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# Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”

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“May you live in interesting times” is reputed to be an old Chinese curse. To call a curse what at first blush appears to be a blessing is to emphasize the risks over the opportunities inherent in living in interesting times. These are, indeed, interesting times for international humanitarian law, otherwise known as the law of armed conflict.<sup>1</sup> Whether history will reward the pessimist or the optimist is, of course, uncertain. Still, there are some indications of how the pressures being brought to bear on humanitarian law by the War on Terror will resolve. The aim of this article is to explore some of those indications and, if it is not too ambitious, to possibly influence the debate.

These are interesting times not only for humanitarian law, but also for international law in general. Recent events have generated renewed debate on the long-standing question: “Is international law really law?” The unique position of the United States in world affairs today, coupled with its apparently unique positions on so many current issues affecting international law, has been cited as proof that power is, indeed, the constitution of international law.<sup>2</sup> The purpose of this observation is not to open debate on that loaded question, but only to point out that with regard to living in interesting times, humanitarian law is in good company.

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## I. THE ACCUSATION AGAINST HUMANITARIAN LAW AND THE REPLY

The question has been posed: is humanitarian law passé, or at least stale and in need of revision—inadequate to deal with the demands of modern day terrorism and the efforts to combat it? Several analysts have attempted to make this

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case, attributing specific shortcomings to the law of armed conflict. Some of the criticisms merely misrepresent or misapply humanitarian law, while others correctly state its substance but fail to grasp the ramifications of suggested changes. Part III of this article addresses some of the most significant of these allegations and observations. The response to them requires familiarity not only with the substance, but also with the scope of application of

humanitarian law in relation to other branches of relevant domestic and international law. Part II of this article addresses the scope of application criteria.

As concerns the scope of application, it must first be understood:

- that humanitarian law applies only in armed conflict;
- that other legal regimes such as domestic and international criminal and human rights law also apply, but only to a limited extent, during armed conflict;<sup>3</sup>
- that terrorism and the War on Terror are sometimes manifested in armed conflict, other times not; and
- that there are good reasons involving the global balance between state and personal security, human rights, and civil liberties for this division of legal labor between humanitarian law and other laws.

As for substance, the criticism of humanitarian law seems to come in two forms that are at once related and contradictory: that applicable law is lacking and that applicable law exists but is a hindrance. First, there is the complaint that humanitarian law has failed to keep up with the changing nature of armed conflict, always fighting the last war rather than the next one. Indeed, though the first Geneva Convention dates from 1864,<sup>4</sup> it was only in response to the First World War, in which massive numbers of prisoners were subjected to unspeakable abuse, that the Geneva Convention for the protection of prisoners of war came into being. Likewise, there was no Geneva Convention for the protection of civilians in armed conflict until after the Second World War, in which civilians were the main victims, and were subjected to mass extermination, indiscriminate attack, deportation, and hostage-taking.

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We may concede these facts. We may even concede that humanitarian law, as most recently codified in the Geneva Conventions of 1949<sup>5</sup> and their Additional Protocols of 1977,<sup>6</sup> does not *anticipate* armed conflict in the context of modern terrorism (that is, between a state and one or more transnational armed groups). But to conclude that humanitarian law cannot *accommodate* terrorism and the efforts to combat it when these phenomena amount to armed conflict (the very circumstance that humanitarian law is meant to address) would be wrong.

A second criticism suggests that existing law is a hindrance and proposes that when law and material reality collide, it is law that must give way.<sup>7</sup> This attractive observation must be parsed. It implies that existing law has been “overtaken” by facts on the ground and, therefore, must be revoked or ignored. But law does not give way only because it is overwhelmed by the frequency or intractability of violations. Were that the case, everything from illicit drug use to tax evasion to (some might argue) murder would be decriminalized. Rather, it is the shift from opprobrium to acceptance that places prohibitions at risk. Violations may be frequent—even rampant—but the burden remains on those who challenge the wisdom and sufficiency of existing norms to prove their obsolescence.

Let us also bear in mind that the “collision course” between law and material reality takes place on a two way street. Law can be said to give way either when it is moving from prohibition to permission, or vice versa. To fill a legal void when conduct shifts from tolerated to intolerable (whether it is reducing the blood alcohol level at which driving becomes a crime or defining the crime of genocide) is also a form of collision.

While there has been plenty of rhetoric suggesting the inadequacies of humanitarian law in the context of terrorism, I hope to show that existing norms of humanitarian law are appropriate and sufficient when the War on Terror amounts to armed conflict and that the material reality of the War on Terror has not collided with humanitarian law.

Returning to the scope of application question, I hope also to show that it is both correct and good that humanitarian law does not accommodate terrorism and the War on Terror when those phenomena *do not* amount to armed conflict. Why is this a good thing? The reasons for respecting the existing limits of application of humanitarian law become clear upon a closer look at its function and substance.

The aims of humanitarian law are humanitarian, namely, to minimize unnecessary suffering by regulating the conduct of hostilities and the treatment of persons in the power of the enemy. But humanitarian law is a compromise. In return for these protections, humanitarian law elevates the essence of war—killing and detaining people without trial—into a right, if only for persons designated as “privileged combatants,” such as soldiers in an army. Those who take part in hostilities without such a privilege are criminals subject to prosecution and punishment, but they do not thereby forfeit whatever rights they may enjoy

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under humanitarian, human rights, or criminal law. Therefore, fiddling with the boundaries or, more accurately, with the overlap between humanitarian law and other legal regimes can have profound, long-term, and decidedly “un-humanitarian” consequences on the delicate balance between state and personal security, human rights, and civil liberties.<sup>8</sup>

In short, humanitarian law is quite at home with the War on Terror when it amounts to armed conflict. When the War on Terror does not meet the criteria for armed conflict, it is not that humanitarian law is inadequate, but rather that its application is inappropriate.

## II. THE SCOPE OF APPLICATION OF HUMANITARIAN LAW

What is the scope of application of humanitarian law to the War on Terror? There is no evidence of any *lex specialis*<sup>9</sup> for wars on terror within the *lex specialis* of humanitarian law. That is, no rule of conventional (i.e., treaty based) or customary international law addresses the conditions of application of humanitarian law, especially with respect to the War on Terror. Humanitarian law applies, as a general matter, when the Geneva Conventions (GCs) and their Additional Protocols (APs) say it applies, namely, in the event of armed conflict.<sup>10</sup> The Conventions and Protocols cover and distinguish between two categories of armed conflict: international armed conflict and internal, or non-international, armed conflict.<sup>11</sup>

### *A. The International Humanitarian Law of International Armed Conflict*

The rules of humanitarian law applicable to international armed conflict are contained in the four Geneva Conventions (GCs I-IV) of 1949 and their Additional Protocol I (AP I) of 1977. The scope of application of these rules is found in Common Article 2 (CA 2) to the four GCs.<sup>12</sup> The International Committee of the Red Cross (ICRC) Commentary<sup>13</sup> to CA 2 further clarifies that “[a]ny difference arising between two States and leading to the intervention of armed forces...is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.”<sup>14</sup>

An international armed conflict is one in which two or more states are parties to the conflict. Armed conflicts that fall outside of this category are those in which a state is engaged in conflict with a transnational armed group whose actions cannot be attributed to a state. To avoid confusion with a term whose use connotes state action, it would be better to speak of this type of armed conflict as “interstate” or “transnational” rather than “international.”

### *B. The International Humanitarian Law of Non-International Armed Conflict*

Non-international armed conflict has historically been thought of as involv-

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ing rebels within a state against the state or against other rebels. The rules applicable to non-international armed conflict are found in Common Article 3 (CA 3)<sup>15</sup> to the GCs and in AP II. The scope of application of these rules is also found in CA 3 and in Article 1 of AP II.<sup>16</sup> The ICRC Commentary to Article 3 provides the following negotiating history of criteria to determine the scope of application. These were rejected from the final text, but are deemed by the Commentary to remain relevant to determining the existence of a non-international armed conflict:

What is meant by “armed conflict not of an international character”?... [I]t was suggested that the term “conflict” should be defined or, which would come to the same thing, that a certain number of conditions for the application of the Convention should be enumerated. The idea was finally abandoned—wisely, we think. Nevertheless, these different conditions, although in no way obligatory, constitute convenient criteria, and we therefore think it well to give a list of those contained in the various amendments discussed; they are as follows:

1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3. (a) That the *de jure* Government has recognized the insurgents as belligerents; or  
(b) that it has claimed for itself the rights of a belligerent; or  
(c) that it has accorded the insurgents recognition as belligerents for the purpose only of the present Convention; or  
(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
4. (a) That the insurgents have an organization purporting to have the characteristics of a State.  
(b) that the insurgent civil authority exercises *de facto* authority over persons within determinate territory.  
(c) that the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.  
(d) that the insurgent civil authority agrees to be bound by the provisions of the Convention.

The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection. Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view.<sup>17</sup>

While application of the international humanitarian law of non-international armed conflict to the War on Terror cannot be ruled out, it is, admittedly, not an elegant fit. We can dismiss AP II from having any bearing on terrorist acts or on the War on Terror because its application requires control of the High Contracting Party's territory by an organized armed group (Article 1.1). If the state that is a party to the conflict is not a party to AP II (for example, the United States), or if the organized armed group controls no territory, then AP II does not apply.

Application of CA 3, on the other hand, does not require territorial control. What is more, the GCs enjoy virtually universal adherence. Still, humanitarian law cannot be applied to any situation until the following criteria are addressed.

### *C. Specific criteria applicable to non-international armed conflict*

The following criteria apply to all determinations of armed conflict, but are described below with specific reference to the law of non-international armed conflict.

#### **1. Identification of Parties (*ratione personae*)**

The essential humanitarian function of humanitarian law is carried out through the parties to the conflict. They have rights and responsibilities. There can be no humanitarian law conflict without identifiable parties.

"Terror" or "terrorism" cannot be a party to the conflict. As a result, a war on terror cannot be a humanitarian law event. It has been suggested that wars against proper nouns (e.g., Germany and Japan) have advantages over those against common nouns (e.g., crime, poverty, terrorism), since proper nouns can surrender and promise not to do it again. Humanitarian law is not concerned with the entitlement to engage in hostilities or the promise not to do so again (the "*jus ad bellum*"). Rather, it concerns the conduct of hostilities and the treatment of persons in the power of the enemy (the "*jus in bello*"). But there is still a strong connection to humanitarian law in this observation. The concept of a "party" suggests a minimum level of organization required to enable the entity to carry out the obligations of law.<sup>18</sup> There can be no assessment of rights and responsibilities under humanitarian law in a war without identifiable parties.

A terrorist group can conceivably be a party to an armed conflict and a subject of humanitarian law, but the lack of commonly accepted definitions is a

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hurdle. What exactly is terrorism? What is a terrorist act? Does terrorism include state actors? How is terrorism distinguished from “mere” criminality? How has the international community’s reaction to terrorism differed from its treatment of mere criminality; from its traditional treatment of international and non-international armed conflict?

There are numerous conventions and other authorities that treat these questions, but none provides a definition of “terrorism” or “terrorist acts.”<sup>19</sup> Negotiations on a Comprehensive Convention on International Terrorism<sup>20</sup> are proceeding, but with considerable difficulty, in no small part due to an inability to reach agreement on the definition of terrorism. Terrorism is not a legal notion.<sup>21</sup> This very fact indicates the difficulty, if not impossibility, of determining how terrorism and responses to it may be identified historically or defined within a legal regime. For example, when the United States in 1998 was still engaged in the negotiations to establish a permanent International Criminal Court in Rome, it took a position against inclusion of terrorism in the court’s statute on the ground that a definition was not achievable. Without international consensus on these questions, how can one determine, for purposes of assigning legal consequences, who are the parties to the War on Terror and which branch, if either, of humanitarian law should apply?<sup>22</sup>

We are all now familiar with the refrain that one man’s terrorist is another man’s freedom fighter. The need for criteria to distinguish terrorists from freedom fighters is more than rhetorical. It may be critical to the determination of whether humanitarian law can apply, and if so, whether it is the rules of international armed conflict or those of non-international armed conflict that will govern. The reason is simply that hostilities directed against a government and undertaken by a belligerent group seeking self-determination may qualify as an international armed conflict under AP I, while the same conduct of a group with different aims will not.<sup>23</sup>

This does not, of course, mean that humanitarian law cannot apply to the conduct of persons responsible for the September 11 attacks.<sup>24</sup> On the other hand, the attacks do not, *per force*, amount to armed conflict which would trigger the application of humanitarian law. In addition to other criteria mentioned below, the non-state participants must qualify as belligerents or insurgents—a status of doubtful applicability to a group not associated with any specific territory.<sup>25</sup> One commentator has suggested that armed attacks by al-Qaeda, which is neither a state, nation, belligerent, nor insurgent group (as those terms are understood in international law), can trigger a right of selective and proportionate self-defense under the UN Charter against those directly involved in such armed attacks. However, neither these attacks nor the use of military force by a state against such attackers can create a state of war under international law.<sup>26</sup> Another commentator has asked: “Should the events of September 11 be considered an ‘act of war’? It depends on whether a government was involved.”<sup>27</sup>

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## 2. Identification of Territory (*ratione loci*)

While CA 3 does not require territorial control by the non-state party, the conflict must still occur “in the territory” of a High Contracting Party. Some analysts construe this requirement to mean that the conflict must be limited to the territory of a High Contracting Party.<sup>28</sup> For this element alone, terrorist attacks on civilian targets in New York may suffice, but retaliation against alleged terrorists in Yemen, for example, may not.<sup>29</sup> This is not because Yemen is not a party to the GCs. It is. Rather, it is because CA 3 is of questionable application to an isolated, targeted killing of persons outside of U.S. territory.

## 3. Relationship of Events to an Identified Conflict (*ratione materiae*)

The strike in Yemen on November 4, 2002, highlights another element. “Acts of war” is an understandable, perhaps inevitable, description of the September 11 attacks. However, this rhetorical reaction does not answer the question of whether or not those attacks and the response to them are part of an armed conflict, i.e., that they have a sufficient nexus to an armed conflict. For example, there should be no doubt that the military confrontation in Afghanistan following the September 11 attacks was (and perhaps remains) an armed conflict. And a case can be made that the September 11 attacks are a part thereof. But it does not necessarily follow that the targeted killing of terrorist suspects by U.S. authorities in Yemen a year after the September 11 attacks falls within that conflict and, therefore, is an event to which humanitarian law applies.

## 4. Identification of Beginning and End of Armed Conflict (*ratione temporis*)

According to the jurisprudence of the International Criminal Tribunals for the former Yugoslavia<sup>30</sup> and Rwanda,<sup>31</sup> as well as under the definitions of the newly established permanent International Criminal Court,<sup>32</sup> hostile acts must be “protracted” in order for the situation to qualify as an “armed conflict.” In fact, the Yugoslavia Tribunal has specifically stated that the reason for this requirement is to exclude the application of humanitarian law to acts of terrorism.<sup>33</sup> On the other hand, the Inter-American Commission on Human Rights says that intense violence of brief duration will suffice.<sup>34</sup> Likewise, it remains to be seen whether the mere gravity of damage resulting from the September 11 attacks will, in retrospect, become a “decisive point of reference for the shift from the mechanisms of criminal justice to the instruments of the use of force.”<sup>35</sup> Whether or not the conflict needs be protracted, and whether or not intensity can take the place of duration, the beginning and end must be identifiable to know when humanitarian law is triggered, and when it ceases to apply.

## 5. Armed Conflict

The most important and most commonly forgotten element is that appli-

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cation of CA 3, like all other aspects of humanitarian law, depends on the existence of a particular quality of hostilities that amount to armed conflict. And yet, nowhere in the GCs or APs is the term "armed conflict" defined. Where the question arises—"Is there a state of international armed conflict (i.e., between or among states)?"—the analysis is relatively easy. The answer is "yes" whenever there is "[a]ny difference arising between two States and leading to the intervention of armed forces."<sup>36</sup> The determination of non-international armed conflict, however, is more complex. One can start with the disqualifying criteria of AP II, Article 1.2 (internal disturbances and tensions such as riots, etc.),<sup>37</sup> but they are hardly precise. One can proceed to the inclusive criteria of the ICRC Commentary, reproduced in Section II.B of this article, but there is no consensus on their legal authority. The ICRC Commentary also appears to presume that the non-state party to the conflict is acting within a determinate territory in revolt against, and attempting to displace, its own government. Must military means be used? Can the line between military and non-military means be neatly drawn? This potential criterion is related to the question of intensity, which has been suggested as an alternative to the requirement that the conflict be "protracted" (see subsection 3, above). Traditionally, acts of international terrorism were not viewed as crossing the threshold of intensity required to trigger application of the laws of armed conflict.<sup>38</sup> Some authority to the contrary is suggested by historical precedents involving the use of military force against extraterritorial non-state actors as indicative of "war." But these examples still fail to make the case that use of such force necessarily triggers the law of armed conflict.<sup>39</sup>

### III. IN DEFENSE OF HUMANITARIAN LAW

#### A. *The Proper Limits of Humanitarian Law*

The broadest, most significant criticism of humanitarian law seems to be that it should adopt provisions to cover so-called "new forms of conflict." Those who take this view are either wittingly or unwittingly calling for expansion of the concept of armed conflict, or the expansion of the scope of application of humanitarian law beyond armed conflict. The critics who claim that humanitarian law does not encompass the War on Terror in the broad, rhetorical sense of that phrase are right. But inapplicability of humanitarian law to aspects of the War on Terror that do not meet the criteria discussed in Section II should be viewed as a benefit rather than an obstacle or collision. Recall the compromise nature of humanitarian law: a license to kill enemy combatants, and to detain without charges or trials anyone who poses a security risk, is the price paid for rules designed to minimize human suffering. In peacetime, domestic and international criminal and human rights law prohibits and punishes homicide. Where the *lex specialis* of humanitarian law is active, however, those prohibitions are narrowed,

and humanity is denied some very fundamental protections provided by other legal regimes.

This is not to imply that any state has explicitly suggested a need to move the boundaries between humanitarian law and other legal regimes. On the contrary, the position of most states leading up to the “Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law,” sponsored by the Harvard University Program on Humanitarian Policy and Conflict Research earlier this year, was “no development of humanitarian law.” However, we have also heard several disturbing, counterproductive, and simply inaccurate assertions as to the content of humanitarian law, which if repeated often enough at influential levels, will become the functional equivalent of legal development.

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### *B. Some Misguided Assertions Concerning Humanitarian Law*

#### **1. The War on Terror is an International Armed Conflict**

U.S. officials and other analysts have asserted that the global War on Terror is an international armed conflict<sup>40</sup> even when it is not a conflict between states, where the territorial boundaries of the conflict are undefined, where the beginnings are amorphous and the end undefinable, and, most importantly, where the non-state parties are unspecified and unidentifiable entities that are not entitled to belligerent status. Since an international armed conflict under humanitarian law must be between two or more states, the better terminology for those aspects of the War on Terror that do amount to armed conflict and that cross state boundaries, but that do not implicate two or more governments as parties to the conflict, would be “transnational” or “interstate.”<sup>41</sup> The error of the United States’ choice of nomenclature is neither insignificant nor innocent. The U.S. view, if accepted as a statement of law, would serve as a global waiver of domestic and international criminal and human rights laws that regulate, if not prohibit, killing. Turning the whole world into a rhetorical battlefield cannot legally justify, though it may in practice set the stage for, a claimed license to kill people or detain them without recourse to judicial review anytime, anywhere. This is a privilege that, in reality, exists under limited conditions and may only be exercised by lawful combatants and parties to armed conflict.

The targeted killing of suspected terrorists in Yemen in November 2002 by a CIA-launched, unmanned drone missile is a case in point. The killings are of

dubious legality under humanitarian law for several reasons. First, unless the event is part of an armed conflict, humanitarian law does not apply, and its provisions recognizing a privilege to kill may not be invoked. The event must then be analyzed under other applicable legal regimes.<sup>42</sup> Second, even if humanitarian law applies, the legality of the attack is questionable because the targets were not directly participating in hostilities at the time they were killed,<sup>43</sup> and because the attackers' right to engage in combat is doubtful.<sup>44</sup>

## 2. No POWs in the War on Terror

On the other hand, in the recent war in Afghanistan—clearly an international armed conflict to which GC III Relative to the Treatment of Prisoners of War applies—the United States took the position that no detainees are entitled to prisoner of war (POW) status.<sup>45</sup> This is despite the plain language of GC III, Article 4.1, which states that POWs are members of the armed forces of a party to the conflict who have fallen into the power of the enemy. The United States has asserted that even the Taliban are not entitled to POW status since they failed to have a fixed, distinctive sign (uniforms) and did not conduct their operations in accordance with the laws and customs of war. These disqualifying factors are part of GC III, Article 4.2, which applies to militias and volunteer corps and not to regular members of the armed forces, who are covered by Article 4.1.

Even if these disqualifying criteria are relevant to regular members of armed forces, as some analysts suggest, their application is subject to two more provisions: GC III, Article 5, which calls for the convening of a “competent tribunal” to determine POW status in case of doubt, and the even more specific language of U.S. Army regulations calling for “competent tribunal” determinations upon request of the detainee.<sup>46</sup> Both of these authorities can only be construed to require individualized determinations. Because the U.S. administration has chosen not to make public any specific allegations, I do not pretend to know what it knows about the Taliban's alleged failure to conduct their operations in accordance with the laws and customs of war. It is obvious, however, that if the mere commission of war crimes by one or more members of armed forces can disqualify them all from entitlement to POW status, then there would never be a POW. Such an interpretation cannot stand, since it would defeat the very purposes for which the status of POW exists in humanitarian law.

While the weakness of the U.S. interpretation is clear, the motives behind it are not. The most frequently stated suggestion is that since POWs are not obliged to provide information, granting that status would impede effective interrogation. This is misguided. POWs and non-POWs are equally subject to interrogation. It is also ominous because of the implicit, albeit false, suggestion that non-POWs may lawfully be subjected to interrogation techniques that may not be used against POWs.<sup>47</sup>

### 3. No Civilian Detainees in the War on Terror

Having denied its Guantanamo detainees POW status under GC III, the United States also rejects application of GC IV for the protection of civilians, thus leaving them in a legal vacuum. This issue is clouded in emotional rhetoric that has far overshadowed the facts. The right of all persons to recognition before the law is a fundamental, non-derogable human right.<sup>48</sup> Consistent with that right, the ICRC Commentary takes the position that all armed conflict detainees are “pro-

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protected persons” either under GC III or GC IV.<sup>49</sup> The idea of granting “protected person” status to “terrorists” is apparently unacceptable to the U.S. administration. But first, not all detainees are terrorists. Those who are mere members of the enemy armed forces—the Taliban—are presumptively entitled to POW treatment “until such time as their status has been determined by a competent tribunal.”<sup>50</sup> Second, others are civilians who may or may not have committed criminal (e.g., terrorist) acts. To recognize their enti-

tlement to “protected person” status under GC IV in no way prohibits their interrogation and detention for the duration of the conflict, so long as they remain a security risk.<sup>51</sup> Nor does it prohibit their prosecution and imprisonment beyond the temporal bounds of the conflict, if convicted of a crime.<sup>52</sup> They may even be subject to execution.<sup>53</sup>

### 4. The Principles of Distinction and Proportionality Must Bend to the Realities of Modern Conflicts

The principle of distinction and the underlying principle of proportionality are the most fundamental principles of humanitarian law. The principle of distinction embodies the concept that the effects of war must be limited to combatants and military objectives as much as is feasible. Civilians and civilian objects should be spared and may not be targeted.<sup>54</sup> Combatants have a duty to take precautionary measures to implement the principle of distinction.<sup>55</sup>

The related principle of proportionality concedes, however, that it is not always feasible to limit damage to military objectives. Even if civilians are not the targets of attack, they may be affected. Otherwise legitimate military objectives are not rendered out-of-bounds simply because of a risk of “collateral damage.” Thus, the principle of proportionality, like that of distinction, also requires that combatants take precautionary measures to minimize civilian harms and to refrain from attacks that are likely to result in incidental civilian damage or casu-

alties that are excessive in relation to the concrete and direct military advantage anticipated.

Terrorism is, of course, a wholesale rejection of these principles.<sup>56</sup> Terrorists are not, however, the only ones to claim that the righteous and compelling nature of the cause for which they fight is relevant to the determination of what type of attacks are permissible. It has, for example, been argued that humanitarian intervention—a term unknown to humanitarian law—is a special case, allowing the “humanitarian intervener” (but not the adversary) greater leeway in calculating proportionality than would be permitted in “traditional” armed conflicts.<sup>57</sup> The argument has its attractions, but the principle is ultimately unworkable.

The view that humanitarian law should distinguish between the evil aggressor and the righteous warrior prosecuting the so-called “just war” or acting in self-defense is untenable for two reasons. First, unless and until the Security Council declares it, or a criminal tribunal adjudicates criminal responsibility for it, there is no forum for distinguishing the aggressor from the aggressed. It is implausible that these determinations, which, in fact, might never be made, could occur in a manner that would permit their timely application to the field of battle. Secondly, recall that humanitarian law—the *jus in bello*—consists of two realms: one governing the conduct of hostilities, the other, the protection of persons in the power of the enemy (or persons not, or no longer, taking part in hostilities). As to the first realm, any humanitarian law that would simply prohibit the aggressor from engaging in hostilities would be a dead letter in practice—a rule of law that would simply undermine the integrity of law, since no aggressor is likely to obey a law prohibiting it from undertaking hostile acts. In addition, such a rule would impinge on the subject matter territory of the *jus ad bellum*—the legal regime that, quite apart from humanitarian law, determines when hostilities are, or are not, legal. As to the second realm, there can be no justification for a law that discriminates between members of the aggressor group, on one hand, and those of the victim group, on the other hand, be they civilians or combatants, if those persons are not, or are no longer, taking part in hostilities.

The absurdity of the proposition that the army, citizens, and members of the aggressor group should rightfully be subject to cruelties that it may not impose upon its

enemy or their citizens underscores why the *jus ad bellum* is distinct from, rather than consanguineous to, the *jus in bello*. The very essence of *jus ad bellum* is the distinction between just and unjust cause—between entitlement and prohibition to wage war. *Jus in bello*, on the other hand, rightfully recognizes no such distinction.

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Another problem with these positions concerns the concept of collective guilt and punishment—a concept that is anathema not only to the principle of distinction upon which so much of humanitarian law rests, but to fundamental human rights and criminal justice values as well. The *modus operandi* of the terrorist is explicitly punitive in the collective extreme. On the other hand, the view from the “humanitarian intervention” perspective that civilians may rightfully be subjected to greater burdens due to the nature of the conflict may be well intentioned. It has been suggested, for example, that an attack today that may be disproportionate in its own right due to the likelihood of excessive civilian consequences may become proportionate if reasonably calculated to prevent a greater civilian calamity tomorrow. But the principles of distinction and proportionality already incorporate a “margin of appreciation.”<sup>59</sup> Attempts to dilute it create an unnecessary risk of appearing to endorse collective punishment, which can only fuel animosities and impede reconciliation.

A final criticism of the principle of distinction is that it puts lawful combatants at a disadvantage against unlawful ones, who remain civilians. This, however, ignores the fact that civilians forfeit their immunity from attack if and for such time as they take a direct part in hostilities.<sup>60</sup>

### 5. Customary Law Will Fill in the Gaps

This somewhat technical claim is a dangerous one that could erroneously be used to apply humanitarian law where it does not belong. I have previously indicated that humanitarian law applies, as a general matter, when the Geneva Conventions and their Additional Protocols say it applies, namely, in the event of

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*Where the War on Terror does not amount to armed conflict under the GCs and APs, customary humanitarian law adds nothing and should be seen to add nothing.*

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armed conflict. But these instruments are not the only sources of humanitarian law. There are, for example, other treaties both older and newer than the GCs and APs that establish additional prohibitions and requirements in armed conflict.<sup>61</sup> The very existence of these treaties, many of them in response to the post-Cold War nature of armed conflict, belies the suggestion that humanitarian law is behind the times.

There is also an entire body of unwritten law—customary international humanitarian law—that supplements the rules of armed conflict found in treaties and in domestic law. In response to the assertion that the existing body of humanitarian law has a gap regarding the War on Terror, some analysts suggest

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customary law as a gap-filler.<sup>62</sup> But it would be wrong to simply say that customary international humanitarian law can cover what the treaties do not. An important distinction must be drawn. Customary humanitarian law certainly does add to the content of treaty law, usually by providing a "floor" or by filling gaps in protection for persons affected by armed conflict. There is no evidence, however, that it enlarges the scope of application of humanitarian law beyond armed conflict, as that term is understood in the GCs and APs. In other words, where the War on Terror does not amount to armed conflict under the GCs and APs (and so, killings and detentions remain subject to the more restrictive legal regimes of international and domestic criminal and human rights law), customary humanitarian law adds nothing and should be seen to add nothing.

#### IV. CONCLUSION

Humanitarian law is basically fine. Its boundaries are properly drawn in a respectful balance among interests of state security, individual security, and civil liberties. It is effective when properly implemented. Its very vitality and relevance in the War on Terror stems not from any claim that it is capable of encompassing all of the exigencies of terrorism and the efforts to combat it. The strength of humanitarian law lies, rather, in the fact that it is adequate to deal with such exigencies when they amount to armed conflict. There is little evidence that domestic and international laws and institutions of crime and punishment are not up to the task when terrorism and the War on Terror do not rise to the level of armed conflict. But there are powerful reasons to conclude that the application of humanitarian law in those circumstances would do more harm than good.

Criticism of humanitarian law is also fine. Humanitarian law can be frustratingly vague, although sometimes for good reason.<sup>63</sup> It can appear to be internally contradictory and unduly burdensome. But some of the criticisms simply misread the law. These are relatively easy to address. Other criticisms correctly state the law and, in suggesting the need for change, misconstrue the law's purpose and function. Just as truth is the first casualty of war, logic is often a casualty in the effort to mold the laws of war, or at least their image, for parochial purposes.

The concept of war feeds the vision of an enemy that must be defeated, rather than a criminal problem to be solved. Viewing terrorism as crime, we might be permitted to consider its root causes. But to ask why they make war against us is to risk the appearance of sympathy. In the view of one commentator upon whose words I cannot improve, it is precisely by declaring war against them that we fall into their trap, following them in a scorched earth policy of burning bridges between civilizations and driving civilian populations with them over the precipice.<sup>64</sup>

The Geneva Conventions and their Additional Protocols did not anticipate September 11 or al-Qaeda. And yet, the balance struck between humanitarian law and other legal regimes is probably more valid today than ever before. Civil rights, judicial guarantees, human rights, and the rule of law are not impediments to human security. They are, in fact, the ultimate repositories of it. Humanitarian law, in particular, is a bulwark of human security in times of armed conflict, but only if invoked where it properly belongs and obeyed where properly invoked. ■

## NOTES

- 1 The terms “international humanitarian law,” “humanitarian law,” “law of armed conflict,” “*jus in bello*,” and “laws of war” are interchangeable. The term “war” is somewhat archaic in international law, having been replaced by “armed conflict.” The distinction reflects a change from past times, in which wars were declared, to the present, in which facts on the ground are rightfully given greater emphasis over the declarations of parties to conflict.
- 2 See, for example, Robert Kagan, “Power and Weakness,” *Policy Review* 113 (June/July 2002).
- 3 Humanitarian law is a *lex specialis*—a term used to indicate any specific branch of law that is triggered by special circumstances. *Lex specialis* prevails over conflicting *lex generalis*, or generally applicable law. Humanitarian law is a *lex specialis* applicable in times of armed conflict. Some analysts assert that as a *lex specialis*, humanitarian law, when applicable, displaces legal regimes that apply in peacetime. This is clearly wrong as to international criminal law, a significant part of which is devoted to war crimes, covering a broader scope of prohibitions than humanitarian law. It is equally wrong with regard to domestic criminal law, which is also capable of covering war crimes and an even broader scope of other prohibitions than are covered by international criminal law. It is also wrong as to human rights law, as enunciated in the International Covenant on Civil and Political Rights (ICCPR), UN General Assembly Resolution 2200A (XXI) adopted 16 December 1966, UN General Assembly OR, Twenty-first Session, Supplement 16, at 52, United Nations Document A/6316 (1967). The ICCPR recognizes that some rights may be subject to derogation “in time of public emergency which threatens the life of the nation,” but identifies a “hard core” group of rights from which there may be no derogation in any circumstances, including armed conflict. See ICCPR, Article 4.
- 4 The Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field, 18 Martens Nouveau Recueil (ser. 1) 607, 129 Consol. T.S. 361, entered into force on June 22, 1865.
- 5 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of 12 August 1949, 75 U.N.T.S. (1950) 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS (1950) 85; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS (1950) 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12 1949, 75 UNTS (1950) 287. There are 190 states party to the Geneva Conventions.
- 6 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 UNTS (1978) 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS (1978) 609.
- 7 David Rieff, “What is Really at Stake in the US Campaign Against Terrorism,” *Crimes of War Project* (September 2002), <<http://www.crimesofwar.org/sept-mag/sept-home.html>> (accessed April 5, 2003): “The crisis of international humanitarian law was an accident waiting to happen. For when law and material reality no longer coincide, it is, of course, law that must give way.”
- 8 See Carsten Stahn, “International Law at a Crossroads? The Impact of September 11,” *Heidelberg Journal of International Law* 62 (2002): 183, at 195, citing W.J. Fenrick, “Should the Laws of War Apply to Terrorists?” *American Society of International Law Proceedings* 79 (1985): 112: “[T]here are times and places when it is appropriate to apply other regimes such as the criminal law of a State at peace....Premature application of the laws of war may result in a net increase in human suffering, because the laws of war permit violence prohibited by domestic criminal law.”
- 9 See endnote 3 above.

- 10 There are peacetime obligations under humanitarian law, but those are not relevant to the present discussion.
- 11 The reason there are two separate strands of humanitarian law is sovereignty. States are more willing to accept greater international controls on their international affairs than on their internal ones. Thus, Protocol I Additional to the Geneva Conventions Relating to the Protection of Victims of *International* Armed Conflicts runs to 102 articles, plus two Annexes of 17 and 28 articles, respectively. There are 161 states party to AP I. (The United States is not a party to AP I, but considers much of its substance as “either legally binding as customary international law or acceptable practice though not legally binding.” U.S. Army, *Operational Law Handbook 2002* (Charlottesville, Virginia: 2001): 5.) Protocol II Additional Relating to the Protection of Victims of *Non-International* Armed Conflict has 28 articles and no annexes. There are 156 states party to AP II.
- 12 AP I, Article 1.3 incorporates by reference GC Common Article 2 (CA 2) on scope of application. CA 2 provides:  
In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.  
The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.  
Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.
- 13 The ICRC is acknowledged to be the guardian of international humanitarian law. It has published extensive commentaries to the Geneva Conventions and their Additional Protocols.
- 14 See J.S. Pictet, *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: International Committee of the Red Cross, 1952): 32. The “difference arising between two States” language suggests the requirement of a *causis belli*. This interpretation is not universally shared. See Jean-François Queguiner, “The Contribution of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia to International Humanitarian Law” (forthcoming 2003).
- 15 “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:...”
- 16 AP II: Part I. Scope of this Protocol  
Art 1. Material field of application  
1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.  
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.
- 17 Pictet, 49. The International Criminal Tribunal for Rwanda also applied these criteria in the determination of armed conflict. See *The Prosecutor v Jean Paul Akayesu*, ICTR-96-4-T, para. 619 (1998). The *Akayesu* Court did not, however, see these criteria as minimum requirements for existence of non-international armed conflict. See also S. Boelaert-Suominen, “Humanitarian Law applicable to all Armed Conflicts,” *Journal of International Law* 13 (2000): 619: “In light of the ICTY jurisprudence since 1995, it can be safely concluded that the threshold suggested by the ICRC Commentary has failed to crystallise into customary law.”
- 18 Gerald I.A.D. Draper, “The Geneva Conventions of 1949,” *Rec de Cours* 114 (1965i): 63, 90.
- 19 I acknowledge, but exclude as unhelpful, the definition of terrorism found in the 1937 Convention for the Prevention and Punishment of Terrorism: “criminal acts directed against a State or intended to create a State of terror in the minds of particular persons, or a group of persons or the general public.” A comprehensive list of treaties on terrorism can be found at <<http://untreaty.un.org/English/Terrorism.asp>>.
- 20 UNGA Res. 51/210, 17 December 1996. See *Measures to Eliminate International Terrorism*, Report of the Working Group, A/C.6/56/L.9, 29 October 2001.

- 21 Hans-Peter Gasser, "Acts of Terror, 'Terrorism' and International Humanitarian Law," *International Review of the Red Cross* 84 (September 2002): 547, at 553-554: "It is much more a combination of policy goals, propaganda and violent acts—an amalgam of measures to achieve an objective."
- 22 Chibli Mallat, "September 11 and the Middle East: Footnote or Watershed in World History?" *Crimes of War Project* (September 2002), <<http://www.crimesofwar.org/sept-mag/sept-home.html>> (accessed April 5, 2003): "The problem is that terrorism as a concept remains so ill-defined that the idea of attacking it systematically transforms the use of violence—in international and domestic law the prerogative of States—into an open-ended project of endless war. And that, surely, is inconceivable, unless the American government now means to prosecute a series of wars to end all violence in the world."
- 23 AP I, Article 1(4).
- 24 Stahn, 192-194.
- 25 *Ibid.*, 189. See also, M. Cherif Bassiouni, "Legal Control of International Terrorism: A Policy-Oriented Assessment," *Harvard International Law Journal* 43 (2002): 83, 99.
- 26 Jordan J. Paust, "There is No Need to Revise the Laws of War in Light of September 11," *American Society of International Law Task Force on Terrorism* (November 2002), citing *Pan American Airways, Inc. v Aetna Casualty & Surety Co.* 505 F.2d 989, 1013-1015 (2d Cir 1974) ("United States could not have been at war with the Popular Front for the Liberation of Palestine [PFLP], which had engaged in terrorist acts as a non-state, nonbelligerent, noninsurgent actor"). But see Yoram Dinstein, "Humanitarian Law on the Conflict in Afghanistan," *American Society of International Law Proceedings* 96 (2002): 23: "...a terrorist attack from the outside constitutes an 'armed attack' under Article 51 of the (UN) Charter."
- 27 Eyal Benvenisti, "Terrorism and the Laws of War: September 11 and its Aftermath," *Crimes of War Project* (September 21, 2001), <<http://crimesofwar.org/expert/attack-apv.html>> (accessed April 5, 2003). See also *The Prosecutor v Dusko Tadic, Decision on the defence motion for interlocutory appeal on jurisdiction*, IT-94-1-AR72; See also Dinstein: 24, citing *Nicaragua v United States*, 1986 ICJ 14, and the General Assembly's Consensus Definition of Aggression, General Assembly Resolution 3314 (XXIX), Article 3(g) (1974).
- 28 Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002): 31.
- 29 For analysis of the legal consequences of the killings in Yemen, see Anthony Dworkin, "The Yemen Strike: The War on Terrorism Goes Global," *Crimes of War Project* (November 14, 2002), <<http://crimesofwar.org/onnews/news-yemen.html>> (accessed April 5, 2003).
- 30 *The Prosecutor v Dusko Tadic*, para 70, p. 37 (1995).
- 31 *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 619 (1998).
- 32 The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 dated 17 July 1998, 37 ILM (1998) 999-1019, Article 8.2(f) contains this requirement, which may be seen as an expression of the drafter's belief that "protracted" is a defining element of non-international armed conflict, or merely that ICC jurisdiction is triggered only in case a non-international armed conflict is protracted.
- 33 *The Prosecutor v. Zeynil Delalic (Celebici Camp case), Judgment*, IT-96-21, para. 184, (1998).
- 34 See *Abella Case*, Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137, November 18, 1997, paras. 155-156.
- 35 Stahn, 188.
- 36 See text at endnote 14.
- 37 See endnote 16.
- 38 Carsten Stahn, 192, citing Elizabeth Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (Boston: M. Nijhoff, 1996), 128, and noting the United Kingdom's denial of existence of armed conflict in Northern Ireland. In fact, the UK's ratification of AP I was accompanied by a statement that the term "armed conflict" is distinguishable from the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.
- 39 See Robert Goldman, "Terrorism and the Laws of War: September 11 and its Aftermath," *Crimes of War Project* (September 21, 2001), <<http://crimesofwar.org/expert/attack-apv.html>> (accessed April 5, 2003), noting the 1805 U.S. military action in Tripoli against the Barbary Pirates and that of 1916 in Mexico against Pancho Villa and his band.
- 40 On the other hand, President Bush and others speaking on behalf of the U.S. administration have clearly suggested that some aspects of the War on Terror will not involve armed conflict, permitting us to conclude that in their view, those aspects, at least, will not be covered by humanitarian law. On September 20, 2001, President Bush said in an Address to a Joint Session of Congress and the American People, "The war will be fought not just by soldiers, but by police and intelligence forces, as well as in financial institutions," <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>> (accessed April 5, 2003). National Security Advisor Condoleezza Rice stated on a *Fox News* broadcast on November 10, 2002: "We're in a new

- kind of war, and we've made it very clear that this new kind of war be fought on different battlefields." See <<http://www.foxnews.com/story/0,2933,69783,00.html>> (accessed April 5, 2003).
- 41 See Sec. II.B.1. The exception to the “between States” requirement for international armed conflict is armed conflicts “in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination...” These are deemed international armed conflict by AP I, Art. 1.4.
- 42 Sweden's Foreign Minister, Anna Lindh, used the term “summary execution” and further stated: “Even terrorists must be treated according to international law. Otherwise, any country can start executing those whom they consider terrorists.” Quoted in Walter Pincus, “Missile Strike Carried Out With Yemeni Cooperation; Official Says Operation Authorized Under Bush Finding,” *Washington Times*, (November 6, 2002), A10.
- 43 See AP I, Article 51.3. The U.S. position on this point is difficult to discern. The Yemen attack notwithstanding, the U.S. State Department remains critical of Israeli targeted killings of Palestinian militants. Press briefing by State Department Spokesman Richard Boucher, November 5, 2002.
- 44 The criteria of GC III, Article 4, that the United States invokes to deny POW status to detainees it deems “unlawful combatants” would also appear to apply to the CIA. The CIA is not part of the armed forces of the United States. Only members of the armed forces of a party to the conflict (other than medical personnel and chaplains) are combatants, entitled to participate directly in hostilities. AP I, Article 43.2.
- 45 This view is probably correct as to al-Qaeda members detained in relation to the Afghan conflict. It is certainly correct as to others detained outside the context of armed conflict.
- 46 Section 1-6(b) Army Regulation 190-8, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Headquarters Departments of the Army, the Navy, the Air Force, and the Marine Corps” (Washington D.C., October 1, 1997).
- 47 See GC IV, Art. 27, AP I, Art. 75 and CA 3. See also “Request by the Center for Constitutional Rights and the International Human Rights Law Group for Precautionary Measures under Article 25 of the Commission's Regulations on Behalf of Unnamed Persons Detained and Interrogated by the United States Government,” filed with the Inter-American Commission on Human Rights, February 13, 2003.
- 48 ICCPR, Arts. 16 and 4.2.
- 49 J.S. Pictet, *Commentary of the Fourth Geneva Convention* (Geneva: International Committee of the Red Cross, 1952), 51: “[It is] a general principle which is embodied in all four Geneva Conventions of 1949 [that] [e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status; nobody in enemy hands can be outside the law.*” Note, however, that nationals of the detaining authority and of neutral and co-belligerent states are not “protected persons.” See GC IV, Art. 4. Nevertheless, even they must have some legal status. See ICCPR, Arts. 16 and 4.2.
- 50 GC III, Article 5.
- 51 GC IV, Arts. 42, 78.
- 52 GC IV, Arts. 64-68.
- 53 GC IV, Article 68.
- 54 AP I, Arts. 48-49.
- 55 AP I, Arts. 57-58.
- 56 Thus, we should not be surprised by these comments attributed to Osama bin Laden, “Letter to the American People,” *The Observer* (November 24, 2002), <<http://www.observer.co.uk/international/story/0,6903,845724,00.html>> (accessed April 5, 2003): “You may then dispute that all the above does not justify aggression against civilians, for crimes they did not commit and offenses in which they did not partake...the American people are the ones who choose their government by way of their own free will;... (who) have the ability and choice to refuse the policies of their Government and even to change it if they want;... who pay the taxes which fund the planes that bomb us in Afghanistan, the tanks that strike and destroy our homes in Palestine, the armies which occupy our lands in the Arabian Gulf, and the fleets which ensure the blockade of Iraq. These tax dollars are given to Israel for it to continue to attack us and penetrate our lands. So the American people are the ones who fund the attacks against us, and they are the ones who oversee the expenditure of these monies in the way they wish, through their elected candidates.”
- 57 See, e.g., Ruth Wedgwood, “Propositions on the Law of War after the Kosovo Campaign: *Jus Ad Bellum* and the Personal Factor in History,” *U.S. Naval War College International Law Series* 78 (2003): 435. Asserting the “consanguinity of *jus ad bellum* and *jus in bello*,” Prof. Wedgwood states: “[w]hether one's framework is utilitarian or pure principle, it is possible to admit that the merits of a war make a difference in our tolerance for

- methods of warfighting. This teleological view can be incorporated, albeit awkwardly, in the metric for 'military advantage' in judging proportionality, for surely we do not value military objectives for their own sake."
- 58 See Dino Kritsiotis, "On the *Jus ad Bellum* and *Jus in Bello* of Operation Enduring Freedom," 96 *American Society of International Law Proceedings* 35 (2002), referring to the distinct spheres, histories, methodological traditions, stages of development, and circumstances of application of these two legal regimes: "As represented in the UN Charter, the laws of the *jus ad bellum* proceed from the general prohibition of the threat or use of force by member States of the United Nations 'in their international relations' (Article 2(4)), while the *jus in bello* of the (GCs and APs) applies to such use of force. Thus, the Preamble to AP I declares that "the provisions of the Geneva Conventions and of this protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."
- 59 The Rome Statute of the International Criminal Court, Arts. 8.2(b)(i) and (ii) prohibit "[i]ntentionally directing attacks against the civilian population" and "civilian objects," respectively; Art. 8.2(b)(iv) prohibits "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or civilian objects...which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." (Emphasis added.)
- 60 AP I, Article 51.3.
- 61 1899 Hague Declaration (IV, 2) Concerning Asphyxiating Gases and Hague Declaration (IV, 3) Concerning Expanding Bullets, *American Journal of International Law* 1 (1907) Supplement 155-9; 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and its annexed Regulations, Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Hague Convention VII Relating to the Conversion of Merchant Ships into Warships, Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, Hague Convention IX Concerning Bombardment by Naval Forces in Time of War, Hague Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, *American Journal of International Law* 2 (1908) Supplement 90-127, 133-59, 167-74, 202-16; 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict and its First Protocol, 249 UNTS 240-88, 358-64; 1999 Second Hague Protocol, 38 ILM (1999) 769-82; 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and Protocols and 21 December 2001 amended version, 1980 Protocol I on Non-Detectable Fragments, 1980 Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 1980 Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, 1342 UNTS (1983) 137-255, 1995 Protocol IV on Blinding Laser Weapons, 35 ILM (1996) 1218, 1996 Amended Protocol II 35 ILM (1996) 1206-17; 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, UN doc. S/25704 of 3 May 1993, 32 ILM (1993) 1192; 1994 Statute of the International Criminal Tribunal for Rwanda, UN doc. SC/5974 of 12 January 1995, 33 ILM (1994) 1598; 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 36 ILM (1997) 1507-19; 1998 Statute of the International Criminal Court, UN doc. A/CONF.183/9 dated 17 July 1998, 37 ILM (1998) 999-1019.
- 62 See Steven R. Ratner, "Rethinking the Geneva Conventions," *Crimes of War Project* (January 30, 2003), <<http://www.crimesofwar.org/expert/genevaConventions/gc-ratner.html>> (accessed April 5, 2003).
- 63 A case in point is the lack of any precise definition of "armed conflict." Every so often a call for precision arises, but ultimately gives way to an understanding that a certain degree of ambiguity is beneficial, so as to assure the laws' protections in close cases.
- 64 Frederic Megret, "'War'? Legal Semantics and the Move to Violence," *European Journal of International Law* 13 (2) (April 2002): 362-399.