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# *Humanitarian Law and Counterterrorist Force*

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## **Abstract**

*The current context of a 'war against terrorism' raises the question whether international humanitarian law should govern a state's actions in an armed conflict against a foreign terrorist organization. Depending on the configuration of the conflict, including the response of the foreign state from whose territory the terrorists operate, existing treaties may already apply to the military operations. The limited protections they impose, though not originally designed with such a conflict in mind, do not unduly hinder defence against international terrorism. Restricting counterterrorist operations is justified, in part by bedrock human rights of the terrorists themselves, but more strongly by the rights of innocent civilians exposed to counterterrorist violence.*

The events of September 11, 2001 and their aftermath have given new urgency to the question 'Should humanitarian law protect terrorists?' Although that question could be sharpened to address particular facts, its verbal breadth and ambiguity deserve a more general and considered answer.

As an outsider to the field of humanitarian law, my response, in the space of a short essay, is preliminary but affirmative: 'Yes, sometimes.' I will argue that, in many circumstances, complying with international humanitarian law (IHL) in a conflict with a terrorist organization is necessary for the protection of innocent civilians and to ensure respect for bedrock human rights of the terrorists themselves. Although the existing regimes of international humanitarian law extend beyond the norms necessary for those purposes, the additional restrictions that would apply to a conflict with terrorists do not appear to be so disadvantageous as to militate against their observance.

## **1 IHL, Civilians, and Reciprocity**

International humanitarian law forms a portion of the international law relating to war, or more generally to armed conflict. IHL addresses the acceptable conduct of war,

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*jus in bello*, rather than the initial lawfulness of resort to war, *jus ad bellum*. To a great extent, IHL brackets the question of *jus ad bellum*, treating belligerent adversaries symmetrically rather than making the rules for their conduct depend on determinations of blame for the initiation of the conflict. The rules are not, however, wholly uninfluenced by this factor.

The modern name IHL should not distract from the fact that considerations of humaneness are not the sole factor taken into account in the design of IHL, and that even if everyone always complied with IHL (which they do not), it would achieve its humane goals imperfectly. IHL embodies compromises between ideals of humanity and considerations of military advantage, as well as other policy concerns.

The subject matter of humanitarian law has evolved considerably since the mid-nineteenth century. Where the earlier law primarily addressed humane treatment of soldiers (including those who had been wounded or had surrendered), modern IHL places great emphasis on protection of civilians. The ‘principle of distinction’ is one of the fundamental principles of modern IHL. It demands, most centrally, that ‘[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.’<sup>1</sup>

Since 1945, IHL has been influenced by the concurrent growth of international human rights law. The coverage of the two fields of law overlaps. Human rights law principally addresses the relationship between states and persons subject to their governing authority, and many of its norms are subject to derogation in times of emergency. Parts of IHL apply to conflicts between states, neither of whom claims authority over the armed forces or population of the other, but IHL also regulates certain armed conflicts internal to a single state, and provides rules applicable to the emergency situation that are more specific than the human rights norms. IHL also restricts a state’s behaviour in governing territory of another state under a regime of belligerent occupation, and its treatment of captured adversaries.

The humanitarian concerns of IHL share a common foundation with international human rights law. The fundamental commitment of human rights law is the principle of human dignity: that all human beings possess an intrinsic worth that cannot be alienated or forfeited, and which limits how they can be treated. That commitment is mirrored in IHL by the principle that even in conducting war, the parties to a conflict do not have an unlimited choice of methods and means of warfare. This essay will assume the validity of the human dignity principle, and that principle will inform its normative assessment of IHL rules.

Reciprocity plays a much larger role in IHL than in human rights law. States negotiate rules of IHL for international armed conflicts in the awareness that their soldiers may be both attackers and objects of attack, and that their citizens and

<sup>1</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 51(2), 1125 UNTS 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Art. 13(2), 1125 UNTS 609 [hereinafter Additional Protocol II]; see Greenwood, ‘Historical Development and Legal Basis’, in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (1995) 1, at 32.

territory may suffer the effects of war. States do not have identical interests: among other factors, they differ in their military capacities and their resources and the ideological commitments that they bring to the negotiations. But in case of war, states (and their citizens) stand to benefit directly from the adversary's compliance with rules of IHL to a far greater degree than they stand to benefit directly from another state's compliance with human rights law in time of peace.

Reciprocity is built into the structure of many IHL norms, although its prevalence diminished over the course of the twentieth century. Early humanitarian treaties included general participation clauses, limiting their force to wars in which all the parties to the conflict were parties to the treaty. The Geneva Conventions of 1949 dropped the general participation requirement; they apply as between contracting parties whenever they are opposed in a conflict, and also extend to other parties in such a conflict if they accept and apply the Conventions. Moreover, most IHL conventions have permitted parties to take reservations modifying the effect of particular provisions, and these modifications then apply symmetrically as between the reserving state and the other parties.<sup>2</sup> When rules of IHL are determined to have become rules of customary international law, party status to a treaty becomes irrelevant but the interest in reciprocity is served by universal coverage.<sup>3</sup>

That does not mean that case-by-case compliance with IHL norms is legally conditioned on reciprocal observance of those norms by the adversary. In that specific sense, IHL has lost most of its reciprocal character, as IHL scholars correctly emphasize. The older law of war gave greater scope to the remedy of reprisal — the justified violation of a norm by one side in response to a violation by the other side, for the purpose of discouraging further violations.<sup>4</sup> Increasingly over time, treaties have forbidden reprisals in international armed conflicts against categories of persons (as well as objects), such as prisoners of war, the wounded and sick, medical personnel, civilians in the hands of a foreign power, and (controversially<sup>5</sup>) the civilian population

<sup>2</sup> See A. Roberts and R. Guelff, *Documents on the Laws of War* (3rd ed., 2000), at 44. The Statute of the International Criminal Court is a recent and important exception. See Rome Statute of the International Criminal Court, 17 July 1998, Art. 120, UN Doc. A/CONF.183/9\* [hereinafter ICC Statute].

<sup>3</sup> If a particular customary norm does not apply to a particular state because of its persistent objection during the norm's emergence, then presumably that state cannot claim the benefit of the norm either. See M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), at 102–103.

<sup>4</sup> See Kalshoven, 'Belligerent Reprisals Revisited', 21 *Netherlands Yearbook of International Law* (1990) 43. In addition, Article 60(5) of the Vienna Convention on the Law of Treaties, 1155 UNTS 331, provides that a material breach of a humanitarian treaty obligation cannot be invoked as a ground for suspending the operation of the treaty in whole or in part, which would be a broader response than a reprisal. See Kalshoven, *supra* this note at 71.

<sup>5</sup> See Additional Protocol I, Art. 51(6) (re persons), *ibid.* Arts. 52–56 (objects). Some states, including the United States, have cited the breadth of these provisions as a reason for refusing to ratify the Protocol, and other states have taken reservations against them. Trial Chamber panels of the International Criminal Tribunal for the former Yugoslavia have nonetheless found that the prohibition of reprisals against civilians is a rule of customary international law applicable in both international and internal armed conflicts. See *Prosecutor v. Kuprešić*, Case No. IT-95–16-T, Judgment, paras 527–534 (ICTY Trial

of an enemy state. But thus far the legality of reprisals against active combatants has been maintained.

Reciprocity may also be seen in portions of the elaborate code governing prisoners of war. Some of the provisions of the Third Geneva Convention require respect for core human rights, and many create procedures or prophylactic rules designed to increase the likelihood that those rights will be respected. But other provisions of that Convention might best be described as pursuing the tradition of professional courtesy among soldiers.

Considerations of reciprocity have been involved differently in the design of IHL norms applicable to purely internal armed conflicts between a government and an insurgent force in its territory. The treaties have normally been negotiated by states, as agreements among states, not as agreements between states and insurgents.<sup>6</sup> In that respect, the situation resembles the configuration of human rights treaties, in which states exchange promises that each will respect certain rights of its own nationals (among others). The rules of internal armed conflict bind both the state and the insurgent, by virtue of the state's sovereignty over its nationals and its territory, although insurgents sometimes deny this. Nonetheless, states have resisted convergence between the rules of international armed conflict and internal armed conflict, for several reasons. One reason involves the claim of sovereignty — states have resisted the intrusion of international norms into their internal affairs in so momentous a context as their defence against armed rebellion. Another reason is concern that international regulation, particularly the impartial regulation that characterizes humanitarian law, would confer inappropriate legitimacy on movements making violent challenges to their authority. That concern is partly accommodated by the refusal to grant a combatant's privilege or prisoner of war status to the insurgents, who may lawfully be punished for resort to arms (illustrating the influence of *jus ad bellum* considerations on *jus in bello*). A third concern is that insurgent movements may lack the inclination or the capacity to conform their conduct to the requirements of IHL. Guerrilla fighters in particular are often part-time soldiers engaged in an unequal struggle against more conventionally powerful government forces. The fact that guerrillas disguise their identities and hide among the civilian population makes it harder for government forces to distinguish among adversaries and civilians, as humanitarian principles would require.

As a result, the treaty obligations applicable in internal armed conflict have been far fewer than those applicable in international armed conflict. The 1949 Geneva Conventions each contained only one article, Common Article 3, imposing bedrock humanitarian requirements in internal conflicts. Common Article 3 also encouraged

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Chamber 14 January 2000), affirmed in part and reversed in part on other grounds. Case No. IT-95-16-A, Appeal Judgment (ICTY Appeals Chamber 23 October 2001); *Prosecutor v. Martić*, Case No. IT-95-11-R61, Review of the Indictment, paras 10–17 (ICTY Trial Chamber 8 March 1996; revised 13 March 1996).

<sup>6</sup> Several national liberation movements were, however, invited to the conference that led to the adoption of Additional Protocols I and II as non-voting participants. See I. Detter, *The Law of War* (2nd ed., 2000), at 54–55.

the parties to a particular internal conflict to negotiate a higher standard of conduct, and did not preclude the emergence of more stringent rules as a matter of customary international law. A quarter century later, an attempt was made to raise the level of protection for both civilians and fighters in the ostensibly internal conflicts that had raged in the era of the Cold War and decolonization. One hope expressed was that offering heightened protection to insurgents would increase their incentives to comply with rules protecting civilians. The solution adopted, however, was limited. First, certain favoured categories of conflict (directed against 'colonial domination and alien occupation and against racist regimes'<sup>7</sup>) were recharacterized as international, and the criteria for lawful combatant status in international conflicts were revised so that guerrillas could more easily satisfy them. Second, for the remaining, less politically favoured internal conflicts, the Second Additional Protocol enumerated a longer set of norms than Common Article 3, but subject to a higher threshold of coverage, by which the insurgents must have a sufficient degree of state-like organization to justify the expectation that they could comply with the rules.<sup>8</sup> This Protocol still gave far less protection in internal conflicts than the 1949 Conventions and the First Additional Protocol afford in international conflicts, and insurgents remained subject to punishment for fighting and were not entitled to prisoner of war status. Internal armed conflicts intense enough to be covered by Common Article 3 but falling below the threshold of the Protocol continued to be governed by Common Article 3, and by the rules that achieved recognition as customary international law.

More recently, the Statute of the International Criminal Court has codified a set of serious criminal violations applicable to internal armed conflicts that satisfy yet another threshold definition, 'protracted armed conflict',<sup>9</sup> borrowed from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and said to reflect customary international law. These criminal provisions go beyond Common Article 3 in affording several additional protections to civilians and civilian property in internal armed conflict, and also include a few basic rules protecting adversaries.<sup>10</sup> The ICC Statute does not affect the lack of lawful combatant status for insurgents, or confer on them the privileges of prisoners of war.

<sup>7</sup> Additional Protocol I, Art. 1(4). This represents another interaction between evaluations of *jus ad bellum* and *jus in bello*. Some states who did not share these assessments did not ratify the Protocols.

<sup>8</sup> See Additional Protocol II, Art. 1(1) (limiting the field of application of the Protocol to conflicts between the armed forces of a state party 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').

<sup>9</sup> ICC Statute, Art. 8(2)(f). Like Additional Protocol II, the definition also clarifies that it does not apply to lesser 'internal disturbances and tensions, such as riots, isolated acts of sporadic violence or other acts of a similar nature'. The ICC Statute also applies to genocide and crimes against humanity, regardless of whether an armed conflict exists, *ibid.*, Arts 6, 7, and to violations of Common Article 3 in internal armed conflict, regardless of whether the conflict is 'protracted', *ibid.*, Art. 8(2)(d).

<sup>10</sup> See ICC Statute Art. 8(e)(vi, ix–xii) (prohibiting sexual violence, perfidy, denial of quarter, physical mutilation, medical experimentation, and unnecessary destruction or seizure of an adversary's property).

## 2 Terrorism

To discuss the question whether humanitarian law should protect terrorists, it would be helpful to have some idea of what we mean by ‘terrorists’, and of why applying humanitarian law to protect terrorists might be cause for concern. The difficulty of defining terrorism is notorious, both in academic disciplines and in international law. The historian Walter Laqueur has written:

terrorism has been defined in many different ways, and little can be said about it with certainty except that it is the use of violence by a group for political ends, usually directed against a government, but at times also against another ethnic group, class, race, religion, or political movement. Any attempt to be more specific is bound to fail, for the simple reason that there is not one but many different terrorisms.<sup>11</sup>

International cooperation against terrorism has long been impeded by disagreements over whether ‘state terrorism’ should be included and whether ‘national liberation’ movements should be exempted from otherwise accepted norms. Treaties have attempted to finesse these difficulties by focusing piecemeal on particular forms of violence typically employed by terrorists, leading Rosalyn Higgins to conclude:

‘Terrorism’ is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both. . . . The term is at once a shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned.<sup>12</sup>

More recently, however, the Convention for the Suppression of the Financing of Terrorism supplemented its list of prohibited acts with the residual category of any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>13</sup>

That definition’s emphasis on the status of the target also appears in the definition employed in the US government’s annual reports on terrorism: ‘premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents.’<sup>14</sup>

I will concentrate in this paper on the core category of terrorism, violence against

<sup>11</sup> W. Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (1999), at 46. See also Crenshaw, ‘Terrorism, and International Violence’, in M. Midlarsky (ed.), *Handbook of War Studies II* (2000) 3, at 4–7 (summarizing attempts at definition); Schmid, ‘The Response Problem as a Definition Problem’, 4 *Terrorism and Political Violence* (1992) 7 (discussing uses of the term in four different discourses).

<sup>12</sup> Higgins, ‘The General International Law of Terrorism’, in R. Higgins and M. Flory (eds), *Terrorism and international law* (1997) 13, at 28.

<sup>13</sup> International Convention for the Suppression of the Financing of Terrorism, Art. 2(1), GA Res. 54/109, 19 December 1999.

<sup>14</sup> 22 U.S.C. § 2656(d)(2). See also P. Wilkinson, *Terrorism versus Democracy: The Liberal State Response* (2001), at 12–13 (‘Terrorism is the systematic use of coercive intimidation, usually to service political ends. . . . A common feature is that innocent civilians, sometimes foreigners who know nothing of the terrorists’ political quarrel, are killed or injured’).

civilians. I also will try to evade the traditional diplomatic controversies by addressing terrorism only by private actors<sup>15</sup> who are not granted special combat privileges as representatives of peoples under the First Additional Protocol. Thus, the terms 'terrorism' and 'terrorist' will be used in reference to the deliberate killing or wounding of civilians by private actors (other than national liberation movements) for the purpose of achieving ulterior political purposes.<sup>16</sup>

So defined, the strategy of terrorism is in clear conflict with international humanitarian law. The choice of civilian targets runs directly contrary to a fundamental principle of IHL. Nonetheless, even people who perform terrorist acts should sometimes be protected by IHL.

I will also reframe the question in order to focus on conflicts between states and non-state organizations engaged in terrorism, rather than on individual terrorists. If an individual performs an isolated terrorist act in the context of what is otherwise a conventional international or internal armed conflict governed by IHL, that person's status and rights should be evaluated within the IHL framework for war crimes and their consequences. The central question here is whether and how humanitarian law should apply to an armed conflict between a state and a terrorist organization based outside its borders. That raises two other problems of definition: What relationship to terrorist activity makes an organization a terrorist, and what relationship to a terrorist organization makes a person a terrorist? Few organizations exist solely for the purpose of engaging in terrorist activity. Terrorism is usually a means to an end, and usually not the only means (and possibly not the only violent means) employed for that end. I will consider as a 'terrorist organization' any non-state organization that has committed terrorist acts (as defined above) in the past, and that has a policy of committing terrorist acts such that further terrorist acts can be expected in the future.

With that understanding, the performance of a terrorist killing by a member of a terrorist organization involves various forms of responsibility. For example, within the organization there may be the killers who performed the act, the superiors who ordered it, the colleagues who facilitated it, the trainers who taught the killers techniques, colleagues who knew nothing about the particular act but provided general encouragement, and possibly even members of the organization who disapprove of terrorism but participate in other activities of the organization. Outside the organization there may be donors and supporters of different kinds. States whose citizens are murdered by terrorists may apply the label 'terrorist' to a very broad circle of supporters distantly related to actual terrorist acts.<sup>17</sup> For simplicity of reference, I will often refer to everyone fighting on behalf of the terrorist organization as 'terrorists', but it should be remembered that they may have different connections to actual acts of terrorism.

<sup>15</sup> There is no doubt that states engaged in terrorist acts are still states, and that the law of international armed conflict applies to a war of self-defence against terrorist attacks made by a state.

<sup>16</sup> The requirement of political purpose simply sets aside common crime for profit or purely personal reasons; the argument here will not turn on refinements regarding motive.

<sup>17</sup> See, for example, the definition of aliens inadmissible because of their relation to terrorist activity in the US immigration laws, 8 U.S.C. § 1182(a)(3)(B).

The literature on terrorism demonstrates the wide variety of terrorist organizations. In size and resources, they range from very small groups that could not engage in sustained combat to very large conventionally armed forces controlling territories in a civil war but also employing terrorism as an auxiliary tactic. Terrorist organizations also differ significantly in their motivations. For example, some carry on armed struggles aimed at secession or revolution within a country, using terrorism strategically to attract attention to their grievances or to destabilize their government; some are doomsday cults seeking to hasten the apocalypse; some may be simply psychotic. Groups strong enough to engage in prolonged armed conflict with a state presumably are capable of rational calculation within their belief systems, and may respond to incentives.

A word should be added concerning weapons of mass destruction. In the recent past, experts on terrorism have disagreed concerning the likelihood that terrorists would use nuclear, biological or chemical weapons to cause mass casualties among civilians. For many terrorist strategies, the effects would arguably be counterproductive because of adverse reaction in global public opinion and the severity of the response from the target. There may be some terrorist groups, however, that would predict a net benefit from the attack. Clandestine terrorist groups may be less easily deterred from the use of weapons of mass destruction than governments, which have territories, populations and economies to defend. No matter how low the probability of occurrence, the magnitude of the harm tends to dwarf other considerations in public discussion.<sup>18</sup> Some might insist then that issues regarding terrorism should be resolved on a categorical basis assuming the worst possible threat. Recognition of human individuality, however, cautions against sweeping aside in such a categorical manner the human rights of terrorists who do not employ weapons of mass destruction and the welfare of civilians living in proximity to such terrorists. Moreover, even with regard to terrorists who do pursue mass destruction, there are certain bedrock human rights that must be respected, such as the absolute prohibition of torture.<sup>19</sup> Where weapons of mass destruction are genuinely involved, they will obviously weigh heavily in evaluations of military necessity and proportionality within the framework of IHL. It may also become necessary for states to utilize the remaining forms of lawful reprisal. The following analysis suggests that the IHL norms applicable to terrorists are actually few enough as not to unduly impair defence against weapons of mass destruction.

### 3 War against Terrorists: Three Scenarios

The use of force against a terrorist organization may take many forms. Some would not rise to the level of armed conflict within the meaning of IHL, and would not trigger

<sup>18</sup> See Falkenrath, 'Analytic Models and Policy Prescription: Understanding Recent Innovation in U.S. Counterterrorism', 24 *Studies in Conflict & Terrorism* (2001) 159, at 174–175.

<sup>19</sup> For discussion of systemic reasons why the ban on torture must be absolute, see Shue, 'Torture', 7 *Philosophy & Public Affairs* (1978) 124; Twining and Twining, 'Bentham on Torture', 24 *Northern Ireland Legal Quarterly* (1973) 305, at 348–355; Kadish, 'Torture, The State and the Individual', 23 *Israel Law Review* (1989) 345.



the applicability of that body of law. They might instead amount to police actions, military control of internal disturbance, or extraterritorial law enforcement. This essay will discuss three configurations of genuine armed conflict against a foreign terrorist organization, to examine whether IHL should ever protect terrorists. The configurations are intended as illustrative and heuristic, not as an exhaustive listing of possibilities.

### ***A First Scenario: On the High Seas***

To consider an unrealistically pure case of conflict between a state and a foreign terrorist organization, imagine a band of stateless terrorists operating from an unflagged, well-armed fleet on the high seas, attacking a state and demanding that it change its environmental policies. If the state responded with force and substantial fighting resulted, it would be neither international armed conflict nor armed conflict 'not of an international character' (viz., internal) within the meaning of the 1949 Geneva Conventions, the Additional Protocols, and the ICC Statute. Assuming circumstances were favourable, the state could attack the fleet without endangering any civilians or encroaching on the territory of any other state. The role of IHL in constraining the conduct of the state would exclusively concern duties owed to the terrorists themselves — limitations on the choice of weapons and tactics, duties to rescue shipwrecked or wounded adversaries, status and rights after capture.

Does or should international humanitarian law address such a conflict? Arguably general principles of customary international law, reinforced by the Martens clause,<sup>20</sup> impose certain basic requirements of humanity even in this context. Positive evidence that customary law does apply those principles to this unusual conflict may, however, be difficult to find. The terrorist fleet's struggle with the state is a cross-border private war, a category of warfare that once provided a significant subject for the law of nations,<sup>21</sup> but that was suppressed over the course of the nineteenth century.<sup>22</sup> If recognizing and regulating such conflicts would relegitimize them and increase their frequency, IHL might do better by overlooking them. On one side, at least, the conflict is already regulated: the terrorists' conduct is criminal in the first place, and they would only compound it by committing unjustified killings to avoid arrest.

Even terrorists, however, are human beings, and despite their crimes the principle of human dignity indicates that there are limits on how they can be treated. Some of the constraints on the state's conduct might be supplied by human rights law rather than IHL. For example, once the state's forces acquire custody of adversaries who are

<sup>20</sup> Martens clauses in IHL treaties specify, in varying language, that the enumeration of humanitarian obligations in the treaty does not exclude other obligations derived from principles of humanity and public conscience. See Greenwood, *supra* note 1, at 29; Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *AJIL* (2000) 78.

<sup>21</sup> War between a state and a non-state entity was also known as 'mixed' war because of the dissimilar character of the adversaries. Grotius was quite familiar with issues of mixed war, as former counsel for the Dutch East India Company.

<sup>22</sup> The history of this category and its suppression is narrated and analysed from the perspective of international relations theory in J. Thomson, *Mercenaries, Pirates, and Sovereigns: State Building and Extraterritorial Violence in Early Modern Europe* (1994).

*hors de combat*, the adversaries may derive protection from the Convention against Torture, which applies regardless of any condition of war or emergency.<sup>23</sup> The reach of other human rights treaties, however, may be limited by such factors as derogability, territorial scope, or restriction to persons within the state's 'jurisdiction'.<sup>24</sup> As a consequence, terrorists taken captive by the state may enjoy some basic human rights protections, notwithstanding the inapplicability of Common Article 3, but for adversaries still at liberty there is a gap that only IHL would fill.<sup>25</sup>

One difficulty in filling the gap is that there is no reason for confidence that the adversary would observe any rules that were adopted. Nonetheless some limits on conduct toward human beings are so basic that they should be observed without any assurance of reciprocity. Weapons that cause extreme suffering without conferring any additional tactical advantage should not be employed. Adversaries making visibly sincere attempts to surrender should not be killed. Some rules, perhaps, should be observed while reserving the option of reprisal if the other side violates them.

To say that states should comply with certain limits does not necessarily imply that those limits should be embodied in positive IHL. Conceivably compliance should be left to voluntary restraint, reinforced by external public opinion and diplomatic exhortation. But these forces are likely to be weak under battle conditions accompanied by outrage over terrorist attacks. There are serious grounds for IHL to provide some protection for terrorists, even in this scenario.

## **B *Second Scenario: Against a Host State***

The greater value of the preceding science fiction hypothetical, however, is probably to highlight the contrast with the realistic situation in which the terrorist organization operates out of populated territory. Consider a terrorist organization operating from the territory of a host state (with or without its knowledge or acquiescence) and conducting attacks on a target state, provoking an armed response for the purpose of preventing future attacks. Now that the terrorists are situated

<sup>23</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2(2), 1465 UNTS 85. Although some state obligations under the Convention are limited to territory under its jurisdiction, see Art. 2(1), the Convention also requires states to criminalize officially condoned torture by their nationals wherever it occurs. See Arts. 4(1), 5(1)(a); cf. 18 U.S.C. § 2340A (implementing statute criminalizing extraterritorial torture by US nationals).

<sup>24</sup> See *Bankovic v. Belgium*, App. no. 52207/99 (European Court of Human Rights 12 December 2001) (Grand Chamber) (admissibility decision). In *Bankovic*, the European Court of Human Rights held that individuals killed or injured in NATO air strikes on Belgrade in April 1999 were not within the 'jurisdiction' of NATO members in a manner that would implicate rights under the European Human Rights Convention. The Court distinguished situations in which the state, 'through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.' *Ibid.*, para. 71. Thus the Court's interpretation indicates that extraterritorial use of force in armed conflict sometimes does, but often does not, implicate human rights obligations under the Convention toward enemy soldiers and civilians.

<sup>25</sup> Indeed, the Human Rights Committee's General Comment on States of Emergency, General Comment No. 29, CCPR/C/21/Rev.1/Add.11, 31 August 2001, points out that some human rights obligations will be non-derogable in time of war if and only if they are already imposed by international humanitarian law.

within a civilian population, the applicability of IHL to the conflict vitally affects the safety of civilians. The imperative of humanity toward civilians — the same norm that the terrorists have violated — demands that the conflict be regulated. True, the interest asserted here is that of the host state's civilians, not the target state's civilians, but their human dignity is equally deserving of respect. Human rights law provides too few norms addressing the target state's conduct of armed conflict in the host state, and it is necessary to look to IHL.

The consequences of applying existing IHL norms will depend on the host state's reaction to the crisis. If the target state enters the territory of the host state without the latter's consent in order to attack the terrorists, the result may be an international armed conflict between the two states, which may align the terrorist group with the host state. Under this second scenario, the IHL norms governing international armed conflict apply for the protection of the host state's civilians. The principle of distinction, as elaborated for international conflicts, requires that the target state refrain from intentional attacks on host state civilians and also that it take precautions to minimize collateral damage to civilians from attacks on legitimate military objectives.<sup>26</sup> Even if the host state has knowingly harboured the terrorists, the norms of IHL insist that the civilian population of an enemy state must be treated as innocent and vulnerable human beings,<sup>27</sup> and that military operations must take their interests into account. The fact that the conflict between the two states was triggered by terrorists should not displace the protection that IHL attempts to provide to the civilian population. Human rights norms will not safeguard the host state population against the target state's forces, and so IHL must. Compliance with these norms will provide some indirect protection for the terrorists, for example by disallowing bombing strategies that might kill a few terrorists at the cost of excessive civilian casualties.

Would — and should — the IHL rules of international armed conflict also afford direct protection to the terrorists as participants in the conflict? These rules confer lawful combatant and prisoner of war status, with accompanying rights and privileges, on the armed forces of both states, but the rules would properly apply in a different manner to the terrorist organization. Under the Third Geneva Convention, 'other volunteer corps' are entitled to prisoner of war status only if they meet a series of conditions, most crucially here 'that of conducting their operations in accordance with the laws and customs of war'.<sup>28</sup> The First Additional Protocol to the Conventions, which has been less widely ratified, was deliberately drafted to ensure lawful combatant and prisoner of war status to a select group of 'national liberation'

<sup>26</sup> See, e.g., Additional Protocol I, Arts. 51, 57; ICC Statute Art. 8(b)(i, iv).

<sup>27</sup> The assumption that the civilian population is absolutely innocent may paper over complex issues of political and moral responsibility, but IHL grants both sides in a war the benefit in principle of that oversimplification. See G. Best, *War and Law since 1945* (1994), at 258–259. Treating civilians as responsible for violence committed or condoned by their government would make the modern structure of IHL unravel, and would also make it difficult to condemn terrorists for choosing civilian targets. Individual civilians who depart from their civilian role and take an active part in the hostilities forfeit this protection. See Additional Protocol I, Art. 51(3).

<sup>28</sup> Convention [No. III] Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 4(A)(2), 75 UNTS 135.

movements despite their commission of acts of terrorism, but its provisions do not improve the status of other armed corps that fall outside that select group.<sup>29</sup> Thus, the members of the terrorist organization could not claim prisoner of war status if the magnitude of its terrorist activities justifies the characterization that it does not conduct its operations ‘in accordance with the laws and customs of war’. Interpreting and applying either that criterion or the principle of reciprocity that underlies it raises significant difficulties. The Third Geneva Convention has been interpreted as affording privileged status to the law-respecting majority of an irregular force despite the commission of isolated war crimes by individual members, acting in violation of the group’s policy.<sup>30</sup> In the hypothetical situation being discussed here, however, terrorist attacks against civilians have been committed in pursuance of group policy, and further terrorist attacks are expected. These attacks represent serious violations of a key principle of IHL, and might well justify denial of privileged status to all members of the group. It is possible, however, that the hypothetical is too thinly stated, and that additional assumptions might undermine that conclusion. In particular, it might be important to know more about the structure of the group, and the degree to which its members are involved in terrorist activity.

As a polar example, assume that the host state has been riven by internal armed conflict, and that the group in question is a private militia active in support of the government; assume that the militia’s major activity is conventional combat against the insurgent forces, and that it maintains an internal disciplinary system and enforces compliance with IHL, but that it also maintains a small special unit trained to commit terrorist acts; and that some of those acts have been directed against the target state (which has been funding the insurgents). The militia undoubtedly contains war criminals, both in the special unit and in the leadership, but it is less clear whether the status of the majority of low-ranking members of the militia should be assimilated to that of the leadership and the special unit.<sup>31</sup> An impartial observer might consider the ordinary fighters entitled to the privilege of defending their country against the target state. This theoretical conclusion might, however, never be relevant in practice.<sup>32</sup> More likely, a group that engages in terrorism would not bifurcate itself and isolate its terrorist component from a conventional armed force. It would not impose a

<sup>29</sup> Additional Protocol I, Arts. 43–44. I am continuing to assume here that the terrorist group is independent from the armed forces of the host state.

<sup>30</sup> See Goldman, ‘Irregular Combatants and Prisoner of War Status’, in *Liber Amicorum Héctor Fix-Zamudio* (1998) 767, at 774–775.

<sup>31</sup> Members of a government’s own armed forces would not lose their privileged status on such a basis. The more favourable rule for government forces may be justified by the fact that private forces generally operate with less transparency and enjoy less legitimacy than government forces. The exceptional extension of the same rule to ‘national liberation’ movements like the PLO in Additional Protocol I should not be regarded as reflecting a broader principle applicable to all private groups, but rather as *lex specialis*. Some would explain it as a mere political concession, and others would explain it as resting on specific approbation of the movements’ quasi-governmental legitimacy.

<sup>32</sup> Two other practical considerations should be mentioned, that weigh in opposite directions. First, members of a private militia of the kind described may face insuperable difficulties of proof in establishing the dual character of their organization. As a matter of legal design, it may not be administratively justifiable to maintain a sub-rule for such exceptional cases. All the members of the militia would then

disciplinary framework to prepare its members for complying with lawful rules of engagement, but would predispose and train them to attack civilians. The entire group would then be properly denied combatant status. They would still retain the right to surrender.

Thus, recognizing the applicability of IHL in the conflict would not confer undesirable legitimacy or the full range of POW privileges on captured terrorists. At the same time, denying the terrorist group the privilege of lawful combatancy and the status of prisoners of war does not mean that the target state is permitted to treat its captives inhumanly. It only means that they cannot claim entitlement to the full code of rights and privileges that states have guaranteed to each other's soldiers in international armed conflict. They should still receive the more basic protections IHL affords to unprivileged combatants. These include protections equivalent to Common Article 3, a sex-differentiated detention regime for the protection of women detainees, and additional procedural formalities regarding trial and punishment for crime.<sup>33</sup> The latter are fairly substantial, and may pose obstacles to prosecution for crimes that are difficult to prove. But they do not interfere with incapacitation of the terrorists by detention during the conflict. Even from the tactical perspective, guaranteeing unprivileged combatants a minimum level of humane treatment after capture gives them an important incentive to surrender instead of fighting until dead.

Characterizing the terrorists as unprivileged combatants should also not prevent the application of IHL norms governing the means by which combat can be waged against them. Not only the norms designed to prevent incidental harm to civilians, but also the norms protecting adversaries against unnecessary suffering, should be applicable. Although the rules prohibiting use of particular weapons are historically contingent and may not create an infallible hierarchy of crueler and less cruel methods, their purpose is to avoid gratuitous injury (as always, within the constraints of perceived military necessity). To the extent that the suffering is truly unnecessary, the forces of the target state should not inflict it even on terrorists. Moreover, employment of otherwise forbidden weapons against terrorists risks destabilization of the international regime prohibiting their use more generally. Admittedly, there is ground for concern that terrorists will not feel equally obliged to comply with these rules. Ultimately, if the terrorist organization's use of forbidden weapons gives it significant tactical advantage, the target state may need to resort to reprisal. It should be emphasized, however, that the doctrine of belligerent reprisal involves, at least in principle, a law-governed regime of proportionate response for the purpose of deterring violations, not an abandonment of legal constraint.

The IHL norms of combat also include the prohibition of killing or injuring an adversary by 'perfidy', a category of deceitful conduct that exploits the adversary's

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face the consequences of having joined a private armed force that maintains a terrorist unit. Second, if acts of terrorism provide a basis for disqualifying entire private forces from lawful combatant status, there is a danger that states will use overly broad definitions of terrorism for that purpose, given the uncertain boundaries of the concept.

<sup>33</sup> See Additional Protocol I, Arts 45, 75.

trust and compliance with IHL.<sup>34</sup> Perfidy is distinguished from lawful ‘ruses of war’, and includes such proscribed tactics as feigning surrender, feigning incapacitation by wounds, and feigning civilian status, as a means of attack. The ban on perfidy reflects both soldierly honour and the instrumental rationale that abuse of the appearance of protected status destroys the basis for exercising restraint. I confess to some uncertainty about the role of perfidy norms in a conflict with a terrorist organization. If the organization pursues a policy of killing civilians, and attacks them in civilian disguise, those facts weaken the argument that target state soldiers’ feigning civilian status would undermine the organization’s willingness to comply with the principle of distinction.<sup>35</sup> This may be a situation justifying proportionate reprisal.

### *C Third Scenario: Within a Host State*

Finally, consider a third (one hopes, more likely) scenario: the host state does not defend the terrorists, who have been operating without its acquiescence, and the host state invites the target state to join it in subduing the terrorist organization within its territory. If the terrorists have sufficient strength to resist, the resulting struggle could rise to the level of an internal armed conflict, which could be characterized as an internationalized internal armed conflict because of the participation of the target state’s forces.<sup>36</sup> The legal consequences of internationalized internal conflicts have been debated, but at a minimum it is maintained that the rules of internal conflict govern the relations between the private forces and both their government and foreign states intervening in support of the government. If the analogy holds, then both the host state and the target state would be bound to comply with at least the standards of IHL in internal armed conflict.

As in the prior scenario, the application of those standards is justified by the danger to the civilian population of the host state. Human rights law does provide an additional source of constraint on actions of the host state that endanger civilians within its territory. Its limits are, however, uncertain, partly subject to derogation, and ordinarily not binding on the target state. Nor can the host state government’s goodwill toward its citizens always be trusted as a basis for constraining the target state. The terrorist organization may operate, for example, from an ethnic minority region that the government does not regard benevolently. Moreover, there may be an imbalance of power between the target state and the host state, which by hypothesis has been unable to control the terrorist organization. Thus, the civilians need the protection of IHL, even if compliance with those norms indirectly benefits the terrorists.

The content of the IHL standards for internal armed conflict is currently unsettled;

<sup>34</sup> Additional Protocol I, Art. 37 (defining perfidy); ICC Statute Art. 8(b)(xi) (prohibiting killing or wounding treacherously).

<sup>35</sup> Perhaps weakens the argument, but does not totally refute it? It might happen, for example, that the terrorists are nationals of the host state, and that they have a policy of killing civilians of the target state, while scrupulously respecting the civilian status of their own fellow citizens.

<sup>36</sup> See Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, *RdC* (1979-II) 121, at 150.

as previously mentioned, the 1949 Geneva Conventions included only the bedrock humanitarian standards of Common Article 3, and later treaties have raised the level of obligations in certain categories of internal armed conflicts. Even the later treaties have not achieved parity with the norms of international armed conflict, despite humanitarian arguments and claims of convergence in customary international law.

The IHL treaty norms for internal armed conflict prohibit intentional attacks on civilians, but do not expressly impose as high a duty of care to avoid unintended harm as the standard that governs in international armed conflict. This disparity in treaty texts contrasts with broader interpretations offered by some IHL experts and the progressive interpretation of customary international law by the International Criminal Tribunal for the former Yugoslavia. The Appellate Tribunal in the *Tadic* case maintained that the prohibition on indiscriminate attacks also applied to internal conflicts, which may imply a duty to avoid disproportionate collateral injury to civilians.<sup>37</sup> Subsequently, however, the ICC Statute criminalized knowing infliction of excessive collateral injury to civilians in international armed conflict, without adopting a parallel offence for internal armed conflicts.<sup>38</sup> The reluctance of treaty negotiators to adopt parallel provisions may result from the politics of IHL. States facing the prospect of domestic insurgencies may have seen less benefit to themselves in a stricter regime, and have limited the intrusion of international criminal law on their internal sovereignty. However that may be, the standards for protection of civilians in this third scenario are no higher than the standards in the second scenario, and the target state's logistical difficulties in fighting the terrorist organization with the host state's cooperation are lower than when the host state resists.

In terms of the treatment of the terrorists themselves, IHL imposes even fewer restrictions in the present context than in the previous one. The issue of lawful combatancy and prisoner of war status does not arise for terrorist group members in this scenario, because those concepts do not apply in internal armed conflict. Common Article 3 of the Geneva Conventions requires humane treatment of persons *hors de combat*, including bans on murder and torture and other degrading treatment. It forbids the taking of hostages, and calls for minimal procedural guarantees before punishments are imposed. It also recognizes a duty of care toward wounded and sick adversaries. The latter positive duties are shared with the host government. The target state would not be unduly impeded by affording these minimal protections for the terrorists. The ICC Statute adds, in situations of 'prolonged' conflict, prohibitions against perfidy and against the unnecessary destruction or seizure of property.<sup>39</sup> The

<sup>37</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Appeal on Jurisdiction, para. 127 (ICTY Appeals Chamber 2 October 1995); see also *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Decision on Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction, para. 31 (ICTY Trial Chamber 2 March 1999).

<sup>38</sup> Compare ICC Statute Arts 8(b)(i) (criminalizing attacks directed against civilians), 8(b)(iv) (criminalizing attacks inflicting excessive incidental injury on civilians), with *ibid.*, Art. 8(e)(i) (criminalizing attacks directed against civilians).

<sup>39</sup> ICC Statute Art. 8(e)(ix, xii). I am treating the prohibitions of sexual violence, denial of quarter, physical mutilation and medical experimentation in Art. 8(e)(vi, x, xi) as elaborations of obligations already inherent in Common Article 3.

rule regarding property, though broadly phrased, should not be interpreted as preventing measures to subdue and dismantle a terrorist organization.<sup>40</sup>

If the higher threshold of the Second Additional Protocol is satisfied, then detained terrorists may be entitled to somewhat better conditions of detention than the First Additional Protocol guarantees for unprivileged combatants in an international conflict.<sup>41</sup> The procedural standards for criminal trial of detainees under the Second Additional Protocol are slightly lower.<sup>42</sup> It should be recalled, however, that the Protocol applies only to conflicts between a state and an armed group that exercises control over a part of its territory.<sup>43</sup> For the present context, that suggests that a civil war was already in progress before the target state intervened, and the IHL framework had already been activated. Failing to apply these rules to the target state would undermine the regime that was intended to temper the harshness of the civil war. It could also create opportunities for states involved in civil wars to manipulate the IHL system by making accusations of terrorism.

## 4 Conclusion

Terrorists are human beings, and there must be some limits on the kind of war that can be waged against them, and how they can be treated once captured. That is not, however, the sole reason for applying international humanitarian law to an armed conflict between a state and terrorists. A stronger reason is that innocent civilians can be endangered both by terrorism and by counterterrorism. The application of international humanitarian law is necessary for the protection of civilians.

It is conceivable that a separate set of IHL rules designed specifically to cover a conflict between a state and a foreign terrorist organization would strike a somewhat different balance between opposing interests, while still respecting core human rights. But IHL regimes necessarily cover broad categories of conflicts, and the existing rules appear sufficiently adapted to the realities of a war against terrorists. Some of the rules should be interpreted as denying particular rights or privileges to terrorists, but even terrorists should often receive both indirect and direct protection from the system of humanitarian law.

<sup>40</sup> See ICC Statute Art. 8(2)(e)(xii) (for internal conflict) ('Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict'); *ibid.* Art. 8(2)(b)(xiii) (for international conflict). Although these provisions are broadly phrased and use archaic language derived from the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, the Elements of Crimes clarify that they apply only to property protected from destruction and seizure under international law, and that the destruction or seizure may be justified by military necessity. See Report of the Preparatory Commission for the International Criminal Court, Addendum: Finalized Draft Text of the Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, 2 November 2000; Zimmermann, 'Prohibited destruction', in O. Triffler (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2000) 227.

<sup>41</sup> Compare Additional Protocol II, Art. 5, with Additional Protocol I, Art. 75. Some of the standards of Article 5 vary with the capabilities of the particular party, and thus require more from wealthier governments than from poorer governments and insurgent forces.

<sup>42</sup> Compare Additional Protocol II, Art. 6, with Additional Protocol I, Art. 75(4).

<sup>43</sup> Additional Protocol II, Art. 1(1).