

ARTICLES

APPLICABILITY AND APPLICATION OF THE LAWS OF WAR TO MODERN CONFLICTS

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I. INTRODUCTION

This Article examines if, and how, the laws of war apply to conflicts involving non-state actors—whether they are guerrilla groups, terrorist organizations or private military contractors.¹

The lack of reciprocity prevailing in conflicts involving non-state

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1. Please note that the expression “laws of war” and “international humanitarian law” are used interchangeably in this Article.

actors raises the question of the applicability of the laws of war to these conflicts. “Reciprocity” in international law refers to the expectation by a belligerent state that other state parties to a conflict will respect similar legal and behavioral norms, such as non-use of prohibited weaponry, minimization of collateral damage, and humane treatment of prisoners of war. Non-state actors, which are not party to treaty-based norms regulating the conduct of war, cannot be assumed to operate on the basis of reciprocity. Given that reciprocity is the assumption underlying this entire body of law, the question arises of whether, in the absence of reciprocity, the law continues to apply. I answer this question in the affirmative. I argue that the involvement of non-state actors in warfare does not, in and of itself, affect the applicability of the laws of war. The only situation in which a state may *not* be bound by all of humanitarian law is when an opposing non-state party repeatedly violates international humanitarian law in an international armed conflict.

Having established the applicability of most, if not all, of international humanitarian law to most conflicts involving non-state actors, I analyze the application of the law to these actors. The application of the law is complicated by the fact that, when dealing with non-state actors, civilians and combatants may not be clearly distinguishable. In order to overcome this challenge, I argue for a more expansive interpretation of the concept of “combatant”—one which allows for the greater application of international humanitarian law to these actors, an easier implementation of the principle of distinction, and improved protection of civilian populations.

This interpretation draws on an expanded body of sources (religious, moral, historical and legal) designed to inform our understanding of the principle of distinction. I review the historical evolution of the principle, how it became fundamental to international humanitarian law, and how the concept of “combatant” evolved over time from an activity-based to a membership-based designation. I then examine the substance of the law as stated in the Geneva Conventions,² which diverge, I argue, from both earlier and subsequent characterizations of combatant status. I conclude by offering an interpretation of combatant status which would

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention] (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention] (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (entered into force Oct. 21, 1950).

allow more non-state actors to accede to combatant status.

II. RECIPROCITY—OR THE APPLICABILITY OF THE LAWS OF WAR TO NON-STATE ACTORS

Borrowing from general international law, international humanitarian law builds on the notion that a state is generally willing to grant another state's citizens certain protections it wishes to be guaranteed to its own.³ In times of war, the laws of war seek to provide an incentive for states to limit inhumane treatment of enemies. Reciprocity, however, is much less of a concern to non-state actors. For a variety of reasons, the idea of reciprocal rights and duties simply does not translate well to entities that generally do not feel bound by international law. Absent reciprocity, do the laws of war apply to these non-state actors?

This section analyzes the implications of the breakdown of the reciprocal relationship between states and non-states. In Iraq, where both states and non-state actors are engaged in hostilities, there is no real expectation of reciprocity by any party. Does the absence of reciprocity, on which the laws of war are based, imply that the laws of war cease to be applicable to the conflict? At the heart of the issue is the question of whether the laws of war should be regarded as a set of interdependent obligations or as unilateral and unconditional undertakings.⁴

Discussions of the importance of reciprocity on the laws of war abound, often in the context of terrorist organizations or guerrilla groups. But the question is also relevant to other non-state entities found on the modern battlefield, such as private military contractors. Taking into account the prominence of non-state actors today, reciprocity constitutes a threshold issue in the applicability of the laws of war to an increasing number of conflicts.

I argue that in the vast majority of cases reciprocity has minimal relevance. Despite the conflicting messages provided by the laws of war on the role of reciprocity, such laws envisage only one situation in which a state is no longer required to comply with humanitarian law:

3. *E.g.*, RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 121 (1st ed. 2002) ("International law, being a system based on the formal equality and sovereignty of states, has arisen largely out of the exchange of reciprocal rights and duties between states."). *See also* FEDERAL POLITICAL DEPT., *FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949* VOL II-A 813-14 (Berne ed., 1963).

4. Examples of conflicts involving non-state actors include the U.S. global fight against al-Qaeda, Israel's conflicts with Hezbollah (2006) and Hamas (2009), the conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (2009), and the growing violence pitting Pakistani forces against the Tehrik-i-Taliban Pakistan.

when, in an international armed conflict, the state fights against a non-state actor that neither accepts nor applies the law. Even in such a situation, certain principles continue to apply. Thus, I conclude, only *part of* humanitarian law would cease to apply in the limited circumstances where a state is fighting a non-compliant non-state entity as part of an international armed conflict. In all other situations and conflicts, the absence of reciprocity would have no effect on the applicability of the laws of war. This conclusion, which acknowledges the limited role of reciprocity, echoes the humanitarian concerns embedded into the laws of war.

A. Reciprocity in International Humanitarian Law: An Ambivalent and Evolving Position

Determining whether the absence of reciprocity is fatal to the application of international humanitarian law comes down to establishing what the true objective of the law is: is it meant to advance the interests of states in certain, limited, circumstances, or is it meant to protect civilians in *all* armed conflicts? Each of these positions embodies an essential purpose of the laws of war. The Geneva Conventions were drafted by states for states, creating a set of expectations and reassurances on which states can rely in time of war. The underlying assumption is that a State Party will comply with the laws of war in the hope that the other party will, too.⁵ Under this logic, the entire purpose of the laws of war is that they are agreed to and observed by both sides.⁶ Translated into legal terms, this would mean that the obligations set forth by international humanitarian law are interdependent; namely, when a party violates its side of the bargain the other party ceases to be bound: “[r]eciprocity refers to the interdependence of obligations assumed by participants within the schemes created by a legal system.”⁷ Or, as Richard Wasserstrom puts it, “one side must do, or thinks it must do, whatever the other side does.”⁸

But what happens when, to paraphrase Wasserstrom, one side does not do what the other side does? In such cases, those who regard international humanitarian law exclusively as a state-to-state legal vehicle, and consider that the obligations it sets forth are interdependent, will view the absence of reciprocity as fatal to the

5. PROVOST, *supra* note 3, at 172-73.

6. George Mavrodes, *Conventions and the Morality of War*, in INTERNATIONAL ETHICS: A PHILOSOPHY AND PUBLIC AFFAIRS READER 85 (Charles R. Beitz et al. eds., 1985).

7. See PROVOST, *supra* note 3, at 121.

8. RICHARD A. WASSERSTROM, WAR AND MORALITY 56 (1970).

applicability of the laws of war.⁹

An opposing line of thinking shifts the focus of the law from the state to the individual, and holds that the purpose of humanitarian law is primarily humanitarian.¹⁰ Protecting civilians in times of war was without question among the most significant factors driving the elaboration of the Geneva Conventions. The focus on the individual, as opposed to the state, is often regarded as the *raison d'être* of the Geneva Conventions.¹¹ In this context, suspending the application of the laws of war in cases of non-reciprocity would negate its humanitarian character and would be damaging to the protection of civilians.¹² Even when one party does not respect its side of the bargain, the other party still must remain bound by its own.

I argue that this latter view is ascendant, even though the Geneva Conventions and the Additional Protocols may have been understood differently (and as more reciprocal in nature) by their drafters. During the drafting sessions of the Geneva Conventions of 1949, the question arose whether the conventions would apply to conflicts between a signatory state and an entity (state or otherwise) which had not ratified the Geneva Conventions.¹³ The U.S. delegation had suggested to “draft the reciprocity clause by saying that the Convention[s] would apply if the insurgent civil authority declared it would observe it.”¹⁴ The Special Committee entrusted with the task of resolving this question concluded that a contracting state is *not* bound to apply the Convention in its relations with an entity that neither recognizes itself as being bound by

9. See, e.g., Dan Belz, *Is International Humanitarian Law Lapsing Into Irrelevance in the War on International Terrorism?*, 7 THEORETICAL INQUIRIES L. 97, 115 (2006) (noting that “[r]eciprocity is a vital element” in the utilitarian approach to the laws of war); James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEGAL STUD. 41, 43 (2002) (“[L]aws of war can be effective only to the extent that the parties can enforce them against one another; they must possess both the ability and the willingness to make the treaty work.”); GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 452-53 (1968).

10. In support of the view that the purpose of the Conventions is mainly humanitarian, see, e.g., PROVOST, *supra* note 3, at 137; Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorism,”* 46 VA. J. INT’L L. 165, 185 (2005); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, 55-57 (1994).

11. Nineteenth Meeting of the Diplomatic Conference, Diplomatic Conference of Geneva, Vol. II, § A, May 19, 1949, at 675 (“point[ing] out that the Hague Convention was intended to regulate relations between States, whereas the present Convention [civilians] was concerned with the rights of individuals.”).

12. See PROVOST, *supra* note 3, at 171.

13. FEDERAL POLITICAL DEPT., FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 VOL II-A 813-14 (Berne ed., 1963).

14. *Id.* at 46.

the Convention nor abides by it in practice.¹⁵

The present formulation of Article 2, common to all four Geneva Conventions (Common Article 2), reflects these considerations:

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.¹⁶

Common Article 2 embodies one of the few instances in which the laws of war contemplate situations where reciprocity is lacking—in this case, between a belligerent state that has ratified the Geneva Conventions and another entity, also involved in the conflict, but not a party to them.¹⁷ Common Article 2 enjoins state parties to continue to apply the Geneva Conventions “in their mutual relations” among themselves.¹⁸ As for their relationship *vis-à-vis* a non-signatory (referred to as a “Power” to distinguish non-signatory states from “Contracting Parties”), a signatory is bound to comply only if the non-signatory “accepts and applies the provisions” of the Geneva Conventions.¹⁹ Common Article 2 thus provides valuable insight by (1) providing for “bilateral reciprocity even within a multilateral, interstate war”; and (2) subjecting the Geneva Conventions’ application to a minimum amount of reciprocity on the part of a non-signatory party.²⁰

While the letter of Article 2 requires a certain degree of reciprocity as a prerequisite to the applicability of the Geneva Conventions, since 1949 views have shifted toward a non-reciprocal conception of compliance. In the well-respected Commentary of Jean Pictet to the Geneva Conventions, for example, the case is made that the conventions

are coming to be regarded less and less as contracts concluded on a basis of reciprocity in the national interests of the parties, and more and more as a solemn affirmation of principles respected for their own sake, a series of unconditional engagements on the

15. *Id.* (“The Chairman noted that the introduction of a clause according to which a Party to the conflict shall be bound by the Convention only if the other Party respectively acknowledges the same obligation, raised no objections.”).

16. Third Geneva Convention, *supra* note 2, art. 3 (emphasis added).

17. *Id.*

18. *Id.*

19. *Id.*

20. MARK OSIEL, THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR 68 (2009).

part of each of the Contracting Parties “vis-à-vis” the others.²¹

That a state must at all times comply with the laws of war—even when an opposing party does not—has indeed become the prevailing view. In recent forays of the U.N. Human Rights Council into the field of international humanitarian law, the Human Rights Council has placed absolute obligations on states to comply with international law even in the clear absence of reciprocity. When addressing the ongoing conflict in Sri Lanka, the Human Rights Council emphasized the obligation for all parties—including the Liberation Tigers of Tamil Eelam—to respect norms of international humanitarian law regardless of reciprocity.²² The Human Rights Council condemned the use of human shields by the non-state group, but did not consider how this might affect the obligations of the government forces in Sri Lanka.²³ Further illustrating the declining role of reciprocity is the report of the mission led by Judge Richard Goldstone on Operation Cast Lead.²⁴ The report does not consider that the conduct of a belligerent (in that case, Israel) should be analyzed differently in light of the other party’s (Hamas) disregard for humanitarian law.²⁵ The lack of reciprocity has no apparent bearing on the scope of Israel’s obligations under the law. Setting aside jurisdictional questions regarding the Human Rights Council’s authority to opine on matters squarely within the realm of humanitarian law, the Human Rights Council’s findings only strengthen the growing belief that humanitarian obligations are not interdependent.

Also minimizing the legal relevance of reciprocity in war are the “grave breaches” provisions common to all four Geneva Conventions: “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of *breaches* referred to in the preceding Article.”²⁶ These breaches are defined by the Geneva

21. JEAN PICTET, COMMENTARY: GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 20 (Int’l Comm. of the Red Cross 1960) [hereinafter PICTET COMMENTARY].

22. See U.N. Human Rights Council, 11th Special Session, *The Human Rights Situation in Sri Lanka* (May 27, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/11/index.htm>.

23. *Id.*

24. See U.N. Human Rights Council, June 29-July 3, 2009, U.N. Doc A/HRC/12/48, *Report of the United Nations Fact Finding Mission on the Gaza Conflict* (Sept. 15, 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMG_C_Report.PDF.

25. *See id.*

26. The Grave Breaches Provisions are contained in Article 51 of Geneva Convention I, Article 52 of the Geneva Convention II, Article 130 of Geneva Convention III, and Article 147 of Geneva Convention IV. Int’l Comm. of the Red Cross, *How “Grave Breaches” are Defined in the Geneva Conventions and Additional Protocols* (Apr. 6, 2004), <http://www.icrc>.

Conventions as: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” committed against persons or property protected by the relevant convention.²⁷ The Grave Breaches Provisions are, to a large extent, reciprocity neutralizers. Reciprocity no longer has any role to play when it comes to grave breaches of humanitarian law. As Mark Osiel explains, “[i]t is immaterial, when one’s own violations are judged, that one’s military opponent committed the same breaches.”²⁸ Echoing this view, René Provost writes that “the fact that High Contracting Parties cannot absolve each other of responsibility for grave breaches of the 1949 Geneva Conventions underscores the non-bilateral, *erga omnes* character of *some* obligations under humanitarian law.”²⁹

Article 1 of the Geneva Conventions (Common Article 1) lends further support to the view that the obligations imposed by the laws of war are unilateral and non-reciprocal. It provides that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”³⁰ This undertaking, René Provost notes, “is not based on any consideration in the form of the creation of similar obligations on behalf of other state parties to the Conventions and Protocol.”³¹

Taken together, Common Article 1, the Grave Breaches Provisions, and recent statements by the Human Rights Council support the application of humanitarian law even in the absence of a reciprocal relationships between belligerents. But what can be made of the letter of Common Article 2 itself which, as noted above, exempts states from their obligations *vis-à-vis* non-states that neither accept nor apply humanitarian law?

A distinction must thus be made, in international armed conflicts, between non-signatory parties that operate in disregard of the Geneva Conventions and those that adhere to the Geneva Conventions. Private security and military companies provide a good example of entities that have expressed a wish to abide and be bound by the laws of war. Some companies have adopted internal policies that refer explicitly to the Geneva Conventions or to the laws of war more generally.³² Others

org/eng/resources/documents/misc/5zmgf9.htm.

27. First Geneva Convention *supra* note 2, art. 51.

28. OSIEL, *supra* note 20, at 73.

29. PROVOST, *supra* note 3, at 139 (emphasis added).

30. Third Geneva Convention, *supra* note 2, art. 1.

31. PROVOST, *supra* note 3, at 137.

32. See, e.g., American Company Triple Canopy’s Commitment to Human Rights, available at <http://www.triplecanopy.com/philosophy/human-rights/>. As a part of Triple

have publicly expressed their commitment to international law and have become involved in efforts to regulate the private security and military industry.³³ Members of the main industry association, for example, are “encouraged to follow all rules of international humanitarian law and human rights law that are applicable as well as all relevant international protocols and conventions,” including the Geneva Conventions and their Protocols.³⁴ While such self-regulation is not devoid of weaknesses, the efforts and declared intention of military contractors should generally be taken as meeting the requirement of Common Article 2 with respect to reciprocity. In other words, military contractors may fall within the category of non-signatories who are not parties to the Geneva Conventions but “accept and apply” the provisions thereof. In international armed conflicts involving such companies, states are certainly under an obligation to apply all of international humanitarian law.

In contrast to private military companies, which increasingly embrace the laws of war, transnational terror networks neither accept nor apply international humanitarian law. The very *modus operandi* of such networks contradicts the spirit of the laws of war (their declared targets are often civilians or civilian infrastructure). In an armed conflict against a terrorist organization that neither accepts nor applies the laws of war, Common Article 2 implies that the state is not bound to respect such laws. Ignoring, for the sake of argument, the countervailing view of Common Article 1 and the Grave Breaches Provisions, the question

Canopy’s commitment to conducting its operations in a legal, ethical, and moral manner, the company has adopted an organization-wide human rights policy to further inform and educate its employees: “The policy states that Triple Canopy’s business conduct be guided by the United Nations Universal Declaration of Human Rights and other applicable human rights documents and principles. These include the Chemical Weapons Convention, Convention Against Torture, Geneva Conventions (including Protocols Additional to the Geneva Conventions), and the Voluntary Principles on Security and Human Rights.” Triple Canopy adds that it “operates an Employee Helpline where employees may report concerns directly to the company’s senior leadership.” *Id.* G4S’ Business Ethics Policy, available at http://www.g4s.com/en/Social%20Responsibility/Our%20ethics/~/_media/Files/Corporate%20Files/g4s_business_ethics_policy.ashx (“G4S supports the principles of the United Nations Universal Declaration of Human Rights and we are committed to upholding these principles in our policies, procedures and practices. Respect for human rights is and will remain integral to our operations”).

33. See, e.g., Aegis’ statement on its website, *Regulation, Ethics and Sector Reform*, AEGIS, <http://www.aegisworld.com/index.php/about-us/regulation-ethics-and-sector-reform-2> (last visited Jan. 28, 2011). Aegis has long been a supporter of Regulation of the Private Security Company industry. Aegis has financially supported and is a founding member of the British Association of Private Security Companies (BAPSC) which lobbies for regulation in the private sector in the United Kingdom. The BAPSC has developed, together with its members, a comprehensive Code of Conduct. *Id.*

34. ISOA, Code of Conduct, Int’l Sec. Operations Assn. 1, <http://stability-operations.org/index.php> (last visited Dec. 31, 2011).

arises whether, under Common Article 2 itself, a state may cease to be bound by all or part of humanitarian law. Do the laws of war continue to apply *at all* in an international armed conflict pitting a state against a noncompliant non-state entity, such as al Qaeda, for example?

In recent years, a consensus has emerged that certain humanitarian norms apply to all actors in all armed conflicts. Defining these minimum standards goes beyond the scope of this paper but it should be noted that the “Minimum Humanitarian Standards” defined by Judge Meron and the Turku Declaration of 1990 constitute pertinent examples of this trend.³⁵ The “Minimum Humanitarian Standards” applicable to all actors in all conflicts would echo and expand Article 75 of Additional Protocol I, which provides that captives in international armed conflicts who are not entitled to prisoner of war status

shall be treated humanely in all circumstances and shall enjoy, at a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.³⁶

Article 75 further provides that “[e]ach Party shall respect the person, honour, convictions and religious practices of all such persons,” and prohibits “at any time and at any place” the threat and infliction of violence, murder, torture, corporal punishment, mutilation, the taking of hostages, and collective punishment.³⁷ It also provides guarantees in cases of arrest or detention, and criminal convictions. The commitment of Additional Protocol I to the concept of minimal protection for all is most apparent in Article 75(7)(b), which provides that persons accused of war crimes or crimes against humanity shall be protected “whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.”³⁸ This provision illustrates the

35. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 273-74 (2000) (Meron suggests that key procedural safeguards such as proportionality and nondiscrimination be part of “minimum humanitarian standards,” as well as core judicial or due process guarantees, limitations on excessive use of force and on means and methods of combat, the prohibition of deportation, rules pertaining to administrative or preventive detention and humane treatment, and guarantees of humanitarian assistance); *see also* Abo Akademi, *Declaration of Minimum Humanitarian Standards*, http://web.abo.fi/institut/imr/publications/publications_online_text.htm (last visited Dec. 31, 2011).

36. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (entered into force Dec. 7, 1978).

37. *Id.*

38. *Id.* art. 75(b).

broad scope of application of Article 75—even individuals who have committed grave violations of humanitarian law benefit from its protections.³⁹

That a set of minimum protections is available to all actors in all armed conflicts also transpires from Article 3 common to the four Geneva Conventions (Common Article 3) applicable to non-international armed conflicts: “[p]ersons 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.”⁴⁰

To conclude, while the Geneva Conventions communicate apparently contradictory messages on the reciprocity of obligations under the law, by their own terms they contemplate the suspension of the laws of war only in the most limited of circumstances—namely in the case of international armed conflicts involving states and non-state entities that neither accept nor apply humanitarian law. Even in these limited circumstances, the “suspension” of the laws of war is only partial: the core obligations to distinguish between civilian and military objectives and avoid causing unnecessary harm and suffering, for example, continue to apply. That a minimal set of unilateral obligations apply to states in all conflicts, involving all types of actors, is supported by the letter and spirit of Common Article 1 (“[h]igh Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”), the reasoning of the Pictet Commentary (regarding the Geneva Conventions as a “series of unconditional engagements”), the declarations of the U.N. Human Rights Council (not taking into account the disregard by a non-state entity of its obligations when analyzing the obligations of the opposing state), Article 75 of Additional Protocol I (affording human treatment to all in international armed conflicts), Common Article 3 (affording human treatment to all in non-international armed conflicts), and a growing amount of state practice.⁴¹ In other words, the conflicting messages given by the laws of

39. This view has recently been reiterated in the *Interpretive Guidance on the Notion of Direct Participation in Hostilities*. *Interpretive Guidance*, *infra* note 53, at 11 n.15. In the ICRC’s view, in international armed conflict, any person failing to qualify for prisoner-of-war status under Article 4 GC III must be afforded the fundamental guarantees set out in Article 75 AP I, which have attained customary nature and, subject to the nationality requirements of Article 4 GC IV, also remains a protected person within the meaning of GC IV. ***Id.*** [Author: I am not sure this is correct. Please check].

40. Third Geneva Convention, *supra* note 2, art. 3(1).

41. See, e.g., S.C. Res. 1193, ¶ 12, U.N. Doc. S/RES/1193 (Aug. 28, 1998) (In the context of the Taliban’s offensive in northern Afghanistan, the Security Council declared that “all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular under the Geneva Conventions.”); Institute of International Law Res., *The Application of International Humanitarian Law and Fundamental Human Rights*,

war themselves as to the role of reciprocity can be resolved by saying that in the vast majority of conflicts, all (or at least part) of humanitarian law applies without any condition of reciprocity.

B. Note on Non-International Armed Conflict

To this point, I have dealt primarily with the relevance of reciprocity in international armed conflicts.⁴² In non-international armed conflicts, the role of reciprocity must be assessed by reference to the specific norms governing such conflicts.⁴³

Norms applicable to non-international armed conflicts are contained in Common Article 3 and Additional Protocol II to the Geneva Conventions (Additional Protocol II).⁴⁴ Unlike Common Article 2, Common Article 3 includes no reference to cases in which one party to the conflict may not behave in accordance with the laws of war.⁴⁵ Why

in Armed Conflicts in which non-State Entities are Parties, Berlin Sess. art. II (Aug. 15, 1999) (The Institute, aware that “armed conflicts in which non-State entities have become more and more numerous and increasingly motivated in particular by ethnic, religious or racial causes,” declared that “[a]ll parties to *armed conflicts in which non-State entities are parties*, irrespective of their legal status . . . have the obligation to respect international humanitarian law as well as fundamental human rights.”) (emphasis added); Prosecutor v. Sam Hinga Norman (2004), Case SCSL-2004-14-AR72(E) ¶ 2 (Sierra Leone) (“[I]t is well settled that all parties to an armed conflict, whether states or non-State actors, are bound by international humanitarian law, even though only states may become parties to international treaties”).

42. “International armed conflict” is defined as a conflict between two or more states. Cases of partial or total occupation are considered international armed conflicts as per Article 2 common to all four Geneva Conventions. To these two situations, Article 1(4) of Additional Protocol I (which has not been ratified by all states) also adds the specific category of fights against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination. Additional Protocol I, *supra* note 36, art. 1(4).

43. Conflicts “not of an international character” include conflicts between government forces and non-state actors, and conflicts between two non-state actors on the territory of a single state (in these conflicts, state participation is generally not required). Examples would include the conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam, the ethnic conflict in Rwanda, and the conflict involving the United States in Afghanistan. See Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90. It is also worth noting that a non-international armed conflict may be “internationalized” if a state intervenes in that conflict or if one of the non-state entities acts on behalf of a state. While central to International Humanitarian Law (IHL), the distinction between international and non-international armed conflict has lost much of its relevance in recent years—in part because it fails to capture the reality and subtlety of modern warfare. See, e.g., James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, INT’L REV. RED CROSS 313-14 (2003).

44. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (entered into force Dec. 7, 1978).

45. See Third Geneva Convention, *supra* note 2, arts. 2-3.

did the drafters not include a reference to reciprocity in cases of non-international armed conflict as they did in Common Article 2? In non-international armed conflicts, by definition, a state is fighting against an entity that is *not* party to the Geneva Conventions (or two non-state groups are fighting each other). The existence of a non-international armed conflict inherently suggests a non-reciprocal relationship between the warring parties. Yet, the purpose of Common Article 3 and Additional Protocol II is precisely to extend the application of the laws of war to such conflicts. There was no reason to indicate that humanitarian law applies to non-state entities or to states that are not party to the Geneva Conventions since the objective of these instruments was precisely to subject this type of non-reciprocal, non-symmetrical, conflict to the laws of war—without any condition of reciprocity.

In non-international armed conflicts, therefore, there is no need to distinguish between entities that comply with the law and those that do not. Whether terrorist organizations or private military companies or some other kind of actor are involved, and whether or not they respect the law, Common Article 3 (and, when appropriate, Additional Protocol II) applies. Because non-international armed conflict takes into account the lack of reciprocity *ab initio*, the applicability of the laws of war is *never* conditioned upon reciprocity between the parties to such conflicts.⁴⁶

The table below summarizes how reciprocity or the lack thereof affects the application of the laws of war to armed conflicts involving non-state actors:

46. I should note that in my view Article 1 of Additional Protocol II does not introduce any element of reciprocity in non-international armed conflicts. In order to qualify as an organized armed group to which Additional Protocol II would apply, such a group must have the ability to implement Additional Protocol II. I interpret this requirement as one calling for a certain level of organization and discipline within the group—or, as the Commentary to Additional Protocol II puts it, a “minimum infrastructure” necessary to implement the law. *See* CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4470 (Int’l Comm. of the Red Cross 1987), available at www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf.

	International Armed Conflict	Non-international Armed Conflict
	State v. State (including occupation and wars of national liberation)	State v. Non-state Non-state v. Non-state
Abiding non-state actor Ex: Private Military Company	All of IHL applies	All of Common Article 3 and/or AP II rules apply
Non-abiding non-state actor Ex: Terrorist network	Part of IHL applies	All of Common Article 3/AP II rules apply

As the table shows, the absence of reciprocity affects the application of humanitarian law rules *only* in international armed conflicts involving entities that openly disregard the laws of war. While Common Article 2 suggests that the Geneva Conventions do *not* apply to such situations, other provisions of the Geneva Conventions (the Grave Breaches Provisions, for example) and subsequent developments in humanitarian law indicate that its core norms still apply.⁴⁷ To paraphrase Louis Henkin, it might therefore be said that almost all of international humanitarian law applies to almost all armed conflicts involving non-state actors, almost all of the time.⁴⁸ The only conflicts in which part of international humanitarian law (and not all of it) might be suspended or relaxed are international armed conflicts involving states and noncompliant non-state entities. Even in these conflicts, the absence of reciprocity does not render the laws of war wholly inapplicable. At the very least, humanitarian law provides minimum protections and obligations to all actors in all armed conflicts. In other words, the absence of reciprocity among the parties should not, in the overwhelming majority of cases, constitute an obstacle to the application of the laws of war in conflicts involving non-state actors.

47. The content of these core norms has been debated in particular questions such as how the proportionality calculation might be affected by the use of human shields by a terrorist organization or how the rules of the targeting apply to civilian-looking combatants. The limited scope of this Article does not allow for a treatment of these important questions.

48. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (“It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*”).

What remains to be determined is how certain rules (such as proportionality and targeting) might be relaxed in light of the provisions (and limited circumstances) envisaged by Common Article 2.

III. DISTINCTION—OR THE APPLICATION OF THE LAWS OF WAR TO NON-STATE ACTORS

The laws of war rest on the fundamental assumption that a distinction can (and should) be made between civilians and combatants.⁴⁹ Many of the rules governing the conduct of war stem from this absolute distinction, such as, for example, the rules determining which targets are legitimate. The principle of distinction also underpins the rights and obligations of individuals in times of war—such as civilian immunity, prisoner-of-war status, and the protected status of religious and medical personnel.⁵⁰

Undoubtedly, the principle of distinction worked well enough when war was a state-to-state affair, with dueling sovereigns or empires battling for territory or treasure on clearly delineated battlefields. Adopted in 1949 in the wake of the First and Second World Wars, the Geneva Conventions crystallized this view of warfare—regulating war by clearly defining the rights and obligations of civilians and combatants, which they treat as separate and identifiable groups.⁵¹ The assumption that civilians and combatants are easily distinguishable in war resulted from the recent experience of the state parties with conflicts between large, standing armies at the service of sovereign states. Generally speaking, and setting aside the case of partisans (also a product of Second World War experiences), the Geneva Conventions envisage the active involvement of non-state actors in warfare only to deny them the legal benefits afforded to ordinary soldiers.⁵²

But the modern battlefield is different than that contemplated by the Geneva Conventions and earlier international instruments. Modern warfare features an array of non-state participants playing central roles

49. The International Court of Justice has declared the principle of distinction a “cardinal principle . . . constituting the fabric of humanitarian law. . . .” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8). It has also been recognized as a rule of customary law applicable to all states, even to those who have not ratified the Protocol, by the International Criminal Tribunal for the Former Yugoslavia and the Inter-American Commission on Human Rights. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (Cambridge Univ. Press rev. ed. 2009) (2005), available at www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf.

50. See HENCKAERTS & DOSWALD-BECK, *supra* note 49, at 3, 11.

51. *Supra* note 2. [Author: Please verify that this cite is correct].

52. See *supra* note 21. [Author: Please verify that this cite is correct].

in hostilities, often with substantial resources and firepower at their disposal. From guerrilla and terrorist groups in South Asia, to American military contractors in Iraq and human shields in Gaza, the legal status of the varied participants in modern conflicts is less clear-cut than in the past. This is particularly the case in fluid urban battle zones, where combatants can easily find shelter among, hide behind, or blend into civilian populations. Distinguishing between civilians and combatants in these situations—even at the level of theory—is increasingly difficult. Non-state actors find themselves somewhere along the spectrum of the traditional “black and white” civilian/combatant divide, though the laws of war do not contemplate a spectrum but rather clear-cut categories.

Consider, for example, the case of private military contractors, tens of thousands of whom support U.S. forces in Iraq, Afghanistan, and elsewhere. The range of tasks entrusted to these actors illustrates the problems inherent in the distinctions set forth in international legal instruments. While not part of a standing army, private military contractors are a far cry from ordinary civilians. Contractors perform activities ranging from preparing food and building bases to delivering armaments and fuel, planning combat operations alongside ordinary troops, gathering intelligence, providing personal security for senior military and civilian officials of belligerents, and training soldiers in the use of military hardware. By virtue of the environment they operate in, the activities they perform, and their close relationship with armed forces, military contractors are in practice more akin to combatants than they are to civilians. And yet the Geneva Conventions generally regard them as civilians because they do not meet the formal requirements of combatant status. Only in limited circumstances are they treated as civilians directly participating in hostilities a status which does not allow for any predictability, but which at least recognizes that they constitute legitimate targets.⁵³

Their legal status is in stark contrast to the reality on the ground: in the eyes of the “enemy,” contractors are clearly allied with the armed forces they are hired to support.⁵⁴ However deliberate their attempts to

53. See Additional Protocol I, *supra* note 36, art. 51(3); NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 70 (Int'l Comm. of the Red Cross 2009) [hereinafter INTERPRETIVE GUIDANCE].

54. That contractors are often regarded as a proxy of the hiring state is evident in the attacks suffered by companies over the years. In 1995, a car bomb exploded in one of the Saudi National Guards' training facilities in Riyadh. Seven employees of Vinnell died, including five American nationals. James Gerstenzang, *Vinnell Corp., Targeted in Riyadh Before, Loses 9 More Workers*, L.A. TIMES, May 14, 2003, available at <http://articles.latimes.com/2003/may/14/news/war-vinnell14>. The attack is widely regarded as having been directed specifically at Vinnell's Guard training contract. The company was once again targeted in 2003, when several

steer clear of combat, private contractors do take part in military activities on or near the battlefield. Telling examples include the involvement of Vinnell Corporation employees in repelling Saudi rebels in 1979,⁵⁵ and the 2003 capture of employees of California Microwave Systems by the Revolutionary Armed Forces of Colombia (known as FARC) while conducting a surveillance mission on behalf of the Colombian government.⁵⁶ In such cases, it is extremely difficult for friendly or enemy forces (or, for that matter, for outside observers) to determine whether the contractors are civilians or combatants. The application of the current laws of war to these actors often leads to absurd or inconsistent outcomes.

The situation with terrorist organizations is even more complex, because they tend to be well-integrated into and make extensive use of civilian populations. They might even view themselves as civilians, engaging in combat activities only episodically. Terrorist groups make tactical use of civilians to hide from their enemies; they target civilian populations to achieve political and military objectives; and they sometimes draw fire upon civilians to arouse public sentiment. They often “rejoin” the civilian population immediately after engaging in hostile acts by simply putting down a weapon and walking home. It is difficult to identify terrorists-to-be before attacks are actually carried out, and any attempt at stopping them may lead to civilian casualties.⁵⁷

Today’s accepted legal tools do not allow for a straightforward, before-the-fact, or consistent determination of a non-state actor’s legal status. As they are presently interpreted, the Geneva Conventions set

suicide car bombs went off near a Vinnell housing compound, and in 2005 when the company’s compound in Riyadh was attacked by Al Qaeda affiliates. *Id.* The repeated attacks against Vinnell illustrate the fact that the company is regarded by the enemy as an extension of the United States Army in Saudi Arabia, designed to advance key strategic goals of the United States. *Id.*

55. Matthew J. Gaul, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause*, 31 LOY. L.A. L. REV. 1489, 1497-98 (1998); William Hartung, *Mercenaries Inc.: How a U.S. Company Props Up the House of Saud*, PROGRESSIVE, Apr. 1996. Vinnell employees also accompanied the SANG into combat at first major ground engagement of the Gulf War—the battle of Khafji. See Esther Schrader, *U.S. Companies Hired to Train Foreign Armies*, L.A. TIMES, Apr. 14, 2002, available at <http://articles.latimes.com/2002/apr/14/news/mn-37825>.

56. John McQuaid, *Citizens, Not Soldiers*, TIMES PICAYUNE, Nov. 11, 2003, available at www.nola.com/speced/fatalmission/index.ssf?/speced/fatalmission/citizens.html (The hostages—Stansell, Marc Gonsalves and Thomas Howes—were captured by the guerrillas when their surveillance plane crashed on February 13, 2003. American pilot Tom Janis and Colombian Army Sgt. Luis Alcides Cruz were shot and killed by FARC forces).

57. Consider, for example, the shooting of innocent civilians mistaken for terrorists, including that of Brazilian Jean Charles de Menezes in London in July 2005 by the British police, following attacks on London’s transportation system. BBC News, *Shot Man not Connected to Bombing*, BBC NEWS (July 23, 2005), <http://news.bbc.co.uk/2/hi/4711021.stm>.

forth a view of combatant status that is highly formalistic, membership-based, and excludes a number of non-state entities from the definition. In a provision widely held as defining the meaning of combatant, Article 4 of the Third Geneva Convention enumerates the categories of persons entitled to prisoner of war status as including:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - (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.⁵⁸

Though widely embraced, this definition is problematic, if not anachronistic. The requirements set forth by Article 4 of the Third Geneva Convention are difficult to apply in practice. To take only one example, it is far from clear whether contractors meet the “recognizable at a distance” test. Most contractors do wear company hats or polo shirts with the company logo, but is this sufficient to be recognizable “at a distance” as required by Article 4?

One of the difficulties with the Geneva Conventions—and the Third Geneva Convention in particular—is that they focus on membership in identifiable and organized armed groups as the touchstone of combatant status. In other words, the Geneva Conventions, as commonly understood, focus not on a person’s activity but on his or her membership status: only soldiers and their like are considered combatants.

I argue that a contemporary reading of the Geneva Conventions requires placing the four conditions set forth by Article 4 in context, and that a substantial amount of history and moral tradition must be read into the text. I also argue that recent additions to the Geneva Conventions, in particular Additional Protocol I of 1977, should inform

58. Third Geneva Convention, *supra* note 2, art. 4.

our understanding of the Conventions (and particularly, the Third Geneva Convention). Non-state actors should fall within an expansive understanding of combatant status if we are “to respect and to ensure respect for this Protocol in all circumstances”⁵⁹ as the principle of distinction requires.

A. *Early Formulations of the Principle of Distinction*

The principle of distinction is an age-old principle. As Geoffrey Best notes:

From as far back as there is written evidence of the laws of peoples and the decrees of kings come examples of injunctions to distinguish in combat between warriors and the rest: between the arms-bearing, “combatant” part of society, the part which alone made it able to conduct war, and the other “non-combatant” parts whose contribution to war-making could be at most indirect and, in the case of those old men, women, and children who have always figured as the essential non-combatants, probably not even that.⁶⁰

This passage captures well the nature of warfare in past centuries when large standing armies met on battlefields removed from population centers and the bulk of an army’s troops wielded muskets, cannons, and swords.⁶¹ The laws of war derive from this traditional view of warfare, establishing a clear distinction between civilians and combatants in order to protect the former based on their non-participation in the war effort.

A number of ancient and widely-embraced codes already required that belligerents exercise care not to kill civilians. Although each civilization expressed this requirement slightly differently, the motivation remained the same: to spare civilians from the brutality of warfare. While the injunction to avoid harming civilians was sometimes couched in legal terms, often it was no more than the expression of a moral or ethical duty on the part of the warring parties.⁶² The origins of noncombatant immunity, in other words, are not exclusively legal.

As Best points out, most deserving of protection against hostilities

59. See Additional Protocol I, *supra* note 36, art. 1.

60. GEOFFREY BEST, *WAR AND LAW SINCE 1945* 24 (Clarendon Press 1994).

61. MICHAEL WALZER, *JUST AND UNJUST WARS* 42 (Basic Books, Inc. 1977) (“[T]he general conception of war as a *combat between combatants* . . . turns up again and again in anthropological and historical accounts.”).

62. See LEON FRIEDMAN, *THE LAW OF WAR: A DOCUMENTARY HISTORY* 5 (Random House 1972).

were women and children.⁶³ From the earliest times, women and children have been regarded as a protected category of persons. The Old Testament provides a valuable illustration of this special status in the chapter of Deuteronomy setting out the rules applicable in wars waged against “cities that are very distant from you.”⁶⁴ In these wars, fighters were allowed to “strike every male thereof by the . . . edge of the sword,” but they were told that “women, . . . the little ones, the livestock, and all that is in the city, even all the spoil thereof, [you shall] take to yourself”⁶⁵ Similarly placing an emphasis on the treatment of women and children, Mohamed’s successor, Caliph Abu-Bakhr, urged the Muslim Arab army invading Christian Syria in 634 A.D. not to mutilate or kill a child, man, or woman.⁶⁶ These examples are not meant to suggest that the Abrahamic religions only advocated peace and protection. They did, however, establish a distinction between who ought to be killed or spared as part of a divinely justified war.

Only later did early just war theorists give a legal dimension to what religious teachings and morality had identified as the limits of warfare. In its effort to establish rules governing the conduct of war, early legal scholarship focused on the elaboration of specific guidelines on who could be killed in war. This long process—which eventually led to the codification of the principle of distinction—began in the fifth century with the prominent philosopher and theologian St. Augustine. Although St. Augustine did not distinguish between soldiers and combatants, he developed the concepts (and terminology) that others after him used to shape noncombatant immunity.⁶⁷ Following in St. Augustine’s footsteps, St. Thomas Aquinas took two important steps when he proclaimed in the thirteenth century that “it is in no way lawful to slay the innocent.”⁶⁸ First, he set forth the notion that certain acts ought to be prohibited in *all* wars, whether just or unjust.⁶⁹ Second, he established categories among enemy nationals, distinguishing between those who are innocent (and can never be killed), and those who are guilty (and

63. See BEST, *supra* note 60, at 257.

64. Deuteronomy 20:15 (New King James Version).

65. *Id.* 20:13-14.

66. Waldemar A. Solf, *Protection of Civilians against the Effects of Hostilities under Customary International Law and Under Protocol I*, 1 AM. U. J. INT’L L. & POL’Y 117, 118 (1986) (citing MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 102 (1955)); ALAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR, A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 48 (Suoma Lainén Tiedeakatemia rev. 2005) (1976).

67. See generally SAINT AUGUSTINE, CITY OF GOD (Henry Bettenson trans., Penguin Books 1972).

68. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Question XL, Sixth Art. (Henry Bettenson trans., Penguin Books 1972).

69. *Id.*

can be killed).⁷⁰

Progressively, innocence and the bearing of arms became the yardsticks for noncombatant immunity. In the period spanning from the late tenth to thirteenth centuries, the Church adopted regulations granting immunity from violence to the clergy, peasants, merchants, children, women, and, more generally, anyone not bearing arms.⁷¹ As for the concept of innocence, while it remained at the heart of noncombatant immunity, it became understood independently of the notion of punitive war. Instead of conceiving war as a way to punish the enemy—both combatants and civilians—Hugo Grotius promoted the laws of war as a set of rules founded in custom and natural justice applicable even to those on the unjust side of war.⁷² While some of his predecessors had touched on the subject, Grotius was the first to give strong and sustained force to the argument that restraint, moderation, and compassion should apply to all belligerents in times of war.⁷³ While immunity had been conceived as an attribute of those waging a just war, Grotius argued that restraint should also be exercised toward innocent enemy civilians (*i.e.*, those who are not armed or immediately harmful).⁷⁴

Jean-Jacques Rousseau's formulation of the principle of distinction in the eighteenth century further highlighted the importance of bearing arms when distinguishing between civilians and combatants. Rousseau's formulation of noncombatant immunity was couched in universal, non-legal, and non-religious terms, and it distinguished the soldier who carries his weapon, on one hand, and the "man" who has laid it down, on the other:

Since the purpose of war is to destroy the enemy State, it is legitimate to kill the latter's defenders *so long as they are carrying arms*; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.⁷⁵

70. *Id.*

71. See, e.g., *Peace of God—Synod of Charroux, 989*, in INTERNET MEDIEVAL SOURCEBOOK (Paul Halsall ed., Jan. 1996), available at <http://cassian.memphis.edu/history/jmblythe/3370/PeaceOfGod989.htm>.

72. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE: THREE VOLUME SET (NATURAL LAW AND ENLIGHTENMENT CLASSICS) 1439-45 (Richard Tuck ed., Liberty Fund 2005) (1625).

73. JEAN PICTET, DEVELOPMENT AND PRINCIPLES IN INTERNATIONAL HUMANITARIAN LAW 9 (Martinus Nijhoff Publishers 1985).

74. See GROTIUS, *supra* note 72, at 1439-45. See also PICTET, *supra* note 73, at 20.

75. JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL 111 (Ronald Grimsley ed., 1972) (1762) (translation provided by author) (emphasis added).

Moving beyond just war theory, Rousseau established (and durably so) that there are two categories of enemy nationals: while those “who are carrying arms” deserve to die, others deserve to be protected. Protection from attack, in other words, is to be granted to civilians on both sides of a conflict. With Rousseau, the principle of distinction—and the importance of bearing arms at its core—was firmly established.

A century later the principle of distinction was finally formulated in legal terms with the drafting of the Lieber Code, a pamphlet prepared by the jurist Francis Lieber at the request of General Henry Wager Halleck, General-in-Chief of the Union Armies during the American Civil War.⁷⁶ It is the first document which can be said to have codified the laws of war.⁷⁷ The Lieber Code could not have phrased the principle of distinction in clearer terms: “[a]ll enemies in regular war are divided into two general classes—that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government.”⁷⁸

Building on Grotius, the Lieber Code emphasized that restraint should be exercised even *vis-à-vis* enemy noncombatants.⁷⁹ Building on Rousseau, it defined noncombatants as “unarmed citizens of the hostile government.”⁸⁰ All subsequent legal pronouncements governing the conduct of war reiterate the essential distinction established by the Lieber Code between civilians and combatants.⁸¹

Most remarkable is the definition of armed forces provided by the Hague Regulations of 1907 as consisting of both combatants *and* noncombatants.⁸² This definition implies that only members of the armed forces actually involved in combat constitute legitimate targets.⁸³ The Hague Regulations provide that the activity performed by the

76. International Committee of the Red Cross, Introduction to Instructions for the Government of the U.S. in the Field (LIEBER CODE) (1863), *available at* <http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/a25aa5871a04919bc12563cd002d65c5?OpenDocument> (last visited Jan. 27, 2011).

77. *Id.*

78. *Id.* art. 155.

79. *See id.* arts. 18-19.

80. *Id.* art. 155.

81. *See, e.g.*, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29, 1868, 18 Martens Nouveau Recueil (ser. 1), at 474; Project of an Int’l Declaration Concerning the Laws and Customs of War art. 9, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2), at 219, *available at* <http://www.icrc.org/IHL.nsf/INTRO/265?OpenDocument>; Convention Respecting the Laws and Customs of War on Land annex art. 22, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Regulations], *available at* <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6>; 1923 Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare arts. 13, 16, 34, *available at* <http://www.icrc.org/ihl.nsf/INTRO/275?OpenDocument> (last visited Dec. 29, 2011).

82. Hague Regulations, *supra* note 81, annex art. 3.

83. *Id.*

soldier matters, at least for purposes of targeting (note that all members of the armed forces—irrespective of the type of activity they perform—are entitled to prisoner of war status under the Hague Regulations).⁸⁴ Subsequent legal instruments abandoned this activity-based approach to combatant status in favor of one based upon membership.

On the whole, early formulations of the laws of war provide valuable insight into the considerations that guided the development of combatant status—innocence, harmlessness and the bearing of arms. The activity-based definition of combatant status embedded in the 1907 Hague Regulations not only reflected these considerations, but also lent support to the view that activity ought to play a role in identifying those entitled to combatant status.⁸⁵ According to this conception of combatant status, certain non-state actors (in particular those who engage in military activities on behalf of a state) would qualify today for combatant status.

B. *The Principle of Distinction as Formulated in the Geneva Conventions and Additional Protocol I*

The Hague Regulations and early formulations of the principle of distinction took into consideration the nature of the activity in which individuals were engaged, in particular whether they bore arms and were involved in combat.⁸⁶ But in the wake of two world wars fought largely by opposing conventional forces, with millions dead in indiscriminate attacks on civilian infrastructure, and following the detention of hundreds of thousands of uniformed soldiers, the Geneva Conventions of 1949 shifted the focus from an actor's activity to membership.⁸⁷ The Third Geneva Convention views combatant status through the prism of large-scale conventional warfare: all members of the armed forces are combatants, regardless of what their function within the armed forces might be.⁸⁸

What is more, the Geneva Conventions define combatants in an inconvenient place: the conditions of accession to combatant status are set forth in the Third Geneva Convention, which deals with prisoners of war.⁸⁹ This less than ideal confusion between the concept of combatant and the protection of prisoner of war is at the heart of the Geneva

84. *Id.*

85. *See* Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (ser. 2), at 949, *available at* <http://www.icrc.org/ihl.nsf/FULL/150>.

86. *Id.* annex arts. 1-2.

87. Third Geneva Convention, *supra* note 2, arts. 3-4.

88. *See id.* art. 4.

89. *See id.*

Conventions. The Geneva Conventions' drafters, mindful that the new treaties conferred benefits upon captured combatants, were reluctant to extend the benefits of prisoner of war status to any but the most legitimate, well-trained, and accountable parties. It is for this reason that under Article 4 only "members of the armed forces of a Party to the conflict" (and similar actors operating under similar conditions) qualify as combatants.⁹⁰ The only exception (*i.e.*, a non-state actor *not* operating under such strict conditions, but nevertheless entitled to prisoner of war status) is based on the model of partisans—allied, it should be recalled, with the victors of the Second World War.⁹¹

The development of the laws of war, however, did not end in 1949. With awareness of the narrowness of the Third Geneva Convention and, given the backdrop of the wars of liberation and guerrilla movements of the 1960s and 1970s, the Additional Protocols to the Geneva Conventions were adopted in 1977 with a far more expansive view of both armed conflict and combatant status.⁹² Placing a greater emphasis on activity, Article 43(1) of Additional Protocol I provides that:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.⁹³

This definition of armed forces widens the scope of actors entitled to combatant status. Under Article 43's expanded definition, an indirect or implicit relationship between a non-state entity and a state party can

90. *Id.*

91. PICTET COMMENTARY, *supra* note 21, at 52. At the time of drafting of Article 4, the discussion focused on whether partisans (or resistance movements) would have to meet more conditions than ordinary combatants in order to be granted prisoner of war status or whether such conditions should be somewhat relaxed to enable them to accede to such status. After much heated debate, it was decided to assimilate resistance movements to militias and corps of volunteers not forming part of the armed forces of a Party to the conflict—a move that was regarded as an "important innovation which has become necessary as a result of the experience of the Second World War." *See* Comm. II, Third Meeting, Apr. 27, 1949, Prisoner of War Convention, at 242s; and Report of Committee II to the Plenary Assembly of the Diplomatic Conference of Geneva, at 561. That the Article was meant primarily to address the question of the legal status of partisans under the laws of war is also apparent from the fact that the Pictet Commentary not only addresses sub-paragraph (2) of Article 4 under the heading "Partisans," but also repeatedly refers to partisans in its analysis of the provision.

92. *See* Additional Protocol I, *supra* note 36.

93. *Id.* art. 43(1) (emphasis added).

establish combatant status.⁹⁴ In place of the four conditions required by the Geneva Conventions, Additional Protocol I only requires that two conditions be met: (1) responsible command under a Party to the conflict, and (2) behavior in accordance with the laws of war.⁹⁵ Gone are the requirements to wear uniforms or carry weapons openly. Such requirements are no longer relevant to identify combatants for purposes of targeting; they only matter “with respect to a combatant’s entitlement to prisoner of war status.”⁹⁶

Setting aside continuing disagreement over the benefits afforded to non-state combatants (*i.e.*, Hezbollah or al-Qaeda) or the status of Article 43 of Additional Protocol I as customary international law,⁹⁷ Additional Protocol I certainly marks a return to the traditional meaning of combatant as characterizing harmful individuals, bearing arms, and posing a threat.

The practice of certain states shows that this shift in the direction of a more activity-based definition of combatant is gaining ground. Military manuals of Germany and the United States (importantly not a party to Additional Protocol I), for example, point out that there can be non-combatant members of the armed forces besides medical and religious personnel (*i.e.*, members of the armed forces who do *not* have any combat mission).⁹⁸

We should therefore be circumspect about using the formal, membership-based, standards of Article 4 of the Third Geneva Convention to define who is a combatant and who is a civilian generally, and keep in mind the historical context surrounding the adoption of the Geneva Conventions. The Third Geneva Convention is substantially focused on who is entitled to benefit from prisoner of war status; it became the touchstone of combatant status only because combatant and noncombatant are not defined elsewhere in the Conventions. But the rationale that guided the crystallization of the principle of distinction and underlies the Geneva Conventions—protecting innocent, harmless, individuals—can be instructive in characterizing battlefield protagonists. Similarly, definitions of combatant status adopted after 1949 (whether or not accepted by all states) can shed light on the meaning of Article 4 of the Third Geneva

94. *Id.*

95. *Id.*

96. HENCKAERTS & DOSWALD-BECK, *supra* note 49, at 15.

97. Anthony Rogers, *Combatant Status*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmshurst & Susane Breau eds., 2008) (doubting whether Article 43 of Additional Protocol I has become customary international law).

98. HENCKAERTS & DOSWALD-BECK, *supra* note 49, at 13.

Convention.⁹⁹

In particular, it is helpful to turn to Additional Protocol I when interpreting the phrase “belonging to a Party to the conflict” contained in Article 4 of the Third Geneva Convention. Article 4 provides that “members of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging to a Party to the conflict* and operating in or outside their own territory” are combatants, provided that such groups meet the required four conditions.¹⁰⁰ Depending on the interpretation of the phrase “belonging to a Party to the conflict,” certain non-state actors on today’s battlefields might therefore qualify as combatants.¹⁰¹

Even before Additional Protocol I was adopted, it was accepted that neither a formal incorporation into the state’s forces nor the authorization of all of the armed group’s activities by the state was required for an armed group to “belong to a Party to the conflict” in the meaning of Article 4. At the time, a *de facto* relationship between the armed group and a party to the conflict was deemed sufficient to meet such requirement.¹⁰²

With Additional Protocol I, the type of relationship required between the armed group and the state became even looser. Under Article 43 of Additional Protocol I, the definition of combatants encompasses all organized forces, groups and units *which are under a command responsible to that party for the conduct of its subordinates*, have an internal disciplinary system, and respect international humanitarian law.¹⁰³ By conferring combatant status to armed groups under a command responsible to a party to the conflict, Article 43(1) retroactively sheds light on the meaning of the phrase “belonging to a party to the conflict” of Article 4 of the Third Geneva Convention: “belonging to a party to the conflict” essentially means being in a relationship of subordination with a belligerent state (*i.e.*, receiving

99. Incidentally, extending international humanitarian law (IHL) protections to as many persons as possible was one of the declared goals of the Geneva Conventions. *See generally* Commander Gregory Noone, *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1, 13 (2004); Stanislaw Nahlik, *L’Extension du Statut de Combatant à la Lumière du Protocol I de Genève de 1977*, RECUEIL DES COURS 213 (1979); Diplomatic Conference, Prisoner of War, Third Meeting, Apr. 27, 1949, at 242; Hungarian Delegation, Joint Comm. on Common Articles, First Meeting, at 11; Delegation of the Netherlands, CDDH/SR. 41, 142 (41st plenary meeting, May 26, 1977).

100. Third Geneva Convention, *supra* note 2, art. 4(A)(1)-(2) (emphasis added). The four conditions are: being commanded by a person responsible for his subordinates, having a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations in accordance with the laws of war.

101. *Id.* art. 4(A)(2).

102. Pictet Commentary, *supra* note 21, at 57.

103. Additional Protocol I, *supra* note 36, art. 43(1).

orders from such state, including through contract, or fighting alongside the state's armed forces).¹⁰⁴ As a result, Additional Protocol I is commonly understood as conferring combatant status to the members of a non-state group fighting *on behalf and with the agreement* of a party to the conflict.¹⁰⁵

Private military contractors, like those operating on behalf of the United States in Iraq, are a particularly good example of why the interpretation of "belonging to a Party to the conflict" matters. There is little doubt that employees of Xe (formerly Blackwater), Aegis, or DynCorp operating alongside American forces in Iraq might be considered as "belonging to a Party to the conflict," especially when such phrase is interpreted in light of Article 43 of Additional Protocol I. They would also, as noted above, meet that Article's second condition of having an internal disciplinary system capable of enforcing compliance with the laws of war.

Back to Article 4, it seems that the relaxed standards of Additional Protocol I (which require only that they operate under a party to the conflict and that their behavior is in accordance with the laws of war) call for a less restrictive interpretation of Article 4's requirements with respect to these actors' command structure, their obedience to the laws of war, or their dress (as noted above private military contractors might not, strictly speaking, display "a fixed, distinctive sign recognizable at a distance").¹⁰⁶

The status of terrorists and members of guerilla groups under the Geneva Conventions is more problematic. Except in the most unusual cases (a uniformed, disciplined, openly armed, and legally-compliant guerrilla army reporting to a state), these actors would not meet the conditions of Article 4. They would also have difficulty meeting the more relaxed definition of Additional Protocol I, though one can imagine a terrorist organization or guerrilla group operating on behalf of a Party to the conflict that acts generally in accordance with the laws of war (*i.e.*, targeting exclusively military forces and infrastructure). As the laws are formulated and interpreted today, any attempt at making such actors fit within the civilian/combatant divide requires convoluted legal exercises.

I would argue that in the case of terrorists, members of guerillas, and private military contractors alike, we should look to the principles underpinning the Geneva Conventions and earlier formulations of the principle of distinction for guidance. As the battlefield has evolved, as

104. See HENCKAERTS & DOSWALD-BECK, *supra* note 49, at 15.

105. INTERPRETIVE GUIDANCE, *supra* note 53, at 23.

106. This is true in spite of the debate surrounding Article 43's customary nature. I do not suggest that the requirements of Article 4 have become irrelevant. Rather, I argue for a slightly less restrictive interpretation of these requirements.

non-state actors have proliferated, and as the destructive capacity of irregulars has exponentially increased, we should endeavor to subject *all* non-state actors to the laws of war. This does not necessarily entail extending to them prisoner of war status. It does, however, suggest we step back from the purely status-based definition of Article 4 of the Third Geneva Convention in favor of a more activity-based conception of combatant status.

While the tendency today is to regard the restrictive interpretation of the definition of combatant as set in stone, the analysis conducted in this Article reminds us of the dynamic approach to combatant status. From the earliest legal pronouncements which emphasized the nature of the threat posed by combatants, the Geneva Conventions marked a shift toward membership as the touchstone of combatant status. Later, Additional Protocol I loosened the criteria of Article 4 to embrace a wider range of actors, reverting to a more activity-based conception of combatant—increasingly advocated by states. These shifts track the states' interest in defining combatant more or less restrictively. After WWII, mindful of the dangers of conventional warfare, states sought to define membership restrictively as covering only regular members of the armed forces. The only accepted exception was drawn up on the basis of states' experience with partisans. Today, the shift back to a more membership-based standard can be attributed to the challenges states face when contending with terror and indiscriminate warfare at the hands of irregulars. In this specific context, the constraints of membership-only standard have led states to revert to a more activity-based conception of combatant status. The point is that the definition of combatant has traditionally reflected states' concerns and the geopolitical realities of the moment. What this Article suggests is to continue this tradition, keep in mind that the legal provisions are merely the expression of basic principles, and adapt our understanding of legal provisions to new realities and challenges—as has historically been the case.

C. Note on Non-International Armed Conflict

For purposes of the principle of distinction, the involvement of non-state actors in non-international armed conflicts raises one important question. Given the technical nature of humanitarian law, there are no combatants *stricto sensu* in non-international armed conflicts as combatants are defined in the context of the Third Geneva Convention and Additional Protocol I, both of which apply to international armed conflict. If there are no combatants in non-international armed conflicts, how can there be a duty to distinguish between civilians and combatants?

Noting this important feature of non-international armed conflicts, the *Customary International Humanitarian Law* study explains that, in non-international armed conflicts, the term “combatant” is used in the generic sense to refer to “persons who do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner of war status.”¹⁰⁷ Similarly, the International Committee of the Red Cross’s *Interpretive Guidance on the Notion of Direct Participation in Hostilities* considers that “for the purposes of the principle of distinction in non-international armed conflict” civilians are those individuals who are neither members of the state’s armed forces nor members of the armed forces of a non-state party.¹⁰⁸

These statements underscore the continued relevance of the principle of distinction, even in non-international armed conflicts. In such conflicts, the obligation to distinguish between protected and unprotected individuals holds, and for such limited purposes, unprotected individuals are actually comparable to combatants in international armed conflicts.¹⁰⁹

IV. CONCLUSION

This Article has focused its attention on two meta-issues that arise whenever a non-state actor is involved in hostilities: reciprocity and distinction. Contending with these issues is indispensable as they affect the applicability of accepted legal principles to virtually all modern conflicts—whether they involve private military companies, well-organized guerrilla armies, or terror organizations.

With respect to the applicability of the laws of war to conflicts involving this type of actors, the laws themselves provide only a confusing answer to the myriad of questions that arise. Do al-Qaeda militants deserve the benefits of the laws of war? Are there minimum unilateral standards that constrain states even when fighting a non-compliant actor? I have argued that while the role of reciprocity in international humanitarian law should not be undermined, the laws of war should continue to apply even when reciprocity is lacking. This conclusion is warranted both by a technical analysis of the intention of the Geneva Conventions and by an evolving consensus regarding minimum humanitarian obligations applicable to all. By the Geneva

107. *Id.*

108. See INTERPRETIVE GUIDANCE, *supra* note 53, at 16.

109. See Rogers, *supra* note 97, at 109 (“[s]o there is a difference in the Study between ‘combatant which denotes somebody taking an active part in hostilities’ and ‘combatant status,’ which implies more but does not apply in non-international armed conflicts”).

Conventions' own somewhat convoluted terms, reciprocity was never made a prerequisite to the application of the laws of war, except in the case of international armed conflicts involving entities that do *not* apply or respect the laws of war. In such conflicts, and in such conflicts only, a state may be absolved of some of its obligations in light of the refusal of the non-state to comply with the laws of war.

While Common Article 2 would set aside the Geneva Conventions in those circumstances, it is well-accepted today that, at a minimum, certain core norms of humanitarian law apply to all actors in all armed conflicts. In light of the growing consensus on the constant applicability of minimum humanitarian standards, I conclude that in most conflicts (whether international or non-international) the absence of reciprocity will not affect the applicability of the laws of war. The only situation in which part of humanitarian law—and not all of it—may be relaxed is an international armed conflict involving a state and a noncompliant non-state entity, such as a transnational terrorist network. Further analysis is required to examine what rules, in substance, may be set aside or relaxed in such a conflict.

I then examined the challenges of applying the laws of war to non-state actors. Most norms of international humanitarian law have evolved from the principle of distinction, which calls on combatants to distinguish themselves from the civilian population and on commanders to distinguish between civilian and military objectives. The hybrid nature of non-state entities—they fall somewhere along the continuum separating civilians and combatants—makes any application of the principle of distinction to these entities extremely difficult. Non-state actors do not fall neatly within the categories of actors entitled to the guarantees and protections (as well as the obligations) contemplated by the Geneva Conventions. This situation is not only adverse to the interests of non-state participants in warfare, it also (and perhaps most importantly) hurts the civilian population, whose protection cannot be properly ensured.¹¹⁰

This Article suggested a way to overcome issues of distinction in conflicts involving non-state entities. The formal and technical requirements of the contemporary laws of war should be interpreted to allow certain non-state actors to accede to combatant status—depending, *inter alia*, on whether they act on behalf of a state, respect the laws of war, and conduct military-like activities on a regular basis. This can be done by interpreting the definition of combatant status

110. INTERPRETIVE GUIDANCE, *supra* note 53, at 70 (noting that the confusion and uncertainty as to the distinction between legitimate targets and persons protected against direct attacks has resulted in civilians being “more likely to fall victim to erroneous or arbitrary targeting, while armed forces—unable to properly identify their adversary—run an increased risk of being attacked by persons they cannot distinguish from the civilian population.”).

contained in Article 4 of the Third Geneva Convention within its proper historical and legal contexts. This provision was meant to set forth the requirements for prisoner of war status under the Geneva Conventions—not the assessment of who is a combatant and who is a civilian. Instead of resting solely on Article 4, our understanding of combatant status should be informed by formulations of the principle of distinction which preceded and followed the adoption of the Geneva Conventions. This broader understanding of combatant status not only takes into account a long line of religious, historical, and legal tradition; it also upholds the law's objective to extend protection to as many actors as possible in time of war.¹¹¹

111. *See supra* note 99.[**Author: Please correct. Need specific reference(s)**].