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TRANS-STATE ACTORS AND THE LAW OF WAR: A JUST WAR ARGUMENT

A Dissertation
Submitted to the Faculty of the
Graduate School of Arts and Sciences
of Georgetown University
in partial fulfillment of the requirements for the
degree of
Doctor of Philosophy
in Government

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Peter Watson Huggins, M.A.

Washington, DC
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class entitled "Ethics in International Relations," again exposed me to the just war tradition, which in turn led to the idea for this dissertation.

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Trans-State Actors and the Law of War: A Just War Argument

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ABSTRACT

International law regarding the use of force is ill-equipped to provide guidance to policymakers when one of the belligerents in a conflict is a trans-state actor (TSA). This dissertation investigates the legal and moral aspects of this problem. It first identifies the lacunae that emerge in both the *jus ad bellum* and *jus in bello* portions of international law regarding the use of force. It then examines the moral aspects of such a conflict using the just war tradition. It subsequently makes a moral statement that provides guidance for policymakers, as well as recommendations for changes to treaty law and interpretations of customary international law. The dissertation derives important conclusions. Within the legal *jus ad bellum*, three lacunae emerge: the lack of a definition for armed attack within the framework of the United Nations Charter; the imprecise location for where state action imputes legal responsibility for support of a trans-state actor; and a victim state's response to a TSA's action may run afoul of a strict interpretation of the principles of necessity and proportionality. Within the legal *jus in bello*, an important lacuna emerges regarding what protections a TSA's combatant ought to receive under international humanitarian law (IHL). The moral analysis, conducted within the framework of the just war tradition, reveals an internal

inconsistency between two of its *jus ad bellum* criteria. The criterion of Competent Authority limits the number of actors possessing the necessary authority to conduct public violence; yet the society of states has conferred this authority upon sub-state groups in a war of self-determination. The dissertation's moral argument, termed the *justice of states*, provides the necessary moral backing for states to respond to a destabilizing TSA. The moral statement also argues that a TSA's combatant can claim the protections of prisoner of war status under IHL if the TSA receives *conferred* competent authority and if the combatant himself fulfills combatant duties outlined in IHL. This dissertation provides workable recommendations regarding a number of vexing international relations challenges. It also begins the moral debate regarding the status of TSAs and their combatants within the just war tradition.

TABLE OF CONTENTS

Chapter One	Introduction.....	1
Chapter Two	Background Theory and Definitions.....	10
Chapter Three	The Legal <i>Jus ad Bellum</i> and Trans-State Actors.....	53
Chapter Four	The Legal <i>Jus in Bello</i> and Trans-State Actors.....	120
Chapter Five	Trans-State Actors and the Just War Tradition.....	156
Chapter Six	Law and Morality: The Confluence of Many Streams.....	209
Chapter Seven	Policy Implications.....	237
Chapter Eight	Conclusion and Recommendations.....	253
Bibliography	262

CHAPTER ONE

INTRODUCTION

In the wake of the events of September 11, 2001, the resulting American and world reactions appear on the surface to be justified. After suffering a devastating armed attack—the bloodiest day in America since the Civil War—the United States, responded in self-defense against the group and the state responsible for the attack. Yet beneath the surface of this seemingly straightforward action lie significant legal and moral questions. Perhaps the most publicized challenge concerns the status of al-Qaeda detainees held in Guantanamo Bay, Cuba and elsewhere. Are they considered prisoners of war, or should they be categorized as something else? This question points to a broader and more general problem in the Law of War.¹ Traditionally, the Law of War has governed state behavior in a conflict between states. The society of states recently extended limited humanitarian protections to people involved in a conflict contained within the political borders of a sovereign state: a non-international or internal conflict. But the Law of War says little about a conflict where one of the belligerents is not a

¹ The term the “Laws of War” is generally understood to refer to the *jus in bello*, or international humanitarian law, which provides legal restraint on the actual conduct of hostilities. For this dissertation, the term the Law of War refers collectively to both the *jus ad bellum* or law governing when force may be used, along with its more traditional sense of the *jus in bello*.

state, but a trans-state actor (TSA).² Is the Law of War applicable in this situation?

And if it applies, how does one interpret existing treaty law and customary practice in light of this new conception of warfare?

Why the Law of War Does Not Work

The fact that the Law of War does not reflect the new reality, with its resulting problems for policymakers, is not surprising. One can attribute this to three distinct reasons. The first reason is that much of the *jus ad bellum* law, or rules for when states can go to war, reflect assumptions about the nature of the international system that have not borne out. The primary example of this is the United Nations Charter. Embedded in the UN Charter is the idea that states no longer have the right to use force unilaterally except in self-defense and that self-defense would become a collective action on the part of international society. The viability of collective security is premised on the idea that the mechanism ensuring the occurrence of this action, United Nations Security Council action under Chapter VII of the Charter, would be responsive to states's security needs. In reality, the Security Council, hobbled by the veto power held by the victorious World War Two states or their successors combined with the challenges of Cold War superpower politics, proved ineffective in providing to states the needed

² A TSA is a non-governmental, non-intergovernmental organization that is willing to use either hard power or soft power to achieve political goals. Membership in this organization transcends political boundaries. Instead of being based on a loyalty to a nation-state, loyalty to the organization has a religious, ethnic, economic, epistemic, or ideological basis, or a combination thereof. See Chapter Two for an in-depth discussion.

security.³ Because of the Security Council's impotence, states have repeatedly taken unilateral action to ensure what they perceive to be their security concerns, leading to what scholars have termed "the post-Charter paradigm."⁴

A second reason why the Law of War does not reflect this new conception of warfare is that the nature of war continually evolves. The major treaties of the Law of War, the United Nations Charter and the Geneva Conventions of 1949, reflect an understanding of the nature of war based on the recently concluded conflict—the Second World War. "Armed conflict" to the framers meant massed conventional armies attacking each other across political borders. With the rise of nuclear weapons, conventional warfare faded into the background, at least as far as a direct conflict between the Soviet Union and the United States. Wars of national liberation and insurgencies emerged in the post-colonial era. Some small sub-state groups, facing an overwhelming conventional capability on the part of the state, attempted to coerce states using terror tactics. In addition, new modes of warfare continually arise, such as information warfare, which present new challenges to the western tradition of restraint

³ For arguments supporting this contention, see Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (Berkeley, CA: University of California Press, 1958); and Thomas M. Franck, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States," *American Journal of International Law* 64, no.5 (Oct 1970): 809-837. For rebuttals, see Louis Henkin, "The Reports of the Death of Article 2(4) are Greatly Exaggerated," *American Journal of International Law* 65, no. 3 (July 1971): 544-8; and Oscar Schachter, "In Defense of International Rules on the Use of Force," *University of Chicago Law Review* 53, no. 1 (Winter 1986): 113-146.

⁴ Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (New York: Routledge, 1993). For an examination of Israeli behavior in this area, see Derek Bowett, "Reprisals Involving Recourse to Armed Force," *American Journal of International Law* 66, no. 1 (January 1972): 1-36; and William V. O'Brien, "Reprisals, Deterrence and Self-Defense in Counterterrorism Operations," *Virginia Journal of International Law* 30, no. 2 (Winter 1990): 421-478.

in warfare as codified in the Law of War.⁵ Finally, new issues emerge, with civilianization of the military⁶ and the use of private security firms and mercenaries⁷ being but two examples. The continued emergence of new issues suggests that the Law of War must continually adapt and that the evolution of the Law of War lags that of warfare. These are all issues with which states must wrestle.

The final reason why the Law of War is inadequate is a product of the first two. As Geoffrey Best puts the matter, despite the best efforts of states to provide legal protections to both combatants and noncombatants in an area of conflict, some classes

⁵ The goal in Information Warfare is to deny one's adversary the use of information, while protecting one's own ability to gain and exploit it. The discussion of the implications of this new mode of warfare on the Laws of War has exploded in legal journals. For a sampling, see James P. Terry, "Responding to Attacks on Critical Computer Infrastructure: What Targets? What Rules of Engagement?" *Naval Law Review* 46 (1999): 170-187; Roger D. Scott, "Legal Aspects of Information Warfare: Military Disruption of Telecommunications," *Naval Law Review* 45 (1998): 57-76; Robert G. Hanseman, "The Realities and Legalities of Information Warfare," *Air Force Law Review* 42 (1997): 173-200; Alexander C. Dale, "Note: Countering Hate Messages that Lead to Violence: The United Nations's Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts," *Duke Journal of Comparative and International Law* 11, no. 1 (Fall/Winter 2001): 109-131; Michael N. Schmitt, "Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework," *Columbia Journal of Transnational Law* 37, no. 3 (1999): 890-937; Mark R. Shulman, "Discrimination in the Laws of Information Warfare," *Columbia Journal of Transnational Law* 37, no. 3 (1999): 939-68; George K. Walker, "Information Warfare and Neutrality," *Vanderbilt Journal of Transnational Law* 33, no. 5 (Nov 2000): 1079-1201.

⁶ The term civilianization of the military refers to the increasing use of government outsourcing in the United States military to private firms that results in a growing number of civilians holding jobs critical to the war effort that were formerly held by military members. As the number of civilians directly supporting the fighting increases, it leads to questions concerning their status under international humanitarian law. See Michael E. Guillory, "Civilianizing the Force: Is the United States Crossing the Rubicon?" *Air Force Law Review* 51 (2001): 111-142; and Lisa L. Turner and Lynn G. Norton, "Civilians at the Tip of the Spear," *Air Force Law Review* 51 (2001): 1-110.

⁷ See Christopher N. Supernor, "International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice," *The Air Force Law Review* 50 (2001): 215-252; Juan Carlos Zarate, "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder," *Stanford Journal of International Law* 34, no. 1 (Winter 1998): 75-162; Herbert M. Howe, "Global Order and the Privatization of Security," *The Fletcher Forum of World Affairs* 22, no. 2 (Summer/Fall 1998): 1-9; Dino Kritsiotis, "Mercenaries and the Privatization of Warfare," *The Fletcher Forum of World Affairs* 22, no. 2 (Summer/Fall 1998): 11-25; Montgomery Sapone, "Have

of people still fall through the gaps that exist within international humanitarian law. As warfare evolves and new lacunae emerge, states are continually faced with the need to update the Law of War to restrain their actions based on the horrific events of the previous war.⁸ For instance, states in 1949 took the previously unprecedented step of signing and ratifying a new convention for the protection of Civilians in Time of War.⁹ This resulted from the brutal treatment that Nazi occupation forces inflicted on civilian populations during their occupation of captured states during the Second World War. States amended the Law of War again during the 1970s to reflect the rise of wars of national liberation and the belief that the protections of the Law of War ought to extend to internal struggles. The two Additional Protocols to the 1949 Geneva Conventions approved in 1977 reflect this intent.¹⁰

Based on this record of the Law of War not anticipating actual state behavior, with the result of people slipping through its cracks, it is not surprising that a number of theoretical and policy dilemmas emerge with the advent of the “war on terror.”

Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence,” *California Western International Law Journal* 30, no. 1 (Fall 1999): 1-43.

⁸ Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon Press, 1994).

⁹ “Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949,” August 12, 1949, in *Documents on the Laws of War*, 3d ed., Adam Roberts and Richard Guelff, eds. (Oxford: Oxford University Press, 2000): 301-355 (The Adams and Guelff volume will hereafter be referred to as *Documents*; the fourth Geneva Convention of 1949 will hereafter be referred to as GC4).

¹⁰ “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, *Documents*, 419-479 (Protocol I will hereafter be referred to as AP1); and “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),” June 8, 1977, *Documents*, 481-493 (Protocol II will hereafter be referred to as AP2).

The Research Question

While the immediate intellectual stimulus for this dissertation emerged in part from the al-Qaeda attacks on New York City, Washington DC, and Pennsylvania, this dissertation investigates this issue in broader and more abstract terms than analyzing how the Law of War applies to a trans-national terror organization. The dissertation examines the Law of War when one of the belligerents is a trans-state actor, which would not only include such terror organizations, but also multinational corporations, international crime syndicates and drug cartels.

The dissertation's first task is to examine the codified Law of War to determine the lacunae and gray areas that arise in a state-TSA conflict. This will produce questions in a number of areas, mostly dealing with issues of interpretation of not only the treaties codifying the Law of War, but also of customary international law. Having accomplished this task, the dissertation then analyzes the moral aspects of this issue by examining how classic and contemporary just war theorists might view this issue. The resulting just war statement and synthesis of the legal and moral aspects of a state-TSA conflict will then be used to inform the interpretation of treaty law and customary practice outlined in the first section of the dissertation. An important subsidiary goal of the dissertation is to demonstrate that the moral reasoning in the just war tradition can provide useful guidance to policymakers.

It is important to note what this dissertation will not do. This project specifically examines the impact of this new conception of conflict on the Western view

of international law and just war theory. A comparative analysis of the Western, Eastern, and Islamic traditions would be fascinating and highly illuminating; this project represents the first stage of such an endeavor. However, the larger project is outside the scope of this dissertation.

The Benefits from This Project

This dissertation will provide important contributions for both the scholar and policymaker. The contributions to academe are twofold. First, a systematic examination of how the Law of War does or does not apply to this new type of conflict will provide the basis for future work and discussion. The project's just war statement will prove to be a point of departure for the discussion of important international moral issues arising from this phenomenon. For the policymaker, the work will be *one answer* to some of the vexing international legal questions arising from the war on terrorism. Such an argument, based as it is in the moral reasoning that forms the backbone of modern international law, ought to provide sound policy recommendations from both the legal and moral perspectives. Moreover, such work ought to provide direction for the reexamination of the Law of War by such organizations as the International Committee of the Red Cross.¹¹

Outline of the Dissertation

This dissertation accomplishes this task in the following manner. Chapter Two sets the table for the rest of the dissertation by elaborating the background theory and

outlining appropriate definitions. It discusses why international relations theory and international legal reasoning are inadequate by themselves for the examination of this question; it analyzes how the international legal system works and the resulting systemic limitations; and it explicitly defines the term trans-state actor. The legal analysis begins in Chapter Three with an examination of the Law of War for when states may use force, or the *jus ad bellum*. This chapter concludes that questions concerning the lack of precise definition for the term “armed attack,” the lack of consensus regarding at what level of state support to a TSA is necessary for the state to be legally accountable for the TSA’s actions; and the normative limitations of the proportionality of a victim state’s response to a TSA’s actions all represent significant lacunae in the Law of War, and serious challenges for policymakers. This analysis is followed by Chapter Four which investigates the impact of this new conception of warfare on the Laws of War dealing with international humanitarian issues—the *jus in bello*, or how states and their agents ought to conduct a war. The chapter argues that a state-TSA conflict reflects a conception of conflict that is fundamentally different from the two conceptions that are currently codified within international humanitarian law. Chapter Five is the moral examination of this issue. It investigates classic and contemporary just war thinking; in particular, the writers of the Middle Ages and late Middle Ages, scholars such as Aquinas, Vitoria, and Grotius, provide significant insight into this matter since the “international system” of their day is analogous to today’s in

¹¹ Nora Boustany, “Swiss Reconsider Geneva Conventions,” *Washington Post*, September 18, 2002, A26.

several important ways, even if there are differences. After examining how classic and contemporary just war theorists might approach the problem, Chapter Six outlines this author's just war statement and synthesis. Chapter Seven applies the dissertation's conclusions to three important policy challenges facing international society today. In doing so, Chapter Seven makes the case that this legal and moral reasoning can be applied to contemporary international relations challenges. Finally, Chapter Eight summarizes the dissertation's conclusions, as well as providing specific recommendations for changes to treaty law as well as basis for interpretation of customary international law.

CHAPTER TWO
BACKGROUND THEORY AND DEFINITIONS

If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.

H. Lauterpacht, "The Problem of the Revision of the Law of War."

Introduction

The first task in examining the legal and moral aspects of a conflict between a state and a trans-state actor (TSA) is to discuss fundamental concepts; this chapter accomplishes that task in three main sections. The first section looks at international relations theory and shows why it is not the best tool to use for making an advocacy-type argument that will be at the heart of this project. The second section examines the sources of international law and how they apply specifically to the Law of War. It concludes that the nature of international law itself creates systemic limitations that cloud the law's application. The last section investigates the recent evolution of the Law of War, discusses the rise of the trans-state actor and examines why the current Law of War does not cover it well, and then posits a definition for the term.

The Limitations of Different Approaches

This chapter's first section examines why international relations theory is a poor tool for a project that will make an argument for changes to international law. It does this in two subsections. The first discusses the differences in the primary goals of international relations scholars and international lawyers. The second section reviews how the three main research programs in international relations theory, realism, institutionalism, and constructivism view international law and the limitations that result from these analyses.

Explanation and Description

From the outset, it is important to examine the strengths of the different approaches to international affairs, as well as their weaknesses. The most important reason why international relations theory is a poor tool for this project emerges from the basic objectives of international relations scholars in particular and political scientists in general.¹ International relations scholars' key goal is to *explain* state action through the

¹ This is the crux of the difficulties bridging the gap between international relations scholars and those who study international law. See Robert J. Beck, "International Law and International Relations: The Prospects for Interdisciplinary Collaboration," *International Rules: Approaches from International Law and International Relations*, Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt, eds. (New York: Oxford University Press, 1996), 3-33; Harold K. Jacobson, "Doing Collaborative Research on International Legal Topics: An Autobiographical Account," Charlotte Ku *et. al.*, "Exploring International Law: Opportunities and Challenges for Political Science Research: A Roundtable," *International Studies Review* 3, no. 1 (Spring 2001): 18-19. For differing views of the future of interdisciplinary work, see Paul F. Diehl, "International Law: Stepchild in Social Science Research," Charlotte Ku *et. al.*, 4-9; Beth A. Simmons, "International Law" Stepchild in Political Science Research? A Rejoinder to Paul Diehl," Charlotte Ku *et. al.*, 9-12; Anne Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *American Journal of International Law* 92, no. 3 (1998): 367-397; and Paul F. Diehl, Charlotte Ku, and Daniel Zamora, "The Dynamics of International Law: The Interaction of Normative and Operating Systems," *International Organization* 57, no. 1 (Winter 2003): 43-75.

construction of a model of behavior that is generalizable to all relevant situations. For such scholars, prescription is possible, but it is based on inferences derived from the theoretical model. Professor Robert J. Beck summarizes this nicely by noting that:

Some approaches—typically those that are empiricist in method—attempt principally to derive causal relationship explanations for rule-related outcomes or events. Other approaches, often those critical in method, endeavor to understand whence rules have come and what they mean.²

The key objective for the majority of mainstream international relations scholars, then, is to *explain* behavior in the international realm. But international relations scholars do not have the tools to provide an answer about what international law *ought* look like.

The international legal community has a different objective. For international lawyers, the goal is not to explain behavior, but to *describe* what behavior ought to be, based on what the law *is*. While international legal scholars go to great lengths to interpret and argue what codified law actually *is*, the legal community is methodologically limited in arguing what the law ought to look like.³ This limitation has its basis in the inherent tension found within international law's evolution. The first school within international law—present since before the birth of modern international law—is the idea of natural law. The proponents of natural law argue that certain aspects of how people ought to behave towards one another can be known to all men, and can be discovered by reason. Behavior towards other people, and analogously towards other nations, will be easy to determine once these natural law norms are discovered. The

² Beck, 6.

³ This matter is in dispute. Professor Beck notes that one of the goals of the international legal community is to *prescribe* behavior: "Prescriptive scholarship, in sum, is fundamentally concerned with either what 'by

other important school of international law, and the one that is dominant today, is legal positivism. Most international lawyers today work within the positivist framework⁴ that does not permit any influence on international law beyond that to which states have consented. Positivists discount any influence of natural law upon international law. Since international law, according to the positivists, is based on state consent, anything to which states have not consented is not considered to be international law.⁵ Because of the dominance of positivism within international legal jurisprudence today, it makes it difficult for those who work within this methodology to make an argument for what international law *ought* to look like.

It quickly becomes apparent that scholars working in either international relations or international law are unable, because of the methodological limitations of their fields, to provide insight into what the law *ought* to look like. The role of international legal scholars is one of description as much as anything else—describing what international law demands that state behavior should be. Conversely, international relations scholars grounded in empiricist epistemology are, at best, suspicious of the idea of international norms, if not discounting them outright. Compared to both fields, a moral argument is better-equipped to provide an answer for the law *ought* to look like.

law' state behavior should be, or with what international rules governing state behavior should be." Beck, 6.

⁴ Unless explicitly stated otherwise, further references to positivism refer to legal positivism vice the positivist social science approach that emphasizes studying human affairs in a scientific manner.

⁵ For a deeper discussion of the interaction of and the tensions between positivism and natural law, see Chapter Two, "Natural Law," *International Rules: Approaches from International Law and International Relations*, Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt, eds. (New York: Oxford University Press, 1996), 34-55; and Chapter Three, "Legal Positivism," *International Rules: Approaches from International Law and International Relations*, Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt, eds. (New York: Oxford University Press, 1996), 56-93.

How International Relations Theory Explains International Law

In addition to having difficulties advocating a direction for international law, international relations theory faces challenges because in some cases it does not conceptualize international law well. Methodologically, mainstream political science examines the phenomenon of the dependent variable; for example, what causes changes in the balance of power, or what type of international regime one might expect to emerge based on given values of certain causal variables. Relatively few studies examine international law as the dependent variable, such as what explanatory variables cause international law to change over time. Moreover, political scientists view international law as a poor explanatory variable because of its slow evolution over time; it does not provide the necessary variation on the independent variable to make it useful in explaining changes in other variables.⁶

The three main research programs in international relations theory, realism, institutionalism, and constructivism view international law in different ways, if it is even acknowledged at all.

Realism

Realism is arguably the dominant research program in international relations theory today, although it is losing ground. The currency of explanation for the realists is power. In a realist explanation of international relations, there is little weak states can do to prevent the powerful states from doing what they will. Thucydides' twentyfour-

⁶ Diehl, 7.

hundred-year-old axiom “the strong do what they can and the weak suffer what they must” is as relevant today, the realists argue, as it was during the days of ancient Greece.

Some realists acknowledge the existence of international law. E.H. Carr argues that law and politics are inextricably intertwined with each other. In the case of the international system, the absence of a central mechanism for enforcing the law only exacerbates the discrepancies in power between different states: “the power element is more predominant and more obvious in international than in municipal law.”⁷ He continues: “[Law] cannot be understood independently of the political foundation on which it rests and of the political interests which it serves.”⁸ For Carr, international law exists, but he rejects any causal effect it might have on the behavior of states that is independent from power.

Hans Morgenthau, another “classic” realist acknowledging the existence of international law, goes so far as to concede that “the great majority of rules of international law are unaffected by the weakness of its system of enforcement”⁹ and that it is voluntary compliance to these laws that limits the need for enforcement.¹⁰ Where problems do arise, though, is where disagreement exists between states. These “acute”

⁷ Edward Hallett Carr, *The Twenty Years Crisis 1919-1939: An Introduction to the Study of International Relations*, 2d ed. (New York: Harper Torchbooks, 1946), 178.

⁸ *Ibid.*, 179. Carr wrote this classic work at the beginning of the Second World War and issued a second edition in 1946—effectively before the advent of the United Nations. It is not unreasonable to assert, however, that Carr would have viewed the enforcement mechanism embedded in the Security Council and Chapter VII as still being subject to the political whims of the Council’s five permanent members—the five most powerful states in the system.

⁹ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 4th ed. (New York: Alfred A. Knopf, 1967), 283.

¹⁰ This is similar to Louis Henkin’s oft-cited statement: “Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2d. ed. (New York: Columbia University Press, 1979), 47.

cases are the ones where the power discrepancy between the states directly affects the enforcement of the law, or the lack thereof:

There can be no more primitive and no weaker system of law enforcement than this; for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation. It makes it easy for the strong both to violate the law and to enforce it, and consequently puts the rights of the weak in jeopardy.¹¹

Morgenthau, while acknowledging the existence and efficacy of international law in most cases, rejects it as a means for ensuring world order because it lacks the necessary enforcement mechanism.

While some of the classic realists grant the existence of international law, more recent “structural” realist writers barely acknowledge it. In both of his influential works, Professor Kenneth Waltz barely mentions the concept of international law, and when he does, it is limited to a short discussion of enforcement mechanisms, or the lack thereof, in the international system.¹² A recently published work by another “structural” realist, Professor John Mearsheimer, also fails to mention international law. He argues that while states attempt to achieve peace and a sustainable and stable international order, they do so because of “narrow calculations about relative power, not by a commitment to build a world order independent of a state’s own interests.”¹³ For Mearsheimer and other

¹¹ Morgenthau, 282.

¹² See Kenneth N. Waltz, *Man, the State and War: A Theoretical Analysis* (New York: Columbia University Press, 1959), 209-10. In this case, Waltz’s discussion of enforcement mechanisms lasts for six lines. See also Waltz, *A Theory of International Politics* (New York: McGraw Hill, Inc., 1979).

¹³ John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton, 2001), 49. While Mearsheimer is not specifically discussing international law in this instance, it seems reasonable to infer that international law is part of the “world order” that he mentions. For a further examination of Mearsheimer’s work in this area, see “The False Promise of International Institutions,” *International Security* 19, no. 3 (Winter 1994/1995): 5-49. For an extended rebuttal, see Robert O. Keohane, *et. al.*, “Promises, Promises: Can Institutions Deliver?” *International Security* 20, no. 1 (Summer 1995): 39-93.

realists, power discrepancies drive state behavior and other causal factors such as international law have little effect, if any.

There is little room for international law in the realist world of power, security, state interest, balancing, and revisionist states. And since it still remains the dominant research program within international relations, it is suggestive of the difficulties of using international relations theory in analyzing the problem of the Law of War and a state-TSA conflict.

Institutionalism

While realist theory experiences difficulty explaining international law, scholars working in the institutionalism¹⁴ research program have better tools for addressing it. Unlike their realist colleagues who focus on state power and survival in an anarchical realm, the institutionalists examine international regimes and institutions to see how these can benefit states attempting to cooperate in areas where their interests converge.

In one of the seminal works on regime theory, Professor Stephen Krasner outlines what has become the classic definition of a regime:

Regimes can be defined as sets of *implicit or explicit* principles, norms, rules, and decision-making procedures around which actors' *expectations converge* in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or

¹⁴ For the purpose of this explanation, institutionalism refers to any work related to international regimes or institutions.

proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.¹⁵

Based on this definition, it is possible to argue that international law is, in fact, an international regime. The emphasized terms “implicit and explicit” are key to this analogy. One can view treaties and conventions as explicit rules; similarly, customary international practice represents the implicit rules or principles. Moreover, the idea of converging expectations also explains international law because it is a set of norms that set the standards for state behavior. While one may debate the issue of how well the analogy between an international regime and international law actually holds, the important thing to take away from this is that regime theory provides a plausible explanation of how international law works in the international system.

Later institutionalist theorists extend this thinking. Professor Robert Keohane, in his work on international institutions, bases his entire argument on the premise that institutions only work when states’ interests converge or are at least minimally complementary. When state interests diverge on an issue, an institution will prove less helpful in ensuring cooperation, if it even occurs at all.¹⁶ This inference echoes Morgenthau’s analysis of international law—it is effective in modifying behavior most of the time, but fails in the areas where state interests diverge. Keohane also posits the idea

¹⁵ Stephen D. Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables,” reprinted in *International Organization: A Reader*, Friederich Kratochwil and Edward D. Mansfield, eds. (New York: Harper Collins College Press, 1994), 97. Emphasis added.

¹⁶ Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984), 6.

that international institutions can have an independent effect on state behavior.¹⁷ The core weakness of Keohane's work, however, is that he does not unearth the mechanisms that explain how institutions actually influence state behavior through changing state preferences.¹⁸ Later institutionalists make compelling arguments to explain these mechanisms. Professor John Ikenberry identifies three such mechanisms, which he terms collectively as "institutional binding." Interestingly enough, Ikenberry's first mechanism is that "institutional agreements can embody *formal legal* or organizational procedures and understandings that strengthen expectations about the orientation of state behavior."¹⁹ Ikenberry explicitly acknowledges the independent effect of international law—as a mechanism—on the behavior of states, a mechanism that binds states closer together.

Another area of institutionalist theory that explains international law is the concept of reciprocity. There are two distinct types of reciprocity. The first is *specific* reciprocity where "specified partners exchange items of equivalent value in a strictly delimited sequence. If any obligations exist, they are clearly specified in terms of rights

¹⁷ Ibid., 9. For a counterargument, see Joseph M. Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism," *International Organization* 42, no. 3 (Summer 1988): 485-507. For a compendium of the realist-institutionalist debate, see David A. Baldwin, ed., *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993).

¹⁸ Keohane's work is a state-based analysis where state preferences are considered exogenous to the analysis. He chose his base assumptions specifically to mirror Waltz's assumptions in *Theory of International Politics*, his goal being to demonstrate the value of international institutions on Waltz's terms. But the result of this Faustian pact is that his theory cannot explain how state preferences change in light of the influence of institutions.

¹⁹ G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars* (Princeton: Princeton University Press, 2001), 65. Emphasis added. His other two mechanisms include institutional arrangements lead to transgovernmental connections, routines, and coalitions; they also provide the basis for further intergovernmental cooperation for a wider set of activities. Ikenberry, 66-69.

and duties of particular actors.”²⁰ In *diffuse* reciprocity, obligations are less spelled out and the sense of reciprocity is more conforming to generally accepted norms of behavior.²¹ It is possible to characterize international law in terms of both types of reciprocity. On the one hand, specific reciprocity is incorporated into arms reduction treaties that require each actor to take specific steps in a specific order and would provide for concrete measures if one actor believes that the other is not fulfilling its obligations. On the other hand, diffuse reciprocity can be seen in the idea that most states, as a general proposition, will lower their trade barriers with other states as long as other states do the same.

The final area of institutionalist theory that explains how international law works is closely related to reciprocity and emerges from the game theory and formal modeling methodologies: the shadow of the future. Professor Robert Axelrod examines this issue and argues that people are more likely to reciprocate and cooperate with each other if they consider how their lack of cooperation today may influence another’s behavior towards them tomorrow. If the person values another’s behavior in the future, he would be more inclined to cooperate today. Conversely, if a person places a greater emphasis on today’s gains over those of the future, that person may well prove uncooperative today and lose the cooperation of the antagonist in the future.²² The shadow of the future

²⁰ Keohane, “Reciprocity in International Relations,” *International Organization* 40, no. 1 (Winter 1986): 3.

²¹ Ibid. For an extension of Keohane’s work on reciprocity, see Joseph Leibold and George E. Shambaugh, “Who Owes Who, How Much, and When? Understanding Reciprocated Social Exchange in International Politics,” *Review of International Studies* 28, no.2 (April 2002): 229-252.

²² Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984), 124-32. See also Kenneth A. Oye, “Explaining Cooperation Under Anarchy: Hypotheses and Strategies,” *Cooperation Under Anarchy*, Kenneth A. Oye, ed. (Princeton: Princeton University Press, 1986), 1-24; Duncan Snidal,

explains why states follow international law today, even if not following it were in their best interest. Since states have to work with other states in the future and gain their cooperation, the shadow of the future usually provides a significant incentive to states to follow international law.

Institutionalist theory, particularly recent works, provides a strong basis for explaining how international law influences state behavior. Moreover, Ikenberry's concept of institutional binding along with the concepts of reciprocity and the shadow of the future go a long way to explain why states may follow international law even if it is not in their interest. directly challenging realist claims to the contrary. However, while institutionalism provides a good basis for *explaining* how international law works in the international realm, it does not make a specific argument for what international law *ought to look like*.

Constructivism

In contrast to realists who deny that international law has any independent effect on state behavior, constructivists, like their institutionalist colleagues, argue that it does have an impact. However, constructivists take a different route than the institutionalists to arrive at these similar conclusions. Contrary to the rationalist approach of institutionalists, constructivists view the world, the relationships between actors, and the international structure as being socially constructed.

"The Game *Theory* of International Politics," *Cooperation Under Anarchy*, Kenneth A. Oye, ed. (Princeton: Princeton University Press, 1986), 48-52; Robert Axelrod and Robert O. Keohane, "Achieving Cooperation Under Anarchy: Strategies and Institutions," *Cooperation Under Anarchy*, Kenneth A. Oye, ed. (Princeton: Princeton University Press, 1986), 232-4.

Two aspects of constructivism²³ are to understanding how the research program explains international law. The first is the idea that the actor and the structure are mutually constitutive. This is contrary to the realist belief that actors in the international realm cannot consciously change the international structure; structural changes occur, according to the realists, only as the unintended consequence of states pursuing their goals of achieving power or security.²⁴ Constructivists believe that through the mutually constitutive process between the structure and the actor, states can change the nature of the structure, which in turn changes the identity of the state.²⁵ And a change in the identity of the state may lead to a change in a state's preferences, causing it to act in a different manner.

The second important aspect of constructivism that is important in explaining the effect of international law on state behavior is intersubjective understanding. To the constructivist, the idea of convergent expectations embedded in a regime denotes the importance of the intersubjective understanding between states of what the regime is

²³ For the purpose of this discussion, constructivism represented here is an amalgamation of the different constructivist variations. Dean John Gerard Ruggie categorizes constructivists into three variants, each possessing different philosophical bases. The neo-classical constructivists generally share an epistemological affinity for pragmatism, a set of analytical tools to understand intersubjective meanings, and a commitment to the idea of social science. The postmodernist constructivists break with modernism. These scholars emphasize discursive practices as being the foundation of reality and analysis, as well as "hegemonic discourse" imposing a "regime of truth." The postmodernists also reject the idea of causality, placing a greater emphasis instead on the logic of interpretation. Within Ruggie's third constructivist category reside the naturalistic constructivists, who share some of the ideals of mainstream theorists, such as causality. But beyond the positivist theorists, these constructivists also allow scientific inquiry into the material and social world. John Gerard Ruggie, "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge," *International Organization* 52, no. 4 (Autumn 1998): 880-882.

²⁴ David Dessler, "What's at Stake in the Agent-Structure Debate?" *International Organization* 43, no. 4 (Summer 1989): 448-458. Dessler uses the term "transformational model" in lieu of mutually constitutive, but the ideas they convey are the same.

supposed to do.²⁶ And since intersubjective understandings are a socially constructed result of state interactions, it is apparent that constructivism provides important explanatory power for how international law actually works.

Another advantage of constructivism over rationalistic theories like realism and institutionalism is that it explains the concept of norms, something that theories rooted in the positivist model of explanation cannot incorporate. For the positivists:

Norms can be thought of only with great difficulty as 'causing' occurrences. Norms may 'guide' behavior, they may 'inspire' behavior, they may 'rationalize' or 'justify' behavior, they may express 'mutual expectations' about behavior, or they may be ignored. But they do not cause effect in the same sense that a bullet through the heart causes death or an uncontrolled surge in the money supply causes inflation.²⁷

Since theories grounded in positivist epistemology cannot incorporate the nonmaterial, social aspects of the international system, such as the intersubjective understandings of norms, any theory that incorporates the social aspect will possess an advantage.

An important contributor to constructivism is Professor Alexander Wendt. In his state-based version of constructivism, Wendt views the international system as having both material and social aspects, where the socially derived intersubjective understandings provide meaning to the material part. To use his oft-cited example, Wendt argues that the United States views the United Kingdom's 500 nuclear warheads as less of a threat than the limited number of warheads that North Korea might possess.²⁸

²⁵ State identity is "how [a state] conceives of itself and its role in the international system." Anthony Clark Arend, *Legal Rules and International Society* (Oxford: Oxford University Press, 1999), 118.

²⁶ Friedrich Kratochwil and John Gerard Ruggie, "International Organization: A State of the Art or An Art of the State," *International Organization* 40, no. 4 (Autumn 1986): 764.

²⁷ *Ibid.*, 766-769. Quote is found on 767.

²⁸ Alexander Wendt, "Constructing World Politics," *International Security* 20, no. 1 (Summer 1995): 73.

Conversely, a realist would view the former as having a much greater level of power and would disregard any other state-level variable as having any mitigating effect.

An important work extending state-based constructivism to international law is Anthony Clark Arend's *Legal Rules and International Society*. In Arend's view, as states consent to be bound by international law, these "international legal rules do, in part, constitute the structure of the international system."²⁹ Once this occurs, the mutually constitutive process between the structure and the actor will, over time, change the actor's identity and perhaps its preferences. So where an actor may initially agree to be bound by a certain international legal rule for strategic reasons, over time its identity may change and the actor may in the end follow the norm for its own sake.³⁰ While Arend's work goes a long way in explaining how international law affects state behavior through changing its preferences, his state-based methodology, unsurprisingly, does not describe the mechanism behind how this identity change occurs due to the mutually-constitutive nature of the actor-structure relationship. Others have subsequently unearthed some of those sub-state mechanisms that explain how state identity changes with the influence of international law or an international norm.³¹

²⁹ Arend, 138.

³⁰ Arend, 129-142. For an argument outlining the effect of norms on the change in state behavior, see Martha Finnemore, "Constructing Norms of International Intervention," *The Culture of International Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), 153-185.

³¹ The literature that explains how international law and norms change state identity is growing rapidly. For examples, see Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (Autumn 1998): 887-917; Thomas Risse and Kathryn Sikkink, "The Socialization of Human Rights Norms into Domestic Practices: An Introduction," *The Power of Human Rights: International Norms and Domestic Change*, Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds. (Cambridge: Cambridge University Press, 1999), 1-38; Richard Price, "Reversing the Gun-Sights: Transnational Civil Society Targets Land Mines," *International Organization* 52, no. 3

While recent work in the constructivist research program goes a long way to explain how international law affects state behavior by changing a state's identity and can incorporate socially derived norms more easily than do rationalistic theories, it faces the same inherent problem for this project as do realism and institutionalism: it cannot make the argument for what international law *is* or *what it ought to look like*.

International Relations Theory—Conclusion

All three core research programs in international relations theory, while providing varying explanations of how international law influences state behavior, cannot answer the questions of what international law actually is, or provide guidance on the direction where international law needs to go. This is not surprising since the one of the key objectives of scholarly research in the field of international relations, at least in its empiricist realm, is to explain international behavior in generalizable terms, with prescription for state behavior resulting from the insights of theoretical models. Given this inherent weakness of international relations theory, one must conclude that using it as the sole tool for this project will not provide a useful or satisfying answer to the research question.

Still, a grounding in international relations theory is useful for a project that will ultimately provide a moral argument for the direction of the Law of War in a state-TSA conflict. While moral argument provides the beacon for the direction in which international law ought to evolve, and will ultimately be the standard by which

(Summer 1998): 613-644; Kenneth Robin Rutherford, "NGOs and the International Ban on Anti-Personnel Landmines," (Ph.D. diss., Georgetown University, 2000).

international law and state behavior will be judged, such moral thinking cannot be completely disconnected from the realities in the political system. Such divorced moralizing, in the end, is of little use. An understanding of the various processes involved in how states actually behave in the international realm will, in the long run, provide the basis for a sound moral argument that has a greater chance of implementation.

International Law, Its Sources, and How It Applies to the Law of War

The Law of War governs when states can go to war with each other and, when they do go to war, how they conduct that conflict.³² More generally, The Law of War is an important subset of international law. Since the nature of international law is substantively different than domestic legal systems, an important part of setting the stage for this project of examining the implications of a state-TSA conflict is understanding international law and how it applies to the Law of War. This section first outlines the sources of international law; it subsequently examines how the *systemic limitations* of the international legal system produce several important lacunae in the Law of War with respect to a state-TSA conflict.

³² Here lies an important distinction. War in a “technical” sense occurs when a state declares war on another. This brings about the legal state of war. War in the “material” sense can occur even if there is not a declaration as such. Yoram Dinstein, *War, Aggression, and Self-Defence*, 2d ed. (Cambridge: Cambridge University Press, 1994), 8-9.

Sources of International Law

Article 38 of the Statute of the International Court of Justice lists the types of law that the Court should apply when it adjudicates cases. These are now almost universally recognized as the authoritative sources of international law:

- a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognized by civilized nations;
- d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law³³

Using this as a starting point, this section examines these sources by first probing how the two most important sources, treaties and custom, work and interrelate. Subsequent to this is an examination of the other sources, general principles of law, and judicial decisions and publicists. Finally, this section on international law concludes by providing an outline of the systemic limitations that international legal theory places on the analysis of how one might analyze a state-TSA conflict through the Law of War.

³³ United Nations, "Statute of the Court of International Justice," 26 June 1945, Article 38, Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, eds., *Basic Documents Supplement to International Law: Cases and Materials*, 4th ed. (St. Paul, MN: West Group, 2001), 34 (hereafter referred to as *Supplement*).

*Treaties*³⁴

Treaties are the explicit written agreements between states, whether it is an agreement between two states or an agreement between all.³⁵ One can think of treaties as contractual agreements between states that establish rights and duties for all signatories in a given issue area. There are a number of important issues related to treaties. The first is one of the most important principles of international law—*pacta sunt servanda*—treaties will be observed. Like contracts in a domestic legal system, states are expected to uphold the provisions of treaties that they enter into.

Another important aspect of treaty law is that, unlike domestic legal systems where the law is binding on all members of the society, the rights and duties enumerated in a treaty apply only to those states that have signed and ratified³⁶ the treaty. Non-signatories are not bound by the treaty's provisions. This reflects the doctrine of *positivism*: "international law is the sum of the rules to which states have *consented* to be

³⁴ For greater discussion of treaties, see Arend, 46-47; Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (New York: Routledge, 1993), 6; J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed., Humphrey Waldock, ed. (New York: Oxford University Press, 1963), 57-8; Mark W. Janis, *An Introduction to International Law*, 3rd ed. (Gaithersburg, NY: Aspen Law and Business, 1999), 9-40; Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, eds., *International Law: Cases and Materials*, 4th ed. (St. Paul, MN: West Group, 2001), 108-118 (hereafter referred to as Damrosch, *et. al.*); Hans Kelsen, *Principles of International Law*, 2nd ed., Robert W. Tucker, ed. (New York: Holt, Rinehart and Wilson, 1966), 454-506 (hereafter referred to as Kelsen and Tucker); Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, 5th ed. (New York: MacMillan, 1986), 15-19; Michel Virally, "The Sources of International Law," *Manual of Public International Law*, Max Sorenson, ed. (New York: Carnegie Endowment for International Peace, 1968), 123-127.

³⁵ One can term written agreements between states as treaties, conventions, pacts, protocols, or accords. For the purposes of this discussion, the term treaty covers all of these types of international agreements.

³⁶ States agree to be bound by a treaty in a two-step process. The first is where a state signs the treaty. The second part of the process is where the state ratifies the treaty according to its own constitutional processes. Once a state deposits the instrument of ratification with the United Nations, and the treaty enters in force, the state is considered to be a party to the treaty's provisions.

bound, and that nothing can be law to which they have not consented.”³⁷ According to the positivists, states can only be bound to that which they actually consent, whether it be explicit consent in the case of a treaty, or implicit in the case of customary practice.

Applicability to a State-TSA Conflict?

While it is relatively straightforward to analyze how the treaty law of the Law of War applies to signatories, this becomes more difficult to determine when one of the belligerents is either a non-signatory or a TSA. The purpose of this analysis is to examine the possible legal arguments that actors might use if they were to argue that they ought not to be held to the norms of a treaty. The first part examines whether treaty law of the Law of War still constrains states when one of the belligerents is a TSA; second, it investigates whether TSAs are constrained by the black letter law of treaties. Let's examine the first question. As previously discussed, treaties are, in essence, contractual agreements between states that confer rights and duties upon the signatories. Important concepts that explain why states do tend to adhere to these agreements, and particularly in the Law of War, are reciprocity and the shadow of the future, which provide incentive to states comply with the black letter law. The fact that State B may commit the same violation of the law in retaliation for some perceived violation on the part of State A provides an incentive for State A to follow the law. The treatment of prisoners of war illustrates this well. States have incentive to treat the adversary's prisoners in accordance with the law since they want their own prisoners to be accorded with the full protection of the Geneva Conventions. But when one of the parties to a conflict is not a state, such a

³⁷ Brierly, 51. Emphasis in original.

party has not given its consent to be bound by the provisions of the Law of War. In light of this, are the relevant treaties of the Law of War binding on State A if one of the belligerents is not a signatory to the treaty, or is not a state? Or has the State A, by agreeing to be bound to these treaties, also agreeing that these will govern its behavior in all conflicts?

There are a number possible arguments that states could make in this regard. The first is that State A could argue that since the other belligerent is not a signatory, the treaty is not applicable in this specific instance. In some cases, treaty provisions allow a state to opt out of the treaty if one of the belligerents is a non-signatory.³⁸ But using this type of argument could be more difficult today since such language, while common in treaty law of the early twentieth century, generally does not appear in later treaties of the Law of War. The counterargument that one could make is that State A would still be bound by treaty provisions if those provisions were also part of customary international law, either through crystallization or codification (the next section discusses these concepts in greater detail). An example of this is Article 2(4) of the United Nations Charter which charges states “to refrain from...the threat or use of force against the territorial integrity or political independence of any state.” As simply a provision of a black-letter treaty, State A could argue that in a conflict with a belligerent that is a non-signatory that such a provision no longer applies. But Article 2(4) also represents an

³⁸ Treaty language applicable to both of these arguments is in the “Convention (IV) Respecting the Laws and Customs of War on Land,” October 18, 1907, *Documents on the Law of War*, Adam Roberts and Richard Guelff, eds., 3d ed. (Oxford: Oxford University Press, 2000): 69-84 (the Adams and Guelff edition will hereafter be referred to as *Documents*). Article 2 states: “The provisions contained in the

important norm in the international legal system, a norm that a state would be hard-pressed to justify any non-adherence.

These arguments would be similar if the non-signatory belligerent happens to be a TSA. In fact, it might even make State A's case stronger; it could argue that since the belligerent is not even a state actor, the treaty provisions are less binding than if the actor were a state. On the other side, a TSA could unilaterally declare that it would abide by the rules of the Law of War on the condition that the state belligerent would also argue to follow them.³⁹ When faced with such a declaration, regardless of whether it were codified in treaty law or not, a state could well find itself under considerable moral and political pressure to abide by the relevant provisions of the Law of War.

Let's now examine the second question: does treaty law apply to an actor which is a non-signatory to the treaty? A positivist would argue that if a state has not consented to be bound by a treaty, it is not subject to its provisions. And to extend this reasoning, it would be then be reasonable to argue that a TSA would not be bound by such a treaty either. However, if the treaty's provisions represent a codification or crystallization of customary practice, then a non-signatory state is then bound by its provisions. By the same logic, a TSA would also be bound. The section on customary international practice discusses this in greater detail.

Regulations...do not apply except between contracting Powers, and then only if all belligerents are parties to the convention."

³⁹ "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)," Article 96(3), *Documents*, 419-479 (Protocol I will hereafter be referred to as AP1).

The nature of treaty law, as a subset of international law in general, opens up two important lacunae in the Law of War that result from the *structural limitations* of international law. Since one of the belligerents in a state-TSA conflict is not a state, State A could make a general argument that it is no longer bound by the provisions of the relevant treaties. And secondly, since a TSA has not agreed to be bound by the treaty law—a TSA cannot even make international law since this is the exclusive domain of the states—it could also argue that it is not bound by the treaty's constraints. It is important to note, however, that in certain circumstances—where such treaty law also reflects customary international law—one can make compelling counterarguments to both.

Customary International Law⁴⁰

The second source of international law cited in the ICJ's governing statute is "international custom, as evidence of a general practice accepted as law," more commonly referred to as customary international law (CIL). Originating in Roman times, CIL was the principal source of international law up until the twentieth century when states began to sign an increasing number of bilateral treaties and conventions. The idea behind CIL is that

⁴⁰ For a discussion of customary international law, see Arend, 47-48; Arend and Beck, 6-7; Brierly, 59-63; Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press, 1971); Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 19-28; Janis, 41-54; Damrosch, *et. al.*, 59-108; Kelsen and Tucker, 440-454; William V. O'Brien, *Law and Morality in Israel's War With the PLO* (New York: Routledge, 1991), 83-4; Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," *American Journal of International Law* 95, no. 4 (October 2001): 757-791; von Glahn, 19-22; Virally, 128-143. For a critique of the efficacy of customary international law, see J. Patrick Kelly, "The Twilight of Customary International Law," *Virginia Journal of International Law* 40, no. 2 (Winter 2000): 449-543.

states in and by their international practice may *implicitly* consent to the creation and application of international legal rules. In this sense, the theory of customary international law is simply an *implied* side to the contractual theory that explains why treaties are international law.⁴¹

The important difference between treaties and CIL is that the former is an explicit statement of what states consider to be international law, while the latter is implicit.

There are two differences between treaty law and CIL. The first is that CIL is more general than the explicit black-letter law of treaties. As a result, one can apply these principles more easily than in treaty law, which often has lacunae. And second, CIL applies to all states regardless of whether they have consented to it or not, although a state may claim that it is not bound by a specific aspect of CIL through the practice of persistent objection.⁴²

Modern CIL consists of two distinct components. The first is objective—state practice: does state practice follow what is understood to be CIL? The second component is subjective—*opinio juris*: is the state acting from a sense of legal obligation? As one might expect, it is not easy to definitively determine if these components exist; CIL is much more of “an art” than it is a science.⁴³

⁴¹ Janis, 42. Emphasis added.

⁴² To make this claim, a state must explicitly take action to demonstrate that it does not consider the evolving CIL to be law, as well as make statements to that effect. Assuming it were to do this, then it could argue later after the practice had become CIL that it was not bound by such practice. An example illustrating this is the Reagan administration’s contention that the Libyan claim that the Gulf of Sidra was Libya territorial waters was not actually the case. To demonstrate that it did not recognize this claim, Washington sent elements of the U.S. Sixth Fleet across “line of death” to ensure through its practice that its “persistent objection” to this evolving CIL was noted. If the Libyan claim were to eventually become accepted CIL, the U.S. would not be bound. von Glahn, 22; Damrosch, *et. al.*, 100-3.

⁴³ Janis, 44.

State Practice

To make an argument for the existence of CIL, it is reasonable to expect that the law must reflect the practice of states—how can it be customary practice if it is not what states actually do? Making this determination can be difficult and contentious. Yet of the two components of CIL, state practice is easier to determine its existence since it measures something reasonably objective. One of the earliest examples of the methodology used to determine the existence of state practice can be found in the *The Paquete Habana*. In its ruling in 1900, the U.S. Supreme Court cited more than twenty instances of state practice spanning almost 500 years where innocent fishing boats were protected during wartime as evidence for its assertion of the ripening of the state practice of protecting fishing boats in wartime.⁴⁴ While the Court acknowledges that all state practice in this area was not entirely supportive of their claim, the ruling notes that since 1810, state practice was uniform regarding protections given to innocent fishermen.⁴⁵ While detailing actual state practice over the years is a fairly objective process—either it occurred or it did not—making the determination of the existence of customary law based on that practice is where states and jurists run into the grey area of international law: interpretation. The courts have provided some vague guidance. But phrases such as “a *very widespread* and *representative participation* in the convention might suffice of itself, provided that it included that of States whose interests were specially affected...”⁴⁶

⁴⁴ “*Paquete Habana*,” (United States Supreme Court, 1900), Damrosch, *et. al.*, 62-6.

⁴⁵ *Ibid.*

⁴⁶ “Decision in North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands),” (International Court of Justice, 1969), Article 73, *International*

or “State practice, including that of *States whose interests are specially affected*, should have been *both extensive and virtually uniform* in the sense of the provision invoked...”⁴⁷ provide little definitive help. Individual interpretation remains an important issue.⁴⁸

Opinio Juris

If the determination of the existence of state practice is a contentious proposition, determining if states “show a general recognition that a rule of law or legal obligation is involved”⁴⁹ is more so. Instead of having relatively objective state actions to measure, one must now examine the subjective realm of what states’ leaders thought and said regarding their belief that legal obligation compelled their actions. While it is possible to find information at that level of detail, it can be problematic. Are the state’s leaders acting out of a genuine sense of legal obligation? Or are they saying so in public, yet actually acting that way for instrumental reasons due to other international or domestic influences? And as with state practice, the researcher must then determine whether the level of evidence meets the threshold for *opinio juris* to exist.

The Challenge of Determining State Practice/Opinio Juris and the Law of War

One of the difficulties involved in determining the existence of state practice relative to the Law of War is that states have had relatively little chance to demonstrate practice because international wars are relatively infrequent. As noted earlier, the U.S.

Legal Materials 8, no. 2 (March 1969), 374 (hereafter referred to as “North Sea Continental Shelf”).
Emphasis added.

⁴⁷ *Ibid.*, Article 74, 375. Emphasis added.

⁴⁸ The difficulties involved in the subjective process of interpretation represent one of the core areas of discussion in the debates over CIL. See generally Roberts, “Traditional and Modern Approaches.”

⁴⁹ “North Sea Continental Shelf,” Article 74, 375.

Supreme Court could only muster approximately twenty instances of state practice over a period of almost 500 years as evidence in its determination of the existence of state practice. A little more than 50 years have elapsed since the entry into force of the United Nations Charter and the 1949 Geneva Conventions. Even less time has elapsed since the approval of key interpretative documents, such as the United Nations General Assembly Resolution 3314, "Definition of Aggression." Has sufficient definitive state practice occurred in this short period to warrant the conclusion of the existence of state practice?

This challenge leads to another contentious area in the debates over the modern Law of War. In some cases, lawyers and jurists argue that since there is limited state practice in this area of international law, *opinio juris* ought to have greater weight in the determination of the existence of CIL.⁵⁰ While such a "modern" approach to the determination of the existence of CIL may produce a ruling or legal argument that is normatively satisfying—one that furthers a "good" end such as extending international human rights law—it can become problematic in a positivist legal system that is allegedly objective.

Relationship of Treaty Law to Customary International Law

The relationship between treaty law and CIL is particularly important in the area of the Law of War since so much of the codified Law of War is based on state practice

⁵⁰ This is an example of what has been termed the "deductive" method of determining CIL since the legal reasoning starts from general principles and the results in an argument for a specific law. The determination of the existence of state practice and *opinio juris* was previously based on an inductive method—the existence of state practice and *opinio juris* led to the conclusion of the existence of CIL. See D'Amato, "Trashing Customary International Law," *American Journal of International Law* 81, no. 1 (January 1987): 101-105; Roberts, 757-761 (Roberts terms the inductive and deductive methods as the traditional and modern methods, respectively).

that spans centuries. There are five "ideal" ways to characterize the relationship between treaty law and CIL. The first is simply that the treaty does not have any CIL associated with it. An example is when states sign a treaty that covers a new area of international law, such as the Outer Space Treaty⁵¹ or the 1899 Hague Declaration prohibiting the launching of projectiles and explosives from balloons.⁵² The latter is an example where no customary international law exists and states, sensing the advent of a new mode of warfare, attempt to restrict their own conduct in this new area.

The second type of relationship between treaty law and CIL is where states sign a treaty codifying what is already accepted international practice. A prime example of this is 1961 Vienna Convention of Diplomatic Relations⁵³ that codifies long-standing practice of how states conduct diplomacy and protect diplomats and consular facilities. This relationship type is particularly relevant to the Law of War since much treaty law of the Law of War codifies previous state practice. Examples of these are the various 1899 and 1907 Hague Conventions, which for the first time codified what had generally been considered to be the "laws and customs of war." But this is a contentious area. Disagreements will exist over the precise interpretation of the language of the treaty law and whether it does in fact represent what had been customary practice. An example of this is the debate over the meaning of "inherent right of individual or collective self-

⁵¹ United Nations, "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies," January 27, 1967, *Supplement*, 981-984.

⁵² "Declaration (IV, 1) To Prohibit For the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature," July 29, 1907, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents*, Dietrich Schindler and Jiri Toman, eds. (Dordrecht, The Netherlands: Martinus Nijhoff, 1988), 201-206.

⁵³ United Nations, "Vienna Convention of Diplomatic Relations," April 18, 1961, in *Supplement*, 574-583.

defence” found in Article 51 of the United Nations Charter.⁵⁴ As Chapter Three will point out, sources such as the *travaux preparatoires*, the record of the debates that led to the drafting of the treaty that one could use to determine the framers’ intent in the matter, sometimes do not provide clear answers regarding the framers’ intent.

The growth of CIL from a treaty is the third type of relationship between these two sources of international law. An example of this is the governance of aerial warfare. While states have never signed a treaty that either outlaws or constrains aerial warfare specifically, it has come to be understood that the users of this instrument must apply it with the same principles—discrimination and proportionality—that apply to both ground and naval warfare and codified in various conventions.⁵⁵

The fourth type of relationship between treaty law and customary international practice is where a treaty crystallizes customary international law; in other words, states agree that the principle encapsulated in the treaty represents CIL from the time that the treaty enters into force.⁵⁶ To determine if this is the case, a researcher would examine the *travaux preparatoires* to see if this was the states’ intent; one must then examine state

⁵⁴ United Nations, “Charter of the United Nations,” 26 June, 1956, Article 51, *Supplement*, 11. The Article reads in part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...” Chapter Three examines this debate in greater detail.

⁵⁵ See generally, L.C. Green, “Aerial Consideration in the Law of Armed Conflict,” *Essays on the Modern Law of War*, 2nd ed. (Ardsley, NY: Transnational Publishers, 1999): 577-95. Air Force Regulations regarding the application of air power explicitly state this: “The law of armed conflict is not entirely codified. Therefore, the law applicable to air warfare must be derived from general principles, *extrapolated from law affecting land or sea warfare*, or derived from other sources including the practice of states reflected in a wide variety of sources.” Department of the Air Force, Air Force Pamphlet (AFP) 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*, November 19, 1976, para. 1-3 (c), p. 1-7. Emphasis added.

⁵⁶ “North Sea Continental Shelf,” Articles 61-69, 370-3.

practice to see if this practice actually mirrors crystallized CIL after the treaty enters into force.

The final “ideal” type of relationship between treaty and customary international practice is where CIL exists and the states have not signed a treaty related to it. This is the relationship type where most of the Law of War was located as states began to codify these rules at the end of the nineteenth century. As more time passes and states codify more of the Law of War residing in CIL, this type of relationship between the two sources of law will further shrink.

It is important to note that these five types of relationships between treaty law and CIL are ideal types. While many examples found in the Law of War fall cleanly into one of the five types, many other examples are contentious. The important thing to take away from this discussion is that the relationship between treaty law and CIL is contextual and nuanced and that understanding the relationship in any particular instance is important for this project.

Applicability to a State-TSA Conflict

Unlike treaty law that binds only those states that have signed and ratified the treaty, CIL binds all states. Thus, if a state is a non-signatory to one of the treaties of the Law of War, yet the treaty represents a codification or crystallization of customary practice, then that non-signatory state is subject to the treaty’s provisions. How does this affect a State-TSA conflict? If a particular part of the Law of War is in CIL, then a state would be bound to follow it, regardless of whether the other belligerent is a state or not.

It would be more difficult for a state to claim that customary practice was not applicable to it. However, a state could argue that since CIL is based on the practice of states, in a conflict with a TSA, which is not a state, there is less of an obligation to follow such practice.

On the other side, a TSA cannot, by definition, make international law since this is the exclusive domain of states.⁵⁷ Yet one can still argue that a TSA is still bound if that law is part of CIL. And this is particularly true in the Law of War. There are examples where international tribunals have held individuals criminally liable for their actions during wartime because treaty law also represented CIL, either through codification or evolution.⁵⁸ Based on the Nuremberg precedent, it would not be a far leap to argue that the leaders of TSAs could also be held liable for their actions under the Law of War if the relevant treaty is part of CIL and if their actions amounted to Crimes Against the Peace, War Crimes, or Crimes Against Humanity. However, a TSA could make a positivist argument that since CIL represents the implicit consent among states to be bound and that a TSA cannot by definition agree to be bound by such constraints, it is not affected by such law. To make that case, however, the TSA would have to overcome any

⁵⁷ While it is still true that states are the sole creators of general international law, the role of non-state actors is increasing as a result of globalization. Professor Arend hypothesizes the effect of the loss of state sovereignty in a "neomedieval" system. Arend, 176-178. Others draw on the tools available in both international relations and legal scholarship to explain how non-state actors can influence the development of international law. Julie Mertus, "Considering Nonstate Actors in the New Millenium: Toward Expanded Participation in Norm Generation and Norm Application," *New York University Journal of International Law and Politics* 32, no. 2 (Winter 2000): 537-566.

⁵⁸ See Damrosch, *et. al.*, 404-21; United Nations, Rome Statute of the International Criminal Court," July 28, 1998, in *Supplement*, 637-672; "Decision in Prosecutor v. Dusko Tadic," (International Criminal Tribunal For the Former Yugoslavia, October 2, 1995), Art. 127, *International Legal Materials* 35, no. 1 (January 1996), 69 (hereafter referred to as Prosecutor v. Tadic).

presumption of the legal obligation of these types of norms on all international actors, not just the states.

It seems reasonable to conclude generally that if the Law of War is reflected in CIL, then both states and TSAs are presumed to have an obligation to follow it. However, depending on the specific case and the law related to it, both a state and a TSA could viably argue that CIL does not apply to them in that particular instance.

Other Sources of International Law

In addition to treaty and customary international law, Article 38 of the Statute of the International Court of Justice posits two other sources of international law: general principles of law and two subsidiary means: judicial decisions and the writings of publicists.⁵⁹

General Principles of Law⁶⁰

Article 38 notes the third source of international law as “the general principles of law recognized by civilized nations.” Of the three primary sources of international law, general principles is perhaps the most contentious and difficult to define and categorize. Professor Arend, for instance, posits three potential sources for general principles: principles that are common to municipal legal systems; principles of “higher law” such as

⁵⁹ Publicists is a term of art that generally refers to scholars.

⁶⁰ See generally Arend, 49-53; Arend and Beck, 7; Briery, 62-63; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons: 1953); Janis, 55-59; Damrosch, *et. al.*, 118-34; Wolfgang Friedmann, “The Uses of ‘General Principles’ in the Development of International Law” *American Journal of International Law* 57, no.2 (April 1963): 279-99; O’Brien, 84-5; von Glahn, 22-24; Virally, 143-147.

natural law; and principles about the nature of international law.⁶¹ The principles common to municipal systems is the idea that if there is a legal principle common to virtually all domestic legal systems of the states, it would not be unreasonable to apply it in the international setting. The notion of higher principles tries to apply to international law principles that are, in theory, applicable to all mankind. Such concepts might be the principles of equity and humanity. Finally, principles about the nature of international law include basic ideas that allow the international legal system to function: states create international law only through their consent; *pacta sunt servanda*; and the idea that a change can occur in an existing rule of treaty or custom through a change in practice.⁶²

The purpose behind the framers' intent of placing general principles in Article 38 is that despite the wealth of customary practice and the proliferation of treaties, lacunae in international law remain. This is particularly true as mankind continues to press the outer boundaries of knowledge and politics and as international law is increasingly called upon to regulate areas of state conduct and relations that early writers on international law could not have imagined. In the absence of law, one can use general principles to fill the gap until a treaty on the subject is negotiated or customary practice develops.⁶³ Yet despite having general principles available for use as a source, jurists have been reluctant

⁶¹ Arend, 45-49. For different views, see Brierly, 62-63; Janis, 55-59; Friedmann, 279-99; von Glahn, 22-24. Cheng's approach is novel: instead of deriving principles deductively, he determines them inductively based on state practice.

⁶² Arend, 45-49.

⁶³ Brierly notes that the explicit codification of general principles in the ICJ's Charter represents an important dismissal of positivist doctrine in international law, representing "an authoritative recognition of the dynamic element in international law." Brierly, 63.

to apply them in cases because states might then question the legitimacy of their rulings since they had not consented to be bound by imprecise general principles.⁶⁴

Perhaps the most influential general principle to keep in mind when examining the Law of War is the principle of humanity.⁶⁵ With the rise of international human rights law since the end of the Second World War, considerations of humanity are becoming increasingly prevalent in international humanitarian law codified in treaties, as well as in the interpretation of those laws.⁶⁶ In any examination of the Law of War and how it relates to a state-TSA conflict, one must keep in mind the principle of humanity as a guiding principle.

Judicial Decisions/Writings of Publicists

The final source of international law, and an explicitly subsidiary one, are judicial decisions and the writings of publicists. The impact of judicial decisions in and of themselves is limited because they only directly affect the involved states. Yet judicial rulings can be important because a court can make a statement regarding the existence of customary international law. For instance, in the case of *Nicaragua v. United States*, the International Court of Justice in 1986 asserted that the United Nations General Assembly

⁶⁴ Friedmann, 280.

⁶⁵ A key case providing the legal basis for this is "Corfu Channel Case (United Kingdom v. Albania)," (International Court of Justice, 1949), in Damrosch, *et. al.*, 133. "Such obligations are based, not on the Hague Convention of 1907, No. VIII which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war..."

⁶⁶ See generally Theodor Meron, "The Humanization of Humanitarian Law," *American Journal of International Law* 94, no. 2 (April 2000): 239-278; and L.C. Green, "Human Rights and the Law of Armed Conflict," *Essays on the Modern Law of War*, 2nd ed. (Ardsley, NY: Transnational Publishers, 1999), 435-457.

Resolution 3314, "Definition of Aggression," had effectively become customary international law.⁶⁷

The second subsidiary source of international law is the work of publicists, or scholars. Like judges, publicists do not actually make the law, but contribute to it in a similar manner. They voice opinions regarding the formation or change in customary international practice and in doing so, provide a valuable source of data supporting their claims. Publicists also play an aspirational role in international law. By arguing what law *ought* to look like, publicists help shape the direction of the evolution of international law. In one example, the New Haven School, based on the work of Myres McDougal and Harold Lasswell, argues that the basis for international law ought to be the fulfillment of "human dignity."⁶⁸ A work using the New Haven School's method to examine the Law of War is McDougal and Feliciano's *Law and Minimum World Public Order*, where the authors argue that all states have a common interest in adhering to the Law of War to minimize the destruction of values.⁶⁹ Needless to say, states that jealously guard their right to create international law tend to dismiss such aspirational writings. Yet such writings can have an important influence on the creation and evolution of international law.

⁶⁷ United Nations, United Nations General Assembly Resolution 3314, "Definition of Aggression," December 14, 1974, *Supplement*, 409-12; "Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits," (International Court of Justice, June 27, 1986), Article 195, *International Legal Materials* 25, no. 5 (September 1986), 1068 (hereafter referred to as *Nicaragua v. United States*).

⁶⁸ See for instance, Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of World Order," *American Journal of International Law* 53, no. 1 (January 1959): 1-29; John Norton Moore, "Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell," *Virginia Law Review* 54, no. 4 (1968): 662-688.

International Law—Conclusions

A number of *systemic limitations*, based on the nature of international law itself, emerge at the beginnings of this legal analysis of a conflict between a state and a trans-state actor. Under treaty law, two lacunae emerge. A state could argue that it is not bound by treaty law if the other belligerent is not a state. A state could also argue that having a trans-state actor as a belligerent gives it the right to opt out of a treaty's provisions, regardless of whether the treaty contains such a provision. A TSA could make a similar argument: treaties are binding only on signatory states, and not upon others. Under customary international practice, other lacunae emerge. For states: a state could argue that CIL binds it only when the other belligerent is another state; if the other belligerent is a TSA, then CIL is no longer in effect. But the state must then make an argument for its overcoming the presumption in favor of the norm. For the TSA, possible lacunae include the argument that CIL does not bind non-state actors because it represents an implicit contract only between states. However, such an argument would have to overcome the presumption of prior legal rulings that held individuals accountable for violations of the Law of War.

Finally, it is important to keep in mind the principle of humanity. As one of the more acceptable general principles of law—if one judges acceptability by the large numbers of states who have agreed to adhere to human rights norms—it is important to keep in mind the importance of the principle of humanity when examining international humanitarian law in light of a state-TSA conflict.

⁶⁹ Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal*

Trans-State Actors: A Discussion and Definition

As Geoffrey Best eloquently argues, the Law of War is constantly evolving as states try to change it to provide protections to modes and means of warfare change.⁷⁰

This final section examines the evolution of war since the Second World War and the rise of non-state actors in warfare. In particular, it looks at the rise of a subset of non-state actors, the trans-state actor (TSA), and provides a definition.

The Law of War Since World War Two

As Best argues, states are constantly trying to improve the Law of War in order to fix the problems that emerged in the last conflict. One can see this in the post-Second World War era as states signed and ratified the UN Charter that explicitly stipulates in Article 2(4) that states can no longer use or threaten to use force against another state. One can also see it in how states revised the 1929 Geneva Convention Relative to the Treatment of Prisoners of War to reflect the lessons learned during the war. The four conventions signed in 1949 apply those lessons and strengthen the protections given to personnel who are *hors de combat*, as well as providing unprecedented protections for civilian populations who are in occupied territories.⁷¹

States also attempted to provide humanitarian protections to another class of people: those who fought against invaders from behind their lines using partisan

Regulation of International Coercion (New Haven, CT: Yale University Press, 1961), 53.

⁷⁰ Geoffrey Best, *War & Law Since 1945* (Oxford: Clarendon Press, 1994).

⁷¹ "Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949," August 12, 1949, in *Documents*, 301-355 (hereafter referred to as GC4).

warfare.⁷² This extension of humanitarian protections is encapsulated in what is termed “Common Article Three”—language similar across all four conventions—that specifically deals with an “armed conflict not of an international character in the territory of one of the High Contracting Parties.”

But warfare’s means and modes changed in the post-Second World War era. Instead of conventional conflicts common during the previous war, the international system faced a new problem—the possibility that the two nuclear-equipped states, the United States and the Soviet Union, could destroy human life on the planet with a nuclear exchange. As a result, direct conventional conflict between the great powers subsided in a mutual attempt to lessen this risk. As a result, warfare migrated to different forms that are significantly less intense than those seen in the Second World War. War became less of an international matter between states and more of an internal matter as colonial peoples sought to overthrow their colonial masters. Wars of national liberation, insurgencies, and civil wars became commonplace in the decades following the entry into force of the 1949 Geneva Conventions.

This change in the modes of warfare uncovered a significant gap in the Law of War. While Common Article Three provides protection to partisans engaging an enemy in occupied territory, states found it a meddlesome provision when it was applied to an internal conflict. In these cases, states cite Article 2 (7) of the UN Charter, which notes

⁷² Partisan warfare is different from conventional war because the combatants are not in uniform and do their best to blend into the general population. This makes it difficult for an occupying power to discriminate between the “combatants” and the innocent members of the civil population.

that in matters which “are essentially within the domestic jurisdiction of any state”⁷³ that the international community has no jurisdiction; states subsequently dismiss the notion of Common Article Three applying in their particular instance.⁷⁴ This allows the state to prosecute the insurgents as criminals and not to provide them with even the minimal level of protections cited in Common Article Three.⁷⁵

Recognizing this lacuna in the Law of War, states returned to the negotiating table in the 1970s in an attempt to fix it. These negotiators produced the two Additional Protocols signed in 1977.⁷⁶ AP1, concerned with international conflicts, provides significant new protections to those combatants who are not typical soldiers in uniform and who use “unconventional” tactics.⁷⁷ More importantly, Article 1(4) of AP1 extends the classification of international conflict 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...”⁷⁸ States wrote AP2 with the express

⁷³ UN Charter, Article 2 (7), *Supplement*, 2. The full article reads: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

⁷⁴ See Howard J. Taubenfeld, “The Applicability of the Laws of War in a Civil War,” *Law and Civil War in the Modern World*, John Norton Moore, ed. (Baltimore, MD: Johns Hopkins University Press, 1974), 499-517.

⁷⁵ Protections cited under Common Article 3 include: humane treatment for those not participating in combat, to include those members of the armed forces who are *hors de combat*; prohibition of the following acts against the aforementioned personnel: violence to life and person, to include murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity; minimal levels of legal protections; taking care of the wounded, sick, and shipwrecked.

⁷⁶ See AP1; and “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),” in *Documents*, 481-493 (Protocol II will hereafter be referred to as AP2).

⁷⁷ AP1, Articles 43-44, *Documents*, 444-5.

⁷⁸ AP1, Article 1(4), *Documents*, 423. This provision is controversial because it extends the key categorization of “international conflict” as well as the associated protections of AP1, to those fighting in an internal conflict that is deemed a struggle for self-determination. This provision led a number of states,

intent of extending these humanitarian protections to non-international conflicts. An important limit of this protocol, though, is that the conflict must reach such a high threshold before its terms come into effect that it excludes most rebellions and revolutions. These provisions would not apply to a civil war until the rebels were well established.⁷⁹ Thus the attempts to extend international humanitarian laws to non-international conflicts, while noble, are flawed; nevertheless, one cannot deny the fact that states have attempted to extend these provisions to internal conflicts, even if it has proven difficult to do so through treaty law.

The Rise of Non-State Actors

Concurrent with the changes in warfare is the rise of non-state actors in the international system.⁸⁰ A general definition of a non-state actor is “an entity other than nation-states that interact in the international political system.”⁸¹ This broad term

to include the United States, to not sign the Protocol. See Ronald Reagan, “Letter of Transmission,” January 29, 1987, *American Journal of International Law* 81, no. 4 (October 1987): 910-912.

⁷⁹ L.C. Green, “International and Non-International Armed Conflict,” *The Contemporary Law of Armed Conflict*, 2d. ed. (Manchester, Manchester University Press, 2000), 65-67. For historical insight into the negotiations over AP2, see David P. Forsythe, “Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts,” *American Journal of International Law* 72, no. 2 (April 1978): 272-295.

⁸⁰ The rise of non-state actors in the international system is also a result of globalization. For a sampling of the literature on globalization in general and its effect on non-state actors at the expense of the state, see Richard Falk, *Law in an Emerging Global Village: A Post Westphalian Perspective* (Ardsley, NY: Transnational Publishers, 1998); Robert O. Keohane and Joseph S. Nye, Jr., *Power and Interdependence*, 3d ed. (New York: Longman, 2001); Keohane and Nye, eds., *Transnational Relations and World Politics* (Cambridge, MA: Harvard University Press, 1972); Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of Political Community* (Cambridge: Polity Press, 1998); Susan Strange, *Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996); David Held and Anthony McGrew, eds., *The Global Transformations Reader: An Introduction to the Globalization Debate* (Cambridge, Polity Press, 2000). For a work that examines specific non-state and trans-state threats to states, see Maryann Cusimano Love, ed., *Beyond Sovereignty: Issues for a Global Agenda*, 2d. ed. (Belmont, CA: Thomson Wadsworth, 2003).

⁸¹ Phillip Taylor, *Nonstate Actors in International Politics: From Transregional Organizations to Substate Organizations* (Boulder, CO: Westview Press, 1984), 20.

encompasses organizations such as intergovernmental organizations (IGOs) like the United Nations and World Bank, non-governmental organizations (NGOs) such as the International Committee of the Red Cross, Greenpeace, and Human Rights Watch, and regional actors such as the Kurds and Basques. Non-State actors have gained greater influence international politics over the years. But despite this increase in NGOs's influence, states still remain the creators of international law.

The focus of this dissertation is on a subset of non-state actors: trans-state actors (TSAs). For the purpose of this project, a TSA is a non-governmental, non-intergovernmental organization that is willing to use either hard power or soft power⁸² to achieve political goals. Membership in this organization transcends political boundaries. Instead of being based on a loyalty to a nation-state, loyalty to the organization has a religious, ethnic, economic, epistemic, or ideological basis, or a combination thereof. Examples of a TSA include: Roman Catholic Church, various Kurdish factions that exist in Turkey, Iraq, and Syria; multinational corporations (MNCs); the coalition of groups that worked together to persuade states to ban landmines; scientific communities; international crime syndicates and drug cartels; transnational terror organizations; communist revolutionary organizations. An example of the organization that does not fit this definition is the International Studies Association. Its membership is epistemic in nature, but its political activities, if it has any at all, would be extremely limited.⁸³

⁸² Joseph S. Nye, Jr., *Born to Lead: The Changing Nature of American Power* (New York: Basic Books, 1990), 26-35.

⁸³ The goal for this project is to make this definition as broad as possible to ensure the highest level of generalizability. It is important to recognize that such a level of abstraction sets up the theoretical, yet absurd, possibility of a war-like conflict between a state and the Roman Catholic Church. Yet work at this

Another type of group excluded from this definition is the sub-state actor whose membership comes from the territory of one nation-state. Examples of these include the Irish Republican Army and the insurgents in Chechnya. These groups already have protections, if flawed, under the Law of War, and would thus fall outside the scope of this project.

Conclusion

The state-TSA conflict represents a new conception of warfare; when it is held up to the norms of the Law of War, many lacunae emerge. While the Law of War provides guidance for state action in a conflict with another state or a sub-state group, it does not explicitly discuss how a state ought to act when it is in a conflict with an actor whose membership transcends political boundaries and whose loyalty is based on something other than loyalty to the nation-state.

In that regard, it is important to recognize that the nature of the international legal system itself is the source of *systemic limitations* for the Law of War. If the law is codified solely in a treaty and has no correlative CIL, a state could argue that such a law does not apply in a state-TSA conflict since the TSA never consented to the terms of the “contract” that is inherent in the treaty. A TSA could make a similar argument: since the treaty represents states consenting to be bound in their actions, the provisions of the treaty do not apply to it. For either case, if the treaty law also represents an important

level of abstraction is worthwhile if French actions towards Greenpeace are any indication. The policy implications for this work will be most applicable to a small subset of this group, specifically transnational terror groups, international drug and crime syndicates, and some MNCs such as private security firms and those that facilitate the proliferation of weapons of mass destruction or the components thereof.

norm of international law, it would be more difficult to make such an argument.

Similarly, if the law is somehow a part of CIL, then this argument becomes more difficult for the state and the TSA. Both would have to make their cases against the presumption of the binding effects of CIL on all actors in the international system. But such an argument might be viable depending on the context of the specific issue. Finally, one must keep the principle of humanity in view when making any argument regarding international humanitarian law.

As this dissertation moves deeper into its analysis of the legal issues involved with a state-TSA conflict, it is important to remember the relationship of international relations theory to the project. While international relations theory is poorly equipped for use as an advocacy tool, knowledge of how and why states behave is important in the construction of a politically viable moral argument.

CHAPTER THREE

THE LEGAL *JUS AD BELLUM* AND TRANS-STATE ACTORS

The changing facts and faces of international law have not detracted from the validity of the law of the Charter and have only reinforced its desirability.

Louis Henkin, *How Nations Behave: Law and Foreign Policy*

International law, after all, is not a suicide pact.

Eugene Rostow

The Law of War is classically divided into two areas. The *jus ad bellum* provides guidance for when states can or cannot go to war with each other. The *jus in bello* outlines the norms for how states ought to conduct that war, without regard for whether the war is just or not. These next two chapters analyze these two parts of the Law of War when the conflict is not between states, but between a state and a trans-state actor (TSA). As with the previous chapter's section on international law, the purpose here is to find the key questions regarding the emerging challenges in this area and, in the process, uncover the lacunae and gray areas that exist in the *jus ad bellum* when one of the belligerents is a TSA. Chapter Four does the same for the *jus in bello*.

This chapter conducts this analysis in two main sections. The first section examines the existing *jus ad bellum* as it applies to states. In addition to outlining the black-letter treaty law, it outlines the current debates in the field. Using this as a

backdrop, the second section investigates the nuances of three separate legal arguments that a state might use to justify the use force against a TSA. In the process of doing so, the chapter unearths the lacunae and gray areas in the Law of War that exist when this law is used to provide guidance for this new conception of warfare.

Jus ad Bellum: Just Between States

This first section examines the *jus ad bellum* as it currently exists for a traditional state-state conflict. It sets the context for understanding how a state-TSA conflict is likely to be different in a legal sense than a traditional conflict, as well as establishing the current areas of the debate in the literature.

Current *Jus ad Bellum*

The core of the existing *jus ad bellum* language in international law lies in the United Nations Charter. Article 2(4) of the Charter contains the explicit language:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.¹

The article represents a departure from previous international law for when a state can go to war with another and marks an important step in the evolution of the norm regarding the non-use of force that had been evolving over a number of decades. States had previously agreed to constrain their right to use force in two related instruments.

¹ United Nations, "Charter of the United Nations," June 26, 1945, Article 2(4), *Basic Documents Supplement to International Law: Cases and Materials*, 4th ed., Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, eds. (St. Paul, MN: West Group, 2001), 2

The first was the Covenant of the League of Nations. This treaty is significant because for the first time, states agreed that a war between any of them became the concern of the entire League.² States agreed to submit to a process of procedural delays that would give them a chance to resolve their differences peacefully before actually going to war with each other. The League's drawback, though, is that it viewed war as lawful so long as states followed the League's procedures: "Under the Covenant...the lawfulness of resort to war was primarily defined in procedural terms. The lawfulness of war did not depend solely on the justness of one's cause but rather on compliance with procedural standards."³ It would still be lawful for a state to go to war with another so long as it submitted its dispute to the League's mechanisms and followed the League's procedures; the Covenant deemed a war unlawful only if a state failed to do this.⁴

States attempted to fix this problem a few years later when they negotiated and signed The Pact of Paris, or as it is more commonly referred to, The Kellogg-Briand Pact. In agreeing to this document, states "condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it as an instrument of national policy in

(This collection of international documents will hereafter be referred to as *Supplement*; The Charter of the United Nations will hereafter be referred to as the UN Charter).

² League of Nations, "The Covenant of the League of Nations," June 28, 1919, Article 11, *Supplement*, 397.

³ John Norton Moore, "Development of the International Law of Conflict Management," *National Security Law*, John Norton Moore, Frederick S. Tipson, and Robert F. Turner, eds. (Durham, NC: Carolina Academic Press, 1990), 65 (This volume will hereafter be referred to as *National Security Law*). The Covenant describes the mechanism for dispute resolution in Articles 12, 13, and 15.

⁴ Moore, 66.

their relations with one another.”⁵ Hereafter, the criterion for judging the lawfulness of a war was based not on whether states followed procedures, but on whether the use of force was aggressive or defensive in nature. The importance of this shift should not be underestimated. One noted scholar describes this change as reflecting “a fundamental shift in the history of the law of conflict management that may have been the single most important intellectual leap in that history... The focus was squarely on whether a use of force was aggressive and thus illegal or defensive and thus lawful.”⁶ And thus, as the ink of the foreign ministers’ signatures dried, so did the idea of any sense of justice as the basis for war, replaced by a black and white categorization of aggressive war as unlawful—defensive as lawful.

The UN Charter represents another step in this evolution. Article 2(4) stipulates that states will “refrain...from the threat or use of force.” Let’s examine this closely. First, states can no longer even threaten to use force against another state; and second, the Charter’s language is more general than that previously used, citing the threat or the use of force itself as the source of illegality. But while the Charter attempts to tighten the restrictions on states regarding their use of force, it includes a number of exceptions to the proscription contained in Article 2(4). The first exception is that states retain the right to self-defense. Article 51 of the Charter reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken

⁵ League of Nations, “The Treaty for the Renunciation of War as an Instrument of National Policy,” August 27, 1928, Article 1, *Supplement*, 403.

⁶ Moore, 68.

measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁷

The second exception to Article 2(4) comes under Chapter VII of the Charter, “Action With Respect To Threats To The Peace, Breaches of the Peace, and Acts of Aggression.” Under these articles, the Security Council may, after determining that some action by a state is a threat to the peace or an act of aggression, may authorize actions to “maintain or restore international peace and security.”⁸ In other words, military action authorized by the Security Council, and thus by the society of states, is lawful.⁹

The proscription on the unilateral use of force by individual states represents the current end-point of a long evolution of attempts on the part of states to restrain their own ability to go to war with each other through international law. An easy way to sum this up is that a state cannot use or threaten to use force against another state unless it is in self-defense or unless the Security Council authorizes the action.

⁷ UN Charter, Article 51, *Supplement*, 11.

⁸ UN Charter, Article 39, *Supplement*, 9.

⁹ The Charter elaborates two other exceptions to the Article 2(4) proscription, but these are no longer valid. Article 106 authorizes the five permanent members of the Security Council to take joint action as the organization transitions to what was then envisioned as a United Nations military force under the Military Staff Committee. Articles 53 and 107 authorize states to use force against “enemy” states (those whom the Allies were still fighting against when the Charter was signed), as well as whatever force might be necessary in the future to prevent a military resurgence of these states. In both cases, while one might argue that the UN is still in transition—the envisioned Military Staff Committee has yet to come into being—the reality is that neither of these exceptions is important for this project.

The Debates

Despite the unprecedented language and intent incorporated into the Charter regarding the use of force, there is, not surprisingly, fierce debate over the Charter's interpretation. This section outlines the contours of those debates. It is beyond the scope of this project to provide a thorough and complete outline of all the debates—scholars have written numerous books covering these—yet it is important to provide the context within which the legal analysis of a state-TSA conflict occurs. The first part outlines the argument of the “restrictionist” school.¹⁰ The three subsequent sections outline arguments and interpretations that run counter to the restrictionist school and which are also relevant to the discussion of a state-TSA conflict.

The Restrictionists

The restrictionist school argues that the language of the United Nations Charter regarding the use of force—Articles 2(4), the exception for self-defense in Article 51, and subsequent interpretative documents—ought to be strictly interpreted.¹¹ The

¹⁰ The term restrictionist—referring to those scholars who argue for a strict interpretation of international law regarding the recourse to force—is from Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (New York: Routledge, 1993).

¹¹ This condensation of the restrictionist position is a summation of many scholars' views. It is important to note that these scholars disagree amongst themselves on some aspects and some might disagree with parts of this summary. For a sampling of restrictionist thinking, see Michael Akehurst, *A Modern Introduction to International Law* (New York: Atherton Press, 1970); J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed., Humphrey Waldock, ed. (New York: Oxford University Press, 1963); Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963); Yoram Dinstein, *War, Aggression and Self-Defence*, 2^d ed. (Cambridge: Cambridge University Press, 1994); Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2^d ed. (New York: Council on Foreign Relations, 1979); Henkin, “Use of Force: Law and U.S. Policy,” *Right V. Might: International Law and the Use of Force*, 2^d ed. (New York: Council on Foreign Relations, 1991), 37-70; Philip C. Jessup, *A Modern Law of Nations: An Introduction* (New York: MacMillan, 1948); Hans Kelsen, *Principles of International Law*, 2^d ed., Robert W. Tucker, ed. (New York: Holt,

restrictionists view the language stipulating that states “shall refrain...from the threat or use of force” as an important new norm in international law; exceptions to this norm, such as in Article 51, must also be construed strictly. As an example, one of the leading restrictionists, Professor Ian Brownlie, argues that the term “armed attack” in Article 51 “strongly suggests a trespass.”¹² Such a characterization leads Brownlie to argue against wider interpretations regarding the use of force in areas such as intervention and anticipatory self-defense. Restrictionists also argue that while a broadly-construed right to self-defense may have existed in the pre-charter customary international law (CIL)—which included rights such as intervention to protect nationals and anticipatory self-defense—the Charter effectively narrows self-defense under CIL to what is currently contained in the Charter’s language in Articles 2(4) and 51. Finally, as the restrictionists would surely point out, the practice of the vast majority of states since 1945 supports this strict interpretation of the Charter.

As one might expect with any type of legal argument, other scholars disagree and argue that certain aspects of the restrictionist view, if not all of it, are incorrect. While this “counterrestrictionist” school examines issues that are broad in their scope, this chapter only discusses areas relevant to the analysis of state-TSA conflict.

Rinehart and Wilson, 1966) (hereafter referred to as Kelsen and Tucker); Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict* (Aldershot, England: Dartmouth Publishing, 1992); K. Skubiszewski, “Use of Force by States. Collective Security. Law of War and Neutrality,” *Manual of Public International Law*, Max Sorenson, ed. (New York: Carnegie Endowment for International Peace, 1968), 739-854.

¹² Brownlie, 278.

What is an "Armed Attack?"

The first area of contention over the restrictionist's strict interpretation is Article 51's term "armed attack."¹³ What specific actions or events must happen before an armed attack is said to have occurred? The Charter does not define in any manner what the framers' intent was when they placed this language into the Charter; none of the subsequent interpretative documents approved by the United Nations General Assembly (UNGA) explicitly defines the term. One such document is the 1974 UNGA Resolution 3314, "Definition of Aggression."¹⁴ While the resolution lists specific acts that the body construes to be "aggressive," it does not specifically label these as "armed attacks." However, the International Court of Justice, in its 1986 ruling in *Nicaragua v. United States*, specifically notes that "there appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks."¹⁵ The Court then cites the "Definition of Aggression" as containing these acts about which general agreement exists as constituting armed attacks.

So while an international consensus is growing regarding what acts actually constitute an armed attack, in the end, international law does not mandate that any international organization must adjudicate whether an armed attack has actually

¹³ "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an *armed attack* occurs against a Member of the United Nations..." UN Charter, Article 51, *Supplement*, 11. Emphasis added.

¹⁴ United Nations, United Nations General Assembly Resolution 3314, "Definition of Aggression," December 14, 1974, *Supplement*, 409-12 (hereafter referred to as the Definition of Aggression).

¹⁵ "Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), Merits," (International Court of Justice, 1986), Article 195, *International Legal Materials* 25, no. 5 (September 1986): 1068 (this cases will hereafter be referred to as *Nicaragua v. United States*).

occurred. Under Article 51, states must report to the Council any actions that they justify as self-defense; from there it is up to the Council to determine, should it choose to do so, what actions it might choose to take, if any.

Interpretation Issues in Article 2(4)

A second area where some scholars argue against the restrictionist view of the Charter is the interpretation of different phrases of Article 2(4). The first of these interpretation conflicts occurs with the phrase: “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Some scholars argue that this phrase represents a qualification to the previous proscriptive language that denies states the right to threaten or use force.¹⁶ Such qualifications, these scholars argue, justify the use of force against a state so long as such a use of force is sufficiently small in both scope and time that it does not affect the state’s territorial integrity or political independence.

A second contentious area for interpreting Article 2(4) is over the meaning of the term “use of force.” Like with “armed attack,” the Charter’s framers did not define what they meant. The restrictionists argue that this phrase prohibits any threat or use of force. But different degrees of force are possible: Professor John Norton Moore notes that some uses of the military instrument do not reach the “Article 2(4) threshold.”¹⁷ What types of actions fall under this threshold? While some may argue otherwise, it is

¹⁶ For one example, see Jeane J. Kirkpatrick and Allan Gerson, “The Reagan Doctrine, Human Rights, and International Law,” *Right V. Might: International Law and the Use of Force*, 2^d ed. (New York: Council on Foreign Relations, 1991), 19-36.

possible to characterize certain actions that are limited in both scope and time as falling beneath this threshold. Actions such as intervention to protect nationals or reprisal actions taken in response to a perceived unlawful action could be construed as being beneath this threshold. Moreover, it is possible to argue that actions taken against a state that are not a threat to that state's political independence or territorial integrity could also fall beneath the Article 2(4) threshold.

This is an important argument. While the Charter prohibits the threat or the use of force on the part of states, a significant corpus of state practice runs counter to this proscription.¹⁸ And a large portion of this state practice consists of acts falling under the Article 2(4) threshold. Some scholars argue that, because of the scope and breadth of state practice that are in contrast to the norm incorporated in Article 2(4), a new use of force "paradigm" that views the limited use of force for reasons other than self-defense as being lawful has superseded the old Charter "paradigm."¹⁹

Does Pre-Charter Customary International Law Remain Intact?

The final set of arguments that are contrary to the strict restrictionist interpretation of the UN Charter is that the self-defense norm embedded in pre-Charter CIL is still in effect. These scholars point to Article 51's language, "*inherent* right of

¹⁷ Moore, 72.

¹⁸ Arend and Beck list a Israeli and U.S. actions taken in response to terror acts. See Arend and Beck, 147-57. For further discussion, see William V. O'Brien, "Reprisals, Deterrence and Self-Defense in Counterterror Operations," *Virginia Journal of International Law* 30, no. 2 (Winter 1990), 459. Professor O'Brien's work builds and extends upon Derek Bowett, "Reprisals Involving Recourse to Armed Force," *American Journal of International Law* 66, no. 1 (January 1972): 1-36.

¹⁹ Arend and Beck, 177-88. Arend and Beck argue that such a "post-Charter paradigm" would also include the use of force to promote self-determination and the use of force to correct past injustices.

individual or collective self-defence,” and argue that the word *inherent* signifies a right that cannot be taken away. This then allows them to argue that a strict interpretation of Article 51 is incorrect and contrary to the framers’ intent. Scholars generally buttress these claims by noting that the framers never intended to limit pre-Charter CIL dealing with self-defense. The only reason why the framers even inserted Article 51 into the Charter was as a compromise to allay the concerns of some Latin American states that the Charter would limit their right to work together in a regional security organization.²⁰ Since pre-Charter CIL remains in effect, these scholars argue, it leads to the conclusion that certain acts previously justified under the rubric of self-defense—anticipatory self-defense, intervention to protect nationals abroad, and the legality of some forms of reprisals—are still lawful.²¹ These scholars arrive at a broader interpretation of self-defense through this use of pre-Charter CIL, allowing states to take actions that they would be unable to do otherwise under a strict interpretation of Articles 2(4) and 51.

²⁰ John Norton Moore, “The Secret War in Central America and the Future of World Order,” *American Journal of International Law* 80, no.1 (Jan 1986): 82-3; Leland M. Goodrich, Edvard Hambro, and Anne Patricia Stevens, eds., *Charter of the United Nations: Commentary and Documents*, 3^d ed. (New York: Columbia University Press, 1969), 344; Mark B. Baker, “Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter),” *Houston Journal of International Law* 10, no. 1 (Autumn 1987): 30-1.

²¹ For a sampling of scholars who believe that pre-CIL still exists, see D.W. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), 158, 184-93; Myres S. McDougal and Florentio P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, CT: Yale University Press, 1961), 233-241; William V. O’Brien, “International Law and the Outbreak of War in the Middle East, 1967,” *Orbis* 11, no. 3 (Fall 1967): 721; Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (Berkeley, CA: University of California Press, 1958), 92-101; C.H.M. Waldock, “The Regulation of the Use of Force by Individual States in International Law,” *Recueil des Cours* 81, pt. 2 (1952): 496. For counter arguments, see Ian Brownlie, “The United Nations Charter and the Use of Force, 1945-1985,” *The Current Legal Regulation of the Use of Force*, Antonio Cassese, ed. (Boston: Martinus Nijhoff, 1986), 497. Other scholars acknowledge that the prior rights of self-defense in CIL still exist in the Charter era, but warn against interpreting self-defense too broadly that it limits the effect of Article 2(4).

As noted in Chapter Two, the issue of what precisely makes up the right of self-defense under CIL has important implications. CIL binds all states and one can use it to fill the lacunae that exist in the black-letter treaty law. As such, determining the precise content and scope of CIL is of critical importance for international law in general, and for this project in particular since it deals with issues that treaty law does not cover.

Even a limited examination of the debates regarding the law on the use of force illustrates a significant breadth of opinion. While the restrictionists and the majority of states hold to a strict interpretation of Articles 2(4) and 51, significant and compelling arguments coupled with important state practice suggest that a strict interpretation may not be appropriate for the international system as it currently operates. This will become clearer in the next section that examines how these arguments relate to a conflict where one of the belligerents is not a state, but a trans-state actor.

Jus ad Bellum: State-TSA Conflict

Having examined the key aspects of the current debates in the *jus ad bellum*, this chapter now turns to analyze how these arguments change when one of the belligerents in a conflict is a trans-state actor. The goal of this section is to unearth a number of issue areas in the *jus ad bellum* portion of the Law of War where a state-TSA conflict complicates an already contentious area of debate.

In making this analysis, this section examines three possible legal arguments that a state might make when dealing with a TSA. Argument number one is made

See Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82, nos. 5&6

within the context of a state responding to a TSA's armed attack. While this is relatively straightforward, it provides a point of departure for examining the other two legal arguments. Argument number two is where a state must respond to some act of a TSA that *does not reach the threshold* of an armed attack. The last argument takes a different approach. It argues that since the circumstances involved in a state-TSA conflict are so different than the context for the *jus ad bellum* envisioned by the framers of the UN Charter in 1945 and that a state-TSA conflict is so distinct from a state-state conflict that it is necessary to consider a new exception to the Article 2(4) proscription on the use of force.

State-TSA Conflict With an Armed Attack

This first section examines the legal argument that a state could make after a TSA conducts an armed attack against it. While the actual definition of what constitutes an armed attack remains contentious and undefined, it is assumed for the sake of this argument that such an attack has occurred, thus allowing a state to invoke Article 51 of UN Charter to justify its actions. While such a context may seem contrived, this assumption allows for the clean examination of other contentious issues, without the analysis being clouded by the question of whether the precipitating act actually is an armed attack. This section examines three main issue areas. The first issue area is what precisely is an armed attack in the context of a state-TSA conflict and how can one measure it? While the working assumption for this section is that armed

an attack has actually occurred, what actually constitutes an armed attack is a contentious subject and is worthy of further examination. The second area outlines the concept of state responsibility. Unless a TSA is based out of an abandoned oilrig located outside of all states' jurisdiction or in international airspace, it must use the territory of some sovereign nation. Thus it is possible that some state could bear legal responsibility and liability for the acts of a TSA. In making this analysis, this section examines different types of relationships that might exist between a state and a TSA and what level of state support must exist before an injured state could justify attacking such a supporting state. The final area of investigation examines how a state might respond after the occurrence of a TSA attack. While this may overlap somewhat with the analysis conducted in Chapter Four, important debates have occurred in the *jus ad bellum* literature that deals with the principle of proportionality and how the principle ought to be applied when the other belligerent is a trans-state actor.

What is an Armed Attack?

As previously discussed, there are many debates over what acts actually constitutes an armed attack: there is no accepted definition of this term in any international treaty or document. But this is not for a lack of effort: there have been attempts through the years to provide guidance to states on this matter.

The first attempt is the decades-long effort on the part of the UN and the International Law Commission to find a commonly accepted definition for what constitutes aggression. In 1974, the UN General Assembly approved Resolution 3314,

“Definition of Aggression,” where states agreed to a set of principles and a few concrete examples of what actually constitutes aggression in the international community. The following articles from “The Definition of Aggression” are relevant:

Article 2. The first use of force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression...

Article 3. Any of the following acts, regardless of a declaration of war, shall...qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack...
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State *of such gravity as to amount to the acts listed above, or its substantial involvement therein.*

Article 4. The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the Provisions of the Charter.²²

There are a number of points to highlight. First, this document specifically discusses what constitutes aggression between states. Extrapolating these guidelines to a TSA, one must demonstrate that these criteria have become part of customary international law for these to be applicable to a TSA. The second point is related to the first. The “Definition of Aggression” is a resolution of the General Assembly and as such, does not create international law between states. However, one can use this as one source

²² “Definition of Aggression,” *Supplement*, 410-411. Emphasis added.

illustrating state practice or *opinio juris* when determining the existence of customary international law. And finally, the resolution provides broad guidelines, but it does not precisely define or describe an armed attack. So while it is not definitive, it gives some sense about what acts international society considers to be outside the boundaries of accepted behavior.

If the "Definition of Aggression" represents one source of what could be customary international law, another data point is the International Court of Justice's ruling in the case of *Nicaragua v. United States* in 1986, where the court makes an explicit statement regarding what actually constitutes an armed attack in general and what might constitute an armed attack by a TSA:

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts or armed force against another State of such gravity as to amount to'...an actual armed attack conducted by regular forces, 'or its substantial involvement therein'. This description, contained in Article 3, paragraph (g), of the Definition of Aggression...may be taken to reflect customary international law.²³

It is important to point out that this ruling explicitly stipulates that the sending of "armed bands, groups, irregulars or mercenaries" by one state into another constitutes an armed attack from the sending state on the receiving state. And as the emphasized section demonstrates, the Court concludes that acts described in the "Definition of

²³ "Nicaragua v. United States of America," Article 195, 1068. Emphasis added.

Aggression” constitute an armed attack within CIL. For the purposes of this discussion, it is important to note that “armed bands...” may not necessarily be congruent with the definition of a TSA adopted in this project. But it is not unreasonable to claim that a TSA consisting of “armed bands, groups, irregulars or mercenaries,” *acting on its own accord to further its own political objectives*, that committed these acts would also be guilty of committing an armed attack against a state. Looking at it from another perspective, one could also argue that the *act itself* is unlawful according to customary international law regardless of the nature of the actor perpetrating it. A TSA could argue in its defense, as suggested in the discussion of the systemic limitations of international law in Chapter Two, that since CIL is an implicit agreement between states, such norms do not apply to it. Such an argument could be viable, but a TSA would have to be careful for two reasons. First, it ought to ensure that such acts are not Crimes Against the Peace, War Crimes, or Crimes Against Humanity, for which the international community has previously determined that individuals can be held responsible.²⁴ And second, international criminal tribunals are increasingly extending CIL across different types of conflicts, as the International Criminal Tribunal for the Former Yugoslavia’s (ICTY’s) 1995 ruling in *Prosecutor v. Tadic* demonstrates.²⁵ While it is possible for a TSA to argue that CIL in this area does not apply to it, the

²⁴ International Military Tribunal, Nuremberg, “Charter of the International Military Tribunal,” August 8, 1945, Article 6, *Supplement*, 404-405.

²⁵ “Decision in *Prosecutor v. Dusko Tadic*,” (International Criminal Tribunal For the Former Yugoslavia, 1995), Article 127, *International Legal Materials* 35, no. 1 (January 1996), 69 (hereafter referred to as “*Prosecutor v. Tadic*.”)

trend within international jurisprudence today is to deny the viability of such assertions. Thus a TSA may have difficulty making the case that CIL does not apply to it.

The ICJ in *Nicaragua v. United States* also highlights an important caveat contained in the text of the "Definition of Aggression." Paragraph 3 (g) states "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State *of such gravity as to amount to the acts listed above* [referring to the acts that one might consider to be conventional armed attacks]." The act of an "armed band" must reach a level that one might expect to see from a similar attack made by the State's conventional military forces. This represents a high threshold that a TSA must cross before one can consider its acts to be armed attacks. This leaves substantial room beneath that threshold where a TSA could commit acts that might not reach the level necessary to be considered an armed attack, but which still might violate the Article 2(4) proscription against the threat or the use of force. In his dissent, Judge Schwebel argues that because of the court's stipulation of such a high threshold for armed attack, a state will be unable to lawfully exercise its right of self-defense against such acts in accordance with Article 51. This in turn leaves few lawful options available to a state to counter acts that might threaten its political independence, but do not reach the level of an armed attack.²⁶

²⁶ Stephen M. Schwebel, "Dissenting Opinion, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits," Articles 176-77, *International Legal Materials* 25, no. 5 (September 1986), 1191. See also Robert Jennings, "Dissenting Opinion, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits," 1288. For other opinions critical of this ruling, see John Norton Moore, "The Secret War in Central America," in "Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)," *American Journal*

But the ICJ's ruling in this case is not the only source for this discussion. Scholars have debated this issue regarding where the threshold lies, across which a TSA's act of violence could justify a state's use of force in self-defense. One can categorize this debate into three thresholds: high, medium, and low.²⁷ Under the high threshold for self-defense, a state would be justified in acting in self-defense only if an attack occurred on the state's territory.²⁸ Scholars situated in the moderate threshold for self-defense argue that a state may act in self-defense "only when the acts in question are on a scale equivalent to what would be an armed attack if conducted by government forces." But such an attack may occur outside the victim state's sovereign territory. In addition, isolated acts cannot justify the use of force in self-defense.²⁹ Another scholar falling into the moderate threshold argues that a terror act must be a "very serious attack" either on the victim state's territory or overseas, and it must be part of a consistent pattern of actions instead of being an isolated incident.³⁰ Finally, scholars in the low threshold for self-defense argue that acts against civilians or non-military targets would justify acts of self-defense, regardless of their location. Actions against

of *International Law* 81, no. 1 (January 1987): 77-183 (this collection of articles is hereafter referred to as "Appraisals"); Abraham D. Sofaer, "The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense," *Military Law Review* 126 (Fall 1989): 89-123; Anthony A. D'Amato, "Trashing Customary International Law," in "Appraisals," 101-105; John Lawrence Hargrove, "The *Nicaragua* Judgment and the Future of the Law of Force and Self-Defense," in "Appraisals," 135-143; John Norton Moore, "The *Nicaragua* Case and the Deterioration of World Order," in "Appraisals," 151-159; Fred L. Morrison, "Legal Issues in the *Nicaragua* Opinion," in "Appraisals," 160-166.

²⁷ Arend and Beck, 159-62.

²⁸ Francis A. Boyle, "Remarks," *Proceedings of the American Society of International Law* 81 (1987): 294.

²⁹ James P. Rowles, "Military Responses to Terrorism: Substantive and Procedural Constraints in International Law," *Proceedings of the American Society of International Law* 81 (1987): 314.

military targets are considered acts of war for which the Charter's self-defense provisions are more than adequate.³¹

Professors Robert J. Beck and Anthony Clark Arend also wrestle with the armed attack threshold and through their analysis of the literature outlined in the previous paragraph outline a useful framework for determining when the acts of a specific type of TSA, in this case a terrorist group, might cross the threshold. Beck and Arend first stipulate that the effect of a terror attack must be equal to an overt armed attack—this mirrors the ICJ ruling. But recognizing that a terror group represents a different type of threat than those envisioned by the Charter's framers, Beck and Arend posit three factors to consider when making such a judgment. The first factor is the locus of the attack: an attack on sovereign territory represents a greater injury than an attack on a state's property or interests overseas. Temporal duration is the second factor. A series of on going, although low-level, attacks against a state by a terrorist group represent a greater injury than a single incident. The final factor is the severity of the sustained injury. An attack that causes more harm obviously carries greater weight than a low-level attack. Beck and Arend specifically cite an attack against any facet of a state's sovereignty as being particularly grievous.³² While Beck and Arend's criteria represent an important extension of the evolving analysis of what constitutes an armed attack by a

³⁰ Antonio Cassese, "The International Community's 'Legal' Response to Terrorism," *International and Comparative Law Quarterly* 38, no. 3 (July 1989): 596.

³¹ Alberto R. Coll, "The Legal and Moral Adequacy of Military Responses to Terrorism," *Proceedings of the American Society of International Law* 81 (1987): 298.

³² Robert J. Beck and Anthony Clark Arend, "'Don't Tread on Us': International Law and Forcible State Response to Terrorism," *Wisconsin Journal of International Law* 12, no. 2 (Spring 1994): 216-218.

terror organization, they do not provide guidance about how to weigh these factors when making that determination. But this is not a crippling concern since any such evaluation depends on the context of the particular situation and any prior weighting would not necessarily be in the best interest of such an evaluation.

Finally, the events of September 2001 and their aftermath furnish an important set of data points for this debate. In the days and weeks following al-Qaeda's attacks on New York City, Washington DC, and Pennsylvania, a number of international institutions made important statements regarding the matter. First, the UN Security Council unanimously approved Resolution 1368 on September 12, 2001, which recognizes "the inherent right of individual or collective self-defense in accordance with the Charter." More interestingly, on September 28, the Council approved Resolution 1373, calling upon all UN member states to act to repress terrorism and terror groups, as well as to cooperate to ensure the suppression of such groups.³³ And in an instance of *inaction* whose significance lies more in what was not said, the UNSC *did not authorize* any actions against al-Qaeda under Chapter VII of the UN Charter, and affirmed that any actions taken against the group were taken under Article 51 that provides for individual and collective self-defense. The two resolutions do not, however, explicitly categorize the terror attacks of September 11, 2001 as "armed attacks" in Article 51's sense. But it is implicit in the Council's statements affirming the right of individual and

³³ United Nations, United Nations Security Council Resolution 1368, "On Threats to International Peace and Security Caused by Terrorist Acts," September 12, 2001, *International Legal Materials* 40 no. 5 (September 2001), 1277; United Nations, United Nations Security Council Resolution 1373, "On Threats

collective self-defense that al-Qaeda's actions *reach the armed attack threshold* as far as international law is concerned. And in doing, the Council makes an important statement for international law on the use of force that non-state or trans-state actors are capable of conducting such an armed attack, as well as then being subject to a victim state's lawful use of force. This is important because such an interpretation is not present in the UN Charter framework, its subsequent interpretive resolutions, or the rulings of the International Court of Justice.

The Security Council was not the only international institution making an important statement in this matter. The UN General Assembly condemned the attacks.³⁴ The North Atlantic Treaty Organization (NATO) categorized these acts as armed attacks from abroad and deemed the action to be covered by Article 5 of the Washington Treaty, noting that al-Qaeda's actions represent "an *armed attack* against one or more of the Allies in Europe or North America shall be considered an attack against them all."³⁵ The NATO statements are important for two reasons. First, NATO explicitly declares the actions of September 11 to be "armed attacks." While not possessing the legal weight of the UN Security Council, the statement represents important source of *opinio juris* regarding the acts. And second, it represents the first

to International Peace and Security Caused by Terrorist Acts," September 28, 2001, *International Legal Materials* 40 no. 5 (September 2001), 1278-80.

³⁴ United Nations, United Nations General Assembly Resolution 56/1, "Condemnation of Terrorist Acts in the United States of America," September 18, 2001, *International Legal Materials* 40 no. 5 (September 2001), 1276.

³⁵ North Atlantic Treaty Organization, "Statement by the North Atlantic Council," September 12, 2001, *International Legal Materials* 40 no. 5 (September 2001), 1277 (emphasis added). See also North Atlantic Treaty Organization, "Statement by NATO Secretary General, Lord Robertson," October 2, 2001, *International Legal Materials* 40 no. 5 (September 2001), 1268.

time in the alliance's history that it invoked Article Five. Beyond NATO, the Organization of American States (OAS) condemned the attacks; it also activated the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), calling upon all OAS members to "provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state..."³⁶ Like with NATO, the OAS provides an important source of *opinio juris* from an entire region of the world that categorizes the actions of September 11 as an armed attack justifying self-defense actions. The common thread running through all of these examples is that al-Qaeda's actions, whether explicitly categorized as armed attacks or not, are considered to be armed attacks by the society of states, and justify the use of force in individual and/or collective self-defense. But while these international organizations's explicit and implicit statements represent an important data point in this debate, they do not provide any further guidance as to where the threshold for an armed attack by a TSA might lie. That said, even though one may not be able to define precisely where that threshold lies, al-Qaeda's demonstrated capability, its expressed intent to continue its campaign and acquire and use weapons of mass destruction if it can do so, coupled with state action in response to the attacks of September 11, 2001 all suggest that the armed attack threshold, wherever it might lie, may be dropping.

The international community has come a long way in providing guidance on what actually constitutes an armed attack since the signing of the UN Charter in 1945.

³⁶ Organization of American States, "Resolution on Terrorist Threat to the Americas," September 21, 2001, *International Legal Materials* 40 no. 5 (September 2001), 1273.

The long and contentious debate over the "Definition of Aggression" and its subsequent enshrinement by the ICJ as customary international law provides a benchmark for what actually constitutes an armed attack. From these it is possible to conclude that any actor that carries out an act against a state that is the equivalent of an attack by a state's conventional forces and is consistent with Article 3 of the "Definition of Aggression" amounts to an armed attack. Yet it is important to note that the definition of an armed attack remains contentious as the work of subsequent publicists examining how one might evaluate an armed attack conducted by a specific type of TSA suggests. Finally, statements and actions by many international organizations in the aftermath of the September 11, 2001 attacks establish that the international community either explicitly or implicitly agreed that a TSA like al-Qaeda was indeed responsible for carrying out an armed attack. But these organizations' actions do not provide any further definitive guidance regarding where the threshold for an armed attack is actually located.

State Support for a Trans-State Actor

Another important issue closely related to the examination of what trans-state actor actions might cross the threshold of "armed attack" is state support to TSAs. Unless the TSA is based on an unclaimed island in international waters or operates solely in international airspace, it must be based to some degree in the territory of one or more sovereign states. What legal responsibility, if any, falls on a state that either directly or indirectly supports a TSA's actions? This determination is critical because it directly affects what a victim state can or cannot do in response to a TSA's act. This

section examines this issue in two parts. Drawing on the work related to international terrorism, the first part examines previous scholars' work on characterizing state support to terror organizations. Subsequently, the second part investigates what current international law says regarding state support, to include "The Definition of Aggression," the ICJ's ruling on *Nicaragua v. United States*, the International Law Commission's long efforts to draft Articles on State Responsibility, as well as the various international conventions regarding terrorism. The section concludes by reviewing the spectrum of the arguments.

Typologies of State Support

State support for trans-state actors is varied and mixed. At one end of the spectrum, a state can exhibit direct and support through its own agencies to groups that act as the state's agents, to the other end of the spectrum where support could be simply limited to "ignoring" the presence of the TSA in the state while allowing the group to conduct its business as it chooses. Scholars examining this issue have derived different typologies for the relationship between a state and a terror organization.³⁷ One of the more useful is Richard J. Erickson's that categorizes the state-TSA relationship into four distinct, ideal types:

³⁷ These typologies vary in size and scope. A sampling includes Cassese, "The International Community's 'Legal' Response to Terrorism," 598-600 (six types); Richard J. Erickson, *Legitimate Use of Military Force Against State Sponsored International Terrorism* (Maxwell AFB, AL: Air University Press, 1989), 32-4 (four types); Donald J. Hanle, *Terrorism: The Newest Face of Warfare* (New York: Pergamon-Brassey's: 1989), 182 (three types); John F. Murphy, *State Support of International Terrorism: Legal, Political, and Economic Dimensions*, (Boulder, CO: Westview Press, 1989), 32-4 (twelve types); Oscar Schachter, "The Lawful Use of Force by a State Against Terrorists in Another

1. State sponsorship: state uses terrorism directly as a weapon of warfare
2. State support: state uses its resources to assist the terror group in the form of training, arms, explosives, etc
3. State toleration: while the state is aware of terrorist groups within its borders, it does not support them but does not act to suppress them
4. State inaction: state does not wish to ignore international terrorists within borders but lacks the ability to respond effectively against it³⁸

Erickson's typology is the most useful because it breaks down the relationship between the state and the terror group into four types: sponsorship, support, toleration, and inaction. It is important to remember, though, that these represent ideal types; placing an actual state-TSA relationship into one of these types will be more difficult in practice, since gaining sufficient information to make such a judgment may be difficult, as well as the fact that such a relationship may vary over time.

Nicaragua v. United States: The Necessity of Control

The next task is to investigate what international law says regarding this issue. The first enunciation of international law's position on this issue is the previously cited 1986 ICJ ruling in *Nicaragua v. United States*. One of the key legal issues in this case is whether or not the United States bore any responsibility for the actions of the Contra insurgents in Nicaragua. In addition to the necessity of a state providing logistical support, the Court outlined a second criterion for judging state responsibility: having direction and control over the activities of the group. The Court found that while the

Country," *Terrorism and Political Violence: Limits and Possibilities of Legal Control*, Henry A. Han, ed. (New York: Oceana Publications, 1993), 246 (three types).

³⁸ Erickson, 32-34. The other typologies break down state support in more or less the same manner, but with differing degrees of refinement on the type and degree of actual state support. For the purpose of

United States at times provided significant support to the Contras,³⁹ the U.S. did not have the necessary direction and control over the group for the United States to share responsibility for some of the Contras' actions.⁴⁰ As far as this discussion of the legal implications of the relationship between a state and a TSA, the Court sets a high threshold for state actions—providing significant logistical support and having direction and control—for those actions to impute legal responsibility to the State for the armed attack.

But the ICJ's ruling in *Nicaragua v. United States* has not been the last word in this debate. Listing these chronologically: first, two justices on the ICJ dissented from the majority. Justice Schwebel argues that because the threshold for state action in support of "armed groups" is so high before the state bears responsibility, a state could provide significant support to "armed bands" and it would still not be considered legally liable for assisting in an "armed attack" if it did not also exercise the requisite direction and control over the group.⁴¹ Erickson, in his work on state-sponsored terrorism, does

this project, Erickson's differentiation between state sponsorship, support, toleration, and inaction provides the best level of conceptual clarity without sacrificing too much parsimony.

³⁹ The Court concluded that the United States provided "logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communications, the deployment of field broadcasting networks, radar coverage, etc." "Nicaragua v. United States," para. 106, 1047.

⁴⁰ The Court concluded that the Contras "were so dependent on the United States that [they] could not conduct [their] most crucial or most significant military and paramilitary activities without the multi-faceted support of the United States." "Nicaragua v. United States," para. 111, 1048. Thus, the United States did have control over the Contras to the extent that the group was dependent on the United States for their ability to conduct effective operations. But the Court later concludes the such a level of support with its resulting dependency "is still insufficient in itself...for the purpose of attributing to the United States committed by the *contras*..." "Nicaragua v. United States," para. 115, 1048. Emphasis in original. The Nicaraguan government argued that the United States bore responsibility for human rights violations that Managua alleged the Contras committed.

⁴¹ Schwebel, paras. 176-177, 1191; Jennings, 1288.

not explicitly state the requirement for direction and control. However, one can infer from his description of the “State Sponsorship” type that a state would have significant control over the activities of a terrorist group since the group would be directly carrying out state policy on behalf of the state.⁴²

In 1999, the Appeals Chamber of the ICTY dissected the criterion of the necessity for state direction and control. In *Prosecutor v. Tadic: Appeal*, the ICTY argues that the ICJ’s reasoning in *Nicaragua v. United States* regarding the level of state direction required for a state to assume responsibility for an armed group’s actions was “unpersuasive.” The ICTY’s ruling cites two reasons for this conclusion. First, the Nicaragua test is unconvincing because it does not follow the “logic of the entire system of international law on State responsibility.”⁴³ And second, “the ‘effective control’ test propounded...as an exclusive and all-embracing test is at variance with international judicial and state practice.”⁴⁴ The ICTY concludes that state practice and other judicial rulings suggest that there ought to be two standards for state responsibility, with the higher standard being used for individuals and unorganized groups, and a lower standard for organized or paramilitary groups.⁴⁵

Finally, the International Law Commission (ILC) in 2001 *reaffirmed* the criterion of state direction and control. Article Eight of the “Draft Articles on

⁴² Erickson, 32.

⁴³ “Prosecutor v. Tadic,” (International Criminal Tribunal for the Former Yugoslavia—Appeals Chamber, July 15, 1999), *International Legal Materials* 38, no. 6 (November 1999), Article 115, 1540 (hereafter referred to as *Prosecutor v. Tadic: Appeal*)

⁴⁴ *Ibid.*, Article 124, 1542.

⁴⁵ *Ibid.*, Articles 115-45, 1540-46.

Responsibility of State for Internationally Wrongful Acts” examines the issue of when the actions of private individuals can be attributed to a state:

Article 8. Conduct Directed or Controlled by a State. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the *instructions of, or under the direction or control of*, that State in carrying out the conduct.⁴⁶

The key inference is that private individuals are acting as *de facto* agents of a state; in other words, carrying out state policy without actually being a member of the state government. As with *Nicaragua v. United States*, state direction or control still remains a necessary component in determining whether a state bears any legal responsibility for an act of a “person or a group of persons.” The ILC reiterates the requirement that a high threshold for direction and control must exist if a state is to be held legally responsible for the actions of a person or a group.⁴⁷

While the “Draft Articles on Responsibility of State for Internationally Wrongful Acts” represents another data point in this analysis, it is important to remember how this document relates to international law. This document, an ILC product, represents the work of publicists, though these publicists are among the most respected in the field today. And as such, it represents neither international law nor an example of state practice or belief in legal obligation. However, if an international

⁴⁶ International Law Commission, “Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts,” November 2001, 103, found at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (last viewed October 24, 2002). Emphasis added.

⁴⁷ *Ibid.*, 105-6. The ILC’s Commentary cites the ICJ’s ruling in *Nicaragua v. United States* to back up this assertion.

organization such as the UN General Assembly approved these draft articles as a resolution, it would become one source documenting the existence of *opinio juris* in this area. And the fact that the ILC reaffirms the same high threshold for the existence of state direction and control as the ICJ in *Nicaragua v. United States* suggests that this threshold is becoming embedded in CIL.

The last few pages represent a sampling of the contentious debate over the ICJ's ruling in *Nicaragua v. United States*. The ruling may represent an important benchmark for customary international law, yet the breadth and depth of the arguments against it indicates that the issue is far from settled. There is one final point to make with *Nicaragua v. United States*. One must exercise caution to avoid extrapolating these conclusions too far because of the details of the case itself. As previously noted, the controversy surrounding the high threshold for state support and control suggests caution in applying this ruling. Moreover, the high threshold for state direction and control is particularly problematic when applying it to the analysis of a state-TSA conflict. By definition, a TSA is an international actor pursuing its own political goals. Given its independence, a state may not be able to exercise direction and control over a group, yet the state's actions may impute responsibility for the TSA's actions. This fact calls into question how far the analogy actually holds. A third reason for caution is the specific circumstances of *Nicaragua v. United States*. The United States claimed that it acted in collective self-defense along with El Salvador to mitigate the effects of alleged Nicaraguan support for the insurgents in El Salvador. While the case provides useful

insight into what the norm might be, it is within the context of collective self-defense. For these reasons, one must exercise care in placing credence in this ruling regarding state support for an “armed group” and how far one can extend this analogy to the general argument for state support to a TSA. Yet despite these caveats and the important counterarguments, this case represents an important data point regarding what the law is and one must carefully consider it in any examination of these issues.

International Conventions on Terrorism

While the “Draft Articles of State Responsibility” are not yet international law or even at the point of documenting emerging CIL, states have agreed to a number of conventions that *are* international law; specifically, states have brought into force a number of conventions that outlaw specific acts of what many regard as terrorism.⁴⁸

While they have been reluctant to condemn specific sub-state groups, states have outlawed a number of specific acts. For instance, the most recent convention, “International Convention for the Suppression of Terrorist Bombings,” lists the following actions as offenses as unlawful:

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers,

⁴⁸ States agreed to categorize a number of acts related to international civil aviation as unlawful. See “Convention on Certain Offences and Certain Other Acts Committed on Board Aircraft [Tokyo Hijacking Convention],” September 14, 1963; “Convention for the Suppression of Unlawful Seizure of Aircraft [Hague Hijacking Convention],” December 16, 1970; “Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation [Montreal Hijacking Convention],” September 23, 1971; “Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation [Montreal Convention],” February 24, 1988. See generally, *International Terrorism: Multilateral Conventions (1937-2001)*, M. Cherif Bassiouni, ed. (Ardsley, NY: Transnational Publishers, 2000); *International Instruments Related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2001).

- places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:
- (a) With the intent to cause death or serious bodily injury; or
 - (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.
2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.
 3. Any person also commits an offence if that person:
 - (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or
 - (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or
 - (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.⁴⁹

In addition to stipulating specific acts as unlawful, these conventions establish a number of state duties, to include a duty to either extradite alleged perpetrators to the victim state or to prosecute the alleged perpetrators in their own domestic legal systems.⁵⁰ So while states still cannot agree on a definition of terrorism, states have stipulated that a number of specific, objective acts are unlawful, and have also agreed either to prosecute the perpetrators of such acts themselves or to extradite them to the victim state. This duty is an important responsibility to which states have agreed and it will become prominent in later discussions.

⁴⁹ United Nations, "International Convention for the Suppression of Terrorist Bombings," January 9, 1998, Article 2, *International Legal Materials* 37, no. 2 (March 1998), 253.

⁵⁰ For instance, see "International Convention for the Suppression of Terrorist Bombings," Article 8, 256.

State Practice—Post September 11, 2001

In the aftermath of the September 11, 2001 attacks, the United States took a number of actions that one can view as representing the emergence of a new norm. After the attacks and after the UN Security Council approved Resolutions 1368 and 1373, the United States demanded that the Taliban regime hand over all suspected al-Qaeda members within its borders, shut down all al-Qaeda training camps, and admit inspectors into the country to verify the closure of the camps. Not only did President Bush make these demands of the Taliban regime, but he also put other nations on notice regarding their support of terrorism: “Either you are with us, or you are with the terrorists.”⁵¹ The Taliban regime refused and subsequently became the target of the United States operating under Article 51 of the UN Charter. In the days following the attack against Afghanistan, it became apparent that not only was the Taliban sponsoring al-Qaeda, but evidence emerged suggesting that al-Qaeda was in fact sponsoring the Taliban.⁵² These actions and statements suggest two important points. First, the United States’ actions indicate that it did not hold to the criterion of direction and control that the ICJ stipulates in *Nicaragua v. United States* as being necessary to impute state responsibility. Given the close relationship that existed between al-Qaeda and the Taliban regime, where it would be difficult to say where one group ended and another began, state control has become less of an issue. And perhaps more significantly, the

⁵¹ George W. Bush, “Address to a Joint Session of Congress and the American People,” September 20, 2001, found at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> last viewed on March 28, 2003.

United States' declared policy of "either you are with us, or you are with the terrorists" and subsequent action make an implicit statement that the threshold for state support to a TSA such as a terror group has now dropped significantly, at least as far as the United States is concerned. This may be particularly true if one views U.S. actions as "significant state practice." It remains to be seen how much of an effect this example of state practice will have on evolution of customary international law in this area.

Discussion

It becomes apparent from this discussion of state support to trans-state actors that a significant lacuna still exists in the Law of War. The ICJ's ruling in *Nicaragua v. United States*, and the more recent ILC "Draft Articles on Responsibility of State for Internationally Wrongful Acts" together set a high threshold for state support and direction and control that is necessary for a state to bear responsibility. These two sources suggest the direction in which CIL is evolving. But this threshold is contentious. As Judge Schwebel's dissent suggests, it may ultimately prove politically unrealistic for states to conform to the norm suggested in the ruling. Other publicists make broader assertions. Beck and Arend argue that if a state provides logistical support and if that support is used to carry out the attack, then the state bears responsibility.⁵³ They do not consider the issue of direction and control. And in an even wider reading, Donald Hanle argues that a state-TSA relationship that involves

⁵² Bob Woodward, "Bin Laden Said to 'Own' Taliban: Bush is Told He Gave Regime \$100 Million," *Washington Post*, October 11, 2001, A1.

⁵³ Beck and Arend, 219.

state support for the TSA actually represents a military alliance. Since military allies do not control the details of each others' operations, yet are equally responsible for the actions of the alliance, it is reasonable to conclude the level of direction and control on part of the state that is necessary for state responsibility is significantly less than that posited by the International Court of Justice or the International Law Commission.⁵⁴

Moreover, states have agreed to be bound by a number of conventions that define as unlawful a number of acts related to civil aviation. One of the key duties delineated in these conventions is that states have a responsibility either to extradite alleged perpetrators of crimes defined in these treaties, or to try these alleged criminals in their own courts. An important limitation of this analysis, however, is that these represent specific acts or tactics that most states would consider to be terrorist in nature. A TSA may not necessarily use these tactics, so one must be careful when suggesting how well these conventions might apply. Still, the stipulation of the unlawfulness of these acts represents a movement towards a universal condemnation of tactics of terrorism, which would be applicable to a TSA were it to use such methods.

Finally, the United States' post-September 11 declaratory policy regarding terrorists and those that support them, coupled with the worlds' cooperation in the war on terrorism, suggest the emergence of a new norm of holding states responsible for supporting any form of trans-state actor perpetrating these acts, if those TSAs use terror tactics. It remains to be seen, however, whether subsequent state practice and *opinio*

⁵⁴ Hanle, 191. Hanle even goes so far as to argue that since the state-TSA relationship is a military alliance, a victim state can hold the supporting state responsible because of the alliance relationship.

juris will continue to reflect the emergence of this new norm in customary international law.

State Response to a TSA After an Armed Attack

The last important area in the analysis of state-TSA conflict when an armed attack has actually occurred is how a state might respond to a TSA's actions. The classic principles derived from customary international law that govern a state's response to an armed attack are necessity and proportionality.⁵⁵ Let's first look at how these principles apply in a state-state conflict, and then examine how one might apply them to a TSA.

Necessity

The idea behind the principle of necessity is that whatever actions a state might take in self-defense must be indispensable for the state to exercise self-defense successfully. In this particular instance, however, the principle is moot: the governing assumption for this section is that a state is responding to an armed attack. Therefore, state action, by definition, is necessary. That said, it is important to keep this principle in mind when examining issues of self-defense.

An important facet of the principle of necessity that is relevant in this instance is that any response to an armed attack must be immediate. The idea behind self-defense

⁵⁵ The classic source for these principles in customary international law is the *Caroline* case. For a discussion of the details of this case, see John Bassett Moore, ed., *A Digest of International Law*, vol. 2 (Washington, DC: Government Printing Office, 1906), 409-414; and R.Y. Jennings, "The *Caroline* and *McLeod* Cases," *American Journal of International Law* 32 (1938): 82-99. For the actual text of the

is that an individual, whether the individual is a person or a state, is taking immediate steps to mitigate the effects of an illegal act. To draw an analogy to an individual person: a person may act to protect himself, his family, or his property from a criminal and such actions would not be considered unlawful so long as the actions were proportionate to the threat of harm and they occurred during the criminal's attack. Any action taken after the attack would be considered criminal. Extending this analogy to the international realm, justified state self-defense actions must occur almost immediately after the harm is inflicted. The reason for having this requirement is that without it, a state could, theoretically, act against another state's decades-old action and justify the action as self-defense. Actions such as these would be more correctly classified as retaliation or reprisal for past actions.

Proportionality

The second principle governing a state's response to an armed attack is proportionality. The principle's core idea is that whatever circumstances surround a state's use of force in self-defense after an armed attack, the use of force must be at more or less the same level in scope and intensity as the original attack upon it. For instance, in the case of repelling a neighboring state's attempt to seize some of its territory, proportionality limits the injured state to only the means necessary to regain ~~the~~ territory and perhaps to take measures to ensure its territorial integrity in the future.

United States' position in this case, see Daniel Webster, "Letter to Henry S. Fox," April 24, 1841, *British and Foreign State Papers*, vol. 29 (London: James Ridgway and Sons, 1857), 1129-1139.

Measures going beyond this end, such as removing the source of a threat, would be outside the scope of a proportional response.

Application to a State-TSA Conflict

Having examined these principles and how they apply in a state-state conflict, one can now apply these to a state-TSA conflict after a TSA conducts what amounts to an armed attack against the state. As discussed previously, the idea of whether such an action is necessary is moot in this instance because the working assumption for the analysis is that an armed attack, however one defines it, has actually occurred.

But the other facet embodying this principle, immediacy, becomes important in the case of a state-TSA conflict. Unlike an attack from a state that might involve significant conventional forces, a TSA's attack in all likelihood will be short, intense, and involve limited numbers of people. Drawing again from the research conducted on the operations of one type of TSA, the terrorist group, such attacks are usually bombings, shootings or other such actions that are short in duration. Because of this, a state will be hard-pressed to respond quickly to a terror attack. Considerable debate exists about how quickly a state must respond to a terrorist attack before its actions are no longer considered to be self-defense. Some scholars argue, in line with the "restrictionist" school, that any state response not occurring immediately after the terrorist act is not self-defense, but a reprisal—an illegal act under the UN Charter. Others argue for a different view of immediacy. This view holds that states ought to pursue all other means before resorting to the use of force in response to a TSA's attack.

Because of this requirement to exhaust all peaceful means first, it is possible to have a gap between the terror attack and a state's forcible response to such an act. Finally, a third group argues that to combat terrorism effectively and to secure the integrity of the state, it is necessary to attack the terror organization in ways that go beyond the immediacy of a post-attack response.⁵⁶ Because of this, an immediate response against a terror organization is not only impractical, it could be unwise.

Not only does the strict interpretation of the principle of necessity not translate well when applied to a state-TSA conflict, there are also problems applying the principle of proportionality. While these common interpretations may provide sound guidance for restrained state action in a state-state conflict, considerable debate amongst scholars and substantial variance in state practice exists regarding the efficacy of this principle when dealing with at least one type of TSA: a terrorist organization. One way to characterize this debate is to divide state responses into three differing types: tit-for-tat proportionality, cumulative proportionality, and deterrent proportionality.⁵⁷ The "tit-for-tat" response is consistent with the restrictionist interpretation of the principle: the state inflicts approximately the same amount of damage on the TSA that the TSA inflicted on the state. But such actions may not be realistic when a state is dealing with a TSA such as a terrorist organization. In this instance, other scholars argue for cumulative proportionality, where proportionality is not measured in relation to the immediate preceding event, but an accumulation of many prior events. Under this

⁵⁶ Arend and Beck, 162-165.

⁵⁷ *Ibid.*, 165-166.

interpretation, a state has greater justification for a disproportionate response after a series of small attacks than after a single attack. As an example of applying to a real-world situation, Professor William O'Brien argues that in the case of Israel's ongoing struggle with the Palestine Liberation Organization, the measure of proportionality must not be compared to an individual act, but it must be compared to the proportionality of the overall policy:

Proportionality should not be measured simply by the number of casualties on each side, since the impact of terrorism goes far beyond the actual number of casualties it causes. This is the genius of terrorism as a means of coercion.⁵⁸

Instead of relying on a tit-for-tat response policy, O'Brien explains that Israel used the "accumulation of events" interpretation of proportionality justify actions taken in self-defense.

But a policy of disproportionate response leads to difficulties. As a state's actions move away from "tit-for-tat" proportionality, it edges towards the realm of reprisals. As Professors Bowett and O'Brien document Israeli actions against the PLO, they note that the United Nations Security Council consistently condemned Israeli actions as disproportionate. This reflects the view of the "restrictionist" school and that of the majority of states that reprisals under United Nations *jus ad bellum* are unlawful. While reprisals were considered lawful under customary international law prior to the Covenant of the League of Nations, reprisals in the current UN Charter framework are viewed as unlawful, along with any other use of force used to settle international

⁵⁸ O'Brien, "Reprisals," 459; Bowett, "Reprisals," 1-36.

disputes. Conversely, Professors Bowett and O'Brien argue that the United Nation's *jus ad bellum* regarding reprisals in general, and against terror groups in particular, is simply not realistic and is "based on a faulty model of the international legal and political system and on unpersuasive legal arguments."⁵⁹ The underlying problem of the existing rules prohibiting reprisals points to the difficulties inherent in the third type of proportionality: deterrent proportionality. Instead of ratcheting up the response based on the accumulation of a terror groups actions, a response guided by deterrent proportionality would produce a strong initial response against the sources of the terror organization's sources. This is arguably the best way to deal with such a group, otherwise it will return to attack the state again and again. But such actions will in all likelihood be disproportionate to the TSA's initial attack on the state.⁶⁰

Summary: State-TSA Conflict When an Armed Attack Occurs

This lengthy analysis sets the stage for the rest of chapter by examining the legal issues involved in what one might term the easy case in a state-TSA conflict: when a TSA conducts an undisputed armed attack against a state. Yet even with this simplifying assumption, the lacunae and grey areas in the *jus ad bellum* portion of the Law of War are apparent. First, what is the threshold that a TSA must cross before its actions are considered to be an armed attack against the state? While it is reasonable to

⁵⁹ O'Brien, "Reprisals," 469.

⁶⁰ Ibid. Professors Bowett and O'Brien are not the only ones to argue for the value of deterrence against terror groups: former Israeli Prime Minister Benjamin Netanyahu makes similar arguments in "Terrorism: How the West Can Win," *Terrorism: How the West Can Win*, Benjamin Netanyahu, ed. (New York: Farrar, Straus, Giroux: 1986), 199-226.

conclude that for a TSA's act to be termed an armed attack, it must be the equivalent of an attack made by a state's conventional forces, this definition is not without its problems. It allows a TSA to use significant and dangerous amounts of force against the state that may cross the threshold of the prohibition on the threat or the use of force contained within Article 2(4), without allowing the state any recourse to respond lawfully in self-defense. This produces a dilemma for the state: either not act and let the TSA conduct its attacks at will—a politically infeasible solution—or respond to the TSA's actions even if such a response is outside the strict interpretation of necessity and proportionality. Most Israeli and American responses to terrorist groups over the years fall into this category.

Another problematic area in the Law of War is the issue of when a sponsoring state bears responsibility for a TSA's actions. The ICJ in *Nicaragua v. United States* and the ILC's recent adoption of the "Draft Articles on Responsibility of State for Internationally Wrongful Acts" both set a high threshold that demands not only that a state provide substantial logistical support to the TSA, but that it also have direction and control over the TSA's actions before the state is responsible. While this may be where international law currently stands on this issue, the previously cited dissents of Judges Schwebel and Jennings in *Nicaragua v. United States*, the ICTY's ruling in the *Prosecutor v. Tadic: Appeal*, and the work of publicists suggest that this issue is far from settled. And U.S. actions and declared policy in the wake of the September 11, 2001 attacks serve only to make this problematic area even more difficult to interpret

with the possible emergence of a new norm: either you are with us or you are with the terrorists. It remains to be seen how these actions will affect the development of customary international law in this area.

Finally, previous scholarship examining terrorism suggests a lacuna in the law regarding how a state might respond to a TSA attack. The restrictionist school argues that any response a state takes against a TSA must be both immediate and proportionate. Yet the reality is that the best means to combat the threat of an ongoing terror campaign, reflected in significant state practice, is that a state response to a terror group ought not to be proportional, but be guided by "deterrent proportionality." And the way that a state conducts a response under the concept of "deterrent proportionality" means that, in all likelihood, such a response may not be as immediate as the strict interpretation of international law demands.

State-TSA Conflict Without an Armed Attack

The previous section outlines the lacunae and grey areas that emerge in the Law of War when one examines the legal issues involved when it is assumed that a state is responding to a TSA's armed attack. The number of lacunae and the intensity of the debate over them is significant especially given the attempt to simplify matters with the assumption. But this assumption is, in practice, not overly realistic: how many times do a TSA's actions rise to the level of an armed attack, no matter how one might define it?

The purpose of this section, then, is to examine how the legal issues change when a TSA's actions against a state *do not rise to the level of an armed attack*. In doing so, the section will at times reexamine issues discussed in the previous section in light of the change to the assumption. It also discusses areas of international law on the use of force not covered in the previous section. This section conducts this investigation in three sub-sections. The first examines customary international law in the pre-Charter era; CIL becomes critical when the legal basis for the use of force contained in treaty law is no longer as cut and dried as it was in the previous section. Following this is a reexamination of how the previous section's conclusions change as the base assumption driving the analysis, the existence of an armed attack, is changed. This will include an examination of how state responsibility for supporting a TSA changes, as well as how the legal requirements for a victim state change.

How the UN Charter Prescribes Behavior

When one changes the base assumption to where an armed attack has not occurred, two possible avenues for investigation emerge. First, a TSA's action may simply not rise to the level of "armed attack." And second, a TSA may not have actually conducted an operation against a state, but is only preparing to do so. In that case, a state would act in anticipatory self-defense. Either way, the shift in the analysis resulting from changing the base assumption is that a state can no longer cleanly invoke Article 51 of the UN Charter to justify any use of force in self-defense.

If a state can no longer invoke Article 51 without providing additional legal justification in doing so, what principles might govern state action? In an area where treaty law does not explicitly provide guidance, one must turn to customary international practice.

Customary International Law in the Pre-Charter Era

Customary international law regarding the use of force prior to the UN Charter recognized four types of self-help as being lawful: retorsion, reprisal, intervention, and self-defense. Retorsion is an act that, while unfriendly, is ultimately legal regardless of the illegality of the prior breach. Examples of such actions include severing diplomatic relations, closing ports to a state's ships, denying visas to the state's nationals, limiting or eliminating foreign aid, or revoking special trade privileges.

Reprisals, such as the seizing of property or persons, are acts that retaliate for a previous wrong. The classic case examining reprisals is *Naulilaa*, which establishes three conditions for a lawful reprisal. First, a state must have committed an illegal act; second, the victim state must make a request for a peaceful settlement of the wrong; and third, any measure must be proportional to the wrong received.⁶¹

Intervention is forceful interference in the affairs of another state. Customary international law outlines a number of circumstances that justify lawful intervention: a

⁶¹ For a discussion of the *Naulilaa* case, see Green Haywood Hackworth, ed., *Digest of International Law*, vol. 6 (Washington, DC: Government Printing Office, 1943): 154-56; for a general discussion of Countermeasures and Self-Help, see generally Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, eds., *International Law: Cases and Materials*, 4th ed. (St. Paul, MN: West Group, 2001): 713-29 (hereafter referred to as Damrosch, *et. al.*)

treaty right to intervene, legitimate reprisal, protection of one's nationals abroad, and self-defense.⁶² For self-defense in general, the Caroline case of 1837 outlines what has become the key principles of self-defense: the acts must be necessary and proportional.⁶³ Another facet of self-defense generally recognized as lawful in the customary international law of the pre-Charter era is the right to anticipatory self-defense: a state had the right to defend against an expected attack from another state before this attack occurs. And again, the principles of the Caroline case provide the basis for how a state ought to conduct such an action.⁶⁴

Customary International Law: State-TSA Conflict

Because this section's goal is to examine a state-TSA conflict in two of the grey areas of the law, namely where a TSA action does not reach the "armed attack" threshold or when a state might respond to an armed attack prior to its occurrence, let's assume for the sake of this argument that the UN Charter *did not change* previous customary international law with regards to the use of force. That being the case, how does pre-Charter CIL illuminate the two gray areas in the Law of War? Since CIL governs state practice more generally than does treaty law, one can use it to fill in the

⁶² For a greater discussion of retorsion, reprisal, intervention and self-defense, see Brierly, 398-408; and Waldock, 456-461.

⁶³ Webster, "Letter to Henry S. Fox," 1129-1139.

⁶⁴ One of the great debates in international law on the use of force is whether customary international law regarding the use of force that existed prior to the UN Charter is still in effect. As noted earlier in this chapter, writers from the "restrictionist" school generally argue that the UN Charter not only codified the prohibition against the threat or the use of force into treaty law, but also changed customary international practice by removing all the previously lawful reasons outlined above for the use of force. Other writers argue that the wording of the Charter's Article 51—"inherent" right of self-defense—and the lack of

gaps that exist in treaty law, providing guidance for what states can or cannot do in areas not covered by treaty. And as such, pre-Charter CIL allows states to take certain self-help actions: reprisals, intervention, and anticipatory self-defense. CIL also provides guidance and principles for how states ought to conduct such actions. Based on this understanding of CIL, a state could respond to a TSA's action that was below the threshold of "armed attack." Thus a state could conduct a reprisal against a TSA for some unlawful act, such as rescuing its citizens that were directly threatened by a TSA inside another state's sovereign territory. And with this understanding of CIL, a state could launch an anticipatory attack against a TSA to blunt a prospective attack. And as a general proposition, any such response conducted with any of these justifications would have to be both necessary and proportional to the TSA's action. But it is important to note, as previously discussed, that effective state action against a TSA may fall outside the traditional scope of proportionality and immediacy.

While pre-Charter CIL regarding the use of force provides significant insight and guidance into several lacunae that exist in a state-TSA conflict, it is important to remember the nature of the assumption—that the UN Charter did not change the nature of CIL to reflect a strict interpretation of Article 2(4) and 51. While the arguments in favor of the non-change in CIL are more compelling, restrictionist arguments in this area as well as state practice since the signing of the Charter both suggest that the majority of states adhere to a strict interpretation of the Charter and CIL. Because of

justification for such a conclusion in the *travaux préparatoires* means the restrictivist conclusion is inaccurate.

this difference of opinion over the existence of pre-Charter customary international law, and the resulting implications for what actions a state may lawfully take in response to a TSA short of an armed attack, one must categorize this, at a minimum, as a grey area in the law, if not a lacuna.

State Responsibility

Another problematic area in this analysis of what actions a state might take against a TSA without an armed attack is: what actions can a victim state take against a state supporting a TSA? As discussed earlier, the ICJ in *Nicaragua v. United States* ruled that a state bears responsibility for an attack if it provides support and exhibits direction and control over the actions of the “armed group.” But what if the actions of the “armed group” do not reach the level of an “armed attack” that one might expect from a state’s conventional forces?

Pre-Charter CIL provides some guidance in this matter by noting that a victim state may take some actions, specifically intervention to protect its own citizens and anticipatory self-defense. The most celebrated instance of intervention to protect one’s citizens is the Israeli raid on Entebbe in July 1976.⁶⁵ In this action to rescue the Israeli hostages, the Israeli Defense Forces attacked sites of the Ugandan military to the minimum extent necessary to ensure the rescue’s success. The Ugandan government later argued that Israeli actions violated its territorial integrity, but others noted that Kampala’s complicity with the terrorists made it as guilty as the terrorists themselves in

⁶⁵ See generally Damrosch, *et. al.*, 973-5.

violating international law. Because of this, Israeli actions were legally justified since the host-state refused to act to protect the citizens of another state.⁶⁶ CIL provides some justification for limited action against a state that supports a TSA's unlawful act, but one must be careful to consider the context of any future situation to determine whether this legal justification actually exists in that instance.

What about an anticipatory attack against a state that supports a TSA? Based on pre-Charter CIL, it is reasonable to conclude that a potential victim state could launch a strike in anticipatory self-defense against a TSA located in another state so long as the principles encapsulated in the *Caroline* case govern such action. The anticipatory attack must be necessary—it must be the only means of preventing the attack from occurring. The need for the attack must be immediate: “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁶⁷ Finally, the anticipatory action must also be proportional—no more force should be used or damage inflicted than is necessary to stop the attack. But while a victim state could act against the TSA, it would have limited options against the host state. If one were to adhere to the high threshold established by the ICJ and ILC, unless a host state crossed that threshold, the victim state could not justify attacking the victim state's facilities beyond what was necessary to ensure the success of the strike on the TSA.

Webster's principles provide sound and accepted guidance for how states ought to conduct their actions in an anticipatory self-defense situation. But it is important to

⁶⁶ “Memorandum by Monroe Leigh, Legal Advisor to the Secretary of State, to Henry A. Kissinger, Secretary of State,” July 8, 1976, *National Security Law*, 189-90.

recognize an important limit. On the surface, the Caroline incident and a state trying to deal with a troublesome TSA sheltering in another state's sovereign territory appear to be similar. But the CIL for which the Caroline case forms the basis does not differentiate between acts that the UN Charter's describes as "armed attacks" and those which fall beneath this threshold; nor does CIL provide any guidance on how a victim state might deal with a state that is a sheltering and supporting such a TSA. Does the Caroline case provide a viable model and principles for state policy and action, or does the Charter's "armed attack" stipulation significantly change this formulation?

Summary: State-TSA Conflict Without an Armed Attack

As one might expect, state actions in the absence of an armed attack become significantly less clear when examining the actions a state might take in the absence of an "armed attack." The debate over the interpretation and intent of Articles 2(4) and 51 of the UN Charter is fierce when the conflict is simply between states. When one of the belligerents is a TSA, that debate becomes even less clear. Much of that debate hinges on the intent of the UN Charter's framers regarding pre-existing CIL. If the pre-Charter CIL remains in place, it provides adequate, if not perfect, guidance to states about what to do if a TSA's action does not reach the "armed attack" threshold or if a state wishes to act in anticipatory self-defense against a TSA. This becomes significantly more problematic if the Charter narrows pre-Charter CIL regarding the use of force as the restrictionists argue. Such a strict interpretation provides little viable guidance to a state

⁶⁷ Webster, 1138.

facing a troublesome TSA. Finally, state responsibility for supporting a TSA becomes cloudier in the absence of an armed attack. While a state could make a strong anticipatory self-defense argument if it faced a TSA's attack that would be the equivalent of conventional attack, lesser TSA actions again make this more problematic since the Caroline incident does not differentiate between armed attack and lesser acts of violence as does the UN Charter. And these problems, in all likelihood, are the ones a state would face since a TSA's actions generally are not the equivalent of attacks by conventional forces. All in all, pre-Charter CIL provides better guidance to a state than the "restrictionist" interpretation of the Charter's framers' intent.

Another Exception to the Article 2(4) Proscription

Even under the best of circumstances, using Article 51 to justify actions against a TSA produces a number of important legal challenges. Because of this, one must ask the question: might there be a better way? There is a possibility: the use of force against a TSA could become another exception to the proscription against the use of force contained in the UN Charter's Article 2(4).⁶⁸ This final section examines this argument in three parts. The first part makes the case that the situation facing the society of states—a threat that is sufficiently different from that which the Charter's

⁶⁸ This is not the first attempt to argue for a change to the UN Charter's *jus ad bellum* rules. See for example Baker, "Terrorism and the Inherent Right of Self-Defense;" and Arend and Beck, 194-202. In both cases, these scholars argue for changes to the Charter's law governing self-defense, although they take different routes to reach their conclusions. The initial inspiration for this argument—that there ought to be a new exception to the prohibition on the use of force—is Gregory M. Travalio, "Terrorism, International Law, and the use of Military Force," *Wisconsin International Law Journal* 18 (Winter, 2000): 166-171. In the end, however, the argument contained here places a greater emphasis on the

framers envisioned in 1945—justifies such a change. Moreover, since the Charter's collective security mechanisms have failed to work as the framers intended, states have returned to the era where individual self-help is necessary to ensure their own safety. The second part makes the case that the use of force within the territorial boundaries of a third state that is either unwilling or unable to take care of the problem itself does not actually violate that state's territorial integrity or political independence. Finally, the last part examines the counterarguments to this view and provides a rebuttal.

Why the Current Charter Framework is not Appropriate

In order to make the case for the inadequacy of the current theory of self-defense encapsulated in the relationship between Article 2(4) and 51, one must first establish that the situation is indeed sufficiently different to warrant such a change. This argument occurs in two parts. First, a TSA can be sufficiently different from a state, in terms of its legal personality, the threat it now poses, as well as in its vulnerability to retaliatory actions. And second, the current UN system for collective security, which the framers envisioned as providing for the peace and security of the world, has not functioned as the framers' intended.

A TSA is Qualitatively Different than a State

The first part of this argument makes the case that a TSA is qualitatively different from a state; this has become apparent on a number of levels in the discussion

failure of the UN Charter system to provide for international peace and security, as well as the qualitative difference between a state and a TSA.

thus far. First of all, a TSA is not a state as far as international legal personality is concerned, and as such, there is a question of whether the Law of War even applies to states in a conflict with a TSA—this was discussed at length in Chapter Two. While some TSA's and non-state actors have become important and influential international actors, states view the actions of these TSAs as lawful because they work within the legal system established by the states. Since TSAs that inflict private violence against a state uses that force in defiance of international legal norms, states ought to view such a use of force as a threat to the system.

A second way in which a TSA is different is the threat that it poses to the state. Up until recently, the greatest threat that a TSA posed to a state was a terrorist attack against either state facilities or a small group of individuals. However, in the wake of the al-Qaeda attacks against the American embassies in Africa in August 1998, the attacks against New York City, Washington DC, and Pennsylvania in September 2001, and the bombings in Bali, Indonesia in October, 2002 collectively suggest that some TSAs have achieved a sophisticated capability to inflict grievous harm on a state as well as its citizens.

This increased sophistication is not the only way that the threat is growing. The proliferation of weapons of mass destruction—nuclear, chemical, biological weapons and the means of their delivery—is becoming an increasing source of concern. While most states would prefer to see these weapons destroyed, some TSAs would do just about anything in their power to acquire them because these weapons provide a

relatively easy and inexpensive means to inflict enormous damage upon a state, countering the enormous advantage in conventional military capability that most states possess over TSAs. Since it is probable that some TSAs would use these weapons against states should they come to possess them, it is unreasonable to expect a state to allow a TSA to strike it with such a weapon before the state could take any form of military action to prevent it.

Changes in the International System Since 1945

A second point to make in this argument is that the international system is different than the one that the UN Charter's framers envisioned when states signed the Charter in 1945. First, as noted in the previous section, the nature of the threat is significantly different. In 1945, the concept of an armed attack, in the framers' eyes, was encapsulated in the conflict the states were concluding—the Second World War. For states in 1945, armed attack meant columns of tanks crossing border frontiers before daylight and before an effective defense could be mounted. Armed attack meant a surprise air raid against a naval anchorage before a declaration of war. Armed attack meant the complete devastation of one's territory while occupied by an alien invader. The end of the Second World War brought changes in the realm of international security. The advent of nuclear weapons and the implementation of the policy of deterrence led to a great reluctance on the part of the superpowers to consider using force against each other, out of fear of escalation to a nuclear exchange. But the threat of a nuclear confrontation did not mean the end of conflict. The threat of "massive

retaliation” rings hollow when one might be retaliating in response to logistical, moral, and rhetorical support for a national liberation movement. So as the nuclear stalemate led to the limitation of conventional conflict between states, the armed threat facing states came not from other states, but from sub-state or trans-state actors. And the era of globalization has made it increasingly easy for these trans-state actors to threaten states. The whole concept of “armed attack” has broadened significantly from that envisioned by the Charter’s framers.

Another way that the international system differs from that envisioned by the Charter’s framers is that the Charter’s mechanism for collective security has proven ineffective. While the framers might have expected that the wartime cooperation among the Allied powers would continue in the post-War era, such a belief proved naïve. And since United Nations action under Chapter VII requires at least the acquiescence of the permanent members of the Security Council along with a majority of the voting members of the body, great power politics gets in the way of effective collective action.⁶⁹

⁶⁹ One of the classic statements of this argument is Thomas M. Franck, “Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States,” *American Journal of International Law* 64, no.5 (Oct 1970): 809-837. For other statements supporting this argument, see O’Brien, “International Law and the Outbreak of War in the Middle East, 1967,” 714; and Victoria Toensing, “The Legal Case for Using Force,” *Fighting Back: Winning the War Against Terrorism*, Neil C. Livingstone and Terrell E. Arnold, eds. (Lexington, MA: Lexington Books, 1986), 145-156. For a rebuttal to Franck, see Louis Henkin, “The Reports of the Death of Article 2(4) are Greatly Exaggerated,” *American Journal of International Law* 65, no. 3 (July 1971): 544-8. For other critiques, see Oscar Schachter, “In Defense of International Rules on the Use of Force,” *University of Chicago Law Review* 53, no. 1 (Winter 1986): 119-128. For a middle ground view, see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 252.

Coupled with this problem is the lack of an effective mechanism to help states resolve disputes peacefully. Article 2(3) of the Charter stipulates that states are obliged to resolve disputes peacefully—this article is often termed as the complement to Article 2(4) which outlaws the threat or the use of force.⁷⁰ But the UN framework does not provide a mechanism to enable this peaceful resolution. British jurist and publicist Humphrey Waldock commented on this problem, noting: “Clearly, a law, which prohibits the resort to force without providing a legitimate claimant with adequate alternative means of obtaining redress, contains the seeds of trouble.”⁷¹

The international system of the early twenty-first century is significantly different than the one envisioned by the framers of the UN Charter. While the framers may have believed that the UN Charter framework represented a step forward in bringing peace to the world, the changed international security environment and the Charter’s inability to furnish security provide compelling evidence that a change is necessary.⁷²

⁷⁰ Article 2(3) states: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

⁷¹ Waldock, “The Regulation of the Use of Force,” 490.

⁷² For examples of publicists who believe that a change in the international system does not change a state’s obligation not to use force, see Schachter, “In Defense of International Rules on the Use of Force,” *University of Chicago Law Review* 53, no. 1 (Winter 1986), 126 (legislative history of Article 2 shows that the proper functioning of the collective security mechanism was not a prerequisite for the acceptance of UN framework for the use of force); Brownlie, *International Law and the Use of Force by States*, 346, (the failure of the Security Council to fulfil its responsibilities does not release states from theirs).

Use of Force That is Not Against "Territorial Integrity or Political Independence" of a State

In addition to the Charter's inadequacies in dealing with the new international security problems of the twenty-first century, one faces the challenge that a TSA will almost certainly have to rely on the acquiescence of a state to conduct its operations. How might a legal argument that makes the case for another exception to the prohibition of the use of force in Article 2(4) solve this puzzle? One way can be found in the language contained within the article: "All Members shall refrain in their international relations from the threat or use of force *against the territorial integrity or political independence* of any state, or in any other manner inconsistent with the Purposes of the United Nations." As the emphasized section suggests, one could interpret the language as saying that the threat or the use of force against a state is lawful so long as it does not threaten the state's territorial integrity or political independence. This argument would be useful in making the case for striking a TSA that operates within a state's sovereign territory. So long as a victim state's actions against the TSA does not threaten the supporting state's territorial integrity or political independence, such use of force would be lawful.⁷³ Moreover, as discussed earlier, some uses of force within the sovereign territory of another state, such as the protection of nationals, were considered lawful according to pre-Charter customary international law. This too supports the claim that limited uses of force against a TSA would be

lawful as long as such a use of force was not directed at the host state's political independence or territorial integrity. While others disagree with this line of argument,⁷⁴ significant state practice suggests that a strict interpretation of "territorial integrity and political independence" may not be as widely held by states as some might argue. Scholars such as Bowett, O'Brien, and Beck and Arend all document Israeli and American efforts to limit terror groups' ability to attack their states through attacking terror groups' facilities in third states. While Israeli and American legal justifications for their actions are based on a self-defense argument vice a new exception to Article 2(4) that is being argued here, their actions in using force against terror groups in host states suggests that the norm embodied in a strict interpretation of "territorial integrity and political independence" lacks strength.⁷⁵

The argument for a new exception to Article 2(4)'s prohibition on the use of force to deal with a threat posed by a TSA is compelling. TSAs are a different type of actor than a state and they pose a different and more virulent threat than a state. The international legal framework for the peaceful settlement of disputes and collective security is either ineffective or non-existent. And finally, the international system has seen state practice that is at odds with the principle of the inviolability of a state's

⁷³ Supporters of this argument include Kirkpatrick and Gerson, who argue that the protection of "territorial integrity" encapsulated in Article 2(4) is not the same as territorial inviolability: "Territorial integrity is preserved so long as none of a state's territory is taken from it." Kirkpatrick and Gerson, 32.

⁷⁴ See Higgins, 240 (most uses of force do violate the territorial integrity of a state); Schachter, "The Lawful Use of Force," 246 (extra-territorial operations against terrorists violates the political sovereignty of host state); and Schachter, "The Lawful Resort to Unilateral Use of Force," *Yale Journal of International Law* 10, no. 2 (Spring 1985): 291-294 ("The idea that wars waged in a good cause... would not involve a violation of territorial integrity or political independence requires an Orwellian construction of those terms." Quote on 293-4).

territorial integrity and political independence. Such practice at a minimum calls into question the efficacy of a norm based on this principle. Given all this, coupled with the apparent necessity for action against a threatening TSA, provides significant evidence supporting the claim for a new exception to the Article 2(4) proscription against the threat or the use of force.

The Counterargument

Any proposal recommending a new exception to the UN Charter's prohibition on the use of force is provocative and invites a vigorous counterargument. This section examines these counterarguments and attempts to rebut them.

The first counterargument is that a new exception would be subject to abuse, even if one does not consider the argument that the use of force against a TSA is not a violation of the host state's territorial integrity. Such an exception could lead to a "slippery slope" where the use of force would become more prevalent within the international system. Because of these potential problems, restrictionist scholars would argue that it would be best to stay within the current UN Charter framework that mandates the prohibition of the use of force except in self-defense or with a Security Council authorization under Chapter VII.

The possibility for abuse or of sliding down the slippery slope is always present. But if the international legal system does not provide a state with the legal machinery to protect itself and to resolve disputes peacefully, then a state will take the necessary

⁷⁵ See Bowett, "Reprisals;" O'Brien, "Reprisals;" Beck and Arend, 173-192.

actions to prevent attacks against itself, regardless of their legality. And in justifying their actions as lawful, states stretch the self-defense argument until the concept itself is so large that the Article 2(4) proscription against the threat or the use of force becomes almost worthless. Such stretching of the self-defense justification is an abuse in and of itself. Would it not be better to provide states with a lawful means to combat a TSA, a means that reflects state practice and is more politically palatable than allowing the continued abuse of the self-defense argument, particularly when such abuse renders the argument for restraint less viable?

It is important to remember what this exception allows and what it does not. It allows a state to use force against a TSA that is in the territory of a host state. It does not allow a state to attack the host-state in any fashion unless the host-state provides some form of defense for the TSA. And then the victim state could only use the minimal force necessary to ensure the success of the strike. Moreover, if a victim state were to use force under this exception, its actions would still be governed by the principles of necessity and proportionality. Necessity demands that a state exhaust all other means to resolve its problem with the TSA before it acts under this new exception. Such other means would include demands to the host-state to take steps itself to stop the TSA's activities and, if the situation warrants, hand over members of the TSA for trial if an international convention covers the situation. The principle of necessity also suggests that the threat posed by the TSA must be sufficient to justify the use of force against it. As for proportionality, any use of force against a TSA that is justified under

this argument must be proportional to deter future attacks: “violence threatened or actually used in deterring an adversary should be the minimum necessary to persuade him not to undertake aggression in the future.”⁷⁶ In other words, a response would be proportionate so long as it was the minimum force necessary to deter future attacks. This reflects a change from the traditional “tit-for-tat” proportionality, but it better reflects the needs of states confronting a TSA threat.

A second counterargument to a new exception to the prohibition on the use of force emerges from the presumption that is the foundation of the current international legal system regarding the use of force, namely the presumption of peace over justice. Grounding this presumption is that while there are a number of important “goods” in the international system, international society has chosen the “good” of peace over all other “goods” such as justice: peace must be maintained at the expense of justice. This presumption is incorporated into the *jus ad bellum* of modern international law in the prohibition against the threat or the use of force in Article 2(4) of the UN Charter.⁷⁷

The presumption of peace over justice—peace at all costs—is a compelling counterargument, particularly in light of war’s devastation in the twentieth century.

⁷⁶ Coll, 299.

⁷⁷ A number of scholars have commented on this presumption. See Schachter, “In Defense of the Lawful Use of Force,” 128 (international law regarding the use of force was designed not to uphold the rights of states but to maintain peace and security in the international system); William V. O’Brien, *The Conduct of Just and Limited War* (New York: Praeger Publishers, 1981), 23-4 ; Arend and Beck, 34 (“Undergirding the Charter was a belief that a greater harm would be done to the international system by using force to promote justice than by living with a particular injustice.”); Inis C. Claude, Jr., “Just Wars: Doctrines and Institutions,” *Political Science Quarterly* 95, no. 1 (Spring 1980): 94 (“The preservation of peace took precedence over the promotion of justice.”); Henkin, *How Nations Behave*, 164 (“order is essential for international society, and self-help is fundamentally disorderly; justice and vindication of law will have to be worked out separately and by other means.”)

However, while the Charter's framers' goal of outlawing aggression—the embodiment of this presumption—is noble, the reality of international politics has not borne this assumption out. In the absence of an effective collective security regime to enforce international law and contain aggressive nations, states have taken matters of justice into their own hands. State practice regarding the use of reprisals, ably documented by Professors Bowett, O'Brien, and Arend and Beck, demonstrate that some states view the justice of their security as being more important than maintaining the presumption of peace. Professor O'Brien eloquently explains:

In the face of the manifest failure of collective security, it can be argued that a state suffering grave injustice would reasonably reclaim its sovereign right to wage just war. The UN system is now in a crisis in which states may be expected to think and act this way, thus putting the UN legal regime of force in question. In effect, the charter is a world social contract whereby individual sovereign competence to use the military instrument was severely restricted in favor of collective security. The social contract is now threatened with a wholesale return to the state of nature by the states of the world. The states, not having received security in conceding much of their competence to use armed force, would now reclaim that competence in full.⁷⁸

And not only does state practice call into question the validity of this presumption, states themselves have incorporated ideas of justice into various international documents. The most prominent codification of justice is what one could call a presumption for self-determination. In this instance, states codified the idea that international law shall help, and certainly not hinder, the right of peoples in their quest for self-determination, particularly “peoples under colonial or racist regimes or other

⁷⁸ O'Brien, *The Conduct of Just and Limited War*, 23-4.

forms of alien domination.”⁷⁹ While few would object to the nobility of such a statement, it calls into question the objectivity of international law and makes a strong case that the presumption for peace over justice is a lot weaker than many actually claim.

Moreover, some publicists argue that one of the other core goals of the UN Charter, the protection and furtherance of international human rights norms, ought to have a greater priority in the international system than the presumption of peace over justice. These publicists argue for international intervention to prevent the abuse of human rights by the state itself, or within a state where the government will not or cannot prevent such abuses.⁸⁰ International state practice over the past decade presents a picture of state willingness to intervene in the affairs of another state for humanitarian reasons, as the military actions in Somalia, Bosnia, and Kosovo all demonstrate. While

⁷⁹ Two prominent examples of this are “The Definition of Aggression,” Article 7 (quote in text is taken from this article); and “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),” Article 1(4), *Documents on the Law of War*, Adam Roberts and Richard Guelff, eds., 3d ed. (Oxford: Oxford University Press, 2000), 423.

⁸⁰ For samples of these arguments, see Michael Reisman and Myres S. McDougal, “Humanitarian Intervention to Protect the Ibos,” *Humanitarian Intervention and the United Nations*, Richard B. Lillich, ed. (Charlottesville, VA: University Press of Virginia, 1973), 177 (Article 56 of the UN Charter specifically authorizes action to promote human rights; humanitarian intervention is not against the political independence or territorial integrity of a state, therefore it falls below under the Article 2(4) threshold); Wil D. Verwey, “Humanitarian Intervention,” *The Current Legal Regulation of the Use of Force*, Antonio Cassese, ed. (Boston: Martinus Nijhoff, 1986), 67 (bases argument not on revival of customary international law but on “the perpetual applicability of certain superior, overriding principles of law; notably, *the principle of necessity*,” quote on 73-74); Fernando R. Teson, “Collective Humanitarian Intervention,” *Michigan Journal of International Law* 17, no. 2 (Winter 1996): 323-371 (“international law today recognizes, as a matter of practice, the legitimacy of collective forcible humanitarian intervention—of military measures authorized by the Security Council for the purpose of remedying serious human rights violations,” quote on 324); Richard B. Lillich, “Forcible Self-Help Under International Law,” *Readings in International Law from the Naval War College Review 1947-1977*, Richard B. Lillich and John Norton Moore, eds. (Newport, RI: Naval War College Press, 1980), 134-136.

some claim that an intervention without UN Security Council approval—like in Kosovo—is unlawful,⁸¹ one cannot deny that this line of argument represents another example of the weakening of the presumption of peace over justice.

The final argument deals with the nature of the problem itself. It is agreed that the goal of the UN Charter framework is to maintain the peace and stability of the international system. But do not TSAs, particularly those that have the capability and intent of carrying out sophisticated attacks with weapons of mass destruction, threaten the peace and stability of the international system? And thus states, as the actors who are responsible for maintaining the viability of the system, bear ultimate responsibility to ensure that other actors in the international system play by the accepted rules.

Conclusion

The difficulties the Law of War experiences when the two belligerents in a conflict are both states are significantly magnified when one of the belligerents is a trans-state actor. The current *jus ad bellum* works reasonably well when a TSA attack reaches the level of an armed attack that one might expect from a state's conventional forces.⁸² The current *jus ad bellum* also provides guidance on what types of acts are

⁸¹ For example, see Ian Brownlie, "Thoughts on Kind-Hearted Gunmen," *Humanitarian Intervention and the United Nations*, Richard B. Lillich, ed. (Charlottesville, VA: University Press of Virginia, 1973): 139-148 ("A rule allowing humanitarian intervention, as opposed to a discretion in the United Nations to act through the appropriate organs, is a general license to vigilantes and opportunists to resort to hegemonial intervention," 147-148); and Schachter, "The Right of States to Use Armed Force," 1628-33 (governments are reluctant to accept humanitarian intervention on human rights grounds because of potential for abuse).

⁸² A number of publicists argue that the current *jus ad bellum* is adequate to justify U.S. actions in the wake of the attacks on September 11, 2001. See Jack M. Beard, "America's New War on Terror: The Case for Self-Defense Under International Law," *Harvard Journal of Law and Public Policy* 25, no. 2

considered an armed attack regardless of the actor carrying them out. But the *jus ad bellum* becomes less helpful when the act of a TSA does not reach the “armed attack” threshold. A strict interpretation of the law and the practice embodied by the majority of the states provide little viable guidance—other than do nothing—to states about how to deal with a troublesome TSA short of an unambiguous armed attack. Because of this, states make clever arguments using Article 51’s self-defense provisions to justify their actions, and in the process stretch the fabric of the law to the point where the legal conception of self-defense is almost too broad to be useful as a legal means of restraint. Thus the restrictionist self-defense arguments outlined in this chapter are inherently problematic when applied to a state-TSA conflict. Finally, the UN system has failed to provide for the collective security of states. That fact, coupled with the rise of TSA’s and their growing capability and intent to inflict grievous harm on a state forces a state to confront a dangerous dilemma. Should it absorb what could be a devastating TSA attack, as the restrictionists argue, or should it continue the tradition of stretching the self-defense argument to justify its actions to provide security for its population? Both choices are troubling: the first is politically infeasible; the second leads to another slippery slope where the legal conception of self-defense is so broad and diluted that it renders impotent any sense of restraint.

A new exception to Article 2(4)’s general prohibition on the threat or use of force provides a clean, lawful way for a state to protect itself from the threats posed by a

(2002): 559-590; Christopher Greenwood, “International Law and The ‘War on Terrorism,’” *International Affairs* 78, no. 2 (2002): 301-317; and Adam Roberts, “Counter-Terrorism, Armed Force

contemporary TSA. In the process, it side steps the issue of whether a TSA's actions actually reaches the "armed attack" threshold. The core norms embedded in any use of force—necessity and proportionality—also govern the use of force in this instance, with the recognition that TSAs present a situation that would justify a different interpretation of these principles. The challenge for such an argument is that it runs against the deeply-ingrained norm of peace over justice that is at the core of the international legal system in the modern era. The question then becomes: given the importance of this norm and the majority of state practice that embodies it, will states agree to support such a change?

Lacunae

For the purpose of this project in general, and the goal of this chapter in particular, the preceding analysis leads to the following conclusions regarding lacunae in the *jus ad bellum* portion of the Law of War. First, the location of the armed attack threshold is still in dispute. Despite the fairly definitive statements by the ICJ in *Nicaragua v. United States* and recent ILC writings, other court rulings, writings of publicists and state practice call the ICJ's conclusions in *Nicaragua v. United States* into question. Second, the issue of what level of state support to a TSA is necessary before the state can be held accountable is still unresolved. It is important to note that this chapter's proposed new exception to Article 2(4)'s proscription on the threat or the use of force allows a victim state to attack a TSA located in another state so long as that

and the Laws of War," *Survival* 44, no. 1 (Spring 2002): 7-32.

attack does not violate that state's political independence or territorial integrity. The argument does not provide any justification for attacking the state itself beyond what is necessary to ensure the success of the attack on the TSA. The third lacuna relates to the principles of necessity and proportionality in how a state might attack a TSA. While a restrictionist would argue that a victim state's response must be immediate and tit-for-tat in nature, considerable opinion and important state practice suggests that the conventional interpretations of those principles may not be adequate to deal with a TSA's threat.

CHAPTER FOUR

THE LEGAL *JUS IN BELLO* AND TRANS-STATE ACTORS

It is clear that since earliest times there has been recognition that humanity and the future survival of society demand that limitations be placed upon the means and methods of warfare; this remains the case today, whether the hostilities take place in international or non-international conflicts.

L.C. Green, "What is—Why is There—The Law of War?"

The way to international hell seems paved with "good" conventions.

Bert Roling

The second part of the Law of War, the *jus in bello*, establishes norms for how states ought to carry out a war when one occurs. In a similar manner to the previous chapter, this one examines the standing *jus in bello* law when one of the belligerents in the conflict is a trans-state actor (TSA). The goal for the analysis is the same: identify the key questions emerging from the legal analysis of this conflict, and in the process unearth the lacunae and grey areas in the *jus in bello* law so that these can be viewed through the lens of the moral argument developed in Chapters Five and Six.

This chapter accomplishes this task in two main sections. The first section analyzes how current international humanitarian law (IHL) conceptualizes conflict between actors. In essence, IHL categorizes conflict into two conceptual types: international and non-international. A state-TSA conflict is sufficiently different from

these other conceptions that it calls into question IHL's applicability to this new conception of warfare. Based on this analysis, section two examines IHL in greater detail to determine if and how the norms established by this international law apply when one of the actors in the conflict is not a state. The chapter concludes by summarizing the findings of the analysis.

International Humanitarian Law: Two Legal Conceptions of Conflict

When examining how current IHL applies to a state-TSA conflict, one immediately confronts the fact that IHL views conflict as either one of two conceptions, neither of which is sufficiently similar to a state-TSA conflict to provide adequate guidance to the policymaker. The first conception is an international conflict where the belligerents in the conflict are states that have signed the treaties; the second conception, termed non-international or internal, is where a state is in conflict with its own population within its borders. It quickly becomes apparent that a state-TSA conflict fits neither of these categorizations. This section examines this problem by investigating how IHL categorizes different types of conflicts and outlines how, from a positivist interpretation, standing treaty law is problematic in its application to a state-TSA conflict.

International Conflicts

IHL's first conception of conflict is the international conflict. This conception has been IHL's traditional concern—regulating warfare between states. The core documents forming the basis of IHL for international conflicts are the four Geneva

Conventions of 1949, along with the Additional Protocol I (AP1) to the Geneva Conventions signed in 1977.¹ These are collectively termed “Geneva Law.” Other sources regulating international conflict include the numerous Hague Conventions, termed “Hague Law,” most of the terms of which have now been incorporated into AP1. Common Article 2 of the 1949 Geneva Conventions provide the basis for the state-state nature of an international conflict:

Article 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 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.

The Convention shall also apply in all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound

¹ “Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949,” August 12, 1949, *Documents on the Laws of War*, 3d ed., Adam Roberts and Richard Guelff, eds. (Oxford: Oxford University Press, 2000), 197-219 (The Adams and Guelff volume will hereafter be referred to as *Documents*; the first Geneva Convention of 1949 will hereafter be referred to as GC1); “Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949,” August 12, 1949, *Documents*, 222-241 (the second Geneva Convention of 1949 will hereafter be referred to as GC2); “1949 Geneva Convention III Relative to the Treatment of Prisoners of War,” August 12, 1947, *Documents*, 244-298 (the third Geneva Convention of 1949 will hereafter be referred to as GC3); “Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949,” August 12, 1949, in *Documents*, 301-355 (the fourth Geneva Convention of 1949 will hereafter be referred to as GC4); “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, *Documents*, 419-479 (Protocol I will hereafter be referred to as AP1).

by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.²

A key problem applying the Geneva Conventions to a state-TSA conflict becomes readily apparent in the term "High Contracting Parties" or HCPs. Since states are traditionally the only actors that can sign a treaty, it makes international war, by legal definition, a state-state proposition. One could argue that the language of Article 1, "The High Contracting Parties undertake to respect and to ensure respect for the present Convention *in all circumstances*," obliges states to follow these norms regardless of the circumstances of the conflict; some argue that this language universalizes these norms.³ But a strict positivist interpretation would argue that in the case of a state-TSA conflict, since one of the actors cannot sign the treaty, a state involved in such a conflict would not be bound by the letter of this law.⁴ The language of Article 2, "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" reinforces this argument and provides a legal loophole in the instance of state-TSA conflict. At a minimum, the debate over the technical details of international law muddies the waters dealing with this issue.

There is one other way that a conflict is considered international in nature.

Article 1(4) of AP1 expressly stipulates that:

² GC1, Article 2, *Documents*, 197-198. Emphasis added.

³ For commentary supporting this argument, see Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon Press, 1994), 146-7.

⁴ This is not the first time that the question of the laws' applicability has arisen. See Adam Roberts, "Land Warfare: From Hague to Nuremberg," *The Laws of War: Constraints on Warfare in the Western*

The situations referred to in the preceding paragraphs include 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, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁵

A people fighting for their right to self-determination also constitute an international conflict. And as such, the rights afforded by the four Geneva Conventions and AP1 apply in this situation. But this is not automatic. Such a sub-state group must agree to be bound by AP1's provisions.⁶ But a strict interpretation would deny the applicability of this rule to a state-TSA conflict since a conflict for self-determination is an *internal conflict* between an indigenous group and its government. But this is a conflict that the society of states agrees ought to be governed by the laws of war governing an international conflict. Since a TSA draws its membership from *across international political boundaries* and would fight a conflict that, in all likelihood, would not be for self-determination, a strict interpretivist would argue that it would not be possible to apply the rules reserved for international conflicts to a state-TSA conflict through the use of this language.

Given IHL's history and states' historic resistance to applying IHL protections relevant to an international conflict to other conceptions of conflict, states could well

World, Michael Howard, George J. Andreopolous, and Mark R. Shulman, eds. (New Haven, CT: Yale University Press, 1994), 133.

⁵ AP1, Article 1(4), *Documents*, 423.

⁶ AP1, Article 96(3), *Documents*, 476-77.

prove reluctant to concede the applicability of IHL treaty law protections to this different type of conflict.

Non-International Conflicts

The second conception of conflict for which IHL provides protections is the non-international conflict. This type of conflict traditionally is contained within a single state's borders and does not meet the requirements for an international conflict stipulated in Article 1(4) of the First Additional Protocol. Because of this, states have refused to concede IHL's applicability in this type of conflict, citing their right to sovereignty over matters within their own borders. Undeterred, IHL advocates continued to press for the provision of greater IHL protections to those involved in internal conflicts. In addition to the limited protections provided by Common Article 3 of the 1949 Geneva Conventions, states signed and brought into force the Second Additional Protocol (AP2) to the Geneva Conventions in 1977.⁷ While AP2's protections are significantly less robust than those of the Geneva Conventions and AP1, it represents a significant step forward for providing humanitarian protections in these types of conflict.⁸

Unlike the treaty law governing state behavior in an international conflict where it is relatively clear when it applies, determining which part of IHL that applies to non-

⁷ "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)," June 8, 1977, *Documents*, 481-493 (Protocol II will hereafter be referred to as AP2).

⁸ For a history of the evolution of this branch of international humanitarian law, as well the politics involved, see Best, 403-422; and Jean Pictet, *Development and Principles of International Humanitarian Law* (Boston, MA: Martinus Nijhoff Publishers, 1985), 44-49.

international conflicts is murky at best. One can divide internal conflicts into two subtypes. The first is a conflict where a relatively well-established dissident or insurgent force exists:

This Protocol...shall apply to all conflicts...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...⁹

For AP2's provisions to come into force, the conflict must achieve a relatively high threshold, almost on par with that of a civil war, although there is no mention of the requirement of belligerent recognition.¹⁰

Because of this high threshold, most internal conflicts will not fall into this subtype. For conflicts not reaching the AP2 threshold, IHL provides certain minimal protections. The first source of these minimal protections is Common Article 3 of the Geneva Conventions. During the diplomatic conference that negotiated the Geneva Conventions, many western states pushed to include greater humanitarian protections for all people, regardless of either combatant status or conflict type. The difficulty, diplomats found, was that states proved reluctant to provide Geneva Convention protections to people whom they considered to be "rebels" or "traitors," and in doing so, inferentially characterize the conflict as international. To get around these concerns, the

⁹ AP2, Article 1, *Documents*, 484.

¹⁰ Commentators note that the threshold for the applicability of AP2's provision is so high that it would exclude most revolutions and rebellions. See L.C. Green, "International and Non-International Armed

diplomats compromised and agreed to include the language contained in Common Article Three.¹¹ In essence, Common Article Three provides minimal protections for all people, regardless of combatant status or conflict type. Yet it provides no change in the status of any sub-state group if a state were to provide these protections.¹²

How might these norms apply to a state-TSA conflict? On the one hand, a strict interpretation of the language of Common Article Three suggests that it would not apply to this new type of warfare. Since, by definition, a TSA's membership is based on transnational loyalties, it is possible, though unlikely, that such a conflict would occur in the territory of one state, meaning that it would be non-international. On the other hand, some would argue that norms embedded within Common Article Three are

Conflict," *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester: Manchester University Press, 2000), 66; Pictet, 44-49.

¹¹ Common Article Three reads: 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:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict. See GC1, Article 3, *Documents*, 198-99.

now embodied in customary international law (CIL). If this were the case, then it is possible that these norms could migrate and apply to all types of conflict.

The Martens Clause represents the second source of minimal protections applicable in a non-international conflict not meeting the AP2 threshold. Incorporated into the Preamble of the Fourth Hague Convention on 1907, the clause's purpose is "to deal with any lacunae or unexpected situation that might arise and was intended to prevent the possibility of any belligerent contending that its actions were legitimate since they were not expressly forbidden by the Convention."¹³ It reads:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, *as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*¹⁴

States have subsequently incorporated this clause into later conventions, such as AP1¹⁵ and the Conventional Weapons Convention of 1980.¹⁶ Some argue that this principle is now embedded within customary international law. If that is the case, the question then becomes: does this part of CIL migrate and become applicable to this new conception

¹² For a view of the history of these negotiations, see Best, 168-179. In addition to the innovation being included in such a convention, Common Article Three represents an important shift in IHL because it introduced for the first time elements of international human rights law into IHL.

¹³ L.C. Green, "What is—Why is There—The Law of War?" *Essays on the Modern Law of War*, 2d ed. (Ardsley, NY: Transnational Publishers, 1999), 31.

¹⁴ "Convention (IV) Respecting the Laws and Customs of War on Land," Preamble, *Documents*, 70 (The Fourth Hague Convention of 1907 will hereafter be referred to as Hague IV). Emphasis added.

¹⁵ AP1, Article 1(2), *Documents*, 423.

¹⁶ United Nations, "Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects," October

of warfare?¹⁷ And assuming that this migration is universal, then how do “principles of the law of nations....” apply to this new conception of warfare?

States have prescribed detailed and wide-reaching norms for their behavior when they engage in a state-state conflict. These norms are less far-reaching if the conflict is non-international, but certain minimal protections do exist.¹⁸ Yet it seems that for this new conception of warfare, a conflict between a state and trans-state actor, it is debatable at best whether these norms apply at all. A state could strictly interpret the treaty language and argue that since a TSA is not a state and thus cannot be a party to the various conventions, the state is no longer obliged to act according to these norms.

A Third Conception of Conflict

What the society of states faces in a state-TSA conflict is neither an international nor a non-international conflict, but a *different conception* of conflict. The fact that international humanitarian law experiences difficulties when one applies it to this new

10, 1980, Preamble, *Documents*, 520 (this will hereafter be referred to as the “Conventional Weapons Convention”)

¹⁷ The International Criminal Tribunal for Yugoslavia (ICTY) argues in its 1995 ruling in *Prosecutor v. Tadic* that such migration can occur, although the court only addresses the question of these norms migrating from international to non-international conflicts. See “Decision in *Prosecutor v. Dusko Tadic*,” (International Criminal Tribunal For the Former Yugoslavia, October 2, 1995), Article 127, *International Legal Materials* 35, no. 1 (January 1996), 69 (hereafter referred to as “*Prosecutor v. Tadic*”).

¹⁸ Best provides a conceptually useful illustration of how the protections of IHL ebb as the conflict becomes non-international in character and how international human rights (IHR) law increasingly provides protections as IHL protections wane. He notes that IHL has vertical and horizontal applications. On the vertical plane, it has become universalized and applies regardless of regional, national or other differences. On the horizontal, one could argue that it has three levels of application. At the highest level, inter-state conflict, IHL applies and IHR has little relevance. In serious, violent conflicts within states, identifiable IHL still applies that provides some protections while IHR provides more protection.

conception of warfare is not surprising. The history of the evolution of codified international humanitarian law demonstrates that the society of states has consistently lagged one step behind the evolution of warfare, allowing people to fall through the cracks of standing IHL. States fixed these new problems at the conflict's conclusion by returning to the negotiating table to fill in the gaps.¹⁹ The experience of civilian populations and partisans during the Nazi occupation of Europe during the Second World War led states to approve Common Article Three, along with an entire convention dealing with the protection of civilians in occupied territory: the Fourth Geneva Convention.

A different problem emerged in the post-War era. As conflicts increasingly became internal struggles for self-determination, the victims of the conflict became the civilian populations and those fighters who were conducting the uprising against the government. Since states denied the applicability of international humanitarian law to their own internal conflict through the doctrine of sovereignty, the populations of states in many cases suffered horrific treatment. Thus the advocates for extending the humanitarian protections of the Geneva Conventions to internal conflicts pushed to have states agree to such an extension, resulting in the Second Additional Protocol.

As was seen in the previous section, since it is a questionable proposition, at best, whether one can apply standing IHL treaty law and practice to this new conception of warfare, another approach is warranted by asking the question: *how does it matter?*

In lesser internal conflicts, IHL becomes contentious, and the greatest protections derive from IHR. Best, 247.

Should the makeup of one of the belligerents in a conflict—a trans-state actor—matter when applying the basic principles of international humanitarian law?²⁰

International Humanitarian Law: Three Categories

For the purposes of aiding this analysis, this project divides IHL into three general areas: “Do No Unnecessary Harm,” Chivalry, and Humanity.²¹ In each of these areas, the goal of the analysis is to see if the protections provided in the two previously-codified conceptions of conflict within international humanitarian law ought to change since one of the belligerents in a conflict, a TSA, has a nature that is significantly different than that of a state.

¹⁹ Best repeatedly makes this claim in *War and Law Since 1945*.

²⁰ There are four core principles of international humanitarian law. The first principle is the already cited Martens clause. Other principles are eloquently codified by Jean Pictet, one of the great commentators of international humanitarian law. The first of Pictet’s principles is the Principle of Humanitarian Law: Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy. A second principle that Pictet outlines is the Principle of the Law of Geneva: Persons placed *hors de combat* and those not directly participating in hostilities shall be respected, protected and humanely treated. Pictet’s final principle is what he terms the Principle of the Law of War: The right of the parties to the conflict to choose methods or means is not unlimited. Pictet, 62-3.

²¹ The author is grateful to Professor Anthony Clark Arend for this characterization of international humanitarian law. It is important to note that this is characterization differs from the mainstream which includes the concept of military necessity in these types of discussions. For example, see William V. O’Brien, *The Conduct of Just and Limited War* (New York: Praeger Publishers, 1981), 64-67. Professor O’Brien divides IHL into three areas: military necessity, humanity, and chivalry. Such characterization is also incorporated into the U.S. military’s manuals. See Department of the Air Force, Air Force Pamphlet (AFP) 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*, November 19, 1976, para. 1-3, p. 1-5 – 1-6 (hereafter referred to as AFP 110-31). The U.S. Army categorizes this in a similar fashion, dividing forbidden acts into two areas: Forbidden Conduct With Respect to Persons and Forbidden Means of Waging War. See Department of the Army, Field Manual 27-10, *The Law of Land Warfare*, July 15, 1976, Ch. 2, sections II and III. The inclusion of military necessity captures the tension between it and the demands for humanitarian protection. While this project’s characterization differs from the mainstream, it is chosen with the goal of parsing international humanitarian protections in order to provide greater conceptual clarity to the protections in IHL.

Do No Unnecessary Harm

The first area for this examination of the Law of War is the category of “Do No Unnecessary Harm.” This area of IHL limits the weapons and modes of warfare that states can or cannot use, with the object being to limit the suffering of individual combatants and populations.²²

States have undertaken significant steps to limit the occurrence of unnecessary harm. The famous “Lieber Code” was the first attempt to codify the Law of War. Promulgated in 1863 by the Union forces in the American Civil War, the “Lieber Code,” named for its author Francis Lieber, corresponded in large part to the customary practice of the day. The Code stipulates that “Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or revenge...”²³ While the Code only applied to Union forces during the Civil War, its unprecedented nature and content exerted a tremendous influence on the development of other states’ military manuals and subsequent international law.²⁴

The first codification of “Do No Unnecessary Harm” in international law was the 1868 St. Petersburg Declaration, where states renounced the use of any projectile

²² Pictet’s first principle encapsulates this idea nicely: Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare.

²³ United States of America, General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*, April 24, 1863, Article 16, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Dietrich Schindler and Jiri Toman, eds. (Dordrecht, The Netherlands, 1988), 6 (hereafter referred to as *The Laws of Armed Conflict*). The Lieber Code contains similar prohibitions in Articles 37 and 44.

²⁴ For a discussion of the impact of the Lieber Code on the military manuals of other states, see L.C. Green, “Unnecessary Suffering, Weapons Control and The Law of War,” *Essays on the Modern Law of War*, 345-354.

weighing less than 400 grams in any conflict with any other state that was a party to the agreement. It also contained important language:

That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest number of men;

That this object would be exceeded by the employment of arms *which uselessly aggravate the sufferings of disabled men*, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity.²⁵

The means that states chose in this instrument to implement this principle was the renunciation of a certain type of weapon. But while this short Declaration represents an attempt by states to limit the suffering of their military members, it does not provide explicit protections for an adversary's non-combatants. Such protections eventually emerge in the Fourth Hague Convention of 1907 (Hague IV).²⁶ In addition, Hague IV contains the previously discussed Martens clause, as well as codifying for the first time what has now become one of the core principles of international humanitarian law:

"The right of belligerents to adopt means of injuring the enemy is not unlimited."²⁷

Hague Law has a long and storied history of attempting to restrict a state's right to build and use weapons. After the 1868 St. Petersburg Declaration, states subsequently agreed to prohibit the production and use of chemical and bacteriological

²⁵ "Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight," December 11, 1868, *Documents*, 54-55. Emphasis added.

²⁶ Article 23 stipulates a number of general protections, but these seem inadequate compared to the protections provided in later instruments. Hague IV, "Annex to the Convention—Regulations Respecting the Laws and Customs of War on Land," Article 23, *Documents*, 77-8.

²⁷ *Ibid.*, Article 22, *Documents*, 77.

weapons,²⁸ as well as different types of conventional weapons. These include a prohibition on weapons with non-detectable fragments, mines and booby traps, restrictions on the use of incendiary weapons, blinding laser weapons,²⁹ and a prohibition on the production and use of anti-personnel landmines.³⁰ It is important to note that some of these conventions, specifically a number of the protocols of the 1980 Conventional Weapons Convention, ban weapons before states actually develop them, referring specifically to the ban on x-rays, and before they use them in combat, as is the case with optical laser beams. Moreover, current IHL obliges states to examine whether future weapons that they contemplate developing would violate applicable international law.³¹

Finally, states have moved beyond simply limiting and prohibiting the use of certain types of weapons. They have officially codified rules governing the protection

²⁸ "Declaration (IV, 2) Concerning Asphyxiating Gases," July 29, 1899, *Documents*, 60-61; "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare," June 17, 1925, *Documents*, 158-159; United Nations, "Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction," April 10, 1972, *Basic Documents Supplement to International Law: Cases and Materials*, 4th ed., Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, eds. (St. Paul, MN: West Group, 2001): 463-464 (This collection of international documents will hereafter be referred to as *Supplement*); and United Nations, "Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention)," January 13, 1993, *Supplement*, 471-491.

²⁹ United Nations, "Conventional Weapons Convention, Protocols I – IV," *Documents*, 527-535.

³⁰ United Nations, "Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction," September 17, 1997, *Documents*, 648-661.

³¹ API, Article 36, *Documents*, 442. Article 36 reads in part: "a High Contracting Party is under an obligation to determine whether [a new weapon's] employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."

of non-military objects on the ground,³² as well as providing prohibitions for the destruction of the environment.³³ Where states have been less successful, though, is outlawing specific modes of warfare, as the lack of subsequent action on the non-binding draft 1923 Hague Rules of Aerial Warfare attests.³⁴

It is clear that states have taken many explicit steps to not only limit weapons that might cause unnecessary suffering, but also to codify specific guidelines for how states and their militaries will actually carry out warfare against an adversary.³⁵ But with regards to this new conception of warfare, the state-TSA conflict, does all this change? Is this new conception sufficiently different either materially or legally from an international or non-international conflict, or the nature of the TSA sufficiently different from that of a state, that the norms embodied in "Do No Unnecessary Harm" ought to be changed or set aside?

³² United Nations, "Convention for the Protection of Cultural Property in the Event of Armed Conflict," May 14, 1954, *Documents*, 373-395; AP1, Articles 52-54, *Documents*, 449-451; United Nations, "Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict," *Documents*, 700-718.

³³ United Nations, "Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques," September 2, 1976, *Documents*, 409-413; AP1, Articles 55-56, *Documents*, 451-452.

³⁴ "Rules of Aerial Warfare," *Documents*, 141-153. See also "Declaration (IV, 1) To Prohibit For the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature," July 29, 1907, *The Laws of Armed Conflict*, 201-206. It is important to point out, though, that while states have not outlawed aerial warfare, it is understood that they must employ the airpower instrument with the same principles that govern land and naval warfare. See generally, L.C. Green, "Aerial Consideration in the Law of Armed Conflict," *Essays on the Modern Law of War*, 2nd ed. (Ardsley, NY: Transnational Publishers, 1999): 577-95. U.S. Air Force Regulations regarding the application of airpower explicitly state this: "The law of armed conflict is not entirely codified. Therefore, the law applicable to air warfare must be derived from general principles, *extrapolated from law affecting land or sea warfare*, or derived from other sources including the practice of states reflected in a wide variety of sources." AFP 110-31, para. 1-3 (c), p. 1-7. Emphasis added.

³⁵ AP1 is particularly useful in this regard. The protocol provides specific definitions for military objective and civilian objects, as well as outlining specific precautionary measures states will take during

Chivalry

At first glance, it appears absurd to include chivalry in this discussion. How can a concept based on the honor of medieval knights have any bearing on an examination of a new form of warfare in the twenty-first century? Many notions embedded within chivalry descended more or less intact from the Middle Ages and have become important components in the modern Law of War.³⁶ Instead of focussing on the idea of limiting the way one fights through prohibiting weapons or modes of warfare, chivalry encompasses the idea of how one fights. This section examines two aspects of *how* one combatant fights another. The first is that combatants should not fight treacherously; the other forbidden manner of fighting is the use of poison.

Fighting treacherously or perfidiously is the use of certain means or symbols that exploit an adversary's confidence in that symbol in order to gain a military advantage over that adversary. International law explicitly defines perfidy as:

Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in an armed conflict, with intent to betray that confidence...³⁷

AP1 is not the first treaty to prohibit perfidy. The Fourth Hague Convention of 1907 was the first international instrument to discuss the importance of not fighting

military operations to spare the civilian population and objects. See generally AP1, Articles 48-58, *Documents*, 447-453.

³⁶ For an overview of the evolution of the intellectual history behind the current Laws of War over the centuries, see James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740* (Princeton: Princeton University Press, 1975); and Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton University Press, 1981).

treacherously. The first area in the Hague Regulations is the oft-cited Article 22, which states "The right of belligerents to adopt means of injuring the enemy is not unlimited."³⁸ It also stipulates that treacherous behavior is not allowed,³⁹ as well as the improper use of a flag of truce, or the national flag or uniform of an adversary.⁴⁰ The First Additional Protocol builds on these ideas and explicitly stipulates a number of acts as examples of perfidy, and thus unlawful:

- a. The feigning of an intent to negotiate under a flag of truce or surrender;
- b. The feigning of an incapacitation by wounds or sickness;
- c. The feigning of civilian, non-combatant status;
- d. The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.⁴¹

Further, while the Protocol does not categorize these acts as examples of perfidy, it explicitly notes that the use of emblems or symbols of international humanitarian organizations such as the Red Cross or Red Crescent organizations, or the use of emblems of nationality of a combatant, neutral, or of the United Nations, are all unlawful.⁴² These acts are particularly damaging, for using the symbols of humanitarian organizations in an attempt to gain the upper hand over an opponent decreases that organization's ability to provide humanitarian aid to the conflict's victims. The resulting damage to an organization's credibility and neutrality would

³⁷ AP1, Article 37, *Documents*, 442.

³⁸ Hague IV, Article 22, *Documents*, 77.

³⁹ Hague IV, Article 23(b), *Documents*, 77. The article does not define what it is meant killing or wounding "treacherously."

⁴⁰ Hague IV, Article 23(f), *Documents*, 78.

⁴¹ AP1, Article 37(1), *Documents*, 442.

have a serious impact on international humanitarian efforts, even if it were generally recognized that it resulted from unlawful activities.

While AP1 provides a lengthy list of treacherous actions, it makes an important distinction. What it does not outlaw are *ruses de guerre*, which it defines as:

Acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under the law.⁴³

Lawful ruses include the use of camouflage, decoys, mock operations and misinformation.⁴⁴ The key to the distinction, then, is that a combatant may not attempt to mislead an opponent through improperly using the protections provided for in international law.⁴⁵

The second important subset of chivalry is the prohibition on the use of poison.⁴⁶ The first international instrument to prohibit the use of poison was the Fourth Hague Convention of 1907, which stipulates that it is forbidden "to employ poison or poisoned weapons."⁴⁷ There is an important distinction. This is the sole reference in any international treaty prohibiting the use of poison or poisonous weapons. By this, it is taken to mean such uses as poisoning water supplies or applying poison to what would otherwise be considered a lawful weapon. Since 1907, states have agreed to prohibit

⁴² AP1, Articles 38 and 39, *Documents*, 443.

⁴³ AP1, Article 37(2), *Documents*, 442.

⁴⁴ *Ibid.*

⁴⁵ Best provides a useful discussion of the perfidy-ruse distinction. See Best, 288-293.

⁴⁶ While this prohibition is more readily traceable to the Church in the Middle Ages that viewed the use of poison as dabbling with "dark" forces, its influence still remains. For the purposes of this project, it is included under chivalry which argues for prohibiting certain behaviors.

the production and use of chemical weapons, many of which are poisonous. Thus, in addition to having outlawed an entire class of poisonous weapons, states still consider the use of poison, in and of itself, unlawful.

Having now examined the two areas of prohibited conduct under the rubric of chivalry in international humanitarian law, how does this new conception of conflict, the state-TSA conflict, change this? As with the section discussing “Do No Unnecessary Harm,” the question to consider for chivalry: is the nature of the conflict between a state and a TSA sufficiently different in either a material or legal sense from either an international or non-international conflict, or is a TSA’s nature sufficiently different from a state’s, to justify changing the norms and customs in this area that have existed for centuries? Or does sufficient commonality exist that would suggest that these norms be followed despite the differences between the conceptions?

Humanity

The final section of international humanitarian law deals with humanity: how does IHL protect all people involved in a conflict, as well as non-military objects, in a war zone? For IHL to function effectively, one must understand the importance that it places on the distinction between combatant and non-combatants. For it is understanding this distinction, and the role of all parties in ensuring that it is apparent to the adversary, that all combatants and non-combatants receive the maximum benefits from these protections.

⁴⁷ Hague IV, Article 23(a), *Documents*, 77.

AP1 defines a combatant as a “member of the armed forces of a Party to a conflict.”⁴⁸ It also defines the armed forces of a state as:

all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.⁴⁹

This builds on the implicit definition of combatant contained in the Third Geneva Convention of 1949, which adds members of resistance groups to those considered to be a state’s combatants.⁵⁰ As for all others, IHL considers that everyone who is not explicitly defined as a combatant in either AP1 or GC3 to be a civilian.⁵¹

Beyond supplying a relatively explicit definition for a combatant, IHL provides guidance on how to differentiate between military objectives—those subject to attack—and all other civilian objects. A military objective is:

Those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial

⁴⁸ AP1, Article 43(2), *Documents*, 444.

⁴⁹ *Ibid.*, Article 43(1), *Documents*, 444.

⁵⁰ “Members of other militias and members of other volunteer corps, including those of organized resistance movement, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distances; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.” GC 3, Article 4 (a)(2), *Documents*, 246. The POW Convention also provides POW status, and thus implicit status, to those members of “the regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power,” Article 4(a)(3), as well as those inhabitants who rise up in an unorganized *levee en masse* to resist an invader, Article 4(a)(6).

⁵¹ AP1, Article 50, *Documents*, 448.

destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵²

AP1 also stipulates that if any doubt exists as to whether an object that is normally protected, such as a place of worship, is actually being used to make an effective contribution to an adversary's military effort, the presumption is that the object is not making an effective contribution, and thus not subject to attack.⁵³ Further, AP1 specifically prohibits attacks against civilian cultural objects and places of worship,⁵⁴ those objects deemed indispensable to the survival of the civilian population,⁵⁵ and installations containing dangerous forces that might hurt civilians if released.⁵⁶ Finally, the First Additional Protocol provides guidance to military commanders on the precautionary measures they must take in order to spare the civilian population and objects.⁵⁷ Given the increasing codification of these principles in international humanitarian law, it is not unreasonable to conclude that the principle of discrimination between combatant and non-combatant is high on the minds of states as they agree to limit the destruction of warfare in an international conflict.

IHL mandates that states also protect combatants. The key protection given to a combatant is that if he/she is detained by a hostile power as a Prisoner of War (POW), he/she cannot be held criminally liable for any acts committed during the conflict that may violate the detaining power's domestic laws, so long as those acts are lawful under

⁵² AP1, Article 52(2), *Documents*, 450.

⁵³ AP1, Article 52(3), *Documents*, 450.

⁵⁴ AP1, Article 53, *Documents*, 450.

⁵⁵ AP1, Article 54, *Documents*, 450.

⁵⁶ AP1, Article 56, *Documents*, 451-2.

the Law of War. For example, a combatant cannot be tried for the murder of an adversary's combatant so long as that act occurred within the realm of the Law of War.

For a member of state's armed forces to be considered a PoW, IHL stipulates that he/she must fulfill a number of conditions.⁵⁸ Both the Fourth Hague Convention of 1907 and the Third Geneva Convention 1949 define these classic criteria as:

- (a) being commanded by a person responsible for his subordinates;
- (b) having a fixed distinctive sign recognizable at a distances;
- (c) carrying arms openly;
- (d) conducting their operations in accordance with the laws and customs of war.⁵⁹

In other words, if a state's combatant meets these criteria when captured, the detaining power must grant to him the protections of Prisoner of War status. But as armed conflict increasingly became more of an internal affair—with its increasing emphasis on irregular warfare and the need to “blend in” with the population—a movement grew to grant greater protections to people in internal conflicts qualifying as international conflicts. States loosened the conditions that guerrillas or insurgents must fulfill in order to gain PoW protections. AP1 notes:

⁵⁷ AP1, Article 57, *Documents*, 452.

⁵⁸ For a deeper discussion of the evolution of PoW law within the IHL, see L.C. Green, “Lawful Combatants,” *The Contemporary Law of Armed Conflict*, 2^d ed. (Manchester: Manchester University Press, 2000), 102-121.

⁵⁹ Hague IV, Article 1, *Documents*, 73; GC3, Article 4(A)(2), *Documents*, 246. These four criteria, and the parallel criteria contained within AP1, actually refer to other people who are not official combatants of a state, people such as “Members of other militias and members of other volunteer corps...” GC3, Article 4A(2), *Documents*, 246. A literal interpretation of this wording suggests that these criteria only apply to “Members of other militias and members of other volunteer corps...” and it is not necessary for a state's combatant to fulfill these criteria to gain the protections of prisoner of war status. However, it seems unreasonable for any person, regardless of whether he or she is officially characterized as a combatant, would not have fulfill these criteria to receive prisoner of war protections.

Article 44, (2). In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant *cannot so distinguish himself* [from the civilian population], he shall retain his status as a combatant, provided that, in such situation, he carries his weapons openly:

- (a) during each military engagement;
- (b) during each time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.⁶⁰

Article 44(2) changes the conditions that a guerrilla or insurgent must fulfill to be considered a PoW. While a guerrilla or insurgent must still be under responsible command and must adhere to the law and custom of war, he no longer has to wear a distinctive sign such as a uniform and only has to carry his weapon openly in certain circumstances. This loosening of the conditions for PoW status resulted from a sympathy on the part of the vast majority of states for the goal of guerrillas or insurgents in a anti-colonial rebellion. But in doing so, it significantly decreases the IHL protections afforded to legitimate civilians.⁶¹ If it becomes less easy to discriminate between a combatant and a civilian, it increases the chances that an inadvertent attack against civilians might occur.

The preceding discussion about combatants and PoW status is based on a conflict being international in nature. What IHL provisions protect combatants and non-combatants in a non-international conflict? As states negotiated AP1, they also

⁶⁰ AP1, Article 44(2), *Documents*, 444. Emphasis added.

⁶¹ For a greater discussion, see Best, 333-341; and Pictet, 35-40.

negotiated AP2, the provisions of which are significantly less robust than AP1's. AP2 does not distinguish between combatants and non-combatants, nor list any measures that both sides must take to protect civilians. Further, it provides only minimal protections to those who are detained, regardless of their combatant status. However, AP2 provides important protections for those not involved in the hostilities, in particular women and children. It also stipulates that detainees must receive minimally humane treatment. Finally, while a state can still put on trial those who took up arms against it, AP2 provides certain legal protections for them.⁶²

For those conflicts not meeting the AP2 threshold, Common Article Three of the Geneva Conventions applies. Like AP2, Common Article Three does not define the conditions for being a combatant or a PoW. All it prescribes is the minimal level of treatment for those who are not involved in the hostilities, either because they are civilians or because they are *hors de combat*.

In concluding this analysis on the part of IHL this project terms as Humanity, one must ask the same question asked after the analysis of the other parts of IHL: how does this new conception of conflict, the state-TSA conflict, change the norms as they stand? Is the nature of the conflict between a state and a TSA sufficiently different in either a material or legal sense from either an international or non-international conflict, or is a TSA's makeup sufficiently different from that of a state, to justify changing the

⁶² See generally, AP2, Articles 4-6, *Documents*, 485-488. During the negotiations, states almost granted significant protections to combatants in this type of non-international conflict. But at the last minute, some third world states—ironically—withdraw their support, thus emasculating the protocol. For a deeper discussion, see Pictet, 44-49; Best, 341-347.

norms and customs in this area that have existed for centuries? Or does sufficient commonality exist that would suggest that these norms be followed despite the differences between the conceptions?

Effect of a Trans-State Actor

After examining the three areas of international humanitarian law to see how they may or may not work given the fact that one of the belligerents is a TSA, this final section examines the core question of this investigation: how does it matter, if at all? If a state is in a conflict with a TSA, ought it be allowed to conduct warfare against such an actor that goes against the established norms of IHL simply because a TSA is not a state actor?

When examining the first two areas, “Do No Unnecessary Harm” and Chivalry, it is readily apparent that a state ought to abide by the standing IHL norms in these areas in a conflict with a TSA. The protections embodied in “Do No Unnecessary Harm” are protections provided to individuals regardless of the nature of the actor with which they are affiliated. The protections result from the individual’s humanity.⁶³ Moreover, states or their agents should not act in perfidious ways simply because the other belligerent is a TSA. Perfidious acts, those that take advantage of the confidence a person may have in the internationally accepted norms based on IHL—acts such as firing on a white flag

⁶³ The ICTY, in “Prosecutor v. Tadic,” makes a similar assertion when it examined whether some of the norms of international conflict may have migrated to non-international conflict: “Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in

or using the sign of the Red Cross or Red Crescent for military gain—diminish the significance and the humanitarian nature of those symbols. And in the process, it could cause some to question, incorrectly, the neutrality of humanitarian organizations such as the International Committee of the Red Cross.

While one could not justify adopting unlawful means or methods of war just because the actor involved in a conflict is TSA, the issue of how a TSA affects the portion of IHL this project terms as Humanity is less clear. The principle of discrimination is the key in how IHL provides protections to both combatants and non-combatants. For a state to provide as much protection as possible to both civilians and civilian objects, it must be able to distinguish them from combatants and legitimate military objectives. IHL accomplishes this by outlining rights and responsibilities for both combatants and non-combatants. Combatants have the right to participate in the hostilities, as well as the right not to be held criminally liable for their acts, assuming these acts are lawful under IHL. In return, combatants bear the responsibility of protecting civilians and civilian objects. Non-combatants have the right to the protections that IHL affords them. But in return for that right, they must not participate in the hostilities; and if they do participate, they can be held criminally liable for their actions.

From where do these rights come? In their essence, these are positive rights that are given by states when armed conflict exists. But unlike human rights that govern the

international wars, cannot but be inhumane and inadmissible in civil strife.” “Prosecutor v. Tadic,” Article 119, *International Legal Materials*, 64.

relationship between a state and its people, the rights provided for in international humanitarian law are protections *granted by states to each others' combatants and non-combatants*, in return for the observance of the correlative responsibilities. Since these rights and protections arise from international treaty and custom—which trans-state actors cannot participate in their creation—it is questionable how applicable they would be to this new conception of warfare. Moreover, states would be reluctant to grant these rights to the combatants of a TSA if the TSA is not willing to reciprocate. Thus if a combatant is not willing to follow the accepted rules that maximize the discrimination between combatant and civilian, he then forfeits the protections he would otherwise be entitled to receive under IHL.

Let us now closely examine the criteria that form the basis for discrimination in international humanitarian law. These are the four criteria listed in the Third Geneva Convention that a combatant must fulfill to be considered a PoW, and their subsequent loosening in AP1. To ensure the broadest applicability, for the sake of this argument, this section uses AP1's criteria, despite their contentiousness.⁶⁴ The criteria that a combatant must fulfill are: being under responsible command; carrying arms openly during the approach and during the military operation; and adhering to the law and customs of war.⁶⁵

⁶⁴ This loosening of the criteria for PoW status is one of the reasons that President Ronald Reagan cites to justifying his decision to submit AP1 to the Senate for its advice and consent in the ratification process. See Ronald Reagan, "Letter of Transmission," January 29, 1987, *American Journal of International Law* 81, no. 4 (October 1987): 910-912.

⁶⁵ The criteria outlined in GC3 are more stringent and it is unlikely that a TSA, particularly one that uses a terror tactics, would be able to fulfill them.

Being under responsible command means that the combatants are in a relatively disciplined organization with one individual at the top who controls his subordinates, and who bears responsibility for all their actions. The commander must possess some level of control over the combatants, to include being able to stop his subordinates from fighting when the time comes. Finally, the commander is responsible to the state's political authority, however that might be construed. How will this be problematic for a TSA? A problem immediately emerges from the *makeup of the TSA itself*. A TSA's membership, by definition, is not based on loyalty to a state, but on religious, ethnic, economic, epistemic, or ideological grounds. Because of this difference, the member may be more motivated by the religious, ethnic, economic, epistemic, or ideological cause instead of an inherent loyalty to the organization: he is a servant of the cause. As a result, a commander that is part of a TSA may experience difficulties exercising adequate command over his subordinates since the members may view the cause in absolute and unconditional terms.

The second criterion is carrying arms openly on the approach to combat and during military operations. While there is nothing within a TSA's makeup that would necessarily cause this to be a problem, the tactics that some TSAs have used in the past may make this difficult. Historically, TSAs such as terror groups have used tactics that exploit their ability to blend into the population. Carrying arms openly would make it difficult for such a group to make use of this ability. Thus, while it is possible that a

TSA could adhere to this criterion, past tactics suggest that TSAs may not want to give up this inherent advantage in order to fulfill this criterion.

The final criterion is following the law and customs of war. Again, unlike the first criterion where the very makeup of the TSA might pose challenges, there is nothing inherent in a TSA's nature that would cause its combatants not to adhere to the law and customs of war. But like the previous criterion, the tactics of a TSA such as terror groups suggest that they may not be inclined to follow these rules. Terror groups attempt to instill terror and fear into the civilian population. Such attacks against civilians are contrary to the principle of discrimination embodied within the Geneva Conventions and AP1. And given the disadvantage in conventional warfighting capability that the TSA must overcome, it is likely that it will do everything within its power, to include violating the law and customs of war, to gain an advantage.

The analysis from above suggests that it would be difficult for a TSA's combatants to fulfill the criteria for prisoner of war status. But it would not be impossible. Let's examine this hypothetical example. One of AP1's provisions that a "national liberation movement" must fulfill in order for it to receive the Protocol's protections is contained in Article 96(3):

The authority representing a people engaged against a High Contracting Party in an armed conflict referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration...Such a declaration shall...have in relation to that conflict the following effects:

- (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the Conflict with immediate effect;

- (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
- (c) the Conventions and this Protocol are equally binding upon all members to the conflict.⁶⁶

Assume for the sake of this hypothetical that a TSA deposits with the ICRC a statement of intent to adhere to AP1's provisions if the state with which it were in conflict did the same. If one looks beyond the difficulties that a TSA might experience in actually fulfilling its end of the bargain, could a TSA's combatants then be granted the protections afforded to them under IHL? In essence, such an agreement would maximize the discrimination between combatants and non-combatants. By thus following through on those responsibilities, a combatant could claim the protections provided in IHL on the basis of reciprocity.

Leaving aside the actual probability of a TSA adopting such a declaratory policy, another important part of this issue is the question of how well have the norms contained in the Humanity portion of IHL become embedded within customary international practice, and how applicable is this practice to this new conception of warfare. The ICTY argues in its 1995 ruling in *Prosecutor v. Tadic* that some of the norms governing international conflicts have now migrated in customary international practice and now also govern state and individual behavior in internal conflicts.

It cannot be denied that customary rules have developed to govern internal strife. These rules...cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those

⁶⁶ AP1, Article 96(3), *Documents*, 476-477.

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.⁶⁷

Has such a migration of these norms into customary international law also govern to other conceptions of warfare, to include a state-TSA conflict? It is possible, but the ICTY's language and method in reaching this conclusion suggest that this is not the case. First, from a methodological perspective, the Court examined evidence of state practice and *opinio juris* regarding whether international norms could apply to internal conflicts.⁶⁸ It would be difficult if not impossible at this point to conduct an analogous search for evidence of state practice and *opinio juris* regarding how well these norms would apply to state-TSA conflict since the emergence of this new conception of warfare is relatively recent. It is current state practice and statements of *opinio juris* that will form the basis of any future arguments regarding the migration of CIL to this new conception of warfare.

Secondly, the Court notes the limitations of its ruling.

The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflict have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.⁶⁹

⁶⁷ "Prosecutor v. Dusko Tadic," Article, 127, *International Legal Materials*, 69.

⁶⁸ *Ibid.*, Articles 96-125, *International Legal Materials*, 53-67.

⁶⁹ *Ibid.*, Article 126, *International Legal Materials*, 67.

In other words, not all of the norms governing international conflicts have migrated to internal conflicts, and it is only the general principles behind these norms, not the details of the treaty language codifying them.

While the ICTY asserts that some IHL norms have migrated from the law on international conflicts to internal conflicts, it remains to be seen how applicable it would be to a state-TSA conflict. Given the fact that this conception of conflict is different from the traditional international or non-international conflict, and that IHL governing these types of conflicts is problematic when applied to a state-TSA conflict, can one make the case, based on the Court's argument, that these norms now cover all types of conflict?

Conclusion

Based on this examination of international humanitarian law, one can readily draw a number of conclusions. The first is that the international humanitarian community faces a new conception of warfare that is significantly different materially and legally from the previously codified conceptions of conflict, namely international and non-international conflicts. When one tries to apply treaty law specifically designed to deal with the humanitarian issues of international and non-international conflicts to a state-TSA conflict, one finds that it does not work well. One well-known writer on international humanitarian law comments on the analogous problem that the states faced after the Second World War:

Along with vast human tragedies there was a muddle concerning the applicability of the law—a muddle of the kind which the conjunction between tidy legal categories and messy human realities often throws up. This raised further questions: were the laws of war broad enough, both in their provisions and in the scope of application, to encompass the range of problems produced by human conflict? Did they need to be supplemented by some new body of law?⁷⁰

The problem facing states fifty-five years ago rings hauntingly true today. This dissertation argues that the current international humanitarian law in particular, and the Law of War in general, are inadequate to provide guidance regarding this new conception of warfare. Instead of trying to apply a corpus of law meant for one set of circumstances into a different set of circumstances—the problem of the square peg in the round hole—a better proposition is to take the principles embodying treaty law and apply them to this new phenomenon of war.

In doing so, one quickly concludes that in the areas of “Do No Unnecessary Harm” and Chivalry, the principles behind those norms apply to a state-TSA conflict in the same way as they do in an international or non-international conflict. Just because one belongs to a different type of actor than a state does not mean that one should then be subjected to weapons or modes of warfare that the international community deems inhumane. Chivalric principles embodied within international humanitarian law demand that states must show the same respect to certain symbols and limitations on warfare regardless of the allegiances of the adversary.

Where one runs into problems is in the area of IHL this project terms as

⁷⁰ Roberts, 133.

Humanity—providing humanitarian protections to both combatants and non-combatants. The guiding principle of discrimination demands that combatants must do everything possible to distinguish themselves and their material from civilians and civilian objects. This is incorporated into the IHL's criteria that a combatant must fulfill in order to be designated a PoW, and gain its resulting protections. If a combatant does not fulfill his duties to distinguish himself in such a manner, he forfeits the right to PoW protections provided for in IHL. While it is possible that a state might agree to provide the rights inherent in international humanitarian law to a TSA's combatant if the TSA were to reciprocate along the lines stipulated in AP1, Article 96(3), it remains to be seen whether it is even possible for a TSA to take such a step.

Lacuna

Unlike the previous chapter where the analysis uncovered a number of lacunae, the one lacuna that becomes apparent in this analysis of international humanitarian law is the status of any combatant that belongs to a trans-state actor. The argument set forth in this chapter makes the case for when a TSA's combatant might receive prisoner of war protections based on a rights and responsibilities argument: if the combatant fulfills the responsibilities of being a combatant, as outlined in the Third Geneva Convention and the First Additional Protocol, then he ought to receive the protections of those same treaties. The question is, will the analysis of the moral aspects of the state-TSA conflict come up with the same answer?

Yet this answer is insufficient. It outlines the actions that an individual combatant must take to gain the protections of prisoner of war status, yet implicit within international humanitarian law is the necessity for the actor with which the individual combatant is affiliated to also receive some form of recognition. This recognition is automatically accorded to states, and the society of states has granted this recognition to groups fighting for self-determination. The next two chapters dealing with the moral aspects of the state-TSA conflict delve into the details of this recognition.

CHAPTER FIVE

TRANS-STATE ACTORS AND THE JUST WAR TRADITION

The just war tradition of the West represents one culture's attempt to determine when and how violence is appropriate; at the same time, it is the tradition that gave birth to international law in the modern sense, and it remains apt to speak of international law as forming a part of this tradition as it exists in the contemporary world.

James Turner Johnson

Introduction

Having now examined the Law of War for the lacunae and the gray areas that emerge when one of the belligerents in a conflict is a trans-state actor (TSA), it is now time to move from the legal aspects of this issue to the moral. This chapter examines the moral issues arising from the state-TSA conflict through the lens of the Just War Tradition. The Just War Tradition represents the sum of different just war theories, as well as its theological and secular sources. One of the Tradition's core purposes is to limit, through moral reasoning, both the resort to, and the conduct of, war. This chapter investigates the issue of a state-TSA conflict by examining the thinking of just war theorists who lived in the Middle Ages, the late Middle Ages, and contemporary times, in addition to some of the tradition's individual sources.¹ The goal is that through this

¹ Theorists of the early Middle Ages refers to Augustine and Aquinas; theorists of the late Middle Ages refers to Vitoria and Grotius, and contemporary theorists refers to theorists who lived and wrote in the

examination of the dominant western view of restraining war in international society, one can then proceed towards this dissertation's final goal: making recommendations regarding changes to positive international law, as well as informing interpretations of customary international practice.

This chapter accomplishes this goal in two main sections. Section one examines the *jus ad bellum* aspects of just war theory.² By refracting the state-TSA conflict through the lens of the three core *jus ad bellum* criteria, Competent Authority, Just Cause, and Right Intention, a number of interesting issues arise that warrant serious investigation. The second section explores how the *jus in bello* aspects of the tradition reflect on this new conception of warfare. This occurs primarily through examining how the principles of proportionality and discrimination influence this argument. Each section concludes with a discussion of the key questions arising from the analysis.

Trans-State Actors and the Jus ad Bellum

The *jus ad bellum* portion of the just war tradition examines the question of when it is morally acceptable to use violence in the service of justice. Over the centuries, the *jus ad bellum* evolved significantly, with different sources contributing to the tradition.³ For the purposes of this project, the dissertation examines the three

post World War Two era. While such a categorization may not be historically accurate, it serves this chapter's purpose.

² One must note that while separating the *jus ad bellum* and *jus in bello* in this manner makes sense from the nature of the restraint that each provides, the two parts are intertwined and interdependent in some of the theories of the tradition. Because of this, it makes sense presentation-wise to sometimes discuss an important aspect of the other part if it makes sense within the logic of a particular theorist or source.

³ For an overview of the evolution of the just war tradition over the centuries, see James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740* (Princeton:

primary criteria that played important roles in this tradition's efforts to restrain the resort to force, as well as playing the most important role in the tradition's internal logic: Competent Authority, Just Cause, and Right Intent.⁴ This section examines these three criteria, their origin, and evolution. In the process of doing this, the analysis teases out a number of elements that bear on this investigation.

Competent Authority

The concept of Competent Authority seems almost trite and vestigial in contemporary international politics, where Competent Authority for waging public violence is vested in the sovereignty of states and no other actor. While a number of intergovernmental organizations, such as the United Nations Security Council and the North Atlantic Treaty Organization, possess the authority to authorize or conduct public violence, member states still play a dominant role in these organizations' decision-making processes. In contemporary times, Competent Authority more often than not revolves around an examination of which constitutional offices within a state's government possess the authority to make the "go to war" decision. And within this

Princeton University Press, 1975) (hereafter referred to as *Ideology*); and Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton University Press, 1981) (hereafter referred to as *Just War Tradition*).

⁴ The United States National Conference of Catholic Bishops posit seven criteria that must be fulfilled before a war can be termed just. In addition to Competent Authority, Just Cause, and Right Intention, the U.S. Bishops also list Comparative Justice, Last Resort, Probability of Success, and Proportionality as criteria. See National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response* (Washington, DC: United States Catholic Conference, 1983), 39-43 (hereafter referred to as *The Challenge of Peace*). While these latter four criteria play important roles in this moral analysis, the first three have historically been the key criteria in the just war tradition, while the latter four provide guidance on the prudential aspects of the analysis. See James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, CT: Yale University Press, 1999), 41-70; and William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger Press, 1981), 13-36.

domestic realm, a war might sometimes be considered unjust or illicit if the responsible constitutional officers do not follow through on their legal requirements.⁵

Yet within the just war tradition, Competent Authority plays a critical role in limiting the recourse to war. The first mention of this criteria is in the writings of St. Augustine, the Catholic theologian, bishop, and theorist.⁶ In making the case that a Christian may participate in a war, Augustine notes the importance of the war-making decision being in the hands of the proper authority: "The natural order, which is suited to the peace of mortal things, requires that the authority and deliberation for undertaking war be *under the control of a leader...*"⁷

Unfortunately, Augustine does not provide any elaboration about which leader possesses the authority to make public war; it fell to subsequent thinkers to flesh out this idea. The Church's canon lawyers in the Middle Ages discussed and argued Augustine's meaning in an attempt to provide some canonical influence on the restraint of going to war. Such discussion took two tracks. The first examined which secular figures possess the necessary authority to wage a just war. In the end, Pope Innocent IV concludes that amongst the tangled web of relationships that represented the feudal society of his day, the prince without a temporal superior was the one possessing the requisite authority to wage public war. Other princes could conduct violence in self-

⁵ O'Brien, 17; National Conference of Catholic Bishops, *The Challenge of Peace*, 39-40.

⁶ Unlike most of his successors, Augustine's thinking on the recourse to war is not neatly encapsulated in one work. His thinking in this area is found in a number of his works.

⁷ Augustine, "Against Faustus the Manichaeon," xx, 75, Augustine, *Political Writings*, Michael W. Tkacz and Douglas Kries, trans., Ernest L. Fortin and Douglas Kries, eds. (Indianapolis, IN: Hackett Publishing, 1994), 222. Emphasis added.

defense, but for no other reason. This distinction is important for two reasons. First, it establishes which princes actually possess the moral authority to go to war. And second, it distinguishes between licit and illicit violence by vesting the forms of licit violence in the hands of those secular—and thus political—figures that held responsibility for defending their territories.⁸

The second track that medieval canon lawyers took when trying to parse Augustine's meaning for Competent Authority was examining which religious figures possess the authority to declare a public war for the Church. This analysis produced what would become the Church's canonical doctrine of holy war or crusade for the church. In one of the definitive canonical statements, Huguccio argues that not only could the pope urge secular princes to go to war against the enemies of the church and faith—heretics and infidels—but the Pope also possesses the authority to declare war. Such a statement reflects the medieval logic of the theology of the papacy. In the Old Testament, God commanded wars to be conducted; as God's representative on earth, the pope wields similar authority.⁹ However, as the Middle Ages continued, such a doctrine became less acceptable to secular rulers, whom the pope would still have to persuade to conduct the war even if he possessed the authority to declare it.¹⁰

The next significant contributor is Thomas Aquinas. Thomas's contribution to the tradition is not so much in his original offering to just war thought; rather, he combines the received wisdom of Augustine and medieval canonical thought with a few

⁸ For a greater discussion, see Johnson, *Just War Tradition*, 161-5.

⁹ *Ibid.*, 156-61.

insights from his Scholasticism, and coalesced these ideas into the first concise statement of the *jus ad bellum*.¹¹ Regarding Competent Authority, Aquinas combines the previous conception from canon law, that the prince with no temporal superior possesses the authority to wage war, with the Aristotelian view of the *polis*, or perfect community. Only those princes ruling over perfect, or self-sufficient communities, possess the authority to wage public war. For Aquinas, a number of political units qualified as being a *polis*: the city, the province, and the kingdom. In making this distinction, Aquinas acknowledges that a non-Christian prince could rule such a perfect community.¹² For Aquinas, the prince's role in the perfect community was to promote the common good of the *polis* and its citizens. As such, he was responsible for warding off threats from both inside the community (crime) as well as from the outside (enemy states or bands that threaten war on the city). To meet the internal threat, the prince and the state could punish the guilty; against the external threat, the prince could wage war. However, such decisions were, in Aquinas's view, reserved for the prince or those appointed by him.¹³

¹⁰ Ibid., 160.

¹¹ Thomas's core statement on the *jus ad bellum* is found in his *Summa Theologica*, where he argues that for a war to be just, one needs to have the authority of the sovereign, a just cause, and a rightful intention. While Augustine discusses all these aspects, and the earlier canon lawyers elaborated on aspects of some of these, Aquinas was the first to posit these three core criteria of the just war tradition in one place. See Aquinas, *Summa Theologica*, II, II, Question 40 (London: R.&T. Washbourne, Ltd, 1917), 500-9.

¹² For greater detail regarding Aquinas's contribution to the just war tradition, see generally Leroy Brandt Walters, Jr., *Five Classic Just-War Theories: A Study in the Thought of Thomas Aquinas, Vitoria, Suarez, Gentili, and Grotius* (Ph.D. Dissertation, Yale University, 1971), 59-200; Johnson, *Ideology*, 38-43. For Aristotle's discussion of the *polis*, see his *The Politics*, Book 1, Chapters 1-2, Carnes Lord, trans. (Chicago, IL: University of Chicago, 1984), 35-8; and *Nicomachean Ethics*, Book 1, Chapter 2, Martin Ostwald, trans. (Indianapolis, IN: Bobbs-Merrill, 1962), 4-5.

¹³ For a greater discussion, see Walters, 75-8.

Given his familiarity with the received doctrine in canon law, it is not surprising that Aquinas also endorses the idea of a just conflict for which the Pope was vested with the necessary authority. However, in Aquinas's doctrine, the Pope could not wage war directly, acknowledging the reality that the Church did not have armies to command, but his authority extended primarily through three indirect means: granting of crusade-indulgences, urging secular princes to go to war on behalf of the church, and furnishing chaplains for the army.¹⁴

The idea of Competent Authority for going to war being vested in the sovereign prince became more solidified by the end of the Middle Ages. Later medieval just war theorists such as the Dominican Francisco de Vitoria and the Dutchman Hugo Grotius acknowledge the primacy of the prince in this regard.¹⁵ In effect, these theorists recognized what was becoming the *de facto* reality of international politics of the time: states are the primary actors. However, for all the late medieval theorists, the basis for their reasoning changed, with a new emphasis being placed on natural law premises, which "fundamentally altered the meaning of the very language of just war doctrine, making it not primarily an assertion of God's judgment against evildoers but a

¹⁴ Ibid., 82-7. Professor Johnson points out that it was the presence of this doctrine of the just war for religious reasons justified for not only the Crusades in the Middle Ages, but the Protestant-Catholic strife after the Reformation. See Johnson, *Ideology*, 48-53.

¹⁵ See Francisco de Vitoria, "On the Law of War," in James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford: Clarendon Press, 1934), lii (hereafter referred to as *The Law of War*); and Hugo Grotius, *The Rights of War and Peace, Including the Law of Nature and of Nations*, A.C. Campbell, trans. (Washington, DC: M. Walter Dunne, 1901), 55-62. In addition to incorporating the received view of competent authority being vested in the state, both Vitoria and Grotius explicitly connect the state as a political actor to the Aristotelian *polis*. See Vitoria, liii; and Grotius, 62.

description of the right of princes to retaliate against troublers of their own domains.”¹⁶

This movement away from revelation-based sources of just war doctrine to a more secular source contributed to a change in the source of princely authority. Instead of the power of the prince originating with God—the “topdown” divine right of kings—the later medieval theorists recognized that the authority to govern arose not from God but from within the community itself, from the “bottomup.”¹⁷ In the end, it is the view that the prince exercises this authority as part of the *sovereignty of the state* that became embedded within contemporary positive international law regarding the use of force.

While the Competent Authority of the prince became increasingly embedded within the thinking of the later medieval theorists, the analog of the Pope possessing similar authority began to wane. The Catholic theorist Vitoria still held that the pope could declare war lawfully with sufficient justification: “grave harm to spiritual interests.”¹⁸ But the Protestant Grotius does not provide the Church with authority to declare war, but he argues for a limited role for Christianity in warfare: the obligation for all Christians, to include Christian kings and states, to form an alliance against “the impious.”¹⁹ While the Church’s authority to initiate a public war slowly faded during this period, these late medieval theorists acknowledged the Church’s increasing role in peacemaking and arbitration.²⁰

¹⁶ Johnson, *Ideology*, 55.

¹⁷ Vitoria, *iii*; Grotius, 70-72. See also Johnson, *Ideology*, 55.

¹⁸ As cited in Walters, 300. The next section examines the causes for religious war.

¹⁹ Grotius, 173.

²⁰ See generally, Walters 296-300; Vitoria, “On the Indians Lately Discovered,” in James Brown Scott, *The Spanish Origin of International Law*, xxiii: “when princes are at variance with one another about

These early thinkers in the just war tradition discuss other aspects of this idea that bear on the analysis of the moral aspects of a state-TSA conflict. The first is a prince losing authority. Aquinas was the first to examine this right to rebellion. His thinking on this issue evolved through his writings, and in the end, Aquinas concludes that a prince did not lose his authority to make war because of tyranny, but he could lose that authority because of apostasy.²¹ Later theorists became less enthused with idea of revolution. Using contract theory, Vitoria distinguishes between the state and its sovereign in his justification for war against a tyrannical but otherwise legitimate prince.²² Grotius argues that few justifications exist for revolution against the prince.²³

The converse of a prince losing authority is the concept of sub-state groups gaining authority to revolt. While the just war thinkers of this time held differing views of such a right, in reality, groups attempting to rise up against the prince during these periods generally met with brutal measures. To use the post-Reformation era as an example, "charges of rebellion and counter-rebellion abounded and competing religious ideologies questioned the legitimacy of any government that upheld the opposing ideology."²⁴ Princes viewed such "other" groups as not possessing the Competent Authority for war, as outlined in the just war tradition. Because of this, military actions

some right of sovereignty and are rushing into war, he [the Pope] can act as judge and inquire into the claims of the parties and deliver judgment..." For Grotius, the church could still play a role, but it would not be the Pope conducting such mediation, but a gathering of "general congresses for the adjustment of their various interests, and for compelling the refractory to submit to equitable terms of peace." Grotius, 277.

²¹ Walters, 79-81.

²² Ibid., 290.

²³ Grotius carefully outlines these exceptions in Grotius, 63-72.

²⁴ Johnson, *Just War Tradition*, 50.

taken against them were brutal and unrestrained, because the limits prescribed by the just war tradition did not apply to “rebels.”²⁵

Since Competent Authority to go to war is now firmly embedded within the concept of state sovereignty, contemporary just war theorists accept this as given. The issues with which modern theorists wrestle are the moral challenges of revolution and wars of self-determination in the post-World War Two era. Implicit within the writings of Michael Walzer is the idea that a political community has the right to secede from a larger group if the rights of the individuals in the former community are not upheld. Walzer never explicitly discusses the right of a group to revolt *per se*, but it is a necessary premise for his theory. In the chapter entitled “Interventions” of *Just and Unjust Wars*, Walzer notes that one of the three exceptions to his “legalist paradigm” is that a state can intervene in the affairs of another when there are two political communities inside a set of political boundaries, and one of those communities is attempting to secede. While unstated in the book, the right of such a political community to secede is implicit. And given the rights-based premises of the work, it would seem reasonable to conclude that a justification for such a political community to secede would be if the majority does not uphold the rights of all its members.²⁶ Subsequently, if the secession movement experiences success and gains some territory, the sitting government loses its war authority. That point is measured by the legitimacy

²⁵ Professor Johnson illustrates this point with two examples from the post-Reformation period: the German peasants rebellion of 1524-5 and the Catholic Fomenting of Rebellion in England in the late 16th century. See Johnson, *Just War Tradition*, 50-9.

of both groups: when the seceding community possesses greater legitimacy, it then gains the war authority.²⁷

This idea of a sub-state group *gaining* competent authority is also implicit in positive international law. Incorporated with the First Additional Protocol to the 1949 Geneva Conventions is the idea that a conflict is considered international in nature, and thus governed by the rules of an international war, if it is one where “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination...”²⁸ While it remains unstated, implicit in this codification is the idea that the *justice* of the cause can *confer* the necessary competent authority on a “people.”

But not all contemporary just war thinkers hold this view. Professor William V. O'Brien argues that the regime retains its authority for war until it is defeated. For O'Brien, one does not derive Competent Authority from a just cause, but it is “a product of organization, the exercise of control by responsible commanders, political and military success, and a credible willingness to accept the duties as well as the rights of belligerency under the law of war.”²⁹ Other theorists, such as the American Conference of Catholic Bishops, focus their efforts on other problems of the contemporary era, such as nuclear weapons and deterrence. While these are important moral problems, the

²⁶ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 2000), 86-108.

²⁷ *Ibid.*, 98-101.

²⁸ “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),” Article 1(4), *Documents on the Law of War*, Adam Roberts and Richard Guelff, eds., 3d ed. (Oxford: Oxford University Press, 2000), 423.

Bishops's focus on these issues at the expense of examining the interplay of Competent Authority and revolution means that the resulting debate does not benefit from their participation and wisdom.³⁰

Competent Authority and the Trans-State Actor: Discussion

How can one reconcile Competent Authority with the fact that there are now actors in international politics apart from states that use violent means to achieve their political goals? One of the just war tradition's fundamental principles posits that only states have the requisite authority to conduct public war. This represents a key accomplishment of the just war tradition: only a limited number of actors ought to possess the authority to conduct public violence. All other violence by actors for political ends is private and illicit. Grotius recognizes this problem and explicitly denies Competent Authority to pirates, a trans-state actor in his time.³¹

²⁹ See generally, O'Brien, 158-162 (quote is on 162).

³⁰ Professor O'Brien in 1969 notes that the Catholic Church does not offer any guidelines about when the recourse to violent revolution, other than the demand that men should use their reason and trust one another to find peace. O'Brien replies: "How can there be peace, reason, justice, harmony, agreement...in a world deeply divided by religious, ideological, racial, national, economic, social, and other differences, grievances, and conflicts?" O'Brien, *War and/or Survival* (Garden City, NY: Doubleday & Company, 1969), 29-31 (quote is on 31). Subsequent writings from the American Catholic Bishops, such as *The Challenge of Peace* do not discuss the issue of revolution. However, a 1993 pastoral letter from the American Bishops, *The Harvest of Justice is Sown in Peace*, examines the problems of nationalism and religious violence, similar problems to revolution. But like *The Challenge of Peace*, the work stresses the importance of resolving the problems through peaceful means and reconciliation. See *The Harvest of Justice is Sown in Peace: A Reflection of the National Conference of Catholic Bishops on the Tenth Anniversary of The Challenge of Peace*, November 17, 1993, in *Peacemaking: Moral and Policy Challenges for a New World*, Gerard F. Powers, Drew Christiansen, SJ, and Robert T. Hennemeyer, eds. (Washington DC: United States Catholic Conference, 1994), 311-46 (hereafter referred to as *The Harvest of Justice*). The letter discusses these issues on pages 329-31.

³¹ Grotius, 315.

Yet among contemporary just war thinkers recognize that a state can lose its Competent Authority, either through a lack of legitimacy with the people that it claims to represent or through its overthrow. Three questions emerge. The first is related to globalization. As states experience greater interdependence in the economic, political, social, and communication realms, they lose aspects of their sovereignty.³² Given the challenges of globalization and the changes in the international political arena, is it possible that states could lose another key aspect of their sovereignty: its Competent Authority to wage public war?³³

The second question is related: can other actors acquire this authority? The debates among just war thinkers regarding revolution suggest that it is possible for actors other than states to gain this authority. Moreover, with the rise of globalization, other non-state actors are becoming increasingly influential in international politics without having to use violence.³⁴ Is it possible that the nature of trans-state actors is

³² One example of such a loss arises from the growth of international capital markets. As states increasingly want to lure scarce international investment funds to their shores, they have to adopt monetary and fiscal policies to maximize the attractiveness of their economies to this capital. As a result, states lose significant autonomy and sovereignty over such important areas as the value of their currency and the size of their social welfare budgets. See generally Geoffrey Garrett, "Global Markets and National Politics: Collision Course or Virtuous Circle?" *International Organization* 52, no. 4 (Autumn 1998): 787-824.

³³ Theorists such as Henry Shue argue that some aspects of sovereign ought to be viewed on a contingent basis. While the aspect of sovereignty that Shue is concerned about is the right to non-intervention so long the state provides "basic rights" to its people, the concept of "contingent sovereignty" is a possible source for the loss of a state's competent authority. Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. (Princeton NJ: Princeton University Press, 1996).

³⁴ An example of this is the international alliance to ban antipersonnel landmines, where a group of non-governmental organizations lobbied and persuaded states to sign the 1997 Landmine Convention. For an examination of how this occurred, see Richard Price, "Reversing the Gun-Sights: Transnational Civil Society Targets Land Mines," *International Organization* 52, no. 3 (Summer 1998): 613-644; Kenneth Robin Rutherford, "NGOs and the International Ban on Anti-Personnel Landmines," (Ph.D. diss., Georgetown University, 2000).

evolving to the point where some of these might gain the Competent Authority necessary to wage a public war?

A third question arises from the modern interpretation of the term Competent Authority. For a state, the authority for war is embedded with the state's sovereignty, but contemporary just war thinkers examine this from the perspective of which constitutional officers possess the "go to war" decision. In the United States, for instance, the Congress holds the authority to declare war, while the Executive Branch is primarily responsible for carrying it out. Within a democracy, the electorate can then hold these public office holders politically accountable for these decisions, censuring them through their removal from office by the ballot box. In the case of a TSA, the question becomes: *who possesses this Competent Authority*, or its equivalent? What is the basis of this authority if it is not embedded within the sovereignty of a state? Is there any form of accountability for their actions?³⁵ While such decision makers may not be accountable to a political community, the precedent of the Nuremberg Tribunal strongly suggests that the society of states would hold them accountable for any Crimes Against the Peace or War Crimes.

³⁵ Mark Juergensmayer paints a frightening picture of one example of this, where the leader of a transnational terror network claims "transcendent moral authority" to justify an attack on the public authority of a state. See Mark Juergensmayer, "The Global Dimensions of Religious Terrorism," Rodney Bruce Hall and Thomas J. Biersteker, eds., *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), 141-157.

Just Cause

The idea of fighting for justice in today's international politics is almost considered anathema. As this dissertation's Chapter Three demonstrates, justice no longer exists in the *jus ad bellum* of the international law regarding the use of force: there is a presumption for peace over justice. Contemporary just war thinking also reflects this presumption. But this was not always the case in moral thinking regarding the use of force. Instead of the "presumption against war" that is common in most contemporary thinking, the early theorists of the just war tradition held a "presumption for justice."

Augustine is again one of the first thinkers in the just war tradition who argues for the need for a Just Cause to go to war. Why the necessity of a Just Cause? At the time, Augustine was examining the question of when, if ever, a Christian could participate in a war. He concludes that yes, a Christian could go to war, so long as a just cause motivated the conflict. Thus a Christian could not simply go off and fight a war for any reason; it had to be morally acceptable. Augustine's just causes for a war are compatible with his view of the duty to assist a neighbor in need through the ideal of Christian love or charity.³⁶ From this, Augustine concludes:

That the wise man will wage only just wars—as if, mindful that he is human, he would not much rather lament that he is subject to the necessity of waging just wars. If they were not just, he would not be required to wage them, and thus he would be free of the necessity of war.

³⁶ For an explanation of this view, see Paul Ramsey, *War and The Christian Conscience: How Shall Modern War be Conducted Justly?* (Durham, NC: Duke University Press, 1961), 15-33.

It is the iniquity on the part of an adversary that forces a just war upon the wise man.³⁷

From this, Augustine posits three general just causes for war that meet this criteria of the defense or vindication of justice: to avenge injuries, to constrain a city or a nation that has not chosen to punish an evil action committed by its citizens, or to restore that which has been taken unjustly.³⁸ In other words, just wars are those which punish a wrongdoer or restore what has been taken improperly, in addition to self-defense. These three just causes that Augustine outlines, *self-defense*, *punishment*, and *restoration*, will come to represent the core just causes in the tradition for a number of centuries.

Aquinas, in his *Summa Theologica*, notes the same three just causes for a temporal prince to go to war. But Aquinas applies his own view of moral action to these just causes and in the process, provides significant nuance to it. Aquinas divides moral action into two spheres. The first is the objective: did the action actually occur? Beyond the objective, the more important aspect of moral action, for Aquinas, is the subjective: was the action voluntary or willful rather than involuntary or accidental? For Aquinas, an element of subjective guilt, or willful/voluntary action, must be present for the agent to be morally culpable. This conception of moral action is incorporated in Aquinas's analysis of just causes for war. For a war to be just, and thus justifying the

³⁷ Augustine, *The City of God*, Book XIX, Chapter 19, in *Political Writings*, 149.

³⁸ Augustine, as cited in Johnson, *Ideology*, 36 and as discussed in *Morality and Contemporary Warfare*, 48.

making of war on another, some intentional and otherwise avoidable action on the part of the other entity must have occurred to justify it.³⁹

In addition to the just causes for political war, Aquinas also notes some “suitable causes” for a religious war: utility of the church, wrongs done to God, the defense of the commonwealth of the faithful. Professor Walters comments that Aquinas viewed war for political reasons and war for religious reasons as “parallel phenomenon.” The prince, as the head of the perfect community, possessed the Competent Authority for a political war, and could wage one justly for “the utility of the commonwealth,” “Wrongs done to other persons,” or “Defending the commonwealth from external enemies.” The pope, as the holder of the Competent Authority for religious war, could use one of the above-noted suitable causes to justify such a war. Walters argues that “almost-identical phrases [for just and suitable causes] were employed at the natural and supernatural levels of discussion.” Walters concludes that in Aquinas’s thinking an analogical relationship exists between the just causes for political war and the suitable causes for religious war.⁴⁰

The same three “core” just causes representing the received wisdom from Augustine and Aquinas are also part of Vitoria’s just war theory. Vitoria adds two other reasons that constitute a just cause. First, a state may seek compensation from an aggressor, not only to take back what was unjustly taken, but also for damages received.

³⁹ Walters, 111-4.

⁴⁰ *Ibid.*, 119-127 (quote is on 126).

And second, war may be waged to achieve peace and security.⁴¹ Grotius also lists the same core just causes in his theory, but adds a fourth: recovering what is owed by another.⁴²

While a comprehensive listing of each theorist's just causes is an useful exercise, other aspects of their respective theories are of greater relevance to this discussion. Vitoria's first significant contribution emerges due to his basing his just war theory primarily on natural law principles, instead of revelation, as do Augustine and Aquinas. Vitoria was, in part, reacting to the challenging moral problems that the expansion of Spain's empire to the New World presented. Specifically, he examined how Spain ought to conduct its relations with the native Indian populations of the New World. One of his conclusions is that Spain could not justly make war against the Indians simply because they would not recognize the Christian god or the pope as God's representative on earth. For Vitoria, a just cause is based on a *wrong received*, a wrong based increasingly on customary or agreed upon rights, derived from both natural law principles and state practice or *jus gentium*.⁴³ As a result of this change to a natural law/*jus gentium* basis, Vitoria removes a number of specific causes that he no longer considers to be just causes for war, causes such as differences in religion, extension of the empire, or the personal advantage of the prince.⁴⁴ The growing influence of state

⁴¹ Vitoria, "The Law of War," lv, lxxv.

⁴² Grotius, 75.

⁴³ Johnson, *Ideology*, 55.

⁴⁴ Vitoria, "The Law of War," liii-liv.

practice and custom, and the resulting effect on just causes will play an important role in the evolution of just cause in the future.

Vitoria's second significant contribution is what Professor Johnson terms simultaneous ostensible justice.⁴⁵ Unlike Aquinas who argues that there must always be a wrong side and vindicative side on issues such as war, Vitoria relaxes this stance and notes the possibility that the causes of a war may be difficult to understand, so much so that even an objective observer cannot determine which side possesses the just cause. Both sides may subjectively believe that they are fighting with just cause; one or both sides could be affected with invincible ignorance—unable or unwilling to know the objective facts in the case—leading them to believe that they possessed a just cause.⁴⁶ Vitoria's recognition of the challenges involved in determining the side with the just cause marks the beginning of the end for justice in just war thinking.

Grotius takes this idea a step further. His whole view of the *jus ad bellum* is that it is as much following the procedures of going to war as the justice of the cause itself. A prince must declare war, outline the just cause for the action, and both sides must consent to the conflict for the war to be "solemn" or just (vice "not solemn" or unjust). The fact that he stipulates that a prince must announce the reasons for going to war indicates that Grotius expects that an objective, outside observer will evaluate the justness of the cause of both sides in the conflict.⁴⁷ This "formality required by the law

⁴⁵ Johnson, *Ideology*, 185-195.

⁴⁶ Vitoria, "The Law of War," lx. As will be discussed later in this chapter, Vitoria argues that since one can not be sure of the justness of one's cause, one should limit how one actually conducts a conflict.

⁴⁷ Johnson, *Ideology*, 214-222.

of nations...” or formalization represents Grotius’s *contraction* of the *jus ad bellum* requirements. It also represents his recognition of Vitoria’s concept of simultaneous ostensible justice: that through invincible ignorance, both sides could believe that they are fighting with a just cause. But Grotius’s formalization of the *jus ad bellum* to simply a declaration of the just cause for war and mutual acceptance of the war in order for a war to be “solemn” formed the precursor for the subsequent doctrine of *competence de guerre*, where the state ultimately decides when it is just to go to war. In later centuries, such a decision comes to be based on state interest instead of the justness of the cause.⁴⁸ Vitoria’s concession that the causes of war may be too difficult to unravel—simultaneous ostensible justice—marks the continued devolution of any sense of justice in the just war tradition’s *jus ad bellum*.

Much contemporary just war thinking regarding the idea of just cause mirrors the *jus ad bellum* of international law encapsulated in the UN Charter system: a presumption of peace over justice. While Chapter Three discusses this evolution in the sphere of international law, how does this occur in international moral thinking? Reacting to the rise of nationalism, the increase in the destructiveness of modern weapons, and the growth of modern armies due to conscription and the mass production of weapons resulting from the industrial revolution, the Catholic Church began to write on the evils of war. The *Postulata*, presented to the Vatican I Council in 1870, decries the evils of militarism:

⁴⁸ Johnson, *Just War Tradition*, 174-9.

The present condition of the world has assuredly become intolerable on account of huge standing and conscript armies. The nations groan under the burden of the expense of maintaining them. The spirit of irreligion and forgetfulness of law in international affairs open an altogether readier way for the beginning of illegal and unjust wars, or rather hideous massacres spreading far and wide.⁴⁹

The Church concludes that under modern conditions with large armies equipped with conventional weapons, “no *jus ad bellum* can exist.”⁵⁰ The Church’s subsequent writings, specifically the Conventus of Fribourg in 1931, impose strict bounds on when a state can make war—the theologians limit this right to self-defense.⁵¹ This emphasis on the “aggressor-defender dichotomy”⁵² remains in the writings of the Catholic Church almost to the present day.⁵³ *The Challenge of Peace* reflects this with its core premise, a presumption against war, along with an acknowledgment that a state can make war in self-defense. Such a rejection of justice is not in keeping with the classic view of the just war tradition. Yet there is change in the post-Cold War era. The Bishops in their 1993 pastoral letter *The Harvest of Justice is Sown in Peace*, posit that “force may be used only to correct a grave, public evil” and goes on to cite aggression or massive violation of basic rights of whole populations as examples.⁵⁴ Implicit in this statement is that while the Catholic Church may no longer support the idea of a state-centered view of justice that is part of the classic just war tradition, it agrees in the justice of the use of military force to prevent injustice to peoples.

⁴⁹ As cited in Johnson, *Just War Tradition*, 340.

⁵⁰ Ibid.

⁵¹ Ibid., 340-1. This, of course, mirrors international law with the previously signed Kellogg-Briand Pact in 1928.

⁵² This term is Professor Johnson’s.

Other contemporary just war theorists directly or indirectly acknowledge the lack of justice within the *jus ad bellum*, yet make exceptions in areas that they hold to be special. Walzer provides for three exceptions to his “legalist paradigm,” two of which provide allowances for states to ensure the sanctity of the self-determination process; the third allows states to intervene in an instance “when the violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination or ‘arduous struggle’ seem cynical or irrelevant, that is, in cases of enslavement or massacre.”⁵⁵

Paul Ramsey is more in touch with the classic tradition. Basing his view that there is an obligation, derived from the principle of Christian charity, to defend the innocent, he notes that “it is the work of love and mercy to deliver as many as possible of God’s children from tyranny.”⁵⁶ He continues:

When choice *must* be made between the perpetrator of injustice and the many victims of it, the latter may and should be preferred—even if effectively to do so would require the use of armed force against some evil power.⁵⁷

Thus Ramsey argues for reintroduction of justice back into the *jus ad bellum*.⁵⁸

The most innovative contemporary just war thinker in this area is James Turner Johnson. He argues in *Morality and Contemporary Warfare* that contemporary just war

⁵³ See generally, Johnson, *Just War Tradition*, 339-347.

⁵⁴ National Conference of Catholic Bishops, *The Harvest of Justice*, 320.

⁵⁵ Walzer, 90.

⁵⁶ Paul Ramsey, “Justice in War,” *The Just War: Force and Political Responsibility* (Savage, MD: Littlefield, Adams Quality Paperbacks, 1983), 141-7 (quote is on 143).

⁵⁷ *Ibid.*, 143. Emphasis in original.

thinking examines the moral problems of nuclear weapons and deterrence, and is thus under-equipped to deal with the international community's problems in the post Cold War era. Instead of a presumption against war, Professor Johnson reintroduces the idea of justice from classic just war thinking and argues from a *presumption against injustice*. Johnson then makes the argument that states have "a moral obligation to intervene in situations in which there is rampant evil and injustice..."⁵⁹ Johnson goes beyond *The Harvest of Justice* in stipulating the obligation to intervene in humanitarian situations. But in both cases, the just cause for which the Bishops and Johnson advocate deals with the case of injustice against communities of people.

The final area of this investigation of just cause is embedded in the idea of revolution. In this case, the just cause for which people fight—self-determination or the overthrow of a repressive regime or colonial power—represents a different view of just cause than that contained within the just war tradition. In the classic case, the tradition allows for a political community to go to war to defend, punish or restore what it has lost. In the modern, revolutionary war sense, a more loosely defined community may use warfare to overthrow a repressive regime or gain self-determination. In fact, one could argue that this actually represents the self-defense of that community: Walzer

⁵⁸ According to Professor Johnson, Paul Ramsey is one of the leading figures in the reinvigoration of American just war thought in the 20th century. See generally Johnson, *Just War Tradition*, 347-357. Ramsey was Johnson's dissertation mentor at Princeton University.

⁵⁹ See generally Johnson, *Morality and Contemporary Warfare*, 71-118 (quote is on 117). Johnson acknowledges, however, that statesmen often face conflicting obligations. Other such obligations may include Obligations to the International Order, such as Maintaining the Territorial Ideal of Sovereignty and Protecting the Concept of International Consensus; Obligations to the Political Communities of those that would Intervene; and Obligations to the Members of Societies Targeted for Intervention. These

makes this case implicitly in *Just and Unjust Wars*. In his chapter entitled "Interventions," two of the three exceptions to his rule of nonintervention provide for the sanctity of the self-determination process, to allow it to occur unmolested.⁶⁰ For this argument to work, it must be premised on the idea of the justice of allowing such process to go forward to whatever conclusion may result.

Other contemporary theorists remain skeptical. Professor O'Brien acknowledges that one could use "defense of the community" as justification for attempting to overthrow a repressive regime. But he also points out a crucial problem. Since many groups involved in these types of conflicts base their justice claims in either ideological or absolute terms, it can lead to problems with *jus in bello*, or the actual use of force. The group sees the achievement of the end encapsulating the absolute "good" as justifying any means.⁶¹ And since any means are justified, the restraints embodied in the just war tradition are set aside for whatever restraint, if any, that might be compatible with their ideological basis for justice. This is not only true of contemporary revolutionary wars based in Marxist-Leninist or Maoist theory, but it is also true of the wars of religion that occurred in the Middle Ages, not only during the crusades, but also the post-Reformation conflicts between the Catholic and Protestant princes.

conflicting obligations may produce a conflict of values that may in the end produce more harm than good if a state or states actually intervene. Johnson, *Morality and Contemporary Warfare*, 103-116.

⁶⁰ Walzer, 86-108.

⁶¹ O'Brien, *The Conduct of Just and Limited War*, 162-3.

Just Cause and Trans-State Actors: Discussion

This section examines the idea of just cause and a conflict between a state and a trans-state actor. At first blush, it appears that much of the received wisdom from contemporary just war thinkers mirrors the *jus ad bellum* rules of international law—going to war is just only when it is done in self-defense. Yet in recent years, this thinking has begun to change. Both the American Catholic Bishops and theorists such as James Turner Johnson argue for intervention for humanitarian purposes. But while these arguments reach the same conclusion, they take different paths. The Bishops in *The Harvest of Justice* reach this conclusion by allowing it as an exception to their general presumption against war. Conversely, Professor Johnson makes a conscious attempt to bring justice back into the *jus ad bellum*, framing his argument instead as a presumption against injustice, and concludes that states have an obligation to intervene in such a humanitarian situation, while recognizing that states sometimes face conflicting obligations.

What is key for the discussion of a state-TSA conflict is that while theorists such as Professor Johnson attempt to bring a sense of justice back into the *jus ad bellum*, it is to make the argument for a humanitarian end. And perhaps even more fundamental is that such arguments reflect a presumption for the justice of communities over the justice of a state within the international community. Thus on the one hand, such an argument may not be appropriate or workable in a situation where a state might be considering the moral implications of going to war with a trans-state actor in circumstances that are

outside the realm of self-defense. But on the other hand, most theorists working in the just war tradition would agree that a just cause beyond the realm of self-defense has precedent in the just war tradition.

Professor Johnson's work is groundbreaking because it establishes a precedent for bringing the question of justice back into the *jus ad bellum*. If one were to do that in the examination of a state-TSA conflict, what would justice look like? Could one build such an argument on an individual rights basis, or could one use a states rights basis as the core premise? What are the consequences of making either choice?

On the other side of the issue is the question of the justice for which a TSA might fight. In the last half of the twentieth century, non-state actors fought internal wars using the just cause of self-determination or an ideological just cause based on Marxist-Leninist or Maoist revolutionary theory as the basis for why they fought. While these "just" causes fall outside the western just war tradition—with the resulting problems in the *jus in bello*—it represents an end that those combatants consider just. In an analogous situation, could a TSA have a "just" cause consistent with the received wisdom of the just war tradition that posits three core just causes—self-defense, punishment, and restoration? Is it possible to reconcile a just cause, like that of a struggle for the self-determination of a people, that is outside the just war tradition with the tradition?

And finally, there is the question of simultaneous ostensible justice. Assuming that a TSA has a just cause for which it is fighting that is either from the just war

tradition or is outside the tradition but can be reconciled with it, one then confronts the question: which side is correct from an objective viewpoint? If one agrees with Vitoria that in some situations the causes of conflict are so intertwined that it is impossible for an outside, objective observer to determine which side fights with justice on its side, can one reconcile it? Vitoria argues that in such a situation, both sides must conduct the war in as a restrained a manner as possible in order to minimize the resulting injustice.

There is an important distinction to make. It is not inconceivable that a TSA may have a strong moral case for pursuing its political agenda; yet such a strong moral case for action may not translate into a just cause for violence. As an example, the coalition of non-governmental organization and TSAs that led the charge to persuade the vast majority states to ban the production and use of anti-personnel landmines held a strong moral argument for the banning of these weapons, namely that such weapons are inherently indiscriminate. Yet while the coalition possessed a strong moral purpose for action, it would not have been a just cause for the use of violence against non-signatory states in an attempt to coerce them to concede to the coalition's objectives.

Right Intention

The final criterion within the just war tradition's *jus ad bellum* is Right Intention. What is meant by Right Intention? The original reason for having this criterion in the *jus ad bellum* was to ensure that even if a prince went to war with a just cause, the end goal was correct. The early just war theorists view Right Intention in two ways. Augustine first frames Right Intention negatively. He was concerned that

individuals would not fight a war for the right reasons—reluctantly out of a sense of Christian duty to a neighbor—but because of a lust to dominate, harm, or kill.

What is it about war that is to be blamed? Is it that those who will die someday are killed so that those who will conquer might dominate in peace? This is the complaint of the timid, not of the religious. *The desire for harming, the cruelty of revenge, the restless and implacable mind, the savageness of revolting, the lust for dominating, and similar things—these are what are justly blamed in wars.* Often, so that such things might also be punished, certain wars that must be waged against the violence of those resisting are commanded by God or some other legitimate ruler and are undertaken by the good.⁶²

War, for Augustine, while a terrible thing, is morally neutral. The worst part of war, in Augustine's view, is the potential harm it could produce to a man's heart, as the emphasized portion suggests. This potential for sin during battle—killing from a desire to harm instead of reluctantly out of Christian duty—is the reason why soldiers performed penance after a battle, just to ensure that their souls were cleansed of any sin that may have resulted from the battle.

Augustine also views Right Intention positively—war must serve the positive ends of the political community: peace.

Peace is not sought in order to provoke war, *but war is waged in order to attain peace.* Be a peacemaker, then, even by fighting, so that through your victory you might bring those whom you defeat to the advantages of peace. "Blessed are the peacemakers," says the Lord, "for they will be called the children of God" (Mt 5:9). If human peace is so sweet for attaining the temporal well-being of mortals, how much more sweet is divine peace for attaining the eternal well-being of the angels!⁶³

⁶² Augustine, "Against Faustus the Manichaeon," in Augustine, *Political Writings*, 221-2. Emphasis added.

⁶³ Augustine, "Letter 189, to Boniface," in Augustine, *Political Writings*, 220. Emphasis added.

In Augustine's view of the human situation, both in the individual and political sense, peace was the highest end toward which a person and community ought to strive:

The peace among human beings is ordered concord. The peace of the household is an ordered concord concerning commanding and obeying among those who dwell together. The peace of the city is an ordered concord concerning commanding and obeying among citizens. The peace of the heavenly city is a fellowship perfectly ordered and harmonious, enjoying God and each other in God.⁶⁴

The idea of Right Intent addresses both of these. An individual ought to fight a war with the intention to ensure the peace of his soul. And a prince ought to fight a just war with intention in order to serve the peace of the community he serves.

Aquinas expands upon Augustine's ideas. First of all, he lists Right Intention as one of the three criteria needing to be fulfilled for a just war in his *Summa Theologica*.⁶⁵ Beyond this codification, Right Intention is especially important to Aquinas, who takes great interest in the goals and motives of moral actors involved in enterprises such as war. For Aquinas, perverse intention—the opposite of right intention—produces a negative or destructive end, such as harming a person or property. And the only thing that could justify such an intention was the broader good that might result, either justice or the political common good. Within Aquinas's broader conception of the *jus ad bellum*, if his just or suitable causes for political or religious war represent the objective reasons for going to war, his emphasis on the intention of the moral actors reflects the

⁶⁴ Augustine, *The City of God*, Book IV, Chapter 13, in Augustine, *Political Writings*, 154.

⁶⁵ "Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil." Aquinas, *Summa Theologica*, II, II, Q. 40, 502.

subjective reasons for combatant action in the war.⁶⁶ While Aquinas does not go so far as to claim that a war fought for a just cause becomes unjust if a perverse intention motivates an individual combatant's conduct, he would argue that such an individual's conduct would be a sin.⁶⁷

Despite the importance with which Aquinas holds Right Intention, the criterion begins to decline in importance with the theorists of the late Middle Ages. Vitoria barely mentions it in his two works; he only mentions it in the section of "The Law of War" where he examines the issue of Christian participation in war. In particular, he cites Augustine's justification of peace as the end of war (cited earlier) as justification for Christian participation in not only a defensive war, but also an offensive war so long as the end goal is peace and the security of the state.⁶⁸ Unlike Aquinas, the intentions of the involved individuals do not play an important role for Vitoria.

Grotius provides further evidence of the decline of Right Intention; this is tied to his general deemphasis of the *jus ad bellum* and the greater emphasis he places on the *jus in bello*.⁶⁹ The only place where he mentions right intention in the *jus ad bellum* is in conjunction with a discussion of Just Cause; it comes at the end of the chapter entitled "On the Unjust Causes of War." Here, Grotius denies Aquinas's emphasis on subjective intention:

⁶⁶ See generally Walters, 148-57.

⁶⁷ *Ibid.*, 156-7.

⁶⁸ Vitoria, "The Law of War," li.

⁶⁹ Of the three classic *jus ad bellum* criteria, Grotius incorporates Competent Authority into his discussion of the nature of sovereignty, spends most of his effort discussing Just Causes for war along with their

It is necessary to observe that a war may be just in its origin, and yet the intentions of its authors may become unjust in the course of its prosecution. For some other motive, not unlawful in itself, may actuate them more powerfully than the original right, for the attainment of which the war was begun. It is laudable, for instance, to maintain national honour; it is laudable to pursue a public or a private interest, and yet those objects may not form the justifiable grounds of the war in question.

A war may gradually change its nature and its object from the prosecution of a right to the desire of seconding or supporting the aggrandizement of some other power. *But such motives, although blamable, when even connected with a just war, do not render the war itself unjust, not invalidate its conquests.*⁷⁰

Grotius acknowledges that even if a war with a just cause is actually being fought for unjust reasons, the war itself does not become unjust.

For Grotius, the criterion of Right Intention presents the same problems as Just Cause—it is difficult to measure such areas fraught with subjective interpretation. It explains his emphasis on the objective measurement of just causes, and his formalization of the *jus ad bellum* to have a “solemn” war. Because of this, as the just war tradition evolved into more secular forms based on natural law precepts, theorists like Grotius place a greater emphasis on evaluating just causes and intention by outside, objective observers.⁷¹ The result of this, however, is that the received wisdom from the *jus ad bellum* declines to insignificance as the doctrine of *competence de guerre* arises to replace it.

nature, and covers Right Intention as part of his discussion of just cause, while briefly touching upon it in other areas. Johnson, *Ideology*, 209-214.

⁷⁰ Grotius, 273. Emphasis added.

⁷¹ Johnson, *Ideology*, 209-22.

In the revival of just war theorizing in contemporary times, the criterion of Right Intention returns to moral discussions of the use of force. But because most contemporary theorizing focuses on *jus in bello* issues, a *jus ad bellum* criterion such as Right Intention does not receive much attention. Still, Right Intention is at least now being considered, but its focus has changed. Instead of Aquinas's view, where the moral intentions of *individual actors* is key, analysis of Right Intention now examines the end and means of *states* as they pursue their foreign policies. In general, most contemporary just war theorists—either explicitly or implicitly—stipulate that Right Intention means that war, in addition to needing a Just Cause, must also have the end of peace. Professor O'Brien provides what is perhaps the best explication of Right Intention in the contemporary setting, an explication containing the key aspects of the other theorists. O'Brien posits that Right Intention has several key points:

First, right intention limits the belligerent to the pursuit of the avowed just cause. The pursuit may not be turned into an excuse to pursue other causes that might not meet the conditions of just cause...

Second, right intention requires that the just belligerent have always in mind as the ultimate object of war a *just and lasting peace*. There is an implicit requirement to prepare for reconciliation even as one wages war...

Third, underlying the other requirements, right intention insists that charity and love exist even among enemies. Enemies must be treated as human being with rights. The thrust of this requirement is twofold. Externally, belligerents must act with charity toward their enemies. Internally, belligerents must suppress natural animosity and hatred, which can be sinful and injurious to the moral and psychological health of those who fail in charity.⁷²

⁷² O'Brien, *The Conduct of Just and Limited War*, 34. Emphasis added.

There are several key points to highlight. First, war must be undertaken for just reasons and not for the self-aggrandizement of the state. Second, the goal of the war must be peace. And third—echoing Augustine—combatants must treat their adversaries with charity and love.

There is one final point to make regarding Professor O'Brien's on Right Intention. Such a statement, as well as the concept of Right Intention that it embodies, reflects the interweaving and interconnection of the *jus ad bellum* and the *jus in bello*. O'Brien's second and third points listed above reflect the influence of the *jus ad bellum* guidance on *how* the war ought to be fought. Both points, prepare for eventual reconciliation and fight with charity towards your adversary, reflect the guiding ideals of the *jus in bello*, embodied particularly in the principle of proportionality.

Trans-State Actors and Right Intention: Discussion

Unlike the previous *jus ad bellum* criteria where the fact that one of the belligerents in a conflict is a trans-state actor results in a significant change in the moral reasoning, the criterion of Right Intention does not change significantly. In these days, a state would find it difficult to argue that it has the moral justification to take any military action against any type of international actor that does not have peace as its end. Any state justifying military action for the purposes of self-aggrandizement or profit would face considerable opposition from the rest of the international community. Thus it seems reasonable to stipulate at this point that in any conflict with a trans-state actor, a state must have the intention or end of peace.

The same conclusion holds true for a trans-state actor. If one assumes for the sake of this argument that a TSA possesses the requisite authority and just cause to pursue a military action that is just within the context of the just war tradition, it must also do so with the Right Intention as Professor O'Brien explicates above: the end limited to the purported just cause, war pursued only for peace with eventual reconciliation always kept in mind, and adversaries treated with charity. Is it possible for a TSA to fight with this ideal of Right Intention so-defined? The tactics that a TSA could favor—terror tactics—hardly represent a recipe for setting the conditions for eventual reconciliation with the enemy or fighting with the adversary in a charitable manner.

Jus ad Bellum and Trans-State Actors—Conclusion and Discussion

After this lengthy discussion, it is appropriate to summarize this analysis of how the *jus ad bellum* in the just war tradition reflects on a state-TSA conflict. In the area of Competent Authority, it is debatable whether a TSA could even possess the necessary authority to use public violence to gain a political objective. One of the core principles for restraint in warfare embedded within the tradition is that the number of actors possessing such authority must be strictly limited. And in the case of a TSA, which of its members would be vested with such authority? In a state, such authority belongs to a particular office, and such authority is wielded by the office holder at the time. And the office holder, at least in democracy, is politically accountable to the electorate for

his actions. In the case of a TSA, there is no constitutional designation of who might possess such authority, nor is there any political accountability.

Under the rubric of Just Cause, an important question that emerges is whether or not a TSA could justify its actions based on a cause that is not compatible with the tradition's three core just causes: self-defense, restoration, and punishment.

Conversely, like sub-state groups in the post-colonial era who fought with the just cause of self-determination, might a TSA also find a just cause that could be different from, yet be compatible with, the just war tradition. It remains to be seen, however, whether a TSA armed with an ideological or absolute cause could still restrain the manner in which prosecutes the conflict. And finally, if a TSA could find a just cause that is compatible with the just war tradition, how does Vitoria's concept of simultaneous ostensible justice affect this moral reasoning? According to Vitoria, in such a situation where neither side could be sure of the ultimate justness of its cause, both sides should be more restrained in their actions.

A second aspect of the Just Cause criterion that bears on the state-TSA conflict is lack of a sense of justice in contemporary just war thinking. Professor Johnson makes a compelling case for bringing a sense of justice back into the contemporary *jus ad bellum* in order for moralists to provide guidance on contemporary human rights problems. Given this necessity, if one were to do the same in order to provide moral guidance to international society trying to deal with the problem of a TSA conducting

private and thus illicit violence, what would be the basis for such justice? Would it be state-centered or individual-centered?

Right Intention, the final criterion of the *jus ad bellum*, plays less of a role in this moral debate. A state, regardless of the type of adversary with which it is in conflict, must always fight the conflict with peace as its end, while keeping eventual reconciliation in mind, as well as treating the adversary with charity. Such a requirement may prove difficult for a TSA. The penchant for the use of terror tactics, or the use of unlimited means justified by an ideological or absolute end, does not bode well for reconciliation or treating the adversary with charity.

Trans-State Actors and the Jus in Bello

The second, but no less important, part of the just war tradition is moral thinking regarding what is just in the *conduct* of war. But beyond the fact that the *jus in bello* provides moral guidance for what may or may not be morally correct in warfare, this part of the just war tradition encapsulates the tradition's historical emphasis on restraining the means used in warfare.

This discussion of the effect of the *jus in bello* on a conflict between a state and a trans-state actor divides the analysis roughly into two sections; the first deals with principle of proportionality, the second with discrimination. But it must be noted up front that the topic of the just war tradition's *jus in bello* does not lend itself to this type of categorization. Paul Ramsey is responsible for this division in contemporary just war

thinking,⁷³ but this division does not reflect how this part of the tradition has grown and evolved through the centuries, reflecting the interconnection and interdependence of the two principles. Moreover, the *jus in bello* is derived more from secular sources such as chivalry than the *jus ad bellum*; this discussion addresses these sources in turn.

Because the received wisdom of the just war tradition's *jus in bello* does not cleanly fit into the proposed categorization, this section may take what appears to be mysterious tangents as it outlines this analysis.

It is important to reemphasize what was noted in the previous section about where and when the preponderance of the thinking occurred. The early theologians primarily focussed on *when* it was just for a Christian and a state to go to war. Once this was determined, they generally had little interest in *how* the war was actually carried out,⁷⁴ although some of their thinking influenced the development of this part of the tradition. The theorists of the late Middle Ages, as they deemphasized the *jus ad bellum*, increasingly focussed on *jus in bello* aspects. Finally, contemporary theorists examine *jus in bello* issues almost exclusively as the *jus ad bellum* shrunk to virtually nothing and as these theorists wrestled with the problems associated with nuclear weapons and deterrence.

⁷³ For example, see his essays entitled "The Case for Making 'Just War' Possible," (discrimination) and "When 'Just' War is Not Justified," (proportionality), both in *The Just War*, 148-167 and 189-210, respectively.

⁷⁴ This lack of interest in the just means for conducting war resulted in catastrophic consequences during the crusades in the Middle Ages. See G.I.A.D. Draper, "The Interaction of Christianity and Chivalry in the Historical Development of the Law of War," *International Review of the Red Cross* 46 (January 1965): 3-23.

Proportionality

Proportionality is central to the just war tradition's emphasis on restraint in warfare. In the *jus in bello* sense of the term, proportionality is generally understood to mean that a military commander may use no more force in an individual military action than is needed to achieve the objective. As an example, a company commander calling in artillery to destroy a building containing three enemy soldiers would be a disproportionate act if the same commander could secure the building through the use of a grenade.

There is an important distinction between this sense of proportionality and the sense contained in the *jus ad bellum*. In the latter, proportionality is an assessment made prior to the beginning of a conflict that balances the evil that might occur against the just cause for which the conflict is being fought—the evil that would be avoided or the good that would result.⁷⁵

This idea of restraint in the conduct of warfare, while having roots in antiquity and across cultures,⁷⁶ has important sources within the just war tradition. The idea of restraint is embedded within Augustine's argument justifying Christian participation in war. The idea of Christian love or charity imposes an obligation on all Christians to go

⁷⁵ Professor O'Brien distinguishes between these two ideas of proportionality as "strategic"—as measured against the just cause for which the war is being fought—and "tactical"—a measure of the direct ends to means of individual actions. O'Brien, *The Conduct of Just and Limited War*, 40-1.

⁷⁶ Guy B. Roberts, "Judaic Sources of and Views on the Laws of War," *Naval Law Review* 37 (1988): 221-238; L.C. Green, "What is—Why is There—The Law of War?" *Essays on the Modern Law of War*, 2nd ed. (Ardsley, NY: Transnational Publishers, 1999), 1-40; and Green, "The History and Sources of the Law of Armed Conflict," *The Contemporary Law of Armed Conflict* 2nd ed. (Manchester: Manchester University Press, 2000), 20-53.

to the aid of an innocent person in danger. But the same idea of Christian love imposes a second obligation: the person helping the innocent shall do no more harm than is absolutely necessary in order to provide that protection. In other words, in order to protect an innocent person, a Christian may not kill an attacker if disabling him is all that is necessary to protect the innocent person. While one could argue that this sense of restraint is perhaps a more appropriate expression of the *jus ad bellum* sense of proportionality, it is also appropriate to use it as a guide and justification for *jus in bello* proportionality.

Moving into the Middle Ages, the second source of restraint in the just war tradition during this period came not from theologians, but from the Church's canon lawyers who elaborated upon three concepts for restraining war. The first, termed "The Truce of God" and promulgated in the mid-eleventh century, restricted fighting to certain days, making fighting illicit on Sundays and other holy days. This attempt at restraint met with little success, arguably because it tried to do too much. A second bid to restrain war was a limit on what weapons could be used. In 1139, the Second Lateran Council forbade the use of bows and arrows, crossbows, and siege machinery in combat between Christians. While these restraints resonated with the warrior class of the day who disliked such weapons because it permitted soldiers of a lower social class to kill knights at a distance, this attempt at restraint also did not last.⁷⁷

⁷⁷ See generally Johnson, *Just War Tradition*, 124-131. Johnson also lists a third canonical attempt to limit warfare, termed "The Peace of God," which will be discussed in the section on discrimination.

Among Medieval theologians, Aquinas says little regarding the *jus in bello* sense of proportionality. This is not surprising since Aquinas's primary focus was on the issue of when it was just to go to war. His thinking on the restraint in the conduct of war is limited to discussions of the morality of different means.⁷⁸ For the theorists of the late Middle Ages, the *jus in bello* was in a state of transition. Theologians like Vitoria faced the fact that the *jus ad bellum* did not provide an adequate restraint on war because of the difficulty determining which side possessed the just cause. Because of the possibility of simultaneous ostensible justice, Vitoria argues that both sides in war must restrain their actions unless they were certain that they possessed a just cause.⁷⁹

The idea of restraining warfare through the *jus in bello* becomes more prevalent in the theory of Grotius. As Grotius collapses the *jus ad bellum* into a formalistic framework, he focuses his attention on how states actually conduct war; approximately one third of his lengthy *Rights of War and Peace* deals explicitly with how states ought to restrain the conduct of war. In Book Three, Chapters Four through Ten examine the restraint of warfare based on the customary practice of nations. He concludes that there is little in the practice of nations to argue for restraint in warfare. However, the next six chapters discuss the same set of means as "tempered by moderation and humanity."

The restraint on the conduct of war is much more pronounced from the moral

⁷⁸ Walters outlines Aquinas's thinking on the limitation of different means: lying to the enemy, subterfuge, ambushes, fighting on holy days, booty, and enslavement. See Walters, 158-170.

⁷⁹ See generally Johnson, *Ideology*, 195-203. Vitoria's *jus in bello* contributions are seen in two areas, the first being in the area of discrimination and noncombatant immunity (discussed in the next section), as well as the fact that he was the first to pull all the varying strands and sources of received just war tradition together into one comprehensive theory. Like Aquinas, Vitoria lists a number of limits on

perspective, according to Grotius, than it is from the practice of nations. Moreover, the language that he uses in these later chapters establishes more of an *absolute* requirement for restraint, unlike Vitoria's language that allows for necessity to overcome proportionality. The effect of Grotius's increased emphasis on restraining war through the *jus in bello* sets the stage in later centuries for the development of international humanitarian law that attempts to restrain warfare through international agreements, which initially is the codification of the practice of states.⁸⁰

In contemporary times, most of the work of just war theorists focuses on the *jus in bello*. Not surprisingly due to his inspiration in Augustine, Paul Ramsey argues that the principle of Christian love that justifies going to war to protect the innocent also restrains the conduct of that war. "For even the unjust assailant is worthy of love. Thus the Christian may not act toward him unrestrainedly; rather, he should act so as to thwart the assailant's purpose, using the minimum force necessary to do so."⁸¹

The American Catholic Bishops's view of the proportionality of nuclear weapons represents much of this debate. Although it concerns the *jus ad bellum* sense of proportionality, it is useful to discuss it here to see an important strand of this thinking. In their reasoning on the morality of nuclear weapons, the Bishops argue that the use of such "scientific weapons" even in self-defense "can inflict massive and

specific means, as well as advising combatants not to wage war to ruin the enemy, but only enough to secure one's rights. See Vitoria, "The Law of War," lxx; and Walters, 366.

⁸⁰ See generally Johnson, *Ideology*, 222-31.

⁸¹ See generally Johnson, *The Just War Tradition*, 197-99 (quote is on 198). This reasoning also provides the theoretical basis for Ramsey's argument regarding the protections of noncombatants (discussed in the next section). See Ramsey, *War and the Christian Conscience*, 34-59; and *The Just War*, 189-210.

indiscriminate destruction far exceeding the bounds of legitimate defense.”⁸² Because of this, the Bishops argue that it is unjust to use such weapons because there cannot be an end that is proportional to the resulting destruction.⁸³ Paul Ramsey terms this position—the ends of a war cannot be proportional to the means used—as just war pacifism.⁸⁴

Michael Walzer rejects the utilitarian approach inherent in the balancing of proportion with necessity. Using his rights-based approach, Walzer argues that “a legitimate act of war is one that does not violate the rights of the people against whom it is directed.”⁸⁵ While this statement undergirds Walzer’s argument for noncombatant immunity, implicit in it is a call for restraint in war that also is relevant to proportionality.

Discrimination

The second core concept of the *jus in bello* is the principle of discrimination. In the modern age, this principle means that people or objects that have nothing to do with the adversary’s war effort are immune from direct, intentional attack. How did this principle evolve within the just war tradition?

⁸² National Conference of Catholic Bishops, *The Challenge of Peace*, iv, 34 (quote is on 34).

⁸³ For a counterargument, see O’Brien, “A Challenge of War: A Christian Realist Perspective,” *Just War Theory*, Jean Bethke Elshtain, ed. (New York: New York University Press, 1992), 169-196.

⁸⁴ See Johnson, *Morality and Contemporary Warfare*, 129. A similar argument that Ramsey attempts to counter is that of modern war pacifism, which argues that in modern war, one is bound to harm noncombatants disproportionately due to the nature of the weapons and of society.

⁸⁵ Walzer, 135.

While the idea of the restraint in warfare—to include leaving the innocent alone—has its roots in antiquity,⁸⁶ the first source in the western just war tradition is Augustine. Based on his argument of Christian love that obliges a Christian to use force to protect the innocent, the same obligation to protect the innocent means that a soldier must not attack or harm in any manner any innocent person in the adversary's state.

It should not be surprising that Aquinas does not directly discuss the issue of killing the innocent in war, given his primary interest in the *jus ad bellum*. Still, it is possible to reach conclusions in this area through analogy. Professor Walters notes that Aquinas takes a number of important positions related to this problem. Aquinas argues that killing innocent people is forbidden by both natural and divine law, that murder is one of the absolute moral prohibitions, and that there is no justification for the indirect killing of innocents. Because of these positions in related areas, Walters concludes that Aquinas would hold to an absolute prohibition on the killing of the innocent in warfare.⁸⁷

Another important source for noncombatant immunity that emerges in the Middle Ages is in the Church's canon law: the Peace of God. The idea behind this concept is that because certain types of people do not participate in war in any manner, they have a right to be spared war's ravages. The goal of the Peace of God is to separate various members of church—clergy, monks, and others—from the requirements of warfare so that they may focus more completely on their ecclesiastical

⁸⁶ See footnote 76.

⁸⁷ Walters, 159-62.

duties. The list of those to be spared later grew to those pursuing peaceful secular interests, to include pilgrims, travelers, merchants, and peasants cultivating the soil—to include their lands and animals, too. This view argues that these people ought to be spared the ravages of war because of their *social function*.⁸⁸

A secular source for the principle of discrimination also emerges during this period from the ideals of chivalry. Another way to view the list of people that the Church argues ought to be spared the rigors of war is that these people, as well as those who are not listed who are considered too weak, are unable to bear weapons in any manner. It is *their inability to bear arms* that sets them apart. It was these people whom the chivalric code demands that knights protect. But this expectation of protection had a darker side. Knights would leave these people alone so long as they maintained their non-warlike status in society. When a peasant, who might normally receive protection, enlists in the irregular infantry, he forfeits such protection from other knights. While the chivalric code demands that a knight behave honorably toward another knight, the code says nothing about protecting other people not worthy of such protection. This explains the commonplace slaughter of common soldiers by the victorious knights after a battle.⁸⁹

These two sources of noncombatant immunity coalesced into one view later in the Middle Ages, and their different origins explain a seeming flip-flop in the received view of noncombatant immunity. On the one hand, the ecclesiastical source of

⁸⁸ Johnson, *Just War Tradition*, 127-8.

⁸⁹ *Ibid.*, 131-150.

immunity is based on the argument that those who do not participate in war ought not to be bothered by war. One can consider this freedom from the effects of war as a *right* that is *absolute* in its nature. On the other hand, one can view the source of noncombatant immunity based in chivalry as a *gift* from the knight—a gift that the knight can withdraw at any time when it suits his purpose. Such a view of noncombatant immunity is *relative*. This difference between the absolute and relative views of noncombatant immunity is an important source for the changes in the just war tradition between whether noncombatant immunity is absolute or relative.⁹⁰ The absolute view of the ecclesiastical sources contributes to an absolute view of justice in the conduct of war, and provides the basis for war crimes trials in the twentieth century. The relative view allows for the incorporation of the principle of military necessity, and presages modern international law's attempts to find a compromise between these two seemingly contradictory principles.⁹¹

The theories of the late Middle Ages reflect the successful incorporation of this secular source for noncombatant immunity into the just war tradition. As a general proposition, the theorists of this era would argue that no more than the absolute minimal amount of force must be applied against the innocent.⁹² Vitoria notes that it is

⁹⁰ Ibid. Professor Johnson notes that the functional and "inability to bear arms" perspectives of noncombatant immunity still persist to this day in modern international law. The functional perspective is seen in the protections given to certain people—even in uniform—based on their job: clergy and medical personnel. The "inability to bear arms" perspective is seen in the protections afforded to civilians and prisoners of war, and by how harshly those who do not meet the criteria required for combatant status are often treated in conflicts. Johnson, *Just War Tradition*, 147-8.

⁹¹ Johnson, *Ideology*, 78-80.

⁹² Walters, 385.

permissible to harm innocent people if there are no other means available to achieve the end:

Sometimes it is right, in virtue of collateral circumstances, to slay the innocent even knowingly, as when a fortress or city is stormed in a just war, although it is known that there are a number of innocent people in it and although cannon and other engines of war cannot be discharged or fire applied to buildings without destroying innocent together with guilty.⁹³

Vitoria is the first theologian who incorporates the principle of the double effect into his theory.⁹⁴ Grotius takes a view similar to Vitoria, noting that one can attack a site even if it is known that noncombatants located there will be harmed in the process.⁹⁵

In contemporary just war debates, the issue of discrimination and the ability of states to discriminate between innocents and combatants—particularly with nuclear weapons—is one of the core issues in the debates. Paul Ramsey, who holds an absolute view of discrimination, argues that you cannot directly target any innocent person. But Ramsey allows for the unintended effects of an otherwise moral action to harm the innocent. In one of his most important essays, Ramsey argues that nuclear deterrence is morally acceptable so long as the weapons are used in a counterforce strategy—targeting the enemy's nuclear forces instead of cities.⁹⁶

⁹³ Vitoria, "The Law of War," lxii.

⁹⁴ Walters, 385, footnote 341. The double effect in moral thinking is the idea that one can accept the occurrence of an evil effect so long as it is an unintended consequence of another intended effect that is meant to cause good. Moreover, the good effect must outweigh the evil of the secondary effect. In just war thinking, theorists often use the double effect to justify collateral damage.

⁹⁵ Grotius, 292.

⁹⁶ See Ramsey, "The Limits of Nuclear War," *The Just War*, 211-258. Ramsey argues that even with a counterforce strategy there would be sufficient unintended civilian casualties to deter an adversary from launching a first strike. Ramsey, "The Limits of Nuclear War," *The Just War*, 252-8. Walzer disagrees, noting that Ramsey relies too "heavily on the deaths he supposedly doesn't intend. He wants, like other

Walzer's view of discrimination is derived from his rights-based theory's premise: you cannot take any action that would take away a person's rights. But he also acknowledges exceptions to this rule, such as the double effect. But in Walzer's case, he modifies and restricts it. Not only must an attack not intend the evil effect, but the attacker must also minimize the evil that occurs, even at a risk to himself.⁹⁷

Professor O'Brien tries to find the middle ground. For O'Brien, discrimination is not an absolute value and arguing that it ought to be "appears unconvincing and hypocritical." But that does not mean that one can abandon efforts to restrain warfare. One must find the balance between the competing ends of military necessity and the restraint of warfare. In the end, he concludes:

If the principle of discrimination is viewed as a relative principle enjoining the maximization of noncombatant protection, it seems possible to employ double-effect explanations for actions wherein the major intention is to effect counterforce injury on military objectives while acknowledging an inescapable intention of injuring countervalue targets and thereby predictably violating the principle of discrimination to some extent.⁹⁸

Professor Johnson makes an important distinction regarding discrimination in warfare of the post-Cold War era. Instead of the discrimination problems arising from the inherent inaccuracy and destructiveness of nuclear weapons, some contemporary

deterrent theorists, to prevent nuclear attack by threatening to kill very large numbers of innocent people, but unlike other deterrent theorists, he expects to kill these people without aiming at them. That may be a matter of some moral significance, but it does not seem significant enough to serve as the corner stone of a justified deterrent." Walzer, 280.

⁹⁷ Walzer 152-9. Walzer also allows for a second exception to noncombatant immunity, an exception he terms as the Supreme Emergency. In this instance, if the danger is imminent and if the danger threatens to destroy the very basis of the society itself, then a state may directly target the innocent members of the adversary's society. See Walzer, 251-268.

⁹⁸ O'Brien, *The Conduct of Just and Limited War*, 45-47 (quotes are on 47).

conflicts, like Rwanda in the 1990s, produce a massive violation of the principle of discrimination through the use of a weapon, a machete, which is inherently discriminate, but used in an indiscriminate manner.⁹⁹ This represents an important change in the dynamic of the moral discussions regarding restraint an the use of force. In the late twentieth century, just war discussions centered around whether war could be just despite the inherent lack of discrimination of nuclear weapons. In the post Cold War era with the diminishing importance of nuclear deterrence and the rise of precision weapons, the moral question is now increasingly becoming the *indiscriminate use of weapons that are inherently discriminate*. And as such, individual actors' subjective intentions reemerge as an important area of moral discussion.

The final part of this examination of discrimination is the impact of revolutionary or guerrilla warfare on this principle, which is generally negative. Both sides in such a conflict tend to discount the existence of any noncombatants. "If you are not with us, then you have to be with them," is the common mantra. Specific strategies on both sides lend to the blurring of discrimination. The guerrillas, usually outgunned by the government, must use the few advantages they possess, one of which is the ability to blend into the native population. The government counterinsurgents, aware of this tendency on the part of the guerrillas, will be tempted to attack the population indiscriminately in order to destroy or disrupt the guerrillas or their base of support.

⁹⁹ Johnson, *Morality and Contemporary Warfare*, 153-4.
203

While most theorists condemn a tactic of blending in with the population—creating a discrimination problem for the government—as an immoral act on the part of the guerrillas, Michael Walzer argues differently. He notes that since the guerrillas are “radically dependent” on the villages for support in addition to being their battlefield, being in such close proximity to noncombatants does not cause the guerrillas to forfeit their war rights.

The war rights the people would have were they to rise *en masse* are passed on to the irregular fighters they support and protect—assuming that support, at least, is voluntary. For soldiers acquire war rights not as individual warriors but as political instruments, servants of a community that in turn provides services for its soldiers. Guerrillas take on a similar identity whenever they stand in a similar or equivalent relationship, that is, whenever the people are helpful... When the people do not provide this recognition and support, guerrillas acquire no war rights...¹⁰⁰

Not only is a guerrilla’s attempt to blend in with the population not a problem morally, according to Walzer, it almost becomes a moral imperative for him to do so to gain the combatant protections under the laws of war.

Jus in Bello and Trans-State Actors: Discussion

This final section summarizes the findings and conclusions of the *jus in bello* principles of proportionality and discrimination on the moral analysis of a conflict between a state and a trans-state actor. As for proportionality, it is evident at this point that from the perspective of the just war tradition and its historic goal of restraining the conduct of war, the change in the nature of one of the actors from a state to a TSA in such a contemporary conflict ought to have no effect on whether the belligerents must

fight in a restrained manner. In any conflict, belligerents must act in a restrained manner regardless of the nature of actors involved, in order to be true to the just war tradition. Since a better peace and reconciliation are several of the goals associated with the proportional use of military power, fighting the war in a restrained manner will go a long way towards allowing this to happen; not only from a material, rebuilding the adversary perspective, but also from the perspective of regaining his trust.

That said, it is also important to point out the challenges that may arise when one examines proportionality in light of this new conception of warfare. The very makeup of a TSA—membership based on religious, ethnic, economic, epistemic, or ideological reasons—lends itself to the possibility that a TSA may fight for an absolute or ideological cause. Wars that have such causes as their basis—from the Middle Age crusades to wars of national liberation in the last century—have tended to become unrestrained in their conduct. In the face of this tendency, a state involved in such a conflict with a TSA must be especially careful to ensure that its own conduct does not become disproportionate.

In the area of discrimination, the line is not so clear. It is readily apparent that this new conception of warfare fits into James Turner Johnson's description of the relationship between international humanitarian law and morality regarding noncombatant immunity: "the line distinguishing noncombatants from combatants may move about from time to time, and there have always been ambiguous cases or cases

¹⁰⁰ Walzer, 185.

similar to those named in the law of war or in moral listings of noncombatants but not actually found there.”¹⁰¹ Three questions emerge. The first question is can there be any moral justification for a TSA’s combatants blending in with the indigenous population in order to make their opponent’s task more difficult by presenting the opponent with a discrimination dilemma? While most moral thinkers condemn the guerrilla’s use of the native population as a shield for protecting themselves, Walzer argues that this is an inherent aspect of the population’s support for the guerrillas. There may be certain types of TSAs, based on ethnic or religious loyalties, where some variant of Walzer’s argument may become applicable.

The second question deals with how a combatant gains his war rights. A member of state’s military gains his war rights because he is acting as an agent of the political community of which he is a part, a community based on loyalty to a geographically defined piece of territory. For guerrillas or insurgents, states generally have not *de jure* recognized guerrillas or insurgents as possessing war rights unless the movement attains a high threshold for success. But moral thinkers such as Walzer argue that guerrillas attain such rights *as if* the population were to rise up in a *levee en masse* against the state. Is it possible to extend this argument by analogy to a combatant that belongs to a TSA, an actor whose basis for membership is different from that seen in the past?

¹⁰¹ Johnson, *Morality and Contemporary Warfare*, 153.

Finally, it is important to note the rise of the influence of international human rights law on international humanitarian law¹⁰² and the resulting tendency to argue that all combatants should receive the *de jure* protections of the Geneva Conventions because of humanitarian reasons. Where does this “good” of automatic humanitarian protections fit in with the *de jure* rights and duties of combatants to ensure the protection of noncombatants?

Conclusion

This chapter’s analysis raises a number of key questions regarding Competent Authority, Just Cause, and Discrimination that will bear significantly on the overall just war argument concerning the conflict between a state and trans-state actor. The criteria of Competent Authority and Just Cause suggest inconsistent answers. One of the core principles embedded within the tradition is that to limit public violence, the actors possessing that authority must be limited to states. Yet the society of states *conferred* that authority upon groups involved in wars of self-determination. Can a legitimate Just Cause provide that authority? While the Just War Tradition views these as separate criteria, recent conflicts, codified international humanitarian law, and moral thinking suggest such a linkage. Thus there is a problem of internal consistency. Moreover, is the Tradition’s principle of discrimination still inviolate in the sense that combatants must do their utmost to ensure their adversary can discriminate between themselves and

¹⁰² See generally Theodor Meron, “The Humanization of Humanitarian Law,” *American Journal of International Law* 94 no. 2 (April 2000): 239-278; and L.C. Green, “Human Rights and the Law of

noncombatants? Or do recent guerrilla and insurgent conflicts and the just war reasoning sparked by them provide sufficient precedent for a TSA's combatants to "blend in" with the indigenous population? Can a Just Cause provide the moral impetus to allow such actions? It is to these questions that the next chapter now turns.

CHAPTER SIX

LAW AND MORALITY: THE CONFLUENCE OF MANY STREAMS

War is an ugly thing, but not the ugliest of things: the decayed and degraded state of moral and patriotic feeling which thinks nothing *worth* a war, is worse... A man who has nothing which he is willing to fight for, nothing which he cares more about than he does about his personal safety, is a miserable creature who has no chance of being free... As long as justice and injustice have not terminated *their* ever renewing fight for ascendancy in the affairs of mankind, human beings must be willing, when need is, to do battle for the one against the other.

John Stuart Mill, "The Contest in America," 1862

Introduction

This dissertation has now reached the stage where the final analysis and synthesis can now begin: resolving the questions unearthed in the previous three chapters and making an argument—based in the just war tradition—that answers those questions. The previous chapters outline the legal and moral lacunae that arise when one of the belligerents in a conflict is a trans-state actor; this chapter makes this dissertation's just war statement and provides one answer to this set of questions.

When one examines the landscape of the international legal and moral questions involved in this issue, a number of seemingly irreconcilable conflicts quickly emerge. The examination of these conflicts—and the resulting solutions to them—provide the basis for the answers to this dissertation's research questions. This chapter conducts

this examination in three parts, with each part examining one of these areas of conflict. Part one examines the conflict between Competent Authority and Just Cause. The second part investigates the issue of when a combatant affiliated with a trans-state actor might gain the rights normally given to a combatant, as well as under what circumstances the society of states might confer such a right. Finally, the last section investigates a broader issue that emerges from the contradictory answers arising from the *jus ad bellum* and *jus in bello*. The former argues that a TSA does not possess the necessary authority to wage public war except under limited circumstances; the latter makes a qualified argument that a TSA's combatants ought to receive combatant rights under certain conditions *as if* the criteria of the *jus ad bellum* have already been fulfilled.

Competent Authority versus Just Cause: Order versus Justice

This first section examines the inconsistency that emerges between one of the bedrock ideals of the just war tradition, Competent Authority, and one of emerging trends in within international humanitarian law: the justness of the cause can confer Competent Authority upon an actor that would otherwise not possess it. This marks an important divergence between international law and morality—a divergence that must be explored.

One of the core principles of the just war tradition is that only a limited number of actors ought to possess the Competent Authority necessary to wage public war. As discussed in the previous chapter, this idea emerges in the writings of the Church's

canon lawyers in the Middle Ages as they explicated Augustine's use of the term right authority. In making this argument, the canon lawyers not only distinguish between which actors possess the necessary authority to order a public war, they also distinguish between licit and illicit violence.¹ Thomas Aquinas subsequently expands upon this received wisdom by arguing that only the secular leader of an Aristotelian *polis* or "perfect community" possesses the necessary authority for public war. This limitation on the actors possessing the necessary authority to conduct a public war represents one of the core restraints embedded within the just war tradition. While contemporary theorists treat competent authority almost as an afterthought, the concept played an important role in the limitation of violence since the Middle Ages. And as such, if one examines the issue of whether a contemporary actor such as a TSA might gain such authority *within the context of the just war tradition*, one must be prepared to confront this limitation.

The second aspect of Competent Authority bearing on this conflict is the question of which person within a TSA actually possesses the authority to make the decision to go to war. As outlined in the previous chapter,² contemporary questions of Competent Authority revolve around whether the decision to go to war was made through the proper constitutional processes within a state's government. If the society of states were to grant a TSA the necessary authority to conduct public violence because

¹ See the previous discussion, Chapter Five, 161-70. See also James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton University Press, 1981), 161-5 (hereafter referred to as *Just War Tradition*).

of the justice of its cause, such recognition would not necessarily answer this question of which person actually possesses that authority and whether there is sufficient accountability, political or otherwise, for that person's decisions.

The countervailing trend emerges from the recent evolution of international humanitarian law. In recent decades, the society of states—through its negotiation and ratification of the First Additional Protocol (AP1)³ to the 1949 Geneva Conventions—grants the status and protections provided for in an “international conflict” to those groups fighting “against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”⁴ In essence, the society of states granted the status and protections of an international conflict to those *sub-state groups* that the society of states deemed to have a worthy cause, namely those groups striving for self-determination in the post-colonial era. And in this instance, the cause of self-determination is outside the three core just causes of the just war tradition.⁵ In essence, it is the justness of this cause that led the society of states to *confer* the necessary competent authority on such groups to use public violence. There is a crucial distinction. The society of states, through the ratification of the First Additional

² See Chapter Five, 169.

³ “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, *Documents on the Laws of War*, 3d ed., Adam Roberts and Richard Guelff, eds. (Oxford: Oxford University Press, 2000): 419-479 (Protocol I will hereafter be referred to as AP1).

⁴ Article 1(4) states: “The situations referred to in the preceding paragraphs include 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, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” AP1, Article 1(4), *Documents*, 423.

Protocol, established the precedent where Competent Authority is conferred on a group. There cannot be *self-conference* of this authority.

In addition to this countervailing trend within recent IHL, one must examine this issue of just cause through what James Turner Johnson terms simultaneous ostensible justice.⁶ Based in the just war theory of Francisco de Vitoria, simultaneous ostensible justice is the idea that the causes of a war may be so difficult to understand that even an objective observer cannot determine the side that possesses the just cause. Both sides may subjectively believe that they are fighting with just cause; one or both sides could be affected with invincible ignorance—unable or unwilling to know the objective facts in the case—which would lead them to believe that they possess a just cause.⁷

What is the impact on a conflict between a state and a trans-state actor? The combination of the precedent set by the society of states that confers Competent Authority for war based on the justness of the cause, along with the idea of simultaneous ostensible justice, sets up the following. It is possible that a trans-state actor may actually fight for a cause that the society of states deems to be just. If that is the case, the society of states may then *confer upon* the TSA the necessary authority to wage such a conflict, just as it did in AP1 for sub-state groups struggling for self-

⁵ Michael Walzer does argue that the defense of community is a just cause, but this author would consider this to be outside the core just causes of the tradition.

⁶ See previous discussion, 177-8. See also James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740* (Princeton: Princeton University Press, 1975), 185-95 (hereafter referred to as *Ideology*).

⁷ Francisco de Vitoria, "On the Law of War," in James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford: Clarendon Press, 1934), lx (hereafter referred to as *The Law of War*). See also Johnson, *Ideology*, 185-195.

determination. Moreover, because of the concept of simultaneous ostensible justice, it may well be impossible to determine which side in a state-TSA conflict actually possesses the just cause in a conflict, thus allowing for the *possibility* that a TSA may fight for a cause that is *not necessarily consistent with the tradition's core just causes*.

It is important to state two caveats at this point. First, it is difficult to imagine a set of circumstances where a TSA might actually possess a just cause that is compatible with the just war tradition. This would even be true if one were to use the broader core just causes the early just war theorists all used.⁸ That said, it is also difficult to predict how international politics will evolve in the coming years and decades. It is not inconceivable that some TSA might some day fight for a cause, unimaginable today, that the society of states might consider to be just, and then have the society of states give its imprimatur to such a conflict. Returning to the analogous example of the wars for self-determination, the cause of self-determination is not one of the tradition's core just causes. Yet the society of states granted the status of "international conflict," with the resulting protections, to groups fighting in such conflicts. The second caveat notes that this *conferrence* of competent authority leaves unanswered the question of which person within the TSA actually possesses this authority, along with the accountability issues therein. This drawback is another reason why the society of states ought to be hesitant to confer such authority on a TSA.

⁸ Early theorists consistently list self-defense, punishment, and restoration as the core just causes; each theorist provides his own interpretation of these criteria, as well as adding their own causes that supplement these three.

While it is unlikely at this stage, in the end one cannot deny the possibility that a TSA may in the future fight for a cause that the society of states deems just, bracketing the question of which person within the TSA would actually possess the conferred Competent Authority. Because of this, one is left with a difficult conflict to resolve, where on the one hand, the just war tradition attempts to restrain warfare by limiting the number of actors that can authorize public war; and on the other hand, a concept from the tradition—simultaneous ostensible justice—and the recent trend within international humanitarian law combine to suggest that a TSA may wage a conflict with the necessary authority *conferred on it* by the society of states because the society deems the cause to be just.

Order versus Justice

It is possible to frame this divergence—one between a TSA not possessing the necessary competent authority to wage a public war and the fact that a TSA might gain such authority from the society of states through the justness of its cause—as a conflict between order and justice. The just war tradition's attempt to limit the number of actors having the authority to wage public war represents order; the possibility that the society of states might confer the *de facto* authority upon a TSA because of the justness of its cause represents justice.

As with all debates between the advocates of order and justice, one must ultimately stake out a position. This dissertation uses the conceptualization of international politics provided by the English School in general, and Hedley Bull in

particular. One of the English School's core ideas is that of international society, or the society of states. While acknowledging that states exist in anarchy, the English school posits that order does in fact exist in the international system: "Order is a pattern of behaviour that sustains the elementary or primary goals of social life. Order in this sense is maintained by a sense of common interests in those elementary or primary goals; by rules which prescribe the pattern of behaviour that sustains them; and by institutions which make these rules effective."⁹

According to Bull, the society of states has a number of goals driving how it operates. The first goal is the preservation of the system and the society of states. Second, the society of states desires to maintain the sovereignty and independence of all members; but the society will subordinate the independence of any one member or a few members to the goal of maintaining the society of states. And third, a goal for international society is peace, with peace being understood as the absence of war

⁹ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (New York: Columbia University Press, 1995), 51. See generally, Bull, 51-73. A sampling of the core works of the English School of international relations theory is Herbert Butterfield and Martin Wight, eds., *Diplomatic Investigations: Essays in the Theory of International Politics* (Cambridge, MA: Harvard University Press, 1966); Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (Oxford: Clarendon Press, 1984); Hedley Bull, ed. *Intervention in World Politics* (Oxford: Clarendon Press, 1984); R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986). There are also a number of thoughtful secondary sources that discuss the English School. See Stanley Hoffmann, "Hedley Bull and His Contribution to International Relations," *International Affairs* 62, no.2 (Spring 1986): 179-195; and Kai Alderson and Andrew Hurrell, eds., *Hedley Bull on International Society* (New York: St. Martin's Press, 2000). The Alderson and Hurrell edited work, in addition to being a thoughtful secondary source, also contains a number of Bull's most important essays, to include "The Grotian Conception of International Society;" and "Justice in International Relations: The 1983 Hagey Lectures."

between the members as the condition of membership in the society.¹⁰ It is these basic rules from which international society operates.

Bull also devotes a chapter of *The Anarchical Society* to a discussion of Order vs. Justice.¹¹ He acknowledges the importance of order to international society, for it is order that sets the conditions for the achievement of other values that states find to be important. In this sense, order is the primary good within international relations. But Bull does not unconditionally come down on the side of order in all instances. He notes that in any given case, one must examine the embedded issues of justice within it, and that while order may be desirable, if it comes at the expense of justice—however one chooses to define it—then one must accept the necessity of change to the order.¹² For Bull, then, order is the leading good, but it does not always trump justice.

In addition to Bull's conception of international society, another important piece of this argument is the reemergence of a sense of justice in contemporary just war thinking. This author agrees with Professor Johnson that some sense of justice ought to be returned to the just cause criteria of the just war tradition.¹³ While the moral limitations placed on justice in the era of massed armies and the potential for a superpower nuclear exchange may not have been unreasonable, such limitations in the face of contemporary international problems leads to an inadequate moral base from

¹⁰ Bull, *The Anarchical Society*, 16-9.

¹¹ See generally Bull, *The Anarchical Society*, 74-94.

¹² *Ibid.*, 93-4. Bull outlines three ideal-type conceptions of justice: international or interstate justice; individual or human justice; and cosmopolitan or world justice. See *ibid.*, 75-82.

¹³ See James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, CT: Yale University Press, 1999), particularly Chapter Three, "The Question of Intervention," 71-118.

which to provide guidance to the policymaker. Professor Johnson argues from a presumption for justice and makes the case that states have an obligation to intervene to protect against human rights atrocities.

In light of the problem posed by trans-state actors, it seems reasonable to follow Professor Johnson's precedent. But justice in this case would look different than in Professor Johnson's argument. Instead of protecting human rights, the society of states in this instance would be interested in protecting the very society that they have formed through their own interactions and understandings from the threat posed by a destabilizing TSA. Given the framework of the English School's international society, it is not unreasonable to stipulate that international society would deem a TSA using private violence in order to gain a political objective as a threat to the society and international stability. International society would band together and attempt to limit the TSA's ability to conduct such violence, through the use of force if necessary, if a TSA's use of violence became destabilizing. In this case, the importance of order for international society would, in all likelihood, trump the justice for which the TSA might be fighting. One could term this notion of justice as the *justice of states*, which would allow the society of states to maintain order at the expense of justice. But to be consistent with Bull's thinking on Order vs. Justice, one must, in every instance, examine the idea of justice for which the TSA is fighting, to ensure that it must, indeed, be trumped by the importance of order. For it is not inconceivable that a TSA may at some point in the future find a cause that the society of states would deem just, like the

rise of wars of self-determination in the decades following the Second World War. And if this were the case, then international society would not necessarily choose order over justice.

How might this concept of the justice of states work in the anarchical international system? Implicit within Bull's notion of the international society is that the society is ill-equipped to make determinations of this type. Unlike many theorists who compare international politics to a Hobbesian society,¹⁴ Bull likens international society more to a Lockean notion of society, where the individual members bear the responsibility for interpreting the rules, as well as enforcing or not enforcing these rules.¹⁵ But when the society of states is considering whether to use force against a trans-state actor, and choose order over justice in the process, such a decision cannot be left to an individual state. The society of states must reach some level of consensus on the necessity of such an action.

How might such a decision to use force against a TSA be made? And how might the society of states decide between its own *justice of states* versus the TSA's ostensible just cause? While it is not the place for moral argument to lay out the details of how such a consensus might be achieved, it would seem reasonable to posit that such a consensus could either occur at the level of a supranational organization—such as the

¹⁴ Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth Ecclesiastical and Civil*, Michael Oakeshott, ed. (New York: Simon & Schuster, 1962).

¹⁵ Bull, *The Anarchical Society*, 46; John Locke, "The Second Treatise on Government: An Essay Concerning the True Original, Extent, and End of Civil Government," *Two Treatises of Government* (New York: New American Library, 1960). See specifically Chapter Two "Of the State of Nature," and Chapter Three, "Of the State of War," 309-23.

United Nations Security Council or General Assembly. Or it could occur at the regional level if the TSA's challenge is limited to a single region. The key would be that an individual state could act when backed by such a consensus. Without it, a state could be perceived as acting purely for self-interested reasons, instead of for the goal of maintaining order in international society.

The drive for consensus at the supranational or regional level would also allow for a discussion and consideration of two important aspects of the TSA's case: the nature of the ostensible just cause for which a TSA might be fighting, as well as whether sufficient accountability over the person possessing the Competent Authority exists. While it would not guarantee that the society of states would validate the justice of the TSA's cause, it would ensure that the society at least accounted for the TSA's view. In doing so, it would provide a check against an inadvertent choice of order over justice. If the society of states deems it worthy, it would validate the justness of a TSA's cause. And if the society of states believed that sufficient accountability exists within the TSA regarding the decision to use public violence, the combination would allow the society of states to confer, in effect, competent authority on the TSA to conduct public violence.

The advantage of using Bull's international society, with its presumption against instability, as the basis for the justice of states is that it is a compelling state-based conception that is easily adaptable to the analysis of state-TSA conflict. And with the

presumption for stability, it puts at the forefront the idea that states desire a stable international system so that they can provide for the needs of their own inhabitants.¹⁶

But an argument premised on a justice of states would have a number of disadvantages, the most telling of which is the difficulty of introducing justice into international law. Legal positivists argue that the strength of positive international law is that it is objective and unbiased, although post-modernist and feminist thinkers argue otherwise. Moreover, the New Haven School (NHS) posits human dignity as the basis for their theory of international law, and they have been roundly criticized for it.¹⁷ It is apparent, though, that NHS proponents argue that their theory is objective and unbiased, despite their being explicit about the importance of using human dignity as a key premise. Thus, while using a notion of justice as the basis for change in international law would receive criticism, none of it would be debilitating. Ultimately, with any attempt to advocate for a sense of justice, one must expect criticism from those who disagree with the base premises.

An argument premised on a justice of states would have other disadvantages. Bull's conception of international society is biased towards the status quo; some may also argue that it does not adequately represent globalization. And because of this, it may not adequately account for the fact that the private use of force by a TSA may

¹⁶ Charles Beitz terms this *social liberalism*. This view of the international realm sees a division of labor between domestic and international societies. The individual domestic societies are responsible for ensuring the well-being of their people, "while the international community is responsible for maintaining background conditions in which decent domestic societies can flourish." Beitz, "Rawls's Law of Peoples." *Ethics* 110 (July 2000): 765-807.

become a significant dynamic for change within the international structure, regardless of what states might do to try to prevent it. A third disadvantage would be the criticisms emerging from the cosmopolitan camp. Theorists such as Charles Beitz and Thomas Pogge criticize Walzer's "morality of states" argument in *Just and Unjust Wars*, which in many ways is similar to Bull's. They argue that states cannot be moral agents and the correct focus for morality must be on the individual.¹⁸ Walzer's argument is for the morality of a *people* vice a state; an argument based on Bull's thinking would be more vulnerable.¹⁹

Thus, like with the attempts of the New Haven School to instill a sense of justice into international law, the *justice of states* argument, with its basis in the English School's conception of international society, would be vulnerable to criticism from those not agreeing with the premises that form the basis of justice. But these criticisms are not necessarily debilitating and the advantages gained through such a conception based on international society provide greater leverage for moral thinking when dealing with the issue of conflict between a state and a trans-state actor.

¹⁷ See for example of a critique from the Critical Legal Studies school, see Nigel Purvis, "Critical Legal Studies in Public International Law," *Harvard International Law Journal* 32, no 1 (Winter 1991): 85-6.

¹⁸ Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979); Thomas W. Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989).

¹⁹ The counterargument to the cosmopolitan critique is threefold. First of all, the cosmopolitans focus on the idea of justice for the individual instead of justice of the system, so it remains to be seen how applicable their argument might be to this particular problem. Second, this camp posits a view of humanity that has not yet come into being and to be honest, this author has trouble seeing such a view coming about any time soon. And third, while the cosmopolitans advocate a vision for how people ought to get along, they provide few details about the structure of the international institutions that would be necessary to turn this vision into reality.

A Trans-State Actor's Combatant Gaining War Rights

The conflict between a TSA's lack of competent authority and the possibility that it might possess an ostensible just cause is but one of the conflicts needing resolution when examining the legal and moral issues surrounding a state-TSA conflict. A second difficult challenge posed by this type of conflict is the issue of whether a TSA's combatant might gain war rights, and if it is possible for them to do so, what conditions are necessary for this to occur?

International humanitarian law carefully explicates which people in a conflict gain which specific types of war rights.²⁰ IHL also carefully limits war rights and the protections of Prisoner of War status to those combatants who fight in an international conflict and who fulfill the necessary criteria that maximize the adversary's ability to discriminate between combatants and noncombatants.

While international law is fairly explicit in this regard, how does political theory explain war rights for combatants? In essence, a soldier who is lawfully acting as an agent for a political community ought not to be punished for actions that he takes on behalf of that community, actions that would otherwise be considered unlawful in domestic society. This view has been prevalent since the days of hoplite warfare in the era of the Greek city-state up until the present day.²¹ An early example comes from

²⁰ See the previous discussion of combatant war rights in Chapter Four, 146-7.

²¹ For an examination of the cultural restraint on warfare during this time, see Josiah Ober, "Classical Greek Times," in Michael Howard, George J. Andreopolous and Mark R. Shulman, eds., *The Laws of War: Constraints on Warfare in the Western World* (New Haven, CT: Yale University Press, 1994), 12-26.

Shakespeare, where obedience to the king—and thus the state—is considered paramount: “We know we are the king’s servants...our obedience to the king wipes the crime of it out of us.”²² One of the best examples providing a theoretical basis for this argument comes from Jean-Jacques Rousseau:

War is not a relation between men, but between powers, in which the private individuals are enemies only by accident, less as citizens than as soldiers...One has the right to kill its defenders as long as they are armed, but as soon as they lay down their arms and surrender, they cease to be enemies, or rather instruments of the enemy, and one no longer has right to their lives.²³

For Rousseau, a state’s citizens are innocent parties to the war, which is waged between political communities of states. It is because soldiers fight on behalf of the state and as a result of the general will of the state under the social compact, that they are considered innocent. Thus the individual soldier gains the protections and war rights that are entitled to him.

Rousseau is not the only theorist to examine this idea: Michael Walzer does so, too. Walzer’s argument is similar to that of Rousseau. Under the “war convention,”

²² William Shakespeare, *The Life of Henry the Fifth*, 4.1.131-133, *The Complete Signet Classic Shakespeare* (New York: Harcourt, Brace, Jovanovich, 1972), 787.

²³ Jean-Jacques Rousseau, “Fragments on War,” *Rousseau on International Relations*, Stanley Hoffmann and David P. Fidler, eds. (Oxford: Clarendon Press, 1991), 48-52 (quote is on 52). The full quote is listed below because it provides an useful political theoretical basis for the principle of discrimination: “But it is clear that this supposed right to kill the conquered in no way comes from the state of war. War is not a relation between men, but between powers, in which the private individuals are enemies only by accident, less as citizens than as soldiers. The foreigner who robs, pillages and detains subjects without declaring war on the prince is not an enemy but a brigand; and even in the midst of war a just prince seizes everything in an enemy country that belongs to the public, but respects the person and goods of private individuals. He respects the rights on which his own power is based. The end of war is the destruction of the enemy state. One has the right to kill its defenders as long as they are armed, but as soon as they lay down their arms and surrender, they cease to be enemies, or rather instruments of the enemy, and one no longer has right to their lives. Once can kill the state without killing a single one of its members. War confers no right that is not necessary to its end.”

soldiers have license to kill other soldiers at any time. But soldiers are also obligated to “fight well” according to the rules. Since soldiers are most likely fighting involuntarily out of a sense of duty to the state, they are considered to be moral equals on the battlefield. And as such, they are not considered to be criminals for any acts that they might commit while on the battlefield.²⁴ But Walzer takes this argument one step further. In examining the question of whether the combatants of a non-state actor, such as a guerrilla, might possess war rights similar to those of a soldier, Walzer argues that the guerrillas receive their war rights because the community for which they fight provides such war rights to them because the guerrillas fight *as if* the community is rising up as in a *levee en masse*.²⁵ This represents a key distinction. For Walzer, the fact that the guerrilla is not fighting for a state does not present a problem. So long as the guerrilla fights on behalf of a community, the guerrilla ought to receive war rights. Hedley Bull summarizes Walzer’s position when explaining Walzer’s view of the moral reality of war:

The distinction between moral rules and rules that are better described as procedural or customary is not always easy to draw, but war as a matter of fact is an inherently normative phenomenon; it is unimaginable apart from the rules by which human beings recognize what behavior is appropriate to it and define their attitudes toward it. War is not simply a clash of forces; it is a clash between *agents of political groups* who are able to recognize one another as such and direct their force at one another only because of the rules they understand and apply.²⁶

²⁴ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 2000), 127-28.

²⁵ *Ibid.*, 179-86.

²⁶ Hedley Bull, “Recapturing the Just War for Political Theory,” *World Politics* 31, no. 4 (July 1979): 588-599 (quote is on 595-6). Emphasis added.

Using Bull's language, Walzer transcends what had been the normative view of who had war rights by extending those war rights to those agents of *any political group*, so long as that group supports those agents.

What is this issue's effect on whether a TSA's combatants ought to receive war rights? Walzer makes the case that the agents of political groups ought to receive war rights, so long as they also accord to others their deserved rights. A TSA is, by definition, a political group, although one whose basis is different from that of a state with geographically defined borders, or a political community in Walzer's sense of the term. Are TSAs evolving to the point where their nature as political actors will allow their combatants to gain these war rights? Are these combatants the agents of a political group that is sufficiently similar to Rousseau's classic political group or Walzer's political community? While it is doubtful that the society of states would today conclude that a TSA has evolved to such an extent, one cannot say that this could never occur in the future—particularly in light of the growth in numbers and influence of trans-state actors in world politics—and that the society of states might someday deem the nature of the political community that embodies a particular TSA as sufficient to provide war rights to its combatants.

Given this conclusion, under what conditions might the society of states allow a TSA's combatants to gain combatant rights, and specifically, the protections provided for under Prisoner of War status? At a minimum, a TSA and its combatants must be willing to fight in a manner that is consistent with the established laws and customs of

war. And specifically, a TSA's combatant must respect the principle of discrimination and ensure that all noncombatants and civilian objects are afforded the utmost protection from warfare. If they were to do that, there is no reason for a TSA's combatant to be denied the combatant rights, and the protections afforded by PoW status. But this does not address the other facet of this moral reasoning: the actor with which the combatant is affiliated must itself have some form of recognition from the society of states. The final section addresses this concern.

Divergence of the *Jus ad Bellum* and *Jus in Bello*

It becomes quickly apparent when examining the discussion of the past two sections—Competent Authority vs. Just Cause and a Trans-State Actor Combatant Gaining War Rights—that a second divergence exists, this one being between the two parts of the just war tradition. On the one hand, the first section concludes that while a TSA in general does not possess the necessary authority to wage public war, it is possible that it can gain such authority *de facto* if the society of states agrees that the TSA's cause is sufficiently just. On the other hand, the second section argues that the society of states may grant war rights such as prisoner of war status to a TSA's combatants if they abide by the Laws of War and fulfill the requirements of the principle of discrimination and if at some point a TSA has evolved to the point where international society might grant such rights. Implicit in this argument about combatant rights is that the conditions of the *jus ad bellum* have been fulfilled, which is an

improbable, although not impossible, eventuality. The two sections posit outcomes that on surface appear theoretically inconsistent and perhaps incompatible.

How should one reconcile this divergence? This section examines this issue in two parts. The first examines the fact that there has been a divergence between the *jus ad bellum* and the *jus in bello* throughout the history of the just war tradition, and argues that such a divergence between the two today is not necessarily a problem. Part two then investigates the circumstances that might allow for a reconciliation of this divergence.

The Historical Precedent—Divergence in the Tradition

The fact that the two parts of this chapter's argument contained in the *jus ad bellum* and the *jus in bello* do not seem to agree with each other, while problematic, is not necessarily a debilitating problem. Why is that? Throughout the history of the evolution of the just war tradition, theorists in different eras emphasized one part of the tradition, depending on the reasons why they were examining the just war issues to begin with. For early theorists such as Saint Augustine and Saint Thomas Aquinas, who were primarily interested in the issue of whether a Christian could participate in a war, their focus was on the *jus ad bellum* and ensuring the proper explication of the three criteria for a war to be considered just, thus allowing Christian participation.²⁷ Once the determination was made that the "go to war" decision was just, Augustine and Aquinas

²⁷ For a general history of this evolution, see Johnson, *Ideology*, and Johnson, *Just War Tradition*. See also Chapter Five of this dissertation.

were less concerned with the just conduct of the hostilities. However, the resulting underdevelopment of the tradition's *jus in bello* aspects led to horrors of the Crusades.²⁸ As the tradition evolved, later theorists such as Vitoria and Grotius place greater emphasis on the *jus in bello* as the *jus ad bellum* diminished in importance. And in the modern era, where there is no *jus ad bellum* beyond the "aggressor-defender dichotomy," contemporary theorists focussed on *jus in bello* issues, as the debates over massed armies, nuclear weapons, and deterrence suggest.

Moreover, in today's policy realm, groups and advocates focus their attention on one area, usually the *jus in bello*. As an example, Human Rights Watch focuses exclusively on ensuring that combatants conduct conflicts within the norms of standing IHL. But the group does not offer an opinion regarding the *jus ad bellum*. Regarding the current situation in Iraq:

Human Rights Watch does not make judgments about the decision whether to go to war—about whether a war complies with international law against aggression. We care deeply about the humanitarian consequences of war, but *we avoid judgments on the legality of war itself because they tend to compromise the neutrality needed to monitor most effectively how the war is waged*—that is, compliance with international humanitarian law—and because they often require political and security assessments that are beyond our expertise. Whether or not one favors launching a war, whether or not a war is legally justified, we believe that agreement should be possible on the necessity of waging war in a way that minimizes harm to noncombatants, as international humanitarian law requires.²⁹

²⁸ For this argument, see G.I.A.D. Draper, "The Interaction of Christianity and Chivalry in the Historical Development of the Law of War," *International Review of the Red Cross* 46 (January 1965): 3-23.

²⁹ See "Human Rights Watch Policy on Iraq," found at <http://www.hrw.org/campaigns/iraq/hrwpolicy.htm>, last viewed February 23, 2003. Emphasis added.

As can be seen by even a cursory examination of the evolution of the just war tradition and but one example of a non-state actor's interest in this area, a focus on one of the tradition's parts at the expense of the other is hardly unprecedented. Such compartmentalization is often the result of the emphasis at that point in history, or the focus of the particular group. Because of this, the fact that this dissertation reaches conclusions that are seemingly contradictory is not necessarily problematic or unprecedented.

Conditions for Reconciliation

But while one might concede that such contradictory conclusions might not be problematic or unprecedented, it is unsettling and not satisfactory. As such, this section investigates the conditions where it might be possible to reconcile these two concerns. On the surface, the logical starting point is to ask when might a TSA gain the necessary authority to wage public war? The first section has already posited one possibility: the society of states might confer such authority *de facto* if it believes that the cause for which the actor is fighting is just. If a TSA were to fight in a conflict that were to produce a similar resonance with international society as did the wars for self-determination in the post-colonial period, such authority might be forthcoming.

Another possibility comes from the evolving nature of trans-state actors, state sovereignty, and international politics. As trans-state actors continue to evolve and grow in the influence that they wield within international politics, it is not inconceivable that some day the society of states might concede to certain TSAs the competent

authority to fight a public war, under limited circumstances, on *an independent basis*. Yet while it is possible, one must argue that such a concession on the part of the society of states would be highly improbable. First, when working within Hedley Bull's conception of the society of states, one must agree that states jealously guard that right to competent authority to wage public war and would be reluctant to concede it. While there may be some countervailing forces within international politics pressuring states to concede that authority, most states—and particularly the powerful states—would be loathe to make that concession. Similarly, such a concession would be contrary to the received wisdom of western attempts to restrain warfare, of which the just war tradition and international law on the use of force are the moral and legal manifestations. And key to this tradition of restraining warfare is limiting as much as possible the number of actors within international politics that possess that authority. Finally, the issue of which person within the TSA's hierarchy would possess the authority, along with the accountability issues for the misuse of that authority, would tend to give the society of states further reason to pause before conferring such authority. It is important to note, however, that it is possible, though not probable, that a TSA may become sufficiently evolved in the future that it would possess sufficient internal accountability mechanisms that would lessen this concern. Because of these, while one cannot completely discount the possibility, one must conclude that the society of states would prove extremely reluctant to concede competent authority to make public war to a TSA on an independent basis simply because of the changed nature of trans-state actors.

There is one final possibility for how a trans-state actor might gain the necessary competent authority to wage public war: by gaining such authority from a state by either fighting for it or along side it. This is not an impossibility. Although a TSA is based on loyalties that are different from those that bind the citizens of a state, it is possible that the TSA's political objectives may be compatible with those of a state. The difference in the basis for membership between the two actors does not necessarily result in incompatible political objectives.

How would this work? Since a TSA lacks the necessary competent authority to wage public war, a state could, in essence, grant that authority to a TSA. But in doing so, the state must then accept responsibility for the TSA's actions, for the TSA would be acting as an agent of the state. And thus the society of states could then hold that state legally accountable for those actions if the society found the TSA's actions to be unacceptable. Another important aspect of a state granting to a TSA some of its Competent Authority is that it reduces the problem posed by the question concerning which person within the TSA's hierarchy would possess this authority, as well as the accountability issue. Since a state would be accepting this responsibility, the society of states would be less concerned about having an errant TSA destabilizing international society. The society of states could hold the state accountable.

A state conferring its Competent Authority upon a TSA would be a risky proposition. A state considering this option would have to be certain that the TSA would act in a manner consistent with the state's objectives. It ultimately remains to be

seen, given the nature of the a TSA, whether a state could in fact trust a TSA to that degree.³⁰ Still, assuming that a state could trust a TSA, it would not be unreasonable to believe that it could allow a TSA to fight a public war on its behalf, with the state accepting the necessary responsibility.

It is now possible to complete the investigation of combatant rights.

Traditionally, groups in civil wars received belligerent status—and thus its combatants afforded humanitarian protections—when the group and the conflict achieved four criteria:

First, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy an administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency. Recognition of belligerency is in essence a declaration ascertaining the existence of these conditions of fact.³¹

The quote outlines the conditions under which an outside state might recognize the belligerent status of an insurgent group in a civil war, and thus be put in a position of having to decide whether to remain neutral or not in the conflict. In essence, the achievement of these conditions and the subsequent decision on the part of a state to remain neutral in the conflict *conferred competent authority* upon this group. When applying this to a TSA, it becomes apparent that the situations are not completely analogous. Given a TSA's nature, the conflict could almost certainly be local vice

³⁰ For previous discussion, see Chapter Four, 148-9.

general, nor would it necessarily be fighting for territory, so the first two conditions do not translate. But the third criterion is critical: fighting under responsible authority and according to the law and custom of war. Implicit with a TSA achieving this threshold is that decision makers within the TSA would be held accountable for their decisions: the TSA must demonstrate its acceptance of a belligerent's duties. In essence, then, this idea is the same regardless of whether this group is a sub-state or trans-state in nature: upon receiving *conferred* competent authority, the TSA would then become a belligerent, and would then be accorded belligerent rights and protections as well as accepting the correlative responsibilities. Given this logic, and since a TSA would gain competent authority in a different manner, this argument plays out as follows. When a TSA gains competent authority, either because international society deems its cause to be just or because the TSA gains it from a state, then the TSA gains belligerent status and its combatants ought to receive combatant rights, assuming they fulfill the requirements outlined in the First Addition Protocol.

Conclusion

As one might expect, the conclusions from this chapter are nuanced and contingent—a black and white answer is impossible. What are the implications of these conclusions? First, the concept of the *justice of states* provides a moral basis for a state or a group of states to conduct a just conflict against a TSA, assuming that an

³¹ H. Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1948), 176.

international or at least a regional consensus develops regarding the necessity for doing so. Such a moral basis allows a state or states to take action against such a TSA that might not otherwise be possible if one were limited to the “aggressor-defender dichotomy” that exists within most contemporary just war theorizing. Since the conception of the justice of states is consistent with Hedley Bull’s thoughts on order versus justice, any ostensible just cause for which the TSA might be fighting would not automatically be trumped by the presumption for stability that is inherent within the *justice of states* argument. And this drive for consensus would also allow for a full consideration of whether there would be sufficient accountability for the person within the TSA that would possess this authority.

Second, in addition to gaining *de facto* competent authority through fighting for a cause that international society deems to be just, a TSA could gain Competent Authority from a state to wage a public war on its behalf. But in doing so, the state must accept the responsibility for the TSA’s actions, since the TSA would be acting as the state’s agent.

Third, the society of states conceding belligerent status and combatant rights and protections to a TSA and its combatants if they accept the correlative responsibilities is not unprecedented. The society of states made a similar concession to sub-state groups fighting in an “international” conflict for self-determination. So long as the TSA’s combatants “fight well” and follow the principles of discrimination, they ought to receive these protections.

Finally, one can conclude that there are two conditions that a TSA and its combatants must fulfill, with both conditions being necessary and neither sufficient, for a TSA's combatants to gain the protections of international humanitarian law afforded to combatants. First, the TSA must gain competent authority to wage public war by either of the two possible means—having it conferred by the society of states because its cause is just or gaining it through association with a state. And second, the combatants must fulfill all the requirements necessary to be considered prisoners of war according to the First Additional Protocol, which would then maximize the discrimination between combatants and noncombatants.

CHAPTER SEVEN

POLICY IMPLICATIONS

Introduction

The previous four chapters examine the international legal and moral issues surrounding a conflict where one of the belligerents is not a state, but a trans-state actor. Chapter Six represents a synthesis of the analysis. With any useful legal and moral analysis of an interesting question, though, one must ultimately be able to apply the analysis to that real world problem. If the work will not allow a policymaker to do that, such moralizing is ultimately destined to remain in the ivory tower.

To accomplish this goal, this chapter examines three separate, yet interrelated areas of policy and applies the conclusions from the preceding moral analysis to them. The first part examines the United States's policy and actions towards the al-Qaeda terror network in both the pre and post-September 11, 2001 eras. Part two looks into how the *justice of states* argument more generally reflects on the challenge posed by state sponsored terrorism. Finally, the third section investigates how the entire argument affects a problematic and contentious area of international relations: mercenaries. In the process of examining these areas, the chapter makes the case that

this dissertation achieves its subsidiary objective of providing useful moral guidance to the policymaker.

Al-Qaeda: Before and After September 11, 2001

The events of September 11, 2001 mark an important juncture within international relations, international law, and international morality. This change has sparked a rapidly growing literature that examines all these issues and how they relate to those events.¹ This dissertation adds to this literature by making the claim that what occurred in the days and weeks following September 11, 2001 is actually the *justice of states* concept in action. Chapter Three outlines the steps that a number of international organizations took following the events of September 11, 2001, as well as their

¹ For a sampling of the works emerging in post-September 11 era, see Sean D. Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter," *Harvard International Law Journal* 43, no. 1 (Winter 2002): 41-51; W. Michael Reisman, "In Defense of the World Public Order," *American Journal of International Law* 95, no. 4 (October 2001): 833-35; Jonathan I. Charney, "The Use of Force Against Terrorism and International Law," *American Journal of International Law* 95, no. 4 (October 2001): 835-39; Thomas M. Franck, "Terrorism and the Right of Self-Defense," *American Journal of International Law* 95, no. 4 (October 2001): 839-43; Detlev F. Vagts, "Hegemonic International Law," *American Journal of International Law* 95, no. 4 (October 2001): 843-48; Anne Marie Slaughter and William Burke-White, "An International Constitutional Moment," *Harvard International Law Journal* 43, no. 1 (Winter 2002): 1-21; Christopher Greenwood, "International Law and the 'War on Terrorism,'" *International Affairs* 78, no. 2 (2002): 301-317; Adam Roberts, "Counter-Terrorism, Armed Force and the Laws of War," *Survival* 44, no. 1 (Spring 2002): 7-32; Jack M. Beard, "America's New War on Terror: The Case for Self-Defense Under International Law," *Harvard Journal of Law and Public Policy* 25, no. 2 (Spring 2002): 559-90; Michael Glennon, "The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter," *Harvard Journal of Law and Public Policy* 25, no. 2 (Spring 2002): 539-558; Stephen R. Ratner, "*Jus ad Bellum* and *Jus in Bello* After September 11, 2001," *American Journal of International Law* 96, no.4 (October 2002): 906-921; Jean Bethke Elshtain, *Just War Against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003); Alan Cooperman, "Academics Defend U.S. War on Terrorism," *Washington Post*, February 12, 2002, A16; "What We're Fighting For: A Letter From America," found at http://www.propositionsonline.com/fighting_for/fighting_for.html last viewed on February 25, 2002, reprinted in Elshtain, 182-207; "Roundtable—The New War: What Rules Apply?" *Ethics and International Affairs* 16, no. 1 (2002): 1-26; Pew Forum on Religion and Public Life, "Just War Tradition and the New War on Terrorism," October 5, 2001, found at <http://pewforum.org/events/>, last viewed on March 11, 2003.

significance.² What is clear from these statements is the implicit and sometimes explicit consensus that quickly emerged from the society of states regarding al-Qaeda's threat to the stability of the society of states.

The United States's and the world community's response to the attacks is also instructive. In the days and weeks following September 11, the world witnessed the beginning of an unprecedented level of cooperation between states. Not limited to simply the area of individual and collective self-defense, this cooperation occurred in the realms of intelligence collection and sharing, law enforcement, and financial cooperation. And equally compelling is the fact that as the United States and Britain began their operations against the Taliban regime in October 2001, little or no criticism emerged against these actions, even from Arab governments.³

It is undeniable that a consensus exists among the members of international society regarding al-Qaeda's threat, given the almost near-unanimous condemnation of the acts, as well as the unprecedented support given to the United States as it prosecutes the war on terror. Additionally, one of the core purposes of the society of states, according to Hedley Bull, can be seen in the United States's actions towards the Taliban regime. According to Bull, the society of states will subordinate the sovereignty of one or even a few states to the international society's need to maintain the stability of the system. Recognizing the threat to its stability that al-Qaeda and the Taliban regime pose, international society acquiesced to the destruction of the Taliban regime. Finally,

² See Chapter Three, 73-6.

while international society may have been willing to consider the justness of al-Qaeda's cause, and might have even been sympathetic to it in some quarters, al-Qaeda's indiscriminate use of force was deemed unacceptable. The society of states found that the "self-conference" of the "moral authority" to use public violence, based on transcendent belief, not to be convincing because, among other things, it blurred the distinction between combatant and noncombatant—one of the core restraints on warfare within the international system.⁴

The horrors of the events of September 11 and the resulting actions of the society of states provide an easy example of the conception of the *justice of states* in action. How might this conception work in an era when the threat is less clear-cut? One such example is the period leading up to the attacks on September 11. In the years prior to September 2001, al-Qaeda struck a number of American sites and interests, to include the truck bombing of the World Trade Center in 1993, the bombings of the American Embassies in Kenya and Tanzania in August 1998, and the attack against the USS Cole in October 2000. In this period, it would be difficult to argue that these actions, either singly or collectively, crossed the legal threshold of an armed attack, at least not in the qualitative and quantitative manner of the September 11 attacks. Thus any substantial military action in response to these attacks would have fallen outside of

³ Murphy, 49. For the reaction of Arab governments to American and British actions in Afghanistan, see Daniel Williams, "Islamic Group Offers U.S. Mild Rebuke," *Washington Post*, Oct 11, 2001, A21.

⁴ For a discussion of the emergence of private moral authority in international politics, see Mark Juergensmayer, "The Global Dimensions of Religious Terrorism," *The Emergence of Private Authority in Global Governance*, Rodney Bruce Hall and Thomas J. Biersteker, eds. (Cambridge: Cambridge University Press, 2002), 141-57.

Article 51's exception to Article 2(4)'s proscription on the threat or use of force, because these actions did not rise to the level of armed attack, according to a restrictionist interpretation.

It is illustrative to investigate how the *justice of states* might work in this instance where the TSA's actions do not reach the threshold of an armed attack. Under the *justice of states* argument, while it may not have been *legal* for the United States to launch an attack on al-Qaeda and the Taliban regime of the magnitude of the one in October 2001 in response to the series of attacks occurring *prior* to September 11, such a response against al-Qaeda and the Taliban could have been *morally justified* under the *justice of states* conception. For that to occur, a consensus would have had to form, either at the UN Security Council or at a regional level, that al-Qaeda represented a threat to the stability and safety of international society. With that consensus, the society of states, with the United States at its head, could then have attacked al-Qaeda in a similar manner as it did in October 2001. Yet such a consensus regarding the threat posed by the TSA did not emerge until after the horrific scenes of that late summer morning were beamed worldwide.

The final area of applying this dissertation's conclusions to policy problems emerging from al-Qaeda's actions is the status of the al-Qaeda detainees currently held in Guantanamo Bay, Cuba and elsewhere.⁵ In this student's opinion, an al-Qaeda

⁵ This is not the first examination of this issue. See George H. Aldrich, "The Taliban, al Qaeda, and the Determination of Illegal Combatants," *American Journal of International Law* 96, no.4 (October 2002): 891-898; Stephen R. Ratner, "*Jus ad Bellum* and *Jus in Bello* After September 11, 2001," *American Journal of International Law* 96, no.4 (October 2002): 906-921; George P. Fletcher, "On Justice and

combatant would not be classified as a prisoner of war under the terms of the First Additional Protocol⁶ if he did not fulfill the criteria listed under Article 44(3): carrying arms openly during the military engagement and during the approach. The September 11 hijackers, posed as civilians before they took over the aircraft. Had they lived and been detained after their crimes, they would not have been eligible to receive the protections of prisoner of war status because they did not carry their arms openly. Moreover, the Third Geneva Convention's requirement that combatants must be under responsible command and following the law and customs of war are still in force.⁷ Lastly, al-Qaeda had not received belligerent recognition in any form from the society

War: Contradictions in the Proposed Military Tribunals," *Harvard Journal of Law and Public Policy* 25, no. 2 (Spring 2002): 635-663; Kenneth Anderson, "What to do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base," *Harvard Journal of Law and Public Policy* 25, no. 2 (Spring 2002): 591-634; Anne-Marie Slaughter, "Beware the Trumpets of War: A Response to Kenneth Anderson," *Harvard Journal of Law and Public Policy* 25, no. 3 (Summer 2002): 965-976; Lee A. Casey, David B. Rivkin Jr., and Darin R. Bartram, "By the Laws of War, they Aren't POWs," *Washington Post*, March 3, 2002, B03; Michael J. Nardotti Jr., "Military Commissions," *Army Lawyer* (March 2002): 1-18; generally, L.C. Green, "Lawful Combatants," *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester: Manchester University Press, 2000), 102-121; L.C. Green, "Prisoners of War," *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester: Manchester University Press, 2000), 196-215; L.C. Green, "Prisoners of War," *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester: Manchester University Press, 2000), 317-335; and "Agora: Military Commissions," *American Journal of International Law* 96, no. 2 (April 2002): 320-358 (series of five short articles).

⁶ "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, Article 44(3), *Documents on the Laws of War*, 3d ed., Adam Roberts and Richard Guelff, eds. (Oxford: Oxford University Press, 2000), 444 (The Adams and Guelff volume will hereafter be referred to as *Documents*; Protocol I will hereafter be referred to as AP1).

⁷ "1949 Geneva Convention III Relative to the Treatment of Prisoners of War," August 12, 1947, *Documents*, 244-298 (the third Geneva Convention of 1949 will hereafter be referred to as GC3). This examination represents the most generous conditions that an al Qaeda combatant must achieve. It does not even consider the fact that AP1 represents protections to be granted during an international conflict, where it would be difficult to argue that a TSA is actually a state. Moreover, it does not consider the fact that the United States is not a party to AP1. While the US does consider most of the terms of AP1 to be customary international law, it is reasonable to conclude that it does not agree with the loosening of the criteria for PoW status. See Ronald Reagan, "Letter of Transmission," January 29, 1987, *American Journal of International Law* 81, no. 4 (October 1987): 910-912.

of states, nor did it make any declaration of their intent to uphold combatant duties. And since these detainees are not afforded the protections of Prisoner of War status, both GC3 and AP1 allow for these “combatants” to be tried for any actions they may have taken during the conflict that are either against the Law of War or the domestic laws of the United States.

Based on this dissertation’s conclusions, it may be possible, from a moral perspective, for al-Qaeda combatants detained in the future to be granted prisoner of war protections if the following two conditions are fulfilled, with both conditions being necessary and neither being sufficient. First, al-Qaeda would have to receive some type of conferred competent authority to conduct public war, either from a state, or from the society of states in the form of belligerent status. And second, al-Qaeda combatants must fulfill the requirements for prisoner of war status outlined in AP1. Implicit in this condition is that an al-Qaeda representative must present to the International Committee of the Red Cross an instrument declaring the group’s willingness to abide by the laws of armed conflict.

Given the reality of this situation, however, it seems highly unlikely that either of these conditions will be fulfilled. Regarding the first condition, it is doubtful that al-Qaeda would have conferred upon it the necessary competent authority to wage public violence. Given the reaction of the society of states to its September 11, 2001 attacks, it is unlikely that the society of states will be sufficiently impressed with the justness of al-Qaeda’s cause to confer on the group such authority. And given the demise of the

Taliban regime in Afghanistan, states today would prove reluctant to enter into that kind of relationship with al-Qaeda, with all of the consequences thereof. Finally, given al-Qaeda's use of "transcendent moral authority" to justify its indiscriminate actions, it is doubtful that the society of states would agree that the group had sufficient internal accountability for the misuse of its self-conferred authority to use violence. And regarding the second condition, because of the apparent tactics of al-Qaeda—an avowed determination to attack civilians through the use of terror—any al-Qaeda combatant using such tactics could not receive the protections of PoW status.

Based on this examination of the policy challenges presented by al Qaeda and the war on terrorism, one can reasonably conclude that this dissertation's moral argument and synthesis provide answers to many of the vexing legal questions emerging because of this new conception of warfare. The *justice of states* argument provides the moral framework for the society of states to attack any TSA, and specifically a terror group, that threatens to destabilize the international system, provided that the society of states reaches a consensus regarding the threat that such a group might pose. This moral argument allows the policymaker to skirt the lacunae in the legal *jus ad bellum* of what precisely constitutes an armed attack and provides the moral basis for the society of states to use force outside Article 2(4)'s proscription on the threat or the use of force.

State Sponsored Terrorism

The second area where this dissertation's moral argument provides guidance to the policymaker is the challenging question of state sponsored terrorism. This issue, discussed in Chapter Three,⁸ is the issue of how much support must a state provide to an "armed band" for that state to bear responsibility for the "armed band's" or TSA's actions. This dissertation's moral argument makes the case that it is possible for a state to confer upon a TSA its own competent authority to wage public war. In the process of doing so, it fulfills the first of the two conditions for the TSA's combatant to receive prisoner of war protections.

Given that the resulting relationship between the state and the TSA would be close, one would have to categorize it as "state sponsorship."⁹ Under state sponsorship, the "armed band" or TSA is an agent of the state and carries out actions that are at least concurrent with the state's own policy objectives. Such a relationship produces two important implications. The first is that by conferring competent authority on the TSA, it fulfills one of the necessary conditions for a TSA's combatant to claim PoW status. The second implication is more troubling for the state. By entering into such a relationship with a TSA, the sponsoring state accepts responsibility for the TSA's actions, and could then be held accountable for those actions by the society of states.

⁸ See Chapter Three, 76-86.

⁹ This dissertation uses Richard Erickson's four-type typology as its benchmark. See Chapter Three, 77; Richard J. Erickson, *Legitimate Use of Military Force Against State Sponsored International Terrorism* (Maxwell AFB, AL: Air University Press, 1989), 32-34. Erickson's other types are state support, state toleration, and state inaction.

And under the justice of states argument, the society of states could then take actions against that state's sovereignty—to include the use of force—in order to hold that state accountable.

Once again, the post-September 11 era provides an excellent example with the Taliban regime in Afghanistan. After the attacks in New York and Washington, the United States and the United Nations Security Council through Resolutions 1368 and 1373, demanded that the Taliban hand over all suspected al-Qaeda members within its borders, shut down all al-Qaeda training camps, and admit inspectors into the country to verify the closure of the camps. The Taliban regime refused, and as a result, became the target of the United States operating under Article 51 of the UN Charter, and arguably the society of states under the moral argument of the justice of states. In the days following the attack against Afghanistan, it became apparent that not only was the Taliban sponsoring al-Qaeda, but that al-Qaeda was in fact sponsoring the Taliban.¹⁰ Such revelations regarding the al-Qaeda-Taliban relationship became public only after the attack began; it nevertheless illustrates the relationship between the two actors and that piece of evidence, if true, would justify the attack on Afghanistan with the justice of states argument providing the moral basis. It is evident, then, that this dissertation's moral argument provides useful moral guidance to the policymaker in this second area: state sponsorship or support of terrorism.

¹⁰ Bob Woodward, "Bin Laden Said to 'Own' Taliban: Bush is Told He Gave Regime \$100 Million," *Washington Post*, October 11, 2001, A1.

Mercenaries

The use of mercenaries by states or other actors in the international realm has been a fact of life in warfare for centuries.¹¹ It is only in recent decades, as states employed mercenaries to defend themselves in wars of national liberation or wars for self-determination, that the society of states has taken steps to outlaw their use.¹² Yet despite these legal efforts to outlaw mercenaries, the growth in the number and influence of private security firms and the demand for their services within the so called “weak states” of Africa suggests that the issue of mercenaries will remain an ongoing concern for policymakers, and that this is an area where moral reasoning may provide guidance.¹³

The argument against mercenaries is straightforward. Since his sole criterion in deciding for whom to fight is the highest bidder, a mercenary could on one day fight for one side in a conflict and then on the next day fight for the other. And since a mercenary or even a private security firm is an independent actor not accountable to a state or to any other actor—except its shareholders in the case of a firm—it establishes

¹¹ Michael Howard, *War in European History* (Oxford: Oxford University Press, 1976), specifically Chapter 2 “The Wars of the Mercenaries,” 20-37; James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981), 161-5.

¹² AP1, Article 47, *Documents*, 447.

¹³ David Shearer, *Private Armies and Military Intervention* (Oxford: Oxford University Press, 1998); Bernadette Muthien and Ian Taylor, “The Return of the Dogs of War? The Privatization of Security in Africa,” *The Emergence of Private Authority in Global Governance*, Rodney Bruce Hall and Thomas J. Biersteker, eds. (Cambridge: Cambridge University Press, 2002), 183-199; Juan Carlos Zarate, “The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder,” *Stanford Journal of International Law* 34 no. 1 (Winter 1998): 75-162; Dino Kritsiotis, “Mercenaries and the Privatization of Warfare,” *The Fletcher Forum of World Affairs* 22, no. 2 (Summer/Fall 1998): 11-25; Montgomery Sapone, “Have Rifle with Scope, Will Travel: The Global

the conditions where the mercenary or the firm could conduct a conflict without any regard for the established restraints embodied in the law and customs of warfare. On the surface international law is clear regarding mercenaries. Article 47 of the First Additional Protocol states: "A mercenary shall not have the right to be a combatant or a prisoner of war."¹⁴ The Protocol continues by explicating who might actually be considered a mercenary. While the criteria seem explicit on the surface, it would not prove difficult for a mercenary to find a loophole in the vague language to keep himself out of legal trouble. At best, Article 47's usefulness is questionable.¹⁵

While the image of the mercenary that immediately comes to mind is the Hollywood swashbuckler in search of wealth and fame in combat, the situation in the contemporary international realm is different. Most contemporary "mercenaries" work for private security firms. Most contemporary private security firms provide a wide range of services, only one of which is direct participation in combat.¹⁶ And given the continued growth of private security firms, fueled by the demand for their services in southern Africa because the region's "weak states" cannot provide these basic government services themselves, the phenomenon of a private security firm is one with which the international community must deal and enact acceptable policy.

Economy of Mercenary Violence," *California Western International Law Journal* 30 no. 1 (Fall 1999): 1-43.

¹⁴ AP1, Article 47, *Documents*, 447.

¹⁵ Shearer, 16-20.

¹⁶ In addition to direct Military Operational Support, other types of services that private security firms provide include Military Advice, Logistical Support, Security Services, and Crime-Prevention Services. Shearer, 25-6.

How might one apply Chapter Six's moral argument to this policy challenge? If a state hired a private security firm to provide any type of service, the state has the option of conferring on that firm its Competent Authority to use public violence. Doing so would allow the firm's members/employees to claim PoW status if they fulfilled the criteria for PoW status outlined in either the Third Geneva Convention or the First Additional Protocol. This conference also removes the accountability issue arising from the question of which person within the TSA might possess that authority.

But in conferring Competent Authority upon such a TSA, the state then accepts responsibility for that firm's actions taken on the state's behalf. This means that the state must be completely sure that the firm possesses sufficient military discipline in both its structure and its members that both will follow the state's orders as well as the law and customs of warfare. If this is the case, there would not be a reason, on the basis of this moral argument anyway, why a state could not hire a private security firm and grant to it and its members the necessary authority to conduct public violence on its behalf.

It is important to point out the limits of this argument. A combatant working for a private security firm would gain combatant rights only if the firm worked for a state government possessing the Competent Authority to wage public war. If the firm were hired by some sub-state political entity—like a state government in the United States—its combatants could not receive combatant rights because such a sub-state political entity does not in and of itself possess competent authority. It is possible, however, that

the sub-state entity could confer *law-enforcement* rights and protections upon the firm and its combatants, so long as the firm acted within the state's sovereign territory. The second limitation concerns a private business hiring a private security firm. In this instance, the firm's combatants would similarly not gain combatant rights because the private business does not possess the competent authority for public war that is one of the necessary conditions for a private security firm's combatant to gain prisoner of war rights.

This is a contentious proposition. The negative connotations associated with the term mercenary, along with the society of states codifying its refusal to grant combatant status or prisoner of war protections to mercenaries, suggests that this argument will receive considerable opposition, particularly from states in southern Africa whose people fought against mercenaries during their wars for self-determination. Yet the weak states of Africa will not quickly become strong; the demand for the services of private security firms will not diminish any time soon. Because of this continuing reality and its resulting policy challenges, the society of states must address this issue. And this section provides one such answer to this difficult policy challenge.

Conclusion

The ultimate goal and end use of moral theorizing is to provide guidance to the policy maker confronted with difficult legal and moral challenges. This has been the case since from the days of Plato and Aristotle to the present. Without the moral

philosopher providing insight on what law or policy *ought to look like*, the relations between governments and between a government and its population will never improve.

One of the key goals of this dissertation is to provide guidance to the policymaker, based on a moral argument, which will help the policymaker navigate the dangerous waters of the contemporary foreign policy environment. While conceptualizing international relations as state-based with little or no influence from non-state actors may have the appeal of parsimony, such a basis does not provide much guidance when the non-state or trans-state actors are becoming more influential and powerful, and powerful in areas where states used be the sole lawful practitioners.

This chapter examines three emerging problem areas in the Law of War when one of the belligerents in a conflict is not a state, but a trans-state actor. With its moral argument based in the western just war tradition, the dissertation provides guidance to the policymaker in areas where the emergence of non-state and trans-state actors cloud the issues and make standing treaty law difficult to interpret or even irrelevant. With the challenge of al-Qaeda, the *justice of states* argument makes the moral case for continued operations against the terror network, even if such operations fall outside Article 51's exception to the UN Charter's proscription on the use of force, so long as the consensus for such action continues. Another difficult and more general policy area is the issue of state sponsorship of terror groups. The dissertation's moral argument allows for a trans-state actor's combatants to receive prisoner of war protections, but places the responsibility for that TSA's action on the state sponsoring it. Finally, the

moral argument provides answers to the prickly issue of mercenaries. While the use of mercenaries has a negative connotation for many states, the proliferation of private security firms forces the policymaker to confront these issues. This moral argument provides one answer to that puzzle.

This dissertation provides relevant moral guidance to the policymaker on three contemporary policy challenges. In light of the answers outlined in this chapter, it is safe to conclude that this dissertation achieves its objective.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

The status of the detainees at Guantanamo Bay, Cuba points to a larger problem confronting the society of states as it conducts the war on terrorism. The Law of War, both the *jus ad bellum* and the *jus in bello*, conceptualizes war or conflict as either an international or internal phenomenon. While these conceptions of warfare work well whenever a conflict is actually between two states, or is contained within the political boundaries of a single state, neither conception works well when one of the belligerents is a trans-state actor (TSA). This final chapter reviews the key findings that emerge from this project's investigation. It then presents recommendations, based on the moral argument developed in the dissertation, for changes to codified international law or interpretations of customary international practice.

Findings

In its examination of the international law regarding the recourse to force and the actual use of force, this dissertation unearths a number of important lacunae in the Law of War.

Jus ad Bellum

The first problem area in the *jus ad bellum* is the question of what precisely constitutes an armed attack. According to Article 51 of the United Nations Charter, a state cannot use force in self-defense until an armed attack has occurred. This view of armed attack is based on the framer's conception of an armed attack as a massed conventional army penetrating a state's border. Given the tactics that one might expect a TSA to use, this conception does not provide sufficient guidance. Subsequent legal rulings, such as in the International Court of Justice's 1986 ruling in *Nicaragua v. United States*, provide an important benchmark for what constitutes an armed attack, but the dissent to that ruling makes a compelling case that the threshold for an armed attack is too high. The reaction of numerous intergovernmental organizations to the events of September 11, 2001 establishes a number of important data points. First, resolutions and statements made by these organizations in the aftermath al Qaeda's attacks on New York City, Washington DC, and Pennsylvania either explicitly or implicitly categorize these actions as an armed attack. This establishes that a TSA such as a trans-state terror network can mount an armed attack against a state. The problem, though, is that the attacks were so devastating that there is little doubt that these events exceeded the threshold for armed attack. What these statement do not provide, therefore, is any further insight into precisely where that threshold is located. So in spite of the events of September 2001, the issue of what constitutes an armed attack is still undecided and contentious.

A second problem area in the *jus ad bellum* is the question of state sponsorship of such groups. While much has been written and discussed regarding the varying levels of support that a state might provide to a TSA like a terror organization, there is still much debate and little consensus regarding what level of state support must occur before the society of states can hold one of its members responsible for supporting a TSA's illicit activities.

The final lacuna emerging from this investigation is that a state's response to a TSA's attack upon it, if it is conducted in the manner argued for by the restrictionists, would prove to be inadequate. As discussed in Chapter Three,¹ a more appropriate response to a TSA's attack would fall outside of this interpretation. An effective response that would remove the threat posed by the TSA would in all likelihood resemble deterrent proportionality—close to the realm of reprisals—nor would it necessarily occur immediately after the response.

These three lacunae, the lack of an accepted definition of armed attack, the challenge of state support to trans-state actors, and the legal limitations of an adequate response, combine to present a serious challenge to states contending with a trans-state actor driven to achieve its own political objectives through the use of private violence.

Jus in Bello

Within the *jus in bello* portion of the Law of War, a lacuna emerges as a result of the fact that international humanitarian law (IHL) does not adequately conceptualize

¹ See Chapter Three, 88-93.

this new phenomenon of conflict. Previous conceptions of warfare within IHL include international conflict, traditionally a state versus state conflict; but since 1977 and the ratification of the First Additional Protocol to the 1949 Geneva Conventions, IHL now designates internal conflicts characterized as wars for self-determination as international conflicts. The second conception of conflict, which the Second Additional Protocol codified in 1977, is the internal conflict, a conflict fully contained within the political boundaries of one state. Chapter Four argues that this third conception warfare, the state-TSA conflict, is in fact another conception of conflict and that standing codified IHL is inadequate to address the specific humanitarian challenges associated with this new conception.

When examining standing IHL to see what changes, if any, ought to occur in light of the fact that one of the belligerents this new conception of warfare is a trans-state actor, Chapter Four concludes that the only necessary change results from the different nature of the trans-state actor when compared to the state. The chapter concludes that from the perspective of IHL, if a combatant affiliated with a TSA fulfills the responsibilities associated with being a combatant, specifically the requirements for prisoner of war status outlined in either the Third Geneva Convention or the First Additional Protocol, then that combatant ought to receive the protections provided to combatants outlined in those two treaties. But while this argument outlines what duties an individual combatant must uphold to gain prisoner of war protections, it leaves

unanswered the question of what recognition the TSA itself would need to gain from the society of states before its combatants could gain those protections.

Just War Tradition

The investigation into the moral aspects of this problem, using the western approach to restraint in warfare, the just war tradition, outlines a number of conflicts that emerge within the internal logic of the theory and its application in this instance. The first of these conflicts is that on the one hand, the criterion of Competent Authority within the just war tradition explicitly stipulates that a state is the only international actor possessing the necessary authority to start a public war. On the other hand, the society of states conferred that authority on groups striving for self-determination. In other words, the justness of the cause drove international society to grant that authority. The second problematic area is under what conditions might a combatant affiliated with a TSA gain combatant rights. The final problem that emerges is between the *jus ad bellum* and the *jus in bello*. One can infer in the latter that the *jus ad bellum* criteria have been fulfilled; yet the former does not necessarily concede that a TSA might conduct a just conflict.

Recommendations

These lacunae and challenges that emerge with the advent of a worldwide state-TSA conflict can be answered through this dissertation's moral examination. Under the *justice of states* argument outlined in Chapter Six, if a consensus emerges within international society regarding the threat to stability that a TSA using private violence

might pose, then international society may act against that TSA and any state supporting those actions. In the process of building that consensus, however, it is incumbent on the society of states to examine the justness of the TSA's cause; while there is a presumption for order in this argument, the society of states cannot automatically brush aside the TSA's justice claims.

With this *justice of states* argument providing a moral basis, the society of states can avoid or at least skirt around the murky legal questions raised in Chapter Three. The lack of a precise legal definition of armed attack recedes into the background in this argument, so long as the society of states reaches a consensus regarding a TSA's actions against, or the threat it poses, to the society's stability. Such a moral basis and resulting consensus also provides the moral backdrop for state actions against a TSA that are not strictly within the bounds of self-defense. And finally, the society of states would have the ability to hold one of its members accountable for supporting a TSA's destabilizing activities.

Regarding the challenges posed within international humanitarian law, this dissertation's just war statement explicates two conditions—both necessary and neither sufficient—for a TSA's combatant to receive prisoner of war protections. The first is that the TSA must receive conferred competent authority to wage public war, either through the society of states deeming its cause to be just or through an individual state's conferment of such authority on a TSA, allowing the TSA to act as the state's agent. The second condition is that the TSA combatant must fulfill the obligations associated

with being a combatant. By framing these conditions in this light, it resolves the conflict between the *jus ad bellum* and the *jus in bello* and remains true to the core principles of both parts of the just war tradition.

Recommendations for Changes to International Law

This final section outlines recommended changes to standing international law, changes based on the just war argument outlined in Chapter Six.

UN Charter Framework

The problems inherent in the UN framework on the use of force, the new challenges arising with the emergence of TSAs, and this dissertation's just war argument, collectively suggest the following changes to the UN Charter framework for the use of force. UN members ought to change the Charter's framework to accommodate the new realities of the international system. Member states could accomplish this in one of two ways, or perhaps a combination of the two. The UN membership ought to consider providing another exception to Article 2(4) proscription on the threat or use of force. Such an exception would allow a state or states to use force against a trans-state actor and any supporting states if a consensus of states, either at the UN or in a regional organization, agrees that such a TSA poses a threat to the stability of the international system. This use of force would not necessarily have to occur after an armed attack. Such a consensus could occur through a UN Security Council approving of such an action, or through a General Assembly resolution, or with similar vote by a regional organization. The second change would involve an explicit

acknowledgment on the part of the UN that, at least with regards to TSAs, pre-Charter customary international law regarding the use of force, particularly anticipatory self-defense and reprisals, is still part of the legal framework providing guidance to states in this matter. The final change would consist of a second explicit acknowledgment of the need for broader interpretation of the principles of necessity and proportionality for actions taken against a trans-state actor.

International Humanitarian Law

In the area of international humanitarian law, since the state-TSA conflict is sufficiently different from the two previous conceptions of warfare, the society of states ought to negotiate, sign, and ratify another Additional Protocol to the 1949 Geneva Conventions, perhaps entitled as the Third Additional Protocol. While states would have to negotiate the specific language, the new protocol's intent would be to accomplish the following. First, it would explicitly acknowledge the existence of this third conception of warfare. Second, it would affirm that with this new type of warfare, there would not be any changes to standing law regarding "Do No Unnecessary Harm" and Chivalry.² Additionally, the Third Additional Protocol would stipulate that any combatant, regardless of the type of the actor with which he is affiliated, would receive prisoner of war protections so long as he fulfills the obligations associated with being a combatant and the TSA received conferred competent authority through its belligerent status being recognized. And fourth, the protocol would have to amend or excise

² See Chapter Four, 132-139, 145-6.

Article 47 of Additional Protocol One, the article concerning mercenaries. Such an amendment would make it clear that a combatant employed by a private security firm would receive prisoner of war status if he fulfills the criteria for Prisoner of War status listed in Additional Protocol One, and the host state explicitly states that the private security firm is acting as the state's agent and that the state accepts responsibility for the actions of the private security firm's "employees."

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