

## Articles

# Privileging Combat? Contemporary Conflict and the Legal Construction of War

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*Recent high-profile debates about “unlawful” or “unprivileged” combatants call for fundamentally rethinking the role of international law in relation to war. In the conventional view, the laws of war, both jus ad bellum and jus in bello, primarily seek to oppose or restrain the practice of organized violence. This Article, focusing on the legal doctrines crucial to the combatants’ privilege, argues for three contrary propositions. First, law’s role in relation to war is primarily not one of opposition but of construction—the facilitation of war through the establishment of a separate legal sphere immunizing some organized violence from normal legal sanction and, inevitably, privileging certain forms of violence at the expense of others. Secondly, the forms of this legal construction of war are highly contingent, the subject of historical variation and political contestation. Thirdly, the legal construction of war as a separate sphere has been considerably destabilized in our time, in particular by the strategic instrumentalization of the legal categories by state and non-state participants in violence. Both the “war on terror” and the fourteen year conflict with Iraq provide paradigmatic instances of these phenomena. This Article analyzes the legal*

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*construction of war in relation to two broad questions: “what is war?” and “who is a warrior?” It also examines current conflicts in historical perspective, drawing on past experience from the occupation and colonial contexts. In the Epilogue, it applies its analysis to some aspects of recent Supreme Court decisions on the “war on terror.”*

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The starting point of human rights law is the right of the individual, including the right not to be arbitrarily killed. The international law of armed conflict, which is very much older in its origins than human rights law, starts from totally different premises. The soldier has the right to kill another soldier.

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INTRODUCTION: CONSTRUCTION, CONTESTATION,  
INSTRUMENTALIZATION

In 1928, the parties to the Kellogg-Briand Pact “condemn[ed] war” and agreed to “renounce it as an instrument of national policy.”<sup>2</sup> While it is easy to mock this treaty in light of the horrific events that soon followed, it can be seen as codifying the popular notion of war as incompatible with a modern international legal order. Of course, despite this notion, war has survived, not only in the form of unabated international violence, but also in the form of ever more complex and detailed bodies of legal doctrine. These bodies of doctrine include *jus ad bellum*, or rules about recourse to war, and *jus in bello*, or rules about the methods of war and the protection of those not engaged in combat. Yet, the relatively recent coinage of Latin phrases to describe these fields of law<sup>3</sup> and the more recent renaming of *jus in bello* as “international humanitarian law” appear to reflect a persistent discomfort about the semantic conjunction of law and war. This discomfort may be seen in the strikingly euphemistic, one might almost say prudish, use of the term “humanitarian” to describe a body of rules one of whose key doctrines is the “combatants’ privilege”—the provision of legal immunity for certain kinds of large-scale violence.

The combatants’ privilege, and its corollary statuses of privileged and unprivileged (or “unlawful”) combatants, is a hoary and formerly esoteric doctrine of *jus in bello* that has achieved public fame in the years since 9/11. It is an international law immunity that places some violent actions and actors substantially outside the

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1. Françoise Hampson, *Human Rights Law and International Humanitarian Law: Two Coins or Two Sides of the Same Coin?*, 1 BULLETIN OF HUMAN RIGHTS 46, 50 (1991). I should note that the author then goes on to highlight some of the shared aspirations of the two bodies of law.

2. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art. 1, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].

3. See generally Robert Kolb, *Origin of the Twin Terms Jus ad Bellum/Jus in Bello*, 320 INT’L REV. RED CROSS 553 (1997). Kolb dates the usage of these terms to around 1930.

purview of “normal” criminal law and human rights law. Those who benefit from the combatants’ privilege cannot be prosecuted for mere participation in armed conflict and are entitled to prisoner of war (“POW”) status.<sup>4</sup>

Determining entitlement to the privilege involves two broad issues. First, international law must identify the arenas of violence that count as “combat” in relation to which the privilege might be granted, an issue one might colloquially rephrase as “what is war?” Secondly, international law must identify the persons who count as “combatants” and who might thus be entitled to the privilege, an issue one might colloquially rephrase as “who is a warrior?” The two most high-profile arenas of international violence in which the United States has recently been involved—the “war on terrorism” and the conflict with Iraq—have highlighted the centrality and controversial nature of these issues. The recent U.S. Supreme Court decisions in the so-called “terrorism cases”<sup>5</sup> have further served to place these legal debates in the public eye.

Through examining the legal doctrines crucial to defining the combatants’ privilege, in my view the key concept of *jus in bello*, this Article seeks to undo the circumlocutions that often block frank discussion of the relationship of law to war. Contrary to conventional wisdom, I argue that it is misleading to see law’s relationship to war as primarily one of the limitation of organized violence, and even more misleading to see the laws of war as historically progressing toward an ever-greater limitation of violence.<sup>6</sup> Instead, I put forward three central propositions. First, rather than standing in opposition to war, law has long been directly involved in *the construction of war*—the construction of war as a separate sphere of human activity in

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4. While combatants are the primary group entitled to POW status, there are others who qualify for the status as well. For example, POW status is bestowed upon:

[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

5. See my discussion in the Epilogue *infra* pp. 58–70.

6. See, e.g., François Bugnion, *Guerre juste, guerre d’agression et droit international humanitaire*, 84 INT’L REV. RED CROSS 523, 525 (2002). Bugnion views the limitation of war’s violence as part of the project of international law from its inception in the Seventeenth Century, but also links this project to the separation of *jus ad bellum* from *jus in bello*—a separation key to the construction of war as a separate sphere, as I shall show throughout this Article.

which the “normal” rules of social life, codified, for example, in the domestic criminal law regulating violence, do not operate.<sup>7</sup> Rather than *opposing violence*, the legal construction of war<sup>8</sup> serves to *channel violence* into certain forms of activity engaged in by certain kinds of people, while excluding other forms engaged in by other people.<sup>9</sup>

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7. Cf. Richard Baxter, *So-Called “Unprivileged Belligerency:” Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 323 (1951): The “outbreak of war . . . creates an area in which the normal law applicable to the peaceful intercourse of states is suspended.” The “suspension” about which Baxter writes applies to many aspects of “normal” domestic law as well.

8. As I note *infra* pp. 7–9, the word “war” has lost most of its technical international legal significance and has been replaced by the words “use of force” (*jus ad bellum*) and “armed conflict” (*jus in bello*). Nonetheless, this Article will generally use the word “war” when not discussing specific legal doctrines for two somewhat different reasons. First, I seek to remind us of the reality of organized violence by using the colloquial, “plain language” term, “war,” rather than the more abstract modern formulae, “armed conflict” and “use of force.” Secondly, since I seek to highlight the legally constructed quality of the existence of a separate sphere of organized violence where the “normal” rules do not operate, I am trying to highlight the artificiality of the modern terms, ostensibly designed to be closer to pragmatic reality, by using the older term that, paradoxically, sounds both more formalistic and more colloquial to contemporary ears.

9. This Article develops its central theses concerning the role of law in *constructing* war by focusing on *jus in bello*. The objection may be made that this focus weakens this Article’s central theses, since it subordinates those aspects of the law of war concerned with opposing war—viz., the rules of *jus ad bellum*, particularly as enshrined in the League Covenant, the Kellogg-Briand Pact, and the UN Charter. From the perspective of this objection, the rules of *jus in bello* only come into play when the primary rules, the rules opposing war, fail. The law of war would thus be primarily concerned with opposing war and would only reluctantly take up the task of channeling its effects when that opposition proves ineffective. While a full response to this objection would take another article, I would make two points here. First, it is true that the modern rules of *jus ad bellum* do purport to prohibit certain kinds of force (“war as an instrument of national policy” in the Kellogg-Briand Pact and “the use of force against territorial integrity” in the Charter). Yet, they explicitly legalize other forms of violence, notably self-defense and enforcement action by the Security Council (and analogous doctrines during the League/Kellogg-Briand Pact era). Moreover, they leave wide room for justification of other forms of military action, notably humanitarian intervention and military support of anti-colonial forces. The modern rules of *jus ad bellum*, no less than those of *jus in bello*, thus effect a constructive channeling of violence, rather than simply opposing it. Writers as diverse as Carl Schmitt and Thomas Franck have argued this point. Compare CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 50–51 (George Schwab trans., 1996) (1932) with Thomas Franck & Faizal Patel, *UN Police Action in Lieu of War: “The Old Order Changeth,”* 85 AM. J. INT’L L. 63 (1991). Second, as I note throughout this Article, a foundational principle of *jus in bello* is that of the “equality of belligerents,” i.e., the equal treatment of those on each side of a conflict, regardless of the merits of their respective *jus ad bellum* claims. As a result, commentators who specialize in *jus in bello* are often quite ambivalent about *jus ad bellum*. One recent article in the *International Review of the Red Cross* argues that *jus in bello* could only be fully established once the medieval *jus ad bellum* doctrine, that of “just war,” had been abandoned. See Bugnion, *supra* note 6, at 525–26. Similarly, an International Committee of the Red Cross (ICRC) booklet explains that, because the “purpose of international humanitarian law is to limit the suffering caused by war,” it “addresses the reality of a conflict without considering the reasons for or legality of resorting to force.” ICRC,

The second proposition is that the forms of this legal construction of war are highly contingent, both in the sense of having varied historically and in the sense of having been contested within each period. Every time *jus in bello* was renegotiated—in the late Nineteenth Century in response to the European state wars, in 1949 after World War II, and in the 1970s in the wake of decolonization—the scope of the combatants’ privilege was hotly contested. Each time, the treaties produced by those negotiations codified compromises between competing views, particularly in relation to armed groups who did not fit the traditional image of state armies. Provisions about such “irregular” forces in the pre-WWI documents emerged from disputes between large and small European powers,<sup>10</sup> those in the 1949 Geneva Convention from competing legal notions about resistance to occupation,<sup>11</sup> those in the 1977 Additional Protocols from conflicts between anti-colonial states and others.<sup>12</sup> Indeed, this last set of compromises failed to gain universal assent among the participating states and resulted in non-ratification by the United States, among others. Throughout this history, the contours of the legal construction of war have been contested, defended, transformed, and reconstructed through myriad discursive and practical activities—at the inter-state diplomatic level, at the judicial level, and, perhaps most importantly, at the level of the changing forms of violence between people fighting for powers great and small, for Europeans and those they colonized, and for state armies and guerrilla forces of every political, ethnic, and geographical variety.

The third proposition is that the legal construction of war as a separate sphere has come under considerable destabilizing pressure in our time, from a number of quite different quarters. At the level of

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*International Humanitarian Law: Answers to Your Questions* 14 (2002), at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/\\$File/ICRC\\_002\\_0703.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/$File/ICRC_002_0703.PDF!Open). In other words, a consideration of *jus ad bellum* could detract from the “purpose of international humanitarian law.” To be sure, both commentaries intend merely to sound a cautionary note, urging that the two bodies of law be kept separate in order that each may serve its distinctive purpose. The fear of the contamination of *jus in bello* by *jus ad bellum*, nonetheless, bespeaks a deep ambivalence, if not suspicion, towards the latter. It is thus not accurate simply to declare that the laws of war primarily oppose war and only reluctantly channel war. Moreover, in light of my first point about the constructive role of *jus ad bellum*, one might even suggest that the two bodies of law constitute sometimes competing, sometimes complementary, attempts to construct organized violence—a suggestion whose explication would take another article to elaborate.

10. See, e.g., ALAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR* 70 (1976).

11. See, e.g., COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 52–61 (Jean Pictet ed., 1958) [hereinafter PICTET COMMENTARY].

12. See, e.g., Jean Salmon, *Les Guerres de Libération Nationale*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 55 (Antonio Cassese ed., 1979).

practice, it has been destabilized by the manner in which a wide range of actors, both states and non-state entities, have engaged in violence in the years since the end of the Cold War. Specifically, these actors have often shifted *unpredictably and irregularly* between acts characteristic of wartime and those characteristic of not-wartime. The unpredictable and irregular nature of these shifts makes it difficult to know whether at any given moment one should understand them as armies and their enemies or as police forces and their criminal adversaries. Such actors include terrorists and counter-terrorists, “rogue” states and international authorities, and nationalist militias and international peacemakers. At the level of normative discourse, including legal discourse, the destabilization of the legal construction of war is due to the manner in which a similarly wide range of actors seeks to permeate war with values from other fields of social life. Human rights advocates, for example, seek to circumvent the legal distinctions that shield war from scrutiny by the standards of “normal” human values. Terrorists and counter-terrorists seek to circumvent the legal distinctions that reserve war-like activities to the “exceptional” moments of war. International authorities and “rogue” states circumvent the exceptionality of war by engaging in a variety of coercive actions in relation to each other over prolonged periods of time, involving unpredictable and irregular episodes of violence.

Some may view this destabilization of the legal construction of war as tending to produce a synthesis between the laws of war and not-war; others may view it as tending towards the abolition of one or the other sphere. By contrast, I argue that recent trends would better be viewed as *making the distinction between the two spheres available for strategic instrumentalization*. Rather than contesting the line between war and not-war, those engaged in such instrumentalization employ *the distinction itself* for partisan advantage—seeking to achieve practical or discursive gains through shifting back and forth between war and not-war.

The “war on terrorism,” especially since 9/11, and the conflict with Iraq since 1990 have been replete with examples of this instrumentalization of the legal distinction between war and not-war, between “exceptional” violence and “normal” interaction, between bellicose coercion and long-term regulation. In the series of discursive and practical shifts between police and military responses to terrorism and between ongoing regulation and full military engagement in the case of Iraq, the conspicuous accents of war have irregularly and unpredictably alternated with the discreet routine of not-war. These shifts have often been deliberately used to achieve strategic effects on the battlefield or in the realm of public opinion—

effects that include surprising one's adversary and generally creating apprehension about one's next move. At irregular and unpredictable intervals, activities that traditionally have been pursued in a not-war fashion, such as the pursuit of law-breakers, have been pursued in war-like fashion; at other intervals, activities that traditionally have been pursued in war-like fashion, such as the attempt to coerce another state's arms policies, have been pursued in the manner of not-war regulatory regimes. The combatants' privilege debates of the last few years, in which partisans on all sides have shifted between advocacy of treating detainees as prisoners of war, on the one hand, and as criminals, on the other, is just one instance of this crucial phenomenon of our time.

Indeed, this instrumentalization of the war/not-war distinction has put into question even the conventional notion of war as "exceptional" and not-war as "normal." The irregular and unpredictable alternation between the practical and discursive frames of war and not-war also renders visible the legal construction of not-war, the way in which the scope of the "normal" violence subject to criminal law has been subject to the same dynamics of legal construction and contestation as the scope of the violence subject to the laws of war.

*Construction, contestation, instrumentalization*—these are the key challenges for understanding the role of law in relation to war in our time. Acknowledging the *constructive* role of law in relation to war is crucial for undoing the circumlocutions that can obscure that role. Understanding the *contestable* character of the legal construction of war is crucial for enabling us to imagine the wide range of possible forms that that construction may take. And finally, confronting the vulnerability of the legal construction of war to *instrumentalization*, a challenge far greater than mere contestation of its boundaries, is crucial for truly coming to terms with the role of law in relation to contemporary violence, rather than simply bemoaning its misuse by all the major participants.

This Article will explore these three features of *jus in bello* through a detailed analysis of the combatants' privilege. Part I will give an overview of the role of the privilege in the legal construction of war. It will also argue that the category of "unlawful" or "unprivileged combatants," which occupies such a prominent role in post-9/11 debate, is an irreducible byproduct of the legal construction of war. Part II forms the doctrinal core of the Article. It divides the legal construction of war into the two broad issues that I call "what is war?" and "who is a warrior?"—the two issues indispensable for defining the scope of the combatants' privilege. It argues that the

contingency and contestability of these legal concepts has led in our time to their subjection to strategic instrumentalization. It also argues that some of the features of current conflicts that many view as posing novel legal challenges have long historical antecedents that have been obscured by the counter-factual images of war embedded in traditional doctrine. Part III argues that doctrinal instability cannot be reduced by tracing it to narrowly defined political agendas. Rather, the instabilities latent in the constructed, contested, and now instrumentalized legal framework defy partisan politics as well as normative theory. Finally, the Epilogue examines the way in which American courts have faced challenges to the law of war in the post-9/11 era, rooting these efforts in the history of American jurisprudence on the subject.

## I. THE PRIVILEGE

### A. *The Role of the Privilege in the Construction of War*

The underlying theory of the combatants' privilege is that wars are conflicts between public entities, not between individuals.<sup>13</sup> The detention of combatants is not punishment, but rather, simply a way of putting combatants *hors de combat* for the duration of the conflict.<sup>14</sup> Privileged combatants cannot be prosecuted for engaging in violence when that violence complies with the rules regarding the conduct of combat. This immunity is supposed to apply regardless of whether the party for which the combatant fought had used force in violation of the rules applicable to recourse to force (*jus ad bellum*),

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13. Rousseau is often cited for the classic statement of this position: "War is not, therefore, a relation of man to man but a relation of state to state . . ." Jean-Jacques Rousseau, *On Social Contract*, Book 1, Ch. 4, in ROUSSEAU'S POLITICAL WRITINGS 84, bk. 1, ch. 4 at 90 (Alan Ritter & Julia Bondanella ed., 1988) (1762).

14. Thus, in the past, prisoners were sometimes released during wartime in exchange for a pledge not to participate in combat for a specified period. See HERBERT C. FOOKS, PRISONERS OF WAR 297–301 (1924). This "liberation upon parole" was codified in many of the major documents of *jus in bello*. See U.S. Dep't of War, *Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War, General Orders No. 100*, arts. 119–34 (1863) [hereinafter *Lieber Code*], available at <http://fletcher.tufts.edu/multi/texts/historical/LIEBER-CODE.txt>; Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, arts. 10–12, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague IV]; GPW, *supra* note 4, art. 21. See also ROSAS, *supra* note 10, at 52. This practice may now seem somewhat quaint, but it effectively highlights the purpose of the detention of prisoners of war. Cf. Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200 (1998).

though it does not apply in relation to individual violation of rules about the conduct of combat (*jus in bello*). Ordinary combatants, in other words, cannot be prosecuted for violations of *jus ad bellum*, though they can be prosecuted for violations of *jus in bello*.

Due to the confusion in public debate over the last few years, it is important to clearly distinguish between the legal status of criminals and prisoners of war. The key to this distinction is the sharp difference between the respective criteria for the justification and length of detention of the two kinds of prisoners. Criminals are sentenced to prison as a consequence of actions that they have individually committed in violation of criminal law, domestic or international; the length of their imprisonment will depend on the theory of punishment or rehabilitation to which the sentencer subscribes. POWs, by contrast, are detained until the “cessation of active hostilities.”<sup>15</sup> Assuming the POWs have not committed any war crimes in violation of *jus in bello*, neither their detention nor its length depends on their individual acts or on their violations of any law. A prisoner of war need never have personally fired a gun at an adversary. Nor would the length of detention of a prisoner who had never used his arms be shorter than that of a prisoner who had killed massive numbers of the adversary in battle. The purpose of the detention is to disable enemy combatants from participation in combat, not to punish or rehabilitate them.

If one imagined oneself suddenly appointed as a lawyer for a person detained in a conflict that one had yet to learn much about, it would not be clear *a priori* whether one should strive to have one’s client considered as a criminal defendant or as a POW. For example, if one’s sole concern was to liberate the person as soon as possible, the preferred legal rubric would depend on highly situational considerations. On *the criminal defendant side*, one would need to consider all the familiar issues about the nature of the charges, the probability of conviction, the sentencing practices of the court, bias, and so on. On *the POW side*, one would need to consider the probable length of the particular war. It is impossible to say in advance what result this kind of deliberation would yield.

Nor should the combatants’ privilege be taken for granted. In light of the Kellogg-Briand Pact outlawing “war,”<sup>16</sup> and the stricter prohibition on the “use or threat of force” in the United Nations Charter,<sup>17</sup> one might wonder at the survival of the grant of legal

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15. GPW, *supra* note 4, art. 118.

16. See Kellogg-Briand Pact, *supra* note 2.

17. U.N. CHARTER art. 2, para. 4.

immunity for any acts of violence committed in pursuit of illegal ends. The doctrine seems most suited for eras, such as the late Nineteenth Century, when international law left the initiation of “war” within the realm of unfettered sovereign prerogatives.<sup>18</sup> After the Twentieth Century prohibitions on “war” and the “use or threat of force,” one might have imagined that international law would deny the combatants’ privilege to any soldier who participated in war on the side of a wrongful initiator of force. Such a denial of the privilege, in this imaginary legal world, would make possible prosecutions for murder even against common soldiers who participated in wars in violation of *jus ad bellum*, despite their compliance with all rules of *jus in bello*.

Indeed, some non-lawyers might think that the Nuremberg trials abolished the defense of following orders or of serving one’s country, that it established that individuals had to take responsibility for any grave violation of international law—the most serious of which must surely be wars of aggression. But this impression would be mistaken. The Nuremberg Charter did give the tribunal jurisdiction over both “crimes against peace,” i.e., violations of *jus ad bellum*, and “war crimes,” i.e., violations of *jus in bello*.<sup>19</sup> Yet, the category of people who could be tried for the former was far narrower than those who could be tried for the latter. While the relevant article of the Nuremberg Charter is somewhat ambiguous, the tribunals decided that only the highest officials, those who planned and initiated prohibited recourses to force, could be tried for “crimes against peace.”<sup>20</sup> Contrary to the popular understanding of Nuremberg, the tribunals explicitly stated that those who were “followers and not leaders”<sup>21</sup> should not be held responsible for violations of *jus ad bellum*.

International law has thus continued to grant the combatants’ privilege to most participants even if one side is a state engaged in pure aggression and the other is engaged in self-defense. The

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18. See, e.g., W.E. HALL, INTERNATIONAL LAW 139 (1880): “War is a relation which the parties to it may set up if they choose.” Nineteenth Century doctrine, however, did subject recourse to “uses of force short of war” to some legal regulation. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 26–40 (1963).

19. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279.

20. See United States v. Krauch, VIII Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, 1124–27 (1950).

21. *Id.* at 1126.

“equality of belligerents”<sup>22</sup> in the eyes of *jus in bello*, regardless of their relative merits on *jus ad bellum* grounds, remains a cardinal principle of the law of war. Without this form of the combatants’ privilege, war would look very different to those who plan it, recruit for it, and participate in it. To take one example, the privilege plays a crucial role in domestic courts’ justifications for denying a right to selective conscientious objection to conscription for particular wars on *jus ad bellum* grounds—while imposing a duty on soldiers, including conscripts, to selectively refuse to obey orders when any of those orders contravene *jus in bello*.<sup>23</sup> Without the international law privilege for common soldiers, which shields their violent acts from prosecution even when committed in violation of *jus ad bellum*, individuals would be placed in the position of submitting to conscription at the peril of international legal culpability.

By granting the combatants’ privilege, law thus facilitates war—or, rather, certain kinds of war. The privilege is a central feature of the ever-renewed process of legally constructing war as an arena of permissible violence—and of constructing *jus in bello* as a “*lex specialis*”<sup>24</sup> in relation to normal law, including criminal law and human rights law. As the epigraph to this Article suggests, this *lex specialis* literally implicates matters of life and death, for its applicability may determine whether a particular killing is legally *facilitated* through its immunization by “international humanitarian law” or is legally *prohibited* by “international human rights law” (and by criminal law, be it domestic or international). The construction of the scope of the combatants’ privilege is thus central to the construction of the line between the “exceptional” *lex specialis* of war, and the “normal” *lex generalis* of human rights and crimes.

To be sure, law will not necessarily succeed in its attempt to channel violence into particular forms. The denial of the combatants’ privilege to some combatants does not mean that they will not engage in combat. One may even speculate as to whether those fighting without the privilege may do so with a special ferocity, precisely because the stakes are so high. Nonetheless, despite this unpredictability of the effect of legal rules, the privilege heavily shapes the organization of international violence. Nowhere has this been more evident than in the controversies about “unlawful combatants” that have raged in a variety of public fora in the last few

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22. See, e.g., Henri Meyrowitz, *Le statut des guérilleros dans le droit international*, 107 JOURNAL DU DROIT INTERNATIONAL 875, 880 (1973).

23. See *United States v. Gillette*, 401 U.S. 437 (1971).

24. *Legality of The Threat or Use of Nuclear Weapons*, 1996 I.C.J. 66, 78-9 (July 8).

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PRIVILEGING COMBAT?

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years.

B. *The Irreducibility of the Category of  
“Unlawful”/Unprivileged Combatants*

The high-profile debates that emerged in the wake of 9/11 about the status of a range of people detained by the United States have continued to bedevil courts and diplomats. At one level, the issue seemed to be one of choosing between legal alternatives: should the prisoners be viewed as alleged violators of criminal law or should they be viewed as participants in an armed conflict? In the former case, the detainees would be entitled to the entire apparatus of U.S. criminal procedure; in the latter case, their treatment, especially their entitlement to POW status, would have to be examined under the international law of armed conflict.

Yet, from its inception, the debate did not focus on the alternatives between the two bodies of law, but rather, on a term put forward by the U.S. government that seemed designed to put many of the detainees beyond the reach of any law at all.<sup>25</sup> The term “unlawful combatants” united crime and combat in a manner that short-circuited the alternative between two bodies of law. By declaring that some detainees did not merit the protections of criminal law because of their combatant activities, *and* that they did not merit the protections of *jus in bello* due to the unlawful nature of their combat, the term seemed designed to establish a crude, general dichotomy between law and war, at least certain kinds of war. Indeed, in the way in which it was deployed by the U.S. government, it appeared to create a category of rightless persons—neither criminal suspects nor prisoners of war, committed to the caprice of unreviewable state power. Some of the critics of the United States even asserted that the term had been newly coined for the specific purpose of justifying U.S. policy towards post-9/11 prisoners, that it had been invented in the fall of 2001 “for Donald Rumsfeld . . . to get him through his news conferences.”<sup>26</sup>

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25. This widespread impression might be a bit oversimplified. Even before the Supreme Court decisions in June, 2004, the U.S. Defense Department claimed to have created some special process for reviewing the status of detainees, which it called “multiple layers of review.” See Defense Department Background Briefing on the Combatant Status Review Tribunal, July 7, 2004, at <http://www.dod.mil/transcripts/2004/tr20040707-0981.html>. The government appears to have set up some kind of novel, hyper-exceptional system, operating under neither of the traditional rubrics of war or crime. “Legal” might be too strong a term for this system—perhaps “para-legal” or “pseudo-legal” would be more apt.

26. *Legal Double-Standards Are Not the Way to Win a War Against Terrorism*, THE

Yet, whatever the merits of the treatment of the post-9/11 prisoners, it was not true that the disputed concept was of recent vintage. Whether in the form of “unlawful combatants” or in the more correct form of “unprivileged combatants,” the concept and its attendant controversies are inevitable byproducts of the legal construction of war.<sup>27</sup> The concept simply refers to those fighters who fail to meet the criteria for the combatants’ privilege, criteria whose constructed, contingent, and contested quality I have outlined in the preceding section. The legally correct term for the concept, “unprivileged combatants,” suggests the consequences of the failure to meet those criteria. Engagement in combat by those not covered by the combatants’ privilege, assuming no war crimes are committed, is not illegal *per se* under *international law*.<sup>28</sup> Rather, since such acts are not *immunized* by international law, the contending parties are free to punish individuals engaged in such activities under their own law.

Far from a recent invention of U.S. government publicists, the concept of unprivileged combatants is inherent in the fact that war is a legal construction that puts only a legally limited set of actors and actions outside the reach of “normal” law. And the fierce and perennial debates over the criteria for the combatants’ privilege are inherent in the fact that the legal construction of war has always been contingent and contested. Those who engage in violence in a manner outside the always provisional and rarely unanimous international consensus about the construction of war have always been considered ineligible for the combatants’ privilege—despite the challenge to that consensus embodied in their actions. Debate about the scope of the category of unprivileged combatants is impossible to avoid—and also impossible, even, as I shall argue, undesirable, to resolve definitively.

Since the end of the Cold War, but especially in the years since 9/11, the perennial debate about the coverage of the combatants’ privilege, and hence about the delimitation of the category of unprivileged combatants, has once again achieved the intensity of earlier moments of contestation. As I have suggested, the explanation

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INDEPENDENT (London), Jan. 14, 2002, at 3.

27. See, e.g., Article 82 of the Lieber Code, *supra* note 14, often viewed as the first essential document in the modern codification of *jus in bello*: “Men, or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army . . . are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”

28. This is the dominant view, as articulated in Baxter, *supra* note 7. The U.S. Supreme Court, in *Ex Parte Quirin*, 317 U.S. 1 (1942), appeared to adopt the contrary view, a position rejected by Baxter and most international lawyers.

for this latest reactivation of the debate lies in a distinctive kind of destabilization, caused by a multitude of international actors, of the separation between war and not-war, between warriors and not-warriors. I will proceed, therefore, to consider the contested structure of the doctrine in some detail on two key issues: the conditions for the applicability of *jus in bello* (or, “what is war?”), and the criteria for the combatants’ privilege under such conditions (or, “who is a warrior?”).

## II. THE CONTINGENCY OF COMBATANCY

### A. *What is war?*

#### 1. Formalism, Factualism, and the Irreducibility of Normative Criteria

The criteria for the kind of violence to which *jus in bello* applies have changed dramatically over the past two centuries. This doctrinal contingency should not be surprising, given the changes in international law generally during the same period. However, a brief review of this history serves to underscore the legally constructed quality of the sphere of war, buffeted by the changing winds of legal theory and practice. During this period, the criteria for the existence of war have taken formalist, factualist, and functionalist form, have been submitted to subjective and objective determinations, and have been inflected by ideas of European supremacy, sovereign authority, and anti-colonial rebellion. These vicissitudes highlight the gravity of the doctrinal history, for, in each contingent codification of a provisional consensus about the criteria for war, states determine whether particular killings are to be facilitated or prohibited by international law.

In the century prior to World War I, the “state of war doctrine” vested complete discretion in the hands of states to recognize the existence of a “war in the legal sense.”<sup>29</sup> In particular, “declarations of war” served the function of clarifying the legal situation by providing a bright-line criterion for the line between war and not-war and unambiguously identifying the authorities—i.e.,

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29. BROWNLIE, *supra* note 18, at 26–28.

sovereigns—for determining on which side of the line a particular situation fell.<sup>30</sup> This bright-line criterion, like many such tests, proved to be strikingly under- and over-inclusive. On the one hand, it often flew in the face of reality by failing to include many high-intensity conflicts for want of sovereign acknowledgement.<sup>31</sup> On the other hand, it could similarly deny reality by continuing the legal existence of wars after the end of violence.<sup>32</sup>

In the Twentieth Century, by contrast, the law of war sought objective tests, independent of sovereign caprice, for determining the applicability of its various branches. In the *jus in bello* context, it sought a test based on “the factual character of the conflict,”<sup>33</sup> and not on the parties’ formal recognition of its legal existence. The move from the term “war,” with its Nineteenth Century baggage, to the term “armed conflict”—indeed, the nearly complete loss by the word “war” of its international legal significance—is a product of this change. Yet, despite this dramatic change in the legal criteria for the applicability of *jus in bello*, the Nineteenth and Twentieth Century doctrines agreed that it was imperative to separate the normative evaluation of the opposing *jus ad bellum* claims from the criteria for the applicability of *jus in bello*—and thus, that entitlement to the combatants’ privilege (a *jus in bello* issue) was to be determined in isolation from a consideration of the cause for which individuals were fighting (a *jus ad bellum* issue).

Nevertheless, despite their factualist aspirations, the Twentieth Century tests for a legally cognizable “armed conflict” necessarily

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30. Cf. Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. No. 538:

Considering that it is important, in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning;  
That it is equally important that the existence of a state of war should be notified without delay to neutral Powers. . . .

Article 1. The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war, or of an ultimatum with conditional declaration of war.

In the absence of a formal declaration, some versions of this sovereignty-focused stance required identification of sovereign intention to create a state of war. For a late statement of this position, see Lord Arnold McNair, *The Legal Meaning of War*, 11 TRANSACTIONS OF THE GROTIUS SOC. 45 (1925).

31. BROWNLIE, *supra* note 18, at 26–28.

32. See discussion of *Ludecke v. Watkins*, 335 U.S. 160 (1948), *infra* pp. 60–62.

33. Richard Falk, *The International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 195, 207 (James N. Rosenau ed., 1964).

depend on normative decisions, whether explicit or implicit, reflective or taken-for-granted. Due to the life-and-death stakes involved in the combatants' privilege, determination of the criteria for selecting certain kinds of violence for the legal rubric of armed conflict constitute normative decisions of the gravest kind. These fundamental normative decisions have always been informed, in the codified rules, by strong statist and governmentalist biases. Identification of these biases does not necessarily condemn the doctrine, for normative biases may be defended with normative arguments. It does, however, render the contours of the doctrinal distinction between war and not-war vulnerable to contestation, and it is this contestation that has served as the engine of doctrinal change. Moreover, as we shall see, these definitional biases produce a powerful image of war that obscures those features of many armed conflicts that are inconsistent with that image and thereby hinders clear debate about the role of law in relation to such conflicts.

A key Twentieth Century test for the applicability of *jus in bello* is contained in Common Article 2 of the 1949 Geneva Conventions. It provides an important measure for judging the extent to which the doctrine provides a purely "factual" standard for its applicability. Under Common Article 2, the Conventions in their entirety apply during

all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

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

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

The Article 2 test, providing that the Conventions principally apply to conflicts between "High Contracting Parties" and occupations of territories of those parties, effectively limits the central modern codification of *jus in bello* to inter-state conflict.

To be sure, the Conventions generally avoid the word "state,"

and the third paragraph of Article 2 refers to non-party “Powers.” Such terminological choices leave some room for argument as to whether the Conventions’ full provisions might be applicable to some conflicts other than those between states.<sup>34</sup> While this issue will be discussed in more detail below, two preliminary comments are in order. The avoidance of certain technical terms, especially “war” and “state,” in the Conventions are aspects of the general shift from a formalist to a factualist approach. This shift may be traced partly to the general trend away from formalism in legal discourse in the mid-Twentieth Century. More concretely, this shift in the laws of war was a response to the events of World War II.<sup>35</sup> The Geneva Conventions sought to preclude such phenomena as the Nazi circumvention of *jus in bello* through the creation of puppet governments who terminated hostilities with Germany—placing the actions of those who continued the fight under the rubric of non-war violence, punishable by normal criminal law. The Conventions, therefore, tried to define the international armed conflicts to which they applied in a manner which was as factual, that is, as little dependent on sovereign discretion, as possible.

In the case of Common Article 2, this concern was reflected in paragraph 1’s exclusion of a requirement for mutual recognition of a “state of war” and in paragraph 2’s application of the Conventions to occupations even where the government capitulates without a fight. Nonetheless, this attempt to define international armed conflicts independently of sovereign recognition preserved the requirement that such conflicts be inter-state in nature.<sup>36</sup> This requirement played a key role in the Convention’s effort to prevent the collapse of the line between international and non-international conflicts.<sup>37</sup> Still, the move from a formalist to a factualist evaluation of the international character of conflicts, a move prompted by contestation during World War II, served as the terrain upon which further contestation could take place.

An older, though enduring, instance of the contestation of the line between international and non-international conflicts concerns conflicts between states and non-state groups that have taken a form resembling inter-state conflicts. Such conflicts occur when the non-state group meets the criteria for “belligerency”—i.e., when it looks like a proto-state by, for example, controlling territory, setting up a

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34. See ROSAS, *supra* note 10, at 245–52.

35. See PICTET COMMENTARY, *supra* note 11, at 19–23.

36. See Meyrowitz, *supra* note 22, at 885.

37. See, e.g., PICTET COMMENTARY, *supra* note 11, at 57.

government, and establishing an organized military structure. According to some commentators,<sup>38</sup> customary international law subjects such conflicts to the rules governing inter-state armed conflict, at least in relation to issues like the combatants' privilege.<sup>39</sup> In such belligerencies, no less than in inter-state wars, the test for the existence of an armed conflict for the purposes of *jus in bello* is supposed to be based on a factual evaluation of the conflict and remain indifferent to the merits of the parties' claims.

Nevertheless, such an expansion of the category of international armed conflicts—or, in some versions, the category of non-international armed conflicts subject to the rules of international armed conflicts—would not substantially alter the normative biases of *jus in bello*. In the first place, such an expansion would be based on the state-like quality of the participating entities, especially their establishment of an effective government, rather than, for example, the intensity of the fighting. In other words, the statist bias would be mitigated only by the governmental bias.<sup>40</sup>

Moreover, the current entitlement of even these conflicts to the status of international armed conflicts seems uncertain. The Diplomatic Conference of 1949 debated the full applicability of the forthcoming Geneva Conventions to civil wars, even those that would have met the tests for belligerency, and rejected the idea amid fierce controversy.<sup>41</sup> Among the reasons for this rejection was precisely the unwillingness of states to grant the combatants' privilege to those who take up arms against an incumbent state or government. One may, of course, argue that customary law developments since 1949 have subjected such conflicts to all the rules of inter-state conflicts. Yet, international practice seems insufficient to substantiate claims

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38. See, e.g., Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499, 506 (1994); HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 150 (1952).

39. Possible textual support for this position may be drawn from GPW Article 4(A)(3), which grants POW status to armed forces of a "a government or an authority not recognized by the Detaining Power." However, Article 4(A) is only applicable to conflicts that come within Article 2, i.e., international armed conflicts. ROSAS, *supra* note 10, at 251–52. Even civil wars in which a state recognized rebel forces as "belligerents" were denominated "non-international conflicts" during the drafting of the Conventions. *Id.* at 248. Rosas, however, contends that this history still leaves room for arguing that some civil wars in which rebels have achieved state-like status may be subject to Article 2. *Id.* at 248–49.

40. See JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 305 (1954).

41. For an example of the debate, see the clash between the Soviet and Burmese delegates in 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 325–30 [hereinafter FINAL RECORD]. For a summary of the final decision to relegate all civil wars to the provision that would become Common Article 3, see the Swiss delegate's remarks, in *id.* at 334–35.

that the application of the rules to such conflicts is mandatory, rather than voluntary.<sup>42</sup> Moreover, this position faces the difficulty that many such conflicts seem expressly included in the 1977 Protocol II to the Geneva Conventions. Protocol II concerns *non-international* armed conflicts and does not mandate the granting of the combatants' privilege or prisoner of war status to participants in such conflicts.<sup>43</sup>

While Common Article 2 and customary law limit the full range of *jus in bello* protections to inter-state (or, at most, proto-inter-state) conflict, Common Article 3 provides for certain minimal guarantees of human dignity during "non-international armed conflicts." Like Protocol II, however, Article 3 does not provide the combatants' privilege or POW status for prisoners captured during the conflicts it regulates. States remain free, for example, to prosecute rebels in a "non-international armed conflict" for murder and treason on the basis of mere participation in combat. Common Article 3 and Protocol II are thus consistent with the statist and governmentalist biases that inform the legal construction of war.<sup>44</sup>

The statist and governmentalist biases in the criteria for the applicability of *jus in bello* belie the criteria's factualist aspiration. There is nothing in the *fact* of state control that makes an armed conflict uniquely international or its participants uniquely deserving of the combatants' privilege. Moreover, at least until the second half of the Twentieth Century, this normative bias has operated in the service of a very specific political cause, that of European colonialism. Granting prisoner of war status was not the rule in colonial wars against non-European states, let alone against non-European non-state groups.<sup>45</sup> In the 1920s, during a massive armed conflict between France and anti-colonial rebels, Georges Scelle, one of the leading French international lawyers of the Twentieth Century,

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42. See, e.g., ROSAS, *supra* note 10, at 277–81.

43. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, para. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 . . . shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

44. Indeed, Protocol II appears to go beyond its predecessor in its solicitude for sovereignty. Article 1(2) of Protocol II emphasizes its desire to limit infringements on sovereignty by declaring that its provisions would not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

45. See, e.g., ROSAS, *supra* note 10, at 84.

declared that “legally one cannot even say that there is a war.”<sup>46</sup> If there were no “war” in the legal sense, then it would be difficult to maintain that rules about prisoners of war applied to those captured in battle. The colonialist implications of the criteria for the distinction between war and not-war were more brutally stated by an American writer of the 1920s: “[t]he lack of civilization . . . is the true test as to whether they should be treated as prisoners of war.”<sup>47</sup>

The controversy over the 1977 Protocol I to the Geneva Conventions<sup>48</sup> highlights the normative dimension in the definition of “armed conflict.” Article 1(4) of Protocol I added a new set of conflicts to the category of “international armed conflicts” for the purposes of *jus in bello*: “armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” This provision is among those in the Protocols which remind us that the Diplomatic Conference that drafted them took place in the 1970s, an era of assertiveness by post-colonial states in a variety of international fora.

Those who objected to Article 1(4) argued, *inter alia*, that it contravened the fundamental division between *jus ad bellum* and *jus in bello*.<sup>49</sup> Making the protections of the latter depend on the cause for which a combatant was fighting, a uniquely *jus ad bellum* issue, would be “very dangerous, and against the spirit of humanitarian law.”<sup>50</sup> Yet, this objection, against its intention, demonstrated that the prevailing rules had not divested themselves of a European and state-centered normative bias whose defense could not simply rest on the factual character of the conflict. A defense of the traditional rules today would not, presumably, rely on an *a priori* claim that state violence is inherently more legitimate than violence committed by a non-state entity—and still less on the intrinsic superiority of European state violence to violence practiced by, and against, non-Europeans.

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46. *Rapport de M. Georges Scelle*, 25 LES CAHIERS DES DROITS DE L’HOMME 496 (1925).

47. FOOKS, *supra* note 14, at 27.

48. Protocol Additional (No. I) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

49. See Salmon, *supra* note 12, at 75–76. See also Abraham Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 913 (1986) (“Never before has the applicability of the laws of war been made to turn on the purported aims of a conflict”).

50. PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 11 (Howard S. Levie ed., 1979) (quoting the remarks of the Swiss delegate, Pictet, at a 1974 meeting of the Diplomatic Conference drafting the Protocols).

Rather, it would probably be based on some pragmatic argument about the continuing functional importance of states to the maintenance of a peaceful world—a plausible notion, perhaps, though hardly immune to normative or empirical contestation.

This brief review of the “armed conflict” threshold for *jus in bello* suffices to show the historical contingency of some key aspects of the legal construction of war: its movement from subjective determinations by sovereigns of the existence of war to purportedly objective evaluations of the facts of armed conflicts; from limitations to certain kinds of states to universalization to all states; from exclusion of colonial peoples, whether or not organized into states, to a still-contested expansion to certain oppressed peoples not organized into states; from wholesale exclusion of internal armed conflicts to partial, and also still-contested, inclusion of some of them.

One might be tempted to tell this story as one of progress, of ever-greater inclusion under law’s sheltering wing. Yet, whether the expansion of the jurisdiction of *jus in bello* is a development to be celebrated depends not on whether “law” has been expanded, but on the relative value of different bodies of law: the *lex specialis* of *jus in bello*, with its immunities for certain kinds of violence and relatively impersonal criteria for detention, *versus* the *lex generalis* of criminal law and human rights law, with their prohibitions on some of those same kinds of violence and individualized criteria for imprisonment.

Moreover, the inter-state conflict model persists as the baseline for the applicability of *jus in bello*. The (contested) inclusion of some non-inter-state armed conflicts has proceeded on the basis of their resemblance to such conflicts. This is most obvious in the case of those commentators who would include civil wars in which an insurgent entity has achieved the status of a “belligerent,” the criteria for which resemble the criteria for statehood. Yet, this is also true for the three kinds of conflict included in Protocol I’s Article 1(4). The list in Article 1(4), comprising struggles against alien occupation, colonial domination, and racist regimes, may at first seem somewhat heterogeneous. The key to the list is the notion that such struggles share the goal of “the exercise of [the] right to self-determination”—a right traditionally understood in terms of the aspiration for control over territory by a people, especially when aimed at the establishment of statehood. The territorial and state focus of the struggles mentioned in Article 1(4) made it plausible to assimilate them to the inter-state model, even if that assimilation did not gain universal acceptance.

However, the assimilation of such struggles to the inter-state model on the basis of their *goals* obscures the manner in which the

actual *conduct* of such struggles has persistently posed difficult challenges to the legal framework based on that model. To put it another way, while the “*ad bellum*” dimension of struggles such as those in the colonial and occupation contexts may be assimilated to the inter-state model, many of their “*in bello*” dimensions make them incommensurate with that model. The statist and governmentalist biases in the criteria for the applicability of *jus in bello* are thus not only contestable on normative grounds, but also serve to prevent recognition of the distinctive features of many armed conflicts. Reliance on those biases, even by advocates of the inclusion of anti-colonial and anti-occupation struggles under the rubric of international armed conflict, has made it difficult to engage in a frank legal debate about the distinctive problems of participants in such struggles. Indeed, from the perspective of the actual conduct of armed conflicts, rather than their goals, the current wave of terrorism and counter-terrorism does not present wholly novel challenges to the laws of war. Rather, it only presents in purer form the “*in bello*” challenges posed by anti-colonial and anti-occupation struggles—purer because divested of any “*ad bellum*” resemblance to inter-state conflicts. In the next section, I turn to these challenges, as well as to the challenges posed by other recent phenomena that challenge the doctrinal structure, such as international humanitarian operations and the protracted conflict with Iraq.

## 2. *In Bello* Anomalies

The “*in bello*” dimensions of conflicts in the colonial and occupation contexts that most distinguish them from the traditional image of inter-state conflicts—and that make them resemble the terrorism/counter-terrorism context—concern their discontinuous qualities. These discontinuous qualities have both spatial and temporal dimensions.<sup>51</sup> The spatial dimension concerns shifting control over territory; the temporal dimension concerns the episodic quality of the violence. These discontinuities make problematic the application of the key doctrinal distinctions that select certain forms of violence as the kind of combat entitled to international law privileges.

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51. I derive this analytical framework from Michel Veuthey. See MICHEL VEUTHEY, GUÉRILLA ET DROIT HUMANITAIRE 355–56 (1983).

a. *Occupation and Colonialism*

Wartime occupation presents a particularly obvious example of such discontinuities. The crucial doctrinal distinction in such situations is not exactly between war and not-war, but the closely related distinction between battle and occupation, or, in other words, between the destructive military functions of defeating the enemy and conquering territory, on the one hand, and the preserving police functions of ensuring order in that same territory during those times when it is occupied, on the other.<sup>52</sup> The radical difference between the tasks of destruction and preservation forms a series with other related distinctions discussed in this Article, such as the right to kill under *jus in bello* versus the right to life of human rights law, or the status of prisoner of war versus that of criminal defendant. And, as with those other distinctions, the trigger from switching from one pole to the other depends on identifying a crucial, yet elusive, defining moment.

Under the 1907 Hague Regulations, an army is supposed to switch from destruction to preservation when control over a territory “in fact passe[s] into the hands of the occupant.”<sup>53</sup> As one Nuremberg-era tribunal noted, however, since actual control over territory during war is usually “precarious and temporary,”<sup>54</sup> armies are very often faced with frequent back-and-forth shifts between battle and occupation and, thus, between the incompatible duties of destruction and preservation. In the evocative language of the tribunal, an army in such a shifting situation could be viewed as moving back and forth between a “war performance” and a “police performance.”<sup>55</sup> Similarly, those resisting occupation would be shifting back and forth between a “war performance” and activities that the tribunal did not label, but which one might call a “non-war performance of violence.” While the current doctrinal implications of this tribunal’s discussions are far from obvious,<sup>56</sup> its focus on the

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52. This latter task is codified in the Hague Regulations: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Hague IV, *supra* note 14, art. 43.

53. *Id.*

54. United States v. Ohlendorf, (*the “Einsatzgruppen” Case*), IV Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, 411, 492 (1948).

55. *Id.*

56. The *Ohlendorf* tribunal appeared to consider the difference between war and non-war “performances” as important for the combatant status of the participants. *See id.* This

challenges posed by shifting territorial control and by the movement of a conflict through different phases is crucial for understanding the conceptual and operational difficulties. Moreover, its use of the word “performance” implicitly evokes the notion that the choice of war or not-war rubrics might be a matter of strategic decision, a notion key to my general argument in this Article.

Yet, even this tribunal’s analysis understates the problem, for it seems to rely on an at least momentarily clear line between occupied territory and territory-as-battleground. Moreover, the shifting dynamic described by the tribunal concerns only periods in which the status of the territory is in short-term flux. Michel Veuthey, by contrast, has highlighted the ways that many struggles against occupation and colonialism even more thoroughly defy the distinction between occupied territory and battlefield. In describing the inadequacy of the distinction in these contexts, Veuthey clearly analyzes both the spatial and temporal challenges. The *spatial* challenges concern the territorial ambiguities and confusions faced by occupying soldiers and resisters in almost all occupations, with the “front” appearing and disappearing at makeshift checkpoints, or temporarily dividing neighborhoods, city streets, blocks or even buildings. In Veuthey’s words, such struggles are marked by “the ubiquity of confrontation” in occupied or colonized territory. They may even be said to be wars “without a front,” wars marked by the “interpenetration and reciprocal encirclement” of the forces of occupiers and resisters.<sup>57</sup> This “territorial uncertainty relativizes, if

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notion presumably stemmed from the traditional notion that inhabitants of occupied territory were under a duty not to resist occupation. See GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 48–50 (1957). A year after the tribunal’s decision, however, the Geneva Conventions provided in Common Article 2 that their provisions were to be applicable under conditions of occupation. Article 4 of the GPW was, indeed, specifically drafted with the forces resisting German occupation in mind. See PICTET COMMENTARY, *supra* note 11, at 61. Nonetheless, the importance of the distinction resurfaced in 1977, in Protocol I. As I will discuss *infra*, Article 44 of Protocol I relaxes the criteria for combatant status under certain exceptional circumstances, described vaguely as those in which the “nature of the hostilities” so requires. The *travaux préparatoires* indicate that such circumstances were intended primarily to refer to occupation and colonial situations. While the ICRC Commentary asserts that the test for the applicability of the exception does not involve a formal occupation/non-occupation distinction, a determination of the kind of hostilities that make it impossible to comply with all the requirements necessarily involves policy issues related to those implicit in the old formal distinction between occupation and battle. See International Committee of the Red Cross Commentary on the Protocol Additional to the Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, paras. 1699–1700, available at [http://www.icrc.org/ihl.nsf/b466ed681ddfcd241256739003e6368/d04\(A\)6a9cbbf8b28cc12563cd00433946?OpenDocument](http://www.icrc.org/ihl.nsf/b466ed681ddfcd241256739003e6368/d04(A)6a9cbbf8b28cc12563cd00433946?OpenDocument) [hereinafter ICRC Commentary].

57. VEUTHEY, *supra* note 51, at 21.

not effaces, the fundamental notions of the classical law,”<sup>58</sup> such as the distinction between occupation and battle. The *temporal* challenges concern the length of the occupations against which such struggles are directed and the diverse phases through which such struggles may pass. The length of such occupations and the struggles against them, which may last decades or even centuries, defy the principles underlying the relevant international rules, which presuppose a relatively short occupation.<sup>59</sup> Moreover, regardless of length, such struggles often go through a variety of phases, involving greater or lesser resemblance to military conflict, ranging from organized to disorganized actions, from violent to non-violent confrontations, from war-like periods marked by high-intensity violence to less turbulent periods marked by erratic violence, civil disobedience, or even relative quiescence.

Veuthey proposes that a legal framework that would be adequate for these features of many anti-colonial and anti-occupation struggles would not consist in a binary opposition between war and not-war, privileged and unprivileged combatants. Rather, it would consist of “a series of flexible provisions, an absence of rigidity in [the conditions of] their application, [and] a range of protective rules.”<sup>60</sup> Such a continuum of conflict categories, and a corresponding continuum of legal protections, rather than an on-off war/not-war dichotomy, would defy the “classic codification, made for conflicts easily definable spatially as well as temporally.”<sup>61</sup>

Though Veuthey and some other commentators<sup>62</sup> seem to see such conflicts as evolving fairly linearly from lower intensity to higher intensity phases, from non-military to military confrontations, I would argue that they have very often waxed and waned in intensity and that the shifts between phases have been irregular and unpredictable. Discursive and/or practical shifts between “war performances” and “non-war performances of violence (or even non-violence)” may be forced on the parties, or it may be part of a strategy with the choice of “performance” at any given time involving considerations of both raw power and propaganda.

It is this discontinuous, non-linear, and performative character of these kinds of struggles that presents the most difficult challenges

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58. *Id.*

59. Cf. Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT’L L. 44 (1990).

60. VEUTHEY, *supra* note 51, at 356.

61. *Id.*

62. See, e.g., Meyrowitz, *supra* note 22, at 892–93.

to the legal construction of war. In the occupation context, the recent U.S. experience in Iraq abounds with examples of an occupation army engaged in a series of decisions about whether to shift between the incompatible tasks of destructive military operations and preservationist/reconstructionist activities. And, to take a paradigmatic colonial example, the Algerian response over the course of 130 years of French rule involved a wide variety of episodes of military resistance, popular violence, campaigns for law reform, civil disobedience, and so on.<sup>63</sup> In such contexts, decisions of the participants to present and/or conduct their struggles as war or not-war involve strategic questions in which the distinction itself can become an instrument to achieve partisan advantage.

In the early 1960s, for example, Krishna Menon, the Indian Defense Minister, declared that even a centuries-long colonial occupation should be viewed as an ongoing “permanent aggression.”<sup>64</sup> It is undeniable that the notion of “permanent aggression” captures much of the political and experiential dimensions of at least some colonial situations at least some of the time. Yet, Menon’s formulation also presents a clear case of a strategic instrumentalization of the war/not-war distinction to legitimate anti-colonial military action—specifically, the invasion of Goa by India after 450 years of Portuguese rule.

Nonetheless, like all strategies, instrumentalization of the war/not-war distinction often has unintended consequences. Menon’s formulation, intended to provide *jus ad bellum* legitimacy for recourse to force at any time by the colonized, could also bring a wide range of actions by both colonizers and colonized under *jus in bello* for the duration of colonization. The strategic merits of framing colonization in this way are far from self-evident, due to the indifference of *jus in bello* to the relative *jus ad bellum* merits of the parties. One could easily imagine anti-colonial activists claiming that the colonizers should not be able to invoke *jus in bello* to justify repressive actions that should be handled under “normal” law restricting “police” actions.

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63. On the Algerian conflict, see generally ALISTAIR HORNE, *A SAVAGE WAR OF PEACE* (1978).

64. See Lloyd Garrison, *Goa Move Upheld by Krishna Menon*, N.Y. TIMES, Dec. 21, 1961, at 4(A).

b. *Local Conflicts over Internationalized Values and Internationalist Humanitarian Operations*

Two sets of recent developments have also put pressure on the legal construction of war in ways that either destabilize the line between war and not-war, as well as among different kinds of armed conflict, or that tend to facilitate the strategic instrumentalization of the distinctions. The first set of developments concerns the effect of the ever-widening internationalization of political norms on the definition of “armed conflict.” If an emerging international consensus in favor of anti-colonial self-determination was sufficient for Protocol I to transform armed struggles on its behalf into “international armed conflicts,” why should not armed struggles in favor of an “emerging right to democratic governance”<sup>65</sup> also benefit from that rubric? Similar arguments could be made on behalf of other key international values, from human rights to environmental protection to economic justice, potentially inaugurating a quite far-reaching transformation of many violent struggles into international armed conflicts. Moreover, the fundamental principle of the equality of belligerents in the eyes of *jus in bello* means that the combatants’ privilege would be granted not only to arguably worthy forces such as armed pro-democracy militants, but also to those on the other side as well, such as armed anti-democracy forces. These potential extensions of the category of international armed conflicts are precisely the sorts of slippery slopes that advocates of a strict separation of *jus ad bellum* and *jus in bello* have long feared, but that their arguments have always been normatively and logically insufficient to prevent.

Furthermore, like anti-colonial and anti-occupation struggles, struggles over the wide range of recently internationalized values often do something other than merely destabilize the doctrinal line between war and not-war. Rather, these newer conflicts facilitate the instrumentalization of the doctrinal lines in a manner quite similar to conflicts over colonialism and occupation. For example, democracy struggles do not usually involve clearly defined battlefields, and thus, like anti-colonial and anti-occupation struggles, often inaugurate a constantly shifting “territorial uncertainty” on the spatial level. Moreover, democracy struggles often entail a wide range of phases, from protracted violence to nonviolent protest, and thus, like anti-colonial and anti-occupation struggles, frequently wax and wane in discontinuous fashion on the temporal level. These spatial and

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65. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 90–91 (1992).

temporal discontinuities tend to make subsumption of particular situations under the war or not-war rubrics subject to strategic decisions by partisans on all sides.

The second set of developments concerns the proliferation of the kinds of actions undertaken in the name of the international community (whether formally authorized or not) that the U.S. military at times has referred to as “operations other than war.” These operations, in the words of a U.S. Army manual, include “disaster relief, nation [sic] assistance, security and advisory assistance, counterdrug operations, arms control, treaty verification, support to domestic civil authorities, and peacekeeping.”<sup>66</sup> To this list we can add counter-terrorism operations and the wide variety of actions more or less under UN authority that run the entire gamut of levels of armed force, including the coercive regime placed on Iraq between the Gulf War and the 2003 invasion. And due to the equality of belligerents in *jus in bello*, we must also add to this list the actions against which such operations are directed—such as terrorism, anti-government and anti-UN violence, narco-militia operations, pre-2003 Iraqi attacks on “coalition” forces, and so on. To be sure, not all instances of these operations pose equivalent challenges to the traditional categories. Their proliferation, however, has resulted in many cases involving spatial and temporal challenges to the legal construction of war related to those posed in the occupation and colonial contexts.

The titles of two articles from the late 1990s, written from significantly different vantage points, should give a sense of the legal challenges posed by such operations: Major Timothy Bulman’s *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*,<sup>67</sup> and Brian Tittmore’s *Belligerents In Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*.<sup>68</sup> The first article expresses a U.S. military lawyer’s unease at the lack of clear legal guidance for American soldiers due to the expansion of military operations into untraditional roles, leaving those soldiers engaged in “a dangerous guessing game” about where

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66. Mark S. Martins, “War Crimes” during Operations Other than War, 149 MIL. L. REV. 145, 161–62 (1995) (quoting DEP’T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 2-0, Ch. 13 (June 14, 1993)).

67. Major Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152 (1999).

68. Brian Tittmore, *Belligerents In Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT’L L. 61 (1997).

they were situated in relation to the line between war and not-war and the corresponding bodies of law. The second article expresses an internationalist's<sup>69</sup> unease at the increasingly war-like operations in which the United Nations may appear less like the embodiment of universal interest and more like a party to an armed conflict—transforming the “blue helmets,” the symbols of impartial internationalism, into the headgear of partisan “belligerents.” Both articles give examples of anomalies that may arise when the boundary lines between armed conflict and not-armed conflict, or among different kinds of armed conflict, become destabilized.

From the national military side, Bulman tells of uncertainties about the status of captured persons in such operations as the 1992 humanitarian intervention in Somalia, the 1999 intervention in northern Iraq on behalf of the Kurds, and the 1994 intervention in Haiti to restore President Aristide.<sup>70</sup> U.S. forces had to confront the question of whether the humanitarian nature of the operations meant that they did not constitute “armed conflicts” in the sense of international law<sup>71</sup> and, thus, whether detained persons could not, therefore, be prisoners of war.

From the internationalist side, Tittmore provides a 1990s update to a number of long-noted doctrinal perplexities about offensive operations by UN forces. Two are of particular interest for this Article. First, he notes the majority view that, when UN forces are engaged in an international armed conflict, those attacking them would benefit from the combatants' privilege.<sup>72</sup> This notion would stem from a strict fidelity to the distinction between *jus ad bellum* and *jus in bello*, by allowing those who attack UN forces to benefit from *jus in bello*'s indifference to the competing substantive claims of belligerents—indeed, a striking fidelity to the distinction, given that the goals of a Security Council-authorized force derive from the highest international authority. Secondly, in keeping with the gravity of the combatants' privilege and the consequent need to restrict it to war operations, Tittmore urges limitations on the circumstances under which *jus in bello* should be viewed as applicable to UN

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69. Tittmore was at the time a lawyer for Canada (very much a “blue helmet” perspective) and is currently a member of the Inter-American Human Rights Commission.

70. Bulman, *supra* note 67, at 167–71.

71. *See id.* at 168–71.

72. Tittmore, *supra* note 68, at 110–11. The challenges of applying *jus in bello* to the use of UN military force have been much debated, at least since the Korean War; Tittmore's doctrinal suggestions conform to mainstream opinion on the subject. *See, e.g.*, ROSAS, *supra* note 10, at 236–38.

forces.<sup>73</sup> Specifically, he argues for strictly maintaining the difference between “peacekeeping” and “offensive operations”<sup>74</sup>—another in the series of dichotomies related to the war/not-war distinction on which this Article focuses. Tittmore argues that, because *jus in bello* “applies intrinsically to adversaries and effectively confers a belligerent status on their armed forces,”<sup>75</sup> it is inconsistent with peacekeeping, which seeks to maintain a posture of “neutrality and impartiality”<sup>76</sup> above the fray.

One might argue that this second point stands in tension with the first: should not all UN forces, even those engaged in offensive operations, be viewed as “neutral and impartial” insofar as they (ideally) act not to secure partisan advantage, but rather to vindicate “neutral and impartial” international legal principles? Tittmore implicitly responds to this critique by underscoring the requirement that the application of *jus in bello* be based on purely factual grounds, without reference to goals; accordingly, if UN forces are in fact engaged in “offensive operations,” the ensuing hostilities should be governed by *jus in bello*.<sup>77</sup> Nonetheless, the difficulty of rigorously distinguishing between “offensive” and “peacekeeping” operations in actual situations, as with other distinctions related to the war/not-war divide, bedevils his discussion. Tittmore is compelled to propose doctrinal innovations to accommodate the “hybrid nature of UN forces”—a “hybrid nature” that, as this Article demonstrates throughout, is hardly limited to operations by UN forces. Specifically, Tittmore suggests allowing UN forces to doff and don combatant status depending on the kind of operations they decide to conduct.<sup>78</sup> This kind of strategic instrumentalization of the war/not-war distinction, making the pertinent rubric depend on the choice of performance by participants, is the kind of legal destabilization this Article seeks to identify.

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73. Tittmore, *supra* note 68, at 106–07.

74. *Id.*

75. *Id.* at 106 (emphasis added).

76. *Id.*

77. *See id.* at 108–09.

78. *Id.* at 107. As Tittmore notes, this kind of deliberate shifting in and out of combatant status is analogous to the issue of “part-time combatants,” a long-standing doctrinal conundrum to which I will return. *See infra* pp. 56–58.

c. “War on Terror” and Iraq

Like humanitarian operations, the recent wave of terrorism and counter-terrorism highlights the difficulty of the war/not-war distinction; it also brings into focus the difficulty of applying the distinctions among different categories of armed conflict. The UN Security Council considered the 9/11 attacks as engaging *jus ad bellum* rights. In its resolution of September 12, 2001, the Council “[r]ecogniz[ed] the inherent right of individual and collective self-defense,” a right that, under the Charter, is only applicable in response to an “armed attack.”<sup>79</sup> It also referred to terrorism as a “threat to international peace and security,”<sup>80</sup> which would permit the Council to take military action against it.

Nonetheless, despite the innovations of the Security Council’s apparent interpretation of the attacks’ *jus ad bellum* implications, they posed difficult challenges to the *jus in bello* rubrics. The attacks did not meet the test for “international armed conflict” because they were not inter-state attacks. Nor would Al-Qaeda meet the traditional test for “belligerency status,” since it had not established a government over a relatively stable territory. Yet, neither did the attacks seem to fit within the rubric of “non-international armed conflicts.” It would be quite a stretch to say that they fell within the Geneva Conventions’ Article 3 category of conflicts “not of an international character occurring within the territory of one of the High Contracting Parties,” let alone the stricter definition in Protocol II. The attacks seemed too trans-border in nature to be non-international, but also too non-inter-state in nature (and not even proto-inter-state) to be international in the traditional sense.

Of course, the subsequent war between the United States and the Taliban merited the label “international armed conflict” by all reasonable definitions, at least as long as the Taliban remained the *de facto* government of Afghanistan. Yet, the worldwide conflict between Al-Qaeda and the United States, ongoing for at least a decade, is far more elusive. It would seem to fit the far-reaching definition of armed conflict given by the International Criminal Tribunal for Yugoslavia—“resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups . . . .”<sup>81</sup> Or, rather, it

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79. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/Res/4370 (2001).

80. *Id.*

81. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the

would meet that definition provided that the word “protracted” includes a conflict that is both spatially dispersed and temporally discontinuous, waxing and waning by fits and starts for over ten years—and provided that such a discontinuous conflict is not disqualified as an armed conflict by describing it as “sporadic.”<sup>82</sup> This quality of a discontinuous, yet protracted, conflict, ill-suited to the traditional categories, makes it akin to anti-occupation and anti-colonial struggles.

One could attempt to refuse this problem by categorizing Al-Qaeda’ attacks as purely criminal and the response as law-enforcement activities that should be closely disciplined by domestic civil liberties law and international human rights law. This categorization would, however, defy the way all parties to the struggle conduct and define it. It would also take one of the key armed conflicts of our time, conducted by military means, out of the jurisdiction of the laws of war. No matter which body of law one chooses, to place this conflict within its sole jurisdiction seems to expand its conceptual framework beyond reasonable bounds.

It is the discontinuous quality of the war on terror that makes it akin to the confrontation with Iraq that has persisted for over fourteen years – and that has continually shifted back and forth between exceptional, war-like activities and normalized, ongoing regulation. Indeed, the U.S. and the U.K. position on the Gulf War use of force resolution, Security Council Resolution 678, is a striking example of the instrumentalization of the war/not-war distinction. The Americans and British claimed that this resolution, though adopted in the context of the Iraqi occupation of Kuwait, possessed a latent validity of indefinite duration. According to this view, this latent validity could be activated at any time by states seeking to compel Iraqi compliance with UN-imposed obligations, activation undertaken wholly at the discretion of the self-appointed enforcing states. This argument was used to justify the use of force against Iraq during the dozen years between the end of the Gulf War and the invasion of 2003.

For the Americans and British, Resolution 678 thus inaugurated an era in which the war/not-war distinction was eclipsed

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Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995). I have deleted the sentence’s final words: “within a state.” It is symptomatic of the novelty of the conflict that even the *Tadic* tribunal’s expansive definition of armed conflict would need to be amended to describe it.

82. I refer to the exclusion by Protocol II, Article 1(2) of “sporadic acts of violence and other acts of a similar nature,” as not being armed conflicts. See Protocol II, *supra* note 43, art. 1, para. 2.

in a manner that relegated particular uses of force to strategic, partisan choice. Indeed, the American and British argument instrumentalized the war/not-war distinction in a manner strikingly similar to Krishna Menon's notion of colonialism as "permanent aggression." Like the Americans and British in relation to Iraq, Menon sought to construct a temporal period not subject to stable characterization as war or not-war and during which, therefore, decisions about particular uses of force were left to decision by participants in the conflict.

In the six months prior to the 2003 U.S. invasion of Iraq, the destabilization of the war/not-war distinction reached dizzying proportions. This period witnessed a particularly rapid set of diplomatic and military oscillations between the two rubrics deployed by strategists on all sides. Such irregular and unpredictable shifting by all participants between the two discursive and practical rubrics is yet another feature of recent history that has put immense pressure on the legal construction of war. Thus, the discontinuous fourteen-year conflict with Iraq, like terrorism and counter-terrorism, anticolonial and antioccupation struggles, and "military operations other than war," forcefully destabilize the separation of the spheres of war and not-war, facilitating its strategic instrumentalization.

### 3. From Factualism to Functionalism and Beyond

The destabilization of the line between war and not-war is not exclusively a recent phenomenon. The mid-Twentieth Century move from formal to factual criteria for the distinction between war and not-war, in both *jus ad bellum* and *jus in bello*, has long been viewed as opening up a field of contestation about the kinds of situations that merit the rules concerning the "use of force" (*jus ad bellum*) and "armed conflict" (*jus in bello*).<sup>83</sup> Moreover, the extent to which such contestation can destabilize the line between war and not-war has been reinforced by the distinctive form in which *jus ad bellum* has been revived over the past century, which seeks to make the "use of force" legitimate only as a law enforcement measure. In such a regime, the line between the "police actions" of ongoing regulation and the exceptional measures of war seems difficult to draw.<sup>84</sup> Indeed, for those commentators who view the intent of the UN Charter as the replacement of the "war system" by a system of "global police actions," that line is destined for effacement.<sup>85</sup> The

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83. See FRITS KALSHOVEN, *THE LAW OF WARFARE* 11 (1973).

84. Cf. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* 425–26 (2001).

85. See Franck & Patel, *supra* note 9, at 64.

implications of this thoroughgoing transformation of *jus ad bellum* for the kinds of *jus in bello* issues raised by Bulman and Tittmore are difficult to assess: would we need to distinguish two kinds of police actions—ongoing, normalized police actions and exceptional, war-like police actions—in order to determine the applicability of *jus in bello*?

The contingency and artificiality of the legal construction of war has been stressed by some commentators at least since the 1940s, though rarely in connection with its implications for the combatants' privilege. For example, in 1943, Georg Schwarzenberger attacked "the doctrine of the alternative character of peace and war,"<sup>86</sup> upon which the "traditional system of international law [wa]s based."<sup>87</sup> Schwarzenberger argued that this distinction was belied by centuries of state practice. States were continually establishing a wide variety of legal relationships that were best understood as partaking of a "*status mixtus*,"<sup>88</sup> between peace and war. In 1954, Philip Jessup returned to this theme in the prescriptive mode, proposing that international law recognize a status "intermediate between peace and war."<sup>89</sup>

At the level of concrete doctrinal reform proposals, however, recognition of the constructed quality of the war/not-war distinction primarily led not toward an "intermediate status," but rather, toward a functionalist disaggregation of the question.<sup>90</sup> This perspective was developed, in slightly different versions, by Fritz Grob in 1949 and Julius Stone in 1954. From the functionalist perspective, the characterization of a given situation as "War or No War" varies according to the "purposes for which an answer is sought."<sup>91</sup> One must not look for "one over-all legal definition of war," but rather, a "variety of legal definitions,"<sup>92</sup> whose respective pertinence would depend upon the specific legal issue under consideration.<sup>93</sup>

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86. Georg Schwarzenberger, *Jus Pacis ac Belli?*, 37 AM. J. INT'L L. 460, 471 (1943).

87. *Id.* at 460.

88. *Id.* at 470.

89. Philip Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 AM. J. INT'L L. 98, 100 (1954).

90. The following discussion of what I call the functionalist approach borrows extensively from MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 97–120 (1961).

91. STONE, *supra* note 40, at 312.

92. FRITZ GROB, *THE RELATIVITY OF WAR AND PEACE* 189 (1949).

93. For examples of this kind of functionalism, see my discussion in the Epilogue *infra* pp. 58–70.

All of the writers I have just mentioned undoubtedly were influenced by the seemingly unending conflicts of their times, in which peace and war were either difficult to distinguish or seemed like phases of a broader confrontation. Schwarzenberger wrote in the midst of World War II, experienced by many as a continuation of World War I, with the interwar period appearing simply as a time of the conflict's relative quiescence—a “twenty year crisis”<sup>94</sup> between battles. Jessup, Grob, and Stone wrote in a period in which the Cold War was viewed as the central international phenomenon. “Cold War” is a phrase designed precisely to describe a situation that defies a stable distinction between war and not-war, even if the phrase's paradoxical edge has been nearly effaced due to its familiarity.

As articulated by writers like Grob and Stone, functionalism, while a major departure from formalism and factualism, wreaks much less doctrinal destabilization than strategic instrumentalization. For Grob and Stone, particular legal doctrines have stable, identifiable underlying policies. Even if a single situation may be characterized variably as war or not-war depending on the legal issue, the answers in relation to each issue will remain relatively stable.

In 1962, however, McDougal and Feliciano radicalized functionalism in a manner that threatened even this measure of stability. McDougal and Feliciano asserted that the war/not-war question had to be subdivided not only by specific legal issues, but by “particular problems, particular policies,” and even “particular decisionmakers.”<sup>95</sup> For these writers, no meaningful answer can be given “unless the decisionmaker . . . is identified, his policy objectives clearly articulated, and the various conditions and procedures of application specified.”<sup>96</sup> The variability of the answer to the question, “war or no war?,” in this approach goes beyond the more restrained functionalism of Grob and Stone. For McDougal and Feliciano, a “policy-oriented approach is not a single factor but a multiple-factor approach; rational policy is not uni-temporal but multi-temporal.”<sup>97</sup>

This radical functionalism is but one short step from the strategic instrumentalization I argue is characteristic of many conflicts. In situations perceived by major players as “Cold War,” “colonialism as permanent aggression,” or “war on terror,” the variability of the answer to the war/not-war question lends itself to

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94. Cf. E.H. CARR, *THE TWENTY YEARS CRISIS* (1939).

95. MCDUGAL & FELICIANO, *supra* note 90, at 103.

96. *Id.* at 104.

97. *Id.* at 119.

partisan, strategic decisions about discursive and practical invocations of one rubric or another. The current destabilization of the legal construction of war as a separate sphere thus follows in a long historical line. The distinctive character of the current destabilization, as at some earlier moments, is that powerful actors, such as the United States and some of its adversaries, have not sought to conflate the distinction between war and not-war—but rather, to deploy the two rubrics’ categories and practices for strategic effect. This kind of deliberately deployed oscillation between the two polar rubrics poses a challenge different in kind to that which might be remedied by notions of an “intermediate status” or analyzed by any but the most unrestrained functionalist policy analysis.

The resulting uncertainties about the applicability of *jus in bello* have potentially grave consequences for the status of combatants in a wide range of conflicts. In the ensuing legal scramble, one should not be surprised to witness an exponential increase in controversies over the combatant status of participants in violence. But this requires a detailed discussion of the criteria for such status, to which I now turn.

*B. Who is a Warrior?*

As the American prisons in Guantánamo and elsewhere began to fill with people who allegedly belonged to the Taliban and Al-Qaeda, fierce, worldwide debate broke out over the criteria for POW status. This debate pitted the U.S. government, with its rejection of such status for all the detainees, against many human rights groups, among others. Some of the human rights advocates favored POW status for all the detainees, others favored it only for members of the Taliban, while still others limited their advocacy to the procedural issues, such as the convening of “competent tribunals” under the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) Article 5,<sup>98</sup> to decide the matter. In general, the pro-POW status positions became identified with the human rights world; the anti-POW status positions became identified with the national security world, or rather, that part of the national security world aligned with the incumbent U.S. administration.

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98. GPW, *supra* note 4, art. 5: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

These identifications, however, should have been far from obvious. A broad definition of POW status is linked to an expansion of the combatants' privilege. At first glance, it seems anomalous that such an expansion would be linked to a human rights orientation. As the epigraph to this Article states, the "starting points" of human rights law and *jus in bello* are quite different—the one provides a right to life, the other provides a right to kill.<sup>99</sup> It should be cause for reflection that an expansive definition of the latter became the pro-human rights position.

The situation on the national security side is even more complicated. It is not obvious that a narrower definition of POW status would be linked to a national security position, if the alternative is the granting of the full apparatus of U.S. criminal procedure to detainees. Of course, the pro-administration national security advocates did not simply object to POW status. As I have already noted, their denial that the detainees deserve POW status was not aimed at treating them as criminal defendants, but rather, as "unlawful"/unprivileged combatants—and at asserting that such prisoners are both detainable without trial, like POWs, *and also* liable for prosecution for mere participation in combat, like criminals. Moreover, pro-administration national security advocates also seemed to rely on a greatly expanded definition of the "active hostilities"<sup>100</sup> whose cessation requires release of POWs and, presumably, in their view, of non-POW "unlawful"/unprivileged combatants who have not been prosecuted. In a war against a group like Al-Qaeda, "active hostilities" are unlikely to end with any formal or informal ceasefire. They can be projected as continuing, in their discontinuous fashion, into the indefinite future, thus indefinitely delaying the release of prisoners, whether viewed as POWs or as "unlawful"/unprivileged combatants. These features of the national security position embody the tendencies I outlined in the previous section towards the destabilization and strategic deployment of the lines between war and not-war.

This series of anomalies in the positions on all sides derives in part from the fact that the *jus in bello* doctrines deployed by human rights and pro-administration national security advocates in this debate originally derive neither from human rights nor national security concerns. Rather, they codify normative positions and political compromises in debates about the legal construction of war and about the selection of the kinds of violence and violent actors

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99. Hampson, *supra* note 1.

100. GPW, *supra* note 4, art. 118.

shielded by the combatants' privilege. Understanding these positions and compromises requires some detailed doctrinal analysis—specifically, of whether different criteria for combatants' privilege apply to different kinds of combatants, such as the armed forces of a state, guerrillas, and so on. This doctrinal analysis must include both textual and policy dimensions of the pertinent treaties.

1. Textual Ambiguity, Conflicting Policies, and the “Four Criteria”

According to Article 4(A) of the GPW, those entitled to prisoner of war status include the following:

- (1) Members of the *armed forces of a Party* to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging to a Party* to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of *regular armed forces* who profess allegiance to a government or an authority not recognized by the Detaining Power.<sup>101</sup>

The threshold issue in interpreting this provision concerns its relation to the statist bias discussed above. Article 4(A) applies only to those conflicts covered by Article 2, conflicts between “High Contracting Parties,” i.e., states. It thus makes sense that its first paragraph provides POW status to “members of the armed forces of a Party” to such a conflict. Yet, Article 4(A) also attempted to respond to the difficulties posed by the events of World War II to the

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101. *Id.* art. 4(A) (emphasis added).

identification of which forces were indeed fighting for states. Specifically, as a result of the collapse or exile of governments in some states and the establishment of collaborationist governments in others, “national groups continued to take an effective part in hostilities although not recognized as belligerents by their enemies”<sup>102</sup>—or, sometimes, even by the nominal governments of their own countries. For a law of war modeled on inter-state conflict, this was an “abnormal and chaotic situation in which relations under international law became inextricably confused.”<sup>103</sup> As a result, the German denial of combatant status to many of those resisting occupation could find an arguable basis in the prevailing rules.

Article 4(A) offered two solutions to these problems, both of which sought to preserve the Convention’s adherence to the inter-state model. First, paragraph 3 provided for POW status for those fighting for “[m]embers of *regular armed forces* who profess allegiance to a government or an authority not recognized by the Detaining Power.” This provision could cover “regular armed forces” fighting for a government that continued to resist an occupation from one part of the country despite the presence of a collaborationist government in the capital. This provision, however, does not eliminate the “statist legitimation”<sup>104</sup> of fighting forces. It concerns “not the statist monopoly [on armed conflict], which remains unquestioned, but the governmental monopoly on the exercise of the statist monopoly”<sup>105</sup>—or, more precisely, the notion that only one government may represent a state.

Article 4(A) also provides POW status to “organized resistance movements” in paragraph 2. The definition of these groups is also informed by the statist bias of the Convention as a whole, though it further relaxes its governmentalist bias. Such forces must “belong to” a “Party” to an “international armed conflict” as defined in Article 2. In other words, it “must be fighting on behalf” of a state.<sup>106</sup> The difference between the phrases “armed forces of a Party” (para. 1) and armed groups “belonging to a Party” (para. 2) lies in the nature of the tie between the state and the armed groups. Paragraph 2

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102. PICTET COMMENTARY, *supra* note 11, at 52.

103. *Id.*

104. Meyrowitz, *supra* note 22, at 900.

105. *Id.* Although Meyrowitz makes this comment in the context of Article 4(A)(2), it seems even more apt in relation to paragraph 3.

106. Similarly, Meyrowitz declares that the expansion of POW status beyond the “armed forces of a state” in Article 4(A)(2) concerns “not the statist monopoly [on armed conflict], which remains unquestioned, but the governmental monopoly on the exercise of the statist monopoly.” *Id.* at 900.

refers to “partisans”<sup>107</sup> or “independent forces”<sup>108</sup> whose relationship to the state may consist merely of “affiliation” or a “*de facto* relationship.”<sup>109</sup> Yet the strength of the statist bias of the Convention is such that a relationship to a state must indeed exist, even if to a state other than the national state of the resisters.<sup>110</sup>

While paragraph 2 loosens the mandatory link to the state for “organized resistance movements,” it also requires that such movements meet four criteria in order to be eligible for POW status: (1) the existence of a command structure; (2) the wearing of a distinctive sign; (3) the open bearing of arms; and (4) compliance by the group with *jus in bello*. These criteria are not mentioned in relation to the provisions in paragraphs 1 and 3 for “armed forces *of*” governments. Indeed, given the great importance of the term “armed forces” in the Article, it is striking that it nowhere provides a definition of such forces. While providing a strict set of defining criteria for groups who “*belong to*” a state in a “*de facto*” sense, it is silent on the definition of forces who are formally under the command of the government of a state.

The debate in the wake of the U.S. attack on Afghanistan in the fall of 2001 over entitlement to POW status of the Taliban centered on the question of whether the four criteria required of “resistance movements” under paragraph 2 were nonetheless also applicable to “the armed forces *of*” governments under paragraphs 1 and 3. The Taliban’s forces were clearly the “armed forces *of*” the government of Afghanistan, even though that government was not widely recognized, and thus came under paragraph 3. The U.S. government maintained that the Taliban failed to comply with the four criteria and, therefore, that none of its members were entitled to POW status. The critics of this position maintained that the criteria were not applicable to the “armed forces *of*” a government under paragraphs 1 and 3, but only to the kinds of groups described in paragraph 2.

The critics’ position was based on the fact that paragraphs 1 and 3 do not mention the four criteria. The critics argued that the silence of these provisions about the four criteria demonstrates the treaty’s intent not to require such compliance by the “armed forces *of*” a government. This position is espoused by most international

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107. PICTET COMMENTARY, *supra* note 11, at 52.

108. See ROSAS, *supra* note 10, at 257.

109. PICTET COMMENTARY, *supra* note 11, at 57.

110. See ROSAS, *supra* note 10, at 258–60.

lawyers and finds some support in the *travaux préparatoires*.<sup>111</sup>

By contrast, those who concurred with the U.S. position could present an alternative parsing of the text. They could point to the need to provide *some* definition for the term “armed forces” in paragraphs 1 and 3. If the text of those paragraphs is silent on the definition of its terms, looking elsewhere in the same Article would seem to be a reasonable procedure. Moreover, they could look to the context in which the Article was drafted and rely on the Red Cross Commentary on the Convention, edited by Jean Pictet:

The expression “members of regular armed forces” [in paragraph (3)] denotes armed forces which differ from those referred to in sub-paragraph (1) of this paragraph in one respect only: the authority to which they profess allegiance is not recognized by the adversary as a Party to the conflict. These “regular armed forces” have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): *they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war*. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d).<sup>112</sup>

For this Commentary, it was simply self-evident that the definition of “armed forces” in paragraphs 1 and 3 included at least three of the criteria explicitly imposed on partisans in paragraph 2<sup>113</sup>—so self-evident that “there was no need” to state so explicitly. From this perspective, one could say that the very lack of explicit definition of “armed forces” in paragraphs 1 and 3 highlights the obviousness of these criteria for the very meaning of the term “armed forces.” Explication of the criteria would only be necessary for those forces, like “partisans,” who cannot be counted on to satisfy them as a matter of course. This taken-for-grantedness of the meaning of “armed

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111. See the exchange between the Soviet and Belgian delegates, in FINAL RECORD, *supra* note 41, at 466–67.

112. PICTET COMMENTARY, *supra* note 11, at 62–63 (emphasis added).

113. The reference in this passage from the Pictet Commentary to “organized hierarchy” corresponds to Art. 4(A)(2)(a); the reference to “wear uniform” corresponds to Art. 4(A)(2)(b); and the reference to “know and respect the laws and customs of war” corresponds to Art. 4(A)(2)(d). Given the wearing of a uniform by “armed forces,” the absence in this passage of an analogue to the “carrying arms openly” of Art. 4(A)(2)(c) seems unimportant.

forces” in relation to forces commanded by a state government, and the need for its explication in relation to others, can be viewed as a key expression of the underlying statist and governmentalist bias in the drafters’ conception of war. The drafters just assumed that everyone knew what the term “armed forces” meant in the context of government-controlled forces. And they were only willing to relax their governmentism under the strict conditions in paragraph 2 that required partisans to resemble regular armed forces in every way except for the formality of their tie to the state to which they owed allegiance.

If one turns to the policy arguments underlying this textual debate, one reaches an even more complex standoff. At least four conflicting policies might be advanced to discuss the scope of criteria for combatant status—all policies that have, at one time or another, explicitly played a role in the various diplomatic negotiations that produced the relevant international instruments. These policies include: (1) protecting civilians; (2) protecting soldiers; (3) protecting the prerogatives of powerful states against weaker forces, and (4) protecting weaker forces against powerful states. These policies may be more or less attractive to different constituencies, but none can be ignored if we wish to understand the current doctrinal situation. I shall consider each in turn.

First, if we take the *protection of civilians* as the main policy underlying the criteria for combatant status, then we would want to reinforce criteria like the four requirements in Article 4(A)(2). These requirements can be viewed as indispensable preconditions for compliance with the cardinal humanitarian principle of *jus in bello*: the requirement that combatants distinguish between civilian and military targets. If combatants do not clearly distinguish themselves from civilians by wearing some “distinctive sign” and carrying their arms openly, the adversary will not be able to know whom it should be targeting, and will therefore have an overwhelming incentive to target its opponents without much attention to the combatant/civilian distinction. If the protection of civilians is the main policy, and the four criteria are critical to that protection, then the criteria should be extended to all participants, including, perhaps even especially, members of regular armed forces.<sup>114</sup>

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114. This rationale for applying the four criteria to members of regular armed forces was given by the Privy Council in 1968:

“The separation of armies and peaceful inhabitants . . . is perhaps the greatest triumph of international law. Its effect in mitigating the evils of war has been incalculable. . . .” For the “fixed distinctive sign to be recognisable at a distance” to serve any useful purpose, it must be worn

Second, we may, by contrast, take the *protection of soldiers* as the main policy underlying the combatants' privilege. This perspective focuses on the original idea underlying the privilege: the notion that armed conflicts are public matters, conducted between sovereigns (or, at least, proto-sovereigns) and not between individuals. Individuals should, therefore, not be punished for mere participation in these public actions. In direct contrast to the first policy, this goal would encourage a loosening of the formal requirements for all involved in combat. Though in other respects the opposite of the pro-civilian policy, the pro-soldier policy would also provide no support for distinguishing between the rules applicable to regular and irregular forces.

Third, if we would justify the bias in the rules against irregular forces that many international lawyers see codified in Article 4(A), we would need to argue bluntly that the rules seek to *protect powerful states against weaker forces*. From this perspective, paragraph 2's four criteria impose a heavier burden on irregular forces precisely in order to hamper the ability of weaker groups to engage in combat. It is important to stress again that Article 4(A)(2) applies to forces that "*belong to a Party to the conflict*" and yet do not "*form part of the armed forces*" of that party—i.e., "*partisans*," who fight "*on behalf*" of states, often states whose regular armed forces have been defeated or dispersed.<sup>115</sup> Indeed, these were the very kinds of groups the 1949 Convention had in mind—resistance movements in occupied Europe whose governments had been crushed by the Nazis.

By imposing a heavier burden for combatant status on such forces, the Convention would thus have reinforced the monopoly over armed conflict maintained by strong, centralized states at the expense of weaker or more fragmented adversaries, such as states that have difficulty maintaining one of the key characteristics of states, the governmental monopoly of armed force.<sup>116</sup> States with unified, regular armies might well want to ensure that combat is structured in

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by members of the militias or volunteer corps to which the four conditions apply. It would be anomalous if the requirement for recognition of a belligerent, with its accompanying right to treatment as a prisoner of war, only existed in relation to members of such forces and there was no such requirement in relation to members of the armed forces.

Osman bin Haji Mohamed Ali and Another v. Public Prosecutor, [1969] 1 A.C. 430, 450 (P.C. 1968) (appeal taken from the federal court of Malay). The quote regarding the separation of armies in this passage is from J. M. SPAIGHT, WAR RIGHTS ON LAND 37 (1911). The Privy Council also cited Pictet in support of its view.

115. PICTET COMMENTARY, *supra* note 11, at 57.

116. See Meyrowitz, *supra* note 22, at 900.

a way that is suited to such armies—soldiers in uniform facing each other, not people dressed in plain-clothes engaged in sniping, guerrilla warfare, sabotage, infiltration, and so on. Since diplomatic negotiations are heavily influenced by the most powerful states, it would not be altogether surprising to find that such a bias in their favor had been explicitly codified in a treaty.

Finally, we may advance the opposite notion that *jus in bello* is, or should be, concerned with *dismantling some of the advantages possessed by more powerful entities, such as states, in relation to less powerful entities, such as resistance movements*. From this perspective, we should codify a bias in the rules *against* members of regular armed forces, loosening up the criteria *only for irregular forces*, or at least certain kinds of irregular forces. Proposals based on this notion have formed the perennial themes of debate in diplomatic conferences drafting *jus in bello* instruments from the late Nineteenth Century onward.<sup>117</sup>

For example, the Danish delegation to the 1949 Diplomatic Conference proposed extending the protections of combatant status to “civilian persons participating in the defence of their native land in the event of aggression or of illegal occupation.”<sup>118</sup> In support of the Danish proposal, the Soviet delegate asserted that “[c]ivilians who took up arms in defence of the liberty of their country should be entitled to the same protection as members of armed forces.”<sup>119</sup> While declaring their sympathy for Danish “motives” in presenting the proposal,<sup>120</sup> several delegations opposed its adoption for reasons relating to two issues discussed above: the statist/governmentalist bias of *jus in bello* and the division between *jus ad bellum* and *jus in bello*.

On the first issue, the Belgian delegate declared that the proposal “would weaken the Prisoners of War Convention, which applied to members of regular armed forces and others of an analogous character.”<sup>121</sup> The proposal could only be viewed as “weakening” the Convention if one felt that the legal construction of war depended on a rigorous distinction between regular forces, those commanded by governments of states, and irregular fighters, such as citizens resisting occupation in the face of the collapse of their governments, with exception made only for groups closely

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117. See VEUTHEY, *supra* note 51, at 186–94.

118. FINAL RECORD, *supra* note 41, at 425–26.

119. *Id.* at 426.

120. *Id.* (statement of U.K. delegate).

121. *Id.*

“analogous” to regular forces. Tellingly, some delegations felt that the concerns raised by the Danes should be dealt with in the Civilians Convention, not the Prisoners of War Convention.<sup>122</sup>

On the second issue, the British delegate argued that “[i]t was essential that war, *even illegal war*, should be governed by those principles” of *jus in bello* codified in documents such as the Hague Conventions.<sup>123</sup> In other words, by loosening the criteria for combatant status only for those fighting for certain causes, the proposal would introduce *jus ad bellum* criteria for the applicability of *jus in bello*, thus tarnishing the notion that *jus in bello* is based on the equality of belligerents.

For their part, the Danes had argued that their proposal posed no danger to the impartiality of *jus in bello* because “[a]ll States agreed that wars of aggression constituted an international crime.”<sup>124</sup> In other words, since the *jus ad bellum* condition for looser criteria for combatant status was based on a universally accepted norm, it should not damage *jus in bello*’s impartiality. The rejection of the Danish proposal thus rested on the notion that the test for the applicability of *jus in bello* must, and can, abjure *any* normative criteria—and that the statist/governmentalist-biased criteria for applicability provide a merely “factual” standard. The rejection of the Danish proposal was particularly striking because it explicitly referred to the experience of anti-Nazi resistance in occupied Europe, a cause that no state in 1949 could have publicly rejected.<sup>125</sup>

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122. See *id.* at 426 (statements by the Dutch delegation), 434 (statement by the Canadian delegation).

123. *Id.* at 426 (emphasis added).

124. *Id.*

125. The U.S. and U.K. position on this issue was consonant with the traditional *jus in bello* notion that both sides in a conflict must be held to the same requirements regardless of their *jus ad bellum* merit. As the court declared in the Nuremberg “Hostages Case”:

We desire to point out that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory . . . . Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

United States v. List, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, 1230, 1247 (1948). The issue under consideration by the court was whether anti-Nazi resistance fighters in occupied territory should be held to the traditional criteria to merit the status of lawful combatants—specifically, whether those who were considered “civilians” under the traditional criteria could claim the protection of that status. *Id.* at 1246–47. The American prosecutor had argued for some relaxation of those criteria given the criminality of the German occupiers: “If the occupying forces inaugurate a systematic program of criminal terror, they cannot thereafter call the inhabitants to account for taking measures in self defense.” Opening Statement of the Prosecutor, *in* United States v. List, 11 Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10, 785, 852 (1948). To be sure, the prosecutor was pointing to war crimes

By 1977, however, under pressure from post-colonial countries, a bias in favor of weaker forces was codified in an international instrument, in Protocol I's Articles 43–44.<sup>126</sup> A striking indication that these provisions marked a departure for *jus in bello* is that, unlike the GPW, the Protocol felt the need to define explicitly the term “armed forces.” Anti-colonialism had put into question this central term whose meaning the more state-centered 1949 drafters could take for granted. Before quoting the definition, it is important to remember that, due to Protocol I's expansion of “international armed conflict” to include struggle “against colonial domination and alien occupation and against racist regimes,” the term “Party to a conflict” includes some non-state groups.<sup>127</sup> Article 43(1) defines “armed forces” as follows:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under *a command responsible to that Party* for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an *internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.*<sup>128</sup>

Protocol I's Article 43 thus retains two of GPW Article 4(A)(2)'s four criteria—the requirements of a command structure and compliance with the laws of war—and applies them, against the majority reading of the GPW, to both regular and irregular forces.

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by the occupier (violations of *jus in bello*), not crimes against peace (violations of *jus ad bellum*), as releasing the occupied from compliance with all the criteria for combatant status—so the court did not directly address the prosecutor's argument.

126. See ICRC Commentary, *supra* note 56, para. 1688.

127. I note here that my discussion of “who is a warrior” up to this point focuses primarily on the nature of the *group* to which an individual must belong in order to obtain combatant and POW status. The failure of the group to meet the conditions prescribed by the relevant treaty—whether it is the GPW or Protocol I—will result in loss of the combatants' privilege by all members of the group. See Robert K. Goldman, *The Legal Status of Iraqi and Foreign Combatants Captured by Coalition Armed Forces*, (Apr. 7, 2003), at <http://www.crimesofwar.org/special/Iraq/news-iraq4.html>; Meyrowitz, *supra* note 22, at 915. Sanctions for loss of the privilege for individual combatants' failure to comply with the pertinent criteria are more complex and a full discussion would be quite lengthy. For the remainder of the discussion in this section, it should suffice to say that, under Protocol I, loss of entitlement to POW status for individual failure to meet the criteria is limited to failure to meet the requirements in Art. 44(3), except in the case of mercenaries who are always excluded from combatant status by Art. 47. See Protocol I, *supra* note 48, arts. 44, 47.

128. Protocol I, *supra* note 48, art. 43 (emphasis added).

The other two criteria—the requirements of a distinctive sign and the open bearing of arms—are discussed in Article 44(3) and (7), in a manner that works *against* regular armed forces.

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

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

. . . .

7. This Article is not intended to change the *generally accepted practice of States with respect to the wearing of the uniform* by combatants assigned to the regular, uniformed armed units of a Party to the conflict.<sup>129</sup>

Read together, these provisions codify a bias against regular armed forces. Such forces remain bound by the traditional requirements to wear a uniform, as well as to establish a disciplinary command structure, comply with the laws of war, and carry arms openly.<sup>130</sup> By contrast, certain combatants are partially released from the obligation to distinguish themselves from the civilian population. While the text mysteriously defines these combatants as those who “owing to the nature of hostilities . . . cannot so distinguish” themselves, Article 44’s negotiating context makes it clear that it was meant to cover situations “in occupied territory and in wars of

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129. *Id.* art. 44 (emphasis added).

130. It is not clear that a group’s failure to comply with the requirement to wear a uniform will disqualify them from combatant status under Articles 43 and 44. However, failure to comply with the other three requirements will be disqualifying for all “armed forces,” except for those combatants in the situation of Art. 44(3) – a provision intended, as I note in the text, to refer to anti-occupation and anti-colonial guerrillas, not members of regular armies.

national liberation in which a guerilla fighter could not distinguish himself [from the civilian population] throughout his military operations and still retain any chance of success.”<sup>131</sup>

Indeed, many delegations wished to state explicitly in the text of Article 44 that the loosening of the criteria for combatant status was for participants in “wars of national liberation.”<sup>132</sup> Other delegations, citing the need to distinguish *jus in bello* from *jus ad bellum*, objected to such a reference. Although the final form of Article 44 omits any reference to “wars of national liberation,” it clearly moved the line towards favoring certain kinds of irregular forces and counteracting the practical and legal disadvantages besetting such forces. In fact, despite the compromise over the wording, Article 44’s expansion of combatant status, along with Article 1(4)’s expansion of the category of international armed conflicts, were the main reasons for the refusal of some states to ratify the Protocol.

My review of the competing policies that have been advanced for determining the criteria for combatant status shows that they reflect fundamentally different positions in the perennial debates about the legal construction of war. Some of these positions can be interpreted as limited to contesting the line between combatants and non-combatants. Others, such as the Danish, have the potential to efface the line in some circumstances. Indeed, the accusation that a given proposal would efface the line has been a perennial argumentative tactic in legal debates over reform. Outside the legal debates, political positions that have clearly threatened even a contested line have been presented by some advocates of anti-colonial struggle, who declared that the category of those combating the oppressor included “the whole people”<sup>133</sup> (and, in its maximalist form, that the “whole people” of the oppressor were legitimate targets).<sup>134</sup> A position with a comparable line-effacing potential, though usually articulated from a different political perspective, would be a maximalist soldier-protective position. This perspective would grant the privilege to “foot-soldiers” for organized groups regardless of their goals, an expansion of the privilege whose natural stopping point would be difficult to establish—potentially leading to an indefinite

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131. ICRC Commentary, *supra* note 56, para. 1698.

132. *Id.*

133. See, e.g., VEUTHEY, *supra* note 51, at 195 (quoting the statement of the Vietnamese General Giap: “our whole people was in arms”).

134. See FRANTZ FANON, *THE WRETCHED OF THE EARTH* 122 (Constance Farrington trans., Grove Press 1968) (1963).

expansion of the province of the law of war into the precincts of crime, the realm of such specters as narco-militias and kleptocratic warlords.

## 2. Instrumentalizing Combatant Status and the “Part-time Combatant”

The challenge posed by recent phenomena such as the conflict between the United States and Al-Qaeda, however, concerns something other than either contestation or effacement of the line between warriors and non-warriors. Rather, due to their spatially and temporally discontinuous quality, such conflicts make it difficult to determine dispositively at any given moment how participants should be characterized—as combatants and their military enemies or as criminals and their law enforcement adversaries. This feature makes it possible for participants to reaffirm the line between warriors and non-warriors while deploying it for strategic effect. At this point in my analysis, the challenge posed by such strategic instrumentalization of the legal distinctions appears at the level of participant identity, rather than, as in the section on “What is War,” at the level of the status of conflicts.

Indeed, as in my discussion of the status of conflicts, the current challenges may be viewed as presenting purer forms of issues already raised in the anti-occupation and anti-colonial contexts—such as the problem of the so-called “part-time combatant.” Guerrilla fighters around the world, particularly those resisting military occupation and colonialism, have long included those who live civilian lives part of the time and engage in military activity part of the time. Both at the practical and discursive levels, they have often quite deliberately engaged in the strategic instrumentalization of the distinction between warriors and non-warriors to enable them to pursue their goals. In their daily practice, they may use their civilian roles to obtain the means of subsistence and to pursue tolerated political activities, while shifting to their military roles to pursue actions of violence, such as sabotage, planting bombs, attacking supply lines, and so forth. In discursive fora, including propaganda media and judicial proceedings, they may make shifting decisions to present themselves in either military or civilian guise, according to the needs of particular campaigns to win public sympathy or legal strategies in particular cases (including, of course, in relation to the question central to this Article of whether it is more advantageous to be treated as prisoners of war or as civilian criminal defendants). Indeed, it is precisely the ability of those struggling against

occupation or colonialism to strategically doff and don their warrior and non-warrior personae that often makes their activity possible—especially under conditions of repressive rule, where the possibilities for effective peaceful political action are limited and where the balance of forces makes it equally difficult to pursue overt military confrontation with the rulers.

Such strategic instrumentalization at the level of participant identity, as at the level of the status of the conflict, destabilizes *jus in bello*. Doctrinal insistence on the need to cleanly differentiate between combatants and non-combatants renders the widespread phenomenon of the “part-time combatant” legally inassimilable. In particular, strategic shifting on the level of participant identity may often come close to raising the question of “perfidy,” one of whose primary forms is the feigning of civilian status for military purposes.<sup>135</sup> It is thus no accident that the drafters of Protocol I, the most pro-guerilla of the *jus in bello* treaties, felt a need for the first time to include an article specifically defining and prohibiting perfidy,<sup>136</sup> thereby tacitly defending against the charge that the Protocol’s pro-guerilla stance would destabilize the combatant/non-combatant distinction.

Indeed, the ICRC Commentary on Article 43 emphasizes at some length that the Protocol’s innovations would in no way make room for the part-time combatant in *jus in bello*:

[A]ny concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day . . . disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of

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135. Since Protocol I relaxes the requirements for distinguishing between combatants and non-combatants except during certain military-related activities, it becomes important to define precisely the nature of those activities. Article 44(3) requires the open carrying of arms during each military engagement and “[d]uring such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.” One key issue, then, is the scope of the activities and the time period implied by the phrase “a military deployment preceding the launching of an attack.” In the negotiations of the Protocol, the most pro-guerrilla delegations wished to restrict the scope of the phrase and thus expand the circumstances under which guerrillas could remain incognito; others wished to expand it. See ICRC Commentary, *supra* note 56, paras. 1709–14. Under the very broadest interpretation of the phrase, which could include an array of resistance organizing activities, the relaxation of the requirement to openly carry arms would come close to its nullification.

136. Protocol I, *supra* note 48, art. 37. The 1907 Hague IV treaty had prohibited killing or wounding “treacherously” without providing any definition of the acts to which it referred. Hague IV, *supra* note 14, art. 23(b).

the hostilities . . . . Any interpretation which would allow combatants as meant in Article 43 to “demobilize” at will in order to return to their status as civilians and to take up their status as combatants once again, as the situation changes or as military operations may require, would have the effect of cancelling any progress that this Article has achieved. Undoubtedly the success of guerrilla operations depends on the requirements of flexibility and mobility . . . . However, this concept of mobility could not be extended into the legal field without falling fatally back into the “presumption of illegality,” of which guerrilla fighters have justifiably complained . . . . [I]t does not allow this combatant to have the status of a combatant while he is in action, and the status of a civilian at other times. It does not recognize combatant status “on demand.”<sup>137</sup>

In vehemently rejecting any notion of a part-time combatant, the ICRC Commentary explicitly acknowledges and defends a disjunction between the reality of much guerilla combat and the legal framework that regulates it—or, to use my terms in this Article, that selectively constructs some of its aspects *as* combat in the legal sense. For the ICRC Commentary, the part-time combatant issue is one of those in relation to which law must resist adaptation to the reality of combat. Such a disjunction confirms the view of another commentator that the “confrontation between the guerilla and the law of war” highlights those “rules and principles which must absolutely be maintained,” even in the face of contrary reality, “because they are bound up with the very purpose of the law of war.”<sup>138</sup>

Indeed, it is difficult to envision how to apply the existing framework to a person who *in fact* engages part of the time in combat despite the unavailability of a *legal* rubric for a “part-time combatant.” For the ICRC Commentary, if such a person is “incorporated” into the “armed forces” defined in Article 43, he or she is a combatant for the duration of the hostilities,<sup>139</sup> bound by the rules for such status and subject to attack at any time by the

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137. ICRC Commentary, *supra* note 56, paras. 1677–78.

138. Meyrowitz, *supra* note 22, at 876. Meyrowitz inclines towards the view that anti-occupation fighters who do not comply with the criteria for the privileged combatants are *illegal*, not merely unprivileged, combatants. Nonetheless, he maintains that, unlike privileged combatants, “part-time armed civilian resistance fighters” can only be taken as military targets while they are actually engaged in combat. *Id.* at 922.

139. ICRC Commentary, *supra* note 56, paras. 1677–78.

adversary. If, on the other hand, such persons are not so “incorporated,” then the only possibility contemplated by the Commentary seems to be that they would be “civilians” who do not benefit from the combatants’ privilege and who are subject to attack only “for such time as they take a direct part in hostilities.”<sup>140</sup> However, in the case of *de facto* part-time combatants, it may often be very difficult to determine whether they are “incorporated” into the “armed forces.” For example, if they are only pursuing military activities on behalf of a resistance movement by night and hence are only subject to military discipline for a small portion of their waking hours, should they be viewed as “incorporated” or not? The legal framework simply flies in the face of reality to such an extent that its application seems doomed to arbitrary decision—the very situation that the laws of war, since they are for the most part applied by the adversary, strive to avoid.

The alternative to the ICRC’s purist aspiration to prevent such phenomena as the “part-time combatant” from marring the clean distinction between combatants and non-combatants would be some version of Veuthey’s proposal for a range of flexible protections, with flexible applicability.<sup>141</sup> Veuthey’s proposal would reject the need to view part-time guerillas *either* as combatants *or* as civilians, *either* as privileged *or* as unprivileged combatants. Rather, part-time combatants would be legally defined by a flexible range of statuses with a correlative flexible range of protections. Such a proposal, however, would continually come up against difficult problems—above all, the crucial questions concerning the justification and length of detention. The difference between the detention of combatants and criminals is not one of degree to be ranged along a continuum. Rather, it is a difference in kind with incommensurable criteria for detention’s justification and duration.

Moreover, the ICRC’s firm refusal to accommodate the distinctive features of part-time combatants, a refusal it considers essential in order to maintain the foundational distinction between

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140. The other possibility is that, as “unprivileged combatants,” they would be subject to attack at all times like privileged combatants. This is a plausible position, since it would deprive unprivileged combatants of an advantage, that of not being subject to attack at all times, precisely because they choose to engage in combat outside the rules for combatants. Nevertheless, since I am here discussing the ICRC Commentary’s position, this position seems excluded—for the Commentary declares that there is no third status beyond that of combatants (i.e., privileged combatants who are “members of the armed forces”) and civilians. See ICRC Commentary, *supra* note 56, para. 1917. Still, the Commentary acknowledges that the situation may be more complicated in cases of occupation and self-determination struggles. See *id.*, para. 1761.

141. See VEUTHEY, *supra* note 51, at 357.

combatants and non-combatants, ignores the true challenge posed by strategic instrumentalization. It is the very *preservation*, not the abolition, of *jus in bello*'s "rules and principles" that makes possible their deployment for strategic purposes. If combatants and non-combatants were not viewed and treated differently, then neither powerful states nor weaker forces, such as guerrillas and terrorists, could achieve partisan advantage by shifting between their two rubrics. The destabilization of *jus in bello* by means of its own categories thus cannot be held back through avowedly counter-realistic fiats about the rigorous difference between combatants and civilians; rather, it is such fiats that make the destabilization possible. The inassimilability of the part-time combatant to the current doctrinal structure is one more symptom of the contingency and contestability of the legal construction of war. Yet, the strategic deployment by guerillas (and their adversaries) of the distinction between privileged and unprivileged combatants threatens to destabilize the legal construction of war in a much more threatening fashion than challenges that merely contest the location of the line between the categories.

The problem of the "part-time combatant," originally posed by anti-occupation and anti-colonial struggles, has been posed anew by recent conflicts. Terrorists, such as Al Qaeda operatives, pose challenges to those who would limit the doctrinal choice to that between combatant and civilian status for precisely the same reasons as anti-occupation and anti-colonial fighters. Like those other fighters, terrorists strategically move between civilian and combatant lives; and like those other fighters, their "incorporation" into combat forces is often ambiguous and shifting. The fact that the causes for which such terrorists fight are radically less meritorious simply means that they pose purer challenges to *jus in bello*, with its purported indifference to *ad bellum* motives.

Moreover, as we saw above in my discussion of Tittmore,<sup>142</sup> the problem of the part-time combatant also arises in relation to an equally distinctive, if considerably more worthy, figure of our time, the internationalist peacekeeper/peacemaker. Like anti-colonial and anti-occupation fighters, and like terrorists, such "blue berets" partake of a "hybrid" character, to use Tittmore's phrase. Tittmore's suggestion that "blue berets" be allowed to doff and don their combatant status depending on the kind of operation they choose to undertake would come very close to providing them with "part-time combatant" status (as Tittmore both acknowledges and struggles to

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<sup>142</sup> *Supra* p. 29-31.

evade through a doctrinally paradoxical formulation<sup>143</sup>). And, like other attempts to legalize “part-time combatant” status, it is a paradigmatic instance of the strategic instrumentalization of the legal categories – another instance in which the constructive role of law in relation to war, including its casting of some widespread forms of combat as legally inassimilable, has been destabilized by the way a range of recent participants in organized violence practice and present their actions

### III. BEYOND THEORY AND POLITICS?

The doctrinal debates about the combatants’ privilege—implicating the line between war and not-war, the line between *jus ad bellum* and *jus in bello*, and the lines within *jus in bello* among different kinds of persons engaged in violence—show that the underlying issues are not, in the first place, human rights or national security questions. Rather, they are fundamentally debates involving the deepest normative questions about violence and the law’s facilitation of certain kinds of violence at the expense of others. They also suggest the interminability of the debates and the irreducibility of the category of unprivileged combatants. As long as there is no universal consensus, among non-state groups and individuals as well as among states, about the issues raised in this Article, there will always be those who affirm in word and deed that some forms of currently unprivileged violence merit the same treatment as privileged violence. Though the debates ultimately operate at the deepest normative level, no amount of theoretical inquiry can be expected to resolve them.

It might be tempting, therefore, to view the debates I have analyzed as political in the narrow sense. It is certainly the case that states that negotiated the various international instruments usually sought to codify rules that would provide concrete advantages in specific kinds of conflicts. For example, during the negotiation of the Protocols in the 1970s, the key reference points were Third World struggles, such as the Algerian independence struggle, and, above all, the Vietnam War, whose final stages were played out during the three-year negotiation. Those in favor of loosening up the requirements for combatant status, therefore, tended to be post-colonial states, sympathetic to the political associations conjured up at the time by the word “guerrilla.” Governments attempting to deny

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<sup>143</sup> Tittlemore, *supra* note 68 at 107.

combatant status to guerrillas in 1977 also generally formed a politically predictable group.

Nevertheless, from even a medium-term perspective, the political tilt of an expansive or restrictive category of the combatants' privilege is anything but predictable. Guerrillas and other irregular forces come in all political stripes: they include the Vietnamese NLF of the 1950s as well as the Nicaraguan Contras of the 1980s, the Algerian FLN of the 1950s as well as the Algerian Islamicists of the 1990s. Governments who have tried to deny combatant status to such armed groups have also come in a correspondingly wide range of stripes. Thus, political partisanship, like normative theory, is unable to provide a stable ground for definitive positions in these debates.

As long as the doctrine purports to separate *jus in bello* from *jus ad bellum*, the only thing one may predict with certainty is the tautological forecast that an expansion of the combatants' privilege will expand the list of people with immunity for certain kinds of violence—but not their political complexion. This is an uncomfortable situation. Personally, I never want Nazis to be privileged combatants, whether they are organized as an army of a state or as an insurgent group against a democracy. In my view, killing in the name of Nazism should never be immunized from the most severe criminal penalties. And I always want anti-Nazis to be able to fight Nazis with the combatants' privilege, whether they are organized as a state army, a guerrilla force, or individual snipers. But the rules as they are currently structured—in their aspiration to separate *jus ad bellum* from *jus in bello*—seek to block this goal.

There are, of course, good pragmatic reasons for structuring the rules this way. Since, in practice, POW status is primarily something granted or denied by your enemy, you would want to ensure that this status will be granted regardless of the justice of the contending causes. You would want to design rules that do not depend on the enemy declaring itself an international wrongdoer on the *jus ad bellum* level in order for it to imagine itself duty-bound to treat your soldiers as POWs on the *jus in bello* level.

Nevertheless, this Article has also shown that it is probably impossible to satisfy the aspiration to separate *jus ad bellum* from *jus in bello*. All doctrinal attempts to distinguish the sphere of *jus in bello* from that of normal law involve contestable normative judgments about the causes that transform violence into a legally cognizable armed conflict, i.e., about *jus ad bellum*. The statist paradigm is contestable due to its covert and contestable *jus ad bellum* normative judgments; the “state plus civil war participants who have achieved ‘belligerency’” gloss is similarly contestable; the

“state-plus-national liberation movements” gloss is contestable; my hypothetical “state-plus-democracy/human rights/environmental movements” gloss is contestable. Each of these versions of the armed conflict threshold can be criticized as overbroad or under-inclusive. And all versions of the warrior/non-warrior distinction are similarly contestable. Nevertheless, the maintenance of the legal construction of war requires that we distinguish between combatants and criminal gangs, between people “captured in combat” and people “arrested after a shootout with police,” with the unprivileged combatant category a byproduct of the always contestable character of such distinctions.

The unprivileged combatants category and its attendant controversies are thus symptoms of the fact that the legal construction of war is both indispensable and never more than provisional—that *jus ad bellum* both *must be* and *cannot be* neutrally separated from *jus in bello* and that those entitled to the rules of *jus in bello* both *must be* and *cannot be* defined in a way that will command the assent of all parties to some of the most important conflicts. As long as some people engage in violence even though international law refuses to grant them immunity for their actions, and as long as those people succeed in making the legitimacy of their acts an issue in international debate, the category and its controversies will persist.

Since the continued existence of the category seems likely, it might be useful briefly to inquire into the alternatives to the U.S. government’s seeming desire to keep unprivileged combatants in a legal twilight zone. One possibility would be to look to human rights law to fill the gaps left by *jus in bello*. All detained persons are entitled to a large list of substantive and procedural rights under international human rights law during both war and peace. However important to the humane treatment of detainees, this solution can never be fully adequate, for it fails to resolve some of the most crucial questions, such as the justification and duration of detention. While human rights law *generally* forbids governments from detaining people without trial, the question remains about the effect of the *lex specialis* of the law of armed conflict on this requirement in relation to unprivileged combatants. It would seem to be a perverse legal result if those who engaged in combat without complying with the relevant international rules were entitled to criminal trials—with their requirements of proof of individual acts, the presumption of innocence, and so on—before being detained for mere participation in hostilities, while their more scrupulous fellow combatants were consigned to POW camps without such requirements. And, as already noted, although proposals for an intermediate legal doctrine,

or range of doctrines, between privileged and unprivileged combatancy might be more descriptively adequate to the reality of contemporary violence, they face intractable conundra about the justification and duration of detention.

At a hypothetical level, there are two conditions, both implausible, under which the category of unprivileged combatants would disappear. First, the category would disappear if debate about the contours of permissible combat reached a truly universal and permanent consensus among all potential combatants, not just states. This scenario is not only wildly implausible, but undesirable, for it is likely that such a consensus would simply freeze into place a set of momentarily unchallenged presuppositions. Second, the category would disappear if all acts of combat were treated as either privileged or unprivileged—i.e., the generalization or elimination of the privilege.

What would be the consequences of the elimination or generalization of the privilege? The elimination of the privilege, i.e., the denial of an international law immunity for violence in violation of *jus ad bellum*, however appealing when one thinks of victoriously fighting Nazis, seems far less appealing in a world where the bad guys do not always lose and where the good guys' fate may depend on an at least fictionally neutral set of rules about the combatants' privilege. Moreover, elimination of the privilege would place the ordinary fighter in a position of making *jus ad bellum* judgments to avoid criminal responsibility for mere participation in combat. This would render military discipline extremely difficult, which might be a good thing or a bad thing depending on one's perspective, but in any case probably means that states are unlikely to agree to it. The full generalization of the privilege, on the other hand, would mean a true exclusion of normative considerations from the scope of the privilege. Colombian narco-militias, the Mafia, and other unsavory groups would benefit from the privilege, as well as more attractive souls like pro-democratic rioters—and, one must always remember, *their adversaries*, drug enforcement agencies and police forces, as well as anti-democracy riot troops. Generalization would thus threaten the "legal construction of peace" as well as the legal construction of war.

Full generalization or elimination of the privilege is thus unlikely; normative limitations on generalization, like military limitations on elimination, seem likely to persist and mutate. Nevertheless, while the persistence of the category of unprivileged combatants seems likely, the destabilization and instrumentalization of the division between the spheres of war and not-war has led to pressures towards its explosive growth or collapse. And, conversely,

the twin pressures toward the extremes of generalization or elimination of the combatants' privilege, pressures that derive from a wide and heterogeneous variety of sources, have considerably destabilized the entire legal construction of war.

In this Part, then, I have argued that those who would distort or instrumentalize the doctrinal distinctions of the legal construction of war may end up working against the political values they imagine they are defending, just as doctrinal traditionalists may end up facilitating the destabilization of the legal construction of war they seek to defend. The doctrinal traditionalists—among whom I include the old rivals contesting the lines that separate the doctrinal categories, for example, Eurocentrists *as well as* anti-colonialists—are rapidly finding their centuries-old debates transformed by the instrumentalization of the alternatives that shaped them. Yet, the partisan attempts to manipulate the legal construction of war are no more likely to succeed in their attempts to appropriate its power fully. Rather, the steady move from contestation of the line between war and not-war to its strategic instrumentalization is destabilizing the legal construction of war and its contingent privileging of particular forms of combat in a manner that both defies normative theory and scrambles partisan politics.

#### IV. EPILOGUE: JUDICIAL CONSTRUCTIONS OF WAR AFTER 9/11

In the immediate aftermath of 9/11, both critics and supporters of U.S. policy attempted to use the category-defying quality of the events to support their views. Both engaged in strategic shifting between a crime framework and a war framework. Supporters of U.S. policy used legal doctrines about war to justify expanding the use of military power beyond narrow law enforcement activities and to justify detaining prisoners for a long period without criminal trial; at the same time, they used doctrines about crime, rather than war, to justify treating some prisoners as criminals rather than POWs. And, of course, the category of “unlawful combatants” provided another facet of this blend of crime and war—designating as crime actions that were also designated as combat and denying the need to put the alleged criminals on trial. On the other hand, critics of U.S. policy used legal doctrines about war to justify the applicability of certain protections given to POWs—above all, the combatants' privilege. At the same time they used legal doctrines about crime, not war, to justify granting other prisoners the full panoply of American criminal procedure and to urge limits on U.S. military responses to the terrorist

attacks.

As this Article reached its final stages, the U.S. Supreme Court issued its much-anticipated decisions in a set of “terrorism cases.”<sup>144</sup> These decisions present an opportunity for a brief consideration of the way in which a variety of federal courts have handled the issues discussed in this Article in the years since 9/11. In so doing, I will primarily consider aspects of two of the cases which eventually reached the Supreme Court, *Padilla v. Rumsfeld* and *Hamdi v. Rumsfeld*, as well as one case which did not, *United States v. Lindh*,<sup>145</sup> to the extent that they relate to the central international legal issues of this Article—the issues I have named “what is war” and “who is a warrior.” While it is impossible to separate completely the international from the domestic law aspects of these cases, the underlying conceptual quandaries about the legal construction of war are often very closely related. Examination of these cases reveals courts deeply engaged in preserving and transforming the legal construction of war in the face of partisan efforts that seek either to engage in an unprecedented expansion of its contours or to subject its doctrines to strategic instrumentalization. I caution that I am not seeking to give a thorough overview of these cases, particularly of their domestic law aspects, but will only examine their implications for the international law issues most closely related to the themes of this Article.

#### A. *What Is War?*

On the “what is war” question, the courts have been faced with the way the recent wave of terrorism and counter-terrorism resists subsumption under the available categories of international armed conflict, non-international armed conflict, and mere crime. This issue arose most starkly in *Padilla*, a case involving a U.S. citizen held as an “enemy combatant” who was arrested in the United States on suspicion of working for Al-Qaeda. This case most clearly raised the issue of the applicability of the “armed conflict” rubric to the ongoing conflict between the U.S. government and Al-Qaeda—a conflict with no particular spatial location, no foreseeable temporal delimitation, and fought between a state and a transnational non-state group or network. Specifically, *Padilla* argued that the conflict could

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144. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

145. 212 F. Supp. 2d 541 (E.D. Va. 2002).

not be viewed as an “armed conflict” because Al-Qaeda was an “international criminal organization that lacks clear corporeal definition [and] the conflict can have no clear end.”<sup>146</sup>

This issue arose in a different form in *Hamdi*, which involved an American citizen allegedly captured in Afghanistan while fighting with the Taliban. In *Hamdi*, the issue emerged in relation to the duration of detention. Whatever the truth of the allegations made against him, Hamdi was captured in a country beset by the kind of violence that clearly met the standard of “armed conflict.” Yet, the alleged connection between the war in Afghanistan and the struggle with Al-Qaeda raised the question of whether Hamdi, if he was indeed a detainable combatant, could be held for the indefinite duration of the projected “war on terror.” Hamdi argued that, even if his initial detention had a colorable connection with the armed conflict in Afghanistan, his detention has continued beyond the end of that conflict due to the perceived connection of his detention with the struggle with Al-Qaeda.<sup>147</sup>

In order to understand the federal courts’ comments on this issue, it is necessary very quickly to outline the history of the “what is war” question in American jurisprudence. In the course of this Article, I have described three strands in international legal writing on this question: the formalist, factualist, and functionalist strands. Each of these strands has an analogue in past Supreme Court decisions.

The formalist strand, prominent in international law before World War I, leaves the determination of the existence of war wholly to sovereign discretion. In American law, this strand has been quite widespread and received a characteristic formulation by the Supreme Court in the 1948 case of *Ludecke v. Watkins*.<sup>148</sup> This case raised the question of whether the President’s wartime powers continued three years after the defeat of Germany and Japan, on the basis of executive pronouncements that a “state of war” persisted.<sup>149</sup> Answering in the affirmative, the Court asserted that the termination of a state of war does not take place when the “shooting stops.”<sup>150</sup> Rather, it is a “political act”<sup>151</sup> reserved for the President, the embodiment of U.S. sovereignty in such matters.

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146. *Padilla v. Bush*, 233 F. Supp. 2d 564, 588 (S.D.N.Y. 2002).

147. *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003).

148. *Ludecke v. Watkins*, 335 U.S. 160 (1948).

149. *Id.* at 168.

150. *Id.* at 167.

151. *Id.* at 169.

Then, in a very revealing passage, the Court declared that the continued existence of a war was “a question too fraught with gravity even to be adequately formulated” by the judiciary, “when it is not compelled”<sup>152</sup>—i.e., when the judiciary can plausibly defer to presidential decision. Indeed, in light of my analysis in this Article, one can well understand why the life-and-death question of the existence of war, with its legal consequences for the facilitation of killing, is so “fraught with gravity” that anxiety about its determination might well leave otherwise articulate jurists nearly speechless, almost incapable of “adequately formulating” the question. One might even interpret the Court as explaining that, *precisely because* the existence of war was both the most urgent and the most elusive of questions, it was reserved for sovereign fiat. I call this the “anxious formalism” strand of American law on the “what is war” question.

The second strand in international law, the “factualist” strand, finds its parallel in several cases in American courts, though usually in connection with the third, “functionalist” strand. A very early example of the factualist strand may be found in *Bas v. Tingy*,<sup>153</sup> in which the justices found the existence of a war despite the absence of a declaration of war. Thus, Justice Washington evaluated the “situation” at stake in that case, a conflict between France and the United States, in relation to the “true *definition* of war,”<sup>154</sup> rather than in relation to sovereign fiat.

The third strand, which I call the “functionalist” strand, provided the basis for the reasoning in one of the dissents in *Ludecke*, which implicated policy concerns closely related to those involved in the detention of enemy combatants. The issue in *Ludecke* was whether wartime powers to deport “enemy aliens” without a hearing survived the end of active hostilities.<sup>155</sup> In contrast to the majority’s formalist deference to the executive determination about the persistence of a state of war, the dissent declared that “the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction.”<sup>156</sup> Coupling this factual argument with a functionalist gloss, the dissent declared that, in 1948, “German aliens could not now, if they would, aid the German

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152. *Id.*

153. 4 U.S. (4 Dall.) 37 (1800).

154. *Id.* at 41 (emphasis added).

155. *Ludecke*, 335 U.S. at 164.

156. *Id.* at 175 (Black, J., dissenting).

Government in war hostilities against the United States”<sup>157</sup>—the prevention of which was the purpose of the legislation. In light of this purpose, the legislative bestowal of power on the executive did not survive the factual end of war, despite executive “fictions.”<sup>158</sup>

The functionalist strand was even more fully articulated in *Lee v. Madigan*.<sup>159</sup> Explicitly taking issue with formalist strand, the *Lee* court rejected:

generalized statements that the termination of a “state of war” is “a political act” of the other branches of Government, not the Judiciary. See *Ludecke v. Watkins*. We do not think that . . . those authorities [are] dispositive of the present controversy. A more particularized and discriminating analysis must be made. We deal with a term that must be construed in light of the precise facts of each case and the impact of the particular statute involved. Congress in drafting laws may decide that the Nation may be “at war” for one purpose, and “at peace” for another.<sup>160</sup>

This functionalist decision thus interpreted the applicability of “war”-based legislation by evaluating a given situation in light of the congressional “purpose” in using the word “war” or “peace” in specific pieces of legislation, regardless of the executive’s pronouncements about the existence of a state of war. Thus, the evaluation of a single situation may yield conflicting judgments about “war or no war,” depending on the legislative purpose under consideration.

In the post 9/11 detention cases, therefore, the federal courts had before them a choice of historical approaches on the basis of which to determine the existence of an “armed conflict” within the meaning of *jus in bello*. The novel features of recent events led courts to develop at least three new combinations of the historical approaches. The first new combination was articulated by the district court in *Padilla*, which developed a combination of the anxious formalist and factualist strands. The court cited extensive precedent for the formalist proposition that the executive has primary authority for determining the existence of a war.<sup>161</sup> It supplemented this

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157. *Id.* at 177 (Black, J., dissenting).

158. *Id.* at 175 (Black, J., dissenting).

159. *Lee v. Madigan*, 358 U.S. 228 (1959).

160. *Id.* at 230-31 (citation omitted).

161. *Padilla*, 233 F. Supp. 2d at 589.

formalist assertion with factualist arguments. Thus, it cited the GPW for the proposition that *jus in bello* applies regardless of declarations of war.<sup>162</sup> Then, presupposing a connection between Padilla and events in South Asia, the court declared that “[s]o long as American troops remain on the ground in Afghanistan and Pakistan in combat with and pursuit of al Qaeda fighters, there is no basis for contradicting the President’s repeated assertions that the conflict has not ended.”<sup>163</sup>

Finally, sensing the tension between the formalist and factualist strands, it quoted *Ludecke*’s anxiety about the issue (“a question too fraught with gravity to be adequately formulated”), and proclaimed: “[a]t some point in the future, when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed, there may be occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda, assuming such prisoners continue to be held at that time.”<sup>164</sup> The notion that “at some point in the future”—when formalist and factualist approaches to the continuation of war stand in undeniable opposition—“there may be occasion” to revisit the question both expresses anxiety about the tension between the strands and lays the basis for indefinite deferral of the confrontation between them. For is it not the widely held view that “operations against al Qaeda fighters” have no foreseeable end, or at least none that will be uncontroversially determinable?

A second new stance, combining the features of formalism and functionalism, was developed by the Second Circuit in *Padilla*. On the one hand, the court agreed with the formalist stance that “whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts.”<sup>165</sup> On the other hand, in a functionalist gloss on formalism, it asserted that the *consequences* of accepting the “government’s underlying assumption that an undeclared war exists between al Qaeda and the United States”<sup>166</sup> depended on the particular issue. Specifically, it was the spatially novel quality of this “armed conflict,” the fact that it was limited to no specifiable battlefield, that necessitated a functionalist analysis. The question of “whether the Constitution gives the President the power to detain an American

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162. *Id.* at 590.

163. *Id.*

164. *Id.*

165. *Padilla v. Rumsfeld*, 352 F.3d 695, 712 (2d Cir. 2003).

166. *Id.*

citizen seized in this country,” without putting him on trial, “until the war with al Qaeda ends,”<sup>167</sup> requires consideration of a different set of policy bases for presidential authority than those involved in other exercises of “the inherent wartime power.” Thus, while the Court declared that it did not challenge the executive’s “power to deal with imminent acts of belligerency on U.S. soil outside a zone of combat,”<sup>168</sup> that power did not extend to “the detention of a United States citizen as an enemy combatant taken into custody on United States soil outside a zone of combat”<sup>169</sup> purely on the basis of the “inherent wartime power.”

Finally, the Supreme Court in *Hamdi* developed a third new stance, which may be called “anxious factualism,” in response to Hamdi’s assertion that he faced indefinite detention due to the government’s linkage of his case with the “war on terror.” The Court cited the GPW for the “clearly established principle of the law of war that detention may last no longer than active hostilities,”<sup>170</sup> no matter what the formal status of a conflict. The Court noted, however, that this factualist principle might not provide a reasonable limit on the duration of Hamdi’s detention, given the government’s notion of the “national security underpinnings of the ‘war on terror.’”<sup>171</sup> Implicitly referring to the strategies I have called the “instrumentalization” of the war/not-war distinction, the Court declared that those “underpinnings” were “broad and *malleable*.”<sup>172</sup> Nonetheless, the Supreme Court appeased its anxiety about the “malleability” of the government’s use of the war/not-war distinction by asserting that the problems it raised were not ripe for adjudication since “[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan.”<sup>173</sup> The detention of “Taliban combatants who engaged in an armed conflict against the United States,”<sup>174</sup> therefore, continues to be legitimate. As I have noted, the district court in *Padilla* used a similar factual argument to appease its own anxiety, even though it was deprived of the argument that Padilla was a “Taliban fighter.” I also note that the Supreme Court’s decision not to adjudicate *Padilla*

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167. *Id.* at 713.

168. *Id.* at 715 n.24.

169. *Id.*

170. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004) (citing GPW, *supra* note 4, art. 118).

171. *Id.*

172. *Id.* (emphasis added).

173. *Id.* at 2642 (internal quotes omitted).

174. *Id.*

on the merits saved it from pronouncing how firm a link between more traditional, spatially localizable military activities, like those in Afghanistan, and the more novel, transnational operations of Al Qaeda would suffice to bring the struggle with the latter under the law of “armed conflict.”

The import of this factualist appeasement of the anxiety provoked by instrumentalization must be measured by the depth of that anxiety. The Court stated that its “understanding” of the “authority to detain for the duration of the . . . conflict” was “based on long-standing law-of-war principles.”<sup>175</sup> It then declared that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”<sup>176</sup> This potential “unraveling” of judicial understanding expresses a judicial anxiety in the factualist strand not unlike that of *Ludecke*’s expression of anxiety about the challenge to judicial coherence, to the judicial ability even to “formulate” the war/not-war question, in the formalist strand. It would thus seem to be with some considerable relief that the Court announced that the “unraveling” of its understanding may be deferred to some indefinite future—that, because of continued operations in Afghanistan, such “unravel[ing]” is “not the situation we face as of this date.”<sup>177</sup>

One might, to be sure, counter my reading of this section of the opinion as a defense mechanism against judicial anxiety by interpreting it as a strong assertion of latent judicial authority—specifically, as a warning to the government that, at some point, its detention of Hamdi may exceed the duration sanctioned under the law of war. Yet, the Court did not specify, indeed, did not even begin to provide criteria for, the point at which its “understanding” would “unravel.” On the contrary, the question was indefinitely deferred, the “unraveling” indefinitely postponed. Indeed, given the similarity between this section of the opinion and *Ludecke*, I think that the expression of anxiety about the government’s manipulation of the war/not-war distinction serves only to suggest the strength of the Court’s attachment to its method of appeasing that anxiety—in *Ludecke* through formalism, in *Hamdi* through factualism—and the unlikelihood that the day of the indefinitely postponed confrontation with the executive will ever arrive. Appeasing judicial anxiety with factualism, no less than with formalism, is likely not a presage of

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175. *Id.* at 2641.

176. *Id.*

177. *Id.*

future activism, but an indication of the need to maintain that appeasement, lest the Court face the “unraveling” of its “understanding.” Only time will tell whether the day of reckoning with that “unraveling” will ever be faced squarely by the Court.

*B. Who Is a Warrior?*

Turning to the question of “who is a warrior,” we again find the post-9/11 courts attempting to work with the traditional categories in the face of the new challenges. The *Lindh* court, in particular, faced very extensive briefing on the aspects of the “who is a warrior” issue which I discussed in Part II. *Lindh* was an American who was captured by Northern Alliance forces while fighting with the Taliban. He sought the protection of the combatants’ privilege to the extent the charges against him stemmed from his mere participation in combat as a member of Taliban forces. The government alleged that he was an unprivileged combatant due to the failure of the Taliban to meet the criteria in GPW Article 4(A)(2). The defense argued that these criteria were irrelevant because the Taliban were the “armed forces of” the government of Afghanistan.

The *Lindh* district court sided with the view of the U.S. government (and of a minority of international lawyers) that the four criteria are applicable to both regular and irregular armed forces. The court, somewhat tautologically, declared:

It would indeed be absurd for members of a so-called “regular armed force” to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label “regular armed force” cannot be used to mask unlawful combatant status.<sup>178</sup>

This argument, of course, simply ignores the statist and governmentalist tilt of the majority interpretation of Article 4(A)(2), for which the exemption of regular armed forces from the four criteria is by no means “absurd.”

While this issue was also debated in *Hamdi*, the courts in that case declared they did not need to decide its merits. In *Lindh*, the government was seeking to prosecute an individual for, among other

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178. *United States v. Lindh*, 212 F. Supp. 2d 541, 557 n.35 (E.D. Va. 2002).

things, mere participation in combat; therefore, the issue of whether he was a privileged or unprivileged combatant was crucial. In *Hamdi*, by contrast, the government was seeking to hold an individual without trial as a non-POW enemy combatant. The crucial preliminary issue in *Hamdi* was, therefore, whether unprivileged combatants, like privileged combatants, may be held without trial for the duration of the conflict. If they may be so held, then, on the issue of the length of detention, it does not matter whether they are privileged or unprivileged—thus rendering moot the issue of the applicability of the Article 4(A)(2) criteria to regular armed forces. The issue of holding unprivileged combatants without trial like POWs was also crucial in *Padilla*, particularly because no plausible argument could be made that Padilla was a privileged combatant.

For the Supreme Court in *Padilla* and *Hamdi*, resolution of this issue partly depended on the interpretation of a passage from the World War II-era case *Ex parte Quirin*.<sup>179</sup> In that case, the Court declared:

Lawful combatants are subject to *capture and detention* as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to *capture and detention*, but in *addition they are subject to trial* and punishment by military tribunals for acts which render their belligerency unlawful.<sup>180</sup>

The interpretive debate turned on whether the “detention” mentioned in the second sentence in connection with unprivileged combatants is conditioned on the “trial” to which they are “in addition” subject—or whether, as with privileged combatants in the first sentence, this “detention” is only conditioned on the duration of the conflict.

From the perspective of my argument about strategic instrumentalization, it is striking to note that both many critics and many defenders of the U.S. government have read the *Quirin* passage as giving the government a choice about how to treat unprivileged combatants. Critics of the U.S. government have argued that the passage requires that the government *either* treat unprivileged combatants as prisoners of war *or* put them on trial for mere participation in hostilities.<sup>181</sup> Defenders of the government would add a third choice: detaining them without trial for the duration of the

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179. 317 U.S. 1 (1942).

180. *Id.* at 31 (emphasis added).

181. See, e.g., Brief of Amici Curiae American Civil Liberties Union et al., *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02CIV445(MBM)).

conflict, like privileged combatants, yet without the status or full legal benefits of prisoners of war.

As I have noted, this issue was relevant in both *Hamdi* and *Padilla*—in *Hamdi*, in the event that the courts ruled that he was an unprivileged combatant, in *Padilla*, because he had no claim to privileged combatant status. In *Padilla*, the district court agreed with the government that “there is no basis to impose a requirement” to put unprivileged combatants on trial; rather, they may simply be held for the duration of the conflict “on the same ground that the detention of prisoners of war is supportable: to prevent them from joining the enemy.”<sup>182</sup> Similarly, in *Hamdi*, the Fourth Circuit ruled that, on this issue, “the distinction between lawful and unlawful combatants” is a “distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case.”<sup>183</sup> Finally, the Supreme Court in *Hamdi* declared that, although in the World War II-era cases an unprivileged combatant who was a U.S. citizen was put on trial, “nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities.”<sup>184</sup>

Again, the Second Circuit in *Padilla* stands out. The court emphasized some of the key features of the “war on terror” that distinguish it from traditional combat in order to express skepticism about whether the detention of Padilla came under the president’s war powers. First, the court distinguished the World War II-era cases on the grounds that “the petitioners in *Quirin* admitted that they were soldiers in the armed forces of a nation against whom the United States had formally declared war”<sup>185</sup>—thereby supporting the statist/governmentalist tilt in defining combatant status. It strongly suggested that the government must put on trial those who are not “soldiers” in that traditional sense in order to hold them, at least if they are U.S. citizens.<sup>186</sup> Moreover, the court emphasized the spatially untraditional features of terrorism and counter-terrorism by highlighting the fact that Padilla, unlike Hamdi, was not “captured in a zone of active combat.”<sup>187</sup> Thus, as I noted, while the court did not contest the existence of a “war” with Al-Qaeda, its functionalism allowed it to express its reluctance to view as combatants those who

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182. *Padilla v. Bush*, 233 F. Supp. 2d 564, 593 (S.D.N.Y. 2002).

183. *Hamdi v. Rumsfeld*, 316 F.3d 450, 469 (4th Cir. 2003).

184. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004).

185. *Padilla v. Rumsfeld*, 352 F.3d 712, 716 (2d Cir. 2003).

186. *Id.* at 716–17.

187. *Id.* at 717.

were engaged in pursuing that “war” in the manner most distinctive to it. Or, to give a formulation with a more precise functionalist disaggregation of the issues: at least when it came to U.S. citizens, the court was reluctant to view them as combatants insofar as such a designation implied detention in the manner distinctive to combatants, i.e., without criminal trial. For this functionalist court, war-based powers could not simply be transferred wholesale to this untraditional conflict, but required evaluation on a case-by-case (or rather, power-by-power) basis.

### C. Summary

The foregoing examination of the post-9/11 cases in legal historical context shows courts struggling to preserve or transform the legal construction of war in the face of recent challenges. Such challenges include attempts to effect an unprecedented expansion of the legal construct of war or to subject its doctrines to strategic instrumentalization. The courts’ responses to these challenges vary widely. They include factualist and formalist methods of avoiding a direct confrontation with the challenges (e.g., the *Padilla* district court and the decision of the Supreme Court in *Hamdi* on “what is war”). They include functionalist disaggregation of issues in order to block attempts at unprecedented expansion or instrumentalization (e.g., the *Padilla* circuit court on “what is war” and “who is a warrior”). They also include acceptance of the government’s instrumentalization of the legal categories (e.g., the *Padilla* district court and the circuit and Supreme Court decisions in *Hamdi* on holding unprivileged combatants without trial). They also include a variety of expressions of anxiety about their own work in preserving or transforming the legal construction of war (e.g., the *Padilla* district court and the Supreme Court’s decision in *Hamdi*).

My analysis shows that none of the courts under consideration squarely rejected the government’s claim that the conflict with Al-Qaeda can be viewed as a war to which at least some aspects of the international and domestic laws of war should attach. On the “who is a warrior” issue, only the *Padilla* circuit court came close to rejecting the government’s position on the expansion of the category in its holding that the full reach of the executive’s “inherent wartime powers” could not extend to individuals like Padilla, who stood accused of being an archetypal participant in the unique “war” between the United States and Al-Qaeda. Similarly, on the issue of holding unprivileged combatants without criminal trial, only the

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*Padilla* circuit court came close to rejecting the government's position, though limited to its specific application to U.S. citizens detained in the United States.

None of this detracts from the significance of the Supreme Court's decision in *Hamdi*. Though it accepted all of the government's major substantive legal claims about the detention of enemy combatants, the Court provided Hamdi with very significant procedural rights to contest the claim that he is, in fact, such a combatant. However, if the results of the procedural review mandated by the Court yield a finding that he is, in fact, an enemy combatant, then the Court's decision does not require a criminal trial. Rather, Hamdi may be held for the duration of the conflict—provided, of course, that the nature of that “conflict” does not ultimately prove to be such as to cause the judicial understanding of war to “unravel.”

