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I. Introduction

The attempt to explain the driving forces behind the development of the corpus of law of war, which is better known today as “international humanitarian law” (henceforth “humanitarian law”), has led scholars to concentrate on two main approaches: the humanitarian one and the utilitarian-military one. According to the latter, states act only according to their own interests, which are usually manifested through military power and national security. The advocates of this approach claim that a state’s willingness to

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subordinate itself to the laws of war is proportional to the extent to which doing so would benefit its population and its military. This benefit stems from the fact that the laws of war usually constitute a reciprocal commitment between states, which is enforceable and meant to improve the states’ welfare in two ways: by reducing the costs that result from the destructiveness of war and by reducing the investment in military capital needed to attain a military balance vis-à-vis another state. In contrast, the apologists of the humanitarian school of thought argue that the laws of war have developed as a result of states’ internalization of humanitarian norms, which exist in every human being. These scholars maintain that such norms are capable of influencing states’ willingness to deviate from self-interested conduct. This article questions the ability of the two approaches to regulate states’ conduct in the war on international terror.

The law and economics literature on humanitarian law offers a number of models that explain the way this field has evolved and describe the role of humanitarian law in the regulation of states’ conduct before and during wars. However, these models were formulated using the “classical” meaning of the term “war” – wars between states. In light of the mounting debate among legal scholars regarding the appropriate legal regime to confront international terror, this article reveals some of the weaknesses of humanitarian law in regulating this conflict. While the existing economic models consider humanitarian law as a means of decreasing damage and loss associated with war and minimizing the costs required to attain a military balance, I argue that in its present form, the capacity of humanitarian law to achieve these goals in the context of this global conflict is considerably limited by the war on international terror’s unique characteristics. The article demonstrates through an economics-oriented narrative that the validity of the positivist explanations to states’ adherence to humanitarian law during wars between states is
limited in regard to wars conducted between states and non-state actors, such as terrorist organizations. This limitation is mainly due to the omission of reciprocity from this war, caused by terrorist organizations’ lack of motivation to adhere to humanitarian law, and states’ unwillingness to do so unilaterally. I claim that this situation results in the infringement of the steady-state balance which humanitarian law supposedly constituted in the past. Such a decline in states’ adherence to humanitarian law is bound to increase the destructiveness and brutality associated with wars.

I further argue that while military balance was once achieved by a game between enemy countries, the level of global security generated in response to international terrorism is determined by a multilateral negotiating process between the states that enjoy this public good. There are collective action problems associated with the supply of a public good by numerous actors, specifically free riding, which characterizes coalitions with a militarily and economically dominant state, and leads to a suboptimal level of global security. I therefore claim that the frameworks in which the level of global security is currently determined prevent a sufficiently vigorous reaction to the threat of international terror.

This article discusses mitigating factors to these problems. In my opinion, the solution to a suboptimal supply of global security lies in multinational organizations’ ability to impose the costs, which stem from production of the public good, on all states that enjoy it. The solution to the decline in the status of humanitarian law in the context of this conflict hinges on the strengthening of existing factors, which are liable to increase a state’s motivation to adhere to international law in the absence of immediate military and utilitarian incentives to do so. Such a factor can be found in “audience costs,” imposed by public opinion, and in public conscience externalities, which impose internal and
international political costs on countries for the violation of humanitarian law. The
importance of these costs has increased in recent decades due to the immediate and direct
coverage of armed conflicts by the media and due to NGOs’ scrupulous survey of states’
conduct during those conflicts. A more significant balancing factor lies in international
tribunals’ ability and willingness to promote the humanitarian approach to the laws of war,
mainly by making the existing standards more substantive and by enforcing the latter.

I further argue that the aforementioned factors’ abilities to balance the decrease in the
status of humanitarian law in the context of the war on international terror could be
obstructed by the appearance of a new tripolar system, in which the actors’ differing levels
of commitment to humanitarian law prevent its unequivocal promotion and development.
The first actor is international terror organizations, which are indifferent to the dictates of
humanitarian law and do not comply with it. The second actor is a group of states who
seek to significantly promote and develop humanitarian law either for ideological reasons
or because of their reluctance to ensure global security through military means. The third
actor is a group of states, led by the US, which is significantly involved in military activity
against international terrorism. In the eyes of this group, excessive promotion of
humanitarian law could hinder their military efforts, and they therefore oppose this effort.
In light of this controversy, the accommodation of humanitarian law to its contemporary
challenges is not guaranteed. Moreover, this situation could result in the creation of two
different systems of international law, not unlike the state of affairs during the Cold War
era.
II. The Humanitarian Approach and the Utilitarian-Military Approach to Humanitarian Law

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

Two competing schools of thoughts – the humanitarian one and the utilitarian-military one – have persuaded the world of the importance of limiting war’s devastating effects. The first one has done so through the internalization of basic humanitarian values, which are instilled in human nature. The second one has done so by dictating utilitarian and strategic motivations. Despite sharing a common objective, the two approaches are based on completely different principles. The humanitarian approach distinguishes between combatants and civilians but treats all civilians the same, no matter what side they are on. According to this approach, an army must grant the enemy’s civilians the same rights and respect it does its own population. Therefore, a combating army is compelled to respect the right to life of enemy civilians but not to protect it actively.¹ In contrast, the utilitarian approach, to which most governments and armies subscribe, does not derive from the human rights body. According to this paradigm, the role of humanitarian law is to minimize unnecessary suffering among combatants and civilians and to define the rules of

engagement. This approach does not embrace rules that confer an advantage on one side unilaterally or rules that are not imposed equally on both sides.²

Scholars tend to agree that throughout most of recorded history and until recent decades, the utilitarian approach had the upper hand.³ However, the atrocities of modern war, which have included unprecedented mass destruction and systematic killings made possible by an era of industrialization and technological breakthroughs, has led to the gradual strengthening of the humanitarian approach. An early manifestation of the turning of the tide can be found in Lieber’s Code (1863), which was created for the U.S. Army following the atrocities of The Civil War.⁴ Years later, the international community responded to the challenge of reinforcing the humanitarian school of thought by the codification of laws of war. Among the fundamental events of this process, was the establishment of the International Committee of the Red Cross by Jean Henri Dunant who had been influenced by the horrors of the battle of Solferino in 1859; the signing of the First Geneva Convention of 1864, which dealt with “the Amelioration of the Condition of the Wounded in Armies in the Field”; and the signing of the Hague Conventions of 1899 and 1907⁵, which dealt with the laws and customs of war on land. The trenches of World War I and the use of mustard gas led to the adoption of the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological

² Id.
⁴ Although the codification was initiated by a military man named General Henry Halleck who supported the utilitarian approach to the laws of war, Lieber managed to include purely humanitarian elements in the code, such as the prohibitions on rape, enslavement, the distinction between captured enemies on grounds of color and the refusal to give quarters. See T. Meron, The Humanization of Humanitarian Law, 94 AJIL 239 (2000).
⁵ The preamble to the Hague Convention IV reflects the humanitarian influence on the 1907 Hague convention – “these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents.”
Methods of Warfare in 1928 and of the Geneva Convention relative to the Treatment of Prisoners of War in 1929.\textsuperscript{6}

A significant deviation from this course took place during World War II, when all sides disregarded the laws of war that had been codified up to that period. This disregard resulted in unprecedented suffering, destruction and loss of life, as a result of actions such as the carpet bombing of Rotterdam, London, Hamburg, Dresden and Tokyo\textsuperscript{7}, the use of nuclear weapons on the cities of Nagasaki and Hiroshima, and the violation by all sides of the laws of naval and land warfare and the laws relating to the treatment of prisoners of war.\textsuperscript{8} The status of the humanitarian approach was strengthened by: the war’s tragic results, the lack of humanity that was demonstrated throughout it, the atrocities committed by the Nazis, and their influence on international public opinion. This strengthening led to the adoption of the Charter of the International Military Tribunal in Nuremberg, the four Geneva Conventions of 1949\textsuperscript{9}, the two Additional Protocols of 1977 and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. The status of states as the sole actors in the arena of international law diminished to some extent within these documents since states’ lack of adherence to the laws of war during World War II placed human rights and the rights of civilian populations at the center of the contracting parties’ attention. Those rights largely influenced the formulation and interpretation of these conventions and protocols.\textsuperscript{10} The focus on the defense of civilians also led the contracting

\textsuperscript{6} For a comprehensive review of the influence of the humanitarian approach on humanitarian law, see Meron, \textit{supra} note 4.

\textsuperscript{7} Regarding the laws of air warfare which were ignored during WW II, see for example Hilaire McCoubrey, \textit{International Humanitarian Law: Modern Developments in the Limitations of Warfare} (Brookfield, 1998), at 28.

\textsuperscript{8} Regarding the violation of the rules of war relating to the treatment of prisoners of war during WW II, see Meron, \textit{supra} note 4.

\textsuperscript{9} Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) Relative to the Treatment of Prisoners of War; Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

parties in many cases to give precedence to the use of legal standards over specific prohibiting rules.\textsuperscript{11} During the discussions leading to the formulation of the Ottawa Convention Banning Landmines in 1997, it was already clear that the humanitarian school of thought had overcome the utilitarian one, due to unprecedented pressure exercised by public opinion and NGOs.\textsuperscript{12}

There is no doubt that most countries consider the laws of war as binding nowadays, and that they exert themselves to comply with them at least to some extent. The fact they bother to negotiate the subjects of the relevant conventions and ratify them while making reservations proves they place great importance on them. As will be explained below, NGOs’ surveys of states’ adherence to the relevant laws have also increased greatly in the modern era, and have influenced countries’ willingness to adhere to the relevant conventions. As Benvenisti\textsuperscript{13} explains, there still exists a wide gap “between the concerns that underlie the laws of war and the philosophy of human dignity that inspires many national bills of rights and international human rights law.” It is also clear that utilitarian considerations cause countries to adopt strategic behavior while formulating the laws of war. However, the humanitarian clauses contained in the conventions of which humanitarian law is comprised establish the significant presence of the humanitarian approach in the dialogue on the regulation of war, and oblige the recognition of its influence on the development of the laws of war in general and their modern formulations in particular.\textsuperscript{14} I will argue below that reinforcing this approach could play a significant role in mitigating the decline of states’ adherence to the laws of war.

\textsuperscript{11} Id.


\textsuperscript{13} Benvenisti, \textit{supra} note 1.

\textsuperscript{14} Regarding the humanization of the law of war, see in general Meron, \textit{supra} note 4.
III. Economic Explanations of the Development of the Laws of War

The discussion above makes it clear that economic interpretations of the evolution of humanitarian law cannot fully explain the way in which the laws of war have developed. However central, the models and strategic behaviors described in this section comprise only one category of the motivations that may drive a state to take part in the codification of rules designated to limit war’s brutality. Still, Mathews and McCormack, who recognize the integral part humanitarian motivations play in the development of the laws of war, ascribe the main influence to utilitarian and strategic factors such as the fear of proliferation, the need or lack of need for certain arms, security needs and the desire to restrain other states. This section will review the utilitarian explanations and economic models which interpret states’ adherence to humanitarian law, in a way that will later enable an assessment of their validity in the context of the war on international terror.

The strategic considerations that states take into account while formulating the rules of humanitarian law may indeed encompass different motivations. First, a country may sign an agreement in order to limit itself and avoid taking a future action it might have committed otherwise. This might be done in order to improve its welfare and that of its citizens. Setting aside “strategic precommitments,” four reasons may lead a state to enter into such an agreement – to overcome future passion, to overcome future self-
interest, to overcome hyperbolic discounting of time and to prevent preference change. Second, a state may sign an agreement because it expects it to influence the contracting parties asymmetrically. An example of such an agreement can be found in the prohibition against the use of submarines, which limited the German army more than the British army during the two World Wars. The problem with such an agreement is that the aggrieved state might be inclined to violate its obligations, as happened in the example mentioned above. Third, a state might sign an agreement to win the support of domestic or international public opinion. A contemporary example to this approach can be found in the attempt by the US and its allies to present their military interventions in Kosovo, Iraq and Afghanistan as fully consistent with the laws of war, and specifically with the rules of airborne war. Fourth, a state might sign a convention in order to bring pressure on another state to do the same. An example of that can be found in the ratification of the Nuclear Non-Proliferation Treaty (NPT) by many Middle Eastern countries in order to put pressure on Israel to sign as well.

Morrow goes beyond these strategic arguments and proposes an economic model, which explains among other things the reasons that led to the formulation of the laws of war and their content. According to the model, treaties and international law more generally, aid reciprocal enforcement of agreements. He argues that their dual role is to create a shared understanding of unacceptable conduct and to screen out those who will not comply. Based on that argument, international law can be understood as constituting an equilibrium in a game between states. This equilibrium is characterized by two attributes –

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18 Id.
20 Id.
first, it requires strategies that are “mutual best replies,” and second, it requires a common
conjecture that all parties are playing their equilibrium strategies. It is therefore a steady-
state equilibrium, from which states are reluctant to deviate. How is the equilibrium,
which determines the substance of international law in general and humanitarian law in
particular, attained? The answer is: through the implementation of the laws of war. A
number of economic models attempt to describe the process that formulates these laws.

The first is the “war-of-attrition” model, in which states fight over the stakes in dispute.
Within this model, the laws of war can be thought of as a prewar agreement by the sides to
abstain from using certain battle strategies during the war, such as the use of gas or
poison. Such an agreement is enforceable in the event of the occurrence of two alternative
conditions: if neither side believes that banned strategies are effective or if some mutual
deterrence exists between the sides. If one side violates the agreement, the agreed-upon
restraints are removed. Therefore a state leader will choose to do so only when the short
term benefit expected from such an action will surpass the sum of the long-term costs and
the audience costs he is expected to suffer.

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22 Morrow, supra note 19.
23 A change in a state’s understanding of its own interests might cause a change in its mutual best reply, in a
way that may alter the equilibrium, thus changing international law. A contemporary example of this is the
change in the US approach to humanitarian law since the tragic events of September 11th 2001. See E.
24 As depicted by Morrow, in each round – which can be seen as a battle in war – each state chooses whether
to quit or continue the war and a battle strategy if it chooses to continue the war. The strategies chosen affect
the military balance achieved in each round. The costs of fighting in a round depend on the current military
balance, with costs rising as balance shifts against a state. The war continues until one side concedes the
stakes to the other by quitting. A side will quit when the military balance shifts far enough against it that the
costs of fighting exceed the value of the stakes in dispute. For an elaborated explanation of the model, see
25 In this article, the term audience costs refers to the negative costs suffered by a serving government due to
the infusion of international public opinion or the enemy’s population with antagonism, or because of
sanctions applied by the domestic public due to its dissatisfaction with the government’s foreign policy. For
influence of foreign policy on domestic political support, see A. Smith, International Crises and Domestic Politics, 92 Am. Pol. Sci. Rev. 623 (1998). Regarding the argument that such costs are applied both by the
domestic and international public, see Morrow, supra note 19.
A second model considers the ratification of treaties as a screening process, which separates the states that accept the standards from those that do not. According to this model, a state’s interest in ratifying a treaty with the intention of ignoring its conditions is limited since ratifying a treaty cynically may imply domestic “audience costs.” Additionally, international audience costs will be created if other states are reluctant to make agreements with a state that has previously disregarded its contractual obligations.

The separation of the states into two categories - states that accept the standards from those that do not - enables states to anticipate more accurately the intentions of other states with regard to observing the standards of a treaty, thus avoiding first use of forbidden strategies. The conduct of states during war will hence be affected by the question of whether its opponent has ratified a treaty or not.

A third interpretation of the development of the laws of war can be found in the arms-race model. Such a race occurs when two or more states or alliances with conflicting goals engage in a competitive build-up of their armaments and military manpower. According to Sandler, arms races are often characterized by a tit-for-tat process, in which one state increases its military arsenal in response to increases in a potential adversary’s arsenal. Such dynamics are especially alarming in circumstances that lack equilibrium, in which ever increasing resources are invested in armaments. Although the model includes no

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26 Examples of the complication of the model lie in its application to conditions of uncertainty or asymmetric information regarding the efficacy of battle strategies, the results of battles and the willingness of states to adhere to agreements. The model can also suffer from the problem of noise, according to which armies, or elements inside them, may disregard state policy to comply with existing treaties. Eventually, the aggrieved state’s “zone of tolerance” to noises will decrease, as the damage sustained by the use of a forbidden strategy increases. For an elaborated explanation of the complications of the model, see Morrow, supra note 19.

27 Morrow, supra note 19.

28 Id.

29 When different ratified treaties require a different level of obligation to a certain legal issue, questions regarding the compelling standards arise. For an elaboration on the compelling standards in such a case, see Morrow, supra note 19.
reference to the laws of war, it is obvious that these laws can be considered an effective means for creating such an equilibrium, thereby restricting the endless allocation of resources to armaments, thus leading to a Pareto improvement.

A fourth model is presented by Posner.\textsuperscript{31} It refers to two rival states with equal resources, which are invested either in productive capital or in military capital. The states’ investments in productive capital produce a joint income, from which each state extracts a share proportional to its investment in military capital. If each state invests an equal amount, each obtains half of the joint income. But if one state invests more than the other, then that state’s share is larger than one half.\textsuperscript{32} The jointly optimal outcome occurs if both states invest all their resources in production and none in predation. However, as long as the marginal benefit from investing military capital is high enough, states will do so, consequently developing what could be considered an arms race. In equilibrium, both states will invest equal and positive amounts of resources in productive and military capital, and the more efficient the military technology becomes, the more resources will be invested in military capital, as the marginal utility in doing so will be higher than the marginal utility of investing an additional unit in productive capital. Since both states will exhibit the same behavior, their aggregate welfare will decrease. The outcome of the game reflects a prisoner’s-dilemma-like logic, which is characterized by an excess of investment in military capital.\textsuperscript{33}

\textsuperscript{32} According to the model, the efficiency with which resources are converted into military capital depends on the military technology – as it becomes more efficient, investment of one additional unit in military capital will obtain a larger share of the joint income, i.e. the marginal utility in doing so is higher.
\textsuperscript{33} Thus, Posner’s proposition that the laws of war are designed to limit the efficiency of military technology, thus leading to a Pareto improvement in the states’ welfare.
The model can be complicated by assuming that states hold an unequal amount of resources at the start. This situation may result in a phenomenon called the “paradox of power,” according to which a weaker state can gain at a stronger state’s expense. The limited potential gains that the stronger state may produce by appropriating the weaker state’s income, may – in certain circumstances\(^\text{34}\) - induce it to invest all its resources in productive capital and none of them in military capital. This fact will spur the weaker state to invest an even greater portion of its resources in military capital in order to appropriate the stronger state’s income. This analysis leads to the second proposition regarding the reasons for banning certain military technologies – coalitions of strong states seek to limit weaker states’ extraction power. As I will argue, the same interpretation can be applied to terrorist organizations.

These models propose an economic interpretation of the roles humanitarian law plays in the regulation of war, namely the reduction of war’s brutality through the restraint of states’ behavior and the provision of an optimal level of security in reply to threats. I will now argue that these objectives cannot be attained by humanitarian law in the context of the war on international terror.

IV. The Supplying of Global Security in the Face of the Threat of International Terror

The world’s globalization process has accelerated during the 20\(^\text{th}\) century, with the appearance of innovations in the fields of technology, communications and transportation.\(^\text{35}\) This fact is reflected in the unprecedented openness to flows of capital,

\(^\text{34}\) Posner, supra note 31.
\(^\text{35}\) Sandler & Hartley, supra note 30, at 321.
goods and manpower, and in international political and economic cooperation, which blurs boundaries between states. This process embodies the development of an ever-growing economic inter-dependency of the countries of the world\textsuperscript{36}, which compels them to cooperate in order to preserve the stability of global security and global economy.\textsuperscript{37} Harming the global status quo or even a single state that is part of the system, results in the application of negative externalities on other countries. International political and economic organizations, such as NATO, the European Union and the WTO, which assume some of the judicial authority of their member states and regulate the states’ conduct in order to improve their joint welfare – claim to be resolved to preserve global stability in the domains of the economy and security through extensive multilateral cooperation. Due to this tendency, negotiations in the domains of politics, security and economics are often conducted within the appropriate international organizations instead of through direct negotiations between solitary states. The end of the Cold War, and the duopolic balance which characterized it, reinforce the claim that it would be misleading to consider the laws of war as resulting from a game between only two states. As Benvenisti\textsuperscript{38} illustrates – the adjustment of international law to the current security conditions requires cooperation among nations, and “the elaboration of a new approach that can address and accommodate as many concerns as possible.”

The process of globalization has not left the elements that shape global security unaltered. On the contrary, changes in the character of the threats to world peace constitute another factor that influences the status of humanitarian law. The strengthening of states’ inter-dependency has led some elements to seek their goals by harming the political and

\textsuperscript{37} Regarding the effects of security stability on the global economy, see Benvenisti, \textit{supra} note 23.
\textsuperscript{38} E. Benvenisti, \textit{supra} note 23.
economic global status quo or by harming third parties to a specific conflict, in order to bring negative externalities upon their rivals. International terror\textsuperscript{39} constitutes a glaring example of such a global threat.\textsuperscript{40} The most conspicuous of terrorist organizations, the terrorist network known as Al-Qaeda, aims at restoring Islamic Khalifate rule under Sharia law in the Middle East and removing any foreign presence in the region, especially the American military presence in Saudi Arabia and the Arab Emirates.\textsuperscript{41} The fact that the US supports a number of regimes in the Middle East militarily and economically, has led Al-Qaeda to attack not only Washington’s Western allies\textsuperscript{42}, but also Arab and Islamic countries.\textsuperscript{43} In that sense, the battlefield is no longer a geographically defined area where two armies meet, but the territory of many states where this organization and others have managed to base themselves\textsuperscript{44}.


\textsuperscript{40} Sandler & Hartley’s definition of the term “international terror” reflects convincingly the global character of the threat – “The use, or threat of use of anxiety-inducing, extranormal violence for political purposes by any individual or group, whether acting for or in opposition to established governmental authority, when such action is intended to influence the attitudes and behavior of a target group wider than the immediate victims and when, through the nationality or foreign ties of its perpetrators, through its location, through the nature of its institutional or human victims, or through the mechanics of its resolution, its ramifications transcend national boundaries”. See Sandler & Hartley, supra note 30, at 322.


\textsuperscript{42} Spain, for example, took an active part in the American military effort in Iraq. It is therefore believed that the train attacks of March 2004 in Madrid were meant to influence domestic public opinion on the eve of the elections, thus influencing the government’s position regarding the presence of its soldiers in Iraq. \textit{See After the train bombs, a political bombshell}, The Economist, Mar 16\textsuperscript{th} 2004, available at \url{http://www.economist.com/agenda/displayStory.cfm?story_id=2514441}.

\textsuperscript{43} Al-Qaeda has acted against Arab and Islamic states such as Saudi Arabia, Pakistan, Tunisia, Yemen, Indonesia, Kuwait, Turkey and Morocco.

\textsuperscript{44} As the American President, George W. Bush, affirmed in reference to his country – “the front of the new war is here in America”. \textit{See Remarks on Signing the Homeland Security Act of 2002} (November 25\textsuperscript{th} 2002), 38 Weekly Comp. Pres. Doc. 2090, 2090 (December 2\textsuperscript{nd} 2002). \textit{See also Pierre Conesa, Victoire certaine, paix impossible}, \textit{Le monde diplomatique}, January 2004, available at \url{http://www.monde-diplomatique.fr/2004/01/CONESA/10936?var_recherche=terrorisme+droit+humanitaire}.  

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http://law.bepress.com/taulwps/art23
The presence of a long term threat, which increases states’ economic and political interdependence, on the international status quo has turned global stability and security into a public good in an even purer sense than before. Such a good satisfies two attributes – “non-exclusivity,” meaning that the producers of the good cannot prevent others from enjoying it, and “non-rivalry,” meaning that the consumption of the good does not detract from the ability of others to consume it. Since global stability benefits most states, it can be considered a public good in the almost purest sense of the term. This proposition may lead to the expectation that all states, which enjoy this good, would work to enable its supply. However, problems associated with collective actions allow states to decline bearing a part of the costs that is proportional to their benefit of the good, thus leading to a suboptimal level of its supply. As first noted by Mancur Olson, when the relatively more powerful actors within a certain group are capable of providing the public good by themselves, there is a systematic tendency of the smaller actors to exploit that fact by becoming free or easy riders. This collective action problem, called the “exploitation hypothesis,” characterized the Cold War, when the nuclear umbrella supplied by the two super-powers for the protection of their allies established a mutual deterrence that guaranteed stability between the two sides, thus allowing the smaller allies in NATO and the Warsaw Pact to enjoy the benefits of security while bearing a disproportionately small responsibility for supplying it.

46 See Benvenisti, supra note 23. Although there exists a large consensus regarding the fact that global stability and security constitute a public good, the adequate ways in which to provide it are subject to debate, mainly between the US and Western European states.
47 One can think of “rogue regimes” and states that support terrorism as states which do not enjoy this public good, since they seek to infringe the existing political and economic status quo by the use of means that are banned by humanitarian law.
48 Benvenisti, supra note 23.
50 For a discussion of the problems associated with coalitions’ collective actions, see Sandler & Hartley, supra note 30, at 23-24.
51 Id. at 44-51.
stronger player is that the security level will remain suboptimal, thereby leading to a
constant threat on stability. As Benvenisti pointed out, the fall of the iron curtain only
amplified this phenomenon by leaving the US as the only super-power in the international
arena. Although the threat of international terror has raised the aggregate costs required
to provide security, many states are reluctant to increase the resources allocated to
security. The fact that the main threat on numerous Western states derives from terrorist
organizations and not from their neighboring states, allows them to set themselves apart
from the US and its allies, thereby deflecting the attention of terrorist organizations to
other states. Consequently, the damage expectancy, which stems from the threat of
international terror, does not justify a substantial investment in security on their part.

I propose the addition of two new factors to an economic analysis of the war on
international terror: First is the fact that international terror constitutes one of the main
threats assessed by the US and its allies as they determine their level of investment in
military capital. Second is the fact that the war on terror is generally conducted by a
coalition of states and there are difficulties associated with the provision of a public good
by numerous players. Hence, positivist economic models, which are based on premises
that are consistent with wars in their “classical” meaning, are not expected to depict
accurately the role humanitarian law plays in the context of the war on terror. I will use
Posner’s model to demonstrate this proposition, thus exposing the invalidity of the merits
ascribed to humanitarian law in the context of the war on international terror.

Benvenisti suggests three factors which are expected to exacerbate the problem in the post Cold War era –
First, the disappearance of the duopolistic system, which does not allow the coordination of a mutual level of
deterrence, thereby raising the costs of producing the public good. Second, states can set themselves apart
from the US and its allies and thereby shield themselves from being targeted by terrorists. Third, the lack of
agreement between the US and a number of other key actors, including members of the Permanent Five on
the UN Security Council, on the ways to obtain the public good. For an elaboration, see Benvenisti, supra
note 23.
Posner’s model envisions the laws of war as a means of limiting the efficiency of authorized military technologies during a conflict between two states, consequently serving as an efficient device for the division of productive and military capital. According to the model, states’ willingness to invest in military capital derives solely from their desire to appropriate another state’s produce. It therefore seems that this model would be inapplicable in the context of the war on international terror for a number of reasons. First, there is an absence of reciprocity from the relations of the belligerent parties – terrorists have no industrial production, and states facing them are therefore unable to appropriate it. According to the model, this fact should cancel out any motivation on the part of states that are menaced solely by international terror to invest in military capital. This prediction has not proven accurate, however. For instance, although Britain is not exposed to any military threat from its neighboring countries, its investment in military capital and its commitment to the war on international terror, which is lead by its bigger ally the United States, is second only to that of the United States. It seems that the explanation of this commitment stems from a long-term vision of both economic stability and security, which recognizes the dangers embedded in the alteration by international terror of the political and economic global status quo. Second, disregarding the fact that global security is a public good supplied by a coalition of states and that investment in security, or lack thereof, by states causes externalities, precludes any reference to the problem of free riding that obstructs collective actions. The application of this model in the context of terror while omitting these factors may therefore lead to the

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53 In that sense a suboptimal supply of security by a country creates negative externalities of two kinds for other states – the lack of contribution to the public good which global security constitutes, and the deflection of terrorist groups’ attention to other countries.

54 Regarding Britain’s special status as an ally of the US, the British-American cooperation in the field of security and Britain’s commitment to the American-led war in Iraq, see J. Wither, *British Bulldog or Bush’s Poodle? Anglo-American Relations and the Iraq War*, 33 Parameters 67 (Winter 2003-2004).
conclusion that our era is characterized by a super-optimal level of investment in military capital. However, taking into account the factors that distinguish the war on international terror from “classical” wars, mainly the occurrence of free riding, leads to the conclusion that the global level of security in response to international terror will be suboptimal.

Beyond theoretical implications for the economic analysis of humanitarian law, the discussion above leads to the normative conclusion that the resolution of collective action problems, which lead to a suboptimal aggregate level of security in reply to the threat of international terror, necessitates the formulation of a new set of rules that will regulate the investment in security of states which enjoy this public good. Contrary to what the existing models suggest, these rules cannot belong to the category of *jus in bello*, which regulates the conduct of belligerents. They must be capable of providing the appropriate frameworks for the regulation of allies’ conduct among themselves. The US’s inability to impose on its allies a part of the costs of security, proportional to their benefit from this product, compels the establishment of such international frameworks, which will regulate the level of optimal aggregate security. This can be accomplished through instruments such as the “command mechanism”, the voting system, or the Groves-Clarke tax, which must include the ability to impose the costs that stem from the provision of global security on the relevant states. Such frameworks can be based on existing international security-oriented organizations such as NATO, regional organizations such as the European Union, defense alliances, or compelling resolutions of the Security

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55 This conclusion may be correct in the context of “classical” wars. Posner therefore suggests two ways of limiting investment in military capital – direct limitations of states’ investment in military capital or limitation of the efficiency of authorized military technologies.


57 The “command mechanism” relates to a mechanism in which the amount of the public good is determined by an actor or a group of actors. The “voting system” however, allows individual actors to vote on the provision of the public good. This device seems more appropriate in our context, and its limited ability to
Council under chapter VII of the UN Charter. Hugo Grotius recognized in his treatise *De jure belli ac pacis* (1646) the obstacles that states’ utilitarianism can pose to the achievement of common goals by coalitions - “… that association which binds together the human race or binds many nations together, has need of law … shameful deeds ought not to be committed even for the sake of one’s country.”\(^{58}\) Thus, only such international frameworks that have the power to establish and enforce a virtual tax collecting system, will provide a remedy to the suboptimal supply of aggregate security that stems from collective action problems.

V. The Adequacy of Humanitarian Law to the Regulation of States’ Conduct in the War On International Terror

While the previous section demonstrated the inadequacy of humanitarian law as a tool to generate an optimal level of global security in reply to the threat of international terror, this section presumes to display the limitations of this law in the regulating of states’ conduct during a war on such terrorism. A first reason for this limitation is that the applicability of the laws of war, which have been formulated to regulate the conduct of states, declines in the context of conflicts in which one of the belligerents is a non-state actor. These laws have been designed to regulate mainly wars between states, and their relevancy to the war on international terror is restricted to acts committed in the context of national or international armed conflicts.\(^{59}\) In addition, the unique characteristics of the war on terror hinder the implementation of these laws for numerous reasons. First, this war is largely conducted between regular armies and non-state organizations, rather than

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\(^{58}\) Hugo Grotius, *De jure belli ac pacis* (1646) (trans. by Francis W. Kelsey, 1925), at p. 17.
between states. Second, this war is sometimes conducted between governments and elements that act within their territories in ways that do not always amount to international armed conflicts, thus rendering a substantial portion of the humanitarian law inapplicable. Third, acts of terror are not always governed even by the limited corpus of laws that refers to non-international armed conflicts. Fourth, armies have difficulties observing the principle of discrimination between military and civilian objectives, since terrorist organizations consist of a few distinct military targets. Fifth, members of terrorist organizations might not be entitled to the status of prisoners of war according to Geneva Convention III. Sixth, certain nations argue that even implementation of the obligations dictated by humanitarian law on states and terrorist groups could result in granting legitimacy to those groups.

A partial remedy to the constraint of humanitarian law in this context stems from the fact that by applying the rules of the two systems simultaneously on the same conflicts, the unique characteristics mentioned above contribute to the ongoing blurring of the dividing line between national and international armed conflicts. This blurring consequently leads to the blurring of the dividing line between the corpus of international human rights and humanitarian law. International human rights and humanitarian law are indeed based on mutual starting points, such as respect for human values and the dignity of the human

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59 For a discussion of the constraints on terrorism during armed conflicts, see A. Roberts, Counter-Terrorism, Armed Force and the Laws of War, 44 Survival 13 (2002). See also Gasser, supra note 39.
60 Regarding the argument that most acts committed by states in the context of the war on international terror do not amount to international armed conflicts as defined by international law, see G. Rona, Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”, 27 The Fletcher Forum of World Affairs 55 (2003); International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report prepared by the International Committee of the Red Cross, Geneva (September 2003).
61 For an elaborated discussion of the war on terror’s unique characteristics, and the reasons for which those characteristics hinder the implementation of humanitarian law in its context, see Roberts, supra note 59.
62 Regarding the simultaneous implementation of laws of the two systems in this context, and the two systems’ ability to function together and complement each other, see Watkin, supra note 39.
being, and in recent years they have become more similar to each other. However, their concentration on different interests and frameworks and their different levels of tolerance for the killing of innocent civilians devise systems that differ both in their application of the principles on which they are based and in their way of balancing those principles with competing interests.

It is difficult to determine whether acts of terror – even ones of colossal scale such as the attacks of September 11th 2001 – amount to an international armed conflict. However, the fact that terrorist organizations such as Al-Qaeda are capable of posing threats of an equal scale to those posed by regular armies, and the fact many countries are reluctant to exercise their monopoly on the application of force within their territories to effectively combat international terrorism, render the regulation of the war on terror solely through the system of international human rights both impractical and dangerous. It is therefore essential that humanitarian law remain as a principal tool for the regulating of wars between states and terrorist organizations.

The fact that the tendency of both the perpetrators and the opponents of international terror is not to abide by humanitarian law limits its usefulness. This problem stems first from the terrorist organizations’ lack of commitment to international law in general and to its laws of war in particular. A formalistic explanation would be that those laws pertain to states and not organizations, but a more substantive analysis would reveal that the laws of war sometimes ban the only effective strategies at the disposal of these groups. The only attempt to categorically forbid the use of terrorism on the part of the international

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63 Regarding the advantages and disadvantages which stem from the approximation of the two systems, see Benison, supra note 10.
64 Watkin, supra note 39.
65 Id.
community failed with the refusal of the League of Nations to ratify the draft of the
Convention for the Prevention and Punishment of Terrorism in 1937. Since then, the
legislators of the corpus of laws of war, i.e. the Western powers, have sought to minimize
the “paradox of power,” which counteracts their advantage over smaller states and non-
state actors such as terrorist organizations. They have done so by restricting the means
available to terrorists within an asymmetric war. Such restrictions can be found in
conventions adopted by the UN with the purpose of preventing acts of terror, in the work
of the Ad Hoc Committee established by General Assembly Resolution 51/210 of
December 17th 1996 for the drafting of a Comprehensive Convention on International
Terrorism,67 in regional conventions for the prevention of terror, in Resolution 1373 of the
UN Security Council,68 and mainly in the provisions of the four Geneva Conventions of
1949 and their Additional Protocols of 1977.69 In any event, the current security
conditions allow for only two means to serve terrorist organizations as power multipliers
against Western powers – weapons of mass destruction and terrorist activity directed
against civilian populations.70 Humanitarian law therefore bans both.71 Although most of
the aforementioned documents ban only acts of terror that are committed during armed
conflicts, the inclusion of national and international armed conflicts in the war on terror
may well render this lex specialis pertinent to the regulation of this war. A conspicuous

66 See Gasser, supra note 39.
67 Under the terms of General Assembly resolution 58/81 adopted on 9 December 2003 (operative paragraph
15), the Ad Hoc Committee has the mandate to continue the elaboration of a comprehensive convention on
international terrorism. The committee was still working on the drafting at the time of this writing.
68 Resolution 1373 of the UN Security Council of September 28th 2001, known as the Anti-Terrorism
Resolution. According to some views this resolution does not modify humanitarian law as it is formulated in
existing conventions, but calls for cooperation among nations and the adoption of preventive measures
against international terror. See for example Gasser, supra note 39.
69 For an elaborated review of the international and regional conventions that refer to terror, see
Oppenheim’s International Law (Robert Jennings and Arthur Watts, eds., 9th ed., 1992), Volume I, at 401-
403.
70 The terrorist group Aoum conducted attacks in a Tokyo subway using Sarin nerve gas on March 20th 1995.
The group’s capacity to develop chemical weapons and conduct bacteriological experiments demonstrates
terrorist organizations ability to access such means independently. The attacks of September 11th 2001 cost
the terrorists an estimated 100,000 dollars, and caused total damage estimated between 100 and 200 billion
dollars. See Conesa, supra note 44.
example of the prohibitions that severely limit terrorist organizations in their operations against military and civilian targets during armed conflicts can be found in article 51(2) of Additional Protocol I,\textsuperscript{72} which bans the most effective means at their disposal – terrorization of the general public and attacks directed at civilians.\textsuperscript{73} This provision is meant to significantly reduce the advantages terrorist organizations enjoy in asymmetric wars. Similarly, Protocol I’s prohibition against excessive incidental damage to civilian targets in relation to the concrete and direct military advantage anticipated,\textsuperscript{74} the prohibition against indiscriminate attacks,\textsuperscript{75} and the prohibition against perfidy\textsuperscript{76} ban the disguise of terrorists as civilians, the use of protected bodies or regular armies’ symbols and most of the strategies of attack employed by terrorists.\textsuperscript{77}

On the other side of the equation, the governments of the US and its allies, which typically subscribe to the utilitarian-military approach to humanitarian law, tend to demonstrate a decreasing adherence to the laws of war due to the almost total absence of reciprocity in this war. The utilitarian approach, which aspires to minimize unnecessary human suffering in war, is adopted by armies mainly because of strategic interests and concern for the well-being of their soldiers and their nation’s civilians. Reciprocity is a vital element to the existence of utilitarian motivations in adherence to the laws of war, and has played a key

\textsuperscript{72} Article 51(2) of Additional Protocol I to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) reads as follows - “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”
\textsuperscript{73} The 1937 draft of the Convention for the Prevention and Punishment of Terrorism emphasizes the substantiality of terrorization of the public by defining acts of terrorism as – “criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public”. For an elaboration on the element of terrorization associated with acts of terror, see Gasser, \textit{supra} note 39, at 556.
\textsuperscript{74} See article 51(5) of Additional Protocol I.
\textsuperscript{75} See article 51(4) of Additional Protocol I.
\textsuperscript{76} See articles 37 and 38 of Additional Protocol I.
\textsuperscript{77} Other examples of the reducing of this asymmetry are the prohibitions on attacks on civilian objects (article 52(1) of Protocol I), attacks on non-defended localities (article 59(1) of Protocol I) and attacks on
role both in their development and in the assurance of their implementation. As Dunoff and Trachtman noted: “In negotiating rules regarding international conflicts, the various parties to the Geneva Conventions each had something to give in direct exchange: narrowly reciprocal ex ante agreements to protect combatants and, in certain cases, noncombatants. This reciprocity continues ex post facto when states have the power, if not the legal authority, to withdraw protections in tit-for-tat responses to their opponent’s breaches.” Admittedly, the omission of the si omnes clause from conventions referring to the laws of war, and the prohibition of reprisals in the Geneva Conventions and Additional Protocols, are a sure sign of the decline in the status of the element of reciprocity within humanitarian law. Still, some scholars argue that despite their disadvantages, reprisals may still constitute the only remedy for an attacked state that seeks to coerce its enemy into implementing humanitarian law. For this reason, Italy and Britain made reservations on the relevant articles in Additional Protocol I, and the US has officially rejected the prohibitions on reprisals on the theory that the use or at least threat of these measures is necessary to deter violations of humanitarian law, especially against POWs and civilians.

These reservations demonstrate the importance that states – particularly those who have participated in asymmetric wars – attribute to the element of reciprocity. The presence of this element and its ability to ensure the enemy’s adherence to agreements greatly influence their motivation to adhere to humanitarian law. One should therefore expect at least a decline in states’ adherence to laws implemented unilaterally, thus conferring a militarily advantage to the other side.

78 See Meron, supra note 4, at 243.
79 Dunoff & Trachtman, supra note 16.
80 See for example G. Aldrich, Compliance with International Humanitarian Law, 282 IRRC 294 (1991), at 302.

objects indispensable to the survival of the civilian population prohibition (article 54 of Protocol I). For an elaborate discussion of those prohibitions, see Gasser, supra note 39, at 554-560.
In economic terms, it could be argued that humanitarian law does not constitute a steady-state equilibrium between the belligerents in the war on international terror. The war-of-attrition model, for example, conceives of the laws of war as treaties signed in times of peace in order to ban the use of certain strategies during war. According to this model, such treaties are enforceable only if neither side believes that banned strategies are effective or if some mutual deterrence exists between the sides. Those conditions are not met in this context. First, strategies banned by humanitarian law are a fortiori perceived as efficient by terrorist organizations. Although terrorist acts’ contribution to the achievement of political goals remains a subject of debate, the very use of such strategies attests to the efficiency these organizations ascribe to them.\(^{82}\) Second, terrorist organizations are difficult to deter. The possibility of these groups being defeated solely by military action is reduced because it is difficult to assess their magnitude. This is true because of several factors: these groups usually do not operate within geographically defined areas, do not defend industrial installations, are not committed to the welfare of a civilian population, operate largely within “gray zones,”\(^{83}\) are well camouflaged within their environment and are embodied in an ideology rather than in any particular institution.\(^{84}\) Since a state can not make a credible threat of retaliation to a terror attack that exceeds its “zone of tolerance,” the war on terror renders the logic of Cold War deterrence - which was based on second-strike puissance – defunct.\(^{85}\) Terrorist

\(^{81}\) See T. Meron, supra note 4, at 250.
\(^{82}\) Regarding the efficiency Al-Qaeda ascribes to its strategies, see for example Still Out There, The Economist, supra note 45.
\(^{83}\) The term “gray zones” in this context refers to areas such as parts of Afghanistan, Somalia and Pakistan where no effective control is exercised. See Conesa, supra note 44.
\(^{84}\) Regarding the argument that Al-Qaeda wears a form of ideology more than a substantive existence, see J. Burke, Al-Qaeda: casting a shadow of terror (London, 2003). Admittedly, the removal of terrorist organizations’ leaders could permanently or temporarily impede their operational capabilities, as happened with the apprehension of PKK leader Abdullah Ocalan by Turkey in 1999, or with the apprehension of Abimael Guzman, leader of the “Shining Path”, in Peru in 1992. However, those organizations evolved around the charismatic figures of their leaders. It is doubtful whether highly decentralized groups such as Al-Qaeda, which is comprised of multiple terrorist cells and is based on ideology rather than a personality cult, would be greatly affected by actions directed against its leaders.
\(^{85}\) See Benvenisti, supra note 23.
organizations are expected to employ their full power during their first strike, knowing that retaliation cannot effectively be directed at them by the attacked state. The new reality therefore lacks a steady equilibrium, meaning that humanitarian law treaties are unenforceable in this context.

The screening process model is also irrelevant to the war on international terror. The inability to oblige terrorist organizations to implement humanitarian law’s conventions through audience costs and the omission of the element of reciprocity, has lead states to the compelling conclusion that it is impossible to reach agreement on treaties that can serve as reliable filters of permitted and banned strategies, with such organizations. As a result of the US and its allies’ reluctance to implement the laws of war on a unilateral basis, the materiality of humanitarian law to the war on international terror is limited in its present form, both with regard to the regulation of belligerents’ conduct in war and the regulation of states’ investment in security.

From a utilitarian point of view, each side is therefore devoid of incentives to implement the laws of war. This lack of motivation is bound to lead to more frequent and more egregious violations of these laws, even by states that still exercise them to some extent. This process of alienation and systematic repudiation will gradually set us further away from the equilibrium that humanitarian law was thought to constitute in the past, until the attainment of a new equilibrium. Predicting how this process will stabilize, i.e. how the laws of war will be formulated in the future, is difficult. But the notion that the absence of

86 Depending on tactical considerations, which could temporarily limit the power of the attack.
87 The US attack in Afghanistan, following the events of September 11th 2001, constitutes an exception to this proposition. However, two remarks should be made in this regard. First, the American attack’s effectiveness in neutralizing the threat of Al-Qaeda and apprehending its leaders is subject to debate. Second, the elimination of the only sheltering regime of the organization prevents the repetition of such a concentrated large-scale military offensive.
an external intervention in this process could lead states to comply only with laws that serve their immediate utilitarian interests is alarming. Such utilitarian laws will be found only in domains in which the element of reciprocity is still present, motivating both sides to decrease aggregate costs.

A conspicuous example of such mutual interest can be found in the question of POWs’ status. Geneva Convention III, which concerns the treatment and status of prisoners of war, is considered part of the customary law of armed conflicts. It obligates belligerents during any armed conflict, including limited military operations, whether war has been declared or not and whether the belligerents are parties to the convention or not. However, these protections are reserved for soldiers and other lawful combatants. Civilians who are not members of a state’s armed forces, such as terrorists, are usually considered “unlawful combatants” or “unlawful belligerents.” They are entitled neither to the protection received by combatants, nor to all those granted to civilians according to article 51(3) of Additional Protocol I and Geneva Convention IV. The US and its allies are therefore required by international law to distinguish between lawful combatants, such as the soldiers of the former Afghan Army (the Taliban), and unlawful combatants, such as citizens of other nations who fought in the ranks of Al-Qaeda during the war in Afghanistan in 2001. Meron notes that despite the asymmetry between states and rebel

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88 See Roberts, supra note 59.
90 Regarding the difficulty in defining the term “lawful combatants,” see Id. at 102-105.
91 Regarding exceptions to this rule, such as cases of “levées en masse”, see Id. at 105-109.
92 Regarding the distinction between the denotation of terrorist as “unlawful belligerents” and “unlawful combatants”, see M. Hoffman, Terrorists are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law, 34 Case Western Reserve Journal of International Law 227 (2002).
93 Despite the common conjecture that Geneva Convention IV applies to these elements, some of the protections included in it are not usually applied to “unlawful combatants”. See K. Dörmann, The legal situation of “unlawful/unprivileged combatants”, 849 IRRC 45 (2003).
94 In case a doubt arises as to whether a person is entitled to the status of POW, article 45 of Additional Protocol I concludes this person shall enjoy such status until his case has been determined by a competent tribunal.
forces, reciprocity is still relevant to such conflicts, as is shown by their mutual deterrence regarding the treatment of captured combatants. Since states are allowed to apply the status of POW to every prisoner they capture - whether or not he or she is entitled to it by law - the presence of reciprocity may well apply this logic to conflicts between states and non-state actors other than rebels. It is indeed the element of reciprocity that led the Americans to grant the status of POW to both the soldiers of the North Vietnamese Armed Forces and to the members of the Vietcong during the Vietnam War, notwithstanding the difficulty of distinguishing between the two categories of combatants. However, the US abandoned this policy and ignored humanitarian law when it refused to determine the status of prisoners held in Guantánamo Bay, Cuba, justifying its decision on grounds of the difficulty of distinguishing between the Taliban and members of other groups such as Al-Qaeda. The change in US policy apparently stems from the overwhelming military advantage enjoyed by this country during the war in Afghanistan, the short duration of the war and the fact that the Taliban and the groups that fought by their side did not detain a significant number of American prisoners in comparison with the Vietnam War. These facts infringed upon the principle of reciprocity between the parties, nullifying the US interest in compliance with the laws of war as they relate to POWs.

This example demonstrates the process of decline in adherence to humanitarian law due to the lack of reciprocity. It seems that states’ willingness to comply with the provisions of Geneva Convention III is conditioned by their belief that such compliance would trigger a similar response from the other party. Israel for example, which desires implementation of the convention with regard to its soldiers captured by the Hezbollah organization, has sometimes applied the convention to Hezbollah prisoners, despite the fact it considers

95 T. Meron, supra note 4, at 251.
96 See Gasser, supra note 39, at 567-568.
them terrorists rather than lawful combatants, hoping this will produce similar treatment of Israeli prisoners on the part of Hezbollah.\footnote{Green, supra note 89, at 214.} However, the unlikelihood of the possibility that the implementation of the convention on combatants - whether lawful or unlawful - could lead to a reciprocal attitude of the enemy, will result in non-compliance with the laws relating to the status of POWs. Admittedly, states can provide themselves with a certain “zone of tolerance,” which will induce them to grant members of terrorist organizations the status of POW in spite of sporadic infringements of the laws of war regarding their captive soldiers. However, the more frequent the infringements, the more states will be inclined to consider them as crossing a line allowing no such tolerant policy.

Alas, even where reciprocity is present, potential agreements, which would benefit both sides, might not be reached. This is due to the high transaction costs associated with such agreements. The dearth of international institutions that specialize in the regulating of relations between states and non-state actors,\footnote{See Dunoff & Trachtman, supra note 16. Regarding the role international organizations such as the ICRC can play as intermediaries between states and non-state actors, see T. Meron, The Continuing Role of Custom in the Formation of International Humanitarian Law, 90 AJIL 238 (1996).} and states’ apprehension that dialogue with terrorist organizations might confer upon them a certain degree of legitimacy, render jointly efficient agreements unbeneificial to them. This factor coupled with the inability to enforce agreements on non-state actors due to the lack of reciprocity, may lead to a prisoner’s dilemma, in which both parties’ welfare is affected, thus resulting in a Pareto inefficient outcome.\footnote{Meron, supra note 98.}

Considering the global character of the war on international terror, a decline in the status of humanitarian law could affect the situation of many individuals worldwide; first by increasing the destructiveness and brutality of the war on international terror and second
by leading to violations of the human rights of civilian populations. The shock of the events of September 11th 2001 for example, led a number of states to take steps against terrorism, which resulted in the violation of human rights on their territory.\textsuperscript{100} The inclination of states to violate human rights in the territory of other nations will probably increase due to the law’s asymmetric character, which prevents retaliations against their own citizens as their military operations are mostly conducted on foreign soil. Adam Roberts articulates the danger of such behavior: “While the application of the law may be particularly difficult in anti-terrorist operations, it is not unimportant … In some cases, excesses by the government or by intervening forces may have contributed to the growth of a terrorist campaign against it.”\textsuperscript{101}

\textbf{VI. Mitigating Factors}

The trend of decline in states’ adherence to humanitarian law is not without mitigating factors, which already constitute part of the set of concerns considered by states as they determine the level of its commitment to humanitarian law. However, the trend described above necessitates the reinforcement of those factors to maintain a similar level of global commitment as existed in the past. Since states are not inclined to formulate agreements directly with non-state actors, a normative solution to this problem should be sought by increasing states’ motivations to obey humanitarian law through external factors. The strength of these factors will depend on their ability to impose costs for violating humanitarian law.

\textsuperscript{99} Dunoff & Trachtman, \textit{supra} note 16.
\textsuperscript{100} Gasser notes that the violation of these rights can constitute a clear infringement of the states’ obligations under humanitarian law and the body of international human rights. See Gasser, \textit{supra} note 39, at 565-568.
\textsuperscript{101} Roberts, \textit{supra} note 59.
A first mitigating factor is a compound one: public opinion and public conscience. Meron\textsuperscript{102} claims that dictates of public conscience can be seen as a reflection of \textit{opinio juris}. As he puts it “Although popular opinion, the \textit{vox populi}, may be different from the opinion of governments, which constitutes \textit{opinio juris}, the former influences and helps to form the latter.” The role of public conscience in the development of international law was already recognized in the Martens clause, which first appeared in the 1899 Hague Convention.\textsuperscript{103} The clause reveals public conscience’s ability to influence the adoption or rejection of strategies and means of warfare by governments, by externalizing costs which stem from the collective conscience of the citizens.\textsuperscript{104} This conscience constitutes a preference, which is satisfied by respecting human rights during conflicts.\textsuperscript{105} Additionally, public opinion imposes costs referred to as “audience costs” on governments for violating humanitarian law and human rights. Nations may comply with humanitarian law for utilitarian concerns such as: to win the support of public opinion in neutral states or the support of influential international organizations,\textsuperscript{106} to avoid internal political damage due to antagonistic public opinion that manifests itself in times of elections\textsuperscript{107} and to avoid aggravating the hostility of the civilian population in enemy states or states in which fighting is conducted. Such costs counterbalance the benefit of security means that violate international law. However, the level of internal audience costs depends largely on cultural characteristics, the population’s disposition, the level of security it enjoys vis-à-

\textsuperscript{102} T. Meron, \textit{The Martens Clause, Principles of Humanity, and Dictates of Public Conscience}, 94 AJIL 78 (2000).
\textsuperscript{103} The clause reads – “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” Regarding the clause’s status in contemporary international law, see Rupert Ticehurst, \textit{The Martens Clause and the Laws of Armed Conflict}, 317 IRRC 125 (1997).
\textsuperscript{105} Dunoff & Trachtman, \textit{supra} note 16.
\textsuperscript{106} See Green, \textit{supra} note 89, at 277-79.
\textsuperscript{107} Regarding costs imposed on governments by internal public opinion for the violation of international commitments, see Fearon, \textit{supra} note 25.
vis international terror, and other factors. Keeping in mind that human history has known “bad” public opinions, which encouraged governments’ drifting away from humanitarian law, makes it difficult to rely on those costs as dependable mitigating factors.\textsuperscript{108}

A second mitigating factor can be found in NGOs’ increasing activity. Their surveys of armed conflicts and military interventions and production of seemingly unbiased reports regarding human rights conditions in fighting areas\textsuperscript{109} prevent states’ concealment of their level of commitment to humanitarian law. By encompassing legal standards and principles,\textsuperscript{110} those organizations also observe the substance granted to those standards by states and influence the latter’s interpretation of their legal obligations.\textsuperscript{111} This fact was noticeably manifested in the unprecedented role NGOs played in the formulation of the statute of the ICC. As Meron\textsuperscript{112} perceptively noted – “[NGOs] fill an institutional gap and give international humanitarian law an even more pro-human-rights orientation.” In addition, the immediate and direct coverage of armed conflicts by the media shortens the interval between violations of humanitarian law and the public’s reaction to it. This rapid reaction helped the establishment of the ICTY and ICTR, which have significantly

\textsuperscript{108} Meron, supra note 102.
\textsuperscript{109} Krauss & Lacey, supra note 3.
\textsuperscript{110} See Amnesty International’s report entitled “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force, June 2000, as an example of an NGO’s investigation into states’ adherence to the Discrimination Principle, as formulated in article 51 of Additional Protocol I.
\textsuperscript{111} ICRC’ SirUS project, which is designated to study and formulate objective criteria as to which weapons cause “superfluous injury or unnecessary suffering” (a term borrowed from article 35 of Additional Protocol I), constitutes a conspicuous example of such organizations attempts to influence governments’ interpretation of judicial standards. See R. Coupland & P. Herby, Review of the legality of weapons: a new approach The SirUS Project, 835 IRRC 583; See also Protection of victims of armed conflict through respect of International Humanitarian Law, Reference Document, 27th International Conference of the Red Cross and Red Crescent, Geneva, October 31\textsuperscript{st} to November 6\textsuperscript{th} 1999, available at http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList188/D1DBE52ED17E777DBC1256B66005D6CFF.
\textsuperscript{112} Meron, supra note 4, para. 79.
contributed to the development of humanitarian law and to the reinforcement of its humanitarian approach.\textsuperscript{113}

A third and more significant mitigating factor depends on the reinforcement of the humanitarian approach to humanitarian law presented above. This approach, which remained inferior to its competitor in the past, has enjoyed growing recognition since the middle of the 19\textsuperscript{th} century, and particularly since the end of World War II. Nevertheless, it seems that utilitarian concerns and strategies are still predominant among governments. While strategic behavior as such could lead to a decrease in the status of humanitarian law, the reinforcement of the humanitarian approach and the internalization of the human values on which it is based, could encourage states to adhere to humanitarian law despite the absence of utilitarian incentives.

The possibility of significantly promoting the humanitarian approach hinges mainly on the willingness of UN organs and international tribunals to increase the costs imposed on states for the violation of humanitarian law. Other factors that will play a role in the utility of the humanitarian law approach are its adoption and development through conventions, resolutions and the case law of international bodies. The question is: Will those bodies be willing to increase those costs significantly? Certain scholars argue that recent developments in international law can indeed be understood as an effort of the international community to influence and shape the public’s preferences rather than as an effort to reflect them.\textsuperscript{114} Some international institutions’ activities attest to their predisposition to do so by promoting the humanitarian features of humanitarian law alongside international human rights, and pressuring states to comply with conceptual

\textsuperscript{113} Meron, \textit{supra} note 4, at 243.
\textsuperscript{114} See Dunoff & Trachtman, \textit{supra} note 16.
changes. In view of the numerous violations of humanitarian law and international human rights caused by the war on terror, many resolutions of UN organs such as the Security Council, the General Assembly and the Human Rights Committee have emphasized the need to conduct the war on international terror in compliance with humanitarian law and international human rights.\footnote{See for example article 6 of Security Council Resolution 1456 (2003), according to which “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.” The resolutions of those bodies also induced states to comply with the resolutions, remarks and observations of the UN with regard to international human rights, while observing the special mechanisms and procedures set by the Human Rights Committee. See for example UN General Assembly resolutions 58/187 (2003) and 57/219 (2003), and the UN Commission on Human Rights resolutions 2003/68 (2003) and 2003/37 (2003).}

On the judicial level, the possibility of developing humanitarian law in a more humanitarian direction depends mainly on the case law of international tribunals, and their predisposition to infuse it with more humanitarian and less utilitarian substance.\footnote{Regarding the ICC’s impact on the development of international law in general and humanitarian law in particular, see V. Chetail, The contribution of the International Court of Justice to international humanitarian law, 85 IRRC 235 (2003).} The proposition that human rights have deeply influenced those tribunals’ visions of customary humanitarian law, their methodologies and their interpretation of its provisions, reinforces such a possibility.\footnote{See Meron, supra note 4; See also T. Meron, Human Rights and Humanitarian Norms as Customary Law (Oxford: Clarendon Press, 1989), at 56-57.} The statute of the ICC reflects to a large extent the recent trend of approximation between humanitarian law and international human rights.\footnote{Benison notes that parts of the definitions of war crimes are standard-based rather than rule-based, the laws of war apply to both international and non-international armed conflicts and enforcement is based on prosecution of individuals rather than reprimands of governments. On the ways in which the ICC can further increase the approximation of the two systems in order to implement humanitarian law and international human rights on any person and within any conflict, see Benison, supra note 10.} The ICC and other international tribunals’ predisposition to recognize that the unique characteristics of non-international armed conflicts, such as large parts of the war on terror, necessitate the
combined implementation and development of the body of international human rights and humanitarian law, and could increase even further the humanization of the laws of war.\textsuperscript{119}

However, international tribunals’ fear that states might reject any decision that constrains their actions in the framework of the war on international terror, could deter them from vigorously promoting humanitarian law. Tribunals are not interested in the creation of a gap between them and the disputing states to an extent that will result in a rupture, thus undermining their standing. In view of such far-reaching attempts, states might raise arguments implying that humanitarian standards lack uniform interpretations, prevent belligerents from themselves assessing the legality of their actions during combat, and that the non-military orientation of the judges\textsuperscript{120} prevents them from accurately evaluating concurrent military needs.\textsuperscript{121} Still, states might comply with moderate dictates of the tribunals due to audience costs and the belief that doing so could improve their welfare in the long run.\textsuperscript{122} The question of compliance will therefore be determined by the balance between these factors and the level of the costs imposed by the courts.

States’ appraisals of the ability of the three above-discussed factors to impose costs for violating humanitarian law will determine the extent of their compliance with this law in the absence of immediate military and utilitarian incentives. The factors’ ability to develop a sufficient counterbalance to preserve and perhaps promote the status of humanitarian law

\textsuperscript{119} Regarding the proposition that the judicial confrontation of international terror necessitates the interaction of a number of judicial systems, see \textit{International Humanitarian Law and the Challenges of Contemporary Armed Conflicts}, Report prepared by the International Committee of the Red Cross, Geneva (September 2003); See also the ICRC report entitled \textit{International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence}, The International Institute of Humanitarian Law, San Remo, Italy, in cooperation with The International Committee of the Red Cross, Geneva, Switzerland - XXVIIth Round Table on Current Problems of International Humanitarian Law, November 2003, available at \url{http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList575/ACF03C9E9B96AB23C1256DFF00332E15}.

\textsuperscript{120} See \textit{article 36} of the Statute of the ICC, specifying the qualifications of the Court’s judges.

\textsuperscript{121} See Benison, \textit{supra} note 10.

\textsuperscript{122} Such behavior constitutes a “precommitment strategy”. \textit{See} Dunoff & Trachtman, \textit{supra} note 16.
within the war on terror hinges on their ability to increase those penalizing costs. As I will argue below, this process may be obstructed by a growing controversy between nations over the appropriate way of accommodating humanitarian law to the war on international terror.

VII. A Tripolar System

The proposition that the war on terror reduces states’ adherence to humanitarian law calls for an explanation of the amplification of the factors discussed in the previous section and the promotion of humanitarian law during the last two decades (which has manifested itself mainly in the establishment of international tribunals such as the ICTY, ICTR and the ICC). The settlement of this apparent inconsistency requires an understanding of states’ different interests regarding the extent to which humanitarian law should be promoted. The gap between those interests was revealed during the preliminary work for the establishment of the ICC and the Rome Conference.

The negotiation of the establishment of a permanent tribunal, rather than an ad hoc one, disclosed significant differences between a group of states led by the US (as the state primarily involved in military operations on foreign soil) and a large group of states demonstrating an ever-increasing recoiling from such operations.\textsuperscript{123} The US, as the only remaining super-power, is indeed deeply involved both militarily and financially in peacekeeping and peace-enforcement efforts, implementation of Security Council

resolutions, UN missions and humanitarian interventions.\textsuperscript{124} Its fear that a Court with broad powers would impair its ability to provide global security - thus jeopardizing the global status quo – led it to adopt a conservative approach towards the Court’s jurisdiction. The main concern of the United States- that American troops deployed across the globe would be subjected to politicized prosecutions\textsuperscript{125} – led it to suggest that the prosecution of such elements be left to their nations.\textsuperscript{126} France and Britain’s involvement in peacekeeping operations drove them to join the US position on this issue despite differences on other matters. As permanent members of the Security Council, those states also pleaded that the Court not undermine the authority of that body.\textsuperscript{127}

The objection of many states to the US and its allies’ attempt to restrict the Court’s powers, resulted in the formation of a large group of states, called “The Like Minded States” (LMS). This group, led by Canada and several Western European nations, included many states by the time of the adoption of the final draft of the Statute of the ICC in 1998,\textsuperscript{128} and constituted a significant driving force behind the establishment of a powerful ICC. This position was crystallized by political tensions between North and South due to the Security Council monopoly on peace and security matters and due to the failing attempt of middle-rank powers to expand the make-up of the Council. Germany, France and Britain’s contest over control of the EU and their attempt to forge a common

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\footnote{125} Regarding the US concern in that regard and the contention that it is superfluous, see Zwanenburg, \textit{supra} note 124; R. Wedgwood, \textit{Fiddling in Rome: America and the International Criminal Court}, 77(6) Foreign Aff. 20 (1998).
\footnote{126} This current arrangement has not remained uncriticized. See Zwanenburg, \textit{supra} note 124.
\footnote{127} Regarding their contention that individual permanent members of the Council should have a veto over which cases went before the Court. Regarding the objection of numerous states to this proposition and the compromise attained, see \textit{Id}.
\footnote{128} By the adoption of the final draft of the statute of the ICC in April 1998, the group included: Australia, Austria, Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago (representing twelve Caricom states).\end{footnotes}
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foreign and security policy increased their predisposition to challenge the standing of the United States regarding the Court’s powers.

The dynamic portrayed above implies that the recent promotion of humanitarian law does not contradict the proposition that states that fight international terror by military means, will demonstrate less adherence to its rules. The two courses were followed by different nations, which held different interests and views regarding the ways of promoting global security and stability. The US, which has proven since the end of the Cold War its willingness to conduct direct military interventions, has indeed obstructed the establishment of an effective ICC, fearing this body could impair its ability to actualize its supremacy and promote both global stability and its own interests.\(^\text{129}\) The LMS and several Western European states strive to maintain global stability through different means, and it seems that their refusal to participate in military interventions for the promotion of peace and security has indeed been directly proportional to their support of a powerful ICC.\(^\text{130}\)

In that sense, the promotion of humanitarian law, i.e. its relevancy to the war on international terror, is now determined by the attitude of three different actors: 1). organizations of international terror, which are indifferent to its dictates and do not participate in its development; 2). a group of states who wish to significantly promote and develop humanitarian law; 3). a group of states led by the US, which seeks to reduce

\(^{129}\) Regarding the concern that the ICC could impair the US hegemony in the post-Cold War era, see Wedgwood, \textit{supra} note 125. Regarding actions taken by the US in reaction to the entry into force of the Statute of the ICC, see S. Zappalà, \textit{The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements}, 1 Journal of International Criminal Justice 114 (2004).

\(^{130}\) See P. Lopes, \textit{La paix par le droit. L'exemple de la Justice pénale internationale}, 17 Revue critique d'écologie politique (2003), available at \url{http://ecorev.org/article.php3?id_article=139}. 
humanitarian law. The second actor’s reason for promoting and developing humanitarian law is open to debate. This course of action may have been selected due to an ideology, which advocates the confrontation of contemporary threats through multilateral rather than unilateral means. It could stem from a belief that a strong ICC will be able to stabilize the global status quo by effectively deterring parties from committing crimes of genocide, crimes against humanity and war crimes. On the other hand, this path may have been chosen because acting through international tribunals, as opposed to direct or military involvement, could satisfy public opinion’s demand for action on the part of these states, while exempting them from compromising their troops and allocating the funds required for successful interventions in areas of conflict. The international community’s reluctance to devote the necessary resources required for the successful performance of such missions has indeed been manifested by a number of conspicuous calamities during the last decade.\footnote{Conspicuous examples of those calamities can be found in the French involvement in the massacre of Tutsis in Rwanda in 1994, Dutch and French troops’ failure to prevent the massacre of 7,000 Muslims in Srebrenica (Bosnia) in 1995 and the massacres committed in Kosovo during 1998 and 1999. On the massacre in Rwanda, see for example C. Braeckman, \textit{Rwanda, retour sur un aveuglement international}, Le monde diplomatique, March 2004, available at \url{http://www.monde-diplomatique.fr/2004/03/BRAECKMAN/10872}; P. Leymarie, \textit{La politique française au Rwanda en questions}, Le monde diplomatique, September 1998, available at \url{http://www.monde-diplomatique.fr/1998/09/LEYMARIE/10924}. On the massacre in Srebrenica, see for example P. du Bois, \textit{L’union européenne et le naufrage de la Yougoslavie (1991-1995)}, 104 Relations internationales 469 (2000), available at \url{http://heiwww.unige.ch/ri/Articles/duBoisArt_2.pdf}; Netherlands and UN blamed over Srebrenica massacre, The Guardian, April 10, 2002, available at \url{http://www.guardian.co.uk/vugo/article/0,2763,681868,00.html}; Balkan ghosts haunt the Dutch, The Guardian, April 12, 2002, available at \url{http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,683400,00.html}; France’s Role in a Bosnian massacre, The Observer, April 22, 2001, available at \url{http://observer.guardian.co.uk/comment/story/0,6903,476501,00.html}.} Considering this additional benefit to these states as free riders of American military efforts against the war on terror,\footnote{See Benvenisti, \textit{supra} note 1.} it seems that this course of action does entail a utilitarian aspect. It is therefore expected to be further endorsed by those states. The third actor in this system is generally predisposed to fight international terrorism by military means. These states’ lack of confidence in international tribunals’ abilities to effectively
deter international terrorism, and their apprehension that the promotion of humanitarian law could hinder their military efforts, have led them to adopt an approach that seeks to reduce humanitarian law and leads to a decrease in its implementation.

The emergence of this new tripolar system reduces the plausibility of promoting international law in an unequivocal course; whether by constricting it or by giving it a more humanitarian orientation. It is therefore unclear whether the mitigating factors described in the previous section, and especially the promotion of the humanitarian approach to humanitarian law, will be able to compensate for the decline in the status of humanitarian law. In the meantime, the United States’ eroding away at the ICC’s effectiveness, and its Western allies’ reluctance to proportionally contribute to the military effort against international terror, impair both courses’ ability to restore an optimal level of global security. Since both groups claim a valid perception of international law, an attempt to resolve this situation by further promoting their approaches could simply result in the creation of two different systems of international law, not unlike the state of affairs during the Cold War.

VIII. Conclusion

The increasing threat of international terror on global security and stability necessitates a renewed appraisal of the existing instruments’ effectiveness in regulating states’ conduct in the war on international terror and establishing an optimal level of global security in reply. This analysis raises the question of the adequacy of humanitarian law as a central device in the regulation of this war. As I have argued in this article, the unique attributes

133 Regarding criticism of the attempt to secure global peace and security through the sole means of international tribunals, see M. Néel, La judiciarisation internationale des criminels de guerre : la solution...
of the war, the problems of collective action and the appearance of a triangular relationship that impairs an unequivocal promotion of humanitarian law, raise serious doubts regarding the ability of this law to effectively attain such goals. Although this article contains no normative statement regarding the most appropriate judicial system to confront this problem – humanitarian law, criminal law, the body of international human rights, a *lex specialis* or a conjunction of these systems – it clearly argues that leaving humanitarian law unaltered will result in a reduction of its implementation.

The law and economics literature should therefore address the implication of these factors in order to develop a more relevant dialogue concerning the pursuance of the legal confrontation of this threat. As I have tried to demonstrate, pursuance of the examination of the materiality of humanitarian law to the war on international terror based on premises of “classical” wars obstructs such a dialogue. The article therefore suggests a number of propositions that an economic analysis of the role of humanitarian law in this context should include.

An examination of the history of humanitarian law reveals that it has suffered from “status-cycles” in the modern era. While its development has progressed following atrocities, detachment from such events has led to its decline and to the intensification of brutality associated with it, until the next tragedy reverses the trend. If these cycles stem from a natural tendency to become less concerned with the promotion of humanitarian objectives the further away in time we are to a tragedy, a robust academic dialogue regarding the effectiveness of humanitarian law is indeed necessary to help the international community conceive utilitarian mechanisms to maintain its relevancy.

*aux violations graves du droit international humanitaire ?, 33 Criminologie 151 (2000).*

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