

THINKING THE UNTHINKABLE: HAS THE TIME COME TO OFFER COMBATANT IMMUNITY TO NON-STATE ACTORS?

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I. INTRODUCTION

If there is one designation that has come to symbolize the complexity of characterizing the struggle against international terrorism as an armed conflict, it is “unlawful enemy combatant.” That designation, adopted by the Bush Administration to label Taliban and al-Qaeda fighters captured in Afghanistan beginning in 2001, has come to symbolize a variety of propositions. For the Bush Administration, it was a designation of illegitimacy, providing the foundation for a series of legal and policy decisions allowing a level of treatment inconsistent with the traditional standards applicable to prisoners of war. For critics of the United States, it was the symbolic lightning rod that reflected the ultimate illegitimacy of both designating the struggle against terrorism as a “global war” and the legal exceptionalism that appeared to define the U.S. approach to the treatment of opponents captured in the course of this struggle.¹

For the U.S. military and the al-Qaeda and Taliban operatives it detained following September 11, the characterization represented something much more palpable. From a detention standpoint, it defined a group of subdued enemy personnel who would be detained to prevent their return to hostilities, but who would also be denied the legal status of prisoner of war and the accordant protections of the Third Geneva Convention.² This characterization was also central to the U.S. theory of criminal responsibility for these captives. Based on a theory of war crimes liability first enunciated by the U.S. Supreme Court in *Ex parte Quirin* (a theory considered dubious by many international law experts), operating as an unlawful enemy combatant was alleged by the

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1. See Elizabeth Iglesias, *Article II: Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181, 187 (2008).

2. See Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L.J. 1, 3-6 (2007); see also George C. Harris, *Terrorism, War, and Justice: The Concept of the Unlawful Enemy Combatant*, 26 LOY. L.A. INT'L & COMP. L. REV. 31, 32 (2003).

United States as a crime in and of itself—a crime falling within the subject-matter jurisdiction of military tribunals.³ Accordingly, the designation also resulted in the creation of military commissions to try these captives for, *inter alia*, their participation in hostilities.⁴

These issues of detention and criminal culpability are, however, best understood as consequences of the core significance of the unlawful combatant characterization. The concept of the unlawful enemy combatant is more than just a legal status; it is a moral condemnation. That condemnation is based on a simple premise: only properly authorized and qualified individuals may legitimately engage in armed hostilities. All other individuals lack the “privilege” to do so.⁵ Indeed, the “unlawful combatant” is a synonym for the “unprivileged belligerent,” the substitute characterization adopted by the Obama administration for these detainees.⁶ Operating as a “combatant” without privilege deprives the individual of legal and moral equivalency with his privileged opponent: state actors. As a result, the rules established by international law to protect these “privileged” combatants must be denied to the unprivileged counterpart.⁷

This theory of “status” and “privilege” among combatants is a genuine article of faith. It is derived from an unassailable interpretation of the Third Geneva Convention’s prisoner of war qualification equation. Prisoner of war status, which is international law’s manifestation of the “privileged” or “lawful” combatant, is reserved exclusively for combatants who fight on behalf of a state during inter-state armed conflict and who satisfy the widely known conditions of carrying arms openly: wearing a fixed distinctive emblem recognizable at a distance, operating under responsible command, and complying with the laws and customs of war. What is equally important in this equation, however, is that these factors apply only to combatants engaged in inter-state armed conflicts, effectively excluding from the lawful combatant status an individual fighting on behalf of an entity not affiliated with state authority.⁸

3. “[T]he Quirin Court ruled that unlawful enemy combatants ‘are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.’” David B. Rivkin, Jr. & Lee A. Casey, *The Use of Military Commissions in the War on Terror*, 24 B.U. INT’L L.J. 123, 132 (2006) (citing *Ex parte Quirin*, 317 U.S. 1, 31 (1942)).

4. Military Order of Nov. 13, 2001, 3 C.F.R. § 918 (2002).

5. This is evidenced by the four Geneva Requirements needed to qualify as a prisoner of war and be subject to the Convention’s protections upon capture. The requirements are “(1) a responsible command structure; (2) a uniform or other distinctive dress separating them from the civilian population; (3) carrying arms openly; and (4) conducting operations in accordance with the laws and customs of war.” Rivkin & Casey, *supra* note 3, at 131-32.

6. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009).

7. Rivkin & Casey, *supra* note 3, at 132 (“It was fully recognized that if the regular armed forces of a sovereign state failed to meet these four minimum criteria then its members would lose their status as lawful combatants . . . should they fail in this respect they are liable to lose their special privileges of armed forces”) (citation omitted).

8. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug.

During the past several decades the law of armed conflict applicable to armed conflicts between states (international armed conflicts) and armed conflicts between states and non-state groups (non-international armed conflicts) has undergone a major transformation. Customary norms originally developed to apply exclusively to international armed conflict have migrated to the realm of non-international armed conflict. As a result, the regulatory distinction between these two categories of armed conflict is increasingly imperceptible. However, entitlement to prisoner of war status remains perhaps the most significant exception to this trend. States have been absolutely unwilling to extend this privilege with its accordant lawful combatant immunity to non-state operatives. The determination to preserve the line between the authority to participate in armed conflict with state sanction and the illegitimacy of doing so without such sanction is almost certainly motivated by a desire to preserve the prerogative to sanction such unprivileged belligerents for participating in hostilities. Thus, for states, tribunals charged with interpreting and applying this law, and most commentators, extending combatant immunity to non-state belligerents has and remains unthinkable.

For United States military lawyers, this equation is often referred to as the “right type of conflict” and “right type of person” test.⁹ When applied to the “war on terror,” this qualification equation produced an inevitable outcome: individuals fighting on behalf of non-state entities could never qualify as prisoners of war.¹⁰ Nonetheless, by designating the struggle as an “armed conflict” they were thrust into a twilight zone of status. Because they were belligerents in an alleged armed conflict, they could be targeted and detained like any other “lawful” combatant. However, because they fought for a non-state entity, they could not qualify as prisoners of war and would be condemned as international criminals for this participation.¹¹

12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW Convention]; Int'l Comm. of the Red Cross, *Commentary to Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4*, 51-52 (Jean de Preux ed., 1960) [hereinafter *GPW Commentary*]; see also Rivkin & Casey, *supra* note 3, at 132 (“[T]hese criteria developed as part of customary international law, and were equally applicable to the lawful belligerent armed forces of a sovereign state as the sine qua non of that status.”).

9. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., LAW OF WAR DESKBOOK 120 (2010), available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook.pdf; see also Lieutenant Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 42-43 (2002).

10. Memorandum from George Bush, President of the United States, to Richard Cheney, Vice President of the United States, Humane Treatment of al-Qaeda and Taliban Detainees (Feb. 7, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> [hereinafter Bush Memo].

11. *Id.*; see also ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 197 (2008) (“If these other persons participate in hostilities without satisfying [being a member of the armed forces], they may be prosecuted for having taken part in the conflict.”).

This theory of detention without status first adopted by President Bush was ultimately endorsed by both Congress¹² and the Supreme Court.¹³ Accordingly, there is little question that *if* such individuals are detained in the context of an armed conflict by the United States and are properly found to be enemy combatants or belligerents,¹⁴ the detention without prisoner of war status theory that continues to this day to be the legal basis for preventive detention, is legally sound. Of course, many dispute both of these predicate assumptions, arguing that the struggle against terrorism is not an armed conflict and that terrorist operatives are not properly designated as enemy belligerents.¹⁵ But assuming *arguendo* that the United States and other states will persist in this view of the struggle against terrorism, the rationale that formed the basis for this qualification equation will continue to result in a practical anomaly: individuals will be preventively detained based on an invocation of the customary law of armed conflict but will be denied prisoner of war status and the protections resulting from that status.

At the center of this protection is the concept of combatant immunity—the protection of the enemy captive from criminal sanction for his or her lawful, pre-capture belligerent acts (acts that comply with the regulatory norms of the law of armed conflict). This immunity, and the other humanitarian protections afforded to prisoners of war, developed in large measure to incentivize compliance with humanitarian law. Accordingly, belligerents fighting on behalf of a non-state entity, even when conducting their belligerent activities in accordance with the rules of war, are denied both the benefits of international humanitarian law and, by implication, the incentive to comply with this law based, not on their conduct, but instead on the cause for which they fight.

The unlawful combatant characterization has spawned a proverbial avalanche of legal scholarship, commentary, and analysis. This discourse has even been punctuated by several Supreme Court decisions, such as *Hamdi v. Rums-*

12. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (codified as amended at 42 U.S.C. § 2000dd, 10 U.S.C. § 801 & 28 U.S.C. § 2241 (2006)).

13. “[W]e conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe. . . . Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 517, 519 (2004).

14. President Obama has substituted the term “unlawful enemy belligerent” for his predecessor’s use of “unlawful enemy combatant.” See Joanne Mariner, *A First Look at the Military Commissions Act of 2009, Part One*, FINDLAW (Nov. 4, 2009, 11:25 AM), <http://writ.news.findlaw.com/mariner/20091104.html> (This new designation adds “being a member of al Qaeda” is a distinct category for classification as an unlawful enemy belligerent.).

15. See Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT’L L.J. 135, 141-49 (2008).

*feld*¹⁶ and *Hamdan v. Rumsfeld*.¹⁷ What has been relatively absent, however, is a critical assessment of whether the underlying rationale for the legal dichotomy between the lawful and unlawful combatant is logically applicable to non-state transnational actors. Such an assessment must focus on not only the origins of this dichotomy, but also—and perhaps more importantly—on the ostensible effect intended by denial of lawful combatant status for non-state actors. Considering the issue through this “effects based” analytical lens raises a genuine question as to whether the denial is the most effective way to achieve these desired effects.

This Article will explore this question by focusing on both of these proposed analytical elements. It will begin with a review of the origins of the lawful/unlawful enemy combatant dichotomy. It will then discuss the ostensible effects the United States desires to achieve by applying this dichotomy to transnational non-state actors. Ultimately, it will question whether the unthinkable—extending the opportunity to qualify for lawful combatant status with its accordant combatant immunity—might actually offer a greater likelihood of achieving these effects than clinging to the current lawful/unlawful combatant dichotomy.

II. THE ORIGINS OF THE LAWFUL/UNLAWFUL COMBATANT DICHOTOMY

A. The Treaty Foundation

Even the most cursory review of the history of humanitarian law reveals the origins of the lawful/unlawful combatant dichotomy. This dichotomy is inextricably intertwined with the concept of prisoner of war status, a concept that traces its roots to the development of the nation-state and the regulation of hostilities between armed forces serving those states.¹⁸ It is therefore unsurprising that prisoner of war status remains today contingent on two fundamental predicates: first, a conflict between two or more states; second, that the individual warrior fighting on behalf of a state comply with a number of requirements intended to provide reciprocal benefits for the warring states.

Prisoner of war status is, however, a relatively modern concept. Historically, battlefield captives were at the mercy of their captors, who could enslave them, ransom them, or kill them. But with the emergence of the nation-state in

16. 542 U.S. at 520.

17. 548 U.S. 557, 635 (2006).

18. See Manooher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 CORNELL INT’L L.J. 59, 61-62 (2003) (“International humanitarian law is, broadly, that branch of public international law that seeks to moderate the conduct of armed conflict and mitigate the suffering it causes. It is predicated upon ideas . . . namely, that methods and means of warfare are subject to legal and ethical limitations, and that the victims of armed conflict are entitled to humanitarian care and protection.”).

Europe, those states began to temper the plenary authority of the capturing power. The captured enemy soldier began to be perceived more as a victim of the states engaged in conflict, and as a result the consequence of captivity became more focused on preventing the captive from returning to hostilities.

In ancient times the concept of “prisoner of war” was unknown. Captives were the “chattels” of their victors who could kill them or reduce them to bondage. Throughout the ages, innumerable captives owed humane treatment no doubt to the mercy of their victors. It is a fact, too, that sovereigns or military commanders have been known to ordain that their armies deal humanely with the prisoners who fell into their hands. More than once, philosophical or religious doctrines checked the savagery which prisoners might have been led to expect. The French Revolution, inspired by the idea of the Encyclopedists of the eighteenth century, actually decreed that “prisoners of war are under the safeguard of the Nation and the protection of the laws.”¹⁹

The transformation from a customary norm to a positive rule came in the form of Article 1 of the Regulations Respecting the Laws and Customs of War on Land Annexed to the Hague Convention of 1899.²⁰ This article represented the first codification of a prisoner of war qualification equation, although that status was treated as a byproduct of qualification as a lawful belligerent. Accordingly, Article 1 established that belligerent status—a status triggering the rights and obligations of the law of war (to include the right to engage in hostilities)—was contingent on two requirements. First, the implicit requirement that the individual be acting under the authority of a state (derived from the fact that the treaty applied only to states); second, that the individual be part of an organized military force complying with the now ubiquitous following four qualification conditions:

- (1) To be commanded by a person responsible for his subordinates;
- (2) To have a fixed distinctive emblem recognizable at a distance;
- (3) To carry arms openly; and
- (4) To conduct their operations in accordance with the laws and customs of war.²¹

Considering that this treaty focused exclusively on the regulation of interstate conflicts, it was logical that only combatants associated with a state were covered by Article 1. Thus, the qualification criteria established by the treaty were implicitly predicated on a link between the warrior and state action. This point is emphasized by the International Committee of the Red Cross Commentary to Additional Protocol I: “According to the Conventions, combatant status is given to regular forces only which profess allegiance to a government or authority which is not recognized by the adversary, but which claims to represent

19. *GPW Commentary*, *supra* note 8, at 44.

20. Convention (II) with Respect to the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 403.

21. *Id.*

a State which is a Party to the conflict.”²²

Association with a state party to a conflict was not, however, sufficient in and of itself to satisfy the Hague lawful belligerent qualification standard. Instead, in order to qualify as “lawful” belligerents, warriors had to comply with the four conditions of Article 1. This qualification standard would evolve over time into an axiom of international humanitarian law, and would be solidified in the primary treaty developed to address the treatment of prisoners of war: the Third Geneva Convention (GPW).²³ The 1949 version of this treaty, currently in force, is in fact a successor to the 1929 treaty of the same name.²⁴ Both treaties built on the foundation provided by the Hague Regulations by linking prisoner of war status to the two prong “right type of conflict” and “right type of person” equation. Unlike its Hague predecessor, the GPW did not explicitly indicate that individuals qualifying for prisoner of war status were also vested with the legal privilege of engaging in combat. Nevertheless, because the definition of prisoner of war is derived from the original Hague definition of lawful combatant, it is almost universally recognized that the two terms had become essentially synonymous.²⁵

Any lingering doubt as to the relationship between the POW qualification criteria and lawful combatant status was eliminated when the 1949 GPW was supplemented in 1977 by Additional Protocol I.²⁶ That treaty specifically addressed the relationship between the qualification for prisoner of war status and the definition of combatant. This treatment was linked to the provisions of Additional Protocol I developed to protect the civilian population from the harmful effects of hostilities. The first component of this protection is what Additional Protocol I refers to as the Basic Rule: civilians are immune from being made the deliberate object of attack.²⁷ This rule, which is a codification of the customary humanitarian law principle of distinction,²⁸ in turn, required a definition of both combatants and civilians—definitions that had been surprisingly absent from the Geneva Conventions.

Additional Protocol I first defines combatants. According to the treaty,

22. Int'l Comm. of the Red Cross, *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 43*, 508 (Yves Sandoz et al. eds., 1987) [hereinafter *Additional Protocol I Commentary*].

23. GPW Convention, *supra* note 8.

24. Convention Relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, 49 Stat. 3267, U.N.T.S. No. 846.

25. See *supra* notes 18-19; see also *United States v. Lindh*, 212 F. Supp. 2d 541, 557 n.35 (E.D. Va. 2002).

26. Protocol Additional 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 *Additional Protocol I*].

27. *Id.* art. 35.

28. See Knut Ipsen, *Combatants and Non-Combatants*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 89-93 (D. Fleck ed., 2d ed. 2008).

combatants are members of the armed forces. More importantly, Additional Protocol I indicates that by virtue of that membership such individuals are entitled to participate in hostilities.²⁹ Although this definition does not explicitly incorporate the GPW definition of POW, it does make the GPW Article 4 POW qualification requirements central to its definition:

Section II. Combatants and Prisoners of War, Art 43. Armed forces

1. 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.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.³⁰

Effective implementation of the basic rule of distinction required more than just a definition of combatant; it required a definition of civilian, the primary beneficiary of the rule's protection. Unlike the combatant definition, however, Additional Protocol I does not attempt to provide a comprehensive description of everyone who falls within the definition of civilian. Instead, the treaty simply adopted a definition by exclusion: civilians are all individuals who are not combatants.

It was this definition by exclusion that finally led to the explicit link between combatant status and POW qualification. In order to establish who was *not* a civilian, the drafters of Additional Protocol I referred back to the GPW. A civilian, according to Article 50, is any person *who is not* a combatant, which is further defined as all individuals not qualified for POW status pursuant to Article 4 of the GPW (with the exception of civilians accompanying the armed forces in the field and civilian auxiliary aircraft crewmembers, two unique categories of civilians who although entitled to POW status upon capture (for purposes of preventing their return to the support function they provided their force), are not members of the armed forces in the sense of being combatants qualified to participate in hostilities).³¹

29. Additional Protocol I art. 43-44.

30. *Id.*

31. See Geoffrey S. Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian*

Art 50. Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.³²

According to the International Committee of the Red Cross Commentary that accompanies Article 50, this reliance on the GPW POW qualification article was based on the conclusion that qualification for status as a POW was synonymous with being a combatant:

The provision under consideration here goes one step further in declaring that members of the armed forces have the status of combatants, with two exceptions: medical and religious personnel. In the Third Convention, which deals only with the protection of prisoners of war, and not with the conduct of hostilities, this combatant status is not explicitly affirmed, but it is implicitly included in the recognition of prisoner of war status in the event of capture. The Hague Regulations expressed it more clearly in attributing the "rights and duties of war" to members of armies and similar bodies. The Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces (with the above-mentioned exceptions) can participate directly in hostilities, i. e., attack and be attacked.³³

This relationship between POW qualification and lawful combatant status has been the critical foundation for the U.S. treatment of captured and detained al-Qaeda operatives. Since the inception of the self-proclaimed Global War on Terror, the United States has invoked a humanitarian-law-derived authority to preventively detain these individuals because their association with al-Qaeda rendered them combatants.³⁴ However, because these individuals did not operate on behalf of a state, they were conclusively excluded from the protections afforded by the GPW.³⁵ This was not, however, the only negative consequence that flowed from this lack of state connection. Because these individuals could not even claim applicability of the GPW POW qualification provision, they conclusively lacked the status of lawful combatants. As a result, the United States also asserted a humanitarian-law-based right to sanction their participa-

Battlefield Functions, 2 J. NAT'L SECURITY L. & POL'Y 257, 263-64 (2006); see also *GPW Commentary*, *supra* note 8, at 51-65.

32. Additional Protocol I, *supra* note 26.

33. *Additional Protocol I Commentary*, *supra* note 22, at 515.

34. Cf. Harris, *supra* note 2, at 35-36 ("The Administration justifies its current policy toward suspected terrorists on the basis that the current threat of terrorism requires an emphasis on prevention rather than justice."). Former Secretary of Defense Rumsfeld once stated that "[g]iven the power of weapons and . . . the number of terrorists that exist in the world, our approach has to be to try to protect the American people, and . . . protect deployed forces from those kind [sic] of attacks." *Padilla v. Bush*, 233 F. Supp. 2d 564, 574 (S.D.N.Y. 2002).

35. See *supra* note 9.

tion in hostilities as a violation of international law, namely the unlawful participation in hostilities.³⁶

Both of these interpretations of humanitarian law *vis-a-vis* al-Qaeda captives triggered intense criticism and scrutiny, and remain the subject of ongoing litigation.³⁷ This criticism and accordant legal uncertainty are not, however, focused on the inapplicability of the GPW to non-state actors, but instead on whether it is legitimate to bifurcate the conflict with al-Qaeda from the conflict with the Taliban, and whether engaging in hostilities in the context of a non-international armed conflict without qualifying as a lawful combatant provides a legitimate basis for international criminal sanction.³⁸ Assuming, *arguendo*, that the United States is engaged in a non-international armed conflict with al-Qaeda, the inapplicability of the GPW to al-Qaeda captives becomes far less controversial. This is the result of a simple premise: POW qualification has been and continues to be reserved for individuals fighting on behalf of a state, and therefore this qualification is inapplicable in the context of non-international armed conflicts.

This point is illustrated by comparing the treatment of the other group of captives designated as unlawful enemy combatants: Taliban personnel. Unlike their al-Qaeda counterparts, the U.S. concluded that these individuals were captured in the context of an inter-state armed conflict (after some initial confusion on this point);³⁹ like their al-Qaeda counterparts, they were also designated as unlawful enemy combatants.⁴⁰ However, for these captives, the designation was *not* based on the fact that they were not fighting on behalf of a state, but

36. See *Ex parte Quirin*, 317 U.S. 1, 31 (1942); Rivkin & Casey, *supra* note 3, at 132 (“When the Quirin Court ruled that unlawful enemy combatants are ‘subject to trial and punishment by military tribunals for acts which render their belligerency unlawful,’ it was stating a long-established and universally accepted rule of law.”).

37. See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866 (D.D.C. 2009).

38. See *id.* at 870-74; see also David Rifkin, Jr. & Lee A. Casey, Letter to the Editor, *It's Not Torture, and They Aren't Lawful Combatants*, WASH. POST, Jan. 11, 2003, at A19 (“The United States has not granted the rights of honorable prisoners of war to the Guantanamo Bay detainees because they are neither legally nor morally entitled to those rights. Only lawful combatants, those who at a minimum conduct their operations in accordance with the laws of war, are entitled to POW status under the Geneva Convention. By repudiating the most basic requirements of the laws of war—first and foremost the prohibition on deliberately attacking civilians—al Qaeda and the Taliban put themselves beyond Geneva’s protections. Article 17 of that treaty . . . is inapplicable to the Guantanamo detainees and does not limit the United States’ right to interrogate them.”).

39. See Bush Memo, *supra* note 11.

40. “Even though the Taliban was not the legitimate nor the predominantly recognized government of Afghanistan, the United States stipulated that the Geneva Conventions would apply to Taliban combatants because Afghanistan is a signatory to the Geneva Conventions and the Taliban exercised de facto governance over” the country. However, once the United States “subsequently applied the lawful belligerency requirement of LOAC to the collective conduct of the Taliban and its armed forces, such conduct was determined to be unlawful.” Joseph Bialke, *Al-Qaeda & Taliban Unlawful Combat Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 16 (2004).

instead because although they met this requirement of the GPW POW qualification equation, they failed to meet the “right type of person” component of that equation because the Taliban armed forces failed to wear a distinctive uniform and routinely disregarded the laws and customs of war.⁴¹ Thus, while the ultimate outcome of analysis resulted in denial of POW status, Taliban captives were at least *in theory* capable of qualifying for that status. In contrast, al-Qaeda captives were not, even if they complied with the four criteria element of the qualification equation.⁴²

B. The “Right Type of Conflict” Limitation to Combatant Immunity

This “right type of conflict” predicate to GPW applicability, and by implication to status as a lawful combatant, is one of the last remaining substantive distinctions between the regulation of international (inter-state) and non-international (state v. non-state group) armed conflicts. The origin of this dichotomy is of course the state-centric focus of humanitarian law.⁴³ Indeed, until the 1949 revision of the Geneva Conventions, this was the exclusive focus of the law.⁴⁴ Although that revision did include regulation of non-international armed conflicts within the scope of humanitarian law, it in no way altered this most fundamental dichotomy.

By the time the international community set about revising the Geneva Conventions in 1947, the experiences of the inter-war years had apparently generated enough concern to justify an intrusion of international regulation into the realm of intra-state hostilities, a realm that had up until that point been within the exclusive sovereign prerogative of states.⁴⁵ But acknowledging the humanitarian necessity to impose international constraint onto the parties to non-international conflicts only begged the ultimate question: what rules should apply? The ICRC proposal in response to this question was at the same time simple and controversial. Motivated by the quite legitimate conclusion that there was no material difference in the suffering associated with the two types of armed conflicts, the ICRC proposed applicability of the Geneva Conventions to *any* armed conflict, rendering the inter-/intra-state distinction irrelevant.⁴⁶ If humanitarian protection was the objective of the Conventions, and

41. See *id.* at 16-17; Bush Memo, *supra* note 11.

42. See Bialke, *supra* note 40, at 34 (“Members of Al-Qaeda . . . are classic unlawful combatants . . . who, amongst other failings, are not authorized by a state or under international law to take a direct part in an international armed conflict, but do so anyway.”).

43. See *GPW Commentary*, *supra* note 18, at 21-24.

44. *GPW Commentary*, *supra* note 8, at 19.

45. See Mofidi, *supra* note 18, at 63-64.

46. See *GPW Commentary*, *supra* note 8, at 28-44.

[The Geneva Conventions were] concerned with people as human beings, without regard to their uniform, their allegiance, their race or their beliefs, without regard even to any obligations which the authority on which they depended might have assumed in their name or in their behalf. There is nothing astonishing, therefore, in the fact that the Red Cross has long

if the obligation to protect of the individual had evolved to a level where international law could justifiably intrude upon the internal affairs of states, such a proposition seemed both rational and justified.

This proposal never gained momentum. The response of the states negotiating the treaties indicated the acceptability of injecting some minimal humanitarian regulation into the realm of non-international armed conflicts.⁴⁷ However, the anticipated “internal” nature of these conflicts mandated a much more significant degree of sovereign prerogative to deal with individuals who take up arms against government authority, with the accordant outcome that domestic law remained the dominant source of authority applicable to such conflicts. The end result of this response was the development of Common Article 3 to the four Geneva Conventions.⁴⁸ While the endorsement of humanitarian regulation for such conflicts was certainly a ground-breaking development in the law, the substantive impact of this article was quite modest, as the ICRC Commentary indicates. In essence, it was understood as a mandate to respect the most fundamental precepts of human dignity—precepts that should already be obligatory on states even during peacetime.

Central to the debate over the regulation of non-international armed conflicts and the outcome that took the form of Common Article 3 was the issue of prisoner of war status and the accordant combatant immunity it provides. The original ICRC proposal would have resulted in an unqualified application of the GPW to non-international armed conflicts. Accordingly, the proposal would have required state parties to extend prisoner of war status to non-state armed opponents who satisfied the “right person” qualification requirements of

been trying to aid the victims of civil wars and internal conflicts, the dangers of which are sometimes even greater than those of international wars.

Id. at 28.

The emergence of guerilla warfare raised the issue of whether guerilla fighters should be entitled to prisoner of war status. Also, Article 3 the only portion of the Geneva Conventions devoted to civil wars, proved inadequate in light of the intensity and scale of the fighting accompanying internal armed conflicts.” In response to these new concerns, the ICRC invited states to develop new humanitarian provisions to supplement the Geneva Conventions. These ultimately became the Additional Protocols of 1977.

Mofidi, *supra* note 18, at 65 (footnotes omitted).

47. See *GPW Commentary*, *supra* note 8, at 35.

[Common Article 3] has the merit of being simple and clear. It at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for interventions by the [ICRC] or any other impartial humanitarian organization—interventions which in the past were all too often refused on the ground that they represented intolerable interference in the internal affairs of a State.

Id. There were 185 signatories to the original Geneva Conventions, but only 100 have ratified Protocol I and 125 have ratified Protocol II. The United States has yet to ratify either of these Additional Protocols. *Mofidi*, *supra* note 18, at 66.

48. GPW Convention, *supra* note 8, art. 3. By applying standards to all conflicts regardless of their nature, countries placed a floor on the standards of treatment of captured belligerents across the board. Despite ceding a modicum of sovereignty over prisoner treatment, this was the consensus on how best to ensure their own soldiers would be treated humanely—by agreeing to treat any enemy belligerents under these humane treatment standards.

Article 4 of the Convention. This aspect of the proposal doomed it from the outset. The states revising the GPW realized that armed conflict against internal opposition groups was a virtual certainty in the foreseeable future. Indeed, several of these types of conflict were already ongoing. Accepting the ICRC proposal would have profoundly impacted the sovereign prerogative of states dealing with such internal dissident forces: it would have deprived governments of the ability to hold them criminally accountable for their efforts to topple lawful government authority, because POW status would have prevented the state from prosecuting these dissident operatives for any offense for which its own forces could not be prosecuted, which would have included the harmful consequences of combatant conduct.⁴⁹

It is, however, important to bear in mind that, at the time the ICRC made the proposal to extend the GPW to any armed conflict, non-international armed conflict was understood to be synonymous with internal armed conflict. This is relatively apparent from both the Final Record of the Geneva Conventions and from the ICRC Commentary to Common Article 3.⁵⁰ While the meaning of non-international armed conflict has undergone a significant evolution since that time, and particularly since the U.S. initiated its military response to the threat of transnational terrorism, it is this original meaning that provides the context to understand why states revising the Conventions viewed the extension of POW status to non-state actors as creating an unacceptable and ultimately unjustified intrusion upon their sovereignty.

Combatant immunity exacts an obvious toll from the ability to punish individuals who act to harm the state. Indeed, the immunity extended to a captured enemy soldier who qualifies for POW status deprives the detaining power of punishing the soldier not only for fighting against the state, but even for killing members of the detaining powers armed forces.⁵¹ Nonetheless, in the context of inter-state armed conflicts this was a cost considered acceptable, and even beneficial. The reciprocal application of this immunity protected the detaining

49. See *United States v. Lindh*, 212 F. Supp. 2d at 553. Holding that Lindh was not a lawful combatant, the Court stated that:

Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict. . . . [C]ombatants "may not be sentenced . . . to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

Id. (citing GPW Convention, *supra* note 8, art. 87).

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

GPW Convention, *supra* note 8, art. 82.

50. *GPW Commentary*, *supra* note 8.

51. "[P]risoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited." GPW Convention, *supra* note 8, art. 13.

powers forces to the same extent as it did captured enemy soldiers.⁵² But even more significant is the recognition that all soldiers vested with this benefit act on behalf of state authority in a contest historically regulated by international law.⁵³ As a result, it has become a foundational tenet of humanitarian law that if those individuals comply with the requirements imposed by international law to enhance the ability to mitigate the suffering associated with armed conflict, punishment for discharging the duty imposed on them by their state of nationality is both inappropriate and unjust.⁵⁴ This tenet is implemented through the concept of combatant immunity.

In 1949 this same logic was not considered applicable to internal dissident forces. Unlike their inter-state counterparts, internal dissident forces were not viewed as moral or legal equals to state forces. States did not view these dissident forces as having been compelled by national duty to fight on behalf of lawful authority; instead, their decision to take up arms against their state was regarded as *prima facie* unlawful and invalid.⁵⁵ Furthermore, the participation in hostilities against lawful government authority was and remains almost universally regarded as perhaps the most serious crime against the state: treason. Thus, in a very real sense dissident forces did not share the status of victims of war by virtue of being called into military service in response to a national duty. Instead, while they were entitled to be treated humanely upon capture, they were not entitled to claim the same “privilege” as their inter-state conflict counterparts.

Common Article 3 reflects this dichotomy of perception. That article established a treaty-based obligation to treat humanely any individual rendered *hors de combat* in the context of non-international armed conflict. Common Article

52. “[A]ll prisoners of war shall be treated alike by the detaining power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinctions founded on similar criteria.” GPW Convention, *supra* note 8, art. 16.

53. This becomes clear when considering the qualification for the right type of conflict. The “regular members of the armed forces” prong necessarily excludes those not fighting under the aegis of one of the high contracting parties, indicating that only state authority can justify an armed conflict, and excluding those acting under other authority. If “[r]egular members of the armed forces . . . are engaged in a mission that seem them actively take part in hostilities, they are ‘combatants.’” KOLB & HYDE, *supra* note 11, at 197.

54. *Cf.* Bialke, *supra* note 40, at 9-10.

55. *See id.* at 35-36.

Since the time of the Romans to the present . . . the customary ‘Law of Nations’ has categorized illegitimate stateless piratical forces like al-Qaeda as *hostes humani generis*, ‘the common enemies of humankind.’ Because the conduct in armed conflict of such stateless freelance forces is not regulated and controlled effectively by a sovereign country, *hostes humani generis* are prohibited universally from participating in armed conflicts” and “any such participation is unlawful as a matter of international law.” Because of its prohibited status in international law, “these *per se* unlawful combatants are under no sovereign with the power to grant them combatant’s privilege, and, therefore, have no legal authority to engage in combat, to attack opposing combatants, or to destroy property in international armed conflict.”

Id.; see also J.L. WHITSON, THE LAWS OF LAND WARFARE: THE PRIVILEGED GUERRILLA AND THE DEPRIVED SOLDIER (1984), available at <http://www.globalsecurity.org/military/library/report/1984/WJL.htm> (Apr. 11, 2010, 3:28 PM).

3 was, however, quite limited in its effect. The mere visual manifestation of this reality is profound. Out of the hundreds of articles printed on hundreds of pages imposing regulation on inter-state armed conflicts, only one article on one page was ultimately devoted to intra-state armed conflicts. Thus, while the significance of extending regulation to non-international armed conflicts was indeed a major development in the law, the extent of this regulation was unquestionably modest. This modesty was particularly apparent in relation to the status of captured belligerent forces. Unlike their international armed conflict counterparts, Common Article 3 had absolutely no impact on the status of these belligerents in non-international armed conflicts. The importance of this aspect of Common Article 3 cannot be underestimated, and was expressly included as the final provision of the article: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."⁵⁶ As the ICRC Commentary notes, this clarification was absolutely essential to securing adoption of the article:

This clause is essential. Without it Article 3 would probably never have been adopted. It meets the fear that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the *de jure* Government's suppression of the revolt by conferring belligerent status, and consequently increased authority and power, upon the adverse Party. The provision was first suggested at the Conference of Government Experts in 1947 and was reintroduced in much the same words in all the succeeding draft Conventions. It makes it absolutely clear that the object of the clause is a purely humanitarian one, that it is in no way concerned with the internal affairs of States, and that it merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and in all circumstances.⁵⁷

Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion by all the means—including arms—provided by its own laws; nor does it in any way affect that Government's right to prosecute, try and sentence its adversaries, according to its own laws. In the same way, the fact of the adverse Party applying the Article does not give it any right to any new international status, whatever it may be and whatever title it may give itself or claim.⁵⁸

In many ways, this limited humanitarian intrusion was totally logical. At the time Common Article 3 was adopted, the assumption that non-international armed conflict would be synonymous with internal armed conflicts created an obvious dilemma: while the expansive humanitarian objectives of the Conventions justified regulating these conflicts, their internal nature led to a natural

56. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

57. *GPW Commentary*, *supra* note 8, at 60.

58. *Id.* at 60-61.

aversion to extensive international interference with how states responded to these threats. As the ICRC Commentary to Common Article 3 notes, the fact that domestic law almost universally prohibited inhumane treatment by states of their own populations, even during peacetime, undermined any legitimate resistance to requiring respect for this obligation during internal armed conflicts through the distinct conduit of humanitarian law:

It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages? No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, when dealing with common criminals.⁵⁹

However, this was a far cry from extending application of the entire corpus of the law to these conflicts. In order to embrace the ICRC's original "full application" recommendation, states would have had to accept the applicability of POW status, with its accordant combatant immunity, to internal dissident forces. Such an outcome was unacceptable. In fact, the most problematic impact of such a wholesale extension was the grant of combatant immunity to internal dissident forces, which as explained elsewhere in the Commentary was simply not addressed by Article 3's minimal intrusion into state sovereignty:

No sort of immunity is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law.

As can be seen, Article 3 does not protect an insurgent who falls into the hands of the opposing side from prosecution in accordance with the law, even if he has committed no crime except that of carrying arms and fighting loyally. In such a case, however, once the fighting reaches a certain magnitude and the insurgent armed forces meet the criteria specified in Article 4. A(2), the spirit of Article 3 certainly requires that members of the insurgent forces should not be treated as common criminals.⁶⁰

It seems obvious that this unwillingness to compromise the authority of the state to criminally sanction dissident forces was a major consideration leading to the rejection of extending full Convention coverage to non-international armed conflicts. Nonetheless, over time the notion of international legal regulation of such conflicts gained increasing acceptance and legitimacy. How this issue would be treated in the next major development of conventional humanitarian law provides important insight into how the overall resistance to combatant immunity extension evolved.

59. *Id.* at 36-37.

60. *Id.* at 39.

III. THE ADDITIONAL PROTOCOLS OF 1977 AND THE DISTINCTION DILUTION FOCUS OF LEGITIMATE COMBATANT IMMUNITY

Extending combatant immunity to the context of non-international armed conflict was again an issue when the international community set about revising the 1949 Geneva Conventions. This revision process culminated in the two Additional Protocols of 1977.⁶¹ Each of these supplemental treaties was intended to both reaffirm and further develop international humanitarian law so that it could more effectively mitigate the human suffering associated with armed conflicts.⁶² To that end, they included not only adjustments to existing law, but provisions that represented important advancements in the law.

Additional Protocol (AP) II was developed to enhance the regulation of non-international armed conflicts.⁶³ Although the treaty added flesh to the bones of Common Article 3, and included for the first time modest provisions regulating the methods and means of warfare in the context of these armed conflicts,⁶⁴ as in Common Article 3, there was nothing in the treaty that even remotely raised the prospect of extending combatant immunity to non-international armed conflicts.⁶⁵

It might be tempting to conclude from this fact that the Protocols offer no insight into analysis of this issue; to do so, however, would be erroneous. Instead, it was Additional Protocol I's treatment of three special categories of what had prior to 1977 been understood as non-international armed conflicts that provides this insight. There is no question that, in contrast to Additional Protocol II, the focus of Additional Protocol I was exclusively international armed conflicts.⁶⁶ However, in one of the most controversial provisions of the treaty, Additional Protocol I included within the category of international armed conflicts what are generally understood as wars for national liberation. Specifically, Article 1 of Additional Protocol I indicates that included within the definition of international armed conflicts found in Common Article 2 of the 1949 Geneva Conventions would be:

61. Additional Protocol I, *supra* note 26; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

62. *Additional Protocol I Commentary*, *supra* note 22.

63. *See* Additional Protocol II, *supra* note 61.

64. *See, e.g., id.* art. 13.

65. The scope of Additional Protocol II is articulated as follows: "[t]he High Contracting Parties . . . [agree that] the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character." *Id.* pmbl.

66. The Preamble to Additional Protocol I reads: "[E]very State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." Additional Protocol I, *supra* note 27, at pmbl.

[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁶⁷

This provision has been the subject of extensive analysis, and as the ICRC Commentary indicates, it was in large measure the product of an era involving numerous such wars for national liberation and the influence of the new states that emerged from these struggles.⁶⁸ What is important for purposes of this analysis is that this special category of armed conflicts between states and internal dissident forces challenging state authority was transformed from non-international to international armed conflicts by virtue of this provision.

This obviously was a profound development in the law—and one that a number of participants in the drafting of Additional Protocol I ultimately condemned as an unjustified politicization of what should be a purely *de facto* analysis of conflict classification. For some states, this resulted in opting out of the Article by reservation. For others, most notably the United States, this Article became a primary impediment to ratification.⁶⁹

The negative reaction to the internationalization of these factually non-interstate armed conflicts can only be understood by considering the impact of this inclusion on conflict regulation—a consideration that reveals that the true source of consternation was the extension of combatant immunity to non-state forces.⁷⁰ By including wars of national liberation within the definition of international armed conflicts, Additional Protocol I produced three significant effects. First, it expanded the scope of *international* legal regulation applicable to these conflicts. Second, it increased the perception of legitimacy for forces fighting for national liberation (as the ICRC Commentary indicates, the legitimacy of resort to arms to achieve national liberation had by 1977 been exten-

67. *Id.* art. 1.

68. *Additional Protocol I Commentary*, *supra* note 23, at 47-52.

69. Letter of Transmittal from Ronald Reagan, President of the United States, to United States Senate (Jan. 29, 1987) (transmitting Additional Protocol II to the Senate for advice and consent), reprinted in *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: Letter of Transmittal*, 81 AM. J. INT'L L. 910, 911 (1987) [hereinafter Letter of Transmittal]; see also Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT'L L.J. 323, 350 (2009) ("The United States . . . simply could not accept that grievous war crimes and offenses against law and order could be both justified and immunized based on the moral imperatives of self-determination marshaled by other states that advocated extending combatant status even to a non-state actor that 'displays a callous and systematic disregard for the law.'" (citing GEOFFREY BEST, *WAR AND LAW SINCE 1945* 486 (Oxford Univ. Press 2008))).

70. "The effect of this language would be to internationalize the actions of non-state actors, thereby conveying combatant immunity and immunity from prosecution for crimes committed against the military and police forces of the sovereign state or colonial power." Newton, *supra* note 70, at 345-46, 50.

sively addressed by the United Nations and other international organizations⁷¹). Third, it included within the scope of potential POW status and combatant immunity non-state belligerents fighting for national liberation.

In actuality, it was really the last of these effects that proved most controversial, but this last effect can only be understood in conjunction with the additional effect of a subsequent provision of Additional Protocol I diluting the “right type of person” qualification that will be discussed in more detail below. Collectively, these two provisions opened the door for non-state belligerents to claim POW status and at the same time diluted the criterion applied to qualify for this status. It was this dual effect that became the primary focus of controversy related to Additional Protocol I. Subjecting these conflicts to other humanitarian law regulatory provisions was not particularly troubling, especially considering many of these rules had gradually begun to migrate into the realm of non-international conflicts as a matter of state practice. This was certainly the case in regard to the targeting provisions of Additional Protocol I. The legitimization issue was more of a concern, but as the ICRC Commentary notes, much of that debate had preceded the treaty. As a result, Additional Protocol I was not a radical first step in this process, but instead better understood as a reflection of a trend in perception that had already gained substantial momentum.⁷²

A. The Right Type of Conflict Dilution

Entitlement to POW status and combatant immunity, however, was a different issue. Additional Protocol I had opened the door to what had been foreclosed in 1949 with the rejection of the ICRC total application proposal: the extension of combatant immunity to non-state belligerents fighting against lawful government authority.⁷³ This was indeed a significant extension of protection to such conflicts, but it is equally significant that it was limited to these special categories of non-international armed conflicts, and that the extension was effected not through Additional Protocol II but Additional Protocol I.

The conventional explanation for the inclusion of national liberation wars within the category of international armed conflict is that the objective of the

71. Cf. *Additional Protocol I Commentary*, *supra* note 23, at 47.

[T]he majority of experts considered that wars of national liberation were conflicts not of an international character. Indeed, although they all recognized the need for improving the protection provided by humanitarian law to victims of the armed conflicts for self-determination—and those of other conflicts qualified as not having an international character only a minority advocated the extension of the mandatory legal application of the whole of the Conventions and of Protocol I to such conflicts.

Id.

72. See generally *Additional Protocol I Commentary*, *supra* note 23.

73. Newton, *supra* note 70. Additional Protocol I “represented the end state of the law of combatancy by attempting to reduce the combatant category to its irreducible minimum while maximizing the class of protected civilians.” *Id.* at 345 (footnote omitted).

conflicts rendered them analogous in substance to true inter-state conflicts.⁷⁴ However, the rejection by the United States and opposition to this provision by other states reveals that this analogy was anything but legitimate. In reality, the U.S. view—that allowing the motivation for armed struggle to dictate the status of a conflict contradicted the emphasis on *de facto* conflict character that defined the Common Article 2/3 law-triggering paradigm⁷⁵—seemed much more credible. If this is so, it begs the question: why would so many states accept the elevation of factual non-international armed conflicts to the legal status of international armed conflicts?

One answer to this question might be that although technically non-international (in the sense that they did not involve hostilities between two sovereign states but instead between state authority and dissident forces subject to that authority), states perceived these conflicts as functionally distinguishable from the traditional civil war type non-international armed conflict. Unlike the civil wars that dominated the inter-war years in Europe and provided the primary contextual background for the development of Common Article 3 (and the opposition to full application of the Geneva Conventions in 1949), these wars of national liberation were dominated by challenges to colonial authority. In this regard, dissident forces engaged in these conflicts did not necessarily represent the same type of treasonous threat to sovereign authority as did dissident forces engaged in civil war. This might explain why allowing these dissident forces to qualify for POW status and the accordant combatant immunity it provides was perceived as less offensive to state sovereignty than extending this benefit to all non-international armed conflicts.⁷⁶ Ultimately, it is unclear whether this was a factor related to this extension of the law, or whether it was—as critics have asserted—simply a reflection of newfound power of former colonial possessions. What is significant for this analysis, however, is the fact that the far more controversial aspect of this extension was the dilution to the “right type of person” prong of the POW equation.

74. The commentary makes it clear that the policy reasons for this extension include: [T]he struggle of peoples under colonial and alien domination and racist régimes for the implementation of their right to self-determination is legitimate; any attempt to suppress such a struggle is incompatible with the Charter, the friendly Relations Declaration, the Universal Declaration of Human Rights, and the Declaration on the Granting of Independence, and constitutes a threat to international peace and security; armed conflicts resulting from such a struggle are international armed conflicts in the sense of the Geneva Conventions; combatants engaged in such struggles should enjoy prisoner of war status in the sense of the Third Convention; violation of such status entails the full responsibility of those committing it.

Additional Protocol I Commentary, *supra* note 23, at 46.

75. Letter of Transmittal, *supra* note 70, at 911.

76. Newton, *supra* note 70, at 343 (“There simply is no legal category of ‘combatant’ in a non-international armed conflict, irrespective of the moral imperatives claimed by one party or the other to warrant hostile activities.”) (internal citation omitted).

B. The Right Type of Person Debate

Additional Protocol I's inclusion of wars of national liberation in the definition of international armed conflict may have been a consequence of the new-found international influence of emerging states, a sense that these conflicts did not represent as serious a challenge to state sovereignty as the classic civil war, or a combination of both of these factors. What became far more significant in the debate over the legitimacy of this inclusion was its relationship to the modification of the POW qualification criterion also included in Additional Protocol I. In perhaps the most controversial article in the entire treaty, the axiomatic qualification criteria for POW status was significantly altered. Until 1977, with the almost irrelevant exception of the *levee en masse*,⁷⁷ POW qualification was contingent on complying with the four criteria first established in the 1899 and 1907 Hague Regulations and subsequently incorporated into Article 4 of the GPW.⁷⁸

These four criteria had historically been considered essential to enhance compliance with humanitarian law by ensuring that belligerents distinguished themselves from the civilian population (i.e., carry arms openly and wear a fixed distinctive symbol recognizable from a distance) and that they understood and respected obligations imposed on them by humanitarian law (i.e., operate under responsible command and be part of an organization that respects the laws and customs of war). In contrast, Article 44(3) of Additional Protocol I, which modified the POW qualification requirements provides:

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.⁷⁹

Much ink has been spilled analyzing and critiquing this dilution of the individual POW qualification criteria,⁸⁰ and it is beyond the scope of this chapter

77. *GPW Commentary*, *supra* note 9, at 67-68.

79. *Id.* at 44-62.

79. Additional Protocol I, *supra* note 27, art. 44.

80. *See, e.g.*, Mofidi, *supra* note 19, at 67-68.

This second factor working against civilian protection is fueled in part by Article 44 of Additional Protocol I, which suggests that combatants do not need to distinguish themselves from the civilian population except prior to and during an attack . . . The principle of distinction, among the foundational principles of humanitarian law, exists for the purposes of civilian protection, to ensure that fighters can identify the combatant from the bystander. Article 44, pressed so strongly for largely political reasons in the 1970s, undermines it.

John Bellinger, *Introductory Remarks*, 38 GEO. WASH. INT'L L. REV. 501, 506-07 (2006).

to re-plow this field. Suffice it to say that by modifying the distinction enhancement element of the GPW criteria (carry arms openly and wear a fixed distinctive emblem recognizable at a distance), this provision of Additional Protocol I was seen as diluting one of the most important *quid pro quos* of humanitarian law: in exchange for making yourself more easily distinguishable from the civilian population (and as a result facilitating the ability of an enemy to lawfully attack you), the law granted you the benefit of POW status with its accordant combatant immunity.⁸¹ Because Article 44 limited the obligation of belligerents to distinguish themselves by requiring that distinction only during each military engagement and only when visible to an adversary and only during an attack, critics condemned the modification as encouraging the theretofore perfidious behavior of cloaking themselves within the civilian population.⁸²

Opposition to Additional Protocol I's scope of application expansion cannot be properly understood without considering its relationship to this provision. Article 1 expanded application of the law of international armed conflicts to include conflicts between dissident groups fighting for national liberation against government authority.⁸³ If these forces were required to comply with the GPW's "right type of person" criteria in order to qualify for POW status, the extension might have been perceived as less problematic; although it would have effectively internationalized certain non-international armed conflicts, at least it would have done nothing to alter that critical *quid pro quo* inherent in Article 4 of the GPW. Instead, these forces were then made the beneficiaries of Article 44 of Additional Protocol I, which effectively allowed them to qualify for POW status and combatant immunity *without* satisfying that Article 4 *quid*

[A] combatant need only carry his arms openly "during each military engagement" and "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack." . . . The pervasiveness of surveillance and reconnaissance capabilities in next generation warfare can only serve to exacerbate this trend as the disincentives for distinguishing themselves swell for many combatants.

Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1079 (1998) (citation omitted).

81. "[C]aptured combatants who adhered to the laws of war and distinguished themselves from civilians were accorded protection as prisoners of war. There were thus strong incentives for soldiers not to fight as unlawful combatants—these incentives helped to protect civilians." Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1026 (2004) (citation omitted); see also Eric Talbot Jensen, *The Laws of War: Past, Present, and Future: Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209, 233-34 (2005).

82. Letter of Transmittal, *supra* note 70, at 911 ("Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations.")

83. Additional Protocol I, *supra* note 27, art. 1(4).

pro quo. In essence, these forces received a tremendous windfall. First, they suddenly became eligible to claim combatant immunity. Second, contrary to the traditional qualification requirements, they could claim that benefit even without constantly distinguishing themselves from the civilian population.

It was this combined effect that produced the most significant opposition to Additional Protocol I, and was the primary basis for the U.S. rejection of the treaty. According to President Reagan's letter to the Senate transmitting Additional Protocol II for advice and consent but declining to submit Additional Protocol I for consideration:

One of its provisions, for example, would automatically treat as an international conflict any so-called "war of national liberation." Whether such wars are international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict. To rest on such subjective distinctions based on a war's alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts. It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view.⁸⁴

As Professor Michael Newton notes in his recent article asserting the wisdom of this rejection, although many other states ratified Additional Protocol I, they manifested similar rejection of this provision through reservation or understanding.⁸⁵ Accordingly, the common thread running through rejection, reservation, or understanding was that the dilution of the distinction component of POW qualification was both dangerous and unacceptable.⁸⁶

IV. PROTECTING CIVILIANS IN ARMED CONFLICT, THE PRINCIPLE OF DISTINCTION, AND HOW THE ADDITIONAL PROTOCOL I DEBATE REVEALS A SHIFTING FOCUS OF INTERNATIONAL CONCERN

The debate surrounding the extension of POW status/combatant immunity to wars of national liberation provides insight into a significant shift in focus within the international community. It would be disingenuous to suggest that

84. Letter of Transmittal, *supra* note 70, at 911.

85. Newton, *supra* note 70, at 352-56 (outlining understandings made by NATO allies Belgium, Canada, France, Germany, Ireland, Italy, The Netherlands, Spain, The United Kingdom, Australia, New Zealand, Japan, and Korea).

86. *Cf. id.* (explaining how many U.S. allies limited the impact of this dilution through reservations to the treaty).

there was no concern about expanding the definition of international armed conflict to include these struggles. However, it does seem that opposition to this extension focused far more on the distinction dilution element effect of Article 44 than on the scope of application expansion.⁸⁷ This is consistent with a broader trend in humanitarian law that had been gaining momentum since 1949. Beginning with Common Article 3, the law had been moving continuously away from a primary concern for protecting the sovereign interests of states and towards a primary concern for protecting the interests of individual human beings.⁸⁸ Even the ascendance of the term “humanitarian law” is a manifestation of this trend, suggesting a shift towards the human protective focus of this entire branch of international law.⁸⁹

It is impossible to speculate what the reaction to Additional Protocol I might have been without Article 44(3)'s dilution of the distinction enhancement component of POW qualification. In contrast, the response to Additional Protocol I is established fact. The ratification record indicates that the extension of POW status, even with the effect of Article 44(3), was ultimately considered acceptable by most states. Perhaps more important, concern over the extension focused primarily on Article 44(3), and less on the internalization of wars of national liberation—a conclusion reflected in the reservations and understandings lodged by the state parties that rejected Article 44(3).⁹⁰ Even the outright rejection of the treaty by the United States reveals a primary concern over the distinction dilution effect of the treaty, and a subsidiary concern over internationalization of wars of national liberation.

Collectively, the issue of expanding the international armed conflict definition, POW qualification, and the reaction by states indicates that any future effort to expand access to POW qualification should focus more on the individual qualification element (right type of person) and less on the sovereignty intrusion element (right type of conflict). This conclusion is only bolstered by the general merger of international/non-international regulatory norms that has been ongoing since 1977. This merger, substantially stimulated by the jurispru-

87. *Id.* at 354 (“The NATO allies and the United States simply selected different pathways to manifest identical substantive concerns.”).

88.

The law of war has always contained rules based on chivalry, humanity, and religious values that were designed to protect noncombatants, especially women, children, and old men, who were presumed incapable of bearing arms and committing acts of hostility. It has also incorporated rules protecting combatants (in matters such as quarter, perfidy, and unnecessary suffering). Moreover, the law of war has increasingly encompassed rules on accountability and protection, such as those on protecting powers, the International Committee of the Red Cross, criminal responsibility, and international criminal tribunals.

Theodor Meron, *The Humanization of International Humanitarian Law*, 94 AM. J. INT'L L. 239, 242-43 (2000) (citation omitted).

89. See generally *International Humanitarian Law in Brief*, INT'L COMM. OF THE RED CROSS (Apr. 16, 2010, 9:56 AM), http://icrc.org/web/eng/siteeng0.nsf/htmlall/section_ihl_in_brief.

90. Newton, *supra* note 70, at 349-50.

dence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the subsequent development of the Rome Statute for the International Criminal Court, has been perhaps the most profound advancement in the regulation of armed conflict since 1977.⁹¹ In fact, as one author notes, with the exception of the law of combatant status and belligerent occupation, the regulation of these two types of armed conflicts has become functionally analogous.⁹²

This merger is a further manifestation of the shift in emphasis from protecting state sovereignty to protecting individuals affected by armed conflicts. Limiting regulation of non-international armed conflicts based on respect for state sovereignty has become an increasingly indefensible position, particularly when the consequence is a vacuum of protection for victims of war. Accordingly, in the context of the modern battlefield, most professional armed forces simply adhere to the regulatory regime applicable to international armed conflicts during the conduct of all military operations.⁹³ The one undeniable exception to this general proposition is the treatment of captured opposition personnel, which still turns on satisfying the 1949 POW qualification criteria.⁹⁴

The significance of the pre-1977 POW qualification criteria has been central to the U.S. treatment of individuals detained in what President Bush labeled the Global War on Terror. In his February 2002 Memorandum addressing the treatment of Taliban and al-Qaeda detainees,⁹⁵ President Bush invoked the “right type of conflict” and “right type of person” distinction to exclude all these detainees from status as POWs. As noted above, the President concluded that al-Qaeda detainees were not captured in the context of an international armed conflict, thereby eliminating the need to even consider whether they met the criteria of Article 4 of the GPW. In contrast, the President acknowledged the Taliban detainees had been captured during international armed conflict. However, he then excluded them from GPW protections based on his determination that as an organization the Taliban armed forces failed to comply with

91. Kyle Jacobson, *Doing Business With the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. REV. 167, 200-04 (2005) (citing Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T, May 7, 1997). Cf. Derek Jinks, *The Changing Laws of War: Do We Need a New Legal Regime After September 11? Protective Parity and the Law of War*, 79 NOTRE DAME L. REV. 1493, 1509 (2004).

92. KOLB & HYDE, *supra* note 12, at 69-70.

93. U.N. Secretary-General's Bulletin, Observance by United Nations Forces of International Humanitarian Law, *United Nations*, (Aug. 6, 1999); see also UNITED STATES DEP'T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM (1998).

94. Even after Additional Protocol I came into force, its impact on applicability of POW status was negligible. This may be attributable to the fact that most wars of national liberation had culminated by the end of the 1970s, and to the fact that the few remaining conflicts that might qualify for this special Additional Protocol I status involved state parties that refused to become bound to Additional Protocol I. The combination of these factors has meant that POW status has remained functionally limited to true interstate armed conflicts.

95. See Bush Memo, *supra* note 11.

the requirements of Article 4.⁹⁶

This led to an invocation of preventive detention authority based on the fact that these captives had engaged in belligerent conduct, but a denial of the treaty regime developed to protect captured belligerents who qualify as POWs. Thus, these individuals continue to be detained as if they were POWs without the benefits of the GPW.⁹⁷ Accordingly, they are subject to criminal liability for their belligerent acts, even if those acts do not violate any substantive provisions of humanitarian law.⁹⁸ While this is defensible based on the existing POW qualification criteria, it does raise the question of whether there might be some benefit in extending the opportunity to qualify for combatant immunity to non-state belligerents.

A. The Ultimate Question: What is the Primary Objective of the Law?

The continuing pervasive impact of the GPW POW right conflict/right person distinction might suggest that except for the rare and unlikely war of national liberation, POW status and combatant immunity will and must be restricted to belligerents associated with a state during interstate conflict. However, the fact that the international community was willing in 1977 to distinguish national liberation conflicts from traditional civil wars, coupled with the reality that distinction dilution became the primary focus of criticism of the

96. This determination is based on the assumption that the four criteria explicitly applicable to militia groups pursuant to Article 4(A)2 apply by implication to the regular armed forces. This is the majority interpretation of Article 4, and was subsequently endorsed by the United States District Court for the Eastern District of Virginia when it rejected John Walker Lindh's assertion of combatant immunity. *United States v. Lindh*, 212 F. Supp. 2d at 557-58.

[T]he President's decision denying Lindh lawful combatant immunity is correct. In any event, a review of the available record information leads to the same conclusion. Thus, it appears that the Taliban lacked the command structure necessary to fulfill the first criterion, as it is manifest that the Taliban had no internal system of military command or discipline Thus, Lindh has not carried his burden to show that the Taliban had the requisite hierarchical military structure.

Id. at 558.

97. Before considering these arguments in detail, we note that all of them rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. This premise is mistaken. There is no indication in the AUMF, the Detainee Treatment Act of 2005, or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.

Al-Bihani v. Obama, 590 F.3d 866, 871 (D.D.C. 2009).

98. It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war. U.S. DEP'T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2 § 6(B)(3) (2003), available at <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf>. The critical element for "Murder By an Unprivileged Belligerent" is in § 6(B)(3)(a)(3): "[t]he accused did not enjoy combatant immunity." *Id.* § 6(B)(3)(a)(3).

extension of POW status to non-state belligerents in these conflicts, raises a legitimate question: what is the primary interest advanced by adherence to this POW/combatant immunity equation?

The discussion above reveals that there are two possible interests advanced by this limited POW status equation. The first interest, advanced by the right type of conflict component of the equation, is the protection of the sovereign interest of states to criminally sanction and thereby deter individuals who owe a duty of loyalty to the state who nonetheless engage in hostilities contrary to that duty.⁹⁹ Preserving the option of such sanction advances the sovereign interest of the state by both discouraging individuals from taking up arms against the state and denying the non-state belligerent group any implied claim of legitimacy derived from qualification as “privileged” belligerents. The second interest, advanced by the right type of person component of the equation, is to enhance respect for and compliance with the laws and customs of war—most importantly the principle of distinction—by linking the benefit of combatant immunity to compliance with distinction enhancement requirements.¹⁰⁰

It seems clear that in 1949, the sovereignty interest was the dominant concern of the state parties that developed and adopted Common Article 3. This primacy of interest is indicated by the limited impact of Common Article 3 and its explicit language indicating it did not vest beneficiaries with any type of status or legitimacy. At that time, the value of protecting these aspects of sovereignty clearly outweighed any potential benefit of increasing the probability of humanitarian law compliance by non-state belligerents by extending to them the incentive of combatant immunity.¹⁰¹ Over time, however, the primacy of this interest has arguably yielded to the alternate interest of enhancing humanitarian law compliance. This was first reflected in Additional Protocol I’s extension of the incentive of combatant immunity to non-state belligerents in wars of national liberation, or perhaps more accurately in the widespread opposition to the dilution of the right type of person component of the equation, which according to many states corrupted Additional Protocol I’s purpose. This was followed by the broader trend towards a merger of the regulatory norms applica-

99. Cf. Bialke, *supra* note 41, at 23, 34-35.

100. *Id.* at 24-25 (“[A] military uniform or outwardly distinctive accouterment that clearly distinguishes a combatant from the protected civilian population allows the opposing side to differentiate and then spare protected civilians, without fearing a subsequent treacherous counter-offensive by enemy forces who were illegally masquerading as protected civilians.”).

101. See *GPW Commentary*, *supra* note 9, at 49.

We think, on the contrary, that the scope of application of the Article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what may have been thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed.

Id. at 50.

ble in both types of armed conflicts.

Beginning on September 12, 2001, the focal point of the status debate shifted from wars of national liberation to transnational armed conflicts.¹⁰² Although there are many experts who reject the notion of such armed conflicts (alternatively characterized as internationalized non-international armed conflicts or internationalized Common Article 3 conflicts),¹⁰³ the fact that the United States did and continues to treat the armed component of the struggle against transnational terrorism as a non-international armed conflict has produced this shift in focus.

As noted above, the United States has invoked both components of the POW equation to exclude detainees from the benefit of POW status and combatant immunity.¹⁰⁴ But in light of the evolution of the law, it is appropriate to ask which of these components should be prioritized in relation to these transnational armed conflicts. If the answer to this question continues to be the protection of sovereign prerogative to criminally sanction non-state belligerents for their participation in hostilities against state authority, then the right type of conflict prong of the equation must maintain primacy. If this is the case, any proposal to extend POW status to non-state belligerents—even those who distinguish themselves from the civilian population and endeavor to comply with the laws and customs of war—would frustrate this primary purpose. This answer, however, is arguably inconsistent with both the internationalization of national liberation conflicts and with the overall shift in focus from state interest to individual interest that has dominated humanitarian law development since 1949.

If, in contrast, the answer to this question is that the primary goal of the equation is to ensure compliance with humanitarian law¹⁰⁵—and in particular to mitigate the risk to innocent civilians by enhancing the distinction between these civilians and belligerents—then extending the opportunity to qualify for combatant immunity to non-state belligerents could potentially contribute to this purpose. This could only occur, however, if the second prong of the equa-

102. See Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal For Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 789-90 (2008).

103. For a good overview of the arguments, see INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 17-18 (2003). See also DEREK JINKS, THE TEMPORAL SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW IN CONTEMPORARY CONFLICTS (2003).

104. Bush Memo, *supra* note 11.

105. “[T]here must also be some ‘carrot-type’ incentives to encourage the unlawful combatant to distinguish himself and, therefore, make himself a target (thus protecting the noncombatant population).” Jensen, *supra* note 82, at 233-34; see also Callen, *supra* note 82, at 1026-27 ([I]nternational law permitted armies to deal harshly with unlawful combatants [But] captured combatants who adhered to the laws of war and distinguished themselves from civilians were accorded protection as prisoners of war. There were thus strong incentives for soldiers not to fight as unlawful combatants. . . .).

tion—the right type of person requirement—effectively contributes to this effect.

Even assuming that enhancing compliance with humanitarian law should be considered the priority interest in the equation, it does not necessarily offset the sovereignty concerns associated with the right type of conflict prong. What it does require, however, is a more refined assessment of this balance of competing interests to determine whether extending the benefit of combatant immunity to non-state belligerents involved in transnational armed conflicts could justify the accordant limitation of sovereign prerogative of states engaged in such conflicts. This assessment must focus on four critical questions. First, do transnational non-state belligerents represent the same type of threat to national sovereignty as the more traditional internal dissident forces that have consistently been excluded from the benefit of combatant immunity since 1949? Second, is it rational to conclude that extending combatant immunity to these belligerents will result in a significant increase in their ranks? Third, is the concern that such an extension will legitimize the hostile actions of such belligerents consistent with the axiomatic division between the *jus ad bellum* and the *jus in bello*? Fourth, what benefit will be derived from such an extension? This last question must consider the prospect that such an extension might have little or no actual effect on the behavior of these forces, and therefore must assess benefits under two assumptions: first, that the incentive of combatant immunity will effect a change in non-state belligerent behavior; second, that it will not.

B. The Costs of the Combatant Immunity Extension

The first question in this analysis is whether extending combatant immunity to transnational armed conflicts would produce a compromise to state sovereignty analogous to an extension to internal armed conflicts. There is a plausible argument that the answer to this question is no. Unlike dissident forces engaged in internal armed conflicts, transnational non-state actors normally owe no duty of loyalty to the state they target with hostility. In this regard, their challenge to the state is far more analogous to a traditional state enemy than to an internal dissident enemy.

As noted above, at the time Common Article 3 was developed, the primary concern of states was its application to internal dissident forces. These forces represent the penultimate threat to state sovereignty, because they are inspired by the desire to overthrow lawful government authority. Thus, unlike the interstate counterpart addressed in the GPW, these forces threaten not only physical harm to state forces and assets, but also theoretical harm to the very authority of the state itself. It is therefore understandable why extending combatant immunity to these forces was and continues to be perceived as an unacceptable compromise to their sovereignty. In short, few states would likely willingly cede their authority to criminally sanction their own nationals for such dissident activity.

Additional Protocol I's treatment of wars of national liberation reveals that this concern was less palpable when dealing with dissident forces that did not have the destruction of the state as their ambition, but, instead, separation from the state.¹⁰⁶ This is not to suggest that this ambition was not a challenge to sovereignty. Instead, the inclusion of Article 1's wars of national liberation provision suggests that by 1977 the international community may have perceived the threat to sovereignty created by armed hostility to run across a spectrum of severity. At one extreme was true internal armed conflict—the type of conflict addressed by Additional Protocol II—perceived as so severe that no extension of combatant immunity could be tolerated. At the other extreme was inter-state armed conflict, which although undoubtedly dangerous to the state, did not produce a threat to sovereignty analogous to internal dissident threats. Additional Protocol I's scope-expansion provision suggests that dissident forces seeking to separate from the state as opposed to toppling the state fell closer along the spectrum to inter-state threats than internal dissident threats.¹⁰⁷

If such a continuum is an appropriate method to assess the threat to sovereignty produced by an armed challenge, transnational non-state belligerents arguably also fall closer to the inter-state extreme than to the internal extreme. While these forces undoubtedly present a genuine threat of harm to the state, unlike internal dissident forces, they normally do not engage in violence to topple state authority. Instead, more like separatist groups, they engage in hostilities in order to influence state policy and conduct.¹⁰⁸

Humanitarian law obviously does not equate the threat of harm to a state with a threat to state sovereignty. Instead, the internal/interstate conflict dichotomy has always been premised on the assumption that the degree of threat to sovereignty is related to the motivation for the infliction of harm on the state.¹⁰⁹

106. See *Additional Protocol I Commentary*, *supra* note 23, at 44-46 (“[I]t is necessary to draft ‘additional instruments and norms envisaging, inter alia, the increase of the protection of persons *struggling for freedom* against colonial and alien domination and racist regimes.’”) (emphasis added).

107. This is evidenced by defining struggles against colonial and alien domination and racist regimes as “international armed conflicts in the sense of the Geneva Conventions [and that] combatants engaged in such struggles should enjoy prisoner of war status in the sense of the Third Convention.” *Additional Protocol I Commentary*, *supra* note 23, at 46.

108. This paradigm can be best understood by contrasting al-Qaeda and Hamas. It is undisputed that al-Qaeda is a transnational/multinational belligerent with no stable state affiliation whose goal can be characterized as global jihad. “The reach of al-Qaeda is global: It calls on Muslims all over the world to wage jihad against the United States and her allies [The manifesto states that global jihad] ‘is the duty of every Muslim in this world.’” NIAZ A. SHAH, *SELF DEFENSE IN ISLAMIC AND INTERNATIONAL LAW* 50-52 (2008) (citing the al-Qaeda Manifesto). On the other hand, Hamas is mostly confined to the West Bank and Gaza, and its main goal is the establishment of an Islamic Palestinian State where Israel is now located. Additionally, Hamas has not directly targeted American interests. OFFICE OF THE COORDINATION FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, *COUNTRY REPORTS ON TERRORISM* 195-96 (2006).

109.

The Conventions, therefore, tried to define the international armed conflicts to which they

When that motivation is to terminate sovereign authority, the nature of the threat is most severe, and therefore international regulation is most intrusive. This intrusion is most profound in relation to POW status because of the immunity from domestic criminal sanction afforded by that status. Because transnational non-state belligerents do not represent that type of extreme threat to state sovereignty, providing them the opportunity to claim that immunity is less intrusive on that sovereignty.

The second question in this analysis is whether it is rational to conclude that extending combatant immunity to these belligerents will result in a significant increase in their ranks. While answering this question requires speculation, there is a compelling argument that the answer is no. It must be emphasized that extending combatant immunity will in no way limit the authority of the state to preventively detain captured transnational belligerents.¹¹⁰ Instead, the only compromise to authority will come in the form of a limitation on the right to criminally sanction them for their belligerent acts.

It is difficult to imagine that this limited benefit would provide a significant motivation for the recruiting efforts of these organizations. Potential recruits are in all likelihood far more deterred by the risk of physical harm or deprivation of liberty than by the risk of potential criminal sanction. Indeed, much of the debate on the military commissions created by President Bush and subsequently codified by Congress has focused on why it is even necessary to prosecute detainees when they will be detained preventively regardless of the outcome of such prosecutions. Accordingly, any negative impact related to recruitment is negligible at best.

The third question in this analysis is whether such an extension will legitimize the hostile actions of transnational non-state belligerents. The concern raised by this question is far more significant than the recruitment issue. One of the underlying pillars of the "right type of conflict" component to the traditional POW equation is the premise that armed hostilities are legitimate only when conducted under the authority of the state. As noted above, concern over implying legitimacy of dissident forces in non-international armed conflicts was so significant that it was raised at the time Common Article 3 extended interna-

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.

Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 18 (2004) (citation omitted). *But see* Deborah L. Ungar, *The Tadic War Crimes Trial: The First Criminal Conviction Since Nuremberg Exposes the Need for a Permanent War Crimes Tribunal*, 20 WHITTIER L. REV. 677, 693-94 (1999) ("[T]he Appeals Chamber [in the Tadic opinion] held that Common Article 2 was limited to international armed conflicts because of its intrusion into state sovereignty.").

110. This ability to preventatively detain these belligerents is implied by Common Article 3 along with binding them to the duties contained herein.

tional legal regulation to this context of armed conflict, even though this intrusion into state sovereignty was modest at best.

There is, however, a compelling argument that the extension of combatant immunity to transnational armed conflicts, if properly structured, would not significantly impact the perceived legitimacy of the efforts of transnational non-state belligerents. First, it is axiomatic that application of humanitarian law to a given armed conflict is a distinct issue from the legality (and by implication the legitimacy) of armed conflict. This is often referred to as the *jus in bello/jus ad bellum* distinction.¹¹¹ When a state engages in military action in violation of international law, that violation is not permitted to influence the applicability of humanitarian law to regulate the ensuing hostilities. In the same respect, it would be inconsistent with this principle to assert that application of humanitarian law—in particular the principle of combatant immunity—indicates the legality or legitimacy of the hostilities that trigger the application. Thus, it is thoroughly consistent with contemporary international law to condemn the initiation or prosecution of hostilities by a transnational non-state entity as a violation of international law while at the same time acknowledging the applicability of humanitarian protections for participants in those hostilities.

This distinction is reflected by the growing merger of the law of international and non-international armed conflicts.¹¹² There is an increasing acceptance of the premise that it is the existence of armed conflict that justifies international legal regulation. Consistent with the underlying premise of Common Article 3, this indicates that the applicability of such regulatory norms in no way implies legitimacy of such hostilities, but instead focuses exclusively on the mitigation of suffering caused by any type of armed conflict. While non-state actors might be inclined to assert increased legitimacy of their cause resulting from applicability of humanitarian norms, a proper understanding of the law undermines any such assertion.

The foregoing analysis suggests that the most significant cost of extending combat immunity to transnational non-state belligerents is the loss of sovereign prerogative to criminally sanction these operatives, and that this cost is less significant than the concerns related to true internal armed conflict. Legitimacy

111.

[M]ost just war theorists . . . insist that 'it is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.' In theory, then, any use of force may be simultaneously lawful and unlawful: unlawful, because its author had no right to resort to force under the *jus ad bellum*; lawful, if and to the extent that its author observes 'the rules,' that is, the *jus in bello*.

Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 50 (2009) (footnote omitted).

112. This concept of merger was reinforced by the International Court of Justice, when it proclaimed "[t]hese two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law." *Legality of the Threat of the Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 256 ¶ 75 (July 8).

is also a concern, even if not technically justified based on a proper understanding of the impact of humanitarian law. What then are the benefits that might result from this extension, and could they outweigh these costs? Obviously, eliminating the “right type of conflict” component to the combatant immunity equation would make individual qualification the sole component for this extension. As discussed in the next section, while this will ideally lead to enhanced protection for the civilian population, even a failure to achieve this desired effect would produce a potentially valuable benefit.

V. THE BENEFITS OF COMBATANT IMMUNITY EXTENSION

If transnational non-state belligerents are offered the opportunity to qualify for combatant immunity, qualification analysis must focus exclusively on the humanitarian law compliance enhancement component of the traditional equation.¹¹³ To produce an effect that sufficiently offsets the costs discussed above, the qualification criteria must produce a meaningful likelihood of such enhancement. Because of this, the compliance enhancement dilution that triggered widespread opposition to Article 44(3) of Additional Protocol I must be rejected in favor of a return to the historically validated four criteria at the core of POW qualification. Accordingly, transnational non-state belligerents would be offered the benefit of combatant immunity only in exchange for compliance with these four criteria.

This is undoubtedly a tall order for such belligerents. The very nature of their operations suggests the difficulty of constant distinction from the civilian population, and foregoing the deliberate effort to target civilians and civilian property. But the failure of Article 44(3) was the willingness to dilute the effectiveness of the law in order to accommodate the challenges confronting these belligerents.¹¹⁴ In reality, all belligerents pay a price for complying with the distinction enhancement elements of the four criteria: they make it easier for the enemy to target them. Thus, it is not invalid to demand that transnational non-state belligerents accept the same risk. History validates the premise that it is indeed feasible to expect such forces to meet these requirements—a premise that is central to the associated militia provisions of the GPW. These provisions demanded respect for the four criteria as a condition precedent for POW qualification by militia and volunteer forces associated with a state party to a conflict.¹¹⁵ No modification of these criteria was afforded these forces even though

113. See also Newton, *supra* note 70, at 375 (“Though incomplete compliance with the *jus in bello* is the regrettable norm, knowledge of the law and an accompanying professional awareness that the law is binding remains central to the professional ethos of military forces.”). See generally Jensen, *supra* note 82.

114. Newton, *supra* note 70, at 375.

115. See Geoffrey S. Corn, *Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaeda, and the Limits of the Associated Militia Concept*, 39 ISR. Y.B. ON HUM. RTS. 1 (2009).

the very nature of their operations made it more difficult for them to comply with these criteria than their regular armed forces counterparts (consider the French Maquis, or the Soviet partisans of World War II). This is an example of how belligerents must accept the burden of complying with the law instead of the law bending to the difficulties of compliance.

With regard to respecting the laws and customs of war and how this requirement might conflict with terrorist tactics, this simply imposes a requirement to conform tactics to the dictates of international law. Like their internal armed conflict counterparts that have faced criminal prosecution before international and domestic tribunals, transnational non-state belligerents should not be excused from the obligation to limit their acts of violence to lawful military objectives.¹¹⁶ In fact, the conduct of al-Qaeda since it began to target U.S. interests reveals that this is indeed a feasible requirement. Many of the attacks it has conducted have been directed against military assets, such as the attack on the U.S.S. Cole and the Pentagon (although in the latter case the means of warfare used by al-Qaeda—transforming a civilian airliner into a missile—did violate humanitarian law). Al-Qaeda chooses to expand its target list to include non-military objectives, but the fact that it also targets military personnel and assets indicates that it is certainly capable of so limiting that target list to objectives that indicate respect for and compliance with humanitarian law.

The requirement of operating under responsible command is directly linked to the foregoing requirements of complying with the laws and customs of war.¹¹⁷ Belligerents associated with a group of fighters with a record of distinguishing themselves from the civilian population and restricting their attacks to military objectives would presumptively satisfy this requirement. It would, however, be necessary to define what level of command had to satisfy this “responsibility” requirement (for example, would a group of foreign fighters committed to respecting the law be disqualified if the larger group they associated with was not so committed?). If the objective of the criteria were to encourage positive behavior by non-state groups, it would support a generous interpretation of this requirement.

The assumption of this analysis, therefore, is that combatant immunity would be offered in exchange for compliance with the traditional four qualifi-

116. Unless the world is prepared to accept terrorist acts justified wholly on the subjective, political, or religious motivations of the perpetrator, there must be a strict bulwark between the laws and customs of war regulating the authorization to conduct military operations and the legal framework regulating terrorism . . . In the context of transnational terrorism, even a partial acknowledgement of the propriety of terrorist claims to combatant status presents an unnecessary and ill-advised risk to innocent lives and property.

Newton, *supra* note 70, at 375.

117. Bialke explains that the purpose for this effective chain-of-command is to:

[P]roactively train its armed forces regarding LOAC, consistently mandate strict compliance with such laws, and diligently investigate allegations of violations . . . [it] must also . . . remain answerable for the conduct of its subordinates . . . and be able to order effectively its forces to cease hostilities during a cease-fire, truce, armistice, or surrender.

Bialke, *supra* note 41, at 23.

cation criteria. Assessing the benefit produced by this extension is the final step in the analysis.

A. What if it Worked?

Combatant immunity is not merely a humanitarian principle; it is an incentive to comply with the law during the conduct of military operations.¹¹⁸ Extending the opportunity to qualify for this immunity to transnational non-state belligerents could potentially influence their operational behavior by discouraging commingling with the civilian population and foregoing the opportunity to attack civilians and civilian property. Such an effect would amount to a substantial benefit to the state opponent. Indeed, it would arguably undermine the characterization of terrorist organization normally used to label such groups—a characterization based primarily on the perfidious conduct of such groups and their attacks against civilians and civilian property.

This characterization suggests that the primary criticism of transnational non-state belligerent groups focuses primarily on *how* they fight and only secondarily on *why* they fight. Hence, the Global War on *Terrorism*. If this is true, then offering an incentive that might align the tactics of such organizations with the fundamental humanitarian law principles would seem worthwhile. Offering this incentive would in no way limit the ability of the state to detain captured belligerent opponents, nor to punish them for conduct in violation of humanitarian law. The only sacrifice would be the ability to criminally sanction these captives for their belligerent acts that comply with humanitarian law.

There is obviously, however, a wide delta between the aspiration of influencing the conduct of these belligerents and actually achieving that effect. This will undoubtedly lead to criticism of this proposal. However, even if the probability of such an influence is remote, the extension of immunity must be critiqued against the alternative currently in force. Because non-state belligerents are excluded from even the *opportunity* to qualify for such immunity (because they are not engaged in international armed conflict), they have absolutely no incentive to modify their conduct or tactics. Why would such belligerents ever endeavor to distinguish themselves from the civilian population or restrict their attacks to military objectives? Doing so deprives them of their asymmetrical tactical advantage with no offsetting benefit, because even if they were to do so they could never claim the benefit of combatant immunity. Thus, in the effort to protect state sovereignty, the current qualification equation creates a perverse incentive to disregard humanitarian law.

When considered in this context, offering these belligerents the opportunity to qualify for such immunity, although unlikely to have a significant impact on their conduct, at least offers some potential to do so. Considering the probabili-

118. Jensen, *supra* note 82, at 234.

ty that such groups will continue to operate for the indefinite future, even a limited impact might be worth the potential cost. Furthermore, it is impossible to predict how this extension might evolve. Perhaps the leaders of such groups might gradually perceive the benefit of this extension, which might gradually shift the paradigm of the nature of their hostilities. This might be unlikely, but one thing is certain: the continued application of the current combatant immunity equation offers no hope whatsoever of influencing such a change.

B. What if it Didn't Work?

Assuming the extension of combatant immunity produces little or no influence on the conduct of transnational non-state belligerents does not nullify the potential benefit of the extension. While influencing such behavior modification is certainly the ideal outcome of such an extension, ultimately providing the opportunity for the benefit of combatant immunity itself holds the potential to enhance the credibility of state action against such belligerents and more effectively discredit their conduct. This effect could potentially impact the overall perception of the detention of such individuals and their trial and punishment by civilian and military tribunals. It is difficult to predict precisely the significance of this impact, but it should arguably extend to all sources of criticism of existing U.S. policies. Domestically, the credibility of punishing such individuals would be bolstered with both Congress and the courts, and among the American public more widely. At the most basic level it would facilitate a more logical explanation for why these belligerents are subjected to detention and punishment. Internationally, it could impact perceived U.S. legitimacy among allies and other countries ambivalent towards our current policies, and might also result in the adoption of analogous policies by other states confronting similar threats (e.g. Israel and Turkey).

As noted above, states have historically been concerned that granting humanitarian law protections to non-state actors might legitimize their belligerency.¹¹⁹ This is unsurprising, as states engaged in armed conflict against such opponents have a strong interest in branding their opponent as legally and morally illegitimate. Ironically, the persistent emphasis on the right type of conflict disqualification for such belligerents subtly undermined this objective. This is because it places the legitimacy focus not on belligerent conduct, but on the nature of the conflict itself.

This is arguably not the most effective method of delegitimizing such belligerents, especially in an era where the focal point of legitimacy in any armed conflict is the conduct of the belligerents. (In this regard, it is noteworthy that

119. See Newton, *supra* note 70, at 345 (“The effect of [the language of Article 1(4) of Additional Protocol I] would be to internationalize the actions of non-state actors, thereby conveying combatant immunity and immunity from prosecution for crimes committed against the military and police forces of the sovereign state”).

the conduct of non-state actors has been the sole basis for criminal responsibility before both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.)¹²⁰ Instead, it is the nature of belligerent operations that provides the most meaningful indicator of legitimacy. Extending the opportunity to qualify for combatant immunity to these belligerents as an incentive to conform their conduct to the law would add significant credibility to condemnation for failure to do so. States would then be in the position to emphasize their willingness to sacrifice their own sovereign prerogative of criminal sanction in order to enhance the protection of victims of hostilities. This would serve to magnify the illegitimate behavior of their non-state opponents.

C. Military Commissions and the Crime of Murder in Violation of the Law of War: Exposing the Breach of Symmetry.

There remains one additional benefit that might justify the extension: adding legitimacy to the criminal sanction of unlawful combatants. Prosecution of non-state actors for their participation in hostilities has been a central feature of the military commissions first established by President Bush¹²¹ and subsequently modified by Congress in the Military Commission Act of 2006 (MCA).¹²² It is also one of the most suspect substantive provisions of the commissions. Detainees at Guantanamo were first charged with the offense of "Murder by an Unprivileged Belligerent," defined as a violation of the laws and customs of war.¹²³ Congress modified the title of the offense, but not the substantive underpinning, when it codified the crime of "Murder in Violation of the Law of War."¹²⁴

Both these offenses share a common foundation and pedigree. The foundation is the premise that because non-state actors lack the privilege of lawful combatants, any harm they cause is *ipso facto* a violation of the laws and customs of war. For the offense of "Murder by an Unprivileged Belligerent" established for the original Military Commission,¹²⁵ this premise is reflected in the title of the offense itself—the lack of privilege renders all killings caused by the defendant as murder. Congress modified the title of this offense when it passed the MCA. The MCA analogue is titled "Murder in Violation of the Law of War."¹²⁶

120. See e.g., Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 823-24 (2005) (citing *In re Yamashita*, 327 U.S. 1 (1946)).

121. Bush Memo, *supra* note 11.

122. Military Commissions Act of 2006, 42 U.S.C. §§ 948-49 (2006).

123. U.S. DEP'T OF DEFENSE, MILITARY COMMISSION INSTRUCTION NO. 2 §6(B)(3) (2003).

124. *Id.* § 950v(a)(15).

125. U.S. DEP'T DEFENSE, MILITARY COMMISSION INSTRUCTION NO. 2 § 6(B)(3) (2003).

126. U.S. DEP'T DEFENSE, *supra* note 124.

At first glance, it seems logical to vest a tribunal established to adjudicate allegations of war crimes with jurisdiction over such an offense. Few would debate that murder in violation of the laws of war should be subject to criminal sanction. In fact, any deliberate killing that is not justified by the LOAC should be considered murder. However, the title of the offense is misleading, for it suggests that it is the law of war that renders a killing unlawful. In reality, all killings are unlawful unless they are authorized pursuant to the LOAC, even when committed by belligerents in an armed conflict. But this incongruity reveals the connection to the original military commission offense of “Murder by an Unprivileged Belligerent.”

The thread that connects these offenses is the asserted legal predicate for the crime: any killing by a belligerent who does not qualify for POW status (i.e., is not fighting on behalf of a state) is a violation of the LOAC, *per se* unlawful, and therefore murder. This is reflected in the following explanation for this offense contained in the Manual for Military Commissions, the regulatory implementation of the MCA: “[a] ‘violation of the law of war,’ may be established by proof of the status of the accused as an unlawful combatant”¹²⁷ This legal foundation for the prosecution of those who cause a death while participating in armed conflict without the privilege associated with state actors—such as killings committed in the context of the transnational armed conflict against al-Qaeda—is also reflected in this excerpt from the Manual: “It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war.”¹²⁸

The flaw in the legal basis for both this offense and its predecessor is revealed by this excerpt, which is overbroad and imprecise. Contrary to the assertion, there is no such “general acceptance” in the context of non-international armed conflict. Instead, the theory that operating without privilege renders the belligerent conduct of an individual a violation of *international* law has only been asserted in the context of international armed conflict.

This theory of international criminal responsibility is ostensibly derived from the U.S. Supreme Court’s decision in *Ex parte Quirin*,¹²⁹ which upheld the trial of U.S. citizens acting as German saboteurs for the war crime of “unlawful belligerency” during the Second World War. Even in this context it has never been universally or even widely endorsed. But assuming, *arguendo*, the legitimacy of this theory of war crimes liability in the context of international armed conflict, there is simply no precedent for extending the theory to non-

127. U.S. DEP’T OF DEFENSE, THE MANUAL FOR MILITARY COMMISSIONS § 6(a)(16)(c) (Jan. 18, 2007).

128. *Id.* § 6(a)(13)(d).

129. *Ex parte Quirin*, 317 U.S. 1, 36 (1942).

international armed conflict.¹³⁰ Indeed, such an extension produces an anomaly. In the context of an international armed conflict, the offense provides an international sanction for failing to comply with the requirements for gaining the benefit of international law: combatant immunity. However, because nothing a non-state belligerent can do can ever result in “lawful” belligerent status, it imposes an *international* legal sanction without a complimentary *international* legal reward. In this regard, the underlying rationale for the Supreme Court’s endorsement of this offense—to incentivize operating as a lawful belligerent¹³¹—is nullified when the theory is extended to non-international armed conflicts. Extending the *opportunity* to obtain combatant immunity to non-state belligerents would cure this defect by restoring the symmetry between reward and sanction provided by international law. Like their international armed conflict counterparts, non-state combatants would be on notice that failure to comply with the distinction and LOAC compliance requirements for obtaining combatant immunity would subject them to criminal sanction for their warlike acts.

Some might argue that such an equation is unnecessary due to the robust

130. This does not, of course, mean that the Manual was incorrect to suggest that the unlawful enemy combatants do not enjoy combatant immunity. But by mixing the benefits of status with the consequence of participation in non-international armed conflicts, the Manual distorts the impact of failing to qualify for combatant immunity. Non-state belligerents cannot qualify for this immunity, a privilege reserved for state armed forces engaged in international armed conflicts. But this does not result in the conclusion that acting as a belligerent without qualification for combatant immunity is *ipso facto* a war crime. Instead, it simply permits the assertion of domestic criminal jurisdiction to the acts and omissions of the belligerent. In short, the lack of qualification deprives the belligerent of combatant immunity, subjecting him to the criminal jurisdiction of the state in which his conduct occurs, which for a warrior could include murder, assault, arson, kidnapping, etc.

In order to qualify as a war crime, those acts or omissions must violate not only applicable domestic law (such as prohibitions against murder, assault, arson, kidnapping, mayhem, etc.), but also *international* law, or more specifically the LOAC. And here the overbreadth of the theory is exposed, for there is simply no basis to assert that the mere participation in a non-international armed conflict by a non-state actor violates international law. Instead, those individuals become *internationally* liable for their acts or omissions only when those acts or omissions violate norms of conduct applicable to this type of armed conflict. Why would the ICTY and the ICTR have ever even been bothered to assess which norms of conduct had migrated from international to non-international armed conflict if participation in the conflict by a non-state actor was itself a “war crime”? The answer is clear: operating without the privilege combatant immunity does not automatically result in international criminal responsibility for belligerent actions.

Because the MCA applies to both al-Qaeda and Taliban personnel, and because the United States treated the armed conflict with Afghanistan as “international,” it is possible that this offense was intended to apply only to international armed conflicts. Such a limited application would at least preserve symmetry between international benefit and international sanction. This has not, however, been confirmed by practice. Instead, military prosecutors have used this offense to charge captured al-Qaeda operatives, reflecting a particularly problematic but central theory to the extension of war crimes liability to transnational armed conflict.

131. *Quirin*, 317 U.S. at 35-36.

corpus of international humanitarian law proscriptions against misconduct in the context of a non-international armed conflict. This assumes, however, that non-state belligerents will only face criminal liability for violation of the LOAC rules related to their individual conduct. Thus, if a non-state actor engages in perfidy or treachery, or abuses or kills a detainee, that actor is already subject to international criminal liability. This is indeed true. However, if the U.S. interpretation of the law reflected in the MCA is valid, then non-state belligerents face criminal sanction for a violation of international law with no symmetrical reward for compliance with the same body of law. Additionally, the inability to claim combatant immunity subjects these individuals to domestic criminal sanction for their warlike acts even if they strictly conform their conduct to the requirements of the LOAC.

These latter two realities reveal that the current state of the law provides little to no incentive for non-state combatants to comply with the LOAC. In essence, the inability to claim combatant immunity subjects these belligerents to a form of strict liability—the mere act of participating in armed conflict is treated by at least the United States as a war crime. Additionally, even those states that do not follow this interpretation of the law may prosecute these combatants for violation of domestic law for acts of LOAC compliant violence committed in the context of an armed conflict.

This current incongruity is illustrated by the case of Omar Kadhr.¹³² Captured in Afghanistan after being subdued by U.S. forces, Kadhr was subsequently charged first with the offense of murder by an unprivileged belligerent, and subsequently with the offense of murder in violation of the law of war. These charges are based on the allegation that Kadhr killed a U.S. soldier in Afghanistan prior to being captured. However, there is no allegation that Kadhr engaged in any perfidious or treacherous conduct, nor that he killed an individual who was *hors de combat*. Instead, the charge alleges that Kadhr committed the offense when he threw a grenade that killed the U.S. soldier while he was defending his position against a U.S. assault. In short, the government's position is that by participating in the hostilities without being a privileged combatant, the killing committed by Kadhr during that participation is itself a war crime.

Extending the opportunity to qualify for combatant immunity would add substantial credibility to the criminal sanction, *for violation of the laws and customs of war*, imposed upon transnational non-state actors. Unlike the current situation, failure to comply with the combatant immunity qualification requirements would provide the basis to sanction these individuals for violations of the laws and customs of war. Enhanced credibility would be derived from the fact that the prosecuting state could highlight that it has offered the defendant the benefit of combatant immunity on condition of compliance with these

132. For more on Kadhr's story, see Maggie Farley, *Guantanamo Inmate Stirs Debate in Canada*, L.A. TIMES, Jun. 24, 2007, at A3.

humanitarian law enhancement requirements. Thus, the basis for criminal sanction would be the result of the decision of the non-state belligerent to forego the opportunity to qualify for this benefit in order to gain an asymmetrical advantage from violating these law enhancement qualification requirements. The opportunity to claim this position of credibility therefore supports this extension, even assuming it will be generally ineffective in influencing the actual behavior of these individuals.

VI. CONCLUSION

The prospect of extending combatant immunity to non-state actors may seem unthinkable, but it shouldn't be. Just as the primary focus of international humanitarian law has shifted from the protection of state sovereignty to the protection of the human person and all victims of war, the focus of analyzing the viability of such a proposal should also shift. Although the armed struggle against transnational terrorism did not have to be characterized as armed conflict, it was (at least by some states, including the United States). It was this decision to adopt such a characterization that produced an anomaly that continues to this day: individuals captured by the United States in this struggle are preventively detained on the theory that they are belligerents engaged in armed conflict, but because they are not engaged in "the right type of conflict" they are denied even the opportunity to qualify for combatant immunity.

The cost/benefit analysis related to this denial of opportunity indicates it is time to reconsider the legal and policy justifications that underlie this denial. Considering the evolution of humanitarian law since 1949, including the primary motive that led states to reject the extension of combatant immunity to wars of national liberation in 1977, a picture begins to emerge that indicates the primary objective of the principle of combatant immunity might no longer be the protection of state sovereignty, but instead the enhancement of compliance with humanitarian law itself. If this is true, then a more careful analysis of the benefits and costs of extending the opportunity to qualify for combatant immunity to non-state transnational belligerents is in order.

This cost/benefit equation reveals that the dilution of sovereign prerogative may indeed be offset not only by the potential influence on the conduct of non-state belligerents, but also on the potential enhancement of the credibility of state efforts to criminally sanction these belligerents for their participation in hostilities. One fact is undeniable: the current application of humanitarian law to transnational armed conflict provides absolutely no incentive for individuals associated with these non-state groups to endeavor to comply with the principles of humanitarian law.

Because extending the possibility to qualify for combatant immunity to these belligerents would in no way compromise the authority of states to prevent them from returning to hostilities after they've been captured, nor the authority to criminally sanction them for perfidious or treacherous conduct, the

potential benefit of providing an incentive that might influence their conduct in a positive manner seems a sufficient justification for the extension. However, even if their conduct remained inconsistent with the norms of international humanitarian law, states would enhance the credibility of their condemnation of that conduct based on the fact that they had at least offered their opponents an important incentive to change their behavior. Accordingly, it is time to start thinking the unthinkable.