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Towards a Synthesis between Islamic and Western Jus in Bello

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TOWARDS A SYNTHESIS BETWEEN ISLAMIC AND WESTERN *JUS IN BELLO*

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International Humanitarian Law (IHL) has lagged behind modern warfare. This article deals with the difficulties in distinguishing civilians from combatants in an age where most conflicts are fought between irregular combatants and full-time armies. The recent killing of Osama Bin Laden, as well as the increasing use of armed aerial 'drones' has provided publicity to these debates. It has also become apparent that many Islamist participants in warfare do not consider themselves primarily bound by traditional Western IHL sources, such as the Geneva Conventions, instead preferring religious sources.

It is imperative that new provisions of IHL be developed to accommodate the dynamics of modern warfare. In order that these provisions attain the requisite level of moral force to bind both state and non-state actors, a new element of legitimacy must also be secured. This article takes the novel approach of suggesting that Islamic as well as Western sources of law should be taken into account in re-designing the law. The article concludes by demonstrating how such a synthesis may be achieved in practice, particularly in relation to the distinction between civilians and combatants.

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INTRODUCTION

In the body of international humanitarian law (IHL), there is a lacuna regarding the status of combatants engaged in asymmetric warfare. This has arisen, at least in part, out of a failure to establish a satisfactory distinction between civilians and combatants reflecting the nature of such conflicts and commanding the respect of parties to them.

The recent killing of Osama Bin Laden by United States Special Forces Operatives has publicized the debates regarding the legal status of irregular combatants. Some have claimed that Bin Laden ought to have been captured alive and tried in a court. The U.S. administration has argued that Bin Laden's killing was justified as part of an ongoing war.[1] At least some of the legal and moral uncertainty surrounding Bin Laden's death, as well as the status of many other such belligerents, stems from a lack of clarity in IHL.

It is imperative that new provisions of IHL be developed to accommodate the dynamics of modern warfare. In order for these provisions to attain the requisite level of peremptory force to bind both state and non-state actors, a new element of legitimacy must be secured.

This article suggests that this gap in IHL be solved by recourse to a combination or synthesis of Islamic norms with traditional sources of Western law. Perhaps contrary to popular belief, many of the tactics commonly employed by modern terrorists are contrary to Islamic law. Given that many participants in modern warfare operate on a religious, rather than a nationally motivated, ideological agenda,[2] it seems fitting that this apparent "Clash of Civilizations"[3] be moderated by a solution which draws on the legal doctrines of both groups, rather than just traditional Western just war theory.[4] Indeed, a solution will only command the support required for it to be effectual if a holistic approach is taken.[5]

Although a long-standing tenet of Western just war theory, the appropriateness of applying a single moral and legal standard to all combatants has recently been doubted.[6] Accordingly, this article seeks to meet two challenges: first, to show that a single standard of IHL is both necessary and appropriate for combatants on either side of asymmetric conflicts, and second, to demonstrate

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1. A statement by Attorney General Eric Holder described the action as "an act of national self-defense.," Aidan Lewis, *Osama Bin Laden: Legality of Killing Questioned*, BBC NEWS, May 12, 2011, http://www.bbc.co.uk/news/world-south-asia-13318372.

2. JOHN KELSAY, ARGUING THE JUST WAR IN ISLAM 2 (2007).

3. *See* Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993).

4. Much of just war theory is ostensibly derived from Christian sources. *See* Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665, 667 (1939).

5. This point is also recognised by Bekir Karliğa, who writes, "It is imperative that the approach of 'global ethics' that has been developed by Protestant intellectuals . . . should be enriched, especially with the intellectual tradition of Islamic thinking." Bekir Karliğa, *Terror, War, and the Need for Global Ethics*, *in* TERROR AND SUICIDE ATTACKS: AN ISLAMIC PERSPECTIVE 44, 61 (Ergün Çapan ed., 2005).

6. *See* JEFF MCMAHAN, KILLING IN WAR 38 (2009).

that it is possible to draw such a standard from common themes in both Western and Islamic jurisprudence.

The article will begin by outlining the current system of IHL covering asymmetric warfare. Next, it will identify the problems to which the system gives rise and the manner in which they have been exploited. The moral rationale for a new system will then be assessed from a Western and then an Islamic perspective. In so doing, the article will analyse both moderate and extremist sources and interpretations of Islamic jurisprudence. Finally, the article will attempt to find common ground between these various sources and tentatively suggest a new set of norms concerning the conduct of asymmetric warfare as well as possible approaches to drafting a new code.

I. THE TRADITIONAL APPROACH

It is a truism that generals will try to fight the previous war. The same is true of the scholars who draft the laws of war. The Regulations With Respect to the Laws and Customs of War on Land of 1899 and 1907 (The Hague Regulations) reflect a debate between larger states with powerful organised armies, such as Prussia, and smaller states, such as Belgium and the Netherlands which anticipated being invaded. In the early 20th century the powerful military states prevailed, meaning The Hague Regulations struck the balance in favour of the organised military forces.[7] Every subsequent instrument has been based on the structure of The Hague Regulations. Accordingly, much IHL came to be based on the assumption that wars are clashes between the armies of states, who regulate conflicts by asserting a fundamental dichotomy between combatants and civilians. Although there is a great deal of scholarly debate on the matter, I will assume *arguendo* during this article that the same rules and principles of IHL apply to non-international as to international armed conflicts.

The theoretical divide between combatants and civilians is enshrined in Article 1 of The Hague Regulations.[8] The laws, rights,

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7. For a summary of the debates surrounding the adoption of The Hague Regulations, *see* JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 100-08 (1993); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, 45 BRIT. Y.B. INT'L L. 173, 217-18 (1971).

8. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 1, Oct. 18, 1907, T.S. No. 539, *available at* http://www.unhcr.org/refworld/docid/4374cae64.html [hereinafter *Hague Convention (IV) Annex*]. Chapter I, titled "On the Qualification of Belligerents" states:

> The laws, rights, and duties of war apply not only to armies, but also to militia

and duties of war are applied to all parties who fulfill a relatively strict set of formal conditions, such as wearing a uniform and carrying arms openly. The Hague Regulations do anticipate the fact that civilians might "spontaneously take up arms," and provide that, even if they do not have time to "organise themselves" in accordance with the stipulations of Article 1, such parties shall still be regarded as "a belligerent, *if they respect the laws and customs of war.*"[9] It is apparent that those civilians who spontaneously take up arms are not subject to all the rigours laid down in Article 1, but it is not clear from which they are exempt. It is at least in part the uncertain ambit of this italicised phrase which has given rise to the legal difficulties so prevalent in today's warfare.[10]

In the immediate aftermath of the Second World War, the laws of war were once again reformulated, but the split between combatants and civilians was preserved.[11] Combatants remain entitled to certain protections under the Geneva Conventions of 12 August 1949 (Geneva Conventions).

Under Common Article 3 of the Geneva Conventions, civilians are entitled to unconditional protection from being the object of attack. Further regulations are set out in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (the First Additional Protocol). Article 48 of the First Additional Protocol states the "Basic Rule," otherwise known as the "principle of distinction." "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population

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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 laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Id. at Annex Chapter I.

9. *Id.* at art. 2 (emphasis added).

10. John Kelsay dates the expansion of just war theory to cover irregular forces to the United States Civil War, when Francis Lieber, the legal advisor to the Union General Henry Waller Halleck, recognized that the "guerillamen" of the Confederacy could not simply be treated as criminals and brigands. JOHN KELSAY, ISLAM AND WAR: A STUDY IN COMPARATIVE ETHICS 78-81 (1993). However, as Kelsay notes, whilst the General Orders No. 100 (otherwise known as the "Lieber Code") did advance just war theory in this direction, it still struck the balance in favour of established armies. *Id.*

11. Indeed, lest it be thought that partisan civilian forces rising up against totalitarian and iniquitous regimes are a thing of the past, at the time of writing (March 2012), insurrections are occurring across the Arab world against undemocratic governments.

and combatants and between civilian objects and military object tives and accordingly shall direct their operations only against military objectives."[12]

Article 43(1) of the First Additional Protocol defines the armed forces of a Party 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."[13] To this extent, Article 43(1) adopts most of the fairly restrictive criteria of Article 1 of The Hague Regulations.[14] However, the First Additional Protocol then goes beyond The Hague Regulations in explicitly recognising several other forms of combatants.[15]

Another category of combatants was created in Article 44(3) of the First Additional Protocol. Perhaps having in mind the partisan fighters who resisted the Nazi occupation of mainland Europe, Article 44(3) observes that "there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself."[16] Article 44(3) concludes that such a party

> [s]hall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such 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.[17]

Furthermore, Article 51(3) of the First Additional Protocol provides, "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[18]

It would seem from the foregoing analysis that parties in the field of warfare are required to distinguish themselves definitively from the civilian population (at the very least when they are

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12. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Protocol I*].

13. *Id.* at art. 43(1).

14. *See id.* at art. 1 (in particular, the requirements that such troops are "commanded by a person responsible for his subordinates" and "conduct their operations in accordance with the laws and customs of war"). Article 43(1) similarly provides that "[s]uch 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." *Id.* at art. 43(1).

15. *See id.* at art. 43(2)-43(3).

16. *Id.* at art. 44(3).

17. *Id.*

18. *Protocol I, supra* note 12, at art. 51(3).

mounting an attack). I will term this obligation the "principle of differentiation." A corollary to the principle of differentiation is the prohibition from deliberately blurring the lines between civilians and combatants. Under the First Additional Protocol, such actions are deemed "perfidy."[19] Article 37 proscribes inter alia "the feigning of civilian, non-combatant status."[20] It is unclear whether the principle of differentiation is part of customary international law. There is very little discussion of the crime of perfidy in the current legal literature.[21] This is surprising given its obvious application to situations of asymmetric warfare.

Such reticence regarding perfidy has been reflected in more recent development in IHL. Deliberately disguising oneself as a civilian is not amongst those crimes punishable under the Rome Statute of the International Criminal Court (Rome Statute).[22] However, Article 8(2)(b)(xxiii) does provide that "[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" is to be considered a "serious violation[ ] of the laws and customs applicable in international armed conflict."[23]

In fact, the Rome Statute seems to have dropped the notion of perfidy from its crimes–at least in terms of feigning civilian status. This is evident from the language of Article 8(2)(b)(vii), which proscribes "[m]aking improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury."[24]

This mirrors the language of Article 37(1) of the First Additional Protocol, yet notably does not include part (c) of the latter: the prohibition on the feigning of civilian status. So far as the *travaux préparatoires* are concerned, only the submissions of the United States and New Zealand make any mention of perfidy as a crime that should be included.[25] However, such formulations evi

19. *Id.* at art. 37.

20. *Id.*

21. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 200-03 (2004); *see also* John C. Dehn, *Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction*, 6 J. INT'L CRIM. JUST. 627 (2008).

22. Rome Statute of the International Criminal Court art. 8(2)(b)(xxiii), July 1, 2002, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*].

23. *Id.* at art. 8(2)(b).

24. *Id.* at art. 8(2)(b)(vii).

25. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, U.N. Doc. A/CONF.183/13 (Vol. III) (1998), at 225-26, 236-37.

dently did not find favour in the eventual Rome Statute. No record of the specific reasoning is preserved.

Under traditional IHL, there is no provision for a *tertium quid* between being a combatant, with the rights and obligations that category entails, and being a civilian. Extensive legal literature has been devoted to this issue, and the discussions therein need not be repeated here.[26]

II. PROBLEMS WITH THE TRADITIONAL APPROACH

The text of instruments such as The Hague Regulations and the First Additional Protocol indicate that there was once at least some nexus between the principle of distinction and the principle of differentiation. Today the principle of differentiation is not only ignored, but its absence is actively used as a tool of war by many groups. Yoram Dinstein notes the apparent inconsistency between the prohibition from feigning civilian status in Article 37 of the First Additional Protocol and the relaxation of the civilian/combatant distinction elsewhere in that document. Dinstein considers that situations where "perfidious removal of uniform" may constitute a breach of the Law of International Armed Conflict are "surprising inasmuch as the Protocol in general–far from imposing more stringent constraints on combatants taking off their uniforms–actually relaxes in a controversial way the standards of customary international law in this context."[27]

Dinstein's criticism is pressing, but it does not follow that the principles of distinction and differentiation are utterly irreconcilable. The main difficulty is not with the shift away from combatants perceived solely as uniformed members of established armies per se, as Dinstein suggests, but rather the fluidity of the civilian/combatant definition under the First Additional Protocol.

The issue with the apparently tiered system that operates between Articles 43, 44, and 51 of the First Additional Protocol is that there is an inevitable race to the bottom. Why would a belligerent party desire to be bound by the seemingly higher legal standard applied in Article 43 if they could take advantage of Article 44? Moreover, the impact of Article 51(3) is also a source of con-

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26. Although United States case law recognizes such a category (*see* United States *ex rel.* Quirin v. Cox, 317 U.S. 1 (1942)), Aharon Barak, after having extensively surveyed the relevant literature, said, "In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category." HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., 53(4) PD 817, para. 28 [2005] (Isr.), *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf [hereinafter *Targeted Killings Case*]; *see also* ANTONIO CASSESE, INTERNATIONAL LAW 408-10 (2005).

27. DINSTEIN, *supra* note 21, at 203.

fusion. What constitutes taking part in hostilities? How are such protections to be lost and gained? Traditional IHL provides no clear answers.

The reluctance of armies to attack civilians, or to cause excessive civilian casualties even when they are not being targeted directly, is exploited by belligerent groups. Hizbollah, Hamas, and operatives of the Tamil Tigers–to name but a few–frequently situate their fighters within densely populated areas. This leads to two related problems for a regular army attacking: first, the chances of civilian casualties are necessarily increased; second, there is much greater scope for a belligerent to hide his or her weapon and instantly melt back into the civilian population.

In short, the current state of IHL permits belligerents to claim the full rights of civilians and avoid the liabilities of combatants.[28] In particular, the gaps between Article 43 and Article 44 of the First Additional Protocol allow this to happen–notwithstanding the fact that few modern irregular belligerents consider themselves bound by these legal structures. Armies fighting against belligerents using such tactics are thus prone to accusations of having deliberately and indiscriminately targeted civilians. In an age where media support for or consternation with military tactics can have an enormous bearing on military strategy, such behaviour on the part of belligerents may act as a powerful weapon in furthering their policy aims via the discrediting of the opposition in the eyes of world opinion.[29]

Non-binding interpretative guidance published by the International Committee of the Red Cross in 2008 (ICRC Interpretative Guidance) acknowledged these difficulties,[30] but fell short of recommending root and branch alterations to the law.[31] Although issues such as the scope of "direct participation in hostilities" were clarified in the ICRC Interpretative Guidance, the key ability for insurgents and terrorists to readily switch between civilian and combatant status was preserved.[32] This preservation occurred

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28. *See* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legality Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010).

29. *See* Edward Kaufman, A Broadcasting Strategy to Win Media Wars, 25 WASH. Q. 15 (2002).

30. Nils Melzer, International Committee of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT'L REV. OF THE RED CROSS 991 (Feb. 26, 2009) [hereinafter *ICRC Interpretative Guidance*].

31. *Id.* at 995-96.

32. *Id.* at 996. The ICRC Interpretative Guidance provides:

> Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized

via the restriction of "direct participation" for civilians merely to the period during and immediately prior to undertaking an armed attack.[33]

Ten states, including the United Kingdom, France, and Germany,[34] recognised the potential for the special rule in 44(3) of the First Additional Protocol to reduce the protection of civilians in that members of the opposing armed forces might come to regard every civilian as "likely to be a combatant in disguise and, for their own protection, would see them as proper targets for attack."[35] Those states made a reservation that Article 44(3) would only apply where Article 1(4) of the First Additional Protocol is engaged.[36] This denotes situations where "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[37] However, although superficially attractive, this reservation does not actually restrict the use of Article 44(3) in practice. The determination as to when Article 1(4) is engaged is a completely subjective enterprise. As exemplified below in the rhetoric used by al-Zawihiri and Bin Laden, amongst others, almost every modern irregular belligerent would describe his or her fight as one against colonial domination, alien occupation, etc.[38]

The difficulties of enforcing IHL against such belligerents can be seen from the present difficulties facing the United States, regarding its policy of interning what it termed to be "unlawful com-

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> armed groups belonging to a non-State party to an armed conflict cease to be civilians . . . and lose protection against direct attack, for as long as they assume their continuous combat function.
>
> Continuous combat function is later defined as requiring "lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.

Id. at 1007. It is difficult to see why the designation of "continuous combat function" was reserved only to the organised armed forces of a state, rather than all combatants.

33. *Id.* at 996; *see also* Parks, *supra* note 28, at 784. ("The ICRC gave little deference to the advice of its military experts, declining to correct, much less delete, Section IX.").

34. These states were Australia, Belgium, Canada, France, Germany, Ireland, the Netherlands, New Zealand, the Republic of Korea, and the United Kingdom. Further, Spain and Italy limit the "situations" to cases of occupation alone. *See* Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims*, 849 INT'L REV. RED CROSS 143 (2003).

35. U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT § 4.5.1 (2004), *available at* http://www.icrc.org/customary-ihl/eng/docs/v2_cou_gb_rule 106.

36. *Id.*

37. Gaudreau, *supra* note 34, at 147.

38. *See generally Profile: Ayman al-Zawahiri*, BBC NEWS (June 16, 2011), *available at* http://www.bbc.co.uk/news/world-middle-east-13789286; *Osama bin Laden: Famous Quotes*, THE TELEGRAPH (May 2, 2011), *available at* http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8487347/Osama-bin-Laden-famous-quotes.html.

batants" in Camp X-Ray, Guantanamo Bay. Recent U.S. Supreme Court cases have grappled with these issues. In *Boumediene*, a 5-4 majority ruled that a writ of habeas corpus could apply to Guantanamo detainees.[39] In *Hamdi*, the Supreme Court ruled that prisoners could be termed illegal "enemy combatant[s]," but that this did not deprive them of the right to challenge this before an impartial tribunal.[40] Although President Obama announced through an executive order issued on only his second day of office his intention to close the Guantanamo detention facility within a year, the base remains open at the time of this writing, more than two years later.[41] The current dilemma facing the Obama administration regarding how to deal with prisoners is illustrative of the dearth of IHL.[42]

One particular source of difficulty is that many of the belligerents themselves do not feel constrained by IHL and see its very existence as a tool of Western imperialism. Part of the issue here is that customary international law is generally formed by state behaviour, and, as noted above, most warfare is no longer between two states. One way of circumventing the problem of attributing responsibility might be to widen the rules regarding state responsibility. A recent attempt at clarifying this area was made with the International Law Commission's publication of the Draft Articles on State Responsibility.[43] However, the fundamental debate regarding the level of control over an armed unit--the subject of this article--has not been resolved. Indeed, the International Criminal Tribunal for the former Yugoslavia seems to have created a different standard than that of the International Court of Justice.[44] In any case, it is submitted that adjusting the rules regarding state responsibility is not the optimum solution for three reasons.

First, although certain groups may be seen more directly as proxies for other countries (such as Hezbollah for Iran), it is not true that all such belligerent groups have comparable ties to a particular country. To catch every belligerent group within this new net would risk expanding the notion of state responsibility so wide as to render it meaningless. Second, the prevalent trend in

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39. Boumediene v. Bush, 553 U.S. 723 (2008).

40. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

41. Jonathan Masters, Council of Foreign Relations, *Closing Guantanamo?* (July 11, 2011), http://www.cfr.org/terrorism-and-the-law/closing-guantanamo/p18525 (last visited October 6, 2011).

42. *See id.* (summarizing and discussing the problems specific to Guantanamo).

43. INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, Supplement No. 10 (A/56/10), chp.IV.E.1, (Nov. 2001), *available at* http://www.unhcr.org/refworld/docid/3ddb8f804.html.

44. *See* Antonio Cassesse, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649 (2007).

international law, at least over the last fifty years, has been away from a state-based system. Instead of being the sole repositories for a person's rights and responsibilities, there has been an increasing tendency to accord these to the individual. Numerous documents and treatises reflect this–most notably the Universal Declaration of Human Rights. In terms of IHL, the development of the International Criminal Court has been a major step in this direction: individuals can now be tried for various crimes against humanity.[45] Third, to expand the notion of state responsibility does not get to the root of the problem with IHL here.[46] The key lacuna is in the substantive law; altering the procedural aspects of it will not solve this.[47]

It can be seen from the foregoing analysis that the problem is not necessarily that IHL completely lacks the tools to control the actions of terrorists.[48] The problems are essentially twofold: first, the current provisions regarding how to distinguish combatants from civilians are not clear, and second, those provisions relating to the obligation of combatants to differentiate themselves are not enforced.

III. THE MORAL POSITION

There are sound moral justifications for a single value-neutral code which applies to combatants on both sides of an asymmetric

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45. The empowering document is the Rome Statute of the International Criminal Court, which came into force in 2002. It is widely seen as embodying customary international law, and possible *jus cogens*. Rome Statute, *supra* note 22, at arts. 5-8.

46. *See generally* ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 121-28, 139-54 (1996) (discussing "The Failure of State-Centric Codifications to Comprehensively Address the Extradite or Prosecute Obligation of States").

47. One example of a possible constraint was recognized in a recent article by Richard Goldstone:

> Some have suggested that it was absurd to expect Hamas, an organization that has a policy to destroy the state of Israel, to investigate what we said were serious war crimes . . . the laws of armed conflict apply no less to non-state actors such as Hamas than they do to national armies. Ensuring that non-state actors respect these principles, and are investigated when they fail to do so, is one of the most significant challenges facing the law of armed conflict.

Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST, April 1, 2011, *available at* http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story_1.html.

48. The inadequacies of IHL in this area have frequently been discussed. *See, e.g.*, Emanuel Gross, *Self-Defense Against Terrorism–What Does It Mean? The Israeli Perspective*, 1 J. MIL. ETHICS 91 (2002); Christopher C. Burris, *Re-examining the Prisoner of War Status of PLO* Fedayeen, 22 N.C. J. INT'L L. & COM. REG. 943, 976 (1997); James P. Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, 81 AM. SOC'Y INT'L L. PROC. 307 (1987); Draper, *supra* note 7.

conflict. Doubt has recently been cast on an area long-regarded as fundamental to just war theory: the independence between *jus in bello* and *jus ad bellum* (the "separation thesis"). As will be shown below, the collapse of this distinction would be fatal to the stability of the civilian and combatant distinction, as well as potentially have a bearing on the types of tactics which are permissible. Neither consequence is desirable. Before making the positive case for the necessity of a new set of norms which is applicable to all parties in a conflict, both of these challenges will be addressed.

Even Michael Walzer, who elsewhere is a stringent defender of the independence thesis, suggests that in certain asymmetric guerrilla wars, "considerations of *jus ad bellum* and *jus in bello* . . . come together."[49] The reasoning for this, Walzer contends, is that "the degree of civilian support that rules out alternative strategies also makes the guerrillas the legitimate rulers of the country."[50] In making this argument, Walzer does not retract the principle of separation altogether. Rather, he is merely making the empirical appraisal that in certain situations of a true levée en masse, the otherwise independent factual criteria for a just war of defence would be satisfied.

In fact, those countries which reserved the application of Article 44(3) of the First Additional Protocol to situations of true revolt against colonial domination and alien occupation seem to be making roughly the same point which Walzer does: when such causes have such overwhelming *jus ad bellum* justification, the laws of *jus in bello* become supererogatory. As suggested above, this view is unhelpful on the grounds that such labels are highly subjective, and almost all modern irregular combatants consider their cause to be covered by them.

Jeff McMahan has cast doubt on the moral foundations of the independence thesis in all circumstances, particularly on the notion that all combatants share a "moral equality"[51] notwithstanding the justness (or lack of justness) of their cause.[52] One of the main points made by those who doubt the independence thesis is that the model of simultaneous claims of self-defence cannot be justified. McMahan employs the "policeman and murderer" example in his attempt to demonstrate the truth of this proposition:

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49. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATION 195 (4th ed., Basic Books 2006).

50. *Id.* at 196.

51. *See* MCMAHAN, *supra* note 6.

52. *Id.*

> [T]he murderer has, by wrongfully threatening the lives of further innocent people, made himself liable to be killed in their defense. He therefore has no right of defense against the police, if their only effective defensive option is to kill him. It is therefore false that by posing a threat to another, one necessarily makes oneself liable to defensive action.[53]

Walzer has claimed that such analogies are inappropriate: "War as an activity (the conduct rather than the initiation of the fighting) has no equivalent in a settled civil society. It is not like an armed robbery, for example, even when its ends are similar in kind."[54] The lack of analogy argument is true in part, but its mere recitation does not show why this is the case. The crucial point is that in a war, we simply do not know which party is the "murderer" and which party is the "policeman." The phenomenon of limited human knowledge is a highly relevant material factor in wars which cannot be eliminated or argued out of existence.[55]

As McMahan's book shows, removing the independence thesis can have troubling effects. The final chapter of *Killing in War* addresses possible bases for civilian liability.[56] After having collapsed the separation between *jus in bello* and *jus ad bellum*, McMahan avers that "the account of liability to attack in war that I have defended cannot rule out the possibility that civilians may be liable to intentional attack."[57] Following from his interim conclusion that those combatants who fight in an unjust war do not have the same moral status as those who fight in a just war, McMahan asserts that a civilian who is culpable of being a willing supporter or participant in a system of oppression renders a civilian "not innocent."[58]

The implications of removing the separation thesis might also render the crime of perfidy obsolete. John C. Dehn has posed a powerful example as to why this might be a favourable development.[59] He cites the July 2008 rescue of hostages held in a jungle camp by Revolutionary Armed Forces of Columbia (FARC) rebels, conducted by Colombian security forces who posed as "aid workers and journalists" as well as members of the International Red Cross

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53. *Id.* at 14.
54. WALZER, *supra* note 49, at 127.
55. Christopher Kutz, *Fearful Symmetry*, *in* JUST AND UNJUST WARRIORS 69 (David Rodin & Henry Shue eds., 2008) (arguing for the maintenance of symmetry).
56. MCMAHAN, *supra* note 6, at 213.
57. *Id.* at 221.
58. *Id.* at 232.
59. Dehn, *supra* note 21.

in order to carry out the operation.[60] Dehn notes that the international community's reaction to this act was almost universally positive.[61] On its face, this example provides a compelling reason to collapse the *jus ad bellum* and *jus in bello* distinction as far as acts of perfidy are concerned.

This should be resisted. As will be explained below, such signposts of clear epistemic certainty in the justness of one's cause are few and far between in the fog of war. Dehn effectively makes this point: "an unsympathetic victim presents a threat to the rule of law."[62] Dehn concludes that the prohibition on perfidy either does not apply to non-international armed conflict, or it is a "non-criminal violation of IHL."[63] It is submitted that neither explanation is particularly satisfactory.

Rather than doing away with the separation thesis or creating limited examples of *lex specialis* as Dehn suggests, perhaps a better way of looking at why this action seemed morally acceptable is to appeal to the underlying justifications for the prohibition on perfidy. As argued elsewhere in this paper, the principle of differentiation is a corollary to the obligation to distinguish between the targeting of civilians and combatants. Both principles are designed to minimise the accidental or deliberate killing of civilians. In the Colombian hostage rescue example mentioned above, there was no possibility of endangering any civilians collaterally, given that it took place in an isolated, jungle environment. Simply put, owing to the particular factual circumstances, there was no possibility in that situation of the animating principle behind the rule being violated. This point can be illustrated by changing the fact pattern slightly: had the rescue taken place within a dense urban setting, thickly populated by other civilians, then it might well have been seen as objectionable by many in the international community given the tendency for innocents to be caught in the crossfire.

Does this mean that the prohibition on perfidy might be relaxed in such limited circumstances as were arguably engaged in the Columbian hostages example? Such a conclusion should also be rejected. The long-term consequences of the Colombian forces' act of perfidy should not be ignored. It is probable the FARC rebels would be less willing in the future to grant non-combatant immunity to any party in the aftermath of these actions, on the justifiable

60. *Id.* at 629; *see also, Colombian Soldier Wore Red Cross Logo in Hostage Rescue*, N.Y. TIMES, July 17, 2008, *available at* http://www.nytimes.com/2008/07/17/world/americas/17colombia.html.

61. Dehn, *supra* note 21 at 638.

62. *Id.* at 653.

63. *Id.*

basis that they would have to suspect everyone of being a combatant. Red Cross members, journalists, and other non-combatants in the vicinity could become targets on the basis that they might be disguised enemies. The link between distinction and differentiation is impossible to break.

The role of uncertainty also plays an important instrumental role in restraining the conduct of soldiers. The idea that combatants fighting for a just cause may operate on a higher moral stratum than their enemies (who presumably fight for an unjust cause) could arguably lead to feelings of increased psychological fervour amongst combatants–thus making them more prone to commit atrocities. Anthony Coates writes, "The more war is justified, the less restrained it seems likely to become so that, in extreme but by no means rare cases, 'just' war generates 'total' war."[64] According to this view, the combatant who fights with doubt in his mind as to the justness of his overall cause is more likely to act with circumspection in the theatre of war. Dan Zupan has described this phenomenon as a "catastrophic success."[65]

This element of epistemic uncertainty is inherent in war. It is almost impossible for a combatant in any given conflict to say which side is in the right–particularly at the time of war. Indeed, today many see the 2003 Iraq conflict as being an unjust war.[66] Despite this, at the time of engagement in the war the case was more finely balanced. Soldiers could not have known that Saddam Hussein did not have the weapons of mass destruction which might have furnished a legitimate claim of self-defence on the part of the coalition at the time of engaging in the war.

To counter the point that the merits of either side are sometimes unclear at the outset of war, the suggestion has been made that punishments for participation in an unjust war could be meted out postbellum,[67] once the fog of war has lifted and it has become clear what the precise merits were. This suggestion is problematic for several reasons. Firstly, there is the truism that history is written by the winners. It may well be the case that the unjust side prevails–does that mean that every soldier for the just side should then be subject to potential punishment? Secondly, knowledge of the possibility that every combatant might be subject

64. Anthony Coates, *Is the Independent Application of* Jus in Bello *the Way to Limit War?*, *in* JUST AND UNJUST WARS, *supra* note 49, at 178.

65. Dan Zupan, *A Presumption of the Moral Equality of Combatants: A Citizen-Soldier's Perspective*, *in* JUST AND UNJUST WARS, *supra* note 49, at 223.

66. RICHARD N. HAAS, WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS 6 (2009).

67. David Rodin, *The Moral Inequality of Soldiers: Why* Jus in Bello *Asymmetry is Half Right*, *in* JUST AND UNJUST WARS, *supra* note 49, at 45.

to postbellum sanctions for mere participation may encourage combatants who would not otherwise commit atrocities to do so. If they suspect that they might be punished anyway, then there are fewer disincentives on them to commit a wrong.

What then justifies soldiers taking commands from their government in situations of war? The best explanation of this is Joseph Raz's Normal Justification Thesis (NJT); it is similar to the social contract-type arguments sometimes put forward to justify the abdication of decisionmaking power in favour of some form of higher sovereign authority.[68] In the absence of law, people would act on those first order reasons which matter only to them: we would write our own morality. There are good *prima facie* reasons–such as the value of individual autonomy–not to let our own morality be replaced by the law. How can individual autonomy be consistent with a system of laws, which purport to tell citizens what they can and cannot do?

The NJT breaks down into three related arguments.[69] The first argument is that the law claims authority. By this, Raz means that the relevant sovereign authority that propagates law claims that there are legitimate reasons to conform to its directives.[70] In order for this claim to be true, all authoritative directives should be based on those reasons that apply to the subjects (the dependence thesis). The preemption thesis holds that law functions to reflect and replace first-order dependent reasons through provision of second-order preemptive reasons in the form of legal norms. Finally, the NJT states that the law claims that subjects are normally justified in following the law's directives, since to follow these will more likely lead subjects to act on the right balance of first-order dependent reasons than if subjects tried to act on appeal to first-order dependent reasons themselves.[71] Effectively, when the NJT is satisfied, the law will be replacing individual citizens' decision-making processes, but doing so in a manner which does not destroy individual autonomy. In order to satisfy the NJT, it may well be the case that an authority requires a democratic mandate and various institutional guarantees of fundamental rights–such as the freedom of speech and the avoidance of marginalising minorities. Contrary to the claim of Robert Nozick, the argument from epistemic doubt is not necessarily a "morally elitist view that

68. Judith Lichetenberg, *How to Judge Soldiers Whose Cause is Unjust*, *in* JUST AND UNJUST WARS, *supra* note 49, at 112.

69. *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979).

70. *Id.* at 30.

71. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM (1988).

some soldiers cannot be expected to think for themselves."[72] Instead, the NJT is a principled account of precisely how, in the process thinking for themselves, soldiers are morally permitted to and even justified in putting their trust in another institution.

The argument premised on the NJT applies as much to the reasons for going to war as any other pronouncements by the relevant authority. Indeed, it is *a fortiori* the case that the NJT should apply in times of war, when citizens almost always have less intelligence information available to them regarding the status of the potential enemy, its intentions, its armaments, etc. than does the government.[73] As Raz writes, the NJT does not mean that this is the only justification for obeying a government's directive; other considerations, of community loyalty and the importance of maintaining the efficient functioning of institutions may well apply.[74] However, the NJT does seem to best fit the situation of relative uncertainty which all parties face in times of war.[75]

The NJT further accounts for the transfer of liability from those who participate in the war itself to those who made the political decision to engage in war (the *jus ad bellum* liability). F. M. Kamm has constructed several examples to demonstrate situations whereby a person is not liable for undertaking an impermissible act, so long as that person who does it acts as the agent of a principal and all responsibility for the act lies with the principal rather than with the agent.[76] McMahan criticises these examples on the basis that the agent has at least a right to undertake the action itself.[77] However, it is submitted that it is possible to construct an example where an actor, relying on the NJT, acts as an agent for a party which does not have a claim or right to do something, yet nonetheless should not be held liable.

The example is as follows: Suppose A is B's father. To the best of B's knowledge, A is a reasonable and honest man. Simply put, B trusts A and is justified in doing so. They are in a public park. A asks B to pick up from the ground a gold ring, which he says he dropped earlier. B does this. It transpires later that A did not own the ring. Is B morally culpable for having obeyed his father

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72. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 100 (1974).

73. Although the recent "Wikileaks" affair may have altered this somewhat, the general point remains true.

74. *See* RAZ, *supra* note 71, at 53.

75. The mixed response from the media and populations in the United Kingdom, United States, and France regarding their military action in Libya during the early months of 2011 is indicative of this.

76. F. M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 312 (2007).

77. MCMAHAN, *supra* note 6, at 91.

in picking up the ring? I would argue not. Indeed, not only was B excused from liability, but he was also justified in undertaking the action that he did, on the assumption that the NJT is true for their relationship.

It does not matter whether A knew the ring was not his or whether he thought subjectively that it was. The key point is that B would be justified in his action on the basis that the first-order reasons acting on him (such as not stealing) are better served in this instance by adhering to the directives of another source, rather than by B engaging in a de novo investigation of the provenance of the ring. The familial element of this example is important as it factors in, by analogy, the community loyalty and institutional respect elements which also act on participants in a war. This example can be expanded.

Now let us suppose C is D's mother and to the best of D's knowledge, C is a reasonable and honest woman. C makes exactly the same request of D that A made of B, regarding the same ring. D encounters B as he goes to retrieve the ring. A scuffle breaks out. Is D culpable? Is B culpable? No: any moral responsibility for this act lies with the parents who directed their children to undertake the actions. This would be equally true if A actually owned the ring, B actually owned the ring, or neither of A nor B owned it.

This example demonstrates the workings of the NJT in a practical setting and also how situations of war are not quite as removed from domestic analogies as is sometimes supposed by writers like Shue, Rubin and Walzer. It is incorrect to aver that "[a]nalogies with ordinary life only mislead."[78]

After having attempted to rebut negative arguments, it is necessary to make a positive case as to why there should be a single, value-neutral set of norms which apply equally to all parties in an asymmetric conflict. The growing gulf between the philosophical outlooks of combatants who fight on opposing sides of modern asymmetric warfare reflects not just differences in their status within a moral system, but rather different moral systems altogether. As H.L.A. Hart showed, it is the "internal aspect"[79] to a law which explains its binding nature. Scott Shapiro has explained that the internal point of view plays four roles:

> (1) It specifies a particular type of motivation that someone may take towards the law; (2) it constitutes one of the main

78. Henry Shue, *Do We Need a 'Morality of War'?, in* JUST AND UNJUST WARS, *supra* note 49, at 111.

79. H.L.A. HART, THE CONCEPT OF LAW 57 (2d ed. 1994).

> existence conditions for social and legal rules; (3) it accounts for the intelligibility of legal practice and discourse; (4) it provides the basis for a naturalistically acceptable semantics for legal statements.[80]

Shapiro's passage applies particularly to the rules of IHL which, though widely promulgated, clearly do not give rise to any such internal motivation on the part of many irregular combatants. IHL is not a set of commands backed by threats. One of the main reasons for this is that such threats are often idle, owing to the present inability of international criminal law to provide an individualised sanction against combatants who have not engaged in large-scale atrocities. Instead, adherence to any new code of IHL is much more likely to be enforced internally, by the combatants themselves, if it is to be enforced at all. As Hart identifies, it is the critical reflective attitude on a rule which explains adherence. The realist critics who suggest that rules are merely external regularities of behaviour fail to account for this. As such, the second and third portions of Shapiro's categorisation are the most important for the purposes of reforming IHL.

Thomas Franck has more recently reached a similar conclusion regarding compliance with international law. Following Rawls,[81] Franck advocates a "fairness" approach, contending that if nations perceive a rule to "have a high degree of legitimacy" then they are more likely to obey it.[82] Franck defines "legitimacy" as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[83] It is no great logical jump to apply this reasoning to supranational groups, as this article seeks to do.

Harold Koh, in a review of Franck's work, develops his own gloss on the question as to what makes international law binding, which is pertinent to the methodology of this article.[84] Koh argues that reasons for compliance are found at a "transnational" level.[85] For Koh, this is a tripartite process of "interaction, interpretation,

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80. Scott J. Shapiro, *What is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1158 (2006).

81. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1999).

82. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 25 (1995).

83. *Id.* at 24.

84. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

85. *Id.* at 2649-59.

and internalization" [86] whereby first parties (i) "interact," which forces (ii) an "interpretation" of the global norm applicable to the situation.[87] In so doing, the parties (iii) "internalise" the new interpretation of the global norm into their internal normative system.[88] The input legitimacy requirements for a new code of IHL outlined towards the end of this article–particularly those regarding the drafting stage–are in accordance with this model.

It is the desire to engender such an internal attitude of adherence to IHL that provides the motivation for drawing on Islamic sources in order to ameliorate the current norms. The trends identified by Hart, Franck, and Koh, amongst others, indicate that only a solution which can draw on sources and themes common to both theological and legal traditions can have any likelihood of gaining moral traction and hence adherence.

Moreover, the Middle East–the seat of many of today's conflicts–is characterised by a different legal structure than that upon which much IHL is premised. As opposed to the "Westphalian" model whereby systems of law apply on a territorial basis, in much of the Middle East the jurisdiction of law is viewed on a "personal" basis. The norms that apply to any given person do so on basis of their religion, rather than their nationality or the territory in which they reside.[89] Chibli Mallat writes that the historical foundations for this difference originate in the classical Islamic lawyers' divide between *dar al-harb*, the territory of war, as opposed to *dar al-silm*, the territory of peace.[90]

James Cockayne has recast the recent history of IHL as a "conversation" between civilisations, rather than a Huntingtonian "clash."[91] According to Cockayne, IHL has already drawn upon Islamic traditions and norms, which he says have been instrumental in the drafting of modern codes of IHL.[92] In support of this, he cites the Arab participation in the drafting of the First Additional Protocol, which was precipitated in part by the Arab-Israeli conflicts.[93] Indeed, Cockayne contends that "Article 1 (and even the presence of non-State entities) represented a fundamental shift in humanitarian law, beyond the statist model upon which it had long been

86. *Id.* at 2656.
87. *Id.*
88. *Id.*
89. *See, e.g.*, CHIBLI MALLAT, INTRODUCTION TO MIDDLE EASTERN LAW 141 (2007).
90. *Id.* at 173.
91. James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations*, 84 INT'L REV. RED CROSS 597 (2002).
92. *Id.*
93. *Id.* at 614.

predicated. This radical shift was, in many ways, the direct product of pressure from Islamic players."[94]

Cockayne correctly identifies that "it is crucial to realize that the identities of the latter were based primarily not on Islam, but on nationalism."[95] Cocayne's historical analysis is certainly helpful in demonstrating the extent to which IHL has begun to stop treating Islam as "the other."[96] Examples of this include the adoption by the Red Cross organisation of the Red Crescent symbols and semiotics.[97] However, as well as securing acceptance of Islam's role by Western powers, universal norms of IHL must be accepted by Islamist fighting forces.

The dominance of personal jurisdiction in the legal traditions of the Middle East is not fatal to the development of a general code of IHL. Hitherto however, at least from the perspective of international treaties on IHL, this phenomenon has been ignored. From a heuristic perspective, the failure to recognise the personal characteristics of Middle Eastern law is likely to be another reason why the Geneva Convention, as well as other instruments of IHL, have achieved such little recognition amongst many belligerent groups in that area.

It might be asked whether it is feasible to reconcile the basic tenet of modern IHL, that certain rights are held by all persons simply by virtue of being human, with the starting premise of Islamic law, that authority is ultimately drawn from Allah.[98] N.W. Barber has demonstrated how it is possible for multiple rules of recognition to exist within a "pluralist" legal system, as is the case in the "new legal order"[99] of the European Union, where both the Court of Justice and certain nations' highest national courts claim to be supreme.[100] Indeed, just as in the European Union the existence of competing rules of recognition may encourage productive dialogue between the respective sources of authority; as Barber puts it, "The risks of actual conflict provide incentives on each party to strive towards harmonious interpretation of the law."[101] As will be further shown below, in the case of Islam such a practice could well be aided by the presence of *ijtihad* (interpretation) as

94. *Id.*
95. *Id.*
96. *See infra* note 116.
97. Cockayne, *supra* note 91; *see also* Richard D. Parker, *Homeland: an Essay on Patriotism*, 25 HARV. J.L. & PUB. POL'Y 407, 613 (2002) (highlighting the importance of symbols).
98. Cockayne, *supra* note 91 at 622-23.
99. Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 13 (1963) (introducing the term "new legal order").
100. N.W. Barber, *Legal Pluralism and the European Union*, 12 EUR. L. J. 306 (2006).
101. *Id.* at 328.

one of its sources.[102] The vital question is therefore whether it is possible to locate a common denominator between Islamic law and the traditional Western sources, as far as IHL is concerned.

IV. THE NATURE OF ISLAMIC LAW

Before engaging in an analysis of the relevant norms of Islamic law relating to asymmetric warfare and the status of civilians, it is important to briefly explain the nature of Islamic law. It is far from a single, monolithic text but instead is drawn from numerous sources which are regarded with varying degrees of acceptance and authenticity.

Although *sharia* is colloquially referred to as Islamic law, this is just a subset of *fiqh*, which may be roughly translated as jurisprudence. The principal source of *fiqh* will be familiar to readers: the Holy Koran.[103] This provides certain rulings; although the opacity of its language has left many of these open to varying interpretations.[104] Youssef Aboul-Enein and Sherifa Zuhur observe "Islamists . . . selectively draw on Quranic verses and purposefully omit injunctions that do not suit their political agenda."[105] Aside from the broad scope for interpretation of language, especially in translation, the Koran contains structural elements which further complicate matters. There is ongoing debate as to whether certain contradictory verses of the Koran abrogate others.[106] This method of abrogation is known as *nasekh*.

As Maḥmūd Shaltūt shows, the extent to which *nasekh* has occurred within Koranic verses has a significant bearing on its applicability to IHL. He writes that "about 70 verses are considered to have been abrogated, since they are incompatible with the legitimacy of fighting."[107] The reason for the apparent inconsistencies is

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102. Anisseh Van Engeland, *The Differences and Similarities Between International Humanitarian Law and Islamic Humanitarian Law: Is There Ground for Reconciliation?*, 10 J. OF ISLAMIC L. & CULTURE 81, 81–99 (2008) (advocating this solution).

103. Unless otherwise specified, I use the translation by Muhammad Asad on Islamicity: Quran Search, http://www.islamicity.com/quransearch/ (last visited March 13, 2011). Where I have quoted directly from other sources which cite the Koran, I retain the translations used by those authors.

104. A feature which J. Wansbrough has attributed, at least in part, to "a concomitant failure to assimilate Arabian elements to the Judaeo-Christian legacy." J. WANSBROUGH, QUR'ANIC STUDIES: SOURCES AND METHODS OF SCRIPTUAL INTERPRETATION 29 (2004).

105. YOUSSEF H. ABOUL-ENEIN & SHERIFA ZUHUR, U.S. ARMY WAR COLLEGE, STRATEGIC STUDIES INST., ISLAMIC RULINGS ON WARFARE 7 (2004).

106. Hisham M. Ramadan, *Toward Honest and Principled Islamic Law Scholarship*, 2006 MICH. ST. L. REV. 1573, 1582-83 (2006); *Sahih Al-Bukhari* 6:60:8 at 971 (Mika'il al-Almany ed., M. Muhsin Khan trans., 2009), *available at* http://www.biharanjuman.org/hadith/Sahih_Al-Bukhari.pdf [hereinafter *Sahih Al-Bukhari*].

107. Maḥmūd Shaltūt, *The Koran and Fighting*, *in* JIHAD IN MEDIAEVAL AND MODERN ISLAM 26 (Rudolph Peters trans. 1977).

intricately linked to the historical context of the Koran. The migration of Mohammed's followers from Mecca, where they had been a subjugated minority, to Medina marked a turning point in Islamic history.[108] Their increasing strength allowed Mohammed's followers to defend (and indeed advance)[109] their religion by means of warfare.[110]

A second source of *fiqh* is the *hadith*. This consists of short accounts of the Prophet Mohammed's sayings and actions (*sunna*). However, there are various collections of *hadith*, corresponding to different authors. There is some crossover between their content, although they contain often crucial differences. Moreover, varying sources of *hadith* tend to be followed by the different internal denominations of Muslims.

The third source is the *quiyas* (analogies). These are constituted largely by *fatwahs*. Although popularised in Western parlance as "death sentences" by virtue of the famous directive pronounced by Ayatollah Ruhollah Khomeini against the author Salman Rushdie,[111] a *fatwah* is actually a response to a specific question posed to a qualified cleric (*mufti*, or *al-ulama*). The question as to who is a qualified *mufti* is in itself a source of disagreement. Once again, different internal denominations of Muslims prefer the writings of different *muftis*. Many of the debated sources described below–particularly those of contemporary clerics–are *fatwahs*. The advent of the internet has allowed for the instantaneous universal dissemination of such rulings, providing a clear opportunity for their application worldwide, rather than to a small location-centric population.

Some scholars also consider *ijtihad* (interpretation) as a fourth source of Islamic law. This is connected to *ijma* (consensus),[112] which is achieved when one particular *ijtihad* has been agreed upon by all qualified scholars. Numerous textbooks on Islamic law,

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108. KELSAY, *supra* note 2, at 21.

109. This notion is disputed by some scholars, who maintain that Islam's early wars were of a purely defensive nature. Regardless of the truth of this in Mohammed's time, it is apparent that the expansive wars fought by his successors certainly had their aim as expansion, rather than mere consolidation. Islamic texts support the ideological struggle for this. As Kelsay writes, "Islam is the religion of jihad, in the sense of struggle. That is the premise of Islamic mission." *Id.* at 41.

110. NAUNIHAL SINGH, UNHOLY WAR (EXTREMISM IN THE NAME OF ISLAM) 36-37 (2005).

111. *On This Day*, BBC NEWS, Dec. 26, 1990, http://news.bbc.co/uk/onthisday/hi/dates/stories/December/26/newsid_2542000/2542873.stm (last visited March 6, 2011).

112. *See* JIHAD IN MODERN AND MEDIAEVAL ISLAM, *supra* note 107, at 2 ("Tradition has it that the Prophet said: 'My congregation will never be agreed about an error.' ")

and more particularly the Islamic laws of *jus in bello*,[113] supplement these sources.

It is evident that what constitutes *fiqh* is a body of overlapping and sometimes conflicting sources. Borrowing a phrase from the philosophers Gilles Deleuze and Félix Guattari, Chibli Mallat has consequently described Islamic law as "*Mille Plateaux*, a thousand planes, where various levels and intensities of authority and legitimacy operate."[114] It is this plurality of divergent opinions that has led to the wildly differing accounts of Islam's attitude to war and particularly IHL. With this structural element in mind, it is possible to begin a substantive survey of the relevant norms of Islamic law.

Various articles, papers, and monographs have been published–particularly since September 11, 2001–suggesting that *fiqh* actually prohibits many of the tactics used by Islamist terrorists.[115] The reassertion of Islamic laws of IHL was triggered in part as a response to the work of the "Orientalists."[116] However, unlike previous works on this topic,[117] the discussion below does not attempt to assess the compatibility of *fiqh* with *lex lata* but rather whether it can provide lessons for *lex ferenda*.

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113. I have used *jus in bello* here, as it would be an anachronism to describe works written between the 8th and 20th century as "international humanitarian law." For our purposes, however, the terms are synonymous.

114. CHIBLI MALLAT, *Comparative Law and the Islamic (Middle Eastern) Legal Culture*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 609, 612 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

115. *See, e.g.*, Khaled Abou El Fadl & Ahkam al-Bughat, *Irregular Warfare and the Law of Rebellion in Islam*, *in* CROSS, CRESCENT, AND SWORD: THE JUSTIFICATION AND LIMITATION ON WAR IN WESTERN AND ISLAMIC TRADITION 149 (James Turner Johnson & John Kelsay eds., 1990); Muhammad Munir, *Suicide Attacks and Islamic Law*, 90 INT'L REV. OF THE RED CROSS 71 (2008); ABOUL-ENEIN & ZUHUR, *supra* note 105; Bernard K. Freamon, *Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History*, 27 FORDHAM INT'L L.J. 299 (2003); Ergün Çapan, *Suicide Attacks and Islam*, *in* TERROR AND SUICIDE ATTACKS: AN ISLAMIC PERSPECTIVE, *supra* note 5, at 101, 114; Said El-Dakkak, *International Humanitarian Law Lies Between the Islamic Concept and Positive International Law*, 275 INT'L REV. OF THE RED CROSS 101 (1990); Van Engeland, *supra* note 102.

116. Although it had long been in use to describe the study of the Orient, Edward Said imbued the phrase with a new, pejorative, meaning. EDWARD W. SAID, ORIENTALISM (2003). In that work, Said launched a scathing attack on the tradition of "apologists of an exultant Western tradition" who fetishised the East as "supine" and "feminine" but also characterized it as "enraged, congenitally undemocratic and violent." *Id.* at 220, 343, 349.

117. Such studies may be crudely categorized in three groups: the critics, who condemn the norms of Islam as bellicose and barbaric; the apologists, who emphasize the compatibility between Islam and current IHL principles; and those who take a more balanced approach, emphasizing the synergies as well as the inconsistencies between Islamic norms and contemporary IHL. *See generally supra* note 115 and accompanying text.

A. Classical Islam

Classical Islam lacks a precise term for civilians or non-combatants. The dominant terminology involves the concept of *isma*, (immunity).[118] Although it lacked the terminology adopted by current IHL, this does not mean that Classical Islam did not grapple with the same issues.

A *hadith* describing the aftermath of the battle of Hunayn is often recounted in support of the notion that there is a distinction between civilians and combatants in the *fiqh*. Mohamed came across the body of a woman who had been killed by the forces of Khalid ibn Walid. On hearing this, Mohamed said to one of his companions: "Run to Khalid! Tell him that the Messenger of God forbids him to kill children, women, and servants."[119] One of those present then challenged Mohamed, asking "Are they not the children of the pagans?" Mohamed answered: "Were not the best of you, also, once the children of pagans? All children are born with their true nature and are innocent."[120] Numerous other *hadith* repeat such injunctions against the killing of women and children.[121]

It seems from the foregoing passage that there is a reasonable degree of consensus, at least in the *hadith*, that women and children should not normally be killed. In seeking guidance for the drafting of a new definition of non-combatants, the important issue is whether women and children are excluded simply because they are women and children, or rather because they do not pose a threat. John Kelsay has argued that Classical Sunni theorists favoured the former view: "If one is a leader (an adult, ablebodied [sic] male), one's guilt is obvious. If one is a follower (child, woman), one's guilt may be diminished."[122] James Turner Johnson adopts a slightly different, functional, view arguing that the "reason given in the text is not that these [non-combatants] have rights of their own to be spared harm, rights derived either from nature or from considerations of fairness or justice, but rather that they are potentially of value to the Muslims."[123]

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118. ELLA LANDAU-TASSERON, HUDSON INST., CTR. ON ISLAM, DEMOCRACY, & THE FUTURE OF THE MUSLIM WORLD, "NON-COMBATANTS" in MUSLIM LEGAL THOUGHT 2 (2006) ("The category of those who have full immunity ('*isma*'), meaning that they must not be harmed, includes only Muslims and their allies, the infidels who have a specific legal treaty with Muslims.").

119. Abu Dawud, *Jihad* 111, Verses 2663, 2664, http://www.guidedways.com/book_display-book-14-translator-3-start-100-number-2649.htm.

120. Hamza Aktan, *Acts of Terror and Suicide Attacks in the Light of the Qur'an and the Sunna*, *in* TERROR AND SUICIDE ATTACKS: AN ISLAMIC PERSPECTIVE, *supra* note 5.

121. Sahih Al-Bukhari, *supra* note 106.

122. KELSAY, *supra* note 2, at 66.

123. JAMES TURNER JOHNSON, THE HOLY WAR IDEA IN WESTERN AND ISLAMIC

The better view is that even in Classical Islam, the question as to who was a legitimate target was based on their posing of a threat. At the time when these texts were composed, the notion of formal armies as separate from the civilian population did not exist to the extent that it did in the early 20th century. Much like the situation of irregular warfare today, any able-bodied male might be considered a potential soldier. The great Islamic polymath, Ibn Rushd (known better as Averroes), wrote that there "is no disagreement about the rule that it is forbidden to slay women and children, *provided that they are not fighting*, for then women, in any case, may be slain."[124] The italicised proviso is key to understanding the meaning of this dictum. Averroes bases it on Mohamed's reaction to seeing a slain woman. Mohamed commented, "She was not one who would have fought."[125]

A further example of the rule that only combatants might be targeted can be found in the Koran itself, at 2:190. The verse says: "And fight in God's cause *against those who wage war against you*, but do not commit aggression–for, verily, God does not love aggressors."[126] Ergun Çapan writes that the "reservation of 'those who fight you' in the original text of the verse is of extreme importance."[127] He continues by saying "the mood in Arabic denotes 'participation' which, in this sense means: 'those who fall under the status of combatant.' Thus, non-combatants are not to be fought against."[128] Munir writes similarly: "The reservation 'those who fight you' in the original text of the verse is of extreme importance, because the Arabic word *muqatil* (pl. *muqatileen*) means combatant."[129] Munir does, however, note that "[M. Marmaduke] Pickthall's translation of '*wa la ta atadu*' differs from that of the majority of commentators . . . according to Mufti M. Taqi it means 'and do not transgress. Verily Allah does not like the transgressors.' "[130] However, it is submitted that the translation as "aggressors" or "transgressors" here makes little difference to the substantive meaning: the transgression in question is that of being aggressive towards those who are non-combatants.

It might be argued that this apparent distinction is contradicted later in the Koran. At 9:36, the Koran states "and fight against those who ascribe divinity to aught beside God, *all together*–just as

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TRADITIONS 122 (1997).

124. JIHAD IN MEDIAEVAL AND MODERN ISLAM, *supra* note 107, at 15 (emphasis added).

125. *Id.* at 17.

126. Asad, *supra* note 103, at 2:190 (emphasis added).

127. Çapan, *supra* note 115, at 106.

128. *Id.*

129. Munir, *supra* note 115, at 84-85.

130. *Id.* at 85 n.69.

they fight against you."[131] On its face, this could be read as allowing for the distinction between civilians and combatants to be collapsed, at least where polytheists or pagans are concerned. Ignoring the polytheist categorisation for the moment, closer inspection still reveals that a partial distinction is to be maintained. The second part of the sentence reveals that the duty is reciprocal. Presumably, if the polytheists (i.e. enemies) did not fight the Muslims all together, then Muslims would have no obligation to fight their enemies all together either. Thus, whilst the imperative is conditional, rather than categorical, verse 9:36 does not entirely abrogate verse 2:190.

The idea that immunity is lost once a party engages in hostilities may be found elsewhere in the *fiqh*. The 8th century scholar al-Shaybani, a disciple of Abu Hanifah (the founder of the Hanafi school), states: "I asked Abu Hanifah about the killing of women, children, such old men who do not have the ability to fight, those suffering from chronic illness and are unable to fight. He forbade their killing and detested it."[132] As Ella Landau-Tasseron concludes, it "is widely agreed [in Islam] that the lives of 'non-combatants' who take part in combat–which need not mean taking up weapons–are forfeit, like those of the warriors themselves."[133] The next logical question is what constitutes taking part in hostilities for the purposes of the *fiqh*. It would appear from the example of the elderly Duraid ibn Simma, who was killed by Mohamed's forces for counseling his son on warfare against the early Muslims, that merely advising could constitute the necessary participation in hostilities in certain circumstances.[134]

A major difficulty with comparing Classical Islamic *fiqh* to IHL is that the *fiqh* appears at various junctures to distinguish between Muslims, followers of other monotheistic religions (people of the Book), and polytheists.[135] The former are offered the greatest degree of immunity (*isma*), and the other two categories progressively less. Indeed, some accounts suggest that all polytheists ought to be killed in any circumstances.[136]

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131. Asad, *supra* note 103, at 9:36 (emphasis added).

132. MUHAMMAD AL-HASAN AL-SHAYBANI, THE SHORTER BOOK ON MUSLIM INTERNATIONAL LAW 82 (Mahmood A. Gazi trans., 1998).

133. LANDAU-TASSERON, *supra* note 118, at 12.

134. *Sahih Al-Bukhari*, *supra* note 106.

135. This term may also be translated variously as "infidels," "pagans," "idolaters," and "those who ascribe divinity to aught beside God." Here I use "polytheists" as it carries the least pejorative connotations. *See* Asad, *supra* note 103.

136. ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOSTACY AND ISLAM 76 (2004).

Landau-Tasseron contends that there are two potentially inconsistent principles operating within *fiqh*: that which permits (or even mandates) the killing of polytheists, and that which protects non-combatants.[137] There are varying approaches as to how to resolve this apparent inconsistency. The *Hanafi* School has tended to argue that so long as the polytheists do not themselves fight, then their lives are not forfeit. The *Shafií* school, however, has placed greater emphasis on the directive contained within the Koran at 9:5.

Whilst this clash is usually taken to be one of irreconcilable principles, the actual text of the Koran strongly suggests that there is a clear "right answer" to this issue.[138] In order to illustrate this, it is necessary to quote 9:5 in its entirety:

> And so, when the sacred months are over, slay those who ascribe divinity to aught beside God wherever you may come upon them, and take them captive, and besiege them, and lie in wait for them at every conceivable place! Yet if they repent, and take to prayer, and render the purifying dues, let them go their way: for, behold, God is much forgiving, a dispenser of grace.[139]

The inclusion of a conciliatory caveat in the second sentence utterly changes the nature of the verse. Whilst 9:5 still may be seen as requiring the payment of the *jizyah* tax by polytheists,[140] in no way does this verse support the *Shafií* view that polytheists are to be killed in all circumstances. At the very most, 9:5 advocates a forced conversion of polytheists, although this would depend on the meaning ascribed to the words "repent, and take to prayer."[141] Moreover, it seems unlikely that that instruction would cover the other "religions of the Book," Judaism and Christianity. As such, it can be seen that the putative clash of principles within Islam regarding polytheist non-combatants is illusory. Though subsequent scholars have argued otherwise, it is submitted that reading 9:5 in its full context evinces a fairly clear victory for the Hanafist interpretation.

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137. LANDAU-TASSERON, *supra* note 118, at 16-17.

138. *See generally* RONALD DWORKIN, LAW'S EMPIRE 80 (1986).

139. Asad, *supra* note 103, at 9:5.

140. *Id.* M. Marmaduke Pickthall prefers the term "idolaters" to "pagans"–the former apparently excludes Jews and Christians. Muhammad Asad uses "those who ascribe divinity to aught beside God."

141. For example, it might be suggested that repenting and taking to prayer may potentially be consistent with maintaining some polytheist beliefs.

It is apparent from the foregoing that Classical Islamic *fiqh* does support a distinction between combatants and civilians and that this should be done on the basis of individual agents engaging in hostilities. Although the starting point is that women, children, the elderly, and the incapacitated are not considered threats, once they do participate in an attack, any immunity is lost.

Classical Islam also dealt with the issue of perfidy and the use of deception as a tactic.[142] There appear to be strong indications in the Koran that Islam disapproves of the use of deception in any context. Verse 3:161 provides that he who deceives shall be faced with his deceit on the Day of Resurrection, when every human being shall be repaid in full for whatever he has done, and none shall be wronged."[143]

The prohibition on deception applies also in war time, as verse 8:62 shows: "And should they seek but to deceive thee [by their show of peace]–behold, God is enough for thee!"[144] Perfidy and deception in situations of battle are again mentioned at 22:60: "And as for him who responds to aggression only to the extent of the attack levelled against him, and is thereupon [again] treacherously attacked–God will most certainly succour him: for, behold, God is indeed an absolver of sins, much-forgiving."[145]

Mohamed's companion, and the first Caliph, Abu Bakr, contributed significantly to the development of *jus in bello* norms. On instructing the Muslim armies setting out to conquer what is now Syria, Abu Bakr gave the following pronouncement, which has been described as "a mini-manual on Islamic *jus in bello*."[146]

> Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone.[147]

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142. *See* El-Dakkak, *supra* note 115, at 106-08 (1990).
143. Asad, *supra* note 103, at 3:161.
144. *Id.* at 8:62.
145. *Id.* at 22:60.
146. Munir, *supra* note 115, at 86.
147. ABOUL-ENEIN & ZUHUR, *supra* note 105, at 22.

This dictum contains the seeds of various rules found in modern IHL. It includes the prohibition on killing non-combatants as well as an interdiction on unnecessary harm of the environment. Most importantly, however, there is a proscription of "treachery." Accordingly, it seems that deception as a tactic of war–at least in terms of feigning an absence of belligerency–is prohibited in Islamic law.

Classical Islam dealt specifically with the use of human shields, which were known as *al-tatarrus*.[148] Specifically, this referred to situations where enemies took Muslim prisoners and used them as human shields. The Classical *fiqh* appears to deal with this issue on a basis not dissimilar to a modern proportionality calculation. It is by no means desirable for Muslims to be killed.[149] The 13th century scholar Ibn Taymiyyah, known as Sheikh ul-Islam, rationalises the killing of such shields as follows: "[Permission] is limited and restricted to the situation in which Muslims are in jeopardy if the unbelievers are not raided, even if that leads, as a consequence, to the shield being killed."[150]

Although the more nuanced elements of contemporary a proportionality calculation are not used by Ibn Taymiyyah, it is apparent that a high degree of danger must be engaged before the unintentional killing of civilians is to be allowed. Although the Classical sources do not deal explicitly with the idea of Muslims using human shields themselves, it is highly likely from the unwillingness to risk civilians endangered by the enemy that this would apply *a fortiori* in terms of an obligation for Muslim armies not to use human shields.

B. Contemporary Extremist Islamic Sources

The section below will look into some of the most prominent modern justifications published for the deliberate targeting of non-combatants. These are The Covenant of the Islamic Resistance Movement of August 18, 1988 (Hamas Charter)[151] and the World Islamic Front's 1998 Declaration of Armed Struggle Against Jews and Crusaders (1998 Declaration).[152] As well as these sources, to-

148. *See* Jarret Brachman & Abdullah Warius, *Abu Yaha al-Libi's "Human Shields in Modern Jihad,"* CTC SENTINEL, May 2008, at 1.

149. Asad, *supra* note 103, at 9:4, 6:151.

150. *Website Posts Abu-Yahya al-Libi's Research on Human Shields in Jihad*, May 1, 2008, *available at* http://triceratops.brynmawr.edu/dspace/bitstream/handle/10066/4607/AYL20080410.pdf [hereinafter *Al-Libi*].

151. *The Covenant of the Islamic Resistance Movement of August 18, 1988, available at* http://i-cias.com/e.o/texts/political/hamas_charter.htm [hereinafter *Hamas Charter*].

152. World Islamic Front, *Statement Urging Jihad Against Jews and Crusaders*,

day numerous online discussion forums and militant websites provide the basis for contemporary radicalisation. Although these sources are often decried and dismissed for their stances, an attempt will be made to engage with them as they are seen by their adherents–as serious texts in Islamic law–and if possible to derive principled reasoning from them.

The 1998 Declaration was published in the names of five different Islamic leaders, which included Bin Laden, and is characterised as a *fatwah*. It is interesting to note at this juncture that the *fatwah* here is not a responsum in the traditional sense, but rather a general declaration independent of any particular question or religious controversy. To this extent, it resembles the type of *fatwah* made famous by Ayatollah Ruhollah Khomeini against Salman Rushdie, mentioned above. It may be characterised as a mission statement of Al Quaeda.[153]

The ideological grounding of the 1998 Declaration is set out in the opening sentences, which purport to find support for their aggressive stance in the *fiqh*. It begins by quoting the familiar Verse of the Sword found at 9:5 of the Koran.[154] Second, a hadith of Mohamed is quoted: "I have been sent with the sword between my hands to ensure that no one but Allah is worshipped."[155] After reciting various claims against the US for its occupation of the Arabian peninsula and its support of Israel, the fatwah makes the crucial point that "the ruling to kill the Americans and their allies–*civilians and military*–is an individual duty for every Muslim who can do it in any country in which it is possible to do it"[156]. However, no further reasoning is provided to support the ruling that civilian targets anywhere are justified.

It is no surprise that the 1998 Declaration omits the second part of verse 9:5, which, as discussed above, completely alters its

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AL-QUDS AL-ARABI, Feb. 13, 1998, at 3, *available at* http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_28.html [hereinafter *The 1998 Declaration*]. The original Arabic can be viewed at http:www.library.cornell.edu/colldev/Mideast/fatw2.htm (last visited March 13, 2011).

153. The propriety of making a general announcement of this type–which is not in response to a particular question, issue or target–has been questioned. *See* Çapan, *supra* note 115, at 114:

> One of the primary practices of the methodology of Islamic law is that the determination of the boundaries of the subject matter precedes the final establishment of the judgment . . . Attacks where the goal and target group are not determined [against civilians in general], are in sheer opposition to one of the general principles of Islamic law.

154. *See* JIHAD IN MEDIAEVAL AND MODERN ISLAM, *supra* note 107.

155. *The 1998 Declaration*, *supra* note 152.

156. *Id.*

meaning. Since the 1998 Declaration is not limited to polytheists, but covers Christians and Jews, the citation of verse 9:5 is insufficient to cover the latter categories. More importantly, given that the link between verse 9:5 and the instruction to kill civilians was tenuous at best before, reading its second part strips the 1998 Declaration of any legitimacy as regards fidelity to Classical *fiqh*.

Article 15 of the Hamas Charter cautions against attempts to constrain Muslim ideology by Western values: "The Crusaders realised that it was impossible to defeat the Muslims without first having ideological invasion pave the way by upsetting their thoughts, disfiguring their heritage and violating their ideals. Only then could they invade with soldiers."[157] The nexus between the first sentence and the second is crucial in understanding the aversion of many radical Islamic groups to Western norms of IHL. Such norms are seen as a tactic used by the West (who are deemed to be synonymous with the Crusaders) to emasculate, and hence dominate, Islam.

Nonetheless, the Hamas Charter does seem to make some form of combatant and civilian distinction. Article 20 explicitly distinguishes a "Muslim society" from "a vicious enemy which acts in a way similar to Nazism, making no differentiation between man and woman, between children and old people."[158] Article 30 ostensibly deals with the obligation of non-military personnel in the Arab and Muslim world to support the struggle against the Zionist offensive. However, in so doing, the Charter quotes an interesting (and unsourced) *hadith*: "Whosoever mobilises a fighter for the sake of Allah is himself a fighter. Whosoever supports the relatives of a fighter, he himself is a fighter."[159] It is unclear the extent to which the first sentence (particularly the qualification that mobilising a fighter must be for the sake of Allah) qualifies the second sentence. If the second sentence were read alone, it could be argued that this *hadith* greatly widens the ambit for those who may be legitimately targeted as enemies, probably to whole societies through the iterative operation of its deeming provision.[160] However, it is submitted that this reading is probably not the best one. Rather than concerning *jus in bello* norms, this *hadith* is better seen as explaining the general obligation on Muslims to engage in a jihad (which translates more directly as "struggle," rather than

157. *Hamas Charter*, *supra* note 151, at art. 15.

158. *Id.* at art. 20.

159. *Id.* at art. 30.

160. The process is as follows: fighters may be legitimately targeted. The *hadith* indicates that anyone who provides material or emotional support to a fighter is "himself a fighter." Hence, the class of those who may be legitimately targeted may be expanded almost indefinitely.

"holy war") and does not mean that every member of society must actually take up arms.

Despite the attempt above to engage on a rational basis with the arguments in the Hamas Charter, it is difficult to place too much emphasis on the intellectual rigour behind a document which suggests that the Zionist enemy of Islam was "behind the French Revolution, the Communist revolution and most of the revolutions we heard and hear about."[161] As evidence, the Hamas Charter goes on in Article 32 to cite the Protocols of the Elders of Zion, a notorious anti-Semitic forgery.[162]

Aside from these documents, other arguments have been raised as to why Islamic fighters may target those who are ostensibly civilians. These are generally premised on the basis that whilst the Koran might advocate a prima facie distinction between civilians and combatants, this is abrogated in certain circumstances. Emblematic of this view is Yusuf al-Qaradawi, a prominent Sunni cleric, who claimed that "Israeli women are not like women in our society because Israeli women are militarised."[163] There is some perverse truth in at least the first part of this statement: the emancipated nature of Israeli society allows (and generally requires non-Muslim) women to serve in the army, and fulfill many other roles from which they are precluded in other Middle Eastern states. However, this does not justify, as al-Qaradawi contends, treating all Israeli women as fighters and hence as potential targets.

Such reasoning has been used to justify the destruction of the principle of distinction for not just those who reside in the West Bank, but the entirety of Israeli society. Muhammad Hussayn Fadlallah has argued in a similar vein that "we don't consider the settlers who occupy the Zionist settlements civilians, but they are an extension of occupation and they are not less aggressive and barbaric than the Zionist soldier."[164]

This type of reasoning is not just limited to Islamic scholars. McMahan seems to support at least some of the views of Fadlallah and al-Qaradawi when he writes that all settlers in the West Bank are "active participants in the theft of the Palestinian lands . . . not just conscious and willing participants but enthusiastic and indeed fanatical instigators and perpetrators of the strategy by which the

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161. *Hamas Charter*, *supra* note 151, at art. 22.

162. *Id.* at art. 32.

163. *Yusuf Al-Qaradawi Tells BBC Newsnight That Islam Justifies Suicide Bombings*, BBC NEWS, July 7, 2004, http://www.bbc.co.uk/pressoffice/pressreleases/stories/2004/07_july/07/newsnight.shtml (last visited March 31, 2011).

164. Munir, *supra* note 115, at 74 (quoting Muhammad Hussayn Fadlallah, *An Interview with Secretary General of Islamic Jihad*, AL-HAYAT, Jan. 2003, at 10).

theft is being accomplished"[165] and hence may be the subject of legitimate military targeting. However, he later restricts this principle to only the "adult settlers," writing that instances where children sleeping in their beds are murdered are "instances of murder for terrorist purposes and nothing more."[166] Though McMahan admits that civilian immunity remains a legal necessity, he nonetheless casts doubt on it as a moral proposition. However, as explained in the previous section, if the separation thesis remains intact despite McMahan's attacks, then his assault on civilian immunity here must fail.

Abu Yahya Al-Libi, the prominent Al Quaeda theorist believed by some to be a successor to Bin Laden,[167] published in 2006 a monograph dealing with the aforementioned issue of *al-tatarrus*– the use of human shields.[168] Al-Libi acknowledges that Shafi'ites are of the view that "attacking a shield is not allowed even in cases of coercion,"[169] although he considers this to have been "overwhelmed" and not accepted as *ijma*. The condition of "necessity," however, is recognised numerous times by Al-Libi as a "constraint" upon the doctrine of *al-tatarrus*. Al-Libi considers the extent to which the Classical Islamic fiqh is relevant to modern situations. Noting the changing realities of modern warfare, with "developed weapons which burn targets into ashes"[170] where civilians and combatants are regularly interspersed, he concludes that "modern shielding becomes more effective in achieving its objectives than did ancient shielding."[171]

Although critics of Al-Libi have decried the monograph as an attempt to justify targeting civilians,[172] a close reading reveals quite the opposite. Indeed, Al-Libi goes on to lay down rules for *mujahedeen* fighters which appear as strenuous, if not more so, then the principle of distinction in modern IHL. *Mujahedeen* are directed to:

> [S]tudy [every military operation] taking into consideration many points, such as:
> - Weighing up the military, political, moral or economic im-

165. MCMAHAN, *supra* note 6, at 223.

166. *Id.* at 224.

167. Craig Whitlock & Munir Ladaa, *Al Qaeda's New Leadership: Abu Yahya al-Libi*, WASH. POST, 2006, *available at* http://www.washingtonpost.com/wp-srv/world/specials/terror/yahya.html.

168. *Al-Libi*, *supra* note 150.

169. *Id.*

170. *Id.*

171. *Id.*

172. Jack Barclay, *Al-Tatarrus: al-Qaeda's Justification for Killing Muslim Civilians*, 8 TERRORISM MONITOR 1, 6-7 (2010); Brachman & Warius, *supra* note 148, at 2.

> portance of the target they intend to hit.
> - Choosing, as far as possible, the right place and the right time for the operation and making every endeavor to choose a place far from the homes and thoroughfares used by the public; and trying to avoid rush hour.
> - Using a quantity of weapons or ammunition that will do the job without causing - or at least causing the least possible - damage to Muslims . . .
> - Making a very precise and very realistic evaluation of the damage intended to result from striking a given target, and of the damage that might be caused to the Muslims who are affected by the operation, be it in the number of people killed or in their understanding and support of the operation once it is perpetrated.[173]

It is remarkable the extent to which these rules resemble modern IHL's proportionality and double-effect doctrines, which similarly forbid not the killing, but the deliberate targeting, of civilians. It should, of course, be noted that Al-Libi shows little regard for non-Muslim civilians. Nonetheless, his monograph is highly important inasmuch as modern *mujahedeen* most often conceal themselves within Muslim civilian areas (owing to the fact that a significant amount modern warfare is conducted in territories with a predominantly Muslim population). It must surely follow from Al-Libi's reasoning that there is a reciprocal obligation on Muslim fighters not to endanger fellow Muslims by deliberately situating themselves amongst civilians.

It is apparent from the discussion above that the modern fundamentalist tracts and clerics do not actually disapprove in limine of the distinction between civilians and combatants. Indeed, these sources go out of the way to show that the distinction does not apply to the particular situations where they advocate violence. The issue is not the existence, but rather the factual application of the distinction.

V. BUILDING A NEW CODE

As identified above, two main deficiencies exist in the current law. First, the rules denoting who is a combatant and who is a civilian are made up of a patchwork of conflicting directives. Second, the prohibition on perfidy, and its conceptual relationship with the principle of distinction, is underdeveloped and often ignored.

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173. *Al-Libi*, *supra* note 150, at 22.

As regards the first deficiency, it has been shown that the best view of the Classical Islamic sources is that parties lose non-combatant immunity once they present a direct threat. This new formulation is supported also by verses 2:190 and 9:36 of the Koran, as well as the various *hadith* cited above. The Islamic sources indicate that this is the chief criterion on which parties are to be targeted, a factor which supports the stripping away of the complex and formalistic criteria in existing IHL.

Accordingly, it is proposed that the various definitions of combatants in Articles 1 and 2 of the Annex to The Hague Regulations and Articles 43, 44, and 51(3) of the First Additional Protocol to the Geneva Conventions be deleted and replaced with the following: "A combatant is someone whose deliberate action plays a direct causal role in the existence of a threat of violence towards another or another's property. Once civilian status has been lost in this manner, it cannot be regained until such a time as the party abandons a continuous combat function, or ceases to have the capability engage in such actions (becomes *hors de combat*)."[174]

As with all of the provisions in IHL, this relates only to situations of armed conflicts.[175] There is a fairly strict standard for becoming a combatant, denoted by the inclusions of the direct causal role criterion. This can be expressed as a but-for (sine qua non) causation of a threat.[176] Merely providing general moral support or acting as a human shield would not render a party a combatant. This removes any necessity for near-impossible distinction which some ground commanders might otherwise be forced to draw between those who willingly support belligerent actions by placing themselves close to combatants and unwilling or coerced human shields.

A party who deliberately and directly counsels another to undertake a specific belligerent act, and but for whose counseling the act would not have occurred, may well be classed a combatant. The example of ibn Duraid's killing after he provided close logistical support and counseling to Mohamed's enemies supports this

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174. *Protocol I*, *supra* note 12, at art. 41(1).

175. As stipulated in the Preamble, as well as Article 2(b) of the First Additional Protocol: a party who partakes in actions constituting a threat to persons or property which are not pursuant to the armed conflict (such as a burglar who loots a house during a war), would not be rendered a combatant by this provision. *Protocol I*, *supra* note 12. pmbl. and art. 2(b).

176. It would also exclude those parties whose actions are merely ancillary to the creation of a threat, such as those who cook for combatants. *See* Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, *in* CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FUR DIETER FLECK 505, 506 (Horst Fischer et al eds., 2004); *see also Targeted Killings Case*, *supra* note 26, at §§ 34-48.

distinction from the perspective of Classical Islam.[177] As such, those who direct and plan particular attacks might still be targeted under this definition. Counseling a general course of action is too remote from any single act to give rise to a designation of being a combatant.

The continuous combat function terminology and definition borrows from the ICRC Interpretative Guidance.[178] However, whereas the continuous combat function designation in the ICRC Interpretative Guidance only applied to those with a "lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict,"[179] the definition proposed above would apply to any party–regardless of membership of armed forces. This article's formulation is very similar to one rejected during the drafting stage of the ICRC Interpretative Guidance.[180]

The "abandonment of continuous combat" criterion prevents combatants from simply "chang[ing] their hat"[181] at will and rendering themselves immune from attack at virtually all times. The standard for becoming a combatant (direct causal participation) is different from that required to regain civilian status (abandonment of continuous combat function). In many situations,

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177. Perhaps the targeted killing of the physically frail Sheikh Ahmed Yassin, one of the founders of Hamas, by Israel in 2004 might be seen as a modern analogy to this. *Hamas Chief Killed in Air Strike*, BBC NEWS, Mar. 22, 2004, http://news.bbc.co.uk/2/hi/middle_east/3556099.stm. The Israel Defense Forces spokesperson, much like the US representatives following the killing of Bin Laden, emphasized the fact that Yassin was not just a spiritual leader, but a practical commander who had played a direct and continuing role in planning and approving terrorist attacks. Press Release, Israel Ministry of Foreign Aff., *IDF Strike Kills Hamas Leader Ahmed Yassin* (Mar. 22, 2004), *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/Ahmed+Yassin.htm. *See also*, *Yusuf Al-Qaadawi Tells BBC Newsnight that Islam Justifies Suicide Bombings*, BBC NEWS, July 7, 2004, *available at* http://www.bbc.co.uk/pressoffice/pressreleases/stories/2004/07_july/07/newsnight.shtml.

178. ICRC Interpretive Guidance, *supra* note 30, at 995.

179. *Id.* at 1007.

180. Nils Melzer, International Committee of the Red Cross (ICRC), *Revised Draft: Interpretive Guidance on the Notion of "Direct Participation in Hostilities,"* 60 (2006), *available at* http://www.icrc.org/eng/assets/files/other/2008-02-background-doc-icrc.pdf (last visited April 28, 2011):

> Civilians lose their protection against direct attack for such time as they directly participate in hostilities or, alternatively, for such time as they cease to be civilians due to their continuous assumption of combat function within an organized armed group. Such loss of protection does not mean that the concerned persons fall outside the law. It only entails that the lawfulness of the use of force against the concerned persons is no longer exclusively governed by the standards of law enforcement and individual self-defense, but that operations may now also be based on the standards of the conduct of hostilities.

181. *See Targeted Killings Case*, *supra* note 26 (where respondents had the same fear).

they will be coextensive. To the extent that they are different, it is easier to become a combatant than it is to cease being one. This provision is designed to both deter violence and better accord to the realities of warfare from the point of view of a putative combatant's adversary.

If a party has carried out one attack but then ceases to take any part in hostilities, they will regain civilian status. However, where a known individual has engaged in a long-term continuous course of hostilities (for example, participating in several attacks over a period of months), it is reasonable for their adversary to suppose–in the absence of contrary evidence–that this status will endure. In such a situation, it may be necessary for the party ceasing hostilities to take some active steps to demonstrate that they have abandoned a continuous combat function. This definition will hopefully solve problems as to the temporal scope of when a person becomes and ceases to be a combatant.

Returning to the issue highlighted at the outset, the question as to whether Bin Laden would be considered a combatant would depend on whether the US reasonably believed he was playing a continuing and direct role in the planning of specific new attacks. This causal hurdle would be a difficult one to surpass.[182] Whoever launches an attack bears the burden of proof to show that the target actually is a combatant and that such an attack is proportionate to any collateral damage. Of course, even were he to be considered a civilian criminal suspect, if Bin Laden resisted arrest with force, then–issues of jurisdiction aside–the U.S. military might well have been justified in using deadly force against him. At the time of writing, circumstances surrounding his death remain unclear.

Turning now to the second deficiency of the current IHL identified in this paper, it has been established above that the initial relationship of reciprocity between the obligation to distinguish between an adversary's civilians and combatants and differentiating a party's own combatants and civilians has been largely abandoned in contemporary IHL. For the reasons discussed earlier, it is submitted that these obligations are nearly impossible to put into practice, especially in modern asymmetric conflicts, unless they are seen as mutually reinforcing.

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182. It is perhaps for this reason that the US has been keen to emphasize Bin Laden's role as not just a spiritual figurehead of Al Quaeda (which would not render him a combatant under the new definition proposed here), but rather that he "provided tactical and operational guidance, and directed daily operations." Al Pessin, *CIA Releases bin Laden Videos, Says He was Active Terrorist Commander*, VOICE OF AMERICA, May 7, 2011, *available at* http://www.voanews.com/english/news/CIA-Releases-bin-Laden-Videos-Says-He-Was-Active-Terrorist-Commander-121440829.html.

As Dinstein identifies, some of the confusion regarding Article 37 of the First Additional Protocol can be seen in that it attempts to cover two topics: treachery and perfidy.[183] It is submitted that the two are better viewed as separate crimes. Treachery is not concerned with civilian status. Rather, it refers to illegitimate exploitation of some other ground to render the combatant no longer a target, such as feigned surrender.

Perfidy, on the other hand, is predominantly an act of feigning non-combatant status in order to attain improper protection. This distinction is also reflected in the Islamic literature, which extensively discusses when it is proper to renege on a truce.[184] The discussions of *al-tatarrus* by Classical as well as contemporary Islamic scholars strongly indicates that human shields ought not to be used. The Koran, at verses 3:161, 8.62, and 22:60 demonstrate the obligation not to use deception as a tactic in war. In order to better reflect this divide, Part 1 of Article 37 should be rewritten as follows:[185]

Prohibition of Treachery

1. It is prohibited to kill, injure or capture an adversary by resort to treachery. Acts inviting the confidence of an adversary to lead him to believe that–though still a combatant–he is entitled to protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute treachery. The following acts are examples of treachery:

    a. The feigning of an intent to negotiate under a flag of truce or of a surrender;
    b. The feigning of an incapacitation by wounds or sickness.

The main changes that have been made are the replacement of the word "perfidy" with "treachery," and the removal of the reference in parts c and d to the feigning of civilian or neutral status. In order properly to reflect the importance of the principle of differentiation and the accompanying ban on perfidy, the following new article should be inserted into the First Additional Protocol:

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183. DINSTEIN, *supra* note 21, at 202.

184. *See* Daniel Pipes, *Lessons from the Prophet Muhammad's Diplomacy*, THE MIDDLE EAST Q., Sept. 1999, *available at* http://www.meforum.org/480/lessons-from-the-prophet-muhammads-diplomacy.

185. Part 2 relates to "Ruses of War," which are not discussed in this article.

Prohibition of Perfidy

1. In the conduct of military operations, combatants are obliged to take all possible precautions to avoid deliberately or recklessly endangering civilians, whether they are considered enemy, friendly or neutral.
2. In order to achieve this, combatants are obliged to differentiate themselves from civilians to the greatest extent possible. The intentional failure to do so may constitute the war crime of perfidy. The following are examples of perfidy:

    a. Carrying out attacks in the presence of a civilian or other protected person in order to render certain points, areas or military forces immune from military operations;
    b. Feigning civilian status in order to gain an operational advantage during the planning or course of an attack;
    c. 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.

Part 1 lays down the theoretical framework for the new provision; the language mirrors that found elsewhere in the First Additional Protocol.[186] This is in order to create an analogy between the obligation in this clause and those clauses which pertain to the principle of distinction. However, unlike other areas of the First Additional Protocol which concentrate solely on minimising damage to enemy civilians, this provision extends the obligation to all civilians. Part 2(a) of this provision roughly mirrors the language of the "War Crime" enunciated under Article 8(2)(b)(xxiii) of the Rome Statute. Part 2(b) builds on the prohibition of feigning civilian status originally found in Article 37 of the First Additional Protocol. The definition of perfidy in Part 2(b) should also be added to the list of War Crimes laid down in Article 8(2)(b) of the Rome Statute in order to remedy the surprising gap in the enforcement of this crime.

At no point does a perfidious combatant alter the status of civilians around him. Even where a party to a conflict is aware that

186. *Cf. Protocol I, supra* note 12, at arts. 48, 51 (article 48 sets out the basic rule while article 51 discusses protection of the civilian population).

their adversary is deliberately fighting from a civilian area, the considerations of double-effect and proportionality in causing unintended civilian casualties will still apply. This rule would not render every combatant who fights from a location where civilians are present a criminal. Fighting in such a location for a purpose unrelated to an attempt to feign civilian status would not constitute perfidy. For example, it is unthinkable that those who participated in the Warsaw Ghetto uprising would be so characterised.[187] To put this point another way, the mens rea element of the new crime would be the deliberate attempt to feign civilian status.

Just as combatants use proportionality calculations to decide whether to launch an attack that may cause civilian casualties, so too should combatants use proportionality calculations when deciding from where to launch their attacks. However, protecting combatants by disguising them as civilians would never constitute a "direct and concrete" military advantage relevant to a proportionality calculation[188]–to allow this would be morally unacceptable and also lead to circular calculations. If only a very slight military advantage could be gained by launching an attack from a residential area then it is most unlikely that such benefit would be proportional to the danger created to civilian bystanders.

Cassesse has suggested that there are only two "fundamental principles" of IHL: distinction and proportionality.[189] To these, should be added the principle of differentiation. This proposal represents a change of emphasis, rather than a significant alteration in the substantive law. The principle of differentiation can play a vital prophylactic role in reducing the instances where civilians are collaterally attacked. The elevation of the principle of differentiation and its corollary, the crime of perfidy, to a new normative level may well impact upon actors' decisions, particularly when coupled with the added legitimacy provided by the supporting *fiqh*.

CONCLUSION

Clearly, legal reforms alone will not solve the problems created by asymmetric warfare. The legislative solution proposed here is by no means a panacea, nor indeed is it the only possible formulation that might address these issues. One of the most important elements regarding the success or failure of a project to reform IHL using Islamic *fiqh* would be the process whereby such provisions

187. *See generally* DAN KURZMAN, THE BRAVEST BATTLE: THE TWENTY-EIGHT DAYS OF THE WARSAW GHETTO UPRISING (1976).

188. *Protocol I*, *supra* note 12, at art. 51(5)(b).

189. ANTONIO CASSESSE, INTERNATIONAL LAW 415-16 (2005).

are adopted. Transactional considerations and input legitimacy are key factors in generating the crucial internal attitude of obedience discussed above.[190]

Increasingly, international conferences are including non-state members such as NGOs, corporations, and leading experts when drafting new provisions. The World Economic Forum is a good example of this.[191] In one sense, this represents a shift away from the classical model of international law–where it applies solely to state entities–towards a more individualised one. To this extent, the jurisprudence of international law may be said to have converged with the "personal" methodology of Islamic law, discussed above. A conference or a series of conferences, including States and prominent Islamic and Western jurisprudential authorities on IHL might be organised in order to investigate the possibility of creating a fusion of the type proposed here.

Why stop at Islamic law? Why not attempt to incorporate norms of other non-Western systems into modern IHL? Aside from considerations of brevity, the purpose of this paper is to propose developments in the laws of war which would make them more appropriate for current conflicts, many of which involve fighters motivated by Islam. This may or may not be the case in the future. However, the laws of war must at the very least keep pace with modern developments rather than lag behind. If and when the predominance of conflicts in the world ceases to involve Islamist forces, then further consideration can be given to the issues. Until that point, it is hoped that the solutions proposed here might influence some debate on how the current law is to be reformed. There is reason to hope that the common ground identified between traditional Western IHL and Islamic law is also shared by other traditions, reflecting our mutual humanity. That, however, is a topic to be explored in another article.

190. *See* Koh, *supra* note 84.

191. World Economic Forum, http://www.weforum.org (last visited April 15, 2011).