegates sought to revise and update the law of war in recognition of two facts relevant to this discussion: (1) the overwhelming majority of postwar armed conflicts had been internal, and (2) the proliferation of nonstate actors in armed conflicts and the consequent need to *integrate* them into the conventional war system meant that to preserve the private-army rule in its pure form would ill serve the humanitarian objectives of modern IHL. If nonstate actors, which constitute the vast majority of combatants in armed conflicts worldwide, were to remain by definition excluded from the law of armed conflict, IHL would be limited in its utility to the small minority of armed conflicts fought between states. Because one of IHL's chief goals is to reduce superfluous suffering in war, it would be better to integrate at least some nonstate actors into the conventional system created by and for states.

States therefore designed Protocol I, in part, to ameliorate what they saw as a key defect of the Geneva Conventions: the failure to offer irregular, nonstate combatants any external incentive to comply with the laws of

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109. Aldrich, *supra* note 99, at 769; *see also* DINSTEIN, *supra* note 43, at 42 (“From a pragmatic standpoint, many believe that ‘obedience to these rules would be tantamount to committing suicide, as far as most guerillas would be concerned.’”) (quoting G. von Glahn, *The Protection of Human Rights in Time of Armed Conflict*, 1 ISR. Y.B. HUM. RTS. 208, 223 (1971)); George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT’L L. 693, 704 (1986) [hereinafter Aldrich, *Progressive Development*] (“[I]rregular armed forces . . . cannot possibly comply with the [requirement that they bear a fixed distinctive sign recognizable at a distance] and hope to survive.”). Furthermore, Aldrich argued, the Third Geneva Convention established an unjustifiable double standard: violations of the laws and customs of war by “regular, uniformed armed forces” did not result in the loss of their POW status, but nonstate actors would be deprived of that status if, in the view of the detaining power (that is, a state), “the guerilla armed forces as a whole . . . have not adequately respected the laws of war.” Aldrich, *supra* note 99, at 769.

110. Aldrich, *supra* note 99, at 770; *see also id.* at 774.



war.<sup>111</sup> Protocol I sought to accommodate the asserted legitimacy of many national liberation movements (“NLMs”) deemed to be fighting “just war[s]” against colonial authorities.<sup>112</sup> It sought to integrate NLMs into the global war system by holding out the “carrot” represented by the various rights and privileges formerly reserved for the soldiers of professional state armies. Protocol I, its proponents hoped, would thereby alter the rational calculus presumably engaged in by such irregular combatants so that they would be both able and incentivized to comply with IHL.<sup>113</sup> It did this in three ways. First, Article 1(4) expanded the definition of international armed conflict for purposes of the Geneva Conventions and Protocol I to

include 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, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>114</sup>

Second, Articles 43 and 44 relaxed—or eviscerated, depending on one’s perspective—the criteria for POW status enumerated in Article 4 of the Third Geneva Convention.<sup>115</sup> Third, Article 96 offered certain nonstate actors an opportunity to participate in the conventional war system by making a formal declaration undertaking “to apply the Conventions and this Protocol” in relation to “an armed conflict of the type referred to in Article 1, paragraph 4.”<sup>116</sup>

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111. *Id.* at 769–70; Aldrich, *Progressive Development*, *supra* note 109, at 703–08. For a more recent assessment, see George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1 (1991).

112. Roberts, *supra* note 89, at 124–25, 127.

113. Aldrich, *Progressive Development*, *supra* note 109, at 704; *see also id.* at 707 (“[I]t makes sense to encourage part-time combatants to comply with the rule of distinction during attacks and military operations preparatory to attack by recognizing their combatant status and POW rights if they do so and by subjecting them to criminal penalties if they fail to do so.”).

114. Protocol I, *supra* note 37, art. 1(4).

115. Article 43 stipulates that “armed forces” with “the right to participate directly in hostilities” include “all organized armed forces, groups and units” under responsible command and “an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.” *Id.* art. 43. It thereby, in effect, reduces the four criteria for lawful combatancy to two: responsible command and compliance with the laws of war. But Article 44 then provides that “violations of these rules shall not deprive a combatant of his right to be a combatant,” *id.* art. 44(2), and that even a combatant who fails to observe the relaxed requirement of distinction set out in Article 44(3), although he “shall forfeit his right to be a prisoner of war, . . . shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third [Geneva] Convention and by this Protocol,” *id.* art. 44(4). Dinstein, reflecting a view held by many, opines that “[t]he pendulum in the Article has swung from one extreme to the other, reducing *ad absurdum* the conditions of lawful combatancy. The outcome is that, for contracting Parties to the Protocol, the general distinction between lawful and unlawful combatants becomes nominal in value.” DINSTEIN, *supra* note 43, at 47; *see also* KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE 165–69 (1984).

116. Protocol I, *supra* note 37, art. 96(3).

Unsurprisingly, a considerable number of states and military strategists resisted these changes vigorously. Some argued that Protocol I would give “rights to terrorists.”<sup>117</sup> Others cautioned that the proposed new system would fundamentally undermine IHL’s efficacy. They saw Article 1(4) as a misguided effort to reintroduce the discredited concept of “just war” into IHL.<sup>118</sup> This reintroduction would in effect “license belligerent foreign meddling in the sovereign domain of certain states, politicize humanitarian law, and thereby render humanitarian law even less sturdy a shield for its intended beneficiaries.”<sup>119</sup> Furthermore, opponents argued, the elimination or relaxation of the traditional criteria for lawful combatancy would in practice fail to offer any real incentive to irregular combatants to comply with IHL, for “[p]ersons who resort to guerilla warfare . . . face many privations and the promise of POW status is unlikely to be an inducement to restrain operations which they believe necessary for victory.”<sup>120</sup> To the contrary, by “[r]ecognizing . . . that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot . . . distinguish himself”<sup>121</sup> from the civilian population, the proposed new rules would authorize and perhaps even encourage abuses and violations of the principle of distinction<sup>122</sup>—hallmarks of terrorism.<sup>123</sup> Opponents of the Protocol feared that the purportedly limited exception created by Article 44 would swallow the rule.<sup>124</sup>

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117. William Safire, *Rights for Terrorists?*, N.Y. TIMES, Nov. 15, 1984, at A31; see also Douglas J. Feith, *Law in the Service of Terror—The Strange Case of the Additional Protocol*, NAT’L INT., Fall 1985, at 36; Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 912–15 (1986).

118. See Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55, 69 & n.56 (1984); Draper, *supra* note 101, at 157–60; Roberts, *supra* note 89, at 124–27.

119. Feith, *supra* note 117, at 41. *But see* Levie, *supra* note 58, at 471–72 (emphasizing that the preamble refutes the suggestion that Protocol I reintroduces the “just war” doctrine).

120. SUTER, *supra* note 115, at 168.

121. Protocol I, *supra* note 37, art. 44(3).

122. See, e.g., Sofaer, *supra* note 117, at 914–15; Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT’L L. 784, 786 (1988); see also Howard S. Levie, *Prisoners of War Under the 1977 Protocol I*, 23 AKRON L. REV. 55, 64 (1989) (“[Under Article 44(3),] combatants may merge with the crowd, weapons concealed, until they are about to attack, at which time they move out of the crowd, disclose their weapons, and begin their attack . . . . [a prospect that would undoubtedly] increase the dangers to the civilian population.”).

123. See S. TREATY DOC. No. 100-2, at IX (1986) (“As the essence of terrorist criminality is the obliteration of the distinction between combatants and noncombatants, it would be hard to square ratification of this Protocol [I] with the United States’ announced policy of combating terrorism.”); see also Safire, *supra* note 117.

124. *But see* Gasser, *supra* note 77, at 919–20 (emphasizing the exceptional nature of the circumstances contemplated by Article 44(3) and the limited conditions under which it may be properly invoked). Aldrich and others also responded thoughtfully to this criticism. See, e.g., Aldrich, *supra* note 99; Waldemar A. Solf, *A Response to Douglas J. Feith’s Law in the Service of Terror—The Strange Case of the Additional Protocol*, 20 AKRON L. REV. 261 (1986). See generally *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims* (pts. 1 & 2), 81 AM. J. INT’L L. 910 (1987), 82 AM. J. INT’L L. 784 (1988).

Yet as the era of decolonization wound down, the debate became, for all intents and purposes, obsolete.<sup>125</sup> Experience effectively “resolved” the disputes prompted by Articles 1(4), 43, 44, and 96(3) by showing that they would remain academic. To date, no insurgent group that would arguably qualify under Article 1(4) of Protocol I has made a declaration under Article 96(3),<sup>126</sup> which would have been required to bring the Protocol into effect in the circumstances set forth in Article 1(4).<sup>127</sup> Nor has any irregular, nonstate combatant fighting in an actual international armed conflict—to which Protocol I, it should be recalled, principally applies—been afforded POW status or “equivalent treatment” under Articles 43 or 44.<sup>128</sup> Experience suggests that Protocol I, while successful in other respects, has failed, as Aldrich recognized it might, “in its efforts to give irregular armed forces adequate inducements to distinguish themselves from the civilian population.”<sup>129</sup> Neither, however, has the existence of Protocol I lent support to or legitimized terrorism as critics projected. In short, while many of the less controversial provisions of Protocol I have now crystallized into or been recognized as custom,<sup>130</sup> worries about the extent to which the Protocol would confer legitimacy on terrorists or obliterate the principle of distinction have become moot—in large part because NLMs no longer constitute the paradigmatic nonstate actor of concern to IHL.

### III. IHL AND THE “NEW” NONSTATE ACTOR

Of what relevance is this to current debates over the proper conduct of hostilities in the “war” against modern transnational terrorist networks? To be clear, I stress at the outset that Protocol I cannot plausibly be thought to apply to armed conflict with such networks.<sup>131</sup> I agree with those who argue

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125. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT’L L. 678, 682 (1994).

126. *Id.* at 683.

127. See Gasser, *supra* note 77, at 917.

128. Meron, *supra* note 125, at 683.

129. Aldrich, *Progressive Development*, *supra* note 109, at 708; see also Meron, *supra* note 125, at 682–83.

130. See Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law*, 99 AM. SOC’Y INT’L L. PROC. 423, 424 (2005); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT’L L. 78, 80 (1994).

131. Construing Protocol I “in good faith 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” makes this clear beyond doubt. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331. First, the new genre of nonstate actors does not qualify under Article 1(4) as one of the “peoples . . . fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.” Protocol I, *supra* note 37, art. 1(4). Nor is armed conflict with transnational terrorist networks like al-Qaeda international in the strict sense: it is not a conflict between two or more states, and it does not become *international* simply because terrorists operate *transnationally*. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2756–57, 2795–96 (2006). Second, needless to say, neither al-Qaeda nor any other transnational terrorist network has declared under Article 96(3) of Protocol I its intention to apply the Geneva Conventions and the Protocol. Third, at the collective level, terrorist networks cannot satisfy even the minimal, relaxed requirements

that as a matter of positive law, the global war on terrorism—insofar as it refers to a literal state of armed conflict with al-Qaeda and its allies—in most circumstances falls within the rubric of noninternational armed conflict to which Common Article 3 applies,<sup>132</sup> as the Supreme Court suggested in *Hamdan v. Rumsfeld*.<sup>133</sup> Beyond this, however, it should be clear that the conceptual framework of Protocol I is misplaced in the context of modern transnational terrorist networks typified by al-Qaeda. The prototypical nonstate actor of this new paradigm is not a nonstate combatant who, but for the impracticable nature of the law of war vis-à-vis nonstate combatants, would be amenable to compliance with IHL and would strive to avoid endangering noncombatants.

At best, the members of modern transnational terrorist networks may be indifferent to the deleterious effects of organized violence on non-combatants. More likely, they wish to maximize those effects and thereby spread terror as a means to achieve their political or ideological goals. This strategy, after all, is a distinctive, though not necessarily definitional,<sup>134</sup> characteristic of terrorism.<sup>135</sup> Insurgents battling alien or colonial regimes, and other nonstate actors who have employed terrorism as a strategy (for example, the Irish Republican Army, Euskadi Ta Askatasuna, or the Tamil Tigers), typically aspire to statehood, autonomy, regime change, or some other concrete form of political status that the international legal system could—in theory if not always in practice—accommodate. The Protocol I debate presumed that if only the laws of war could be revised to make compliance by nonstate actors practicable, NLMs would wish to comply: NLMs did not characteristically or in principle reject the principle of distinction, noncombatant immunity, or any other precept of IHL. Rather, as proponents of Protocol I argued, they could not comply with the war convention and hope to survive, still less prevail. Before the demise of apartheid, for example, certain antiapartheid groups fighting the racist South African regime did

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for lawful combatancy set forth in Article 43: responsible command and “an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.” Protocol I, *supra* note 37, art. 43(1). To the contrary, most transnational terrorist organizations deliberately, as a matter of strategy adopted or endorsed by the elite of the organization, flout a paramount principle of the law of armed conflict: distinction. Finally, at the individual level, seldom if ever do the members of such networks fulfill even the sole extant requirement for lawful combatancy under Article 43: carrying arms openly at least during each military engagement or “deployment preceding the launching of an attack.” *Id.* art. 44(3)(b). *See also* Levie, *supra* note 58, at 476; *cf.* William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 *YALE J. INT’L L.* 319, 320–21 (2003) (arguing that members of terrorist networks enjoy no special status under the law of armed conflict and, in particular, enjoy no colorable claim to POW status under the criteria enumerated in Article 4 of the Third Geneva Convention).

132. *E.g.*, Aldrich, *supra* note 74, at 893. At the same time, I agree with those, including the International Committee of the Red Cross, who propose that the global war on terrorism be disaggregated into “more manageable parts” and the appropriate body of law applied to each. Wippman, *supra* note 34, at 18. Whether unprivileged combatants benefit from Geneva Convention (IV) is a contentious issue on which I express no view here. *See* Dörmann, *supra* note 72, at 48–60.

133. 126 S. Ct. at 2795–96.

134. *See* Jeremy Waldron, *Terrorism and the Uses of Terror*, 8 *J. ETHICS* 5 (2004).

135. MICHAEL WALZER, *Terrorism: A Critique of Excuses*, in *ARGUING ABOUT WAR* 51, 51 (2004); *see also* Scheffler, *supra* note 22.

not respect the principle of distinction and were labeled terrorists.<sup>136</sup> Yet members of these same groups—including eminent figures such as Albie Sachs, now a justice of the Constitutional Court of South Africa—currently govern a postapartheid South Africa with a constitution and judicial system that, for all its flaws and difficulties, is in many respects a beacon of the progressive application of international human rights law. In short, while NLMs often violate the war convention, they do not characteristically repudiate it in principle.

By contrast, the transnational terrorist networks of concern to modern IHL do not aspire to join the existing international system. Nor do they accept the war convention's precepts. For strategic or ideological reasons—or both—they generally repudiate the “norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements” that underwrite IHL.<sup>137</sup> The common denominator of the war convention—which, absent reciprocity, reputation, and other interstate political dynamics, makes it “work,” however imperfectly—is a shared *normative* commitment to reducing superfluous suffering and harm in war. And the main convention by which IHL accomplishes this is the axiom of noncombatant immunity, which modern transnational terrorist networks typified by al-Qaeda reject. This “new” genre of nonstate actor also rejects the secular, aspirationally universal conception of human dignity underlying international human rights law.<sup>138</sup>

I put “new” in quotation marks because this genre of nonstate actor is not really unprecedented in the respects just emphasized.<sup>139</sup> What is genuinely new is the geopolitical and technological context in which *all* nonstate actors now operate. Globalization has facilitated the (legal and illegal) transborder movement of persons and goods,<sup>140</sup> making it far easier than in the past for nonstate actors to inflict major, even catastrophic, damage with a single or limited number of strikes.<sup>141</sup> In the context of IHL, nonstate

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136. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1988, at 82 (1989); Bernard Weinraub, *White House: The Speech That Launched a Thousand Critics*, N.Y. TIMES, July 28, 1986, at A12 (quoting President Reagan's characterization of the African National Congress and other antiapartheid organizations). See generally Marina Ottaway, *Liberation Movements and Transition to Democracy: The Case of the A.N.C.*, 29 J. MOD. AFR. STUD. 61 (1991).

137. WALZER, *supra* note 7, at 44.

138. Universal Declaration of Human Rights pmbl., G.A. Res. 217A at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). This is not to suggest that the members of such networks lack *any* conception of human dignity; only that the conception they embrace cannot be reconciled with international human rights norms. Cf. Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 574–75 (2001).

139. See generally PAUL BERMAN, *TERROR AND LIBERALISM* (2003).

140. See generally NAÏM, *supra* note 47.

141. Ruth Wedgwood, *Countering Catastrophic Terrorism: An American View*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 103, 104 (Andrea Bianchi ed., 2004) (cautioning that “[t]he freedom of movement prized in a Schengen ethos can be used to fly couriers, paymasters, and bomb-makers in and about of a country” and that “[t]he technology available on a world market can be purchased by a private group and married to a violent and atavistic worldview”); see also Reisman, *supra* note 45, at 86.

actors refer broadly to any combatant not formally authorized by a state to engage in violence. They exist in varying degrees of organization. Some form private armies; others act independently or in smaller collective units such as terrorist cells. Can we draw any generalizations about the particular genre of nonstate actor in modern warfare typified by al-Qaeda? I do not presume to be an expert on al-Qaeda, Islamic fundamentalism, or transnational terrorist networks generally, and to that extent, I hesitate to generalize. Tentatively, however, I want to stress two characteristics of these networks relevant to modern IHL.

#### A. Noncombatant Immunity

First, modern transnational terrorist networks typified by al-Qaeda characteristically reject the IHL principles of noncombatant immunity and distinction. In a relatively early interview, for example, Osama bin Laden said candidly, “We do not have to differentiate between military or civilian [sic]. As far as we are concerned, they are all targets.”<sup>142</sup> He explained elsewhere that while “the Prophet forbade the killing of [innocents],” the Qur’an also instructs Muslims to “punish [your enemy] with the like of that with which you were afflicted.”<sup>143</sup> In short, the essential rationale is *lex talionis*, an eye for an eye: “We treat others like they treat us. Those who kill our women and our innocent, we kill their women and innocent, until they stop doing so.”<sup>144</sup>

*Lex talionis* is an archaic principle of justice. It generally serves as a rationale for, or crude barometer of, just punishment.<sup>145</sup> Applying *lex talionis* to war, one might logically conclude that it is acceptable to kill those non-combatants who share culpability for the causes of the war. This is what bin Laden appears to suggest: it is justifiable for members of the al-Qaeda network to kill civilians because, at least in liberal democracies, they cannot be regarded as genuinely innocent of the network’s grievances, its *casus belli*:

The American people should remember that they pay taxes to their government and that they voted for their president. Their government makes weapons and provides them to Israel, which they use to kill Palestinian Muslims. Given that the American Congress is a committee that represents the people, the fact that it agrees with the actions of the American government proves that America in its entirety is responsible for the atrocities that it is committing against Muslims.<sup>146</sup>

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142. 9/11 COMM’N REPORT, *supra* note 23, at 47.

143. MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN 118 (Bruce Lawrence ed., James Howarth trans., 2005) [hereinafter MESSAGES TO THE WORLD].

144. *Id.* at 118–119; *see also id.* at 140–41.

145. *See generally* Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25 (1992).

146. MESSAGES TO THE WORLD, *supra* note 143, at 140–41; *see also id.* at 61 (“To kill the American [sic] and their allies—civilians and military—is an individual duty incumbent upon every Muslim.”).

This view is not based on an implausible conception of innocence. But it is not the conception that animates the inherited war convention. Modern just war theory and contemporary IHL use innocence relative to non-combatants as a term of art. In common parlance, innocence often means *moral* innocence. Its antonym is guilt or culpability. But in the context of war,

the operative notion of innocence is not moral innocence, and it is not opposed to moral guilt. If it were, then we would be justified in killing a wicked but noncombatant hairdresser in an enemy city who supported the evil policies of his government, and unjustified in killing a morally pure conscript who was driving a tank toward us with the profoundest regrets and nothing but love in his heart. But moral innocence has very little to do with it . . . .<sup>147</sup>

Of course, whether innocence has a moral connotation depends on what we mean by morality. In the just war literature, “‘innocent’ derives from the Latin *nocentes*, which means ‘those who injure or are harmful.’ The innocent are those who are *not nocentes*.”<sup>148</sup> Noncombatant immunity from direct attack is thought to follow from the fact that civilians, unlike combatants, “have done nothing, and are doing nothing, that entails the loss of their rights.”<sup>149</sup> By contrast, it is said, combatants—by virtue of their training, arms, and very purpose—have been made dangerous or harmful and for that reason may be lawfully attacked.<sup>150</sup> This is certainly a moral account insofar as it is based on a theory that presupposes rights, which may be lost by certain conduct. Alternatively, if “[t]he immunity of noncombatants is best thought of as a convention-dependent obligation . . . which substitutes for [unrestrained] warfare a certain form of limited combat,”<sup>151</sup> then the operative notion of morality at work in the conventional conception of

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147. Nagel, *supra* note 79, at 69; accord Mavrodes, *supra* note 41, at 80–81 (providing a similar hyperbolic contrast). Earlier just war theorists, particularly those in the Christian tradition, *did* rely on a moral conception of innocence: noncombatants were deemed inherently innocent vis-à-vis the causes and violence of war. Mavrodes, *supra* note 41, at 76–82. (summarizing and critiquing the views of Elizabeth Anscombe, John C. Ford, and Paul Ramsey). The examples offered by Nagel, Mavrodes, and others show why it is wrong to presume that a moral-culpability conception of innocence underwrites the convention of noncombatant immunity. Still, some civilians—for example, children—clearly should be deemed innocent of the causes of or guilt for war. Yet because of their beliefs about the fate that awaits children killed in a jihad operation, many Islamic militants typified by al-Qaeda believe that children, too, may be killed without violating any religious stricture. See Moss & Mekhennet, *supra* note 42.

148. McMahan, *supra* note 79, at 695; see also Jeff McMahan, *On the Moral Equality of Combatants*, 14 J. POL. PHIL. 377, 380 (2006).

149. WALZER, *supra* note 7, at 146; see also *id.* at 144–45.

150. *Id.* at 145; see also *id.* at 138 (“The first principle of the war convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured).”); accord Nagel, *supra* note 79, at 70. For a critique of this theoretical basis for noncombatant immunity, see May, *supra* note 80, at 44–46.

151. Mavrodes, *supra* note 41, at 85; cf. McDUGAL & FELICIANO, *supra* note 50, at 543–44 (“Thus, in confining combatancy generally to relatively well-defined categories of persons, such as members of the public armed forces, the rules of warfare may be seen to reflect a policy of limiting the involvement—that is, the participation and hence subjection to direct violence—of individuals in war.”).

noncombatant immunity is more consequentialist in nature: it serves the moral purpose of reducing the aggregate death, suffering, and destruction caused by war.

But whether we find Walzer's deontological account persuasive, prefer Mavrodes's consequentialist view, or adopt some alternative rationale for the convention of noncombatant immunity is not terribly important in this context.<sup>152</sup> Given the fact of value pluralism within any political community,<sup>153</sup> and *a fortiori* within the figurative international community, we can expect no more than an "incompletely theorized agreement"<sup>154</sup> on the rationale for noncombatant immunity. Yet that is also all that is needed for this paramount *convention* of the law of war and its corollaries—the principles of necessity, distinction, and proportionality—to function. When I say that modern transnational terrorist networks typified by al-Qaeda reject this convention, I mean that, as bin Laden's remarks suggest, they seem to view noncombatant immunity as a defeasible principle that can be discarded in circumstances where the enemy, in their perception, bears moral guilt for the grievances that constitute their *casus belli*. Given this idiosyncratic conception of noncombatant immunity,<sup>155</sup> coupled with the increasing availability of weapons of mass destruction to nonstate actors, further catastrophic attacks on or exceeding the scale of September 11, 2001, must be appreciated as a genuine threat to which IHL will ultimately need to adapt.

Of course, the conclusion that modern transnational terrorist networks typified by al-Qaeda reject the conventional conception of noncombatant immunity is in one sense hardly surprising. I stress it in this context because of the shift from a crime to a war paradigm.<sup>156</sup> Before September 11, 2001, states often conceived of and responded to terrorism principally within the rubric of crime and law enforcement.<sup>157</sup> To speak of the principles of distinction and proportionality in that context would be incongruous: these are not principles of criminal law. Terrorism would not suddenly lose its criminal character were it carried out with due regard for these principles: only the combatant's privilege confers the *legal right* to kill or damage even military personnel and infrastructure. But it is clear that for better or worse, some states, especially the United States, now conceive of terrorism within the

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152. For an alternative account of the rationale for noncombatant immunity, see, for example, Robert K. Fullinwider, *War and Innocence*, in INTERNATIONAL ETHICS, *supra* note 41, at 90. *But see* Lawrence A. Alexander, *Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider*, in INTERNATIONAL ETHICS, *supra* note 41, at 98.

153. See ISAIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 166 (Henry Hardy ed., 2002).

154. Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

155. I do not mean to suggest that only Islamic militants typified by al-Qaeda adopt this view of noncombatant immunity. See Moss & Mekhennet, *supra* note 42.

156. See William Lietzau, *Combating Terrorism: The Consequences of Moving from Law Enforcement to War*, in NEW WARS, NEW LAWS?, *supra* note 34, at 31.

157. *Id.* at 33. This is not always the case: the United States responded to the Libyan bombing of La Belle Discotheque with military strikes, for example.



rubric of armed conflict.<sup>158</sup> Given that this rubric has been applied, IHL must adapt to the reality that one figurative party to this particular conflict rejects its central convention<sup>159</sup>: a robust principle of noncombatant immunity based on an amoral—in the culpability sense of that term—conception of what it means to be innocent and therefore not subject to direct attack. In short, insofar as war is a rule-governed activity, the opponent in this war rejects the most basic rule.<sup>160</sup>

I emphatically do not mean to suggest, and it does not follow, that states should abandon the principles of necessity, proportionality, and distinction relative to the global war on terrorism. That would be not only a moral tragedy but a serious strategic error. Nor do I mean to argue, as some do, that a bilateral conception of reciprocity remains the *Grundnorm* of IHL and states therefore need not observe IHL relative to an enemy that baldly repudiates it.<sup>161</sup> If IHL is to function effectively within the context of the new paradigm, however, it must recognize that its core convention will be observed by only one side—in a geopolitical context in which the catastrophic weapons formerly monopolized by states have become increasingly available to nonstate actors.

### B. A Network of Networks

Second, modern transnational terrorist networks typified by al-Qaeda characteristically lack the structural features that enable a reasonable level of compliance with IHL. Because of their diffuse, decentralized nature, they

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158. In contrast, thus far, European states have tended to respond to “new terrorism threats” with “traditional law enforcement methods.” Gerald L. Neuman, Comment, *Counter-terrorist Operations and the Rule of Law*, 15 EUR. J. INT’L L. 1019, 1019 (2004).

159. Modern transnational terrorist networks differ in this regard from, for example, Kamikazes, who engaged in suicide bombings as legitimate acts of warfare. Kamikazes operated from properly marked planes, which enabled their opponents to apply the principle of distinction. See DINSTEIN, *supra* note 43, at 33 n.29.

160. Bin Laden’s statements also suggest that he rejects the war convention’s distinction between “collateral damage” and the deliberate attack of civilians. Deaths and other injuries suffered by the Iraqi people as a consequence of the U.N. sanctions regime directed against the now-defunct regime of Saddam Hussein should be morally (if not legally) equated, on this view, with deliberate attacks on civilians: one justifies the other. While characteristic of apologies for terrorism of the “one man’s freedom fighter is another man’s terrorist” variety, this logic constitutes an explicit repudiation of the war convention, which insists that IHL be observed equally and uniformly by all combatants, regardless of the asserted justice of their *casus belli*.

161. See, e.g., Lee A. Casey & David B. Rivkin, Jr., *Rethinking the Geneva Conventions*, in THE TORTURE DEBATE IN AMERICA, *supra* note 16, at 203; see also Wippman, *supra* note 34, at 10 (noting the “possibly quixotic nature of applying a body of law premised in part on considerations of reciprocity to a conflict with terrorists whose principal aim is to kill civilians in violation of that body of law”). But see Noah Feldman, *Ugly Americans*, in THE TORTURE DEBATE IN AMERICA, *supra* note 16, at 267, 274–79 (pointing out serious rule of law, human rights, and instrumentalist flaws in the nonreciprocity argument inherent in the Bush administration memoranda justifying departures from the norms of the Geneva Conventions and the absolute prohibition of torture); Jinks, *supra* note 24, at 190–95 (distinguishing various forms of reciprocity implicit in the Geneva Convention framework and, while noting that the Conventions create mutual obligations, debunking the myth that they become inapplicable simply because the enemy does not or will not apply them reciprocally).

lack the hierarchical structure of traditional armies. NLMs typically operate in or against a single state. Although they seldom fulfill the Brussels criteria for lawful combatancy, they nevertheless tend to be centralized and hierarchical by contrast to the decentralized, nonhierarchical network structure of transnational terrorist organizations. One expert characterized al-Qaeda's structure before the 2001 attack on Afghanistan, which eliminated its ability to operate from a host state (at least for the moment), as follows:

It is neither a single group nor a coalition of groups: it comprised a core base or bases in Afghanistan, satellite terrorist cells worldwide, a conglomerate of Islamist political parties, and other largely independent terrorist groups that it draws on for offensive actions and other responsibilities. Leaders of all the above are co-opted as and when necessary to serve as an integral part of Al Qaeda's high command, which is run via a vertical leadership structure that provides strategic direction and tactical support to its horizontal network of compartmentalised cells and associate organisations.<sup>162</sup>

To speak of al-Qaeda as a univocal actor is therefore misleading; rather, it "is simultaneously a small core group and a broader network linking various Islamist groups and causes."<sup>163</sup> It would be more accurate to conceptualize the global war on terrorism as a fluctuating state of armed hostilities with a transnational terrorist network that *includes*, but is not limited to, al-Qaeda, which itself must be disaggregated.<sup>164</sup> The enemy in this war is not one network; it is a loose "network of networks,"<sup>165</sup> a series of concentric circles, each comprising distinct actors, even if their agendas, ideologies, and strategies frequently overlap.

Consider the paradigm of al-Qaeda. Within one circle is an inner core "of highly skilled and dedicated members that has sworn loyalty to Osama bin Laden and that has focused on terrorism," numbering, according to some

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162. GUNARATNA, *supra* note 29, at 54. *But cf.* PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 820 (2002) (enumerating features of the al-Qaeda network, including its standing army, treasury, civil service, intelligence cadre, and welfare programs, which make it "a kind of virtual state").

163. Daniel L. Byman, *Al-Qaeda as an Adversary: Do We Understand Our Enemy?*, 56 *WORLD POL.* 139, 149 (2003); *see also* Cuéllar, *supra* note 29, at 1317 (stressing "the dangers of treating a terrorist network as a monolithic entity, impervious to organizational challenges, and enjoying a bountiful supply of members guided by a single purpose"); Kimberly A. McCloud & Adam Dolnik, *Debunk the myth of Al Qaeda: Its size and reach have been blown out of proportion*, *CHRISTIAN SCI. MONITOR*, May 23, 2002 ("The United States and its allies in the war on terrorism must defuse the widespread image of Al Qaeda as a ubiquitous, super-organized terror network and call it as it is: a loose collection of groups and individuals that doesn't even refer to itself as 'Al Qaeda.'").

164. This is in fact how the Bush administration has tended to characterize the global war on terrorism from its inception. *See, e.g.*, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 2 *PUB. PAPERS* 1140, 1141 (Sept. 20, 2001) ("Our war on terror begins with al-Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated."). On the other hand, the administration apparently now acknowledges that "global war on terrorism" is not a legal term. *See* John B. Bellinger, *Remarks on the Military Commissions Act*, 48 *HARV. INT'L L.J. ONLINE* 1, 8 (2007), <http://www.harvardilj.org/online/91> (last visited Sept. 2, 2007).

165. JASON BURKE, *AL-QAEDA: CASTING A SHADOW OF TERROR* 16 (2003).

estimates, only in the hundreds.<sup>166</sup> Then there exists an expanded circle of perhaps 3000 elite al-Qaeda members, followed by another circle comprised of anywhere from 10,000 to 110,000 fighters trained in the al-Qaeda camps formerly based in Afghanistan.<sup>167</sup> We might further break down this network into circles of (1) individuals who profess allegiance to the avowed ideological goals of al-Qaeda or fealty to bin Laden but do not fall within al-Qaeda's command structure; (2) self-declared subunits or followers of al-Qaeda such as the terrorist group led by the late Abu Musab al-Zarqawi in Iraq; (3) "like-minded groups such as the Egyptian Islamic Jihad, the Islamic Movement of Uzbekistan, and literally dozens of other radical organizations;"<sup>168</sup> (4) supporters who provide financial or other assistance; and (5) potential recruits.<sup>169</sup>

Determining the most accurate or helpful model by which to understand the structure of modern transnational terrorist networks is extraordinarily difficult.<sup>170</sup> But the key point for IHL is the absence of a hierarchical military structure. While the inner core of al-Qaeda apparently maintains a strict and complex hierarchy,<sup>171</sup> the real innovation of al-Qaeda, as the archetype of a new genre of private army, is that "it is organized as a network."<sup>172</sup> Professional state armies and their cognates can achieve general compliance with IHL because they are organized as hierarchies:

A hierarchy typically addresses the problems of organizing power, authority, administration, and governance by establishing a centralized and coordinated decision-making headquarters. Typically hierarchies are built around chains of command and animated by rituals and honors, duties and privileges. To use the classic formula of Max Weber, the "charisma" of a clan chief becomes routinized as a bureaucratically rational command-and-

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166. Byman, *supra* note 163, at 149; *see also* BURKE, *supra* note 165, at 13; Cuéllar, *supra* note 29, at 1312 ("Though it is decentralized, it appears still to have a coherent leadership structure and a cadre of strategic thinkers to chart its future course.").

167. Byman, *supra* note 163, at 148.

168. *Id.* at 149; *see also* JONATHAN SCHANZER, *AL-QAEDA'S ARMIES* (2005). Jason Burke stresses that it is a mistake to conceive of al-Qaeda as "an international network of active groups answering to bin Laden," for while "they may see bin Laden as a heroic figure, symbolic of their collective struggle, individuals and groups have their own leaders and their own agenda, often ones that are deeply parochial and which they will not subordinate to those of bin Laden or his close associates. BURKE, *supra* note 165, at 14.

169. *See* LAWRENCE WRIGHT, *THE LOOMING TOWER 301-05* (2006) (describing the general characteristics, training, and indoctrination of recruits in al-Qaeda's former camps in Afghanistan).

170. *See* BURKE, *supra* note 165, at 15-22.

171. *See* GUNARATNA, *supra* note 162, at 57-60.

172. BARRY COOPER, *NEW POLITICAL RELIGIONS, OR AN ANALYSIS OF MODERN TERRORISM* 158 (2004); *see also* SCHANZER, *supra* note 168, at 22. Again, while the network structure of modern transnational terrorist networks typified by al-Qaeda differs both qualitatively and quantitatively from past ones, it is not entirely new or unprecedented. In the extradition context, for example, U.S. courts in the 1980s debated the relevance of such a network structure to the political offense exception. *E.g.*, *Quinn v. Robinson*, 783 F.2d 776, 804 (9th Cir. 1986).

control cadre at the top of which is a sovereign commander-in-chief uttering the words, “I will it.”<sup>173</sup>

By contrast, neither Osama bin Laden nor any other figurehead exercises anything like this plenary power: “Bin Laden does not have the power to issue orders that are instantly obeyed. He is not the commander-in-chief of an army. In fact, any military analogies, despite the martial-sounding names assumed by many Islamic groups, are unhelpful in understanding their nature.”<sup>174</sup> Even were al-Qaeda inclined to adhere to certain aspects of IHL, its network structure renders the authoritative transmission, internalization, and enforcement of IHL rules and principles impracticable.<sup>175</sup>

Two further consequences follow from this structure. The first concerns the potential for negotiation to neutralize the threat posed by modern transnational terrorist networks. While animated by overlapping ideologies and goals, the networks against which the global war on terrorism is fought lack a single, charismatic chief with the authority and credibility required for negotiation. It is difficult enough to identify and understand al-Qaeda’s diverse grievances and demands,<sup>176</sup> although it should be stressed that they tend to be political rather than cultural.<sup>177</sup> But in any event, bin Laden is not the consensus, anointed negotiator on behalf of one “party” to the armed conflict in which al-Qaeda participates. Various components of modern transnational terrorist networks differ in their grievances and demands. Some seek to reestablish the Caliphate or a pure version of Islam identified with some idealized past;<sup>178</sup> others maintain culturally, politically, and geographically specific demands.

Again, I do not want to suggest that negotiation will never be effective and should be abandoned. It remains an indispensable strategy in some cir-

173. COOPER, *supra* note 172, at 160.

174. BURKE, *supra* note 165, at 16. Cf. GUNARATNA, *supra* note 162, at 56–57 (“By issuing periodic pronouncements, speeches and writings, Osama [bin Laden] indoctrinates, trains and controls a core inner group as well as inspiring and supporting peripheral cadres. . . . The constituent groups of Al Qaeda operate as a loose coalition, each with its own command, control and communications structures.”).

175. Stephen Holmes, *Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror*, in *THE TORTURE DEBATE IN AMERICA*, *supra* note 16, at 118, 130.

176. Bin Laden specifically enumerated the grievances on the basis of which, he said, al-Qaeda has attacked the United States. See *MESSAGES TO THE WORLD*, *supra* note 143, at 16–72; see also *9/11 COMM’N REPORT*, *supra* note 23, at 51; WRIGHT, *supra* note 169, at 247; Byman, *supra* note 163, at 144–45; Osama bin Laden, *Statement to America* (October 26, 2002), reproduced in *OSAMA BIN LADEN: AMERICA’S ENEMY IN HIS OWN WORDS* 94–103 (Randall B. Hamud ed., 2005).

177. See GEORGE MICHAEL, *THE ENEMY OF MY ENEMY* 260 (2006); Byman, *supra* note 163, at 145; CHRISTOPHER M. BLANCHARD, *CONG. RESEARCH SERV., AL QAEDA: STATEMENTS AND EVOLVING IDEOLOGY* (2007); see also PAPE, *supra* note 33, at 102–25.

178. *9/11 COMM’N REPORT*, *supra* note 23, at 50–51; SCHANZER, *supra* note 168, at 15; W. Michael Reisman, *Aftershocks: Reflections on the Implications of September 11*, 6 *YALE HUM. RTS. & DEV. L.J.* 81, 85 (2003). Sayyid Qutb, one of the most influential intellectual forebears of radical Islamic organizations like al-Qaeda, sought to purge Islam of the corruption of modern (Western) values, WRIGHT, *supra* note 169, at 24, and restore its pervasive role in every aspect of social and political life. See, e.g., SAYED KOTB, *SOCIAL JUSTICE IN ISLAM* 113–26, 261–62 (John B. Hardie trans., Octagon Books 1970) (1953).

cumstances, particularly to address discrete issues and grievances such as, for example, the status of Kashmir. But the diffuse nature of modern transnational terrorism—the diversity of grievances and demands made by various network components and the absence of a single, authoritative leader with the power to ensure compliance with bargains struck—means negotiation will be at best a partial solution and, not infrequently, futile.<sup>179</sup>

The second consequence that follows from the structure of modern transnational terrorist networks concerns deterrence and reciprocity. The strategic logic of classical deterrence is, many argue, dubious at best relative to a diffuse transnational terrorist network. Like a hydra, it cannot be decapitated.<sup>180</sup> It has “a robust capacity for regeneration.”<sup>181</sup> And it lacks a readily ascertainable “return address.”<sup>182</sup> Ideological objectives and religious beliefs held by some members of these networks exacerbate the deterrence problem, for it is difficult to deter those who regard death in the service of ideology as preferable to life<sup>183</sup>—a mindset that al-Qaeda deliberately cultivates.<sup>184</sup> Modern IHL depends on both internal self-enforcement through normative commitments shared with international human rights law and external enforcement through the political dynamics that obtain between states, as well as, perhaps, some nonstate actors such as the NLMs that aspire to statehood. But because one side in the global war on terrorism repudiates the paramount normative convention of the law of war, namely, a particular conception of noncombatant immunity, IHL must fall back on the

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179. Ideological views held by certain transnational terrorist networks may also render negotiation untenable to their members, for “there can be no bargaining with the infidel enemy: God, not the umma, and certainly not Al Qaeda, is the offended party.” COOPER, *supra* note 172, at 173; *see also* 9/11 COMM’N REPORT, *supra* note 23, at 362 (“[Bin Laden and his allies do not espouse] a position with which Americans can bargain or negotiate. . . . [T]here is no common ground—not even respect for life—on which to begin a dialogue.”); BERMAN, *supra* note 139, at 116. Note, however, that bin Laden has explicitly offered to strike “deals” on several occasions, though the credibility of such offers is suspect. *See, e.g.*, Osama bin Laden, Offer of Peace Treaty With Europe (Apr. 15, 2004) *reprinted in* OSAMA BIN LADEN: AMERICA’S ENEMY IN HIS OWN WORDS, *supra* note 176, at 156–159; Osama bin Laden, Second Statement to the American People (Oct. 29, 2004), *reprinted in* OSAMA BIN LADEN: AMERICA’S ENEMY IN HIS OWN WORDS, *supra* note 176, at 160–66. Furthermore, to the extent that the demands made imply the sacrifice of core international human rights, negotiation may be not only impracticable but normatively untenable from the perspective of international law. Reisman, *supra* note 178, at 85, 90–94; *Cf.* MICHAEL WALZER, *Terrorism: A Critique of Excuses*, in ARGUING ABOUT WAR 51 (2004).

180. COOPER, *supra* note 172, at 165.

181. GUNARATNA, *supra* note 162, at 54.

182. Graham, *supra* note 45, at 9; Reisman, *supra* note 45, at 86.

183. *See, e.g.*, BOBBITT, *supra* note 162, at 820 (“Al Qaeda is a kind of virtual state, which means that our classical strategies of deterrence based on retaliation will have to be rethought.”); Wedgwood, *supra* note 141, at 110 (“[D]eterrence cannot work when a non-State actor is unencumbered by worldly commitments, when it lacks any commitment to a people or a territory, and seeks only supernatural reward.”). *But see* Matthew & Shambaugh, *supra* note 44; Trager & Zagorcheva, *supra* note 44.

184. GUNARATNA, *supra* note 162, at 72–73. Osama bin Laden has reportedly said that “‘We love death . . . as much as the infidels love life.’” Fouad Ajami, *Facing Up to Unholy Terror*, U.S. NEWS & WORLD REP., Sept. 20, 2004, at 31. By contrast, deterrence in the broader sense of strategies to confront the causes and grievances, legitimate or not, of modern transnational terrorist networks remains practicable and, in my judgment, essential.

external enforcement dynamics of deterrence and reciprocity. Yet for the reasons just sketched, these dynamics, too, will be unlikely to function relative to a “network of networks.” This might not have been such a major problem in the past because, as Michael Reisman wrote in the *ad bellum* context, “[a]s long as nonstate actors did not amass significant arsenals, their indifference or even hostility to world public order was inconsequential.”<sup>185</sup> But transnational terrorist networks now operate in a global order characterized by massive weapons proliferation on illicit markets.<sup>186</sup> Many experts believe that absent reinigorated transnational efforts to avoid such a nightmare scenario, it is only a matter of time before catastrophic, including nuclear, weapons fall into the hands of nonstate actors willing to use them.<sup>187</sup>

#### IV. PROLOGUE TO A VOLUNTARIST WAR CONVENTION

Despite the alarming tone of these observations, the existence of a new paradigm, as stressed at the outset of this Article, must be distinguished from particular policies allegedly adopted in response to it. Whether a new paradigm exists and whether it renders the old one obsolete are analytically distinct questions.<sup>188</sup> Insofar as modern transnational terrorist networks repudiate the amoral conception of noncombatant immunity and exhibit a nonhierarchical, “network of networks” structure, contemporary IHL is ill-suited to address armed conflicts with them. At the same time, we should be wary of exaggeration about the nature and extent of the threat posed by this new paradigm and the state measures required to guard against it.<sup>189</sup> Gonzales wrote that the “new paradigm” differs from “the traditional clash between nations adhering to the laws of war.”<sup>190</sup> But as the discussion of Protocol I indicates, this is hardly the first time that IHL has been called upon to adapt to new circumstances. Well before the attacks of September 11, 2001, the “traditional clash between nations adhering to the laws of war” had become the exception rather than the rule.<sup>191</sup> Neither the nonstate actor in general nor

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185. Reisman, *supra* note 45, at 86.

186. NAİM, *supra* note 47, at 38–64; *see also* GORDON CORERA, SHOPPING FOR BOMBS: NUCLEAR PROLIFERATION, GLOBAL INSECURITY, AND THE RISE AND FALL OF THE A.Q. KHAN NETWORK 161–64 (2006).

187. *See, e.g.*, GRAHAM ALLISON, NUCLEAR TERRORISM (2004). *But see* Dafna Linzer, *Nuclear Capabilities May Elude Terrorists, Experts Say*, WASH. POST, Dec. 29, 2004, at A1.

188. *Cf.* Brooks, *supra* note 16, at 745 (“[T]o say that the administration’s interpretations of the laws of armed conflict are plausible is neither to support the policy decisions that underlie the choice of legal paradigms, nor to accept as inevitable or appropriate all of the consequences that flow from this choice.”).

189. *Cf.* John Mueller, *Is There Still a Terrorist Threat? The Myth of the Omnipresent Enemy*, FOREIGN AFF., Sept./Oct. 2006, at 2, 8.

190. Gonzales Memorandum, *supra* note 25.

191. Indeed, “even the battles of the nineteenth century,” and certainly those of the latter half of the twentieth century, “rarely fit this paradigm.” Brooks, *supra* note 16, at 730.

the terrorist in particular is new to IHL.<sup>192</sup> States have previously struggled with the question how to integrate them into the global war system. Gonzalez's reference to a new paradigm, however, might charitably be understood to refer not to nonstate actors or terrorists generally but instead to the distinctive threat posed by modern transnational terrorist networks operating in a global environment in which catastrophic weapons formerly monopolized by states are increasingly available to nonstate actors on illicit markets.

The principal purpose of this Article has been to clarify the respects in which the new paradigm is genuinely new, to stress the challenges posed by modern transnational terrorist networks for IHL, and to point out the need for IHL to define the contours of a voluntarist war convention that can effectively and humanely govern what is likely to be a prolonged state of episodic armed conflict with this particular genre of twenty-first-century nonstate actor.<sup>193</sup> I want to conclude, however, by suggesting that (1) any modifications to the law should be incremental, transparent, and tentative; (2) the burden of persuasion should be on those who would modify IHL; and (3) in the meantime, insofar as existing IHL does not clearly apply, sound policy nonetheless continues to commend adherence to the core precepts of the inherited war convention.

To articulate principles of IHL appropriate for war with transnational terrorist networks typified by al-Qaeda, state political elites must first understand their nature. In view of the Manichean political rhetoric,<sup>194</sup> it is embarrassingly apparent that many do not. For example, that high-level intelligence agents, law-enforcement officials, and many members of Congress, including key lawmakers involved in crucial decisions about matters of national security related to the global war on terrorism, do not know the difference between Shia and Sunni Islam and cannot identify al-Qaeda with a particularly militant and reactionary ideology embraced by some adherents of the latter is deeply disturbing.<sup>195</sup> It is hardly an apology for terrorism to acknowledge that “[i]f we are to reduce the extent of terrorist

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192. As early as 1937, international law recognized and sought to address terrorism as a distinct phenomenon. See Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 L.N.T.S. 23; see generally Antonio Cassese, *Terrorism as an International Crime*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 213 (Andrea Bianchi ed., 2004); Thomas M. Franck & Bert B. Lockwood, Jr., *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69 (1974); Ben Saul, *The Legal Response of the League of Nations to Terrorism*, 4 J. INT'L CRIM. JUST. 78 (2006). Terrorism itself, of course, predates by centuries legal efforts to address it at the international level. One famous example is the Hashashin or Assassins, a radical Ismaili Muslim sect active in the eighth through fourteenth centuries. See generally FARHAD DAFTARY, *THE ISMA'ILIS* (1990); BERNARD LEWIS, *THE ASSASSINS* (2002).

193. See High-Level Panel, *A More Secure World*, *supra* note 23, ¶ 146.

194. E.g., Remarks Following Discussions With Prime Minister Junichiro Koizumi of Japan and an Exchange With Reporters, 2 PUB. PAPERS 1157, 1159 (Sept. 25, 2001) (“And make no mistake about it: This is good versus evil. These are evildoers. They have no justification for their actions. There's no religious justification, there's no political justification. The only motivation is evil.”).

195. Jeff Stein, *Can You Tell a Sunni from a Shi'ite?*, N.Y. TIMES, Oct. 17, 2006, at A21.

violence aimed at us, we must consider the root causes of that terror, and seek ways to address it.”<sup>196</sup>

I doubt that we understand adequately the nature and psychology of the enemy—which is not one enemy, but many—in the new paradigm of armed conflict with transnational terrorist networks.<sup>197</sup> Nor does the rise of a new paradigm necessarily supersede, as opposed to augment, the older, more conventional ones. Blanket verdicts about the obsolescence of the Geneva Conventions or any other component of the inherited postwar IHL would therefore be premature and likely misguided.<sup>198</sup> The war convention may need to be adapted, but it should not be discarded.<sup>199</sup> Ultimately, rather than fit the square peg of the global war on terrorism into the round hole of the existing law, IHL may well need to develop a *lex specialis* for conflicts with transnational terrorist networks, just as it did (albeit with limited success) for the noninternational conflicts of the latter half of the twentieth century. Geoffrey Corn proposes, for example, that IHL recognize a new category of “transnational armed conflict,” which would apply to “the extraterritorial application of military combat power by the regular armed forces of a state against a transnational non-state armed enemy.”<sup>200</sup> In the meantime, however, for instrumental and moral reasons alike, the burden of persuasion should be on those who suggest significant departures from the spirit, if not the letter, of the inherited laws of war.

First, even from a purely instrumentalist perspective, it is far too simple to dismiss the inherited body of IHL because al-Qaeda and comparable groups do not “fight fair” or “play by the rules.”<sup>201</sup> Of course, reciprocity will be unlikely to encourage IHL compliance by modern transnational terrorist networks in a contractual sense, whereby parties to an armed conflict comply with IHL principally to ensure reciprocal compliance by their enemies and to avoid reprisals, which might be characterized as reciprocal breaches of a contractual war convention authorized by a precedent breach. But IHL compliance, even in the absence of contractual reciprocity, continues to serve several vital state and individual interests.

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196. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 205 (2003).

197. See generally MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS (2004); TERRORISTS, VICTIMS AND SOCIETY, *supra* note 33. Cuéllar, while acknowledging the diffuse, network structure of modern transnational terrorist organizations, argues that undue rhetorical emphasis on the trope of decentralization obscures the extent to which terrorist networks face bureaucratic challenges not unlike those of the modern administrative state. Cuéllar, *supra* note 29, at 1307–10.

198. See, e.g., Casey & Rivkin, *supra* note 161, at 203–04; cf. John C. Yoo & Will Trachman, *Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379, 379–85 (2005) (advancing comparable arguments vis-à-vis the *jus ad bellum*).

199. E.g., Renée de Nevers, *Modernizing the Geneva Conventions*, 29 WASH. Q. 99, 100 (2006).

200. Corn, *Regulation of Hostilities*, *supra* note 26, at 299–300.

201. Feldman, *supra* note 161, at 276–79. Whether the Geneva Conventions formally apply, as a matter of existing positive law, is a distinct issue. Derek Jinks argues persuasively that the absence of a robust reciprocity dynamic does not obviate the legal applicability of the Conventions. Jinks, *supra* note 24, at 190–95.



In the first place, the infliction of superfluous suffering generally “yields no military advantage and may have the undesirable effect of stimulating hatred in the enemy. . . . Excessive destruction not only violates humanitarian considerations but is not good practice from a military operational standpoint.”<sup>202</sup> In the context of the global war on terrorism, for example, violations of IHL often contribute to a perception of the United States and its allies that swells the ranks of new recruits for transnational terrorist networks.<sup>203</sup> Second, as Telford Taylor stressed, the laws of war serve an essential psychological purpose insofar as they “diminish the corrosive effect of mortal combat on the participants”;<sup>204</sup> put otherwise, “limitations imposed on the conduct of hostilities—limitations developed by warriors to limit the infliction of suffering to only that which is legitimately necessary—protect not just the adversary, but the moral and psychological integrity of the members of the force regulated by such constraints.”<sup>205</sup> In a related vein, as early as 1880, in the *Oxford Manual of the Laws of War on Land*, military elites recognized that compliance with the laws of war serves not only humanitarian objectives but also, as a general rule, the interests of belligerents: compliance contributes to the discipline and efficacy of military forces.<sup>206</sup>

Finally, contractual reciprocity does not tell the whole story. Recall, in this context, the definitional distinction between formal and informal conventions emphasized at the outset of this Article as well as the diverse prudential, virtue ethicist, and humanitarian roots of past war conventions. Relative to transnational terrorist networks, the analysis supplied above suggests that we lack one sort of instrumentalist reason to comply with formal conventions: the expectation that compliance will induce reciprocal compliance. But it does not follow that we therefore lack *any* instrumentalist—to mention moral or humanitarian—rationale to adhere to the informal conventions that underwrite those treaties. To the contrary:

[R]eciprocity is almost always more than bilateral. . . . Reciprocity extends also to my desire to convince other parties, third parties, that agreements are worth keeping, even when such parties might be able to get away with violating them. Just as important, reciprocity includes the proposition that I

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202. Roberts, *supra* note 89, at 119; Jinks, *supra* note 24, at 191 (“[H]umane and fair treatment increases battlefield effectiveness because poor treatment discourages surrender, encourages reprisals, decreases troop morale, and decreases political support at home and abroad for the war effort.”).

203. HUMAN RIGHTS WATCH, *WORLD REPORT 2003*, at xvii (2003) (“Washington’s tendency to ignore human rights in fighting terrorism is not only disturbing in its own right; it is dangerously counter-productive. The smoldering resentment it breeds risks generating terrorist recruits, puts off potential anti-terrorism allies, and weakens efforts to curb terrorist atrocities.”); *see also* Shirley Williams, *The seeds of Iraq’s future terror: Free market shock therapy must not be imposed by the occupiers*, *GUARDIAN*, Oct. 28, 2003, at 22.

204. TAYLOR, *supra* note 72, at 40.

205. Corn, *Filling the Void*, *supra* note 26, at 484–85.

206. Corn, *Regulation of Hostilities*, *supra* note 26, at 318.

have an interest to signal that I am the kind of person or entity who keeps agreements in spirit as well as in letter.

The rule of law, understood from this perspective of reciprocal interest in keeping to the rules, is not only a good in itself. It is also a tool for promoting a habit of rule-following that serves the interests of stability.<sup>207</sup>

By viewing reciprocity solely as a short-term, utilitarian device for securing compliance with IHL rules in particular circumstances, we neglect the aggregate, systemic effects of real and perceived violations of IHL on the stability of the international legal and political system as well as our efficacy as a state actor within it.<sup>208</sup> The global war on terrorism will not be won solely by military force or even primarily by that strategic instrument.<sup>209</sup> Chronic violations of the spirit, if not the letter, of the law, even if they appear to promise short-term gains, tend in the long term to undermine a state's credibility and reputation with unforeseeable, but predictably negative, consequences for its ability to pursue diplomatic, intelligence, ideological, and other strategies that will be indispensable to its national security. Compliance with the core precepts of the war convention therefore tends to serve the strategic objectives of states engaged in the global conflict with modern transnational terrorist networks. Empirical evidence or a particularly compelling argument may show that this is not the case relative to a given IHL rule. But for these reasons, as well as humanitarian considerations, the burden of persuasion should be on those who urge departures from the existing war convention to show that actual, not speculative, military necessity requires them, even if the letter of law in a particular case is subject to a contrary, but plausible, interpretation. Indeed, it is telling that for more than three decades before the advent of the global war on terrorism, and despite the absence of contractual reciprocity in earlier armed conflicts (for example, the Vietnam War), the Department of Defense Law of War Program saw fit to adopt, in effect, a voluntarist war convention as a matter of policy.<sup>210</sup> It directs the U.S. armed forces to "comply with the law of war

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207. Feldman, *supra* note 161, at 277.

208. Furthermore, because the network of networks against which the global war on terrorism is fought cannot be conceived of as a monolithic actor with a vertical command structure, it is less important than it might at first appear that the incentive structures of key public figures—Osama bin Laden, Ayman al-Zawahiri, and so forth—cannot be influenced by the dynamics of reciprocity. While the use of torture as a tactic of interrogation should be prohibited for humanitarian, pragmatic, and moral reasons, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440–52 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1682–1717 (2005), the diffuse, network structure of modern transnational terrorism also makes it less likely that detainees will possess actionable intelligence on imminent attacks. See, e.g., GUNARATNA, *supra* note 162, at 76 ("Cell members never meet in one place together; nor do they in fact know each other; nor are they familiar with the means of communication used between the cell leader and each of its members." (footnote omitted)).

209. See High-Level Panel, *A More Secure World*, *supra* note 23, ¶¶ 147–48.

210. Com, *Regulation of Hostilities*, *supra* note 26, at 315.

during all armed conflicts, however such conflicts are characterized, and in all other military operations.”<sup>211</sup>

Moreover, from a moral perspective, nothing about the global conflict with modern transnational terrorist networks offers any reason to depart from the broadly shared normative objective of IHL: to limit suffering, destruction, and violations of human dignity to the greatest extent practicable in war. IHL signifies a major postwar shift in the modern law of armed conflict: away from an interstate model grounded solely in simple reciprocity and interstate dynamics and toward a model justified more explicitly by international human rights law’s solicitude for the individual and normative commitment to a universal conception of human dignity. To this effect, the International Criminal Tribunal for the Former Yugoslavia aptly noted:

After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy. The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals *qua* human beings.<sup>212</sup>

Potential changes to the convention that threaten to diminish its protection of human dignity should therefore be made transparently, with caution, and based on compelling evidence of the actual necessity for departures from the old one, not speculation based on hyperbolic “ticking bomb” scenarios and the like. The Martens Clause, though often viewed as merely hortatory, embodies vital humanitarian ideals that lie at the moral core of IHL. As a matter of law, it prescribes a kind of “precautionary principle” for IHL comparable to the axiom of international environmental law, which, among other things, puts the burden of proof on those who advocate conduct that could seriously damage the environment:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience . . . .<sup>213</sup>

None of this is to dismiss the very real dangers posed by transnational terrorist networks operating in a global environment in which catastrophic

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211. Directive No. 2311.01E: DoD Law of War Program, ¶ 5.3.1 (Dep’t of Def. May 9, 2006). I am grateful to Geoffrey Corn for directing my attention to this policy.

212. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 518 (Jan. 14, 2000) (footnote omitted).

213. 1899 Hague Convention, *supra* note 53, pbml. The Martens Clause, named for its drafter, Baron Feodor de Martens, Czar Nicholas II’s legal adviser, first appeared in the preamble to the 1899 Hague Convention. It has since been reproduced, substantially unchanged, in the 1949 Geneva Conventions and the Additional Protocols of 1977. Geneva Convention (III), *supra* note 63, art. 142; Protocol I, *supra* note 37, art. 1(2).

weapons have become increasingly available to nonstate actors. It is, however, to suggest again that the burden of persuasion properly lies on those who urge departures from the core precepts of the war convention,<sup>214</sup> especially the minima of humane treatment prescribed by Common Article 3,<sup>215</sup> as augmented by customary international law.<sup>216</sup> Absent a compelling showing that military necessity not adequately taken into account by existing IHL requires a departure, these considerations weigh strongly in favor of adherence to the core precepts of the war convention even where existing positive law may plausibly be subject to a contrary interpretation.

### CONCLUSION

That said, in the long term, the increasingly anachronistic postwar framework supplied by the Geneva Conventions, as augmented by the Additional Protocols of 1977 and customary international law, will not, in my judgment, suffice to address the diverse challenges to IHL posed by modern transnational terrorist networks.<sup>217</sup> The global war on terrorism has already raised legal quandaries about, for example, the potential for indefinite deten-

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214. Cf. Brooks, *supra* note 16, at 751–52 (arguing, relative to the targeted assassination of al-Qaeda suspects in Yemen by a U.S. predator drone missile in 2002 that given the circumstances and uncertainties, “human rights norms suggest that the U.S. should bear the burden (politically and diplomatically, if not legally) of making a convincing case that the killings were neither arbitrary nor unnecessary”).

215. For all noninternational armed conflicts, Common Article 3 provides in relevant part:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Geneva Convention (III), *supra* note 63, art. 3. It forbids “violence to life and person”; hostage-taking; torture; cruel, inhuman, and degrading treatment; and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.* It also requires that state parties collect and care for the wounded and sick. *Id.*

216. Article 75 of Protocol I, though technically applicable only in international armed conflicts, is regarded by many, including the United States, as customary international law, and it informs the content of Common Article 3. See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2797 (2006) (plurality opinion); see also Geoffrey S. Corn, Hamdan, *Fundamental Fairness, and the Significance of Additional Protocol II*, 2006 ARMY LAW. 1, 5; Taft, *supra* note 131, at 321–22. Equally, Article 6 of Protocol II, while not strictly applicable to the conflict with al-Qaeda or the global war on terrorism according to the terms of Article 1(1), may inform the content of Common Article 3. See Corn, *supra*, at 7. See generally 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 299–383 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). Insofar as state parties have not derogated from it, Article 14 of the International Covenant on Civil and Political Rights should also apply. See International Covenant on Civil and Political Rights art. 14, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. NO. E, 95-2 (1978), 999 U.N.T.S. 171.

217. For arguments that the current framework suffices, see, for example, JORDAN J. PAUST, AM. SOC’Y INT’L LAW, THERE IS NO NEED TO REVISE THE LAWS OF WAR IN LIGHT OF SEPTEMBER 11TH (2002), available at <http://www.asil.org/taskforce/paust.pdf>; Luigi Condorelli & Yasmin Naqvi, *The War Against Terrorism and Jus in Bello: Are the Geneva Conventions Out of Date?, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM* 25 (Andrea Bianchi ed., 2004); and Paust, *supra* note 90.

tion,<sup>218</sup> the lawfulness of intermittent armed attacks in the territory of other (nonenemy) sovereign states,<sup>219</sup> the due process and trial rights of unprivileged belligerents,<sup>220</sup> and the legality of targeted assassinations.<sup>221</sup> And notwithstanding the laudable humanitarian goals of modern IHL, it should always be remembered that no war convention will long survive—to the detriment of those very same laudable goals—unless belligerents operating in good faith accept that it can be applied in a manner consistent with the genuine demands of military necessity and long-term national security.

In time, IHL will need to work out the details of a voluntarist war convention to govern what is likely to be a prolonged state of episodic armed conflict with modern, diffuse transnational terrorist networks typified by al-Qaeda.<sup>222</sup> Those details lie beyond the scope of this Article and in any event should, as emphasized, be developed incrementally, cautiously, and transparently as empirical evidence and deliberation clarify the genuine demands of military necessity in the twenty-first century.<sup>223</sup> At an abstract level, however, any voluntarist war convention should be guided by two overarching considerations. It must suffice to preserve minimum order both globally and within liberal states, for without a certain level of security and freedom from fear, those states will be unlikely to survive in anything like their present form.<sup>224</sup> And it must be humane, as measured against the shared international conceptions of human dignity and rights that have been rightly acknowledged as laudable hallmarks of the postwar international legal order. A voluntarist war convention suitable to the new paradigm will not, in this particular regard, be so new.<sup>225</sup>

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218. *E.g.*, *A. v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, (2005) 2 A.C. 68 (H.L.) (appeal taken from Eng.) (U.K.) (holding that indefinite detention of foreign terrorist suspects is incompatible with the U.K. Human Rights Act and the European Convention on Human Rights and Fundamental Freedoms); *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–21 (2004) (eliding the issue by focusing on the continuation of hostilities in Afghanistan).

219. *E.g.*, Walter Pincus, *U.S. Strike Kills Six in Al Qaeda: Missile Fired by Predator Drone*, WASH. POST, Nov. 5, 2002, at A1.

220. *See, e.g.*, Thomas M. Franck, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 AM. J. INT’L L. 686, 687 (2004).

221. *See* HCJ 769/02 Pub. Comm. Against Torture in Israel v. Israel, Dec. 14, 2006 (sustaining the policy of targeted assassinations under some circumstances); *see also* Michael Ignatieff, *Lesser Evils: What it Will Cost Us to Succeed in the War on Terror*, N.Y. TIMES, May 2, 2004, § 6 (Magazine), at 49–50.

222. For better or worse, the probability of a new international conference to address these issues, such as those convened in the past to address the changing nature of warfare, is low. *See* Wippman, *supra* note 34, at 6, 11–13.

223. Specific proposals include, for example, recognizing and elaborating the IHL rules and regulations for a hybrid category of “transnational armed conflict,” Corn, *Regulation of Hostilities*, *supra* note 26, at 53, and eliminating the distinction between internal and international armed conflicts; revising the criteria for lawful combatancy; and entrenching certain minimal due process rights for all detainees, regardless of their status under IHL, Brooks, *supra* note 16, at 755–60.

224. *See* Scheffler, *supra* note 22, at 4–6 (“[T]he fear that is generated by terrorism can lead to significant changes in the character of society and the quality of daily life, and at the extremes these changes can destabilize a government or even the social order as a whole.”).

225. *See* DINSTEIN, *supra* note 43, at 16–17.