

Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?

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This article uses an economic narrative to examine the theoretical adequacy of applying humanitarian law to the regulation of the war on international terror. I will argue that problems inherent in collective action hinder the ability of this law to generate an optimal level of global security, and that the absence of the element of reciprocity lowers states' compliance with it. The paper discusses factors such as audience costs, negative externalities of public conscience, NGOs' activities, and the promotion of the humanitarian approach toward humanitarian law in international bodies and courts as helping to mitigate these phenomena. A controversy between states concerning the application of humanitarian law to the war on international terror, however, might prevent these factors from offsetting the decline in the status of humanitarian law. Humanitarian law is therefore at risk of lapsing into irrelevance in this war.

INTRODUCTION

Seeking to explain the forces driving the development of the law of war corpus, better known today as "international humanitarian law" (henceforth "humanitarian law"), scholars have focused mainly on two approaches: a humanitarian and a utilitarian-military one. According to the latter, states

* I wish to thank Eyal Benvenisti for his guidance and support. I also thank Aeyal Gross for his helpful comments on earlier drafts. Any errors are mine.

follow only their own interests when exercising their military power and protecting their national security. Advocates of this approach claim that a state will be willing to abide by the laws of war insofar as doing so would benefit its population and its military. Benefits will accrue because the laws of war are usually a reciprocal and enforceable commitment between states, meant to improve their welfare by reducing the costs incurred through the destructiveness of war and the investment in military capital needed to attain a military balance vis-à-vis another state. By contrast, advocates of the humanitarian school of thought argue that the laws of war have developed because states have internalized humanitarian norms found in every human being, and these norms can influence the willingness of states to deviate from self-interested conduct. This article questions the ability of both these approaches to regulate the conduct of states in the war on international terror.

Concerning the utilitarian-military approach, the law and economics literature on humanitarian law offers a number of models explaining how this field has evolved, and describing the role of humanitarian law in the regulation of states' conduct before and during wars. These models, however, were formulated relying on the "classical" meaning of the term "war," referring to wars between states. In light of the mounting debate among legal scholars regarding the appropriate legal regime for confronting international terror, this article exposes some of the weaknesses of humanitarian law in regulating this conflict. Existing economic models view humanitarian law as a means of decreasing the damage and loss associated with war and minimizing the costs required to attain a military balance. I argue, however, that humanitarian law in its present form has limited chances of achieving these goals in the context of the war on international terrorism due to the unique characteristics of this global conflict. Through an economics-oriented narrative, this article demonstrates that positivist explanations of states' compliance with humanitarian law during wars between states are limited in their validity when applied to wars waged between states and non-state actors, such as terrorist organizations. The reason is that wars between states and non-state actors involve no reciprocity, because terrorist organizations lack all motivation to observe humanitarian law, and states are unwilling to do so unilaterally. I will argue that, as a result, the steady-state balance that humanitarian law had purportedly constituted in the past is infringed. A decline of this kind in state adherence to humanitarian law is bound to increase the destructiveness and brutality associated with wars.

I will further argue that, whereas military balance was once achieved by a game between enemy countries, the level of global security generated in response to international terrorism is determined by a multilateral negotiating

process between the states that enjoy this public good. The supply of a public good by numerous actors is associated with collective action problems, specifically the free riding typical of coalitions led by a dominant state in military and economic terms, and results in sub-optimal levels of global security. Hence, I claim that the frameworks currently determining the level of global security prevent a sufficiently vigorous reaction to the threat of international terrorism.

This article discusses factors mitigating these problems. Solutions to the sub-optimal supply of global security hinge on the ability of multinational organizations to impose the costs incurred in the production of this public good on all the states enjoying it. Solutions to the declining levels of compliance with humanitarian law in the context of this conflict hinge on strengthening existing incentives to states to abide by international law, despite a lack of immediate rewards, both military and utilitarian. Instances of such incentives are "audience costs" imposed by public opinion, and public conscience externalities imposing internal and international political costs on countries that violate humanitarian law. The importance of these costs has increased in recent decades due to the media's immediate and direct coverage of armed conflicts, and due to NGOs' thorough scrutiny of states' conduct during such conflicts. An even more significant balancing factor is the ability and willingness of international tribunals to promote the humanitarian approach to the laws of war, mainly by making existing standards more substantive and ensuring they are enforced.

The ability of all these factors to offset the declining status of humanitarian law in the war on international terror could be obstructed, as I will argue, by the emergence of a new tripolar system. In such a system, the actors' differing levels of commitment to humanitarian law could prevent its unequivocal promotion and development. The first actor involves a variety of international terrorist organizations, which are indifferent to the dictates of humanitarian law and do not comply with it. The second actor is a group of states seeking to promote and develop humanitarian law in significant ways, whether for ideological reasons or because of their reluctance to ensure global security through military means. The third actor is another group of states, led by the US, which is involved in military activity against international terrorism. This group holds that "excessive" endorsement of humanitarian law could hinder their own military efforts, and therefore oppose it. In light of this controversy, the reconciliation of humanitarian law with its contemporary challenges is not guaranteed. These circumstances could even lead to the creation of two different systems of international law, not unlike the state of affairs that prevailed during the Cold War era.

I. THE HUMANITARIAN APPROACH AND THE UTILITARIAN-MILITARY APPROACH TO HUMANITARIAN LAW

Historically, the laws of war have developed in two separate categories, and this separation remains largely intact today. The first category, known as *jus ad bellum*, refers to the legality of the purpose of the war. The second, known as *jus in bello*, contains the laws of war and regulates the conduct of the belligerents, independent of the war's legality. This article focuses on the second category.

Two competing schools of thought, the humanitarian and the utilitarian-military, have persuaded the world that limiting the devastating effects of war is a crucial endeavor. For this purpose, the humanitarian school has relied on the internalization of basic humanitarian values inherent in human nature, and the utilitarian-military school has relied on utilitarian and strategic motivations. Despite their common objective, both approaches are based on completely different principles. The humanitarian approach distinguishes between combatants and civilians but treats all civilians equally, no matter what side they support. According to this approach, an army must grant enemy civilians the same rights and respect it extends to its own population. A combating army is therefore compelled to respect the right to life of enemy civilians, but not to protect it actively.¹ By contrast, the utilitarian approach, to which most governments and armies subscribe, adopts a paradigm whereby the role of humanitarian law is to minimize unnecessary suffering among combatants and civilians and define the rules of engagement. This approach, which is not derived from the human rights legal corpus, does not embrace rules that confer unilateral advantages or rules not imposed equally on both sides.²

Scholars tend to agree that, throughout most of recorded history and until recent decades, the utilitarian approach had the upper hand.³ But the barbarities of modern warfare, which have included unprecedented destruction and systematic mass killings made possible by an era of industrialization and technological breakthroughs, have led to a gradual strengthening of the humanitarian approach. An early sign that the tide was turning was Lieber's Code (1863), formulated in the US Army following the

1 Eyal Benvenisti, *Excessive Force and Human Dignity During Military Conflict* (Tel Aviv Univ. Legal Working Paper, 2004).

2 *Id.*

3 See Eric Krauss & Mike Lacey, *Utilitarian vs. Humanitarian: The Battle over the Law of War*, 32 *Parameters* 75 (2002).

atrocities of the Civil War.⁴ Several years later, the international community responded to calls to reinforce the humanitarian school of thought by codifying the laws of war. Landmarks in this process include the establishment of the International Committee of the Red Cross by Jean Henri Dunant, who had been affected by the horrors of the battle of Solferino in 1859; the signing of the First Geneva Convention of 1864, which dealt with "the Amelioration of the Condition of the Wounded in Armies in the Field," and the signing of the Hague Conventions of 1899 and 1907,⁵ which dealt with the laws and customs of war on land. The trenches of World War I and the use of mustard gas led to the adoption of the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous, or Other Gases and of Bacteriological Methods of Warfare in 1928, and of the Geneva Convention relative to the Treatment of Prisoners of War in 1929.⁶

A significant deviation from this course took place during World War II, when all sides disregarded the laws of war codified until then. This disregard led to unparalleled suffering, destruction, and loss of life as a result of such actions as the carpet bombing of Rotterdam, London, Hamburg, Dresden and Tokyo,⁷ the use of nuclear weapons in Nagasaki and Hiroshima, and the universal violation of laws of naval and land warfare and of laws relating to

4 Although the codification was initiated by General Henry Halleck, a member of the military who supported the utilitarian approach to the laws of war, Lieber managed to include in the code elements that were purely humanitarian, prohibiting rape, enslavement, the distinction between captured enemies on grounds of color, and the refusal to give quarters. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239 (2000).

5 Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention]; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention]. The Preamble to the 1907 Hague Convention reflects the humanitarian influence on this convention: "These provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents."

6 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; 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 Geneva Convention III]. For a comprehensive review of the influence of the humanitarian approach on humanitarian law, see Meron, *supra* note 4.

7 On the laws of air warfare, which were ignored during World War II, see, for example, Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitations of Warfare* 28 (1998).

the treatment of prisoners of war.⁸ The horror and inhumanity demonstrated throughout this war left their mark on international public opinion and strengthened the humanitarian approach to humanitarian law, leading to the adoption of the Charter of the International Military Tribunal in Nuremberg,⁹ the four Geneva Conventions of 1949,¹⁰ the two Additional Protocols of 1977,¹¹ and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.¹² These documents point, to some extent, to the diminished status of states as the only actors in the arena of international law. The failure of states to abide by the laws of war during World War II placed human rights and the rights of civilian populations at the center of the contracting parties' attention. At a later stage, these rights significantly influenced the wording and the interpretation of these conventions and protocols.¹³ The focus on the defense of civilians often led the contracting parties to give precedence to the use of legal standards over specific prohibiting rules.¹⁴ Discussions leading to the formulation of the Ottawa Convention Banning Landmines in 1997 are evidence of the humanitarian trend's triumph, largely reflecting the strong pressure exerted by public opinion and by NGOs.¹⁵

8 On the violation of the rules of war relating to the treatment of prisoners of war during World War II, see Meron, *supra* note 4.

9 Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

10 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; Geneva Convention for the Amelioration of the Condition 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; Geneva Convention III, *supra* note 6; 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 Geneva Convention IV].

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I. L. M. 1391 [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, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442.

12 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277.

13 Regarding the approximation of humanitarian law and the body of international human rights and its influence on international tribunals, see Audrey I. Benison, *War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court*, 88 Geo. L.J. 141 (1999).

14 *Id.*

15 Robert J. Mathews & Timothy L. H. McCormack, *The Influence of Humanitarian*

Unquestionably, most countries presently view the laws of war as binding and endeavor to comply with them, at least to a point. Attesting to the importance they ascribe to them is their involvement in negotiations concerning conventions such as those noted, and their ratification of them, even if with reservations. As will be noted below, NGOs have greatly expanded their careful probe into states' adherence to the relevant laws, influencing countries to abide by their commitments. Yet, as Benvenisti¹⁶ explains, a chasm still separates "the concerns that underlie the laws of war and the philosophy of human dignity that inspires many national bills of rights and international human rights law." Besides this detachment between national and international concerns, utilitarian considerations clearly drive countries to adopt strategic behaviors when formulating the laws of war. And yet, the humanitarian clauses included in the conventions making up the body of humanitarian law confirm the significance of the humanitarian approach in the dialogue on the regulation of war. They also compel us to recognize its influence on the development of the laws of war in general, and on their modern formulations in particular.¹⁷ I will argue below that reinforcing this approach could prove central in stemming the ebb in state compliance with the laws of war, when the utilitarian-military approach fails to do so.

II. THE DEVELOPMENT OF THE LAWS OF WAR: ECONOMIC EXPLANATIONS

Economic interpretations of how humanitarian law has evolved are, as shown, insufficient to explain the development of the laws of war. However central, the models and strategic behaviors described in this section comprise only one category of a state's potential motivations to codify rules designed to limit the brutality of war. Mathews and McCormack,¹⁸ though recognizing the essential role of humanitarian motivations in developing the laws of war, still point to utilitarian and strategic factors — the fear of proliferation, the need for certain arms (or lack thereof), security needs, and the desire to restrain other

Principles in the Negotiation of Arms Control Treaties, 834 Int'l Rev. Red Cross 331 (1999).

¹⁶ Benvenisti, *supra* note 1, at 2.

¹⁷ Regarding the humanization of the law of war, see generally Meron, *supra* note 4.

¹⁸ Mathews & McCormack, *supra* note 15.

states — as the main influence. In this section, I review utilitarian explanations and economic models seeking to explain state compliance with humanitarian law. Further on, I assess the validity of these explanations in the context of the war on international terror.

Behind strategic considerations that states take into account when formulating the rules of humanitarian law could be several types of motivations. First, a country may be prompted to sign an agreement by considerations of self-restraint and in order to avoid performing certain actions in the future, meaning thereby to improve its citizens' welfare.¹⁹ Setting aside "strategic pre-commitments,"²⁰ a state may be led to enter such an agreement for four reasons: to overcome future passion, to overcome future self-interest, to overcome hyperbolic discounting of time, and to prevent preference change.²¹ Second, a state may sign an agreement because it expects it to influence the contracting parties asymmetrically.²² An example of such an agreement is the prohibition against the use of submarines, which limited the German more than the British army during the two World Wars. The problem with such an agreement is that the aggrieved state might be inclined to violate its obligations, as was indeed the case in this instance. Third, a state may sign an agreement to win the support of domestic or international public opinion.²³ A contemporary example is the attempt of the US and its allies to present their military interventions in Kosovo, Iraq, and Afghanistan as fully consistent with the laws of war, and specifically with the rules of airborne war. Fourth, a state may sign a convention in order to bring pressure to bear on another state to do the same. One instance is the ratification of the Nuclear Non-Proliferation Treaty (NPT) by many Middle Eastern countries that do not possess nuclear weapons, seeking to pressure Israel to sign it too.²⁴

Morrow²⁵ goes beyond these strategic arguments and proposes an economic

19 Jeffrey Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 Am. J. Int'l L. 394 (1999).

20 In a strategic pre-commitment, individuals bind themselves not out of fear of what they might do, but to make a credible threat to others that they will or will not do something. See Steven R. Ratner, *Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint*, 5 Theoretical Inquiries L. 81 (2004).

21 *Id.*

22 James D. Morrow, *The Laws of War, Common Conjectures and Legal Systems in International Politics*, 31 J. Legal Stud. S41 (2002).

23 *Id.*

24 See, e.g., *Nuclear Watchdog "Ignores Israel"* (BBC television broadcast, Sept. 30, 2003), available at http://news.bbc.co.uk/2/hi/middle_east/3151552.stm.

25 Morrow, *supra* note 22.

model that explains, *inter alia*, the reasons that led to the formulation of the laws of war and their contents. According to this model, treaties and international law in general aid reciprocal enforcement of agreements. He argues that their dual role is to create a shared understanding of unacceptable conduct and to screen out those who will not comply. On this basis, international law can be understood as an equilibrium in a game between states that is characterized by two attributes. First, it requires strategies that are "mutual best replies," and second, it requires a common conjecture that all parties are playing their equilibrium strategies. It is therefore a steady-state equilibrium, from which states are reluctant to deviate.²⁶ How to attain the equilibrium that determines the substance of international law in general and of humanitarian law in particular? Through the implementation of the laws of war. Several economic models attempt to describe the process of formulating these laws.

The first is the "war-of-attrition" model, in which states fight over the stakes in dispute.²⁷ Within this model, the laws of war can be thought of as a prewar agreement by the sides to abstain from recourse to certain battle strategies during the war, such as the use of gas or poison. Such an agreement is enforceable given two alternative conditions: if neither side believes that banned strategies are effective, or if some mutual deterrence exists between them. If one side violates the agreement, the agreed-upon restraints are removed. Political leaders will therefore choose to do so only when the short-term benefit expected from such an action

26 A change in a state's understanding of its own interests might cause a change in its mutual best reply that may alter the equilibrium, thus changing international law. A contemporary example is the change in the US approach to humanitarian law since the tragic events of September 11, 2001. See Eyal Benvenisti, *The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 *Eur. J. Int'l L.* (2004).

27 As depicted by Morrow, in each round — which can be seen as a battle in war — each state chooses whether to quit or continue the war and a battle strategy if it chooses to continue the war. The strategies chosen affect the military balance achieved in each round. The costs of fighting in a round depend on the current military balance, with costs rising as the balance shifts against a state. The war continues until one side concedes the stakes to the other by quitting. A side will quit when the military balance shifts far enough against it that the costs of fighting exceed the value of the stakes in dispute. For an elaborated explanation of the model, see Morrow, *supra* note 22; see also Drew Fudenberg & Jean Tirole, *Game Theory* 119-26 (1991).

surpasses the sum of the audience and long-term costs²⁸ they are expected to incur.²⁹

A second model views the ratification of treaties as a screening process, separating states that accept these standards from those that do not.³⁰ According to this model, a state's interest in ratifying a treaty with the intention of ignoring its conditions is limited, since the cynical ratification of a treaty may entail domestic "audience costs." Additional international audience costs will be incurred if other states become reluctant to make agreements with a state that has previously disregarded its contractual obligations.³¹ The separation of states into two categories — one of states that accept the standards and another of states that do not — enables states to anticipate more accurately the intentions of other states regarding observance of the treaty's standards, thus avoiding first use of forbidden strategies. The conduct of a state during war will therefore be affected by the question of whether its opponents have ratified a treaty.³²

A third interpretation of the development of the laws of war is the arms race model. Such a race occurs when two or more states or alliances with conflicting goals engage in a competitive build-up of their armaments and

28 In this article, the term "audience costs" refers to the negative costs suffered by a serving government due to the antagonism of international public opinion or of an enemy population, or because of sanctions applied by the domestic public due to its dissatisfaction with the government's foreign policy. For further elaboration of this term and its influence on government decision-making, see James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 *Am. Pol. Sci. Rev.* 577 (1994). On the influence of foreign policy on domestic political support, see Alastair Smith, *International Crises and Domestic Politics*, 92 *Am. Pol. Sci. Rev.* 623 (1998). Regarding the argument that such costs may be incurred due to both domestic and international publics, see Morrow, *supra* note 22.

29 The model's complication becomes evident in attempts to apply it to conditions of uncertainty or asymmetric information regarding the efficacy of battle strategies, the results of battles, and the willingness of states to adhere to agreements. The model can also suffer from the problem of noise, according to which armies, or elements inside them, may disregard state policy to comply with existing treaties. Eventually, the aggrieved state's "zone of tolerance" to noises will decrease, as the damage sustained by the use of a forbidden strategy increases. For an elaborate explanation of the complications of the model, see Morrow, *supra* note 22.

30 *Id.*

31 *Id.*

32 When different ratified treaties require a different level of obligation to a certain legal issue, questions regarding the compelling standards arise. For an elaboration on the compelling standards in such a case, see *id.*

military manpower.³³ According to Sandler, arms races are often characterized by a tit-for-tat process, in which one state increases its military arsenal in response to increases in the arsenal of a potential adversary. Such dynamics are especially alarming in the absence of equilibrium, when ever increasing resources are invested in armaments. Although the model makes no reference to the laws of war, these laws can obviously be considered an effective means for creating such an equilibrium, restricting an endless allocation of resources to armaments and leading to a Pareto improvement.

A fourth model is presented by Posner.³⁴ It refers to two rival states with equal resources, invested either in productive or in military capital. The investment of states in productive capital yields a joint income, from which each state extracts a share proportional to its investment in military capital. If each state invests equal amounts in military capital, each obtains half of the joint income, but if one state invests more than the other, its share is larger than one half.³⁵ The joint optimal outcome occurs if both states invest all their resources in production and none in predation. Yet, as long as the marginal benefit from investing military capital is sufficiently high, states will persist in it and an arms race will consequently develop. In equilibrium, both states will invest equal and positive amounts of resources in productive and military capital. As military technology becomes more efficient, so will more resources be invested in military capital, since the marginal utility of doing so will be higher than the marginal utility of investing an additional unit in productive capital. Since both states will exhibit the same behavior, their aggregate welfare will decrease. The outcome of the game reflects a logic resembling that of the prisoner's dilemma, characterized by an excess of investment in military capital.³⁶

The model can be complicated even further by assuming that states have unequal resources at the start. This situation may result in a phenomenon called the "paradox of power," whereby a weaker state can gain at the expense of a stronger one. The limited potential gains to the stronger state obtained by appropriating the income of the weaker one may, in certain

33 Todd Sandler & Keith Hartley, *The Economics of Defense* 73 (1995).

34 Eric Posner, *A Theory of the Laws of War*, 70 U. Chi. L. Rev. 297 (2003).

35 According to the model, the efficiency with which resources are converted into military capital depends on the military technology — as it becomes more efficient, investment of one additional unit in military capital will yield a larger share of the joint income, i.e., the marginal utility of doing so is higher.

36 Thus, Posner's proposition that the laws of war are designed to limit the efficiency of military technology, leading to a Pareto improvement in the states' welfare.

circumstances,³⁷ induce it to invest all its resources in productive capital and none in military capital. The weaker state will then be prompted to invest an even greater portion of its resources in military capital so as to appropriate the income of the stronger state. This analysis leads to the second proposition on the reasons for banning certain military technologies: coalitions of strong states seek to limit the extraction power of weaker states. As I will argue, the same interpretation is valid for terrorist organizations.

These models propose an economic interpretation of the roles that humanitarian law plays in the regulation of war: reducing the brutality of war by restraining the behavior of states and providing optimal levels of security in reply to threats. I will argue, however, that the rationale of these models does not apply to humanitarian law in the context of the war on international terrorism.

III. SUPPLYING GLOBAL SECURITY IN RESPONSE TO THE THREAT OF INTERNATIONAL TERRORISM

Globalization accelerated during the twentieth century, with continuing innovations in the fields of technology, communications, and transportation.³⁸ The result has been a new openness in the flow of capital, goods and manpower, and unprecedented levels of political and economic international cooperation, that have blurred state boundaries. This process is manifest in the growing economic interdependence between countries,³⁹ which compels them to cooperate in order to preserve the stability of global security and of the global economy.⁴⁰ Harm to the global status quo, or even to a single state that is part of the system, results in negative externalities for others. International political and economic organizations (NATO, the European Union, the WTO, and so forth) assume some of the judicial authority of their member states and regulate their conduct in order to improve the joint welfare. These organizations are determined to preserve global security and economic stability through extensive multilateral cooperation. Hence,

³⁷ Posner, *supra* note 34.

³⁸ Sandler & Hartley, *supra* note 33, at 321.

³⁹ Paul Krugman, *Growing World Trade: Causes and Consequences*, in 1 Brookings Papers on Economic Activity 327-62 (William C. Brainard & George L. Perry eds., 1995).

⁴⁰ On the effects of security and stability on the global economy, see Benvenisti, *supra* note 26.

negotiations on political, security, and economic issues are often conducted within the appropriate international organizations instead of through direct negotiations between single states. The end of the Cold War and of the duopolistic balance that had characterized it reinforce the perception that viewing the laws of war as resulting from a game between only two states would be misleading. As Benvenisti⁴¹ illustrates, adjusting international law to prevailing security conditions requires cooperation among nations, and "the elaboration of a new approach that can address and accommodate as many concerns as possible."

The process of globalization has not left the elements shaping global security unaltered. Changes in the menaces to world peace are another factor influencing the status of humanitarian law. The growing interdependence of states has led some elements to pursue their goals by causing harm to the political and economic global status quo or to third parties to a specific conflict, expecting to bring negative externalities upon their rivals.⁴² International terror is a glaring example of such a global threat.⁴³ Al-Qaeda, the most conspicuous terrorist organization, aims to restore Islamic Khalifate rule under Shàaria law in the Middle East and to remove all foreign elements from the region, especially the American military presence in Saudi Arabia and in the Arab Emirates.⁴⁴ American military and economic support for several Middle Eastern regimes has led Al-Qaeda to attack not only Washington's western allies,⁴⁵ but also Arab and

41 *Id.*

42 Regarding the difficulty of adopting a customary definition of the term "terror," see Hans-Peter Gasser, *Acts of Terror, "Terrorism" and International Humanitarian Law*, 847 Int'l Rev. Red Cross 547 (2002). See also Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int'l L. 1 (2004).

43 Sandler & Hartley's definition of the term "international terror" convincingly reflects the global character of the threat:

The use, or threat of use of anxiety-inducing, extranormal violence for political purposes by any individual or group, whether acting for or in opposition to established governmental authority, when such action is intended to influence the attitudes and behavior of a target group wider than the immediate victims and when, through the nationality or foreign ties of its perpetrators, through its location, through the nature of its institutional or human victims, or through the mechanics of its resolution, its ramifications transcends national boundaries.

Sandler & Hartley, *supra* note 33, at 322.

44 On the ideology and goals of the Al-Qaeda group, see Michael S. Doran, *The Pragmatic Fanaticism of Al-Qaeda: An Anatomy of Extremism in Middle Eastern Politics*, 117 Pol. Sci. Q. 177 (2002); Barry R. Posen, *The Struggle against Terrorism: Grand Strategy, Strategy, and Tactics*, 26 Int'l Security. 39 (2002).

45 Spain, for instance, actively supported the American military effort in Iraq. The

Islamic countries.⁴⁶ In that sense, the battlefield is no longer a geographically defined area where two armies meet, but the territory of many states where this and other organizations have succeeded in establishing a base.⁴⁷

The presence of a long term threat⁴⁸ against the international status quo increases economic and political interdependence, turning global stability and security into a public good in an even purer sense.⁴⁹ A good of this type satisfies two attributes: "non-exclusivity," meaning that its producers cannot prevent others from enjoying it, and "non-rivalry," meaning that consuming this good does not detract from the ability of others to do so. Since global stability benefits most states,⁵⁰ it can be considered a public good almost in the purest sense of the term. This proposition could lead us to expect that all states enjoying this good would work to enable its supply. Yet, due to problems associated with collective action,⁵¹ states can decline to bear the part of the costs of this good proportional to their own benefit, leading to sub-optimal levels of its supply. Mancur Olson was the first to note that, in any group, when the more powerful actors are able to provide a public good by themselves, the systematic tendency of the smaller actors is to exploit this by becoming free or easy riders.⁵² This collective action problem, known as the "exploitation hypothesis,"⁵³ characterized the Cold War, and the nuclear umbrella supplied

assumption, then, is that the train attacks of March 2004 in Madrid were meant to influence domestic public opinion on the eve of the elections, thus influencing the government's position regarding the presence of Spanish soldiers in Iraq. *See After the Train Bombs, a Political Bombshell*, *Economist*, Mar. 16, 2004.

46 Al-Qaeda has acted against Arab and Islamic states such as Saudi Arabia, Pakistan, Tunisia, Yemen, Indonesia, Kuwait, Turkey, and Morocco.

47 As President George W. Bush affirmed in reference to his country, "The front of the new war is here in America." *Remarks on Signing the Homeland Security Act of 2002* (Nov. 25, 2002), 38 Wkly. Comp. Pres. Doc. 2090 (Dec. 2, 2002). *See also* Pierre Conesa, *Victoire certaine, paix impossible*, *Le Monde diplomatique*, Jan. 2004.

48 Al-Qaeda's vision of the war on the US and its allies as a long term conflict can be concluded from its comparison to historical religious wars. *See Still out There*, *Economist*, Jan. 8, 2004.

49 *See* Benvenisti, *supra* note 26. The view that global stability and security constitute a public good is widely accepted, but the adequate ways of providing it remain a controversial issue, mainly between the US and Western European states.

50 "Rogue regimes" and states that support terrorism may be viewed as states that do not enjoy this public good, since they seek to infringe the existing political and economic status quo by using means banned by humanitarian law.

51 *See* Benvenisti, *supra* note 26.

52 Mancur Olson, *The Logic of Collective Action* (1965).

53 For a discussion of the problems associated with collective action in coalitions, see Sandler & Hartley, *supra* note 33, at 23-24.

by the two superpowers for the protection of their allies created a mutual deterrence that guaranteed stability to both sides. The smaller allies in NATO and in the Warsaw Pact could thus enjoy the benefits of security while bearing disproportionately small responsibility for supplying it.⁵⁴ Yet, when security is ensured through exclusive reliance on a stronger player, security levels will remain sub-optimal, posing a constant threat to stability. As Benvenisti pointed out, the fall of the Iron Curtain only amplified this phenomenon by leaving the US as the only superpower in the international arena.⁵⁵ Although the threat of international terror has raised the aggregate costs of providing security, many states are reluctant to increase the resources allocated to this purpose. For many Western states and their allies, terrorist organizations rather than neighboring states are the main threat. These circumstances allow them to set themselves apart from the US and its allies and deflect the attention of terrorist organizations toward other targets.⁵⁶ Consequently, the damage expectancy from the threat of international terror does not justify their making a substantial investment in security.

In light of the discussion so far, I propose adding two new factors to the economic analysis of the war on international terror. First, international terror is assessed as a primary threat by the US and its allies when deciding on their investment in military capital (i.e., other states are no longer the sole parameter taken into account in this process). Second, waging the war on international terror is a coalition of states, and the involvement of numerous players spells difficulties for the provision of security at a sufficient level. Hence, positivist economic models based on premises consistent with war in the "classical" sense cannot give an accurate description of the role of humanitarian law in the struggle against international terror. I will use Posner's model⁵⁷ to demonstrate this proposition, thus exposing the invalidity of the merits ascribed to humanitarian law in the context of this war.

⁵⁴ *Id.* at 44-51.

⁵⁵ Benvenisti points to three factors expected to exacerbate the problem in the post Cold War era: first, the disappearance of the duopolistic system, which does not allow the coordination of a mutual level of deterrence, thereby raising the costs of producing the public good. Second, states can set themselves apart from the US and its allies and thereby shield themselves from being targeted by terrorists. Third, the lack of agreement between the US and a number of other key actors (including members of the Permanent Five on the UN Security Council) on the ways to obtain the public good. For further elaboration, see Benvenisti, *supra* note 26.

⁵⁶ In this sense, a sub-optimal supply of security by one country creates negative externalities of two kinds for other states: the lack of contribution to the public good of global security, and the deflection of terrorist groups against other countries.

⁵⁷ Posner, *supra* note 34.

In Posner's model,⁵⁸ the laws of war are a means for limiting the efficiency of authorized military technologies during a conflict between two states, functioning as a successful device in the division of productive and military capital. According to the model, the willingness of states to invest in military capital is solely contingent on their desire to appropriate another state's produce. This model, therefore, is inapplicable to the war on international terror for a number of reasons. First, the relationship between the belligerent parties involves no reciprocity — terrorists have no industrial production, and states facing them are therefore unable to appropriate it. States facing only the threat of international terror, then, would lack any motivation to invest in military capital. This prediction, however, has proven inaccurate. For instance, although Britain is not exposed to any military threat from its neighbors, its investment in military capital and its commitment to the war on international terror is second only to that of the United States, which leads this offensive.⁵⁹ The British commitment seems to rest on ideological considerations and on a long-term vision of security and economic stability that recognizes the looming dangers entailed in the alteration of the global political and economic status quo as a result of international terror. Second, ignoring the nature of global security as a public good supplied by a coalition of states and the externalities resulting from states' investment (or lack thereof) in security precludes any reference to the problem of free riding as an obstruction to collective action. Omitting these factors when applying this model to the study of international terror could thus lead to the conclusion that investment in military capital is presently at a super-optimal level.⁶⁰ By contrast, when the factors that distinguish the war on international terror from "classical" wars, and mainly free riding, are taken into account, the global level of security in response to international terror is shown to be sub-optimal.

A normative conclusion emerges from the discussion so far, beyond its theoretical implications for the economic analysis of humanitarian law. Collective action problems lead to sub-optimal aggregate levels of security in response to the threat of international terror. A new set of rules should therefore be formulated, regulating investments in security

⁵⁸ *Id.*

⁵⁹ On Britain's special status as an ally of the US, British-American cooperation in the field of security, and Britain's commitment to the American-led war in Iraq, see James K. Wither, *British Bulldog or Bush's Poodle? Anglo-American Relations and the Iraq War*, 33 *Parameters* 67 (2003-2004).

⁶⁰ This conclusion may be correct for "classic" wars. Posner therefore suggests two ways of limiting investment in military capital: directly limiting state investment in military capital, or limiting the efficiency of authorized military technologies.

by states that enjoy this public good. Contrary to what existing models suggest, these rules cannot belong to the category of *jus in bello*, which regulates mutual actions between belligerents. Rather, they must provide a framework to regulate mutual actions between allies. The inability of the US to impose on its allies a share of the costs of security proportional to their benefit from this product⁶¹ compels the establishment of international frameworks to regulate levels of optimal aggregate security. Instruments such as the "command mechanism," the voting system, or the Groves-Clarke tax,⁶² enabling the imposition of costs involved in the provision of global security on the relevant states, can be used for this purpose. These frameworks can be based on existing international security-oriented organizations such as NATO, regional organizations such as the European Union, defense alliances, or compelling resolutions of the Security Council under chapter VII of the UN Charter. Hugo Grotius recognized in his treatise *De Jure Belli ac Pacis* (1646) that the utilitarianism of states can be a stumbling block on the way of coalitions to the achievement of common goals: "that association which binds together the human race or binds many nations together, has need of law ... shameful deeds ought not to be committed even for the sake of one's country."⁶³ What we need, then, are international frameworks with the power to establish and enforce a virtual tax collecting system. Only such frameworks can possibly rectify the sub-optimal levels of aggregate security reflecting the collective action problems associated with the war on international terror.

IV. THE ADEQUACY OF HUMANITARIAN LAW TO THE REGULATION OF STATES' CONDUCT IN THE WAR ON INTERNATIONAL TERROR

The last section demonstrated that humanitarian law is an inadequate tool for generating an optimal level of global security in response to the threat

61 On the limited ability of the United States to impose such costs on its allies, see Benvenisti, *supra* note 26. See also Joseph S. Nye, Jr., *Limits of American Power*, 117 *Pol. Sci. Q.* 545 (2002-2003).

62 The term "command mechanism" describes a mechanism in which an actor or group of actors determines the amount of the public good. By contrast, the "voting system" allows individual actors to vote on the provision of the public good. This device seems more appropriate in our context, and its limited ability to generate the provision of the public good at optimal levels can be remedied by a Groves-Clarke tax mechanism. See Hal R. Varian, *Intermediate Microeconomics* 631-39 (5th ed. 1999).

63 2 Hugo Grotius, *De Jure Belli ac Pacis* 17 (James Brown Scott ed., Francis W. Kelsey et al. trans., Oxford 1925) (1646).

of international terror. In this section, I present the limitations hindering this law's attempt to regulate the conduct of states when waging a war against such terrorism. The main limitation is that the laws of war were formulated to regulate the conduct of states, and they prove less applicable when one of the belligerent parties is a non-state actor.⁶⁴ The perpetrators of international terror therefore lack any commitment to international law in general, and to the laws of war in particular.⁶⁵ A formalistic explanation will thus argue that these laws pertain to states rather than to non-state actors, but a more substantive analysis will reveal that the laws of war sometimes ban the only effective strategies at these groups' disposal. The single attempt of the international community to categorically forbid the use of terrorism failed when the League of Nations refused to ratify the draft of the Convention for the Prevention and Punishment of Terrorism in 1937.⁶⁶ Since then, legislators of the laws of war corpus (i.e., the Western powers) have nevertheless sought to minimize the "paradox of power" counteracting their advantage over smaller states and non-state actors such as terrorist organizations by restricting the means available to terrorists in an asymmetric war.⁶⁷ In the present security conditions, terrorist organizations appear to have access only to two means they could use as power multipliers against Western powers: weapons of

64 For a discussion of the constraints on terrorism during armed conflicts, see Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, 44 *Survival* 13 (2002). See also Gasser, *supra* note 42.

65 See Gasser, *supra* note 42.

66 *Convention for the Prevention and Punishment of Terrorism*, Nov. 16, 1937, League of Nations Doc. C.546 M.383 1937 V (1937) [hereinafter *Convention for the Prevention and Punishment of Terrorism*].

67 Restrictions appear mainly in international and regional conventions that refer to terror. For an elaborate review of such conventions, see 1 Oppenheim's *International Law* 401-03 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). Restrictions also appear in the work of the ad hoc committee established by General Assembly resolution 51/210 of December 17, 1996, for the drafting of a Comprehensive Convention on International Terrorism (under the terms of G.A. Res. 58/81, U.N. GAOR, 58th Sess. ¶ 15, U.N. Doc. A/RES/58/81 (2003), the ad hoc committee has the mandate to continue with the elaboration of a comprehensive convention on international terrorism. The committee was still working on the drafting at the time of this writing). Further restrictions appear in Resolution 1373 of the UN Security Council, S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001). According to some views, this resolution does not modify humanitarian law as formulated in existing conventions, but calls for cooperation among nations and for the adoption of preventive measures against international terror. See, e.g., Gasser, *supra* note 42.

mass destruction, and terrorist activity directed against civilian populations.⁶⁸ Humanitarian law, therefore, bans both.⁶⁹

By contrast, the governments of the US and its allies, which typically subscribe to the utilitarian-military approach to humanitarian law, tend to be less committed to the laws of war, claiming an almost total absence of reciprocity on their opponents' part. Armies adopt the utilitarian approach, which aspires to minimize unnecessary human suffering in war, mainly because of strategic interests and concern for the well-being of their soldiers and their nation's civilians. Reciprocity is a vital element when adherence to the laws of war is grounded on utilitarian motivations, and has played a key role in the development and implementation of these laws.⁷⁰ As Dunoff and Trachtman noted:

In negotiating rules regarding international conflicts, the various parties to the Geneva Conventions each had something to give in direct exchange: narrowly reciprocal *ex ante* agreements to protect combatants and, in certain cases, noncombatants. This reciprocity continues *ex post facto* when states have the power, if not the legal authority, to withdraw protections in tit-for-tat responses to their opponent's breaches.⁷¹

Admittedly, the omission of the *si omnes* clause from conventions referring to the laws of war, and the prohibition of reprisals in the Geneva Conventions and Additional Protocols, are a sure sign of the decline in the status of the reciprocity element in humanitarian law. Nevertheless, some scholars argue that reprisals, despite their disadvantages, may still be the only remedy available to an attacked state seeking to coerce an enemy to implement humanitarian law.⁷² For this reason, Italy and Britain have expressed reservations about the relevant articles in Additional Protocol I. The US has officially rejected the prohibition of reprisals, claiming that the

68 The terrorist group *Aoum* conducted attacks in a Tokyo subway using Sarin nerve gas on March 20, 1995. The group's capacity to develop chemical weapons and conduct bacteriological experiments demonstrates the ability of terrorist organizations to access such means independently. The attacks of September 11, 2001 cost the terrorists an estimated 100,000 dollars, and the total damage they caused is estimated at between 100 and 200 billion dollars. See Conesa, *supra* note 47.

69 See Hans-Peter Gasser, *Prohibition of Terrorist Acts in International Humanitarian Law*, 253 Int'l Rev. Red Cross 200 (1986).

70 See Meron, *supra* note 4, at 243.

71 Dunoff & Trachtman, *supra* note 19, at 403.

72 See, e.g., George Aldrich, *Compliance with International Humanitarian Law*, 282 Int'l Rev. Red Cross 294, 302 (1991).

recourse or, at least, the threatened recourse to these measures is necessary to deter violations of humanitarian law, especially against POWs and civilians.⁷³ These reservations demonstrate the importance that states, and particularly states that have participated in asymmetric wars, attribute to the element of reciprocity. We might therefore expect at least some decline in the adherence of states to laws implemented unilaterally and giving the other side military advantages.

In economic terms, humanitarian law may not constitute a steady-state equilibrium between the belligerents in the war on international terror. The war of attrition model, for instance, conceives of the laws of war as treaties signed in times of peace in order to ban the use of certain strategies in times of war. According to the model, these treaties are enforceable only if neither side believes that the banned strategies are effective or if some mutual deterrence exists between them. Neither of these conditions is met in this context. First, strategies banned by humanitarian law appear all the more efficient to terrorist organizations. Although the contribution of terrorist acts to the achievement of political goals remains debatable, their very use denotes that these organizations consider them efficient.⁷⁴ Second, terrorist organizations are harder to deter than states, since the option of defeating them through exclusive reliance on military action is limited.⁷⁵ Since a state cannot make a credible threat of retaliation in response to a terror attack that exceeds its "zone of tolerance," the war on terror pulls the rug out from under the logic of Cold War deterrence, which was based on second-strike puissance.⁷⁶ Terrorist organizations are therefore expected to employ their full power in their first

⁷³ See Meron, *supra* note 4, at 250.

⁷⁴ On the efficiency that Al-Qaeda ascribes to its strategies see, for example, *Still out There*, *supra* note 48.

⁷⁵ Terrorist organizations are sometimes viewed as an ideology rather than a substantive entity, rendering their defeat through military means alone inapplicable. For the argument that Al-Qaeda is an example of such an organizations, see Jason Burke, *Al-Qaeda: Casting a Shadow of Terror* (2003). Removing a leader could temporarily or permanently frustrate the operational capabilities of a terrorist organization, as happened with the apprehension of PKK leader Abdullah Ocalan by Turkey in 1999, and the apprehension of Abimael Guzman, leader of the Shining Path in Peru in 1992. But these organizations evolved around the charismatic figures of the leaders. It is doubtful whether highly decentralized groups such as Al-Qaeda, which is comprised of multiple terrorist cells and is based on ideology rather than a personality cult, would be gravely affected by actions directed against its leaders.

⁷⁶ See Benvenisti, *supra* note 26.

strike,⁷⁷ knowing that the attacked state cannot retaliate effectively.⁷⁸ The new reality, therefore, lacks a steady equilibrium, meaning that humanitarian law treaties are unenforceable in this context.

The screening process model is also irrelevant to the war on international terror. Terrorist organizations cannot be compelled to implement the conventions of humanitarian law through audience costs, and no reciprocity element is at work in the relationship with them. States have therefore concluded that no agreement can be reached with them on treaties that could serve as reliable filters of permitted and banned strategies. Given that the US and its allies are reluctant to implement the laws of war unilaterally,⁷⁹ the relevance of humanitarian law in its present form to the war on international terror is limited, both regarding the regulation of the belligerents' conduct in war and the regulation of state investment in security.

This lack of motivation to implement the laws of war is bound to lead to more frequent and egregious violations of these laws, even by states that still abide by them to some extent. This process of alienation and systematic repudiation will gradually set us further away from the equilibrium that humanitarian law had been thought to constitute in the past, until a new equilibrium is attained. Predicting how this process will stabilize, that is, how the laws of war will be formulated in the future, is not easy. But the notion that in the absence of external intervention in this process states would comply only with laws that serve their immediate utilitarian interests is alarming. Utilitarian laws will only be found where the reciprocity element is still present, inducing both sides to decrease their aggregate costs.

A prominent instance of such mutual interests is the status of POWs. Geneva Convention III, which deals with the treatment and status of prisoners of war, is considered part of the customary law of armed conflicts.⁸⁰ It obligates belligerents in any armed conflict, including limited military operations, whether or not war has been declared and whether or not the belligerents are parties to the convention. These protections, however, are

⁷⁷ Depending on tactical considerations that could temporarily limit the power of the attack.

⁷⁸ The US attack in Afghanistan, following the events of September 11, 2001, constitutes an exception to this proposition. Two remarks, however, are in place here. First, the effectiveness of the American attack in neutralizing the threat of Al-Qaeda and apprehending its leaders is debatable. Second, the elimination of the only regime sheltering these organizations precludes a replication of this concentrated, large-scale military offensive.

⁷⁹ See Roberts, *supra* note 64.

⁸⁰ Leslie Green, *The Contemporary Law of Armed Conflict 196-97* (2d ed. 2000).

reserved for soldiers and other lawful combatants.⁸¹ Civilians who are not members of a state's armed forces, such as terrorists, are usually⁸² considered "unlawful combatants" or "unlawful belligerents."⁸³ They are not entitled to the same protections as combatants, nor to those granted to civilians according to article 51(3) of Additional Protocol I and Geneva Convention IV.⁸⁴ The US and its allies are therefore required by international law to distinguish between lawful combatants, such as the soldiers of the former Afghan Army (the Taliban), and unlawful combatants, such as citizens of other nations who fought in the ranks of Al-Qaeda during the war in Afghanistan in 2001.⁸⁵ Meron notes that, despite the asymmetry between states and rebel forces, reciprocity is still relevant to such conflicts, as attested by mutual deterrence regarding the treatment of captured combatants.⁸⁶ Since states are allowed to grant POW status to every prisoner they capture, whether or not s/he is entitled to it by law, this same logic may apply to conflicts between states and non-state actors, other than rebels. It was indeed the element of reciprocity that led Americans in Vietnam to grant POW status to both the soldiers of the North Vietnamese Armed Forces and to members of the Vietcong, although these two categories of combatants were not easily distinguishable.⁸⁷ But the US abandoned this policy and ignored humanitarian law when it refused to determine the status of prisoners held in Guantánamo Bay, Cuba, claiming it could not distinguish the Taliban from members of other groups, such as Al-Qaeda. This change in US policy could be due to its overwhelming military advantage in the war in Afghanistan, the war's short duration, and the small number of American prisoners detained by the Taliban and its allies, as opposed to the circumstances of the Vietnam War. In the absence of reciprocity

81 On the difficulty of defining the term "lawful combatants," see *id.* at 102-05.

82 On exceptions to this rule, such as cases of "levées en masse," see *id.* at 105-09.

83 On the distinction between the denotation of terrorists as "unlawful belligerents" and "unlawful combatants," see Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 Case W. Res. J. Int'l L. 227 (2002).

84 Although Geneva Convention IV, *supra* note 10, is usually presumed to apply to these elements, some of the protections included in the Convention are not usually applied to "unlawful combatants." See Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 849 Int'l Rev. Red Cross 45 (2003).

85 When doubts arise as to whether a person is entitled to POW status, this person will enjoy this status until a competent tribunal determines otherwise. Additional Protocol I, *supra* note 11, art. 45.

86 Meron, *supra* note 4, at 251.

87 See Gasser, *supra* note 42, at 567-68.

between the parties, the US had no inducement to comply with the laws of war concerning POWs.

Israel provides another illustration of the reciprocity principle in action. Israel seeks implementation of the convention with regard to those of its soldiers captured by the Hezbollah organization. Hence, it has sometimes applied the convention to Hezbollah prisoners, although it considers them terrorists rather than lawful combatants, hoping Hezbollah would respond in kind regarding its treatment of Israeli prisoners.⁸⁸ If the possibility of reciprocity concerning the implementation of the convention on combatants, whether lawful or unlawful, is deemed unlikely, the result could be non-compliance with the laws relating to the status of POWs. States can indeed accept a "zone of tolerance," which will induce them to grant members of terrorist organizations POW status despite their sporadic infringements of the laws of war regarding their captive soldiers. But the more frequent the infringements, the more states will be inclined to view them as crossing a line that bars such a tolerant policy altogether.

Even when the element of reciprocity is present, agreements potentially beneficial to both sides could remain beyond reach because of their high transaction costs. The dearth of international institutions regulating relationships between states and non-state actors,⁸⁹ and the apprehension of states fearing that dialogue with terrorist organizations could grant them legitimacy, sometimes render jointly efficient agreements unbeneficial. Add the inability to enforce agreements on non-state actors due to the lack of reciprocity, and the result is a prisoner's dilemma, in which the welfare of both parties is affected, leading to a Pareto inefficient outcome.⁹⁰

Given the global character of the war on international terror, a decline in the status of humanitarian law could affect the situation of many individuals worldwide, increasing the destructiveness and brutality of the war on international terror and leading to human rights violations within civilian populations. Following the events of September 11, for instance, several states took steps against terrorism that resulted in human rights infringements within each one's own territory.⁹¹ The inclination of states to violate human rights in the territory of other nations will probably increase due

⁸⁸ Green, *supra* note 80, at 214.

⁸⁹ See Dunoff & Trachtman, *supra* note 19. Regarding the role that international organizations such as the ICRC can play as intermediaries between states and non-state actors, see Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 Am. J. Int'l L. 238 (1996).

⁹⁰ Dunoff & Trachtman, *supra* note 19.

⁹¹ Gasser notes that the violation of these rights can constitute a clear infringement of

to the asymmetric character of the law, which precludes retaliations against the attacking state's own citizens. Adam Roberts refers to the danger of such behavior: "While the application of the law may be particularly difficult in anti-terrorist operations, it is not unimportant. In some cases, excesses by the government or by intervening forces may have contributed to the growth of a terrorist campaign against it."⁹²

V. MITIGATING FACTORS

The decline in states' compliance with humanitarian law is not without mitigating factors. These factors are part of the set of concerns that states take into account when determining their attitude to humanitarian law. The trend described above, however, necessitates the reinforcement of those factors to maintain previous levels of global commitment. Since states are not inclined to enter into direct agreements with non-state actors, a normative solution to this problem should be sought in recourse to external factors. The strength of these factors is contingent on their ability to impose costs for violating humanitarian law.

The first mitigating factor is a combination of public opinion and public conscience. Meron claims that the dictates of public conscience can be seen as a reflection of *opinio juris*: "Although popular opinion, the *vox populi*, may be different from the opinion of governments, which constitutes *opinio juris*, the former influences and helps to form the latter."⁹³ The role of public conscience in the development of international law was already recognized in the Martens clause, which first appeared in the 1899 Hague Convention.⁹⁴

the states' obligations under humanitarian law and the body of international human rights. See Gasser, *supra* note 42, at 565-68.

92 Roberts, *supra* note 64, at 13.

93 Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 Am. J. Int'l L. 78 (2000).

94 The clause reads:

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

1899 Hague Convention, *supra* note 5, pmbl. On the status of this clause in contemporary international law, see Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 Int'l Rev. Red Cross 125 (1997).

The clause reveals how public conscience influences governments to adopt or reject strategies and means of warfare by externalizing the costs of the citizens' collective conscience.⁹⁵ This conscience constitutes a preference that is satisfied by respecting human rights during conflicts.⁹⁶

Public opinion also imposes costs on governments for violating humanitarian law and human rights, known as "audience costs." Nations may comply with humanitarian law for utilitarian concerns such as, for instance, to win the support of public opinion in neutral states or of influential international organizations,⁹⁷ to avoid the internal political damages of antagonistic public opinion as expressed in elections,⁹⁸ and to avoid aggravating hostile attitudes within the civilian population in enemy states or in states where fighting is ongoing. These costs offset the potential benefits of security measures that violate international law. Internal audience costs, however, depend largely on cultural characteristics, on the population's disposition, on the level of security it enjoys in its confrontation with international terror, and on other factors. Since human history has known "bad" spates of public opinion, which encouraged governments to drift away from humanitarian law, reliance on these costs as dependable mitigating factors is a questionable proposition.⁹⁹

A second mitigating factor is the increasing activity of NGOs. Their surveys of armed conflicts and military interventions, and their unbiased reports of human rights conditions in conflict areas¹⁰⁰ expose levels of state commitment to humanitarian law. When dealing with legal standards and principles,¹⁰¹ NGOs also consider the contents that states infuse into these standards, which influence their interpretation of their legal obligations.¹⁰²

95 Christopher Greenwood, *Historical Development and Legal Basis*, in *Handbook of Humanitarian Law in Armed Conflicts* 129 (Dieter Fleck ed., 1995).

96 Dunoff & Trachtman, *supra* note 19.

97 See Green, *supra* note 80, at 277-79.

98 On the costs that internal public opinion imposes on governments for the violation of international commitments, see Fearon, *supra* note 28.

99 Meron, *supra* note 93.

100 Krauss & Lacey, *supra* note 3.

101 See Amnesty International, "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force, June 6, 2000, available at <http://web.amnesty.org/library/index/ENGEUR700182000>, as an example of an NGO's investigation into states' adherence to the Discrimination Principle, as formulated in Additional Protocol I, *supra* note 11, art. 51.

102 ICRC's SIrUS project, intended to formulate objective criteria as to which weapons cause "superfluous injury or unnecessary suffering" (a term borrowed from Additional Protocol I, *supra* note 11, art. 35), is a prominent instance of attempts by NGOs to influence governmental interpretation of judicial

The unprecedented role that NGOs played in the formulation of the ICC Statute is a striking illustration of this pattern. As Meron¹⁰³ perceptively noted — "[NGOs] fill an institutional gap and give international humanitarian law an even more pro-human-rights orientation." In addition, the media's direct and immediate coverage of armed conflicts shortens the interval between violations of humanitarian law and the public response. This rapid reaction helped to establish the ICTY and ICTR, meaningful landmarks in the development of humanitarian law and in the reinforcement of its humanitarian orientation.¹⁰⁴

A third and even more significant mitigating factor depends on the reinforcement of the humanitarian approach to humanitarian law presented above. This approach, as noted, had traditionally taken second place, but has enjoyed growing recognition since the mid-nineteenth century and particularly since the end of World War II. Utilitarian concerns and strategies, however, still seem dominant among governments. Whereas strategic behavior could lower the status of humanitarian law, reinforcing the humanitarian approach and internalizing its underlying values could encourage states to observe humanitarian law even in the absence of utilitarian incentives. Fostering the humanitarian approach hinges mainly on the willingness of UN organs and international tribunals to increase the costs imposed on states for violations of humanitarian law. The adoption and development of humanitarian law through conventions, resolutions, and the case law of international bodies could also enhance the effectiveness of the humanitarian outlook, but the question is whether these bodies will be willing to raise costs significantly. Some scholars have argued that recent developments in international law might indeed be understood as attempts on the part of the international community to shape and influence public preferences rather than merely reflect them.¹⁰⁵ Certain activities of international institutions attest to their desire to influence public opinion by promoting the humanitarian features of humanitarian law

standards. See Robin M. Coupland & Peter Herby, *Review of the Legality of Weapons: A New Approach to the SIrUS Project*, 835 Int'l Rev. Red Cross 583 (1999); see also Protection of Victims of Armed Conflict through Respect of International Humanitarian Law, Reference Document, 27th Int'l Conference of the Red Cross and Red Crescent, Geneva, Oct. 31 to Nov. 6., 1999, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList188/D1DBE52ED17E77DBC1256B66005D6CFF>. Regarding the possibility of cooperation between states and the ICRC on the matter, see Meron, *supra* note 4, at 242.

103 Meron, *supra* note 4, at 247.

104 Meron, *supra* note 4, at 243.

105 See Dunoff & Trachtman, *supra* note 19.

alongside international human rights, and pressuring states to comply with conceptual changes. After numerous violations of humanitarian law and international human rights during the war on terror, many resolutions of UN organs such as the Security Council, the General Assembly, and the Human Rights Committee have emphasized the need for compliance with these laws in the conduct of this war.¹⁰⁶

At the judicial level, the development of humanitarian law in a more humanitarian direction is mainly a function of the case law emerging from international tribunals and their preference for humanitarian over utilitarian substance.¹⁰⁷ Human rights have deeply influenced those tribunals' visions of customary humanitarian law, their methodologies, and their interpretation of its provisions, increasing the likelihood of such a development.¹⁰⁸ The ICC Statute, largely reflecting the recent trend of approximation between humanitarian law and international human rights, is an encouraging indication in this direction.¹⁰⁹ The tendency of international tribunals to recognize that the unique characteristics of non-international armed conflicts, a definition largely overlapping the war on terror, require the combined development and

¹⁰⁶ See, e.g., S.C. Res. 1456, U.N. SCOR, 58th Sess., 4688th mtg. ¶ 6, U.N. Doc. S/RES/1465 (2003), according to which "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." The resolutions of these bodies have also induced states to comply with UN resolutions, remarks and observations on international human rights, while observing the special mechanisms and procedures set by the Human Rights Committee. See, e.g., G.A. Res. 58/187, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/187 (2003); G.A. Res. 57/219, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/219 (2003); Commission on Human Rights Res. 2003/68, 62nd mtg., U.N. Doc. E/CN.4/RES/2003/68 (2003); Commission on Human Rights Res. 2003/37, 58th mtg., U.N. Doc. E/CN.4/RES/2003/37 (2003).

¹⁰⁷ On the ICC's impact on the development of international law in general and humanitarian law in particular, see Vincent Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, 85 Int'l Rev. Red Cross 235 (2003).

¹⁰⁸ See Meron, *supra* note 4; see also Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 56-57 (1989).

¹⁰⁹ Benison notes that parts of the definitions of war crimes are standard-based rather than rule-based, the laws of war apply to both international and non-international armed conflicts, and enforcement is based on the prosecution of individuals rather than on reprimands of governments. On the ways in which the ICC can further increase the approximation of the two systems in order to implement humanitarian law and international human rights for any person and within any conflict, see Benison, *supra* note 13.

implementation of both humanitarian and international human rights law, could increase the humanization of the laws of war even further.¹¹⁰

The fear of international tribunals that states might reject judicial decisions constraining their own actions in the war on international terror could deter them from promoting humanitarian law more vigorously. Tribunals are not interested in causing a rift with the disputing states, which could undermine their own standing. If states were to view judicial attempts as too far reaching, they might seek to thwart them by arguing that humanitarian standards lack uniform interpretations, that they prevent belligerents from assessing by themselves the legality of their actions during combat, and that the non-military orientation of the judges¹¹¹ prevents them from evaluating concurrent military needs accurately.¹¹² States may comply with moderate dictates of these tribunals, however, due to audience costs and to the belief that doing so could improve their long-term welfare prospects (e.g., by increasing pressure on other states to comply with the courts' rulings on other matters).¹¹³ The question of compliance will therefore be determined by the balance between these factors and the level of costs imposed on states by the courts.

In the absence of immediate military and utilitarian incentives, states will determine the extent of their compliance with this law based on their appraisal of the power of the three factors discussed above to impose costs for violating humanitarian law. The power of these factors to act as a counterbalancing force preserving, and perhaps even promoting, the status of humanitarian law in the war on international terror hinges on their ability to impose penalizing costs. Unfortunately, as I will argue, this process may be obstructed by a growing controversy between nations over the appropriate way of reconciling humanitarian law with the war on international terror.

110 On the proposition that the judicial confrontation of international terror necessitates the interaction of a number of judicial systems, see Int'l Comm. Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (Sept. 2003). See also Int'l Inst. of Humanitarian Law, San Remo, Italy, in Cooperation with Int'l Committee of the Red Cross, Geneva, Switz., XXVIIth Round Table on Current Problems of International Humanitarian Law, Summary Report, Nov. 2003, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList575/ACF03C9E9B96AB23C1256DFF00332E15>.

111 See Rome Statute of the International Criminal Court, July 17, 1998, art. 36, 2187 U.N.T.S. 90, 37 I.L.M. 999 [Hereinafter ICC Statute] (specifying the qualifications of the Court's judges).

112 See Benison, *supra* note 13.

113 Such behavior constitutes a pre-commitment strategy. See Dunoff & Trachtman, *supra* note 19.

VI. A TRIPOLAR SYSTEM

The war on terror, then, lowers states' compliance with humanitarian law. How is this proposition to be reconciled with the expansion of the mitigating factors discussed in the previous section and with the advance of humanitarian law over the last two decades (evident mainly in the establishment of international tribunals such as the ICTY, the ICTR, and the ICC)? Settling this apparent inconsistency requires an understanding of the different interests of states regarding the question of how far to expand humanitarian law. The gap between these interests surfaced during the preliminary work for the establishment of the ICC and the Rome Conference. Negotiations preceding the establishment of a permanent tribunal exposed significant differences between a group of states led by the US (as the power leading military operations on foreign soil) and a large group of states increasingly averse to such operations.¹¹⁴ The US, as the only remaining superpower, is indeed deeply involved both militarily and financially in peacekeeping and peace-enforcement efforts, in implementing Security Council resolutions, in UN missions and in humanitarian interventions.¹¹⁵ Its fear that a Court with broad powers would impair its ability to provide global security and thereby jeopardize the global status quo led it to adopt a conservative view of the Court's jurisdiction. The main concern of the United States was that American troops deployed across the globe would be subject to politicized prosecutions,¹¹⁶ leading it to suggest that such prosecutions be left to each sending nation.¹¹⁷ Because of their involvement in peacekeeping operations and despite their differences on other matters, France and Britain joined the US on this issue. As permanent members of the Security Council, they also pleaded that the Court not undermine the authority of this body.¹¹⁸

114 For a detailed description of the dynamics of the negotiation surrounding the drafting of the ICC Statute, see generally M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 *Cornell Int'l L.J.* 443 (1999); 3 M. Cherif Bassiouni, *International Criminal Law* 597-635 (2d ed. 1999) [hereinafter Bassiouni, *International Criminal Law*].

115 See Martin Zwanenburg, *The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?*, 10 *Eur. J. Int'l L.* 124 (1999).

116 On this American concern and the contention that it is superfluous, see *id.*; Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, 77(6) *Foreign Aff.* 20 (1998).

117 This arrangement has been criticized. See Zwanenburg, *supra* note 115.

118 On the claim that individual permanent members of the Council should have veto

Following the objection of many other states to the American position and the attempt of the United States' allies to restrict the Court's powers, several states formed the coalition of "The Like Minded States" (LMS). This group, led by Canada and several Western European nations, became quite large by 1998, when the final draft of the ICC Statute was adopted,¹¹⁹ strongly supporting the establishment of a powerful ICC. Their position brought to the surface existing political tensions between North and South hinging on the Security Council's monopoly on peace and security matters, and on the failed attempt of middle-rank powers to expand the Council. The contest between Germany, France, and Britain for control of the EU, together with their attempt to forge a common foreign and security policy, increased their determination to challenge the American standing on the Court's powers.

The dynamic portrayed above suggests that the recent wave of support for humanitarian law is not antithetical to the proposition that states fighting international terror by military means will show less compliance with its rules. These two courses were chosen by different nations, holding different views, and pursuing different interests as to the ways of promoting global security and stability. Since the end of the Cold War, the US has proven its willingness to engage in direct military interventions. Fearing the Court could prevent it from actualizing its supremacy, expanding global stability, and protecting its own interests, it has indeed obstructed the establishment of an effective ICC.¹²⁰ The LMS and several Western European states strive to maintain global stability through different means, and their refusal to participate in military interventions purported to back peace and security indeed appears to have been directly proportional to their support for a powerful ICC.¹²¹

The relevance of humanitarian law to the war on international terror is

power regarding cases to go before the Court, the objections of many states to this proposition, and the compromise attained, see *id.*

119 When the final draft of the ICC Statute was adopted in April 1998, the group included: Australia, Austria, Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago (representing twelve Caribbean states), Uruguay, and Venezuela. Others joined at a later stage. See Bassiouni, *International Criminal Law*, *supra* note 114, at 623.

120 On apprehensions about the ICC hindering US hegemony in the post-Cold War era, see Wedgwood, *supra* note 116. On American reactions to the enactment of the ICC Statute, see Salvatore Zappalà, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 *J. Int'l Crim. Just.* 114 (2003).

121 See Paulo-Serge Lopes, *La Paix par le Droit. L'exemple de la Justice Pénale*

now determined by the attitudes of three different actors: 1) Organizations of international terror, which are indifferent to its dictates and have no share in its development; 2) A group of states willing to promote and develop humanitarian law; 3) A group of states led by the US, which seeks to reduce the scope of humanitarian law. The second actor's reason for advancing humanitarian law is arguable. This course of action may have been selected due to an ideology that advocates confronting contemporary threats through multilateral rather than unilateral means. It could rest on the belief that a strong ICC will be able to stabilize the global status quo by effectively deterring parties from committing war crimes, genocide, and crimes against humanity. Alternatively, this path may have been chosen because acting through international tribunals, as opposed to direct or military involvement, could satisfy a public opinion's demand for state action without compromising troops and without allocating the funds required for successful interventions in conflict areas. The consequences of this reluctance to devote the resources necessary for the successful performance of international missions have surfaced in a number of disastrous episodes during the last decade.¹²² The additional benefit to these states as free riders on the American military efforts against the war on terror¹²³ suggests that this course of action entails a utilitarian aspect as well, and they could therefore be expected to go on endorsing this course in the future. The third actor in this system is inclined to fight international terrorism by military means. These states do not trust international tribunals as effective deterrents of international terrorism.¹²⁴ Their fear that supporting humanitarian law could hinder their

Internationale, 17 *Revue Critique D'écologie Politique* (2003), available at http://ecorev.org/article.php3?id_article=139.

122 Prominent instances are the French involvement in the massacre of Tutsis in Rwanda in 1994, the failure of Dutch and French troops to prevent the massacre of seven thousand Muslims in Srebrenica (Bosnia) in 1995, and the massacres in Kosovo in 1998 and 1999. On the Rwanda massacre, see, *inter alia*, Colette Braeckman, *Rwanda, Retour sur un Aveuglement International*, *Le Monde diplomatique*, Mar. 2004; Philippe Leymarie, *La Politique Française au Rwanda en Questions*, *Le Monde diplomatique*, Sept. 1998. On the Srebrenica massacre, see, *inter alia*, Pierre du Bois, *L'union Européenne et le Naufrage de la Yougoslavie (1991-1995)*, 104 *Relations Internationales* 469 (2000); *Netherlands and UN Blamed over Srebrenica Massacre*, *Guardian*, Apr. 10, 2002; Ian Black, *Balkan Ghosts Haunt the Dutch*, *Guardian*, Apr. 12, 2002; Henry Porter, *France's Role in a Bosnian Massacre*, *Observer*, Apr. 22, 2001.

123 See Benvenisti, *supra* note 1.

124 For a critique of the attempt to secure global peace and security only through international tribunals, see M. Néel, *La Judicialisation Internationale des Criminels*

military efforts has led them to endorse limitations on humanitarian law and its implementation.

The emergence of this new tripolar system reduces the plausibility of promoting international law in an unequivocal course; whether by constricting it or by giving it a more humanitarian orientation. Will the mitigating factors outlined above, and especially the encouragement of a humanitarian approach, offset the lowered status of humanitarian law? In the interim, the United States keeps eroding the ICC's effectiveness, and its Western allies are still reluctant to contribute their share to the military effort against international terror, frustrating both available options for restoring an optimal level of global security. Since both actors claim to hold a valid perception of international law, this dichotomy could simply result in the creation of two different systems of international law, not unlike the state of affairs that prevailed during the Cold War.

CONCLUSION

International terror poses an increasing challenge to global security and stability. The effectiveness of instruments currently regulating the conduct of states engaged in the war against it, and their ability to establish an optimal level of global security in reply, requires reappraisal. The features specific to this war, the problems of collective action, and the emergence of a tripolar system hindering unequivocal support for humanitarian law, lessen the ability of this law to serve as a central device to attain these goals. In this article, no normative stand was endorsed on the judicial system most appropriate for dealing with this problem — humanitarian law, criminal law, the body of international human rights corpus, a *lex specialis*, or some combination of the above. Leaving humanitarian law unchanged, however, will unquestionably reduce the scope of its implementation.

The law and economics literature should therefore address the implication of these attributes in order to develop a more relevant dialogue concerning the pursuance of the legal confrontation of this threat, since relying on the premises of "classical" wars was shown to be obstructive. The economic analysis of the role of humanitarian law in the war on international terrorism, as suggested, should include a number of additional propositions.

The status of humanitarian law in the modern era has gone through

de Guerre: La Solution aux Violations Graves du Droit International Humanitaire?,
33 *Criminologie* 151 (2000).

"cycles," rising in the wake of atrocities and declining as these were forgotten, only to see new signs of brutality reverse the trend yet again. If this cyclical course stems from a natural tendency to become less concerned with the promotion of humanitarian objectives the further away in time we are from a tragedy, a robust academic dialogue regarding the effectiveness of humanitarian law is indeed necessary to help the international community develop mechanisms to preserve its relevance.

