

## EXTRA-STATE ARMED CONFLICTS: IS THERE A NEED FOR A NEW LEGAL REGIME?

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### I. INTRODUCTION

What is the legal status of the Guantanamo Bay detainees? May an Al Qaeda member be targeted while he is sleeping under his own roof? May members of the United States' armed forces wear civilian clothing in their military operations against Al Qaeda? How much collateral damage, if any, is acceptable in the context of an attack directed at an Al Qaeda member? These are but a few of many perplexing questions raised regarding the proper relation between the existing laws of war and new global realities as world politics shift in the wake of the attacks of September 11, 2001.

Our thinking about these complex questions is informed, and sometimes even shaped, by habitual recourse to the classic, well established dichotomies of international law. Dichotomies such as war and peace and inter-state versus intra-state armed conflicts form the basis of our understanding of the law and dynamics of conflict situations.<sup>2</sup> Such dichotomies of international law are incorporated in, or at least lie in the back-

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2. I use the terms "inter-state armed conflict" and "intra-state armed conflict" because the more common terms used in international legal discourse—"international armed conflict" and "non-international armed conflict"—create the false impression that no other category of armed conflict may exist. The terms inter-state conflict and intra-state conflict do not suffer from this shortcoming. See Anthea E. Roberts, *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*, 15 EUR. J. INT'L L. 721, 747 (2004).

ground of, the basic treaties of the laws of war.<sup>3</sup> These treaties are imbued with moral authority that, in turn, fortifies traditional dichotomies and thus makes it more difficult to analyze conflict situations without substantial reliance on them.<sup>4</sup>

And yet, there can be little doubt that these traditional, well-defined dichotomies in the law have been outmoded by a new and messier political reality.<sup>5</sup> At the time the Geneva Conventions were drafted, states rarely pursued ongoing military operations against non-state actors in the territory of other states.<sup>6</sup> The Conventions' main purpose was regulating inter-

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3. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention]. The Geneva Conventions consist of four treaties: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 [hereinafter Geneva Convention III]; 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. Articles 2 and 3 are common to all four Geneva Conventions. Thus, when referring to these articles, the four conventions collectively will be termed the "Geneva Conventions." The provisions relating to inter-state armed conflicts—including common article 2—were supplemented by Additional Protocol I. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Common article 3, relating to armed conflicts not of an international character, was supplemented by Additional Protocol II. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

4. For example, the Geneva Conventions, which are undoubtedly imbued with moral authority, rely heavily on the basic dichotomies between peace and armed conflict (the Geneva Conventions apply only in situations of armed conflict and do not apply in times of peace) and between inter-state and intra-state armed conflicts (applying different regimes to these two types of conflicts).

5. Christopher Greenwood, *International Law and the 'War Against Terrorism'*, 78 INT'L AFF. 301, 301 (2002) (stating, in reference to the attacks of September 11, 2001, that "a challenge on this scale by a non-state actor to the one superpower calls for entirely new thinking about the nature of international law").

6. For instance, when surveying extra-territorial military operations taken by states against non-state actors, Yoram Dinstein cites only one exam-

state wars.<sup>7</sup> Today, however, the frequency of inter-state wars has diminished while conflicts undreamed of in the days when the classic dichotomies made sense are becoming more and more common.<sup>8</sup>

This Article is focused on one type of such non-traditional conflicts: ‘extra-state hostilities’. For the purpose of this Article, ‘extra-state hostilities’ are defined as ongoing hostilities between a state and a non-state actor that take place, at least in part, outside the territory of the state.<sup>9</sup> Extra-state hostilities

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ple of such operations prior to World War II: the American military expedition into Mexico in 1916, which was provoked by attacks on American territory by the armed bands of Francisco Villa. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 218 (3d ed. 2001). Only a few other incidents are noted in the literature. See Barry A. Feinstein, *Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation*, 11 J. TRANSNAT’L L. & POL’Y 201, 280 n.284 (2002) (“Pirates used Spanish-held Amelia Island off the Florida coast during the early 1800’s as a base from which to pillage the U.S. In 1817, the U.S. attacked the island, despite the fact that Spain had engaged in no military action against the U.S., since Spain had not succeeded in repressing the raiders.”); Roy Emerson Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT’L L. 224, 236-38 (1914) (noting the 1838 *Caroline* incident, in which Britain entered U.S. territory and destroyed a steamer in order to prevent an attack by non-state actors on Canada, and General Jackson’s incursion into Spanish Florida in 1818).

7. When the Geneva Conventions were drafted in 1949, inter-state wars were the most common type of armed conflict. Ongoing hostilities between states and non-state actors were generally limited to civil wars taking place within the territory of a state. Non-state actors were nowhere near as powerful as they are today and did not pose a serious strategic threat to states, at least not by attacking them from outside their territory.

8. Apart from the types of hostilities discussed in this Article, there are other non-traditional situations of ongoing hostilities, such as ongoing hostilities between two non-state actors in two different states, which this Article does not address. See Roberts, *supra* note 2, at 747.

9. Admittedly, this Article does not define extra-state hostilities with precision and therefore does not draw specific lines between situations of intra-state armed conflict and extra-state hostilities. Two questions regarding the definition of extra-state hostilities are beyond the scope of this Article and are left for future research: First, the question of what portion of the conflict needs to take place outside the territory of the state to be considered an extra-state hostility; and, second, the question whether the scope of extra-state hostilities should be defined to include conflicts between states and non-state actors, when the latter operate outside the territory of the state but the actual hostilities are limited to the territory of the state. While these are without doubt important questions, they do not affect the existence of extra-state armed hostilities as a separate category of armed conflict, nor do they affect their regulation.

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do not naturally fit into the traditional categories of international law. Thus, in the present state of affairs—for example, in a conflict like that between the United States and Al Qaeda<sup>10</sup>—the usefulness of traditional dichotomies begins to break down, and a whole array of uncertainties arises. When extra-state hostilities erupt, does international law recognize this as an armed conflict, or is the legal status of the situation still one of peace? If there is an armed conflict under international law, what kind of armed conflict is it—inter-state or intra-state? Or is it neither—that is, should international law recognize a third, more appropriate category of armed conflicts? If so, which existing laws should apply to this new category?

These questions carry more than mere theoretical significance. Determining whether a certain situation constitutes war—and if so, whether it is war of the intra-state or inter-state variety—determines in turn the legal regime that should apply to it. For example, in times of peace states are not allowed to target individuals,<sup>11</sup> and they are not allowed to detain people indefinitely without first trying them in court.<sup>12</sup> During an inter-state armed conflict, however, a different legal regime applies: The armed forces of the warring states may lawfully tar-

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10. Unlike most of the academic literature on the subject, this Article is not limited to armed conflicts between states and terrorist groups. It is concerned with conflicts between states and non-state actors. Obviously, some non-state actors may fall under the definition of terror organizations, in which case the current discussion may be relevant to questions concerning the struggle against terrorism. But not all non-state actors are necessarily terror organizations, and this Article relates to conflicts involving these non-state actors as well. While Al Qaeda has become a symbol of evil to the western world, not all non-state actors are necessarily evil. Some non-state actors fight to achieve goals that many in the international community perceive as legitimate (e.g., self-determination or fighting apartheid). At least in theory, non-state actors can use alternative methods of warfare that are deemed to be more legitimate (e.g., not targeting civilians). Hence, one should always be cautious when drawing analogies between Al Qaeda and other non-state actors.

11. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2(2), 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]. For an interpretation of this article in the context of anti-terrorist operations, see *McCann v. United Kingdom*, 324 Eur. Ct. H.R. 8, 45-46 (1995).

12. *See, e.g.*, European Convention on Human Rights, *supra* note 11, art. 5.

get enemy combatants and military objectives,<sup>13</sup> and battlefield detainees may be held until the cessation of hostilities, so long as they are accorded prisoner-of-war status.<sup>14</sup> In the case of intra-state armed conflicts, a third legal regime applies.<sup>15</sup> The armed forces of the state can lawfully target enemy combatants and military objectives,<sup>16</sup> but those fighting on behalf of the non-state actor may be prosecuted by the state if they target the state’s forces and assets.<sup>17</sup> Moreover, they are not accorded prisoner-of-war status under the laws of intra-state armed conflicts.<sup>18</sup> The ability to place a given situation into one—or none—of these categories is therefore a matter of considerable practical significance.

This Article addresses the classification and regulation of extra-state hostilities and in so doing, makes three claims. First, it is the law of armed conflicts, and not that of peace, that should be the frame of reference for the regulation of extra-state hostilities. Second, the Article calls for the creation of a new category of armed conflict in international law for such situations—“extra-state armed conflict”—since such hostilities have unique features rendering their classification into traditional categories of intra or inter-state armed conflict inappropriate.<sup>19</sup> Finally, the Article argues that recognition of

13. Additional Protocol I, *supra* note 3, art. 43(2) (“Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.”).

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14. Geneva Convention III, *supra* note 3, arts. 4-5, 118.

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15. Geneva Conventions, *supra* note 3, art. 3. Additional Protocol II also governs certain intra-state armed conflicts that meet additional specific requirements. Additional Protocol II, *supra* note 3, art. 1.

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16. *See* Additional Protocol II, *supra* note 3, arts. 3-4, 13 (declining any abrogation of a state’s sovereign power to defend itself and to reestablish law and order, guaranteeing respect of the persons of non-combatants and forbidding the targeting of civilians in military operations so long as they do not take part in combat). There is no parallel prohibition on the targeting of combatants and military objectives.

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17. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 318 (2d ed. 2000).

18. Marco Sassoli, *Use and Abuse of the Laws of War in “The War on Terrorism”*, 22 *LAW & INEQ.* 195, 210-11 (“[International Humanitarian Law] of non-international armed conflicts foresees no prisoner of war status, contains no other rules on the status of persons detained in relation to the conflict, or reasons justifying detention of civilians.”).

19. The term “extra-state armed conflict” intends to capture the two defining characteristics of such hostilities: the idea that the conflict takes

this new category of armed conflicts does not result in a legal void. Extra-state armed conflicts are governed by specific rules that are derived from an interpretation of the general principles of international humanitarian law in the unique context of such conflicts, and are therefore tailored to their dynamics.

In making these claims, the Article offers a new approach to the analysis of extra-state armed conflicts. Current legal literature on the topic is limited by the assumption that the laws of war apply only when the situation is governed by the Geneva Conventions. In a universe where the Geneva Conventions are presumed to cover all conflict situations, there is no question that an armed conflict must be of either the inter-state or intra-state variety.<sup>20</sup> Similarly, it follows from such an assumption that an inter-state armed conflict can take place only between states,<sup>21</sup> and that any intra-state armed conflict must occur “in the territory of one of the High Contracting Parties.”<sup>22</sup> Undoubtedly, this positivist-formalist approach is useful for purposes of clarifying whether the Geneva Conventions apply, as a matter of *treaty* law, to the kinds of conflict under discussion in this Article. This approach, however, limits the debate to the linguistic and conceptual framework provided by the Geneva Conventions.

This Article breaks with the traditional assumption, allowing for categories and situations that are not recognized under the Geneva Conventions without altogether abandoning the useful normative and conceptual framework that the Conventions lay down. It argues that the fact that the Geneva Conventions cover certain types of armed conflicts does not preclude the possibility that there may be additional categories of armed conflict that are not regulated by the Conven-

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place, at least in part, outside the territory of the state; and the idea that an entity that is outside the framework of the state is a party to the conflict.

20. Inter-state and intra-state conflicts are the only two types of conflicts that are governed by common articles 2 and 3 of the Geneva Conventions, *supra* note 3, arts. 2-3. For recent scholarship based on this approach, see Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 11-12 (2003); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 348-49 (2002); and Orna Ben-Naftali & Keren R. Michaeli, *We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT’L L.J. 233, 255-56 (2003).

21. Geneva Conventions, *supra* note 3, art. 2.

22. *Id.* art. 3.

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tions. Instead of forcing extra-state armed conflicts into a normative framework that was not designed to fit their unique characteristics, this Article proposes the conceptualization of extra-state armed conflicts as a separate category of armed conflicts. It also suggests that this new category of armed conflicts is governed by a normative regime that is flexible enough to address the unique challenges that emerge in the context of extra-state armed conflicts.

While the analysis below rejects the attempt to force contemporary realities into an outdated historical legal framework, it is not altogether unbounded by certain necessary practical restraints. The proposals in this Article will be politically viable only if they respect the delicate political compromises incorporated in the established laws of war. Thus, the Article deliberately preserves certain basic legal concepts, such as the distinct legal regimes that govern inter- and intra-state armed conflicts, the separation between *jus in bello* and *jus ad bellum*,<sup>23</sup> and the legal framework provided by Additional Protocol I for the regulation of certain struggles of non-state actors. While normative challenges to each of these concepts can and should be presented, any attempt to revise them in the context of this Article would invite significant political resistance and undermine the Article's attempt to present a pragmatic and politically viable solution to the immediate problems in international law created by the changing nature of conflict.

Following this introductory section, the Article is divided into six Parts. Part Two briefly traces the history of extra-state hostilities and surveys the legal scholarship that has thus far addressed this kind of conflict. Part Three introduces various considerations relevant to the legal classification of such hostilities in the context of war and peace. It then analyzes different possibilities for the legal classification of extra-state hostilities. While not taking a firm stance on whether such hostilities should be classified as armed conflicts or as self defense operations in time of peace, the Article argues that the starting point for the regulation of such hostilities should be the laws of armed conflict. Then, in light of emerging state practice

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23. *Jus ad bellum* is the body of international law that regulates when force may be used, while *jus in bello* is the body of international law that regulates the means and methods of warfare once an armed conflict has begun. MICHAEL WALZER, *JUST AND UNJUST WARS* 21 (3rd ed. 2000).

and the overwhelming support of the literature, the Article continues on the basis that such hostilities are best classified as a species of armed conflict. Part Four compares this new type of armed conflict to more traditional inter-state and intra-state armed conflicts and argues that its unique properties call for the establishment of a new category: extra-state armed conflicts. Part Five examines the regulation of the new category under positive law. It rejects the possibility that a legal void is created by the new category and argues that extra-state armed conflicts are governed by specific rules that are derived from an interpretation of the general principles of international humanitarian law in the specific context of extra-state armed conflicts. Part Six demonstrates, through a number of practical examples, how the theoretical framework proposed can assist in deriving rules when extra-state armed conflicts present unique challenges. Finally, Part Seven summarizes the Article's main ideas and argues that it may be too early to consider drafting a treaty that codifies a legal regime for extra-state armed conflicts, an approach that was recently proposed by several governments and international organizations.

## II. EXTRA-STATE HOSTILITIES: AN HISTORICAL SURVEY

### A. *The Emergence of a New Phenomenon?*

Extra-state hostilities are a relatively new phenomenon. Until recently, such hostilities were quite rare.<sup>24</sup> States largely used law enforcement measures to deal with threats emanating from non-state actors located outside of their territory.<sup>25</sup> In more extreme situations, states launched individual self-defense operations against non-state actors located outside of

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24. See DINSTEIN, *supra* note 6; Feinstein, *supra* note 6; Curtis, *supra* note 6.

25. See Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 560 (1999) (noting that following the 1993 attack on the World Trade Center, the United States pursued criminal proceedings against those believed to be involved in the attack). Other tactics used were the disruption of structures of hostile non-state actors through civil sanctions (freezing of financial assets, etc.) and building international norms and enforcement mechanisms through international treaties. *Id.* at 562.

their territory.<sup>26</sup> It was only in the last three decades that conflicts involving extra-state hostilities have emerged more often.

The following are but a few examples of extra-state hostilities in the last thirty years:<sup>27</sup> the conflict between Morocco and the Saharawis in the Western Sahara;<sup>28</sup> the Israeli incursion into Lebanon in 1982 designed to destroy Palestinian bases from which multiple armed attacks across the international frontier had originated;<sup>29</sup> the conflict between India and the Tamil Tigers in Sri Lanka in the late 1980s;<sup>30</sup> the repeated crossings into northern Iraq by Turkish troops in the aftermath of the Gulf War in an attempt to deny Kurdish armed bands a sanctuary in an enclave carved out of Iraq;<sup>31</sup> the conflict between Rwandan forces and Hutu rebels in the Democratic Republic of the Congo;<sup>32</sup> the recent conflict between Israel and Palestinian non-state actors such as Hamas, Islamic Jihad, and the Palestinian Authority;<sup>33</sup> and perhaps most

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26. A detailed survey of such operations can be found in Robert J. Beck & Anthony Clark Arend, *“Don’t Tread on Us”: International Law and Forcible State Responses to Terrorism*, 12 WIS. INT’L L.J. 153, 173-86 (1994).

27. For additional examples, see Hans Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145, 155-56 (1983), and Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT’L L. & POL. 741 (2003).

28. The territorial claims of the various parties to the conflict were analyzed in the Western Sahara Case. Advisory Opinion, Western Sahara, 1975 I.C.J. 12 (Oct. 16). For more recent literature on the conflict, see Yahia H. Zoubir, *The Western Sahara Conflict: A Case Study in Failure of Prenegotiation and Prolongations of Conflict*, 26 CAL. W. INT’L L.J. 173 (1996).

29. DINSTEIN, *supra* note 6, at 218.

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30. See generally David M. Rothenberg, *Negotiation and Dispute Resolution in the Sri Lankan Context: Lessons from the 1994-1995 Peace Talks*, 22 FORDHAM INT’L L.J. 505 (1998); see also Le Mon, *supra* note 27, at 782-86.

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31. Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT’L L. 485, 514-18 (2004) (analyzing the situation and Turkey’s actions under a claim of “necessity”).

32. See, e.g., HUMAN RIGHTS WATCH, WAR CRIMES IN KINSINGANI: THE RESPONSE OF RWANDAN-BACKED REBELS TO THE MAY 2002 MUTINY (2002).

33. For Israel’s characterization of the conflict, see Sharm El-Sheikh Fact Finding Committee, *First Statement of the Government of Israel*, pt. I.E., at <http://www.mfa.gov.il/NR/exeres/FCFDA57E-15AB-4F50-AFBD-BDCE6A289FA8.htm>.

prominently, the conflict between the United States and Al Qaeda in Afghanistan.<sup>34</sup>

A number of developments explain the emergence of this new breed of conflict. Technological developments have enabled non-state actors to wield military capabilities that were previously unimagined.<sup>35</sup> The process of globalization, which allows more freedom in the movement of people and goods, has also served to empower non-state actors. Finally, the accelerated process of state creation over the past century has created states that are too weak to prevent non-state actors from using their territory as a base for launching hostilities against other states.<sup>36</sup> However, as this Article is not focused on an analysis of the reasons for the emergence of this new type of conflict, but rather on the classification and regulation of such conflicts when they occur, a more in-depth analysis of the developments leading to increased conflicts between states and non-state actors will be left to future scholarship.

The salient point in this Article is that the phenomenon of extra-state hostilities is largely a recent development. It did not constitute a significant part of international practice at the time that the Hague Regulations (1907) or the Geneva Conventions (1949) were drafted. This explains why these treaties neither envisaged nor addressed the specific issues associated with such conflicts. The fact that we are faced with a novel category of hostilities that did not exist when the basic documents of the laws of war were created gives good reason to believe that there is a need to reconsider the theoretical framework underlying these documents. Before turning to this academic enterprise, however, it is helpful to first consider how the existing legal scholarship analyzed the phenomenon of extra-state hostilities.

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34. For literature analyzing this conflict, see *infra* notes 48-56 and accompanying text. R

35. For a more detailed analysis of this point, see Wedgwood, *supra* note 25, at 559-60. R

36. See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 14 (2004) (citing MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR* 159 (1997) (arguing that the fact that some states are disintegrating and losing their monopoly on violence is a major contemporary problem)); see also MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 403-08 (1999).

B. *Jurisprudential and Legal Scholarship on Extra-State Hostilities*

A good starting point for a discussion of the traditional classification of extra-state hostilities is the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on the Defense Motion for Interlocutory Appeal on Jurisdiction in the case of *The Prosecutor v. Tadic* (“*Tadic Interlocutory Appeal*”).<sup>37</sup> This decision represents a unique attempt by an international judicial organ to define the concept of “armed conflict”. The Appeals Chamber held: “[A]n armed conflict exists when there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”<sup>38</sup> For the purpose of this Article, however, this definition is not very helpful. On the one hand, the possibility of extra-state hostilities is not explicitly included in the definition. On the other hand, such hostilities are not necessarily excluded from the definition in the *Tadic* decision either.<sup>39</sup>

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37. *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, ¶ 70 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

38. *Id.* The paragraph continues:

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

*Id.* This definition was followed in subsequent judgments of the ICTY and the ICTR.

39. On appeal, the defense in *Tadic* argued that “there was no armed conflict at all in the region where the crimes were allegedly committed.” *Id.* ¶ 65. Hence, the focus of the Tribunal’s discussion was on the absence of hostilities in a specific area, rather than the question of whether a state could be involved in an armed conflict with a non-state actor outside of the state’s territory. *Id.* ¶ 68. Moreover, the language in the judgment does not explicitly determine that ongoing hostilities between a state and a non-state actor outside the territory of the state do not constitute an armed conflict. In other words, the Appeals Chamber did not rule out what it did not consider. It is possible, indeed probable, that the Appeals Chamber simply did not have such situations in mind when the opinion was drafted. *See* Jinks, *supra* note 20, at 27-29 (citing additional comments concerning the interpretation of the definition in *Tadic* of the term “armed conflict”). The *Tadic*

Legal scholarship, especially prior to the attacks of September 11, 2001, did not recognize a need for a comprehensive discussion of the legal status of extra-state hostilities.<sup>40</sup> Still, the preexisting scholarship makes two important contributions. First, it provides the useful concept of “extra-territorial law enforcement.” In his seminal book *War, Aggression, and Self-Defense*, Yoram Dinstein analyzed the *jus ad bellum* aspects of military action of a state against a non-state actor outside the territory of the state, and justified such action under certain conditions as “extra-territorial law enforcement.”<sup>41</sup> In the course of his discussion, Dinstein did not clearly characterize ensuing and sustained extra-state hostili-

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definition also affected the drafting of the Statute of the International Criminal Court. Notably, the *Tadic* definition was not incorporated with respect to crimes under common article 3 of the Geneva Conventions, but only with respect to other breaches of the laws on intra-state armed conflicts. *Id.* at 29.

40. The treatment of the subject was cursory at best. For example, in its definition of armed conflict, the commentary of the Geneva Conventions does not refer to the possibility of extra-state hostilities: “Any difference arising between two states and leading to an intervention of armed forces is an armed conflict . . . .” OSCAR M. UHLER ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVIL PERSONS IN TIME OF WAR 20 (Jean S. Pictet ed., 1958); *see also* JOSEPH G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 526-41 (10th ed., 1989) (suggesting that armed conflicts, unlike wars, can involve states and non-state entities). However, Starke does not expressly refer to situations of extra-state hostilities. *Id.* at 529.

For an argument implying that such hostilities are not armed conflicts, see THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 42 (Dieter Fleck ed., 1995) (arguing that “only the use of force by the organs of a state, rather than by private persons, will constitute an armed conflict”). For an argument foreseeing the need to apply the laws of war to anti-terrorist actions, see Wedgwood, *supra* note 25, at 576 (discussing the possibility that in the future “one may need to place antiterrorist actions within the international legal paradigm of war, rather than unbroken peace, with a right of ongoing offensive action against an adversary’s paramilitary operations and network”). None of the above sources provides a more thorough analysis of the issue.

41. DINSTEIN, *supra* note 6, at 213-21. According to Dinstein, extra-territorial law enforcement is a form of self-defense by a state (State A) against non-state actors within the territory of another state (State B). Dinstein argues that such action is legitimate if it is in response to an armed attack unleashed by the non-state actors from the territory of State B and if State B is unwilling or unable to prevent repetition of that armed attack. *Id.*

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ties as an armed conflict.<sup>42</sup> This Article, then, builds on Dinstein's contribution by addressing the legal characterization and the *jus in bello* aspects of such hostilities. The second contribution from existing scholarship is the concept of "an internationalized non-international armed conflict."<sup>43</sup> This concept is not equivalent to the paradigm of extra-state hostilities,<sup>44</sup> but certain internationalized non-international armed

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42. The operations do not fall under Dinstein's definition of the term "war," which is limited to a conflict between states. *Id.* at 15. Whether such situations may fall under the wider concept of "armed conflict" is left undecided. *Id.* at xii (suggesting that "armed conflict" is a broader concept than "war"). Consequently, it is possible that at least certain extra-territorial law enforcement operations may fall under Dinstein's notion of armed conflict.

43. Internationalized non-international armed conflicts are armed conflicts that would be easily characterized as intra-state armed conflicts were it not for some measure of outside support given by other states to one of the parties of the conflict. Gasser, *supra* note 27, at 145; INGRID DETTER, *THE LAW OF WAR* 46-49 (2000). For an analysis of these conflicts, see H. Meyrovitz, *The Law of War in the Vietnamese Conflict*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 516, 521-33 (Richard A. Falk ed., 1969) (arguing for the application of the laws of inter-state armed conflicts to an internationalized non-international armed conflict); Dietrich Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, 22 *INT'L REV. RED CROSS* 255, 255 (1982); Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 *RECUEIL DES COURS* 117, 150-51 (1979) [hereinafter Schindler, *Different Types of Armed Conflict*]; Anwar T. Frangi, *The Internationalized Non-International Armed Conflict in Lebanon, 1975-1990: Introduction to Confligology*, 22 *CAP. U. L. REV.* 965, 966-67 (1993).

44. Some internationalized non-international armed conflicts do not involve extra-state hostilities. This is the case when the intervening state supports the non-state actor in its struggle with the territorial state. In such a situation the intervening state is not engaged in hostilities with the non-state actor, but rather with the territorial state. Moreover, there are cases of extra-state hostilities that are not covered by the doctrine of internationalized non-international armed conflict. Take the example of a case of ongoing hostilities between a state and a non-state actor within a state (intra-state armed conflict) that spill over to the territory of another state without the involvement of that state. The conflict between the Rwandan government and the Hutu rebels that spilled into the territory of the Democratic Republic of the Congo is one such example. See HUMAN RIGHTS WATCH, *supra* note 32. Since the international component here is not the involvement of another state in the conflict, but rather the fact that the conflict takes place in the territory of this other state, the internationalized non-international armed conflict doctrine does not purport to cover it.

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conflicts do include a component of extra-state hostilities.<sup>45</sup> However, even the literature that specifically analyzes this particular phenomenon<sup>46</sup> merely highlights the apparent difficulty of legally defining this component, and fails to provide us with a theoretical framework to overcome it.<sup>47</sup> This Article provides the necessary theoretical framework that is currently missing from the literature.

The attacks of September 11, 2001, and the subsequent hostilities between the United States and Al Qaeda in Afghanistan have generated a substantial body of legal literature addressing different aspects of the conflict. Two main questions analyzed in that literature are relevant to this Article. The first is whether extra-state hostilities should be classified as an armed conflict. In this respect, the prevailing view in the literature is that the notion of armed conflict (or war) should be expanded to include such hostilities.<sup>48</sup> Only a few scholars ar-

45. This is the case when the intervening state supports the territorial state in its struggle against the non-state actor.

46. There are different approaches in the literature regarding the classification of internationalized non-international armed conflicts and the law that should apply to them. Some scholars argue that once an international component is introduced into an intra-state armed conflict the conflict as a whole becomes an international armed conflict and hence the laws of interstate armed conflicts apply. See Meyrovitz, *supra* note 43, at 532-33. Others believe that an internationalized non-international armed conflict should be analyzed as though it involves separate, bilateral armed conflicts. Each of these conflicts should be analyzed separately; hence, it may be that different bodies of international humanitarian law will apply to different components of the internationalized non-international armed conflict. Gasser, *supra* note 27; Schindler, *Different Types of Armed Conflicts*, *supra* note 43.

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47. As Hans Peter Gasser notes, "The traditional answer, which makes the situation subject to the rules of non-international armed conflict, clashes with the undeniably international character of this type of relationship." Gasser, *supra* note 27, at 147. Gasser states that the ICRC avoided making any determinations concerning the classification of the armed conflicts discussed in his article: Afghanistan, Kampuchea, and Lebanon. *Id.* at 158. In terms of the conflict in Afghanistan, Gasser argues: "Just as relations between the Afghan Government and the insurgents are subject to common article 3 of the Geneva Conventions, the armed forces of the Soviet Union, if engaged in military operations against insurgents, should be equally committed to respecting at least that common article." *Id.* at 151-52.

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48. Jinks, *supra* note 20, at 9 ("[T]he nature and quality of the [September 11, 2001,] attacks, as well as the reaction these hostilities prompted in international organizations and national governments, strongly suggest that the attacks initiated or confirmed the existence of an 'armed conflict' between the United States and an organized armed group, al Qaeda."); Stein

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gue that the situation should not be conceived of as war,<sup>49</sup> and even those writers focus on the lack of justification for the use of force against non-state actors rather than on the question of how to classify such use of force once it has already occurred.<sup>50</sup> The second question has to do with how to classify extra-state hostilities within the traditional categories of armed conflicts: inter-state armed conflicts and intra-state armed conflicts. Many scholars refrain from taking a clear position on the question.<sup>51</sup> Even among the scholars that do reflect on the classifi-

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Tønnesson, *A 'Global Civil War'?*, International Peace Research Institute, at <http://uit.no/getfile.php?SiteId=116&PageId=3324&FileId=32> (last visited Mar. 4, 2005) (“When both sides in a conflict understand what they are doing as ‘war’, use arms against each other, and cause the death of thousands, it seems difficult to categorise their interaction as something else than ‘war.’”); Greg Travallio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 *CHI. J. INT’L L.* 97, 100-01 (2003) (“There is no doubt that the United States and others are engaged in a ‘war’ against terrorism no less real than many other wars fought in the past.”); *see also* Jinks, *supra* note 20, at 41, 48-49 (“If humanitarian law is to regulate intense, organized hostilities, this law should apply to much of the conduct traditionally recharacterized as ‘terrorism.’”); Frank A. Biggio, Note, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 *CASE W. RES. J. INT’L L.* 1 (2002) (“First, acts of terrorism against a country by non-state sponsored organizations or individuals . . . should be considered acts of war against the victim nation. Accordingly, the traditional notions of war should be expanded to include rogue terrorists and their organizations as potential adversaries. Second, if a nation can declare war against a non-state sponsored organization, international law must make concessions that will allow a country to prosecute such a war by conducting limited intrusions into the sovereign territory of another nation if that nation is unable or unwilling to cooperate with efforts to prevent further terrorist acts by groups or individuals operating within their boundaries.”).

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49. *See* Alain Pellet, *No, This Is Not War*, in European Journal of International Law Discussion Forum: The Attack on the World Trade Center: Legal Responses, at [http://www.ejil.org/forum\\_WTC](http://www.ejil.org/forum_WTC) (last visited Feb. 2, 2005) [hereinafter *EJIL Discussion Forum*]; Giorgio Gaja, *In what Sense was there an “Armed Attack”?*, in *EJIL Discussion Forum, supra*; Antonio Cassese, *Terrorism is also Disrupting Some Crucial Legal Categories of International Law*, in *EJIL Discussion Forum, supra*.

50. *See* Cassese, *supra* note 49.

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51. George Aldrich, for example, recognizes that two separate armed conflicts existed in Afghanistan: a conflict between the United States and Al Qaeda, and a conflict between the United States and Afghanistan. George H. Aldrich, *The Taliban, Al-Qaeda and the Determination of Illegal Combatants*, 96 *AM. J. INT’L L.* 891, 893 (2002). However, Aldrich does not specify which kind of armed conflict the armed conflict between the United States and Al Qaeda should be considered. *Id.* Joan Fitzpatrick takes the view that the

cation of the hostilities, the views are diverse. Some take the view that in its first stages the conflict between the United States and Al Qaeda was an intra-state armed conflict.<sup>52</sup> Others, including certain human rights organizations,<sup>53</sup> take the view that we are facing a new type of hostility that requires new rules.<sup>54</sup> Finally, major human rights organizations take

situation cannot be characterized as either an inter-state armed conflict with Al Qaeda or as an intra-state armed conflict in the United States. See Fitzpatrick, *supra* note 20, at 348-49. Fitzpatrick does not make any alternative suggestion for the classification of such hostilities. See *id.*

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52. For example, Derek Jinks argues that “the laws of war applicable in non-international armed conflict govern the September 11 attacks . . . .” Jinks, *supra* note 20, at 9. However, Jinks also argues that, from the moment the President of the United States authorized the deployment of U.S. forces in Afghanistan, the situation became, “without question, an ‘international armed conflict’ in which the laws of war apply.” *Id.* at 34. Orna Ben-Naftali and Keren Michaeli take a similar approach with regard to the classification of the recent hostilities between Israel and Palestinian non-state actors, arguing that these hostilities constitute an intra-state armed conflict. Ben-Naftali & Michaeli, *supra* note 20, at 256. In the context of the Israeli-Palestinian conflict, this position is highly questionable, as is demonstrated by the fact that the authors’ analysis mixes the concepts of occupation, and intra-state and inter-state armed conflicts. *Id.*

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53. Interights, for example, declares that “it may be that the events of September 11 highlight a new hybrid type of armed conflict between organized groups and foreign States. The law governing such a scenario is unsettled.” HELEN DUFFY, RESPONDING TO SEPTEMBER 11: THE FRAMEWORK OF INTERNATIONAL LAW (2001), available at <http://www.interights.org/about/Sept%2011%20Parts%20I-IV.htm> (last visited Feb. 4, 2005).

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54. See Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 2 (2002) (“We thus find ourselves between the threats and the wars of the twentieth century and those of the twenty first. The war in Afghanistan is not a war against a geographically bounded state, nor is it a war against a religion, a people or a civilization. It is a new kind of war, a war against stateless networked individuals . . . . To respond adequately and effectively to the threats and challenges that are emerging in this new paradigm, we need new rules.”). Stein Tønnesson, director of the International Peace Research Institute in Oslo, argues that:

The war . . . between Al-Qaeda and the United States does not seem to fit into either of the two normal categories [inter-state armed conflict or intra-state armed conflict], and also does not seem to be covered by the ‘internationalised intrastate’ label since it did not have its origin in any particular intrastate war . . . . [T]he war between Al-Qaeda and the United States is trans-national rather than international, and its features in many ways resemble those of internal wars . . . . Thus the war seems essentially civil, and must be analysed with the methods used for understanding civil wars, al-

the view that the conflict in Afghanistan was an inter-state armed conflict between the United States and Afghanistan, and that Al Qaeda was merely a part of the Afghan armed forces.<sup>55</sup> Later on, when the hostilities with Al Qaeda contin-

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though it is trans-national and global in character. Intuitively, the term 'global civil war' thus seems appropriate.

Tønnesson, *supra* note 48. Charles Dunlap, an officer in the United States Armed Forces, also suggested that we are facing a new type of armed conflict, though in his view more similar to inter-state armed conflict: "The War on Terrorism is unlike any other war in American history. Terrorists do not wear uniforms, carry weapons openly, fight as organized units, or obey the most fundamental principles of the [Laws of Armed Conflicts]. This new war combines the elements of an international criminal investigation." Charles J. Dunlap, *International Law and Terrorism: Some "Qs and As" for Operators*, ARMY LAW, Oct./Nov. 2002, at 23.

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55. Human Rights Watch issued a report soon after the American-led invasion of Afghanistan:

As noted, the most developed part of international humanitarian law is the law governing armed conflict between states. The hostilities between the forces of the U.S.-led coalition and the Taliban government in Afghanistan fit into this category. The same law governs armed conflict insofar as one government has been joined by a paramilitary organization that has been integrated into the government's armed forces. The military portion of [A]-Qaeda in Afghanistan, sometimes referred to as the 55th Brigade, appears to have such an integrated relationship with Taliban military forces.

Human Rights Watch, *Legal Issues Arising from the War in Afghanistan and Related Anti-Terrorism Efforts* (Oct. 2001), at <http://www.hrw.org/campaigns/september11/ihlqna.htm/ihlqna.pdf>.

In April 2002, Amnesty International issued a memorandum to the U.S. government and urged that the search for justice following September 11 attacks be conducted in strict compliance with international human rights and humanitarian law:

Amnesty International believes that those captured and held by the USA during the conflict in Afghanistan must be presumed to be prisoners of war, whether they belong to the Taleban [sic] or *al-Qa'ida*. The Taleban [sic] were effectively the armed forces of Afghanistan when the US military operations began in October 2001, and *al-Qa'ida* fighters appear to have been an integral part of such forces, thus fulfilling the requirements of article 4(1) of the Third Geneva Convention.

Amnesty Int'l, Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay 32 (2002), available at <http://web.amnesty.org/ai.nsf/recent/AMR510532002>.

ued elsewhere, the difficulty with the human rights organizations' initial legal position became more apparent.<sup>56</sup>

Although the body of literature discussed above represents a variety of opinions, two essential features run throughout. First, by and large, the literature analyzes the conflict between the United States and Al Qaeda without any in-depth consideration of the broader context of extra-state hostilities. Second, most of the opinions are based on an analysis of the language of the Geneva Conventions without reference to any other possible source of authority, or to the possibility of amending, supplementing, or truncating the language of the Conventions. The remainder of this Article presents an analytical approach that is not limited in these ways.

56. See also Jinks, *supra* note 20, at 12 n.58 (arguing that, even in Afghanistan, Al Qaeda cannot be seen as part of the Taliban armed forces); Aldrich, *supra* note 51. Human Rights Watch discusses future possible actions against Al Qaeda outside of Afghanistan—where Al Qaeda cannot be viewed, even according to Human Rights Watch, as an Afghan paramilitary organization—and takes the view that such actions should be viewed as law enforcement measures to which human rights law applies:

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“War”, of course, has been invoked rhetorically to describe campaigns against criminal groups such as drug cartels or the Mafia. However, such campaigns in fact are generally coordinated efforts of law enforcement, even where military means are employed, and not the launching of combat operations outside the context of criminal justice. Traditional human rights law applies to such efforts.

Human Rights Watch, *supra* note 55. This position implies that Human Rights Watch views the situation as one of peace, to which the laws of armed conflict do not apply. Pertinent questions, such as how “law enforcement measures” can take place outside the territory of the state are not pursued in the analysis. Amnesty International has adopted a similar view. Following the missile attack allegedly committed by the United States on an Al Qaeda commander in Yemen on November 3, 2002, Amnesty International published the following statement: “If this was the deliberate killing of suspects in lieu of arrest, in circumstances in which they did not pose an immediate threat, the killings would be extra-judicial executions in violation of international human rights law.” Press Release, Amnesty International, Yemen/USA: Government Must Not Sanction Extra-Judicial Executions (Nov. 8 2002), available at <http://web.amnesty.org/ai.nsf/recent/AMR511682002!Open> [hereinafter Amnesty International]. Obviously, this statement reflects the view that international humanitarian law, which allows the targeting of combatants, does not govern the situation.

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### III. WAR OR PEACE: ARE EXTRA-STATE HOSTILITIES A FORM OF ARMED CONFLICT?

#### A. *Arguments in Favor of the Classification of Extra-State Hostilities as Armed Conflicts*

This Part presents the principal arguments supporting the view that when extra-state hostilities pass a certain threshold, an armed conflict exists. It is not necessary for the purpose of this work to determine what the threshold ought to be. It is enough to accept that such a threshold exists and that it is in some way recognizable to the warring sides or to the international community.

First, nothing in the words “armed” or “conflict” suggests that the concept of an armed conflict should be limited to conflicts between states. The word “armed” suggests that the conflict should involve the use of arms and could be interpreted to require the involvement of armed force; the word “conflict” may be interpreted to imply a certain threshold of violence. But neither implies anything with respect to the identity of the parties to such a conflict.

Second, as there is no dispute that an armed conflict can exist between a state and a non-state actor *within* the territory of a state,<sup>57</sup> it is difficult to see why hostilities between a state

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57. In my view, any hostilities within a state that go beyond a certain threshold constitute an intra-state armed conflict. Some scholars, however, argue that there must be a political element in an armed conflict. See, e.g., Peter Wallenstein & Margaret Sollenberg, *Armed Conflict, 1989-2000*, 38 J. PEACE RES. 629, 643 (2001). The roots of this argument are found in Clausewitz’s famous saying that war is a continuation of foreign policy by other means. Accordingly, ongoing violence between a government and drug dealers should not be viewed as an armed conflict, while the same hostilities between the government and rebels should be viewed as an armed conflict.

In my view, the motivation for the use of force should not be relevant to the characterization of the situation as an armed conflict. In this respect, see the proposed definitions of war that leave out any discussion of motivation in DETTER, *supra* note 43, and DINSTEIN, *supra* note 6. An interesting example in this respect, though in the context of inter-state armed conflicts, is the invasion of Panama by the United States in December 1989. The operation was motivated in part—if not entirely—by a desire to deal with the threat of drugs. While the use of force by the United States in this case has been widely criticized as illegitimate, the application of the laws of armed conflict to the situation has not been disputed. See *United States v. Noriega*, 746 F. Supp 1506 (S.D. Fla. 1990); *United States v. Noriega*, 808 F. Supp 791 (S.D. Fla. 1992); MARCO SASSOLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT*

and a non-state actor that are not limited to the territory of a state should be characterized any differently.

Third, states that are parties to Additional Protocol I are apparently willing to accept that if a non-state actor meets certain conditions specified in article 1(4) concerning the cause of the conflict,<sup>58</sup> it can be a party to an armed conflict with a state, even when such a conflict is not limited to the territory of the state.<sup>59</sup> Hence, states that are parties to Additional Protocol I have accepted the conceptual proposition that at least certain types of extra-state hostilities can be regarded as an armed conflict. It is difficult to see how states party to Additional Protocol I can argue that when the same level of hostilities takes place between a state and a non-state actor in circumstances in which the non-state actor does not meet the conditions of article 1(4), the situation is not an armed conflict.

Fourth, the reality on the ground is instructive. Governments kill agents of non-state actors, whom they designate “combatants.” Sometimes they even kill civilians and explain the killing as “collateral damage.” Moreover, non-state actors kill states’ soldiers and civilians. Conflicts of this type sometimes involve intense hostilities, the use of heavy weaponry, and a relatively large number of casualties. These conditions are similar to—indeed, often indistinguishable from—the conditions in situations that the existing laws deem to be “armed conflicts.” Given the similarities that extra-state hostilities bear

IN WAR? 944 (1999) (reproducing a brief of the government of Panama as *amicus curiae*, in support of a petition for a writ of certiorari in *Lindo & Maduro, S.A. v. United States, cert. denied*, 506 U.S. 973 (D.C. Cir. 1992) (mem.)).

58. Additional Protocol I, *supra* note 3, art. 1(4) (“The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . .”).

59. Article 1(4) of Additional Protocol I does not require that the conflict will be limited to the territory of the state. *Id.* art. 1(4). In fact, struggles for self-determination often involve fighting outside the territory of the state involved. For example, the conflict between Israel and Palestinians takes place, in substantial part, in the West Bank and the Gaza Strip, *see* Sharm El-Sheikh Fact Finding Committee, *supra* note 33; and the conflict between Morocco and the Saharawis takes place in Western Sahara, which is not internationally recognized as part of Morocco, *see* Zoubir, *supra* note 28. Note, however, that neither Israel nor Morocco are parties to Additional Protocol I. *Cf.* Additional Protocol II, *supra* note 3, art. 1 (requiring that the conflict be in the territory of the high contracting party).

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to other situations perceived as armed conflicts, it seems logical to define the former as armed conflicts as well, rather than to rely on artificial distinctions.<sup>60</sup>

Fifth, rejecting the applicability of the laws of war to such hostilities would have harsh results, as the laws of peace are not designed to deal with situations of large-scale violence, such as when a state and a non-state actor engage in extra-state hostilities.<sup>61</sup> The laws of peace do not, for example, regulate bombardment from the air or the use of landmines. Under the laws of peace, there is no distinction between combatants and civilians, no issue of prohibited weapons and no question of military necessity. When a situation of extra-state hostilities exists, the laws of peace arguably become irrelevant.<sup>62</sup>

Finally, whether states are justified in using force outside their territory in struggles against non-state actors is currently a matter of intense debate. This Article does not explore new arguments in this debate. Those who believe that use of force by states against non-state actors is justified will obviously accept the position that when states in fact use force against non-state actors, the situation is an armed conflict to which a certain variation on the laws of armed conflict should apply. There are, of course, those who object in principle to the use of force by states in such situations. Yet, given the divergence of views on the subject, the ongoing debate as to the applicable law, and the recent empowerment of non-state actors, such use of force by states is bound to happen. The real question for those who object to the legitimacy of such use of force is whether it is more worthwhile to insist on ideals that will not be respected by states in practice or to work towards a more pragmatic arrangement of the law. The fact remains that, regardless of the legal regime applied, states that are faced with

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60. Tønnesson, *supra* note 48 (arguing that the conflict between Al Qaeda and the United States should be categorized as a war). **R**

61. In fact, certain situations in times of peace, such as self-defense operations that do not reach the threshold of an armed conflict, are also governed by the laws of armed conflict. Therefore, one can argue that extra-state hostilities should be viewed as an extended self-defense operation that, even though it is governed by the laws of armed conflict, does not transform the legal characterization of the situation into an armed conflict. This position is analyzed *infra* Part III.

62. Jinks, *supra* note 20, at 41, 48-49 (arguing that humanitarian law is the legal regime that governs such hostilities). **R**

substantial enough threats will continue to pursue military operations against non-state actors outside their own territory. Therefore, insisting on a legal regime that defines any military action taken by these states as unlawful will lead states to reject this legal regime as a whole. On the other hand, establishing a legal regime that draws a clear distinction between the question of the legitimacy of the use of force against non-state actors and the question of the norms that should govern such hostilities once they have commenced may, in practice, achieve better protection for civilians and combatants alike.

In armed conflicts between states, a distinction is drawn between *jus ad bellum*, the law that governs the right to use force, and *jus in bello*, the law that governs the conduct of hostilities. Hence, even when the use of force is unlawful, *jus in bello* applies. The logic that supports this distinction in the general rules of armed conflict also supports maintaining the distinction in cases of extra-state hostilities.

B. *Arguments Against the Classification of Extra-State Hostilities as Armed Conflicts*

In spite of the arguments presented above, the question of whether to characterize extra-state hostilities as an armed conflict is not a simple one. This subsection considers some of the objections that might be raised against such a classification.

First, the justification for the use of force by states against non-state actors outside of the territory of the state is different than the justifications provided for the use of force in other types of armed conflicts. Some of the arguments in the previous Part are based on the assertion that there is no material difference between extra-state hostilities and other types of armed conflict. This assertion should be questioned. The justification for action within the territory of another state is based on the following argument: The territorial state has an obligation under international law to prevent harm to other states from its territory; when the territorial state does not fulfill its obligation, because it is either unwilling or unable to do so, the victim state has the right to engage in extra-territorial

law enforcement.<sup>63</sup> But once a state justifies its action as extra-territorial law enforcement, questions arise as to whether the resulting hostilities should be conceptualized as an armed conflict and whether the rules that apply to such hostilities should be similar to the rules governing other types of armed conflict.

Second, there is a concern that recognition of extra-state hostilities as an armed conflict serves to legitimate killings. In peacetime, the state is only permitted to arrest and prosecute agents of a non-state actor. When an armed conflict exists, on the other hand, the state has the right to target and kill those who take part in hostilities against it. Hence, the argument can be made that, by recognizing a certain situation as an armed conflict, a choice is made that legitimates *a priori* the killings that take place in its context.<sup>64</sup> The problem is even more acute in those situations in which it is unjustified for a state to use military force against a non-state actor.<sup>65</sup> Why

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63. DINSTEIN, *supra* note 6, at 213-21; Carsten Stahn, *International Law Under Fire: Terrorist Acts as "Armed Attack"*, 27 FLETCHER F. WORLD AFF. 35, 44, 47 (seeing the unwillingness or inability to prevent terror attacks as a justification for the use of force by the victim state). Note that Stahn suggests that the use of force is permissible against the territorial state, while Dinstein argues that only the non-state actor can be attacked. I share Dinstein's viewpoint on this matter.

64. See Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (arguing that the laws of war have been formulated and have served to legitimate destructive methods of combat). On the other hand, it can be argued that the characterization of extra-state hostilities as an armed conflict does not convey any legal endorsement of the use of force by the state. In the inter-state context, the illegitimate use of force by one state towards another does not prevent the situation from being classified as an armed conflict. The law deals with the illegitimate use of force by holding the aggressor state responsible for the crime of aggression. Arguably, a similar balance should be struck in the case of extra-state hostilities. It is doubtful, however, whether the present regime concerning aggression is appropriate to regulate illegal use of force. This issue is currently the subject of fierce debate in the negotiations concerning the definition of aggression under the Statute of the International Criminal Court. See Jennifer Trahan, "Aggression": *Why the Preparatory Commission for the International Criminal Court has Faced Such a Conundrum*, 24 LOY. L.A. INT'L & COMP. L. REV. 439, 448-49 (2002).

65. There are, however, serious practical objections to adopting a position according to which an armed conflict is recognized to exist only when the use of force by a state is legitimate. First, at present there is no agreement as to whether and when it is legitimate for a government to engage in hostilities against a non-state actor. Conditioning the legal characterization of such hostilities on the issue of legitimacy, therefore, substantially in-

should the law serve to legitimate killings of non-state actors in such situations? What is the difference between such a killing and any other murder?<sup>66</sup>

Third, recognizing extra-state hostilities as an armed conflict favors states over the non-state actors that they fight against in two ways. First, states have more legitimate powers in times of war than in peacetime, while the powers that non-state actors can legitimately use are not necessarily affected by this change in classification.<sup>67</sup> Second, even in a case in which the non-state actor has similar rights to those of the armed forces of a state under the laws of armed conflict,<sup>68</sup> the practical application of those laws usually favors the state.<sup>69</sup> But should the law favor states even when the non-state actor is

creases the uncertainty of the legal system. Second, states will always claim legitimacy for the actions they take against non-state actors, and will consequently apply the rules of armed conflict to such situations anyway. Hence, it may be that tying the definition of a situation of hostilities as armed conflict to the legitimacy of the use of force will make the legal system less relevant to state practice. *Contra* Roberts, *supra* note 2, at 741.

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66. See DINSTEIN, *supra* note 6, at 140. In his criticism of the principle of equality between the aggressor state and the victim of aggression, Dinstein argues that:

The contention rests on the reasoning that every war inevitably consists of a series of acts that are criminal in nature . . . . When a combatant kills an enemy soldier on the battlefield, he is immune from criminal prosecution for murder (he benefits from a 'justification'), because—and to the extent that—the war is lawful. Stripped of the mantle of such legality, the act in question stands out as starkly unjustifiable and inexcusable killing of a human being.

*Id.* (internal citations omitted).

67. For example, in times of peace states are not allowed to target agents of the non-state actor, while during an intra-state armed conflict the state may target such agents. On the other hand, non-state actors commit a crime if they target soldiers of the state either in peace time or during an intra-state armed conflict.

68. For example, in cases that fall under article 1(4) of the Additional Protocol I, *supra* note 3.

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69. The law of armed conflict allows the use of weapons that states have (such as planes and missiles) and that non-state actors rarely possess. On the other hand, it prohibits perfidy, which is mostly used by non-state actors. Additional Protocol I, *supra* note 3, art. 37.

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struggling for a legitimate cause? Likewise, should the law favor states when they use force unlawfully?<sup>70</sup>

Notably, this objection is based on the debatable view that the laws of armed conflict should take fairness into account.<sup>71</sup> However, this view, even if accepted, only justifies the introduction of certain amendments to the rules of conflict (*jus in bello*) that would promote equality of arms between the parties to the conflict. It does not support the rejection of the classification of the conflict as an armed conflict. Indeed, in interstate hostilities, even those who believe in fairness as an objective of the laws of armed conflict have never suggested that a conflict between a weak state and a strong state be viewed as something other than an armed conflict. Thus, it seems that concerns about equality between states and non-state actors should not affect the determination of whether hostilities should be characterized as an armed conflict.

Fourth, the characterization of extra-state hostilities as an armed conflict might encourage states to escalate the level of violence because, in that way, states can change the legal characterization of the situation from peacetime to armed conflict. Such a change in legal status would allow states that struggle with non-state actors to use additional measures that they could not use legally in peacetime (such as the killing of non-state actors' agents).

Though not without some merit, this last argument is a thorny one. States will always have strong reasons to try to contain violence, rather than escalate it. It is by no means self-evident that states that are able to deal with a non-state actor through measures available during peacetime would aspire to bring their country to a situation of armed conflict, especially if the threshold of hostilities that is required for the situation to become an armed conflict is substantial. Obviously, there may be differences in this respect between different types of

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70. See DINSTEN, *supra* note 6, at 141. (“[N]o new powers (i.e. powers beyond those available in peace time) may be gained by a State waging an unlawful war.”).

71. This objection is not limited to armed conflicts between states and non-state actors. It derives from a basic disagreement as to the desirable objective of the laws of war. Should the goal be to promote a certain level of equality of arms between the parties to the conflict, so as to ensure a fair struggle? Or should it only be to protect humanitarian values in the context of an armed conflict?

political regimes. One can speculate that, in general, democracies are more likely to try to contain violence than totalitarian regimes.<sup>72</sup> However, as the conflict between the United States and Al Qaeda demonstrates, even democracies will sometimes have an interest in escalating the level of violence, thereby bringing it within the legal scope of an armed conflict.

Finally, there is another objection that is different from those discussed above, one that does not reject the characterization of the situation as an armed conflict. Rather, it views the situation as an armed conflict between two states: the state that is in conflict with the non-state actor (State A) and the state from which the non-state actor is acting (State B). Despite this argument's apparent appeal, it suffers from a number of fatal flaws.

Two arguments may be advanced in support of the position that the armed conflict is between two states. First, one might argue that any ongoing military action of one state in the territory of another state inevitably creates a situation of armed conflict between the two states.<sup>73</sup> There are two major difficulties with this view. First, characterizing the situation as an armed conflict between states, when the real conflict is between a state and a non-state actor, is an artificial solution which is in many respects a symptom of the larger difficulty with the position of non-state actors in international law. In some cases, there may be no conflict between the two states.

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72. The United Kingdom, for example, made considerable efforts not to characterize its conflict with the IRA as an armed conflict. See *Compromise Clears Way for U.N. Effort to Halt Use of Child Soldiers*, ST. LOUIS POST-DISPATCH, Apr. 25, 2004, at A15 (indicating that the British government rejected the use of the term "armed conflict" to refer to the dispute in Northern Ireland). The Iraqi government, on the other hand, did not hesitate to use clearly military means in its conflict with the Kurdish Front. See Hadi Elis, *The Kurdish Demand for Statehood and the Future of Iraq*, 29 J. SOC. ECON. & POL. STUD. 191, 198 (2004).

73. According to this line of argument, when the United States consistently uses force in Afghanistan against Al Qaeda, an armed conflict exists between the United States and Afghanistan even if no hostilities take place between the United States armed forces and the armed forces or military groups loyal to the government of Afghanistan. If this is the case, and hostilities between the United States and Al Qaeda in the territory of Afghanistan can be characterized as an armed conflict between the United States and Afghanistan, then the Geneva Conventions apply to the conflict under article 2(1). See Geneva Conventions, *supra* note 3, art. 2(1).

State B may, in fact, invite State A to take military action in its territory. Second, characterizing the situation as an armed conflict *between* states extends the scope of the conflict instead of containing it, rendering military installations of State B legitimate military targets. Hence, in my view, unless hostilities actually involve the armed forces of the two states, the situation is not one of armed conflict between them.

The second argument made in support of the idea that conflicts of the kind under discussion are actually a form of inter-state conflict is that State B is responsible for the actions taken by the non-state actor from its territory. Hence, State A has the right to use force against State B.<sup>74</sup> But even if a state has the right to use force against another (which is not at all clear), it is not necessarily true that the state will act on that right. Thus this second argument goes to the legitimacy for using force, rather than to how the situation should be characterized. State A may decide to target only agents and installations of the non-state actor: Under such circumstances, the two states could only be in armed conflict if the non-state actor is seen as an agent of State B,<sup>75</sup> since in this case attacking the non-state actor is equivalent to attacking the state. If there are no agency relations, and the hostilities are only with the non-state actor, one cannot establish the existence of an armed conflict between the two states.

74. See DINSTEIN, *supra* note 6, at 220 (adopting the view that State A cannot use force against State B, but only against the non-state actor, unless a relationship of agency exists); cf. Feinstein, *supra* note 6, at 276-88 (supporting the use of force against the harboring state).

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75. The legal test for these agency relations should not be confused with the relevant rules of international law concerning attribution of actions of non-state actors to states for the purposes of state responsibility (the legal boundaries of which were carved out in the International Court of Justice's decision in the case of Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27)), nor should it be confused with the rules under international law concerning attribution of actions of non-state actors to states for the purposes of defining whether a conflict is of inter-state or intra-state nature (the legal boundaries of which were carved out in Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996)). Moreover, even if the actions of the non-state actor can be attributed to the territorial state for the purposes of the rules of *jus ad bellum* (as some scholars suggest), it does not necessarily mean that an attack by the victim state against the non-state actor should be viewed as an attack against the territorial state.

### C. *Four Ways of Classifying Extra-State Hostilities*

The analysis in the two previous Parts demonstrates that there are convincing arguments on both sides of the debate about whether extra-state hostilities should be classified as a species of armed conflict for the purposes of international law. In light of these arguments, and given the important dichotomy in international law between war and peace, let us consider the four possible solutions for the classification of such hostilities.

First, there is the theoretical possibility that, in spite of the extensive use of force, the situation remains one of peace, in which case the hostilities are governed by the laws of peace. As mentioned above, in a situation where ongoing hostilities are in fact taking place, this solution is unworkable and artificial—the law simply will not square with reality. Insisting on the characterization of such situations as peace is so removed from reality that it is a utopian aspiration. Although such a position may theoretically play an important role in efforts to restrain the use of force in the international arena, as a practical matter it can expect no better outcome than we have seen from other utopian initiatives, such as the Kellogg-Briand Pact.<sup>76</sup>

Second, it is possible that extra-state hostilities create an intermediate situation somewhere between armed conflict and peace. Because no category currently exists between armed conflict and peace in contemporary positive law,<sup>77</sup> the creation

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76. Treaty for the Renunciation of War, Aug. 27, 1928, 94 L.N.T.S. 57. On the futility of the Kellogg-Briand Pact, see Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781, 792-93 (1994) (“The Kellogg-Briand Pact was dead on arrival, flouted repeatedly in the 1930s and most flagrantly in World War II. Kellogg-Briand is now derided as the worst example of Wilsonian naiveté, the paradigm of the ineffectiveness of treaties.”) (internal citations omitted).

77. From the inception of modern international law the prevailing view has been that states are either at war or at peace with one another and that no intermediate state exists between war and peace. DINSTEIN, *supra* note 6, at 15. A number of scholars over the last century have suggested reconsidering this traditional dichotomy. George Schwarzenberger presented a comprehensive critical survey of the historical development of the dichotomy between war and peace and called for recognition of a category of a *status-mixtus*. Georg Schwarzenberger, *Jus Pacis ac Belli? Prolegomena to a Sociology of International Law*, 37 AM. J. INT’L L. 460, 470 (1943). Philip Jessup, in the context of the debate over the legal status of the Korean War, urged the acceptance of a state of “intermediacy” between war and peace. Philip C.

of such category would provide a flexible platform for balancing the considerations of those who support viewing the situation as an armed conflict and those who favor classifying it as a form of peace. In spite of the theoretical attractiveness of such a track, it is quite problematic, especially for those who are concerned with the practical effects of legal theories. Because there is no legal category at the moment between war and peace, the creation of such a category would require the development of rules to govern the new category. In the absence of any such rules, states may feel that they may follow whatever course of action they find expedient. Hence, for the time being, the creation of such a category, even if theoretically sound, would not promote the protection of the humanitarian values.

However, in some respects this Article is a first step towards the creation of an intermediate category between war and peace. As will become clear in the following Parts, the regulation of extra-state hostilities that is envisaged by this Article is based on the interpretation of the general principle of the laws of armed conflict in light of the unique features of extra-state hostilities. The guidelines proposed for this interpretative process recommend introducing rationales that are derived from the laws of peace (in particular, those laws dealing with law enforcement operations) into the rules regulating extra-state hostilities. Thus, the legal framework for the regulation of extra-state hostilities proposed in this Article can be viewed as located somewhere between the laws of war and the laws of peace. Indeed, once this legal framework is more solidly established, it may become possible to reconceptualize it as an intermediate legal framework that falls between these two extremes.

Third, extra-state hostilities—where the state is engaging in no more than extra-territorial law enforcement—may be classified as self-defense during a time of peace. These law enforcement actions would then be governed by a legal regime

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Jessup, *Should International Law Recognize an Intermediate Status between Peace and War?*, 48 AM. J. INT'L L. 98, 100 (1954). However, these views do not represent the mainstream position in international law, which so far has rejected the existence of a third category between war and peace. DINSTEIN, *supra* note 6. In the context of regulating hostilities between states and non-state actors outside the territory of the state, no one has discussed the possibility of creating an intermediate category between war and peace.

parallel to the one that applies to individual actions of self-defense between states. According to these laws, the use of force is justified only if it meets three conditions derived from the famous *Caroline* incident: necessity, proportionality, and immediacy.<sup>78</sup> Moreover, in accordance with the literature and jurisprudence regarding the use of force in self-defense during peacetime, the laws that would govern military actions taken in self-defense would be the same laws as apply in times of formal armed conflict.<sup>79</sup>

Finally, for the reasons stated above, it is possible to classify extra-state hostilities as an armed conflict. Particular attention must be paid to the many similarities this situation bears to other situations of ongoing hostilities that are defined as an armed conflict. Current practice suggests that the tendency among states is indeed to view such hostilities as armed conflicts, and the academic literature overwhelmingly favors such position.<sup>80</sup>

This Article does not attempt to decide whether the third model, which characterizes certain military actions as self defense in times of peace, is preferable to the fourth model, which defines the same military action as armed conflict, or vice versa. Both of these models are viable possibilities for the protection of humanitarian values in the context of extra-state hostilities, because under both of these models the laws of armed conflict serve as a basic frame of reference for the regulation of such hostilities. The main difference between these models is the extent to which they limit the freedom of action of the states in their struggle with non-state actors. Under the third model a specific justification is required for each and every military action taken, while under the fourth model, the prevalent view is that once the conflict has erupted, such justification is unnecessary.<sup>81</sup> Hence, the third model places a greater limitation—some may say too great a limitation—on the use of force compared to the fourth model.

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78. See John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 572 (2003); DINSTEIN, *supra* note 6, at 219-21.

79. See Dinstein, *supra* note 6, at 219-21.

80. See *supra* note 48 and accompanying text.

81. For an opposing view, see Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUD. 221 (1983).

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However, as explained in the next Part, even if one adheres to the fourth model, certain adjustments in the application of the laws of armed conflict to extra-state hostilities are warranted. One such adjustment that should be considered is the possibility of insisting that each military action meets the requirements of self-defense: necessity, proportionality, and immediacy. If adopted, such requirements would bring the third and the fourth models even closer together. Thus, the concerns that may lead one to prefer the third model over the fourth one can be addressed within the context of the fourth model. For that reason, and in light of the fact that the recent literature on the subject, recent state practice, and the practice of human rights organizations all seem to reflect a tendency towards recognition extra-state hostilities as armed conflicts, the rest of this Article will build on the fourth model.

D. *Preliminary Thoughts on the Adaptation of the Laws of War to Conflicts Involving Extra-State Hostilities*

The question of which law applies to conduct engaged in during extra-state hostilities is easier to resolve. The law of armed conflict—the only legal regime that is designed to deal with the legal issues that come up in the context of ongoing hostilities—represents the best frame of reference for the regulation of large-scale ongoing hostilities, including extra-state hostilities. The use of the term ‘frame of reference’ is not coincidental. Applying the laws of armed conflicts to extra-state hostilities ignores the difficulties and concerns that were raised earlier in this Part. Therefore, the laws of armed conflict should be applied only as a general framework—a starting point—within which sufficient flexibility should be preserved in its specific application to accommodate these concerns.

Practically, this means that the basic principles of the laws of armed conflict—such as the need to distinguish between combatants and civilians, the principle of military necessity, and the principle of humanity—are applicable. At the same time, the concerns that were raised above should be reflected in the introduction of certain interpretations of these principles in the context of extra-state hostilities, which represent adjustments of the laws of war as applied to other situations of armed conflicts.

Two rationales for adjustments should be considered. First, the applicable law should reflect the limited justification in contemporary international law for the use of force by states against non-state actors outside their own territory. As discussed above, one mainstream justification for such use of force is the doctrine of extra-territorial law enforcement, which determines the purpose of an armed operation as enforcing the law against individuals or groups operating against the state, rather than imposing the political will of the state on another state.<sup>82</sup> It may be that certain issues in the laws of war should be revisited in light of this justification. For example, one should reconsider whether a separate justification is necessary for each military action in these conflicts, and, if so, what type of justification is required. In addition, one might question whether each member of the non-state actor is defined as a combatant merely due to his membership in the organization, whether the standard of care imposed by the laws of armed conflicts regarding collateral damage should be elevated, and whether the use of certain weapons that pertain to law enforcement operations should be permitted.

The second rationale tries to address the concern that states will either misuse the recognition of a new category of armed conflict for illegitimate objectives or will engage in hostilities against non-state actors that are fighting for what is widely considered a legitimate cause. In light of this concern, it may be necessary to consider whether a modified version of the laws of armed conflict should apply to non-state actors in certain situations (affording more protections to the agents of the non-state actor, for example), while in cases where the struggle of the non-state actor is considered to be illegitimate, a different version of the laws of armed conflicts should apply.

Such an approach, though controversial, is not unprecedented in the history of the laws of armed conflicts. For similar concerns, Additional Protocol I recognized in article 1(4) that the laws of inter-state armed conflicts should apply to certain armed conflicts that were traditionally considered purely intra-state matters.<sup>83</sup> As a result, Additional Protocol I puts both sides of these conflicts on equal footing in terms of their

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82. See *supra* note 63 and accompanying text.

83. Additional Protocol I, *supra* note 3, art. 1(4).

rights and obligations, and according to some, even gives preference to non-state actors.

In light of the political compromise inherent in Additional Protocol I and the concerns raised in the previous Part regarding the possibility that states may seek to illegitimately define hostilities as armed conflicts for their own gain, one might argue that in cases where the government is justified in taking international law enforcement measures, such as when it is fighting a widely condemned terrorist group, a certain version of the laws of armed conflict should apply—perhaps one that is more informed by the rules of intra-state armed conflicts. However, when the struggle of the non-state actor is considered to be legitimate, it would be governed by a different version of the laws of armed conflicts—one that is more informed by the rules of inter-state armed conflicts.

Obviously such an approach introduces a significant component of subjectivity into the application of the law. Similar arguments were discussed in detail in the literature analyzing article 1(4) of Additional Protocol I, and the whole issue of the status of this article is still subject to major disagreement within the international community.<sup>84</sup> However, this disagreement only highlights the pressing need to consider the issue in the context of the regulation of extra-state hostilities.

The practical ramifications of these proposals is discussed in greater detail in Parts V and VI, which address the specific application of the laws of armed conflict to extra-state hostilities. However, before moving into the discussion on questions of positive law, it is important to consider how the phenomenon of extra-state hostilities relates to recognized types of armed conflicts: inter-state armed conflicts and intra-state armed conflicts.

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84. For a discussion of the controversy surrounding the ratification of article 1(4) of Additional Protocol I, see Judith G. Gardam, *Noncombatant Immunity and the Gulf Conflict*, 32 VA. J. INT'L L. 813, 824-25 n.49 (1992); W. Hays Parks, Book Review, 26 GEO. WASH. J. INT'L L. & ECON. 675, 678 (1993) (reviewing EDWARD K. KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* (1992)). For a critique of article 1(4), see Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 719, 752 (1994).

#### IV. EXTRA-STATE ARMED CONFLICT: A NEW CATEGORY OF ARMED CONFLICT

Given that the two primary features of extra-state hostilities are their extra-territorial nature and the fact that one party is a non-state actor, substantial differences exist between such hostilities and the traditional categories of armed conflicts.<sup>85</sup> This Part argues that these differences are sufficiently substantial that a new category of armed conflicts—extra-state armed conflicts—should be created in order to properly conceptualize these hostilities.<sup>86</sup>

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85. Adam Roberts, *Counter-terrorism, Armed Force, and the Laws of War*, 44 SURVIVAL 7, 11 (2002). Adam Roberts points out six fundamental ways in which “anti-terrorist military operations” differ from inter-state armed conflicts. First, such operations do not constitute armed conflicts between states. The military operations are not necessarily covered by the full scope of the rules regarding inter-state armed conflicts in the Geneva Conventions and Additional Protocol I. Second, anti-terrorist operations, even if conducted outside the territory of a state, may be more similar to intra-state armed conflicts, to which fewer laws apply. Third, in many cases the attributes and actions of terrorist movements may not come within the field of application even of the modest body of rules relating to intra-state armed conflicts. Fourth, terrorists have little regard for internationally agreed rules and the resolve of military forces that fight the terrorists to observe these rules may also be weakened. Fifth, the prohibition of targeting civilians can be difficult to apply because terrorist movements may not be easily distinguished from civilians, due to the irregular nature of their armed forces. Finally, some captured personnel who are members of a terrorist organization may not meet the criteria for prisoner of war status in the Geneva Convention III. *Id.* at 11-12.

The analysis in this Article differs from Roberts’ analysis in two important respects. First, it deals with armed conflicts between states and non-state actors, rather than with the more specific phenomenon of anti-terrorist military operations. Second, and more importantly, this Article does not find differences between extra-state armed conflicts and other types of armed conflicts in the positive law that applies to them, but rather suggests a new dichotomy that serves as a basis for deciding what laws should apply. The points that Roberts makes are contingent upon a certain legal situation. However, if one were to apply the laws of inter-state armed conflicts to extra-state armed conflicts, for example, most of the distinctions that are suggested by Roberts would not hold.

86. DUFFY, *supra* note 53; Stein Tønnesson, *A ‘Global Civil War’?*, 33 SECURITY DIALOGUE 389, 389 (2002).

### A. *Extra-State and Inter-State Armed Conflicts*

Extra-state armed conflicts and inter-state armed conflicts share some conceptual similarities. First, like inter-state armed conflicts, extra-state armed conflicts are not limited to the territory of the state involved. This feature plays an important role in the regulation of armed conflicts. The scope of the body of law that regulates intra-state armed conflicts was limited through the principle of state sovereignty specifically because intra-state armed conflicts occur within the territory of a state. The traditional understanding of state sovereignty makes it easier to intervene in what a state does outside its borders than in what it does within its own territory.<sup>87</sup> In the past, states could, and did, invoke their sovereignty to argue against limiting the military measures that they could use in the context of intra-state armed conflicts.<sup>88</sup> The state's sovereignty argument becomes much less relevant when hostilities

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87. Melissa Epstein states that:

The separate standard for internal armed conflicts reflect customary views concerning issues of state sovereignty, non-interference in another state's legitimate internal security affairs, and the concern over perceptions of providing international legitimacy to purely internal violence or terrorism that would be considered criminal conduct under the domestic laws of the affected jurisdiction.

Melissa J. Epstein, *The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions*, 179 MIL. L. REV. 68, 81 (2004).

88. Michael Matison summarizes this point of view:

The weaknesses of the law of internal armed conflict are well-known, and derive from a number of factors, including: . . . (2) the tendency of many governments—particularly in the Third World—to resist international regulation of internal conflicts as an intrusion on national sovereignty and an excuse for foreign intervention . . . . As a result, the traditional law of armed conflict dealt in a relatively detailed and comprehensive way with conflicts between states, but in a cursory and incomplete way with other conflicts. This dichotomy was displayed in the 1949 Geneva Conventions by the contrast between the hundreds of detailed articles devoted to international conflicts and the single rudimentary article in each of the four Conventions (so-called common article 3) on internal conflicts (which, even so, was a significant advance for its time).

Michael J. Matison, *The Law of Internal Armed Conflict*, 97 AM. J. INT'L L. 466, 466-67 (2003) (reviewing LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* (2002)).

take place in the territory of another state.<sup>89</sup> Therefore, extra-state armed conflicts and inter-state armed conflicts are similar in this respect.

Second, like inter-state armed conflicts, many extra-state armed conflicts involve international, or non-internal, aspects. In most instances, the non-state actor is a foreign entity. Its operatives are not necessarily nationals of the state that is involved in the conflict. The non-state actor's bases, training facilities, and headquarters, as well as most of its personnel, are more often than not located abroad. The goals of its struggle are, at least in some cases, based on a more international agenda that is not limited to internal issues, such as overthrowing the government of the state involved in the conflict. The armed conflict between Israel and Hezbollah during the 1990s is instructive. Hezbollah's agenda in the armed conflict with Israel focused, at least publicly, on terminating Israeli military presence in Lebanon, undoubtedly an international issue between Israel and Lebanon. Hezbollah's bases, training facilities, and headquarters, as well as most of its personnel were located in Lebanon. All of these attributes give the conflict a very strong international flavor, and in this respect are similar to inter-state armed conflicts.<sup>90</sup>

These similarities support the argument that, conceptually, extra-state armed conflicts are similar to inter-state armed conflicts and that, as a result, the general framework that regulates inter-state armed conflicts should also regulate them. Under this view, to the extent that there are differences between extra-state armed conflicts and inter-state armed conflicts, these differences should be reflected by adjusting the laws of inter-state armed conflicts to fit the context of extra-

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89. To the extent that sovereignty does play a role in extra-state armed conflicts, it probably works the other way: That is, it advocates greater protection of the state whose territorial sovereignty is infringed, and, therefore, places more obligations upon the state that is a party to the conflict.

90. For a general description of the history of the armed conflict in Lebanon, see Adir Waldman, *Clashing Behavior, Converging Interests: A Legal Convention Regulating A Military Conflict*, 27 YALE J. INT'L L. 249, 253-55 (2002). The conflict between the United States and Al Qaeda serves as another example in this respect. Al Qaeda's agenda focused on challenging American dominance in world politics, which is an international issue. Al Qaeda's bases, training facilities, headquarters, and most of its personnel were located in Afghanistan (as well as in other countries). These attributes give the conflict very strong international characteristics.

state conflicts and does not require the establishment of a new type of conflict.<sup>91</sup>

This approach, however, does not take into account important differences between extra-state armed conflicts and inter-state armed conflicts. Unlike inter-state armed conflicts, extra-state armed conflicts involve a non-state actor as a party to the conflict. Additionally, the manifestation of hostilities in inter-state armed conflicts is significantly different from those in extra-state armed conflicts.<sup>92</sup> These differences are central to the regulation of armed conflicts, and, therefore, they cast doubt as to whether the rules regulating inter-state armed conflicts are appropriate for the regulation of extra-state armed conflicts. In particular, as will be explained further below, these differences cast doubt on whether the rules concerning the means and methods of warfare and the rules concerning certain privileges afforded to combatants in inter-state armed conflicts (such as prisoner of war status) should apply in extra-state armed conflicts as well. Given their effect, differences between extra-state armed conflicts and inter-state armed conflicts are significant and suggest that minor adjustments to the laws that apply to inter-state armed conflicts would not be sufficient to appropriately regulate extra-state armed conflicts. Extra-state and inter-state armed conflicts need to be categorized separately and designated separate governing laws. The next Part further articulates this position.

#### B. *Extra-State Armed Conflicts and Intra-State Armed Conflicts*

It is also possible to argue that extra-state armed conflicts should be classified conceptually as a type of intra-state armed conflict. Extra-state armed conflicts and intra-state armed con-

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91. Grant McLoone, *Sledgehammers, Scalpels and Software: Special Operations and the Law of War in the 21st Century*, 12 U.S.A.F. ACAD. J. LEGAL STUD. 139, 144-45 (2003) (“[P]icture a situation where U.S. SOF actively pursue insurgent guerrillas into a third country. This ramps up the situation much more closely to what resembles traditional ‘international armed conflict’ under the law of war.”); Robert K. Goldman, *Certain Legal Questions and Issues Raised by the September 11th Attacks*, 9 HUM. RTS. BR. 2, 3 (2001) (“One might anticipate that the U.S., by analogy to interstate armed conflict rules, will treat Osama bin Laden and his associates as constituting a paramilitary organization whose members do not comply with the most basic rules and customs of warfare.”).

92. Roberts, *supra* note 85; *see also infra* note 103.

flicts share two important features. First, both involve a non-state actor as a party to the conflict. Some of the differences between the rules of inter-state armed conflicts and intra-state armed conflicts are attributed to this fact.<sup>93</sup> Hence, at least some of the rules applying to intra-state armed conflicts arguably can be explained by reference to the participation of a non-state actor in the hostilities. As extra-state armed conflicts involve a non-state actor as well, there is reason to think that the rules regulating them should be similar to those regulating intra-state armed conflicts. For example, one of the reasons that individuals fighting in an intra-state armed conflict are neither recognized as legitimate combatants under the laws of intra-state armed conflicts nor afforded the protections granted to combatants in inter-state armed conflicts<sup>94</sup> is the unwillingness of states to attach any legitimacy to the use of force by non-state actors.<sup>95</sup> Only in cases where states recognize the non-state actor's struggle as legitimate have the laws of inter-state armed conflicts applied<sup>96</sup> and have individuals

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93. See Matison, *supra* note 88 (citing the "inherent difficulty of regulating conflicts in which some of the participants may never have accepted international regulation, and in any event may not have the political coherence and organizational competence normally considered necessary to enforce such regulation" as one of the reasons for the differences in the regulation of inter-state and intra-state armed conflicts). As discussed in the previous Part, some of the differences can also be attributed to states' concern for their sovereignty. *Supra* notes 88-89 and accompanying text.

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94. Among the protections not afforded in intra-state armed conflict are the right to prisoner of war status once detained and the right to take up arms, which includes the right not to be prosecuted for conducting hostilities in accordance with the laws of war. Geneva Conventions, *supra* note 3, art. 3.

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95. See Matison, *supra* note 88 (citing "the desire of most governments not to give legal or political status to insurgent movements" as one of the reasons for the differences in the regulation of inter-state and intra-state armed conflicts).

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96. See Additional Protocol I, *supra* note 3, art. 1(4). Two rationales may explain the adoption of article 1(4) of Additional Protocol I. The first is that the principle of self-determination suggests that the specific non-state actors referred to in article 1(4) have a right to become members of the international community. Hence, the conflict is not much different from an inter-state armed conflict. The second is based on the strong sense of legitimacy in struggles for self-determination. Hence, non-state actors who participate in legitimate struggles should receive better protection, as compared to the protection afforded non-state actors in an illegitimate intra-state armed conflict.

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fighting on behalf of non-state actors been granted the status of legitimate combatants.<sup>97</sup> It is possible to argue that in extra-state armed conflicts there is no reason to recognize *a priori* the legitimacy of any non-state actor's struggle and that the rules of inter-state armed conflicts should apply only in those specific cases where the international community finds such a struggle to be legitimate. Hence, intra-state armed conflicts and extra-state armed conflicts have similar sensibilities and concerns with respect to the recognition of the legal status of non-state combatants and the rights associated with that status.

Second, the manifestation of hostilities in both intra-state and extra-state armed conflicts is strikingly similar. In most conflicts involving a non-state actor, the military power of the state far exceeds the military power of the non-state actor.<sup>98</sup> This affects the actual manifestation of hostilities between a state and a non-state actor. The methods of warfare typically used by non-state actors<sup>99</sup> diverge from those typically used by states.<sup>100</sup> In addition, because of the sharp discrepancy in military power, the non-state actor often cannot win the war by military means on the battlefield, and therefore often resorts to attrition tactics by which it attempts to inflict as much damage as possible on the other side.<sup>101</sup> Non-state actors also try

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97. *Id.* arts. 1(4), 43. However, there is no example of an armed conflict to which Additional Protocol I was applied pursuant to article 1(4) and therefore no example of agents of a non-state actor that were recognized as legitimate combatants by the other party.

98. See Mariano-Florentino Cuéllar, *Reflections on Sovereignty and Collective Security*, 40 STAN. J. INT'L L. 219-20 (2004). However, there are also some cases in which the military power of the state is smaller than the military power of the non-state actor. One example is the power relationship between the Hutu government and the RPF in the Rwandan conflict of 1990-1994. See Alan J. Kuperman, *Rwanda in Retrospect*, 79 FOREIGN AFF. 94, 96-98 (2000).

99. Non-state actors typically use guerilla warfare, act secretly, and are engaged in surprise attacks. They also tend to disguise themselves to blend with the civilian population. See ANTHONY JAMES JOES, *RESISTING REBELLION: THE HISTORY AND POLITICS OF COUNTERINSURGENCY* 12-13 (2004).

100. For states fighting non-state actors, reconnaissance plays a key role in any military operation. Military operations are conducted more against individuals identified as active on behalf of the non-state actor and less against a military unit or facility, as the infrastructure of a non-state actor is less distinguishable and less important for its existence. See *id.* at 145-46.

101. See generally Kenneth B. Brown, *Counter-Guerilla Operations: Does the Law of War Proscribe Success?*, 44 NAVAL L. REV. 123 (1997).

to mobilize sufficient international attention and pressure on the state by calling media attention to its underdog position. Finally, non-state actors are unlikely to abide willingly by the rules of the existing normative system, for breaching the rules is often intended to obtain international attention or place pressure on the state's government. The low motivation to abide by the rules of international humanitarian law, however, can also be explained by a common belief among certain non-state actors that the rules of international humanitarian law are unfair given the discrepancy in military power between the non-state actor and the state, and given the fact that these rules were drafted and adopted by states, serve states' interests, and were never consented to by the non-state actor.

These similarities between extra-state armed conflicts and intra-state armed conflicts support the argument that the former should be classified as the latter and that the rules of intra-state armed conflicts could serve as the regulating framework for extra-state armed conflicts.<sup>102</sup> Under this view, necessary adjustments to the laws of intra-state armed conflicts should be introduced to extra-state armed conflicts in order to reflect whatever differences exist between them; there should not be a wholly different classification.

However, this approach does not sufficiently appreciate important differences between extra-state armed conflicts and intra-state armed conflicts. Most importantly, extra-state armed conflicts occur outside of the territory of the state party to the conflict and often contain other non-internal components. As discussed above, these factors are the reason for many of the differences that exist between the legal regimes that govern inter-state armed conflicts and intra-state armed conflicts. Hence, these differences cast doubt as to whether the rules regulating intra-state armed conflicts are appropriate for the regulation of extra-state armed conflicts. In particular, doubts arise concerning whether the rules regulating the protection of non-combatants in intra-state armed conflicts are appropriate for hostilities that take place outside the territory of the state. In this respect, the parallel to inter-state armed conflicts is more compelling. Therefore, the differences between extra-state armed conflicts and intra-state armed conflicts are

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102. Tønnesson, *supra* note 47.

also so significant they should not be included in the same category as intra-state armed conflicts.

C. *Extra-State Armed Conflicts as a Separate Category in the Laws of War*

The previous Parts demonstrate that extra-state armed conflicts are substantially different from inter-state armed conflicts as well as from intra-state armed conflicts. The differences are substantial enough so that extra-state armed conflicts cannot, and should not, be placed in either of the two traditional categories in the laws of war.<sup>103</sup> But does this mean that extra-state armed conflicts should constitute a separate category in the laws of war? If so, should it be one category or multiple categories?

Dividing the phenomenon of armed conflict into different categories is not a simple task. It requires some kind of judgment as to which differences among the various conflict situations are important and which are less important. Historically, the two defining factors that differentiated armed conflicts from one another were the participating parties, with emphasis on the state (inter-state or intra-state conflicts), and the territory in which the conflict took place.<sup>104</sup> Inter-state armed conflicts were defined as conflicts between states. Intra-state armed conflicts were envisioned as conflicts between a state and a non-state actor within the territory of the state. The other possible category given these criteria—armed conflicts between a state and non-state actor outside the territory of the

103. Slaughter & Burke-White, *supra* note 54, at 1-3; Tønnesson, *supra* note 86, at 391 (“The US–Al-Qaeda war does not fit into our normal categories. It is neither a civil nor an international war, although it has elements of both . . . . Should the US–Al-Qaeda war be considered another ‘extra-systemic’ aberration? Or does it represent a new category?”).

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104. Some scholars prefer the criterion of the parties involved over the criterion of territory: “[I]nternal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.” Sassoli, *supra* note 18, at 201 (quoting LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 136 (2002)). This position recognizes the importance of the two different criteria: the parties involved and the territory. However, in order to prevent a gap in protection, Sassoli prefers to ignore the territorial criterion. This Article does not ignore the territorial issue, as this issue was instrumental in regulating intra-state armed conflicts. Thus, this Article addresses, rather than avoids, the challenge of regulating extra-state armed conflicts.

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state—was never considered. Extra-state armed conflicts are those that fall into this category, and, under the traditional criteria, they would constitute a third category.

Identifying a separate category of extra-state armed conflicts suggests neither that all extra-state armed conflicts are the same nor that there are no important differences between them. There are many differences. In some cases the state acts outside its own borders but with the agreement and even invitation of the territorial state.<sup>105</sup> In other cases, military action is taken without the agreement of the territorial state.<sup>106</sup> In some instances, military action takes place in a sovereign country.<sup>107</sup> In others, military action is taken in territory whose status is disputed by the state and non-state actor.<sup>108</sup> Furthermore, some non-state actors represent peoples struggling for self-determination,<sup>109</sup> while other non-state actors struggle for different causes.<sup>110</sup>

All of these differences can potentially define various subgroups of extra-state armed conflicts. Of all these subgroups, two are particularly revealing: (1) where groups are fighting for a right to self-determination according to article 1(4) of Additional Protocol I; and (2) intra-state armed conflicts that spill over into the territory of a neighboring country. These two groups are unique because there exist particularly compelling reasons for their regulation under the rules of inter-state or intra-state armed conflicts.

First, it is possible that extra-state armed conflicts fought by peoples for their right to self-determination have more in

105. India, for example, intervened in Sri Lanka upon invitation of the Sri Lankan government. See Le Mon, *supra* note 27, at 782-86.

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106. This was the case, for example, in the military action taken by Turkey in Iraq, by Israel in Lebanon, by Rwanda in the Democratic Republic of the Congo, and by the United States in Afghanistan. See *supra* notes 29, 31-32, 48-56, and accompanying text.

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107. See, e.g., cases referred to *supra* notes 105-106.

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108. This was the case, for example, in the military action taken by Morocco in Western Sahara and by Israel in the West Bank and the Gaza Strip. See *supra* notes 28, 33.

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109. Such peoples include, for example, the Saharawis, the Kurds, and the Palestinians. See *supra* notes 28, 31 & 33.

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110. Al Qaeda, for example, is engaged in a struggle against the United States for various reasons, such as its military presence in the Arab peninsula. Until the Israeli withdrawal from Lebanon in May 2000, Hezbollah fought against the Israeli military presence there.

common with inter-state armed conflicts, than with other types of extra-state armed conflicts. For one, they have already been regulated by Additional Protocol I through norms applicable to inter-state armed conflicts.<sup>111</sup> Additionally, the conflict is between two sides—a state and a potential state—espousing the right of membership in the international community.<sup>112</sup> On the other hand, not all states are parties to Additional Protocol I, and it is well recognized that article 1(4) is the most disputed of its provisions.<sup>113</sup> In fact, there is general agreement that article 1(4) does not codify a customary international norm and, therefore, is not binding on states not party to Additional Protocol I.<sup>114</sup> As a result, the categorization of extra-state armed conflicts is still of great practical importance, at least in the case of conflicts to which Additional Protocol I does not apply either because the relevant state is not party or because the non-state actor does not meet the conditions set forth in article 1(4).

Similarly, there are doubts as to whether intra-state armed conflicts that spill on to the territory of a neighboring country have more in common with other extra-state armed conflicts than with intra-state armed conflicts. One possible solution is to categorize such conflicts as intra-state armed conflicts since their basic structures are internal to a state.<sup>115</sup> However, since

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111. Additional Protocol I, *supra* note 3, art. 1(4).

112. See ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION 264-65 (2004); Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 3, 165 L.N.T.S. 19, 165 U.N.T.S. 21.

113. See Gardam, *supra* note 84, at 824-25 n.49 (noting that of the states that abstained from voting on article 1, nine emphasized article 1(4) as the reason for their abstention); see also Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 131-32 n.81 (2000) (“While Protocol I is generally viewed as a document reiterating customary humanitarian international law, several of its provisions, including article 1(4), are considered very controversial. This article was one of the provisions regarding which the United States made a specific objection.”).

114. See Ben-Naftali & Michaeli, *supra* note 20, at 256 (stating that article 1(4) “cannot be regarded as a customary rule”).

115. In conflicts where the non-state actor originates from within the state, the underlying issue is the right to govern the state or parts thereof, and a substantial part of the hostilities take place within the state. Even in practice there may be some examples suggesting that such conflicts should be classified as intra-state conflicts. For example, article 7 of the Statute of the International Criminal Tribunal for Rwanda extends the jurisdiction of that tribunal to enforce the law of non-international armed conflicts to the

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these conflicts take place in the territory of an uninvolved state, they raise important issues surrounding civilian protections that, under the approach this Article suggests, would justify the application of the rules concerning the protection of non-combatants in inter-state armed conflicts to the situation. Those insisting that such conflicts are intra-state armed conflicts offer non-combatants less protection than that afforded to non-combatants in inter-state armed conflicts even though nothing, as a theoretical or practical matter, justifies adopting a theory that affords non-combatants inferior protection in extra-state armed conflicts.

In spite of the differences between various types of extra-state armed conflicts, they should nonetheless be included in a single category. Indeed, there are parallel differences among those conflicts defined as inter-state armed conflicts as well as those defined as intra-state armed conflicts. These differences include the reasons for the conflicts, the positions of various states affected by the conflicts, the means and methods used, and the positions of power among parties to the conflict. However, these variances do not necessitate abandoning the categories of inter-state and intra-state armed conflicts. Only in very specific cases—in which non-state actors are fighting against colonial domination, alien occupation or against racist regimes in the exercise of their right of self-determination—were the rules of inter-state armed conflicts applied to struggles that would otherwise be intra-state armed conflicts, and even this is not yet accepted by all states.<sup>116</sup> Likewise, the fact that there are many differences among extra-state armed conflicts should not lead to abandoning their categorization as a separate type of armed conflicts. In spite of all the differences, they nevertheless share the aforementioned two primary features: (1) the parties consist of a state and a non-state actor; and (2) they are fought, at least in part, outside the territory of

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neighboring countries. See Statute of the International Criminal Tribunal of Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, art. 7, U.N. Doc S/RES/955 (1994), available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html>. According to Sassoli, *supra* note 18, at 201, this confirms that even a conflict spreading across borders is characterized as a non-international armed conflict. It is noteworthy that Sassoli draws unwarranted conclusions from his analysis of this particular type of extra-state armed conflicts to other types of extra-state armed conflicts.

116. See Additional Protocol I, *supra* note 3, art. 1(4).

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the state. As a result, they all raise similar questions concerning the protection of non-combatants in a non-involved country, the status of non-state actors in armed conflicts fought beyond the territory of the state involved, and the means and methods of warfare allowed to be used in such conflicts. Therefore, analyzing them all as one category is justified so long as one recognizes that differences between particular conflicts exist within the category. In extreme cases, a specific subgroup of extra-state armed conflicts, for example those that are fought by peoples for their right to self-determination, could be carved out from the category of extra-state armed conflicts to be regulated by the rules of inter-state armed conflicts—as was done for intra-state armed conflicts.

D. *The Law of Combatants and the Law of Non-Combatants: Another New Dichotomy in the Laws of Armed Conflict*

Having established that there should be a separate category of extra-state armed conflict under international law somewhere between inter-state armed conflicts and intra-state armed conflicts, it is necessary to consider the appropriate legal regime for regulating extra-state armed conflicts.

In order to do so, it is important to first consider another basic dichotomy in the laws of armed conflict that international humanitarian law scholars often think to be important: the distinction between The Hague Laws provided for in The Hague Conventions of 1907<sup>117</sup> and the Geneva Laws provided for in the four Geneva Conventions of 1949.<sup>118</sup> This distinction is historical, rather than theoretical. States had different concerns and objectives in 1907 than in 1949, after having witnessed the horrors of World War II. Hence, while the 1907 Conventions focus primarily on the rights and obligations of states involved in war, the 1949 Conventions focus on protecting individuals (both combatants and non-combatants) from the horrors of armed conflicts.<sup>119</sup> The two legal regimes

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117. Hague Convention, *supra* note 3.

118. Geneva Conventions, *supra* note 3.

119. For a discussion of this dichotomy, see HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE (2d ed. 1998); Manooher Mofidi & Amy E. Eckert, "Unlawful Combatants" or "Prisoners of War": *The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59, 61 n.11 (2003).

cover, at least in part, different subject matters. Most notably, the Hague Laws include important provisions regulating the conduct of hostilities, while the Geneva Conventions do not address this subject. On the other hand, certain issues are addressed by both legal regimes—for example, the laws pertaining to occupying territory.<sup>120</sup> The dichotomy between the Hague Laws and the Geneva Laws was partially blurred by Additional Protocol I, which elaborates on both of these legal regimes. Additional Protocol I includes detailed provisions on conducting hostilities, as well as extensive provisions regarding the protection of combatants and civilians in times of armed conflict.<sup>121</sup>

The discussion in the foregoing Parts suggests that it may be more prudent to develop a different dichotomy in the laws of armed conflict, a principled dichotomy rather than a historical one. Namely, it is arguably more useful to distinguish between the law of combatants and the law of non-combatants, rather than between the Hague Laws and the Geneva Laws. Norms intended to protect combatants (for example, caring for the wounded and the sick on the battlefield, and prisoner of war status) should be classified as part of the laws of combatants, while norms intended to protect non-combatants (for example, the principle of distinction and its derivatives, and special protections of women and children) should be included in the laws of non-combatants.

The contribution of this new dichotomy to the discussion of the regulation of extra-state armed conflicts is substantial. As mentioned above, affording less protection to non-combatants in cases of extra-state armed conflicts than in the cases of inter-state armed conflicts is difficult to justify. If the state involved in military operations is involved in an armed conflict with a territorial state, all the protections of inter-state armed conflicts would apply to non-combatants in the territory of the territorial state. Why should civilians enjoy less protection when their state is not even involved in the hostilities? Is there anything about a struggle against non-state actors that justifies lesser protections for non-combatants? This Article contends that, as far as the protection of non-combatants is concerned,

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120. See McCoubrey, *supra* note 119, at 198-205; Mofidi & Eckert, *supra* note 119, at 63-64.

121. Additional Protocol I, *supra* note 3, arts. 35-51.

hostilities involving a non-state actor cannot justify a lower level of protection. Hence, theoretically, the part of the laws of armed conflicts that is intended to protect non-combatants in times of inter-state armed conflicts—the law of non-combatants of inter-state armed conflicts—should apply to extra-state armed conflicts as well.

However, with respect to the protections of combatants, a compelling argument can be made for affording combatants protection that is more limited compared to that afforded to them in inter-state armed conflicts and more similar to the protection afforded to them in intra-state armed conflicts. As explained earlier in this Part, one of the reasons that individuals fighting in an intra-state armed conflict are neither recognized as legitimate combatants under the laws of intra-state armed conflicts nor afforded the protections granted to combatants in inter-state armed conflicts is this reluctance to recognize the legitimacy of non-state actors' use of force. As extra-state armed conflicts also involve non-state actors, the same considerations apply. Thus, as a matter of theory, it can be argued that laws intended to protect combatants in times of intra-state armed conflicts—the law of combatants of intra-state armed conflicts—should also apply to extra-state armed conflicts.<sup>122</sup>

Indeed, the proposed distinction between the laws of combatants and the laws of non-combatants may be criticized as incomplete. Certain norms may be intended to protect combatants and non-combatants alike, while other norms may not be intended to achieve either of these purposes. Even if true, this objection does not detract from the contribution of the proposed dichotomy to our analysis of the laws of armed conflict. The great majority of norms in the laws of armed conflict can be classified as either protecting combatants or protecting non-combatants. The contribution of such classification to the discussion regarding regulations of extra-state

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122. However, some believe that, for humanitarian reasons, the distinction between inter-state and intra-state armed conflicts should be deemphasized. See *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, ¶ 97 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996). The debate in this respect is far from settled. To the extent that it results in more protections afforded to combatants in the context of intra-state conflicts, the same protections should also apply to extra-state armed conflicts.

armed conflicts is substantial. Hence, the benefits of following this dichotomy outweigh this concern.

In conclusion, the theoretical analysis suggests that in discussing the regulation of extra-state armed conflicts much can be gained by distinguishing between the laws of combatants and the laws of non-combatants. The regulation of extra-state armed conflicts should be informed by the norms of inter-state armed conflicts with regard to the protection of non-combatants<sup>123</sup> and by the norms of intra-state armed conflicts with regard to the protection of combatants. As explained in the following Part, this theoretical analysis could play an important practical role in interpreting the legal principles of the laws of armed conflicts, which, under positive law, are applicable to extra-state armed conflicts. Naturally, in order to precisely ascertain the effect of the theoretical argument, the question of the positive law that applies to extra-state armed conflicts must first be addressed in a more comprehensive manner.

## V. POSITIVE LAW

Different sources of law are potentially relevant to the regulation of extra-state armed conflicts; among them are: international humanitarian treaties, customary international humanitarian law, general principles of international humanitarian law, and international human rights law. This Part considers these sources, rejects the notion that extra-state armed conflicts exist in a legal vacuum, and, instead, argues that extra-state armed conflicts are governed by a legal framework consisting of either basic customary norms common to all armed conflicts or general principles of international humanitarian law. However, since both of these sources provide only general legal norms, they require substantial interpretation in order to offer a satisfactory legal solution for the practical questions that arise in the context of extra-state armed conflicts.

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123. For an attempt to elevate the protection of civilians to the level of a constitutional principle of international law applicable to all types of armed conflicts, see Slaughter & Burke-White, *supra* note 54, at 1-2.

A. *Treaty Law*

Major international humanitarian law treaties do not provide a comprehensive legal regime for extra-state armed conflicts, and their application to extra-state armed conflicts, at least as treaty law, is partial and inconsistent.

The Fourth Hague Convention and its annexed regulations only apply as treaty law between the contracting powers and even then only if all belligerents are party to the Convention.<sup>124</sup> Hence, one must conclude that the Hague Convention and its annexed provisions were designed to regulate only armed conflicts between states.

Similarly, according to the first paragraph of their common article 2, the Geneva Conventions (except for common article 3) only apply as treaty law to armed conflicts between high contracting parties, which can only be states.<sup>125</sup> Any attempt to interpret common article 2 in a different way, such as including any ongoing use of force by a state in the territory of another even if no hostilities take place between the armed forces of the two states,<sup>126</sup> is far less compelling.

Additionally, according to the second paragraph of common article 2, the Geneva Conventions apply to situations when the territory of a high contracting party is totally or partially occupied.<sup>127</sup> Such occupation does not have to be the result of an armed conflict between high contracting parties; instead, any occupation of their territories, including those resulting from extra-state armed conflict, is governed by the Geneva Conventions. In the context of extra-state armed conflicts, this creates a rather anomalous legal situation in which

124. Hague Convention, *supra* note 3, art. 2.

125. Geneva Conventions, *supra* note 3, art. 2 (“In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”); Jinks, *supra* note 20, at 11; Fitzpatrick, *supra* note 20, at 348; Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677, 683 (2002).

126. *See supra* note 73 and accompanying text.

127. Geneva Conventions, *supra* note 3, art. 2 (“The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”).

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the Geneva Conventions apply to occupied territories while, in situations where hostilities do not involve occupation, the Geneva Conventions do not apply. Moreover, during extra-state armed conflicts, the Geneva Conventions do not apply to hostilities that occurred before the occupation began.

Common article 3 of the Geneva Conventions applies to all armed conflicts that “are not of an international character” and that occur “in the territory of one of the High Contracting Parties.”<sup>128</sup> Hence, the treaty’s language does not seem to cover extra-state armed conflicts because extra-state armed conflicts do not take place within the territory of the state. Moreover, the legislative history of common article 3, relevant commentary, and most of the literature on this point<sup>129</sup> support the view that the provision’s purpose was to deal only with armed conflicts within the territorial boundaries of a high contracting party.<sup>130</sup> Recent scholarship offers an alternative interpretation of common article 3, according to which it applies to all armed conflicts not falling under common article 2, regardless of whether they occur within or outside the territory of the high contracting party. This interpretation, however, is not particularly convincing.<sup>131</sup> There is also neither historical

128. Geneva Conventions, *supra* note 3, art. 3 (“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions . . .”).

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129. See Morris Greenspan, THE MODERN LAW OF LAND WARFARE 619-27 (1959); Jordan J. Paust, *Addendum: War and Responses to Terrorism*, ASIL INSIGHTS (Am. Soc’y of Int’l Law, D.C.), Sept. 2001, at <http://www.asil.org/insights/insigh77.htm#addendum2>; Steven R. Ratner, *International vs. Internal Armed Conflicts*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 206-07 (Roy Gutman & David Rieff eds., 1999); L.C. Green, THE CONTEMPORARY LAW OF ARMED CONFLICT (2d ed. 2000); Keith Suter, AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING 16 (1984); James E. Bond, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR 57-58 (1974).

130. See UHLER ET AL., *supra* note 40, at 26.

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131. In a recently published article, Derek Jinks considered three different interpretations of common article 3:

The plain meaning of the text suggests that the provision covers all armed conflicts not involving two or more states. The legislative history of the provision, on the other hand, provides some evidence that it applies only to “civil wars” proper. Moreover, some evidence suggests that the provision governs only those “armed conflicts” confined to the territory of one state.

nor academic support for reading common article 3 as suggesting anything other than that the conflict must occur within the territory of the state that is a party to the conflict.

Additional Protocol I applies to those situations described in common article 2 of the Geneva Conventions.<sup>132</sup> Therefore, its application to armed conflicts between states and non-state actors raises the same issues discussed earlier concerning the application of the Geneva Conventions to extra-state armed conflicts. Furthermore, Additional Protocol I applies to “armed conflicts [in] which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . .”<sup>133</sup> In other words, it explicitly applies to conflicts between states and non-state actors as long as they meet these conditions, but it does not apply to other armed conflicts between states and non-state actors. Additional Protocol I is also not applicable to armed conflicts in which the state involved is not a party. Additional Protocol II only applies to conflicts

Jinks, *supra* note 20, at 38-39. Jinks rejects the second and third interpretations. In his view, “the reading of the provision most faithful to its purpose and text is that Common Article 3 applies, as a formal matter, to all ‘armed conflicts’ not covered by Common Article 2 . . . .” *Id.* at 41. However, Jinks rejects the position that non-international armed conflicts are only conflicts that take place within the territory of a high contracting party (which is linguistically the most plausible) because it:

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[W]ould create an inexplicable regulatory gap in the Geneva Conventions. On this reading, the Convention would cover international armed conflicts proper and wholly internal armed conflicts, but would not cover armed conflicts between a state and a foreign-based (or transnational) armed group or an internal armed conflict that spills over an international border into the territory of another state.

*Id.* at 40-41. In my view, this argument, which classifies different types of armed conflicts as non-international in order to prevent creating a gap in the Geneva Conventions, is flawed insofar as it bends reality to conform to outdated classifications. Rather than argue that a situation that is essentially different from an intra-state armed conflict should be governed by the laws pertaining to intra-state armed conflicts, it is preferable to recognize that a gap exists in the Geneva Conventions and to focus academic discussions on what should be done about this gap. *See also* Sassoli, *supra* note 18, at 199.

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132. Additional Protocol I, *supra* note 3, art. 1(3).

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

within the territory of a high contracting party, which means that it does not apply to extra-state armed conflicts.<sup>134</sup>

Overall, the treaty regime of international humanitarian law does not properly regulate extra-state armed conflicts. In certain extra-state armed conflicts, the Geneva Conventions apply to occupied territories, but no treaty regulates hostilities in non-occupied territories. Extra-state armed conflicts in which the non-state actors fight for certain categorized causes are regulated extensively under Additional Protocol I, while other extra-state armed conflicts are not regulated at all.<sup>135</sup> In short, there is neither organization nor clarity in the field of international humanitarian law regarding extra-state armed conflicts.

Of course, this analysis only addresses formal application of international treaties to extra-state armed conflicts as treaty law. Prior to drawing any practical conclusions, other sources of law that complement the treaty regime must be explored. In particular, the question of whether customary international law regulates extra-state armed conflicts must be examined.

### B. Customary International Law

For a rule to become customary international law, the International Court of Justice has authoritatively stated that there must be extensive and uniform state practice underpinned by *opinio juris sive necessitatis*.<sup>136</sup> Thus, any attempt to identify customary norms for extra-state armed conflicts presents several major difficulties. First, extra-state armed conflicts are a relatively new phenomenon and are not particularly common. Compared to intra-state and inter-state armed con-

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134. Additional Protocol II, *supra* note 3 (“This Protocol . . . shall apply to all armed conflicts which are not covered by [Additional Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”).

135. See Additional Protocol I, *supra* note 3, art. 1(4).

136. North Sea Continental Shelf, 1969 I.C.J. 4 (Feb. 20), ¶¶ 73-81 (explaining that *opinio juris* requires that states adopt their practice because they “feel that they are conforming to what amounts to a legal obligation” at the international level); see also Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 372-73 (2002).

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flicts there are relatively few historical examples of extra-state armed conflicts from which state practice can be drawn. Second, states take different positions as to the legal regime that governs extra-state armed conflicts. If one considers state practice to include not only the practice of states engaged in conflict, but also the practice of states that respond to the measures taken by states engaged in extra-state armed conflicts,<sup>137</sup> it is hard to find any consistent practice. While states that are involved in extra-state armed conflicts interpret the law to allow their armed forces significant freedom of action, other countries—and human rights organizations—consistently take a more cautious position and often condemn the states involved in such conflicts for their actions.<sup>138</sup>

Nevertheless, the creation of cohesive state practice is underway, some of which may eventually ripen into customary norms. For example, the practices that are the subject of recent legal proceedings in the United States (regarding the treatment of Al Qaeda detainees) and in Israel (regarding the policy of targeted killings and the treatment of Hezbollah detainees), as well as other states' reactions to these practices, are indirectly shaping the law concerning extra-state armed conflicts. Indeed, customary norms may already have emerged with regard to certain issues.<sup>139</sup>

Still, state practice clearly is not consistent with regard to all issues surrounding extra-state armed conflicts. This leads to the next important question: Insofar as there is a lack of consistent practice for extra-state armed conflicts, does this re-

137. See Roberts, *supra* note 2, at 730.

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138. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 721-23 (2004). For a discussion of the relatively uncritical position taken by states in the context of the military action by the United States in Afghanistan, see Roberts, *supra* note 2, at 731-32. For a discussion of some of the difficulties in the development of customary norms in the context of extra-state armed conflicts, see *id.* at 737-38.

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139. See *Rasul v. Bush*, 124 S.Ct. 2686 (2004); H.C. 2055/02, *Obeyd and Dirani v. Sar Ha-Bitakhon* [Minister of Defence] (unpublished), available at <http://62.90.71.124/files/02/550/020/a07/02020550.a07.htm>; H.C. 769/02 *Ha-Va-ad Ha-Tziburi Neged Ha-Inuyim B'Yisra-el v. Memshelet Yisra-el* [Committee Against Torture in Israel v. Israel] (pending as of April 22, 2005), available at <http://62.90.71.124/files/02/690/007/a27/02007690.a27.HTM>. For a more detailed discussion of these cases, see *infra* notes 157, 177, 178, and accompanying text.

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sult in a legal void? And, if so, are states free to take any measures they wish?

### C. *A Legal Void?*

Given both the difficulties in applying international humanitarian law treaties to situations of extra-state armed conflicts and the insufficiency of state practice in establishing customary norms, there is a concern that recognition of extra-state armed conflicts as a separate category of armed conflicts, without prior developments in treaty law or customary law, would result in these conflicts not being governed by any law. In the absence of rules, states are free to act as they wish, and no protection is afforded the individuals participating in or affected by such conflicts. This Article argues that extra-state armed conflicts do not exist in a legal void; rather, such conflicts are governed by a legal framework that, while not particularly detailed, is still binding upon states.

#### 1. *Customary Norms Applicable in All Types of Armed Conflicts*

One possible source for norms applicable to extra-state armed conflicts is customary norms applicable to all types of armed conflicts.<sup>140</sup> There are many basic customs that, in fact, apply to all armed conflicts.<sup>141</sup> These norms include some of the general principles of armed conflicts—such as the principles of distinction and humanity—as well as specific rules that

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140. Common article 3 applies as customary law to all types of armed conflicts, including extra-state armed conflicts. *See* *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 218 (June 27).

141. If one accepts the expansive view of the Appeal Chambers of the ICTY regarding the contents of customary law in intra-state armed conflicts, *see* *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, ¶¶ 126-27 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996) (“[I]t cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as the protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.”), one is bound to find a substantial body of principles and specific norms common to all types of armed conflicts. However, even a more limited view as to the norms applicable to intra-state armed conflicts will find a body of law that is sufficiently large and common to all types of armed conflicts.

apply these principles to more concrete situations—such as the prohibition of rape and torture.<sup>142</sup>

Arguably, customary norms applicable to all types of armed conflicts apply to extra-state armed conflicts. There are two important advantages to this approach. First, the recognition of extra-state armed conflicts as a new category would not lead to the creation of a legal void. The basic legal framework that applies to all types of armed conflicts would also apply to the new category. This basic legal framework could then be supplemented by new emerging customary norms that specifically address extra-state armed conflicts.

Second, this approach maintains a certain degree of flexibility as it does not prevent development of additional principles and norms specific to extra-state armed conflicts. The body of law applicable to all types of armed conflicts is not itself sufficient, for it only includes general principles and, to some extent, more specific norms. More specific customary norms can and should be developed for each separate category of armed conflict through the accretion of state practice and the sense of legal obligation that typically evolves with it.

However, there are two important difficulties with this approach. First, it does not fully address the problem of a legal void because it only provides answers when the practice among inter-state and intra-state armed conflicts is similar. In other situations, it provides neither answers nor a methodology by which to seek them. For example, there is no consistent state practice among types of armed conflicts on the status of battlefield detainees; because legal regimes of intra-state armed conflicts and inter-state armed conflicts differ on this point, it is impossible to derive a single norm applicable to all types of armed conflicts. This difficulty can only be overcome by waiting until sufficient state practice emerges with respect to extra-state armed conflicts. This is not a satisfactory solution be-

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142. For a general discussion of the principles of distinction and humanity and the prohibition against rape and torture in armed conflicts, see Robert A. Bailey, *Why Do States Violate the Law of War?: A Comparison of Iraqi Violations in Two Gulf Wars*, 27 SYRACUSE J. INT'L L. & COM. 103, 105-06 (2000); Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783 (1995); Beth Stevens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87 (1999).

cause, until such practice emerges, there is no legal norm that governs this situation.

Second, this method does not give any weight to the concerns discussed in Part III regarding the classification of extra-state hostilities as armed conflicts. As stated above, one possible way to address these concerns is by shaping the application of the laws of armed conflicts specifically to extra-state armed conflicts. However, the present methodology, which mechanically applies norms applicable to inter-state armed conflicts and intra-state armed conflicts to extra-state armed conflicts, is not flexible enough to take such concerns into account.

Thus, customary norms applicable in all types of armed conflict can be a helpful source in regulating extra-state armed conflicts. In order to achieve a comprehensive regulation of extra-state armed conflicts, however, these customary norms must be supplemented by additional sources of law, as discussed below.

## 2. *General Principles of International Humanitarian Law*

The “general principles of law recognized by civilized nations”<sup>143</sup> are a source of international law separate from those already discussed. The question explored below is the existence of general principles of international humanitarian law that are applicable to extra-state armed conflicts.

In a recent publication of the International Committee of the Red Cross, Sassoli and Bouvier argue that there are six general principles of international humanitarian law: humanity, necessity, proportionality, distinction, prohibition of causing unnecessary suffering, and independence of *jus in bello* from *jus ad bellum*.<sup>144</sup> While some dispute the validity of a few of these principles, there is no dispute that basic principles of international humanitarian law do indeed exist. As the purpose of this Article is not to specify the particular norms that govern extra-state armed conflicts but rather to focus on the methodology and principles that should govern the quest of finding them, it is not necessary to further develop the debate

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143. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 933.

144. SASSOLI & BOUVIER, *supra* note 57, at 115.

over the exact content of the general principles of international humanitarian law.<sup>145</sup>

It is sufficient to note that the general principles are binding and constitute an integral part of international humanitarian law. In fact, it is possible to derive all of the specific norms pertaining to inter-state armed conflicts and intra-state armed conflicts from these principles. If the norms of inter-state armed conflicts and intra-state armed conflicts are understood to be interpretations of the general principles of international humanitarian law in the relevant context, then the norms of extra-state armed conflicts can likewise be determined by interpreting the general principles of international humanitarian law in the specific context of these conflicts.

Admittedly, the foregoing principles are very general, and therefore:

It is . . . not easy to find precise answers to real problems arising on the battlefield through these clauses. In a world with extremely varied cultural and religious traditions, with diverging interests, and peoples with different historical experiences, those clauses can generally no more than indicate in which direction a solution has to be found.<sup>146</sup>

However, general principles of international humanitarian law are nonetheless important for regulating extra-state armed conflicts. The very existence of such binding principles provides an applicable legal framework, one in which existing principles can be interpreted without the need to create new norms. Thus, there is no legal void; general norms, although lacking a certain degree of specificity, apply.<sup>147</sup>

But how should one interpret these basic principles? The theoretical discussions in Parts III and IV suggest two central guidelines. First, Part III discussed a number of concerns re-

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145. For a discussion of the norms and principles of international humanitarian law, see generally JEAN PICTET, *THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 27-34 (International Committee of the Red Cross 1967); Timothy L.H. McCormack, *A Non Liqueur on Nuclear Weapons—The ICJ Avoids the Application of General Principles of International Humanitarian Law*, 1997 *INT'L REV. RED CROSS* 76, 78 (1997); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (Kluwer Law International 1999).

146. SASSOLI & BOUVIER, *supra* note 57, at 113.

147. *Id.*

garding the classification of extra-state hostilities as armed conflicts. In particular, it suggested that in the case of extra-state hostilities the justification for the use of force is extra-territorial law enforcement. The fact that this justification is more limited than justifications for the use force in other situations of armed conflict should bear on the interpretation of the general principles of armed conflicts in the context of extra-state armed conflicts. For example, it is possible that in the context of extra-state armed conflicts the general principles of international humanitarian law should be interpreted to imply, in some circumstances, a duty to arrest combatants. Or, to take another example, it is possible that the use of civilian clothing, which is prohibited in other types of armed conflict but allowed in law enforcement operations, should be allowed in certain types of operations in extra-state armed conflicts.

Second, Part IV compares extra-state armed conflicts to inter-state and intra-state armed conflicts, and demonstrates that in some contexts there is great similarity between extra-state armed conflicts and inter-state armed conflicts, while in other contexts extra-states armed conflicts are more similar to intra-state armed conflicts. Thus, in those contexts in which extra-state armed conflicts are similar to inter-state armed conflicts, the general principles of international humanitarian law should be interpreted in the context of extra-state armed conflict in a way that largely mirrors the interpretation and application of these principles in the context of inter-state armed conflicts. Similarly, in those contexts in which extra-state armed conflicts are similar to intra-state armed conflicts, the general principles of international humanitarian law should be interpreted in a way that largely mirrors the way they have been interpreted and applied in the context of intra-state armed conflicts. Where the interpretation and application of general principles of humanitarian law does not differ between inter-state armed conflicts and intra-state armed conflicts, there is no reason to interpret these principles any differently in the context of extra-state armed conflicts. On the other hand, where interpretation and application varies between inter-state and intra-state armed conflicts—for example, the status of combatants—it is necessary to determine which of the existing paradigms is most similar extra-state armed conflicts, and, moreover, whether the similarities are strong

enough to support the same interpretation of the general principles in both situations.<sup>148</sup>

D. *The Application of International Human Rights Law to Extra-State Armed Conflicts*

International human rights law is often cited as an additional source of norms relevant to the regulation of armed conflicts.<sup>149</sup> Some states (and scholars) dispute the application of international human rights law to situations of armed conflicts for various reasons. For instance, they reject the extraterritorial application of international human rights law,<sup>150</sup>

148. It is important to emphasize that interpretation does not suggest the extension of the law through analogy. Analogy is not a formal source of norms in international law. Analogy is, however, an accepted means of interpreting norms that are formally applicable to a particular situation—in this case, the general principles of humanitarian law.

149. International human rights law was developed substantially following World War II. The major conventions of international human rights law include the International Covenant on Civil and Political Rights (ICCPR), *adopted* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm); the International Covenant on Economic, Social and Cultural Rights (ICESCR), *adopted* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 2, 1976), *available at* [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, Hum. Rts. Comm., 34th Sess., Supp. No. 40, at 195, U.N. Doc. A/RES/34/180 (1979), 19 I.L.M. 33 (1980); the Convention on Elimination of Racial Discrimination (CERD), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 350 (1966); and the Convention on the Rights of the Child (CRC), *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg. at 167, U.N. Doc. A/RES/44/25, 28 I.L.M. 1448 (1989).

In addition, there are regional systems of human rights conventions, most notably the European system, *see* European Convention on Human Rights, *supra* note 11, and the Inter-American system, *see* American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 144, 9 I.L.M. 673, *available at* <http://www.oas.org/juridico/english/Treaties/b-32.htm>. These conventions apply to state-parties and, to the extent they reflect customary international law, to all other states as well.

150. A textual reading of the major human rights conventions suggest that they apply only to persons under the jurisdiction of the State Parties. *See supra* note 149. Until recently, the tendency in the literature and jurisprudence was to interpret expansively the territorial application of international

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or they claim that international human rights law applies only between a state and its citizens.<sup>151</sup> Even so, the common view is that international human rights law applies both in times of peace and in times of armed conflict.<sup>152</sup> The fact that international humanitarian law applies during war does not impede the application of international human rights law as well.<sup>153</sup>

human rights law, and, hence, to include certain extra-territorial actions taken by states within the scope of application. For example, in a series of cases, the European Court of Human Rights acknowledged the application of the ECHR to actions taken by Turkey in Northern Cyprus, *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R. 99 (1995), and against the Kurds in Northern Iraq, *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. (2004). Important scholars also supported a wide application of international human rights law. See Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78, 80-81 (1995). However, in a recent decision, the ECHR adopted a more limited interpretation of "persons under the jurisdiction" of a member state and declined to admit the case. *Bankovic v. Belgium*, 41 I.L.M. 517, 526, 529-31 (2001) (dealing with the bombing by NATO of the Serbian television station in Belgrade in the context of the NATO military campaign concerning Kosovo).

151. This seems to be the position of the United States, as explained in *International and Operational Law Practice Note: Non-Governmental Organizations and the Military*, ARMY LAW., Nov. 1999, at 21-22 ("[T]he vast majority of human rights law protects individuals from the treatment of only their own government, not other governments . . . . However, the core principle of 'humane treatment' is considered by the United States to represent a binding customary international law obligation, which applies everywhere, all the time.").

152. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 240 ¶ 25 (July 8) (observing that the protections of the ICCPR do not cease in times of war; at most, certain provisions can be derogated in accordance with article 4 of the Convention); Sean D. Murphy, *Inter-American Human Rights Commission Decision on Cuba Detainees*, 96 AM. J. INT'L L. 730 (2002); see also A. Laursen, *NATO, Kosovo, and the ICTY Investigation*, 17 AM. U. INT'L L. REV. 765, 801-02 (2002); *International and Operational Law Practice Note*, *supra* note 151, at 21. THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS

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takes a different view:

Human rights law is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a state and its citizens. International humanitarian law, by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a state and the citizens of its adversary, a relationship otherwise based upon power rather than law.

*Supra* note 40, at 9.

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153. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 719 (2000) (quoting a 1998 report of the Human Rights Committee providing that "the applicability of rules of humanitarian law does not

It is also relatively uncontroversial that when international human rights law is applied in times of armed conflict, its interpretation and specific application depends upon international humanitarian law.<sup>154</sup> International humanitarian law is considered to be more specific (*lex specialis*) when governing situations of armed conflict. Under regular principles of interpretation, the general rule (the norm of international human rights law) has to give way to the more specific rule (the subsequent norm of international humanitarian law).<sup>155</sup>

Thus, the exact content and interpretation of international human rights law in the context of extra-state armed conflict depends on the rules of international humanitarian law, as they constitute the relevant *lex specialis*.<sup>156</sup> In turn, the

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by itself impede the application of the Covenant or the accountability of the State under article 2, paragraph 1, for the actions of its authorities”).

154. *See id.* at 67-68, 1131-32.

155. For example, the International Court of Justice adopted this principle for the right to life:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict, which is designed to regulate conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

*Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 240 ¶ 25.

In a different vein, the Inter-American Commission on Human rights has stated:

Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right . . . in a situation of armed conflict may be distinct from that applicable in times of peace. In such situations, international law . . . dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*.

Murphy, *supra* note 152, at 730 (citing the March 2002 Inter-American Commission on Human Rights, Pertinent Parts of Decision on Request for Precautionary Measures).

156. In the case of extra-state armed conflicts, the rules of international humanitarian law may be quite general. However, they still constitute the *lex*

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application of international human rights law does not solve the questions at stake, as it refers back to international humanitarian law, which is, and should be, the focus of the discussion.

## VI. APPLICATION OF THE THEORETICAL FRAMEWORK

### A. *Targeting Individuals Operating on Behalf of the Non-State Actor*

If an individual takes part in hostilities on behalf of a non-state actor in an extra-state armed conflict, is the state allowed to target her?<sup>157</sup>

The general principle of the laws of armed conflicts that governs this question is the principle of distinction.<sup>158</sup> Under this principle, the armed forces should distinguish between combatants and civilians. Combatants may be targeted at all times;<sup>159</sup> however, civilians are completely immune from at-

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*specialis* since they are designed to apply in the specific context of extra-state armed conflict, while international human rights law applies at all times.

157. The Israeli Supreme Court is currently considering this question in H.C. 769/02 Ha-Va-ad Ha-Tziburi Neged Ha-Inuyim B'Yisra-el v. Memsholet Yisra-el [Committee Against Torture in Israel v. Israel] (pending as of April 22, 2005), available at <http://62.90.71.124/files/02/690/007/a27/02007690.a27.HTM>. The petition challenges the legality of Israel's policy of targeting individuals designated by the Israeli security services as terrorists. The Israeli government maintains that Israel is currently in a state of armed conflict with Palestinian terrorist groups, such as Hamas, Islamic Jihad, and Tanzim. *Id.* (submissions on behalf of the Israeli government to the Israeli Supreme Court, February 2, 2003 and January 26, 2004, on file with author). Therefore, the case raises the question that is analyzed in this Article; namely, what legal regime governs ongoing hostilities between a state (i.e., Israel) and non-state actors (i.e., Hamas, the Islamic Jihad and the Tanzim) that take place outside the territory of the state (i.e., in the West Bank and the Gaza Strip)?

158. Additional Protocol I, *supra* note 3, art. 48; Prosecutor v. Kordic and Cerkez, Judgment, Case No. IT-95-14/2, ¶ 54 (Dec. 17, 2004). On the importance of the principle of distinction, see *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 257 ¶ 78. See also W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 514 (2003) (quoting J.M. Spaight, *WAR RIGHTS ON LAND* 37 (1911)) ("The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable.").

159. *Kordic and Cerkez*, Case No. IT-95-14/2, ¶ 51. It is noteworthy that there is no obligation on the parties to the conflict to make an attempt to arrest enemy combatants. However, if the enemy combatants do try to sur-

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tack. They cannot be targeted unless, and for such time as, they take direct part in the hostilities.<sup>160</sup> Once they cease to take part, they can only be arrested.<sup>161</sup>

In accordance with the theoretical framework presented in this Article, as a general principle of the laws of armed conflict, applicable to both intra-state armed conflicts and inter-state armed conflicts, the principle of distinction also applies in the context of extra-state armed conflicts. Thus, combatants in extra-state armed conflicts may be targeted but civilians are immune from attack unless and for such time as they take direct part in the hostilities.

However, the principle of distinction, by itself, does not provide complete answers to a number of important practical questions. How should the law of extra-state armed conflicts define a combatant? Should every person belonging to the non-state actor be defined as a combatant and hence be a legitimate target, or is it preferable to adopt a more restrictive definition of combatant focused on those actually taking part

render, there is an obligation to accept their surrender, if possible. Additionally, an order of “no quarter” is prohibited under the laws of armed conflict. See Additional Protocol I, *supra* note 3, art. 40; DETTER, *supra* note 43, at 297.

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160. Additional Protocol I, *supra* note 3, art. 51(3); Additional Protocol II, *supra* note 3, art. 13(3). There is disagreement as to whether the term “for such time” represents customary international law. See, e.g., L. L. Turner & L. G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 28-30 (2001); see also REPORT OF THE SWEDISH INTERNATIONAL HUMANITARIAN LAW COMMITTEE (1984), reproduced in SASSOLI & BOUVIER, *supra* note 57 at 597-602. The Report of the Swedish International Humanitarian Law Committee lists the provisions of Additional Protocol I that have the status of customary international law. Article 51(3) is not listed among these provisions. *Id.* Article 51(3) is also absent from a parallel list, which includes “the core of Additional Protocols I and II, including Articles 51(1), 52(1) and 75 of Additional Protocol I and Articles 4, 5, 6 and 13(2) of Additional Protocol II” and was put forward in a recent report of the Inter-American Commission on Human Rights. See INTER-AM. COMM’N HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS ¶ 64, available at [http://www.cidh.oas.org/Terrorism/Eng/part.b.htm#\\_ftnref196](http://www.cidh.oas.org/Terrorism/Eng/part.b.htm#_ftnref196).

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Furthermore, the scope of the term “direct participation in hostilities” and the length of time for which immunity is lost are disputed. See Sassoli, *supra* note 18, at 211-12 (“The ICRC is presently holding expert consultations on both questions, possibly in view of drawing up lists of what clearly constitutes direct participation in hostilities, what clearly does not fall under that concept, and what remains in a grey zone.”).

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161. Sassoli, *supra* note 18, at 208-09.

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in hostilities?<sup>162</sup> Furthermore, should states be obliged to make an attempt to arrest a non-state actor agent?<sup>163</sup> Should every military operation in extra-state armed conflicts, or at least specific targeting of individuals, be subject to the rules of self-defense, including the requirements of necessity, proportionality and immediacy? Finally, for the same reasons, should certain procedures that are more stringent than the procedures applicable in other types of armed conflicts be required—including certain evidentiary requirements—prior to targeting such individuals?

Clearly, in order to specifically apply distinction to extra-state armed conflicts, the principle requires further interpretation. One possible way of doing so is by using the guidelines of interpretation presented in the previous Part.<sup>164</sup> According to these guidelines, in the interpretation of the general principles of the laws of armed conflict in the context of extra-state armed conflicts due regard must be given to the disparity between extra-state armed conflicts and other types of warfare. First, extra-state armed conflict may be justified by a doctrine of extra-territorial law enforcement.<sup>165</sup> Quite different from other types of warfare, such justification for the use of force may only support more limited measures compared to those permitted in other types of armed conflicts. For example, it may support a more limited definition of combatant status, the introduction of a duty to prefer the arrest of the non-state actor agent to her targeted killing, and the requirement of a more stringent justification for specific military actions in comparison with other types of armed conflicts. Second, the fact that the military action takes place in the territory of a non-involved state may justify adopting additional cautionary rules in order to avoid targeting individuals belonging to that state

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162. See Sassoli, *supra* note 18, at 212-13 (criticizing the position of the United States government that designates every member of a terrorist organization as a combatant).

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163. Cassese, *supra* note 49 (agreeing to the legitimacy of the use of military force in response to the September 11, 2001, attacks and suggesting that state agents should only have the power to arrest agents of the non-state actor in a military operation and not to kill them). See also *id.* (criticizing a policy of “extra-judicial assassination of terrorists”). In his article, Cassese does not make clear whether his comments refer to situations of armed conflict.

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164. See *supra* Part V.C.2.

165. *Supra* note 63 and accompanying text.

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by mistake (which, apart from the humanitarian outrage, may provide additional reasons for drawing a non-involved party into the conflict, further complicating the situation).<sup>166</sup> This consideration may support, for example, the adoption of relatively stringent evidentiary requirements prior to the targeting of specific individuals. Third, the difference in the actual manifestation of hostilities may justify applying new rules to regulate the methods of warfare used. For example, non-state actors in extra-state armed conflicts are often more difficult to distinguish from the civilian population; at least in some cases, individuals are specifically targeted on the basis of intelligence in a pre-planned operation.<sup>167</sup> The targeting of specific individuals on the basis of intelligence may justify the introduction of new rules regulating the process a state must go through before targeting a specific individual.

The purpose of this Part is not to provide comprehensive answers to all questions concerning the targeting of individuals operating on behalf of a non-state actor in an extra-state armed conflict, but rather to demonstrate the positive attributes and possible consequences of the overall approach suggested in this Article. While the interpretative approach does not leave extra-state armed conflicts outside the scope of law, it also does not apply legal regimes that were not designed for extra-state armed conflicts to such conflicts. Moreover, it does not require choosing between the two extremes of either fully applying what may be an inappropriate legal regime to extra-state armed conflicts or of abandoning any legal restrictions on the targeting of individuals. Rather, it allows for the development of more nuanced solutions that are more appropriate for the challenges posed by the new reality of non-state actors. It preserves the rule of law, while leaving sufficient flexibility

166. See generally Sassoli, *supra* note 18, at 212-13.

167. See *supra*, notes 98-100 and accompanying text. As mentioned there, in many instances the armed forces of the non-state actor are a relatively small group of people that are mostly involved in concealed operations. Part of the measures taken by the state against such groups is the targeting of specific individuals on the basis of evidence that indicates the involvement of such individuals in the activities of the non-state actor. For example, consider the alleged targeting by the United States of a commander of Al Qaeda and five additional people in Yemen. See Amnesty International, *supra* note 56.

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for a principled, rather than arbitrary, development of the law of extra-state armed conflicts.

B. *Collateral Damage*

The question of collateral damage is governed by another important principle of the laws of armed conflict; namely, that of proportionality.<sup>168</sup> Under this principle, causing collateral damage to civilians or civilian property in the context of permissible military operations, such as the targeting of military objectives, is not prohibited as long as the damage caused is not excessive in relation to the concrete and direct military advantage anticipated.

In accordance with the theoretical framework presented in this Article, as a general principle of the laws of armed conflicts, which is widely considered to be applicable both in the context of inter-state and intra-state armed conflicts,<sup>169</sup> the principle of proportionality also applies in extra-state armed conflicts.

However, one could argue that, due to the special features of extra-state armed conflicts, a different interpretation of the principle of proportionality is justified in their case, and, therefore, that a more limited approach towards collateral damage should be adopted. Such interpretation should follow the guidelines presented in Part V. For example, if the use of force in extra-state armed conflicts is justified by extra-territorial law enforcement, it can be argued that the approach towards collateral damage should be informed, at least to a certain extent, by the approach applicable to the question of collateral damage in law enforcement operations. Thus, when the goal of a specific operation is closer to that of a law enforcement operation (for example, in pursuing the apprehension of a suspected non-state actor agent), it may be harder to justify collateral damage. It can also be argued that because actions against non-state actors commonly take place

168. Additional Protocol I, *supra* note 3, art. 51(5)(b) (prohibiting the launching of “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”). Additional Protocol II does not include any parallel provision. *See* Additional Protocol II, *supra* note 3.

169. WALZER, *supra* note 23, at 129.

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in the presence of innocent individuals, a higher standard of care should be expected from the armed forces. For example, proportionality might dictate introducing a positive duty to use sophisticated weapons that avoid collateral damage, at least with respect to countries that possess such weapons.<sup>170</sup> Finally, proportionality may be interpreted to impose a duty to compensate, in some circumstances, certain victims of collateral damage.

At the same time, extra-state armed conflicts are not limited to the targeting of specific individuals. In some cases, such as the deployment of United States armed forces in Afghanistan, wider operations take place.<sup>171</sup> Moreover, even in the targeting of individuals, if one agrees that in certain instances, such as when the non-state actor agent is in a hostile territory, it is permissible to intentionally kill that agent (especially by means of long range weapons), the possibility of collateral damage cannot be ignored. However, even in such circumstances, it can be argued, for the same reasons discussed in the previous paragraph, that a higher standard of care, and maybe even a more demanding proportionality test, should apply.

Again, it must be stressed that this Article does not strive to present solutions but rather demonstrates the potential of the theoretical framework. Unlike all other solutions presented in the relevant literature thus far, which has either left extra-state armed conflicts outside of the rule of law or applied to extra-state armed conflicts a legal regime that is ill-suited for their unique needs, this approach allows for an interpretation of the basic principles of the laws of armed con-

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170. In this respect, it is interesting to consider the use of precision weapons by the United States armed forces in the recent conflict in Iraq. See, e.g., Peter Pae, *Major Shift Seen With Use of 'Smart' Bombs*, L.A. TIMES, Mar. 22, 2003, at A14; Thomas E. Ricks, *What Counted: People, Plan, Inept Enemy*, WASH. POST, Apr. 10, 2002, at A1; see also Bradley Graham, *U.S. Air Attacks Turn More Aggressive: Risk of Civilian Casualties Higher as Range of Targets is Broadened, Officials Say*, WASH. POST, Apr. 2, 2003, at A24. For a theoretical analysis of the subject, see generally Stuart W. Belt, *Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAV. L. REV. 115 (2000).

171. See generally David Rohde & Norimitsu Onishi, *Taliban Abandon Last Stronghold; Omar is Not Found: Streets of Kandahar are Chaotic as Victorious Factions Clash*, N.Y. TIMES, Dec. 8, 2001, at A1.

flicts that recognizes the unique features of extra-state armed conflicts.

C. *Targeting Individuals Operating on Behalf of the State*

During an inter-state armed conflict, combatants on both sides are allowed to target combatants on the other side.<sup>172</sup> Once captured, combatants cannot be punished for their participation in hostilities.<sup>173</sup> On the other hand, during an intra-state armed conflict, non-state actors do not have immunity from prosecution if they participate in hostilities.<sup>174</sup>

Obviously, the question of whether non-state actors should be allowed to kill those operating as part of the armed forces of the state with whom they engage in hostilities is highly political and closely related to the fact that one party to the conflict is a non-state actor. Under the laws of intra-state armed conflicts, the international community has been reluctant to recognize the right of non-state actors to engage in combat.<sup>175</sup> Only in those rare situations described in article 1(4) of Additional Protocol I, which, even at present, is highly controversial, was there a willingness within the international community to recognize a right for certain non-state actors to engage in hostilities against a state.<sup>176</sup>

In this respect, extra-state armed conflict raises the identical question: Should a non-state actors' right to engage in hostilities be recognized? Following the theoretical framework presented in this Article, it can be argued that, for purposes of the regulation of the right of a non-state actor to engage in hostilities in the context of extra-state armed conflicts, the appropriate analogy is to the rules of intra-state armed conflicts and, with regard to states that are parties, the rules of Additional Protocol I, as well. Practically, this would mean that a state would be acting within its rights if it prosecutes combatants belonging to the non-state actor for their participation in hostilities. However, just as Additional Protocol I elevated the rights of combatants in certain intra-state armed conflicts to the rights of combatants in inter-state armed conflicts, it may

172. Additional Protocol I, *supra* note 3, art. 43(2).

173. *Id.* art. 45(1); Geneva Convention III, *supra* note 3.

174. Additional Protocol II, *supra* note 3, art. 6.

175. *Supra* note 102 and accompanying text.

176. Additional Protocol I, *supra* note 3, art. 1(4).

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be that, in certain extra-state armed conflicts—those that parallel the ones specified under article 1(4) of Additional Protocol I—a recognition of the right to engage in hostilities should be considered.

#### D. *The Status of Battlefield Detainees*

One of the most challenging issues facing the laws of extra-state armed conflicts is the status of battlefield detainees. This issue recently came before the courts of two nations that are currently involved in extra-state armed conflicts. In the United States, following the recent decision of the United States Supreme Court in *Rasul v. Bush*, the status of the detainees remains unresolved.<sup>177</sup> In Israel, the constitutionality of legislation providing for the detention of illegal combatants was challenged, but the Israeli Supreme Court ultimately did not have an opportunity to address the question.<sup>178</sup>

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177. *Rasul v. Bush*, 124 S.Ct. 2686 (2004) (recognizing the jurisdiction of federal courts over the detainees in Guantanamo Bay and remanding the case to the lower court for consideration of the merits).

178. In H.C. 2055/02, *Obeyd and Dirani v. Sar Ha-Bitakhon* [Minister of Defence] (unpublished), available at <http://62.90.71.124/files/02/550/020/a07/02020550.a07.htm>, the Israeli Supreme Court was called to test the constitutionality and, in this context, the compatibility with international law of Israeli legislation providing for the detention of what was defined in the legislation as illegal combatants. The legislation was adopted in order to allow the Israeli government to detain members of Hezbollah (a non-state actor operating from Lebanon) that Israel had captured during ongoing hostilities in the 1990s. Cf. *Incarceration of Unlawful Combatants Law, 5762-2002* (Isr.), available at <http://www.justice.gov.il/NR/rdonlyres/7E86D098-0463-4F37-A38D-8AEBE770BDE6//0/IncarcerationLawedited140302.doc> (“This Law is intended to regulate the incarceration of unlawful combatants not entitled to prisoner-of-war status . . .”).

The case raised the question of which legal regime applies to individuals detained in the context of ongoing hostilities between a state (Israel) and a non-state actor (Hezbollah), outside the territory of the state (in this case, the hostilities took place in Lebanon). H.C. 2055/02, *Obeyd and Dirani* (unpublished). On December 2002, the Supreme Court of Israel denied the petition on the grounds that the petitioners had an alternative remedy: They could raise their constitutional claim in the district court in the proceedings in accordance with the law. *Id.* The district court upheld the detention and found the law to be constitutional and compatible with international law. M.R. 92690/02, *Medinat Yisrael* [State of Israel] v. *Sheikh Abd El-Karim Obeyd*, Pad-Or 03 (8) 93 (unpublished). An appeal was filed with the Supreme Court. However, before the appeal was heard, all Hizbulla prisoners were released in a prisoner of war swap with Hezbollah. See Matthew

Under the laws of inter-state armed conflicts, detained combatants must be treated as prisoners of war.<sup>179</sup> Their rights and obligations are governed by the Third Geneva Convention. The state is prohibited from trying them for either participation in the armed conflict or actions taken in accordance with the laws of war, such as the killing of enemy combatants. Prisoners of war must be detained in special conditions, and, at the cessation of hostilities, the state is required to repatriate these combatants.<sup>180</sup>

The laws of intra-state armed conflicts mandate virtually the opposite: No special status is afforded combatants belonging to non-state actors.<sup>181</sup> Trying such individuals for participation in hostilities is not prohibited, and they can even be punished by death. Significantly, states are not obliged to repatriate them during peacetime, though they must endeavor to give the broadest amnesty possible to those who participated in the hostilities.<sup>182</sup> Other aspects of the detention of such individuals are not regulated by the laws of armed conflict. Sassoli interprets this to mean that such individuals may only be detained under domestic legislation, as far as it is compatible with international human rights law.<sup>183</sup> Doubts may arise, however, as to whether the fact that the situation is one of armed conflict implies a power to detain combatants captured on the battlefield, just as it implies the power to target such combatants.

What law should apply in extra-state armed conflicts? It can be argued, in accordance with the theoretical framework presented in the previous Parts, that the status of battlefield detainees is determined by the Law of Combatants, as it exclusively deals with the rights of enemy combatants. As discussed

Gutman, *Prisoner Swap Today*, JERUSALEM POST, Jan. 29, 2004, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1075263109625>.

179. Additional Protocol I, *supra* note 3, art. 44.

180. Geneva Convention III, *supra* note 3, arts. 118-119.

181. *See* Geneva Conventions, *supra* note 3, art. 3.

182. *Cf.* Additional Protocol II, *supra* note 3, arts. 4-6 (requiring the High Contracting Parties to grant humane treatment to “persons deprived of their liberty” without prohibiting punishment by death and imposing a weak obligation to grant the broadest possible amnesty to persons who participated in the armed conflict at the end of hostilities).

183. Sassoli, *supra* note 18, at 211.

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earlier in this Article, as far as rights of combatants are concerned, extra-state armed conflicts are similar to intra-state armed conflicts as both types of conflict involve non-state actors whose fight is not recognized as legitimate by the international community. Hence, there is a convincing argument for applying the law of combatants of intra-state armed conflicts to such non-state actors, and, thus, not affording them prisoner of war status, and immunity from national prosecution.

At the same time, there is a certain similarity between extra-state and inter-state armed conflicts. Battlefield detainees in extra-state armed conflicts are often taken from the territory in which they reside to another country of which they are not citizens. Since the combatants are detained outside of their state of nationality, there should be some protection of their rights—they should not be left completely at the mercy of the detaining state. Moreover, the laws of inter-state armed conflicts address aspects relevant to the detention conditions of combatants who have not been convicted of any crime. In this respect, the laws of inter-state armed conflict are a good example of the application of the principle of humanity to the internment of battlefield detainees. The laws of intra-state armed conflict, on the other hand, do not address this issue.

Finally, in defining the legal regime applicable to battlefield detainees, one also needs to take into account a number of special aspects of extra-territorial armed conflicts. Such aspects come into play, for example, in the debate regarding the appropriate length of detention of such battlefield detainees. On the one hand, people fighting on behalf of the non-state actor may be dangerous. This is especially true when the non-state actor refuses to respect the basic norms of international humanitarian law, most specifically the principle of distinction. Setting these persons free may create a serious risk that they will return to the battlefield. Second, in the context of inter-state armed conflicts (and to some extent in the context of intra-state armed conflicts), there exists a state that can take responsibility for the detained individuals once released. This is not the case when dealing with a non-state actor that is not operating on behalf of any state. On the other hand, extra-state armed conflicts tend to last for long periods of time. For example, it is not clear if or when the United States' conflict with Al Qaeda will end. Thus, if one holds detainees until the

cessation of hostilities, such detention may be extremely long, if not indefinite.

The specific regime designed for the regulation of the status of battlefield detainees in the context of extra-state armed conflicts should reflect the interpretation of two basic principles of the laws of armed conflict: humanity and military necessity. As explained in Part V, these principles must be interpreted, when appropriate, in ways analogous to the laws of both inter-state and intra-state armed conflicts, as well as in light of the special features of extra-state armed conflicts. Thus, the theoretical framework suggested by this Article allows all of the considerations discussed above to be taken into account in the interpretation of these principles.

In my view, this process of interpretation should lead to the development of a new, hybrid model that deals with the specific problems concerning the internment of battlefield detainees in the context of extra-state armed conflicts. One possibility is to afford battlefield detainees the (non-political) privileges regarding conditions of detention that are afforded to prisoners of war under the legal regime regulating inter-state armed conflicts, as this legal regime is designed to hold combatants in detention for long period of times. At the same time, with regard to the more political aspects of detention, one could rely on the analogy between extra-state armed conflicts and intra-state armed conflicts, which allows prosecution of detainees for their participation in hostilities. This possibility is obviously not a well-analyzed, comprehensive proposal; instead, it demonstrates the advantages of the flexibility afforded by the theoretical model presented in this Article. The design of a comprehensive legal regime concerning the internment of battlefield detainees in the context of extra-state armed conflicts requires more substantial research.

#### E. *Methods of Warfare*

Under the laws of inter-state armed conflicts, the use of perfidious methods is explicitly prohibited.<sup>184</sup> States cannot feign intent to negotiate under a flag of truce or to surrender, nor may combatants feign incapacitation by wounds or sick-

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184. Hague Convention, *supra* note 3, art. 23(b); Additional Protocol I, *supra* note 3, art. 37(1).

ness, or non-combatant status<sup>185</sup> or other protected status by use of signs, emblems, or uniform of either the United Nations or other states not parties to the conflict.<sup>186</sup> Additionally, the use of the flag, military emblems, insignia, or uniform of adverse parties while engaging in attacks or in order to shield, favor, protect, or impede military operations is prohibited.<sup>187</sup>

The laws of intra-state armed conflicts are much less clear on these points. Applicable treaty law does not include any specific prohibitions regarding treachery or perfidy.<sup>188</sup> However, recent developments in the laws of intra-state armed conflicts may suggest the partial existence of such prohibitions under customary international law. In *Prosecutor v. Tadic*, the ICTY Appeals Chamber declared that the prohibition on perfidy also exists in the context of intra-state armed conflicts.<sup>189</sup> The ICC Statute followed this ruling in providing that the “killing or wounding treacherously of a combatant adversary” constitutes a war crime if perpetrated in the context of an intra-state armed conflict.<sup>190</sup>

In light of this similarity between inter-state and intra-state armed conflicts, it is appropriate to apply the prohibition on perfidy in the context of extra-state armed conflicts. However,

185. However, W. Hays Parks has recently suggested that limited use of non-standard uniforms of civilian clothing in certain situations is not prohibited under the laws of inter-state armed conflicts. Parks, *supra* note 158.

186. Additional Protocol I, *supra* note 3, art. 37(1)(d).

187. *Id.* art. 39(2).

188. Geneva Conventions, *supra* note 3, art. 3; Additional Protocol II, *supra* note 3.

189. *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, ¶ 125 (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996) (“State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare . . . mention can be made of the prohibition of perfidy.”). The ICTY Appeals Chamber relied on only one precedent—*Pius Nwaoga v. State*, Nig. S. Ct. (1972), *reprinted in* 52 INT’L L. REP. 494, 496-97—a case in which the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. *Tadic*, Case No. IT-94-1, ¶ 125. It is doubtful whether this single precedent is sufficient to establish the Appeals Chamber’s conclusion that a customary international rule has evolved.

190. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 8(2)(e)(ix), U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 52d Sess., Annex II, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999, 1009 (1998).

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there are certain special characteristics of extra-state armed conflicts that may justify a different rule concerning perfidy. Arguably, if extra-state armed conflicts are conceptualized as some type of extended law enforcement operation, the prohibition on perfidy may be qualified in the context of activities in the context of these operations that are more similar to law enforcement activity, for no parallel prohibitions exist for peacetime law enforcement operations. Police forces are allowed to operate in civilian clothing or to feign criminal status as long as they do not actually engage in criminal activity or solicit the commission of the criminal behavior. Alternatively, in certain extra-state armed conflicts where non-state actors do not show any interest in respecting the laws of war, the prohibition on perfidy may be qualified.<sup>191</sup>

Doubts as to the justifiability of the prohibition of perfidy may be particularly pertinent with regard to two specific types of operations: those designed to arrest individuals belonging to a non-state actor and those designed to rescue hostages.<sup>192</sup>

Once again, the theoretical framework suggested in this Article provides the means by which extra-state armed conflict

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191. For example, W. Hays Parks suggests that the recent war in Afghanistan had special aspects, at least as far as the use of non-standard uniforms is concerned:

[I]nto the midst of this discussion steps the global war on terrorism. Terrorists are not entitled to law of war protections, and the law of war is not applicable as such to counter-terrorist operations. Counter-terrorist units have been authorized to use hollow-point or other expanding ammunition, for example, and have worn civilian clothing or non-standard uniforms on missions.

Parks, *supra* note 158, at 524. Parks cautions, however, that “neither the Global War on Terrorism nor the fact that one is a member of Special Operations Forces offers carte blanche for military personnel to wear something other than the full, standard uniform.” *Id.* at 543. Nonetheless, Parks expressly acknowledges the legitimacy of such use on a mission and unit specific basis, and it appears that, in his view, the use of non-standard uniform in the context of the war against terrorism is more often justified than in other types of armed conflicts. *Id.*

192. For examples of German, British and American use of civilian clothing in hostage rescue operations, see Parks, *supra* note 158, at 524 n.70. Similar arguments can be made with regards to other rules of warfare, such as the rule that prohibits the use of enemy uniforms, or the rule against the use of poison—i.e., the action taken by Russia in the 2002 hostage crisis in Moscow. See Judith Miller & William J. Broad, *Hostage Drama in Moscow: The Toxic Agent; U.S. Suspects Opiate in Gas in Russian Raid*, N.Y. TIMES, Oct. 29, 2002, at A1.

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can be regulated. Not only does this framework operate to limit the powers of states, but it also loosens up certain traditional rules that would not otherwise be suitable in the context of extra-state armed conflicts.

## VII. CONCLUSION: IS THERE A NEED FOR A NEW LEGAL REGIME?

Extra-state hostilities are ongoing hostilities between a state and a non-state actor that take place, at least in part, outside the territory of the state. Such hostilities cannot be easily categorized within the traditional framework of international law. This Article considers different arrangements for classifying such hostilities by referring to basic dichotomy in international law between peace and armed conflicts. Although not taking a firm stance on whether such hostilities should be categorized as armed conflicts or as self-defense operations in times of peace, the Article posits that the starting point for their regulation should be the laws of armed conflicts. At the same time, it identifies unique features of extra-state hostilities, such as their justification as extra-territorial law enforcement, which suggest that the laws of armed conflicts require modification if they are to be applied to extra-state hostilities.

In light of the tendency in the academic literature and in state practice to view extra-state hostilities as armed conflict, the bulk of the Article assumes that such hostilities are indeed armed conflicts. However, within the world of armed conflicts, extra-state hostilities do not fall neatly into either of the two traditional categories—namely, inter-state armed conflicts and intra-state armed conflicts. Indeed, conflicts involving extra-state hostilities are so different from the traditional categories that it is impossible even to place them in a subcategory. Therefore, it is necessary to characterize them as a new type of armed conflict: extra-state armed conflict.

Nonetheless, comparison to intra-state and inter-state armed conflicts shows that in certain areas there are important similarities between extra-state armed conflicts and the existing categories of armed conflict. For example, as far as the protections of non-combatants are concerned, there is no relevant distinction between extra-state armed conflicts and inter-state armed conflicts. Hence, it may be argued that in regulat-

ing this aspect of extra-state armed conflicts it is appropriate to draw analogies from the law regulating inter-state armed conflicts. Yet, when considering which laws should govern the protection of combatants, it seems more appropriate to look to laws governing intra-state armed conflicts for guidance.

This Article also explores how extra-state armed conflicts are regulated by positive international law. Most significantly, the possibility of a legal vacuum is ruled out.<sup>193</sup> While none of the basic treaties of international humanitarian law apply to extra-state armed conflicts as treaty law and while specific customary rules for extra-state armed conflicts have not yet been devised, other sources of law, such as customary norms applicable in all armed conflicts and general principles of international humanitarian law, provide the basic framework and principles for the regulation of extra-state armed conflicts.

Such a normative framework assures the international community that law does exist. However, as it is based on general principles, this normative framework does not always provide clear legal solutions to the specific questions that may arise during extra-state armed conflicts. Interpretation of the general principles is required in order to derive specific rules from them. Drawing on the theoretical framework that it develops, the Article suggests two main guidelines for such interpretation: First, it must be sensitive to the special characteristics of extra-state armed conflicts that more closely resemble law enforcement activities. Second, it must take into account the way in which the general principles were applied in the context of inter-state armed conflicts and intra-state armed conflicts, and draw analogies from each of these legal regimes when appropriate.

The Article does not claim that the current state of the law is satisfactory. There is much work to be done in developing this proposed framework into a clear and detailed legal regime. Customary international law is likely to have an important role in this respect. The process of formation of customary norms governing extra-state armed conflicts is already underway, but it is far from conclusive. The international

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193. Greenwood, *supra* note 5, at 301 (rejecting the view of a legal vacuum). However, Christopher Greenwood also argues that this fact does not relieve government and international lawyers of the need to address the issues that emerge as a result of the September 11, 2001, attacks. *Id.* at 301.

community should be willing to accept that, until customary norms are formed, national and international politics will have a central role in determining what is acceptable in extra-state armed conflicts.<sup>194</sup> However, even at this stage, the development of a legal regime is not merely in the political sphere; many obligations already exist under existing contemporary positive law. For example, any suggestion that the individuals imprisoned in Guantanamo Bay are outside the purview of the laws of armed conflict is inconsistent with the current status of the law, as rudimentary and general as the law may be.

National courts are also likely to play an important role in the development of this legal framework.<sup>195</sup> Apart from administering domestic justice, national judges bear special responsibility for the development of international law, mostly due to the central role of state practice in the formation of international law.<sup>196</sup> This Article cites several cases involving extra-state armed conflicts that were recently litigated in different parts of the world<sup>197</sup> and offers a theoretical framework for thinking about these cases, which makes it possible for judges in similar cases to reject any argument suggesting that extra-state armed conflicts take place in a legal vacuum. At the same time, it does not require judges to bind themselves to the laws of inter-state or intra-state armed conflicts. The theoretical framework presented in this Article allows judges necessary flexibility in interpreting the basic principles of the laws of armed conflicts in a way that fits the special features of extra-state armed conflicts and the novel challenges they present.

In the future, there also may be room to consider convening a conference in order to clarify issues in the laws of extra-state armed conflicts. But, at present, convening such a con-

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194. However, Anthea Roberts, in a recent article, highlights the problematic nature of the formation of customary law in the field of international humanitarian law and international human rights law. Roberts, *supra* note 2, at 737-38. R

195. *Id.* at 735.

196. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 23 (1998) (“Article 38(I)(d) of the Statute of the International Court is not confined to international decisions and the decisions of national tribunals have evidential value. Some decisions provide indirect evidence of the practice of the state of the *forum* on the question involved; others involve a free investigation of the point of law and considerations of available sources, and may result in a careful exposition of the law.”). R

197. See *supra* notes 157, 177-178.

ference, as considered by the Swiss government in 2002, is premature.<sup>198</sup> There are risks in gathering such a conference. Politically, extra-state armed conflict is a delicate issue. It is not clear that sufficient common ground currently exists within the international community to reach compromises necessary for the drafting of a treaty for the regulation of extra-state armed conflicts. There is also a risk that such a conference, if not successful, may undermine the existing treaty regime of international humanitarian law.<sup>199</sup> Because a legal framework, even if rudimentary, exists, it may be prudent to wait and observe the development of the existing legal framework before actually convening such conference.

In the meantime, what of the legal status of the Guantanamo Bay detainees? May an Al Qaeda member be targeted while he is sleeping under his own roof? May the United States' armed forces use civilian clothing in their military operations against Al Qaeda? How much collateral damage, if any, is acceptable in the context of an attack directed at an Al Qaeda member? This Article does not provide specific answers to the questions presented at the outset. But the ideas presented should provide the reader with a clearer understanding of the basic legal questions at stake, a view as to the proper legal framework for regulating extra-state hostilities, and some thoughts as to the strategy that is necessary for developing this legal framework into a clear and detailed legal regime that will facilitate answers to these more specific questions.

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198. Anthony Dworkin, *Revising the Laws of War to Account for Terrorism: The Case Against Updating the Geneva Conventions, On the Ground that Changes are Likely Only to Damage Human Rights*, at [http://writ.news.findlaw.com/commentary/20030204\\_dworkin.html](http://writ.news.findlaw.com/commentary/20030204_dworkin.html) (last visited Feb. 21, 2005) (“[T]he government of Switzerland—which acts as custodian of the Geneva Conventions—recently launched a public initiative to look into the subject. Last week, this process got underway with an ‘informal high-level expert meeting’ at Harvard University.”).

199. *Id.*; see also Sassoli, *supra* note 18, at 220. Although Marco Sassoli adopts a different position regarding the analysis of most of the issues discussed in this Article, he agrees that any current attempt to develop a new instrument on the laws of war may weaken the existing system. *Id.*