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15.Abstract:
The laws of armed conflict do not adequately address non-state actors, leaving their combatant status in question. While we may find short-term answers by creatively interpreting the existing guidance, we need to change the law to provide a long-term solution for dealing with non-state actors in armed conflicts, whether internal or international. Given the current doubt regarding the lawful combatant status of terrorists, mercenaries, international corporations, and multinational forces, operational commanders are required to provide all prisoners with a higher level of protection than they may actually be entitled to. This forces them to spend time and effort better used elsewhere. Since the focus of international power is gradually shifting from classic nation-states to non-state actors, the law needs to evolve as well, defining their authorized roles and ensuring that civilians and captured fighters receive the treatment they are entitled to. Ignoring the change in players will make the law irrelevant, undermining the protections it is intended to provide and resulting in confusion instead of order.

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MERCENARIES, TERRORISTS AND CORPORATIONS (OH MY!): THE YELLOW BRICK ROAD TO DEALING WITH NON-STATE ACTORS IN COMBAT

by

Holly Rawson

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature:_____

3 February 2003

As the "war on terrorism" continues, the debate grows on how to deal with enemy fighters captured during military operations. Are the Taliban fighters considered prisoners of war? What about the Al Qaeda terrorists captured alongside them, or fighting separately? Today, the question of how a commander should conduct operations or treat captured fighters while still complying with the law of armed conflict is more complicated than ever. To make the issue even more confusing, the definition of a "lawful" or "unlawful" combatant may differ depending whether a given conflict is internal or international. Terrorists may be the issue of the day, but mercenaries, multinational corporations, international criminal organizations and even multinational peacekeeping forces are other possible non-state actors that may become involved in combat and are not adequately addressed by the laws of armed conflict. While we may find short-term answers by creatively interpreting the existing guidance, we need to change the law to provide a long-term solution for dealing with non-state actors in armed conflicts, whether internal or international. This paper is not intended to determine whether they are criminals instead of combatants, but attempts to determine how the law of armed conflict applies to their actions during combat and treatment when captured, thus assuming that they will be considered combatants because they participate in armed conflict.

Part of the problem with the current law of armed conflict, as described by Louise Doswald-Beck, is that it "generally…has in mind groups fighting for a political purpose. This assumption derives from the historical context of the development of the law, although it is written nowhere."[1] Laws rarely anticipate situations that have never arisen before, and the prospect of a nation-state waging war on a terrorist group with no state sponsorship or defined nationality is something that probably never occurred to the members of the Geneva and Hague conferences. Thus, the law addresses terrorists and mercenaries with a relationship to a state or a

nationalist movement, but when non-state actors such as mercenaries, terrorists, multinational corporations, and even criminal organizations are powerful enough to influence international conflicts for their own political purposes, the law must be stretched and twisted to apply.

The law of armed conflict is intended to "protect both combatants and non-combatants from unnecessary suffering, to safeguard certain fundamental rights of persons who fall into the hands of an enemy, particularly prisoners of war."[2] There are two main treaties regarding the law of armed conflict: the 1907 Hague International Convention with Respect to the Laws and Customs of War on Land (Hague IV), which governs how war is conducted, and the 1949 Geneva Conventions for the Protection of Victims of War, which define international humanitarian law for the treatment of civilians, combatants, and prisoners of war. The First and Second Protocols Additional to the Geneva Conventions were written in 1977, but not all states that signed these Protocols later ratified them, although these states remain signatories to the original Conventions. A third source for the law of armed conflict is international custom, where the standard practices of one or more states can become law if there is general agreement that such actions are "juridicially necessary to maintain and develop international relations."[3]

According to all these sources, the legal right to participate in war is not limited to the regular forces of a recognized nation-state's government. Article 1 of Hague IV states that "The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the law and customs of war."[4] Combatants who did not meet these criteria were considered "unlawful" belligerents, without state sanction for their actions, and liable to trial and punishment for their actions as war

criminals. These "irregular forces" were assumed to be acting in relationship to a state, not independently on a private agenda. However, per Article 2, the Hague Convention applied only to international wars between two signatories, not international war between a signatory member and a non-member, and did not address internal conflicts.

The 1949 Geneva Conventions went one step further and included those international wars where only one side was a signatory of the Conventions. They also attempted "to extend a minimum of humanitarian protection to the parties involved in a non-international conflict."[5] When defining "lawful" combatants, Geneva Convention III Relative to Treatment of Prisoners of War expanded prisoner of war status to "ad hoc citizen militias"[6] and "other volunteer corps including those of organized resistance movements, belonging to a Party to the conflict and operating on or outside their own territory"[7] but only if they met the same criteria laid out in Hague IV Article 1. Note that the citizen militia, volunteer corps or resistance movement must belong to a Party to the conflict. Not only does this have implications for the combatant status of mercenaries, as discussed below, but it implies that the Conventions were intended to apply to those who are fighting on behalf of a state, not for a corporation or a terrorist group that has no state sponsorship or connection.

In 1977, the Geneva Conventions added two protocols which "principally sought to provide additional protections for non-combatants, i.e., the civilian population."[8] Protocol I covers international conflicts while Protocol II is the first serious attempt to apply international humanitarian law to non-international conflicts. While the additional protocols "did not purport to alter, in any significant manner, the pre-existing rules regarding unlawful combatants,"[9] the Protocols may actually have far-reaching implications regarding non-state actors and their combatant status. Protocol I extended the definition of a "Party" to a conflict to include "a

government or an authority not recognized by an adverse Party."[10] This change was intended to apply to "wars of national liberation," allowing a local population some humanitarian protection in the process of using force to gain their independence from a foreign power. However, it also means that if a Party to the Geneva Conventions engages in a conflict against an armed resistance movement in another country, it is considered an international conflict and all participants are bound by international law.

The more serious change embodied in Protocol I, and the reason that the United States did not ratify the Protocol, is the expanded criteria for lawful combatants. Previously, irregular forces were required to wear a distinctive emblem, recognizable at a distance, and to carry their arms openly. The international delegates at the 1977 conference decided that "guerrillas" and "freedom fighters" would be at a distinct disadvantage when participating in "wars of national liberation" if required to wear a uniform and carry their weapons at all times, since the "oppressors" would be able to easily identify and capture their opponents. Article 44 of Protocol I therefore only requires irregular forces to wear a distinguishing emblem and carry their arms openly during the immediate preparations and execution of an attack. Unfortunately, this eliminates the distinction between combatants and civilians on a daily basis, increasing the risk to civilians and negating the intent of the law. Attempts to clarify this requirement and provide the necessary distinction only muddled the matter, leading to a final assessment by the Joint Chiefs of Staff that the rules were "too ambiguous and complicated to use as a practical guide for military operations."[11] The U.S. refused to ratify the Protocol itself, but did identify Articles and concepts from Protocol I that it accepts as customary international law.

If these are the sources of the law, what does the law say about each category of non-state actor? The law of armed conflict does address the use of mercenaries in international conflicts

quite clearly. While historically considered acceptable attachments to a state's armed forces, they gradually fell from favor. Article 4 of the Hague Convention of 1907, when describing the requirements for neutrality, laid out "the duty of a neutral State not to permit the formation or recruitment of corps of combatants in its territory."[12] The United States Code imposes a penalty of one thousand dollars or three years in prison, or both, on anyone on U.S. territory recruiting others for service in a foreign military.[13] While this does not prohibit U.S. citizens from voluntarily enlisting in another country's service, Great Britain went even farther, making "The enlistment of a person as a mercenary…a criminal offense in the United Kingdom," whether that enlistment occurred inside the UK or outside it.[14] Eventually, this prohibition was made into customary international law through a UN Security Council Resolution in response to the use of mercenaries in a crisis in the Congo, which resolution barred all members from "permitting or tolerating the recruitment or mercenaries…with the objective of overthrowing the governments of state members of the United Nations" and called on "all governments to ensure that their territory…[is] not used for the…training and transit of mercenaries."[15]

If a mercenary company is formed, in defiance of all the laws discussed above, the members of the company are considered unlawful combatants. The General Assembly of the UN declared on 12 December 1973 "The use of mercenaries…is considered to be a criminal act and the mercenaries should accordingly be punished as criminals."[16] Although militias and other irregular forces can be considered lawful combatants if they meet certain criteria under the Geneva Protocols, this exception does not apply to mercenaries, since they are not considered part of the armed forces of a state, even when fighting alongside such forces.[17] The final decision on the matter was outlined in 1977 by Article 47 of Protocol I Additional to the Geneva Convention of 1949, which states "A mercenary shall not have the right to be a combatant or a

prisoner of war." [18] While this allows the "Detaining Power" some leeway to decide whether or not to accord a captured mercenary the status of a lawful combatant and a prisoner of war, it forbids the mercenary to claim that status and expressly defines a mercenary as an unlawful combatant.

However, Protocol I only applies to international conflicts, not internal ones. If a state hired a security company to assist in suppressing a rebellion, the company might be viewed as a mercenary organization, but Doswald-Beck feels that "it is arguable that they form part of the government's forces and thus are bound by the rules of non-international armed conflict" even if "not officially part of the government's army."[19] In such a situation, "The security companies concerned are in principle bound by the law of the state in which they function."[20] This uncertainty regarding the use and status of mercenaries in an internal conflict needs to be resolved.

The status of international criminal groups, some of which have "extensive organizations and warmaking ability,"[21] is slightly more problematic. These organizations differ from terrorist organizations mainly in that terrorists have a political goal and wish to affect who rules, while organized criminals have an economic goal and don't care who rules as long as it doesn't interfere in their operations. A criminal organization might decide it was in their best interests to provide financing, weapons and expertise or even enroll in the armed forces of a party. While public opinion is that these organizations are simply criminals and should be treated as such under international law, the problem is that "even traditional rebel groups in non-international armed conflicts are considered common criminals by the authorities they oppose."[22] Unless mere membership in such an organization is declared a criminal act, as it is for mercenaries, the

lawfulness of participation in an internal armed conflict by organized criminals might rest on whom they were fighting for and how they fought.

They could also create their own combat units to fight openly, and if they had a defined relationship with the regular forces of the insurgency or state they chose to support, they might be classed as irregular forces with lawful combatant status if they followed the requirements of the law for such forces. Therefore, if members of a gang or triad or yakuza or mafia fought on behalf of a legitimate party to the conflict, they could not be denied lawful combatant status for their membership in an international criminal organization. They could be tried as criminals for unlawful acts committed previous to taking part in hostilities, as well as for any violations of the laws of war committed while fighting, but not for simply participating as a member of the regular or irregular forces of a "Party" to the conflict. The telling factor would be their conduct. However, if members of a criminal organization fought for only their own interests, and had no connection to another more legitimate party, it would be considered "brigandage and piracy," both of which are international crimes. Since the laws of war prohibit private fighting forces from participating in international conflicts, criminal organizations and their members would be classified as unlawful combatants if they were acting on their own behalf and not that of a state. The question of their status remains open for internal wars.

Another class of potential non-state actors, multinational corporations and their security forces, is also affected by the prohibition on private fighting forces. As trade becomes more and more global, large companies are increasingly multinational, with employees and stockholders from many nations. As a result, the security personnel of such companies may not be citizens of the nation where they are employed, but could find themselves in a situation where the local government is unable to maintain order. In such a case, a corporation might find it necessary to

defend its assets or employees using force if the local government was unable to provide that protection. In some instances, these corporations are considered international entities with legal rights and responsibilities. The future will probably see this progress even a step further, allowing corporations to be recognized as international entities on a par with actual states. According to Louise Doswald-Beck, Columbia actually took a step in this direction when it attempted to require non-state entities to adhere to the requirements of a treaty banning antipersonnel mines, although "certain Western governments represented at the Oslo conference could not accept the proposition that such entities might have responsibilities under international law."[23]

If a private organization eventually has the same legal responsibilities as a state, then it would also be logical to allow it some of the same privileges, including the right to protect its personnel. Employees who work for a given company in an overseas assignment might have closer ties to the company than the nation on their passport, and expect the company to protect them in return for their loyalty, in a type of *de facto* corporate citizenship. Conversely, a company might find it to its advantage to assist national unrest or changes in government to secure concessions from the government regarding taxes, avoid privatization, raise the prices of their products or eliminate competition. There are probably other examples of instances where a private corporation might become involved in a conflict either in self-defense or to increase profit. The security personnel of a multinational corporation might meet all the requirements outlined in the Hague Convention of 1907 for an irregular armed force by wearing a distinctive uniform, obeying responsible leadership, adhering to the laws of war, and carrying arms openly, yet the current law of armed conflict is unclear on how to treat these forces. Doswald-Beck feels that

> Multinational or other industries… ought to be accountable in some way for their behavior, yet these clients are neither states nor parties to an internal armed conflict in any traditional sense of the word...Given the increasing influence of private industry and the growing importance of multinational companies, the international community is going to have to face this issue and decide whether the use of force by such companies against armed groups should be subject to international rules. If so, a departure will have to be made from the traditional application of international humanitarian law to governments and armed rebel groups.[24]

The fact that international corporations and their personnel are not covered under existing laws of armed conflict does not mean that they will not become involved in international or internal conflicts. Should international law simply classify any such employee involved in a conflict as either a mercenary or a terrorist? This seems to be an oversimplification, especially considering that they might be the only source of order in a given situation. The law needs to be broadened to address these potential non-state actors in both international and internal conflicts.

Even the United Nations itself poses a problem when applying international law to non-state actors, since UN peacekeeping forces are composed of personnel from member nations, under the direction of the UN commander who reports to the Secretary General. While each member nation's forces are still subject to the laws of their nation, which law binds the UN force as a whole? Although "the United Nations is an international person in international law," it is not a formal signatory as a legal entity to any of the treaties and protocols governing armed conflict.[25] A similar problem exists regarding North Atlantic Treaty Organization or the European Union, if either of those organizations were to send a multinational force into combat, as NATO did in Kosovo. Even if individual member states of such a "supranational force" are all signatories to the same international humanitarian laws, the supranational organizations themselves are not. Doswald-Beck points out that "It is highly likely that such forces will continue to be used in the next century, and it is simply not acceptable to allow it to remain

unclear which international legal rules govern UN forces. The international community needs to accept and address the fact that the traditional scope of humanitarian law treaties prevents the proper implementation of suitable rules for UN forces."[26]

Finally, how does the law of armed conflict address trans-national terrorist organizations? The law does address what forces are considered lawful combatants, and defines terrorist acts by combatants as criminal, but the assumption is that terrorists are acting on behalf of a state or attempting to gain control of the state. Al Qaeda does not fit the mold because it is not associated with any one state, but rather operates across many nations. It is not so much interested in governing a state as it is in using a state's territory as a base of operations to influence a worldwide audience for its own agenda. Can such an organization actually wage war, or does it simply commit crimes? Some scholars would argue that terrorist organizations are always criminal by their very nature and thus cannot commit acts of war. While the question remains open to debate, the United States at present is conducting military operations against terrorists and treating these operations as war, not simply a law enforcement matter.

Applying existing law to the U.S. operations in Afghanistan, the conflict was defined as an international one as soon as the U.S. became involved in combat with Taliban forces, and both sides were then required to follow the Conventions. The Taliban were the regular forces of Afghanistan, and any al Qaeda fighting alongside them should also be considered regular forces. Al Qaeda terrorists operating separately from the Taliban could be considered irregular forces and lawful combatants if there was a direct tie between al Qaeda and the government of Afghanistan, which there was. However, the close relationship between the Taliban and al Qaeda in Afghanistan which allows the law to consider them irregular forces was unique. Al Qaeda operating outside Afghanistan have a much less solid connection to the local governments

or resistance movements; they are not allied with any "regular" forces elsewhere to legitimize their participation in other internal or international conflicts. At this stage, it is unlikely that a liberation movement or resistance organization would admit to harboring or utilizing al Qaeda members as part of their forces. As a result, the traditional application of the law to only state-affiliated actors automatically makes any al Qaeda participating in armed operations outside Afghanistan unlawful combatants.

Using the four criteria from Hague IV, all lawful combatants, whether regular or irregular forces, must wear a distinctive emblem or uniform, answer to a clear chain of command, carry their arms openly, and follow the existing laws of war regarding treatment of civilians. Al Qaeda presumably has a well-defined hierarchy and organized chain of command, and certainly combatants carried their arms openly, but meeting the other two requirements may not be so easy. Al Qaeda members had no distinctive uniform or emblem, and did not meet this requirement for irregular forces to qualify as lawful combatants. More damning than their failure to distinguish themselves from civilians, however, is their failure to make a distinction between their opponents and civilians. Even if a non-state actor such as a terrorist organization has the right to engage in armed conflict, the terrorists violated the laws of war by intentionally targeting noncombatants and inflicting the maximum suffering possible. Article 33 of Geneva Convention IV expressly states that "all measures of intimidation or terrorism are prohibited" against civilians and civilian objects.[27] Article 34 prohibits the taking of civilian hostages.[28] Their bombing and hijackings were not legitimate acts of war, and they forfeited any rights to POW status and could have been tried as criminals, assuming they had survived. Those members of al Qaeda who planned and assisted the hijackers are equally guilty and need not be considered POWs if captured. But what about the rest of al Qaeda? If some members of an organization

choose to violate the laws of war, does that mean the remaining members also forfeit their status as lawful combatants are no longer considered POWs if captured? It is logical that the decision would depend on to what extent the group as a whole tends to violate the law. If "atrocities are carried on by individual elements in an armed force, they are to be considered war criminals and punished on an individual basis. However, when it is the policy of the group in question to undertake such activities, they may be considered unlawful belligerents."[29] According to the British Royal Warrant of 14 June 1945, used to prosecute war criminals after World War II,

> Where there is evidence that a war crime has been a concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime. In any such case any or all members of any such unit or group may be charged and tried jointly in respect of any such was crime and no application of any of them to be tried separately shall be allowed by the Court.[30]

Therefore, if al Qaeda has a policy of violating the laws of war, its members can be considered unlawful combatants as a group, and no further or individual assessment of their status is necessary. In the case of terrorists, then, the existing laws of armed conflict may allow some leeway when determining if they are entitled to participate in hostilities, in the context of an affiliation with a state actor, but the nature of their activities removes any protections thus implied and makes them unlawful combatants. The Conventions and Protocols do not consider terrorists without a nation-state affiliation, yet such a trans-national organization is precisely what the world faces today. Therefore, the laws of armed conflict need to be amended to apply to this situation.

Overall, the existing laws of armed conflict are more applicable to the regular armed forces of a state than most potential non-state actors, and to international conflicts more than internal ones, largely because the laws were framed by nation-states to define their relationships

with each other during time of war. Due to this bias, the status of terrorists and international criminal organizations is unclear when they are affiliated with regular forces belonging to a party to the conflict. If they conduct themselves according to the laws of war, they may be considered irregular forces and possibly lawful combatants, entitled to prisoner of war status in international or internal wars. If they fight separately, with no legitimate connection to the principal actors, they are currently unlawful combatants subject to prosecution merely for their participation as well as any unlawful acts committed in the process. For the short-term, the law addresses these types of actors in one form or another, although the differing interpretations being debated indicate that the law needs to be clarified in the long term. The laws of armed conflict are much clearer regarding mercenaries internationally, but not internally. Multinational corporations and multinational armed forces are more problematic; they have international status as legal entities or the representatives of those entities, but their governing bodies, whether a company or an organization of nations, are not bound by any of the laws of armed conflict. These possible actors need to be addressed by the laws to prevent future confusion over combatant status.

If the laws of armed conflict do not change to account for non-state actors, there are still some short-term considerations for the operational commander. If the commander cannot determine if a prisoner is a lawful or unlawful combatant based on his affiliation with a party to the conflict or possible violation of the laws of armed conflict, he must give the detainee the benefit of the doubt until proven otherwise. Article 5 of the Geneva Convention III requires the Detaining Power to treat captured belligerents as prisoners of war "until such time as their status has been determined by a competent tribunal."[31] To ensure such tribunals and any subsequent trials for war crimes are fair and present compelling evidence against those combatants who violate the laws of war, Lieutenant Commander Tony DeAlicante points out that the operational

commander "should be particularly cognizant of documenting the activities of the enemy forces and prisoners taken in combat, as the statements of operational forces may be the best source of evidence to convict war criminals and prevent them from fighting another day."[32]

When conducting a tribunal to assess the combatant status of a prisoner, or to try such a prisoner for war crimes, there remain minimum standards for a fair trial even in wartime. Several countries have used procedures similar to those for military courts, but relaxed the rules of evidence to account for wartime conditions.[33] During and immediately after World War II, the U.S. and British held trials that collectively established a customary standard where "the accused must be accorded a regular hearing, before a court composed of at least three officers, permitted the opportunity to present a defense, and to be represented by counsel. No formal appeal process would be required."[34] The requirements in Article 75 of Protocol I are comparable, and the provisions of Military Order Number One, issued by President Bush, meet these standards.[35] Whether a captured enemy fighter is held as a prisoner of war or as an unlawful combatant, there is no requirement to hold such a trial until the end of hostilities, and even POWs who have committed no crimes can be held until the war is over to prevent them from rejoining the conflict.

Regardless of status, captured combatants are entitled to humane treatment according to the original Geneva Conventions as well Protocol I. Article 75 is considered customary international law, and sets out the minimum standards of treatment for those who are ineligible for higher status, such as prisoner of war. Particularly, the Article prohibits inhumane treatment as well as punishment without trial. Other international humanitarian laws define humane treatment, in essence, to be similar to that typically afforded to prisoners of war, but without the legal status of a POW. Therefore, the operational commander should ensure conditions for all

detainees meet the standards for POWs, regardless of their legal status. These short-term measures will ensure the U.S. meets or exceeds the requirements of the law, even though the status of certain types of non-state actors is unclear.

In the long term, the inexactitude of the law regarding non-state actors will become more and more of a problem as the main actors on the international stage shift from nation-states to non-state entities. In discussing failed and failing states, Douglas Dearth suggests "The future of the state-based international order is in question…because of the manifest inability of a noticeable number of states to satisfy the basic criteria of sovereignty [and] because the concept of sovereignty is being eroded in fundamental ways."[36] He identified five influences on this erosion of sovereignty:

> A general proliferation of transnational, or supranational agreements, organizations, and associations among states; the pervasive influence of global telecommunications and economic interaction; the changing nature of wealth creation based on information, rather that [sic] industrial production; a growing number of non-state actors in the international arena that result from the first three influences; a growing propensity of peoples to identify with increasingly restrictive sub-national associations and petty-national or particularistic self-definitions based upon ethnicity, language, culture, and locality.[37]

If Dearth is correct, then the very definition and existence of nation-states is becoming uncertain. In that case, the laws of armed conflict need to change to reflect the new types of players, or they will become irrelevant.

The precedent for such a change was set by Protocol I, where the characterization of an armed conflict as an international one does not require formal recognition of one Party by the other. Kenneth Roberts suggests that "status as a combatant is no longer necessarily linked to affiliation with the classical notion of a sovereignty," and that the term "Party" in the Geneva Conventions "is presumed to mean any party bound to comply with international law" which could include "nonstates which have acquired international personality."[38] Citing Roda

Mushkat's argument that "nonstate entities have traditionally been accepted in particular circumstances and for specific purposes as subject to a legal framework as if they were states,"[39] Roberts makes

> The inescapable inference…that the laws of war may apply to nonstates…The very notion of applying the law of war to oppressed peoples necessarily means that such laws apply to nonstates, noncontracting parties, and entities lacking international personality. It also means that…combatants need not necessarily be affiliated with states, and that modern armies are not always linked to sovereignty as it is traditionally understood.[40]

As an example, he points out that "Most Arab states do not recognize the State of Israel yet they regularly condemn Israel for allegedly violating international law. It follows *a fortiori* that Arab states believe international law can apply to nonstates."[41] Thus, while Protocol I was intended to internationalize the efforts of "oppressed peoples" to achieve self-determination through armed conflict, it broadens the definition of a "Party" and weakens the requirement for sovereignty.

Just as the scope of the laws of armed conflict gradually widened from only international war between those states signatory to the Hague Convention to international wars between all states, then wars of national liberation and internal conflicts, so the next step in the evolution of the law is to apply it to all parties to a conflict, regardless of their political status. If we define war as a game that can only be played officially by nation-states, conflicts will still occur that include non-state actors, but the law will be irrelevant because no-one will now how to apply in a given situation. We must take the pragmatic route by accepting that conflict will occur even if states fade away, and revising the laws to include as many types of combatants as possible. For now, commanders must ensure their forces follow the current law to avoid unintentionally violating the law and subjecting their forces to criminal prosecution. They must also apply it to captives scrupulously, possibly even providing a higher level of treatment than required, to

ensure the rights of prisoners are protected and avoid calling any subsequent criminal prosecution into question. But this is not enough. The laws need to address internal conflicts as well as external.

Historically, international law meddled in internal affairs as little as possible, respecting the sovereignty of states. As states dissolve and lose their power, the potential for abuse of combatants and noncombatants grows. The next convention on international humanitarian law must determine whether mercenaries are lawful combatants in internal conflicts and confirm that criminal organizations may not lawfully participate in any type of armed conflict. It must also determine whether an international corporation has the right to defend its facilities and personnel using armed force, whether during an international or internal conflict, and include supranational organizations such as the UN and NATO in its membership. The revised convention needs to explicitly hold such multinational organizations and their military forces to international humanitarian law instead of assuming they will follow custom and practice. Finally, "A new uniform terrorism code should be adopted that defines who qualifies as a terrorist, and applies criminal status on such individuals…The international community should place terrorists and their supporters outside the definition and protective status of combatants"[42] to prevent them from hiding behind the rules meant to protect the very people terrorists target. By redefining who is expected to follow the laws, we increase the chances that they will actually follow the rules, thus achieving the original purpose of creating those rules in the first place, to protect noncombatants.

NOTES

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3. Ibid., 20.

4. *Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention (II) of 1899 and Hague Convention (IV) of 1907*, (The Hague: 1910), Article 1.

5. Boyd, Peter M. *supra* note 2, at 26.

6. Casey, Lee A., David B. Rivkin, Jr. and Darin R. Bartram, "Unlawful Belligerency and its Implications under International Law," *National Security White Papers, The Federalist Society*. < http://www.fed-soc.org/Publications/Terrorism/unlawfulcombatants.htm> [8 December 2002]: 3.

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9. Ibid.

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13. Ibid.

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