Just War Theory & the Conduct of Asymmetric Warfare

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Abstract: A central element of the dominant view of just war theory is the moral equality of soldiers: combatants have equal rights to wage war against one another and are entitled to certain protections if captured, without regard to which side's cause of war is just. But whether and how this principle should apply in asymmetric armed conflicts between states and nonstate groups is profoundly unsettled. I argue that we should confer war rights on fighters for nonstate groups when they are engaged in violence that has risen to the level of armed conflict, and when the state against which the war is being waged is not entitled to assert its monopoly on the legitimate exercise of force, either because 1) the nonstate group has established sufficient control over territory to assert its own governing authority; or 2) because the group is located abroad. Conferring war rights on nonstate fighters does not, however, permit them to engage in acts that violate the laws of war. Fighters who commit such violations are individually subject to prosecution without regard to their group's entitlement to war rights.

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The notion of the moral equality of soldiers arises from traditional just war theory's embrace of a "dualism of our moral perceptions," under which we distinguish between the justice of recourse to force (*jus ad bellum*) and the justice of the conduct of war itself (*jus in bello*). This separation means that an unjust war of aggression can be fought by just means, and a just war of self-defense can be fought unjustly. Because soldiers fight largely out of a sense of loyalty and accept their particular side's representations about the justice of its cause, the moral status of individual combatants, in the words of Michael Walzer, "is very much the same.... They face one another as moral equals." It follows that soldiers, regardless of which side they fight for, have equal moral standing to invoke the special rights that apply in wartime. To put it plainly, soldiers in wartime possess "the equal right to kill."[1]

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The international law of armed conflict reflects the priciple of the moral equality of soldiers. Under the law, soldiers may claim entitlements to two key clusters of rights. First, soldiers in wartime – at least those participating in an international armed conflict between states – possess the "combatant's privilege," or the right to kill and wound enemy soldiers and to destroy enemy military property without criminal liability.[2] As Telford Taylor, who served as the chief prosecutor before the U.S. military tribunals at Nuremberg, explained: "War consists largely of acts that would be criminal if performed in time of peace. . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the law lays a blanket of immunity over the warriors."[3] Second, combatants in wartime who fall into the hands of their enemy benefit from certain forms of humane treatment if they cease to take part in hostilities, either because they are sick or injured or because they have surrendered. They may not be killed, tortured, or otherwise subjected to "inhuman treatment."[4] And they are entitled to what is referred to as "benevolent quarantine," that is, they are entitled to be treated as prisoners of war, a status that entails an elaborate set of rules regarding their rights and treatment.[5] These rights – the right to kill enemy soldiers and to destroy permissible enemy targets with immunity from criminal liability, together with the right to some basic form of benevolent quarantine – are what I have in mind in this essay in referring to "war rights" of combatants.[6]

Unsurprisingly, the war rights of soldiers come with a corresponding set of liabilities. The corollary of the combatant's privilege is that a soldier, during wartime, may be targeted and killed at any time, even if he poses no immediate threat to the person targeting him. The corollary of the right of benevolent quarantine is that soldiers may be detained as prisoners of war, without being charged or convicted of any crime, to prevent them from returning to the fight. Prisoners of war may be detained for an indeterminate, even indefinite, period of time, and have a right to be set free only upon a cessation of hostilities.

Under the law of armed conflict, however, soldiers possess war rights only in the context of international armed conflict: namely, a war between two or more states. The 1949 Geneva Conventions regulating armed conflict and Additional Protocol I of 1977 each apply only in the case of armed conflict between states that are parties to the Conventions.[7] Although Additional Protocol II of 1977 represented a novel, albeit modest, attempt to expand the law of armed conflict in "armed conflicts not of an international character," that Protocol does not confer "combatant" status on fighters for nonstate groups and does not articulate war rights, at least not in the sense used in this essay, for participants in such conflicts. The prevailing view is that international law is largely silent on the status of fighters in asymmetric conflicts, by which I mean conflicts between a state and a nonstate group, which lawyers refer to as "noninternational armed conflicts" (NIACs).

To be sure, the law of armed conflict does have some application to fighters in NIAC, and extends both protections and restrictions. Common Article 3 of the 1949 Geneva Conventions (the sole provision of the 1949 Conventions that applies to noninternational armed conflict) and Protocol II provide that fighters who have surrendered or are wounded and are no longer taking part in active hostilities are entitled to humane treatment.[8] Protocol II also establishes some limited humanitarian protections for persons "deprived of their liberty for reasons related to the armed conflict," although it does not extend benevolent quarantine rights to fighters in NIAC. And Protocol II and customary international law impose restrictions on the means and methods

of waging a noninternational armed conflict that bind both government forces and nonstate fighters alike.

But international law does not confer war rights on fighters in noninternational armed conflict equivalent to the combatant's privilege.[9] There is no provision that prohibits a government from prosecuting the nonstate side's fighters for acts that would fall under the combatant's privilege in an international armed conflict.[10] While the lack of a combatant's privilege in noninternational armed conflict may once have been merely an esoteric point of the law of armed conflict, it has emerged as a significant concern in the post-9/11 world. Since then, the United States has entered into an asymmetric armed conflict with Al Qaeda, the Taliban, and associated forces,[11] a war in the course of which the United States has been unwilling to recognize any war rights on the part of its adversaries. The United States has refused to allow enemy fighters to claim that their violent activities are privileged, even when they engage in traditional, nonterrorist forms of armed combat. Thus, some of those charged by military commissions at Guantánamo Bay have been charged with such offenses as "murder by an unprivileged belligerent,"[12] "attempted murder by an unprivileged belligerent,"[13] or conspiracy to commit "murder by an unprivileged belligerent,"[14] even though the accusations against them describe engagement in, or preparations for, conventional combat with members of U.S. or coalition armed forces.

Nor does the law of armed conflict confer rights of benevolent quarantine on fighters in noninternational armed conflict. Although persons detained during such conflicts are due basic humane treatment, such as the provision of food, water, and health care, they may not invoke the carefully regulated regime of rights and protections that governs the treatment of prisoners of war in international armed conflict. Soon after detainees captured during Operation Enduring Freedom, the post-9/11 use of force led by the United States in Afghanistan, were transferred to the U.S. naval facility at Guantánamo Bay, the United States took the categorical view that no members of Al Qaeda were entitled to prisoner of war status because Al Qaeda is not a state, and its fighters consequently could not claim war rights under the Geneva Conventions. They were held in conditions incompatible with the requirements of the Geneva Convention on Prisoners of War. In addition, captured fighters in a NIAC are subject to criminal prosecution for "offenses related to the armed conflict"; instead of Telford's "blanket of immunity," such detainees are provided with only limited procedural protections regarding the independence and impartiality of the courts before which they may be tried.[15]

Thus, in contrast to international armed conflict, in which soldiers face one another as moral equals, in noninternational armed conflict international law institutionalizes a profound asymmetry between the war rights of state and nonstate fighters. For even as states deny rights derived from the law of armed conflict to nonstate groups in asymmetric conflicts, they invoke war rights for themselves under that very body of law.

In the course of its post-9/11 armed conflict against Al Qaeda, the Taliban, and associated forces, for example, the United States has exercised many of the extraordinary authorities that are available only during times of war.[16] U.S. forces have claimed and exercised the right – on the basis of law of war principles – to kill enemy fighters in Afghanistan, Pakistan, Yemen, Somalia, Syria, and Iraq. In addition to targeting, U.S. forces in Afghanistan have routinely detained Taliban fighters; the "laws and customs of war" provided the stated authority to detain such individuals on the battlefield.[17]

The exercise of war rights by the United States against nonstate groups is not solely a post-9/11 phenomenon. The United States has effectively invoked such rights in a variety of other contexts, including the attacks against targets in Sudan and Afghanistan following the 1988 bombings of American embassies in Tanzania and Kenya by Al Qaeda affiliates. The U.S. personnel who killed Al Qaeda members or destroyed property in Afghanistan and Sudan undoubtedly acted on the assumption that they were not murderers, but rather were engaged in behavior protected by the combatant's privilege.

Nor is the United States by any means the only country to claim wartime rights against nonstate groups without recognizing reciprocal rights on the part of the adversary. Illustrative contemporary cases include Turkey's use of force against Kurdistan Workers' Party (PKK) fighters in Turkey and Syria, Ukraine's treatment of separatist forces in Eastern Ukraine, the Colombian government's refusal to accord prisoner of war status to FARC (Revolutionary Armed Forced of Colombia) fighters during Colombia's civil war, and Israel's conflict with Hamas in the Gaza Strip.

The failure of the law of armed conflict to recognize the moral equality of soldiers in the context of asymmetric conflicts is particularly striking given that noninternational armed conflicts are much more prevalent than wars between states, and have been increasing as a proportion of wars since the end of World War II.[18] While it may not be surprising that states do not find it in their interest to accord war rights to the nonstate groups that take up arms against them, the increasing prevalence of asymmetric warfare calls on us to examine if nonstate groups *should* have war rights, as a matter of just war theory. The remainder of this essay examines whether, and under what circumstances, nonstate fighters should be accorded war rights – both the combatant's privilege and the right to benevolent quarantine – when engaged in a noninternational armed conflict.

What do the philosophers say about the war rights of nonstate groups? Despite the prevalence of noninternational armed conflict, much of just war writing does not explicitly address asymmetric conflicts and whether the rules that apply in such wars comport with or differ from those that pertain in wars between states.[19] Some more recent work does address the subject, but presents quite fragmented views. Still other theorists who begin from a cosmopolitan perspective, like Cécile Fabre, reject the notion that the rights of individuals, including their rights during wartime, derive from their membership in a group of any kind, be it a state or nonstate group.[20] For cosmopolitans, the question of whether the war rights of nonstate fighters differ from those of members of the armed forces of a state is, accordingly, a *non sequitur*.

Among those just war theorists who have considered whether, and under what circumstances, nonstate armed groups should be able to claim war rights, several approaches have emerged. One line of thought seeks to update the requirement from traditional just war theory that war, in order to be justified, must be authorized by a "legitimate authority," which in early writings on the topic was understood to be limited to the sovereign. This strand of just war theory affirms the relevance of the "legitimate authority" requirement, but rejects its state-centric provenance and revises it to recognize entities other than states that might qualify. Adherents to this view will ask whether a "community"[21] or "political society"[22] exists that is entitled to seek self-governance, and which in turn may claim the right to have recourse to political violence. Assuming a group qualifies as a political community, a closely related

question is whether those who have taken up arms genuinely represent that community, or are merely taking up violence in its name.[23] Under this "consent principle," a warring group will satisfy the legitimate authority requirement only if it has been authorized to wage war "by those on whose behalf the war is fought."[24] Some theorists add prudential considerations, such as whether the nonstate armed group has reasonable prospects of success; others note that even though states may not be the only entities that can be legitimate authorities, in practice they are more likely to satisfy the requirement than nonstate groups.[25]

A second approach tends to link a nonstate group's entitlement to wage war to the character, and sometimes even the justice, of its cause for waging war. A first line of demarcation is to extend war rights only to nonstate groups acting on the basis of *political* motivations, as opposed to other violent groups (like organized crime groups).[26] A second proposed limitation is to deny the entitlement to wage war to groups (whether they are states or nonstate groups) that cannot "pass basic moral tests": an organization that is "sufficiently evil…cannot represent a political community; its members can act only in their private capacity."[27] Revisionist theorists generally adopt this perspective and accord war rights only to those whose *ad bellum* cause for war is just; unjust combatants cannot claim war rights regardless of whether the entity for which they are fighting is a state or a nonstate group. And the cosmopolitans are explicit: the question of whether a group may claim war rights depends on whether its rights are being violated, and not the characteristics of the group; indeed, some cosmopolitans argue that even individuals may claim the right to wage war in certain circumstances.[28]

A third position – one espoused more by lawyers than just war theorists – links entitlement to war rights to the means a nonstate group uses to wage war. Under this view, even if a fighting force is representative of a political community, and even if it is fighting for a just cause, the group's eligibility for war rights depends on whether it complies with *jus in bello* principles. More precisely, adherents of this view believe that warring groups that might otherwise have a just entitlement to war rights forfeit those rights if they violate the laws of armed conflict; for example, if they intentionally target civilians, or if they fail to distinguish themselves from the civilian population. A related position is that armed groups may not claim war rights if they do not meet the standards the law of war uses to define who qualifies as a member of the armed forces of a state: namely, operating under a responsible command; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war.[29]

The principles that underlie the moral equivalence of soldiers in wartime seem to me to be *prima facie* applicable in nonstate conflicts. War, even asymmetric war, is a collective, not an individual, endeavor. Soldiers in such conflicts fight largely out of a sense of loyalty to their side, and they rely heavily on the group's judgment about the justice of their cause. But not every nonstate group that takes up arms should be able to claim war rights. The challenge is to determine in which asymmetric conflicts the moral equivalence of soldiers should be recognized. In my view, none of the prevailing just war theory approaches captures the correct standard, particularly if our goal is to identify a morally defensible standard that can be sensibly and realistically administered in practice. The difficulty with grounding war rights in a principle of legitimate authority is that virtually any nonstate group that takes up arms will claim to represent a political commu-

nity and to have been authorized to fight on its behalf; in the absence of formal governing institutions possessed by states, it will be difficult to evaluate that claim. Similar difficulties arise in linking war rights to the morality of the reasons for having recourse to armed conflict: virtually any warring nonstate group will claim, and probably even believe, that it is fighting for a just cause. As for a test based on compliance with the law of war, the record of a nonstate armed group is likely to be mixed, at best; there is no clear-cut standard for judging what portion of – or the extent to which – a group must fight in violation of the laws of war before that group collectively forfeits war rights, much less for ascertaining what proportion of that force is in fact violating the laws of war.

Administrability matters. Although some argue that it is for the law of war, and not just war theory, to concern itself with compliance and enforceability,[30] a moral framework that effectively delegates to nonstate groups themselves the authority to judge whether they possess war rights fails to provide viable criteria for making moral judgments about the real world. Worse, such a framework runs the risk of perversely turning the goal of revisionist just war theorists on its head by encouraging more wars, including more unjust ones. I accordingly side with those who favor moral norms that are "implementable and action-guiding" in the real world.[31]

Judgments about the war rights of nonstate groups should therefore not necessarily focus on the motivations and characteristics of the group. Rather, the first test I suggest for whether a nonstate group may claim war rights is the (relatively) objective question of whether a state of "armed conflict" exists. International law has a settled set of criteria for deciding whether political violence has risen to the level of noninternational "armed conflict," as opposed to "mere banditry or an unorganized and short-term insurrection."[32] Violence amounts to armed conflict when it reaches a high level of intensity,[33] when it is protracted,[34] and when the nonstate group qualifies as a "party" to armed conflict, meaning that it possesses organized armed forces under a command structure with the capacity to sustain military operations.[35] Perhaps the most significant test is whether the government "is obliged to have recourse to [its] regular military forces," rather than its police, to counter the security challenge presented by the insurgent group.[36] Application of these criteria will not always be clear-cut, but whether they are met in any given case is a question of fact, not a matter of self-judgment by the nonstate party about its motives or character. Nor will the question of whether a state of armed conflict exists be determined by the policy preferences of the state party to the conflict, which might be expected to deny that status to its nonstate opponent for fear of conferring an unwelcome form of legitimacy on the group. The facts on the ground, not the pronouncements of the parties, will determine whether a state of armed conflict exists.

In applying this test, it is particularly important to look at the conduct as well as the legal claims of the government that is engaged in political violence against a nonstate group. Where the government itself claims war rights, that is, the right to kill nonstate fighters on the battlefield rather than arresting them and trying them for crimes, or to detain them for the duration of a conflict without charge, this creates a presumption that the opposing force is entitled to claim reciprocal war rights. This reflects the basic assumption of moral equality that undergirds the war convention in the context of interstate wars. In other words, where a government claims to be "at war" with a nonstate group – as the Sri Lankan government did when it declared war against the Tamil Tigers or

as Turkey has effectively done in launching airstrikes against Turkish PKK fighters – it presumptively triggers the reciprocal application of war rights on the part of the opposing nonstate group. Subject to the limitations of the second test set out below, once we have crossed the threshold from an ordinary legal situation into the extraordinary state of armed conflict, both parties to the conflict should have war rights.

But crossing the threshold into a state of armed conflict is not itself sufficient to confer war rights on nonstate groups. The second test I propose would limit the extension of war rights to nonstate groups involved in armed conflicts that take place in a geographic space where the government may not rightfully claim the authority to exercise the state's ordinary monopoly on the use of force. The test arises from the premise that an essential authority of the state is its monopoly on the legitimate use of force within its territory. From this flows the state's authority to make its law applicable to violence that takes place in its territory and to criminalize violence that occurs there, including violence directed against the state itself. This explains why the United States retains the right to prosecute members of extremist militias like the Symbionese Liberation Army or the Hutaree Militia in Michigan – even if those groups advocate violent resistance to the United States government – and why Germany retained the right to prosecute members of the Red Army Faction for violent acts against state officials.

In some cases, a nonstate group's security challenge to the state may be so serious that the state can no longer rely on its ordinary police forces and must have recourse to its security forces to suppress violence, as in the case of pervasive violence by organized crime groups in Mexico. While violence in such a case may cross the threshold of armed conflict, it does not necessarily mean that the threatened state may no longer rightfully assert its monopoly on the legitimate use of force. Rather, it is only when a group waging war against a state can plausibly claim that it has supplanted the state's functions in exercising the legitimate monopoly of violence that the state forfeits its exclusive right to resort to force. But the loss of a *capacity* to suppress violence does not itself signify the loss of a *right* to suppress violence. Instead of examining solely the nonstate group's motivations, the justness of its cause, or its representative character, this test for the acquisition of war rights focuses on the extent to which the group exercises governance functions. Fighters for nonstate groups that have not plausibly asserted a right to govern and to exercise a monopoly of force in part of a state's territory need not be accorded war rights. They are challengers to the state's legitimate monopoly on the use of force and may appropriately be prosecuted for murder if they kill members of the state's security forces.

These tests seek to balance the war rights of nonstate groups with legitimate state concerns about losing the ability to exercise the law enforcement sanction to control political violence. Efforts to extend the law of war to asymmetric conflicts have traditionally confronted concerns that doing so would undermine the state's domestic authority. The authoritative commentary to the 1949 Geneva Conventions seeks to assuage these concerns by reassuring states that Common Article 3, the only article applicable to noninternational armed conflicts, "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."[37]

The supposition underlying the law of war is that a nonstate group should not be able to claim war rights – which derive from international law – against the state it is fighting where the state's domestic law still applies. In certain contexts, however, we should depart from the presumption that a state faced with violence retains its monopoly on the use of force and its entitlement to rely on its domestic law to deny war rights to nonstate armed groups. That is why the second test of when a nonstate group acquires war rights asks whether that group operates in a realm where the opposing state's purported right to the monopoly on the use of force does not apply; that is, whether the state is engaged in armed conflict in an "other-governed space." Two such other-governed spaces are particularly salient.

First, when a group exercises sufficient control over territory within a state, the presumption of the state's monopoly of control ceases to be justifiable. A useful guideline in this regard is the threshold for application of Additional Protocol II to the 1977 Geneva Conventions, which is triggered when dissident armed forces "exercise such control over a part of [a state's] territory as to enable them to carry out sustained and concerted military operations"[38] – although Protocol II does not afford war rights to such dissident forces. This standard echoes the test under the old law of neutrality for determining when a nonstate group acquired the rights of belligerents: "Among the tests [for recognizing belligerent rights], are the existence of a *de facto* political organization of the insurgents, sufficient in character, population, and resources to constitute it, if left to itself, a State among nations, reasonably capable of discharging the duties of a State."[39] Where a nonstate group exercises "*de facto* authority over persons within a determinate territory,"[40] the state waging war against that group lacks not only the capacity, but also the right, to claim a monopoly on the use of force in the zone of war. Linking a nonstate group's war rights to its governing functions derives not only from the opposing government's loss of a legitimate basis for applying its domestic criminal law, but from a separate moral foundation: it comports with just war approaches that confer war rights on groups that represent and have the consent of the political communities on behalf of which they are fighting. If armed conflict takes place between two armed groups, neither of which may claim the right to rely on its domestic authority to govern the other, the fighters for the warring factions should be treated as moral equals, and each should be entitled to claim war rights.

Second, the presumption that a state is entitled to exercise a monopoly over the use of force on its territory, and may consequently make its law applicable to violence that occurs there, should not apply in *transnational* armed conflicts between states and nonstate groups that take place outside the state's territory. The war the United States today is waging against Al Qaeda, the Taliban, and associated forces entails the use of armed force against nonstate groups located not only in Afghanistan and Iraq, where the United States operates with the consent of the territorial state, but also in Pakistan, Somalia, Yemen, and Syria. In at least some of these settings, the United States asserts that it is exercising self-defense rights under international law because the territorial government "is unwilling or unable to prevent the use of its territory for such attacks."[41] The United States is using force in such contexts in an other-governed space; in such a setting, concerns that according war rights to a nonstate group would improperly displace the warring state's monopoly on the legitimate use of force do not apply.

Thus, where political violence has crossed the threshold of armed conflict, and in circumstances where the state's ordinary right

to exercise its monopoly on the legitimate use of force does not apply, a state invoking war rights may not claim the right to regulate violence by nonstate groups under its domestic law. In such circumstances, as in armed conflict between states, the state's regular domestic authority ceases to apply, and fighters for the nonstate groups should be entitled to war rights.

The tests I propose for conferring war rights on nonstate groups do not address the concern raised by some theorists, international lawyers, and military personnel that nonstate groups should not be entitled to claim war rights if their members do not conduct their military operations in accordance with the laws of war. Soldiers, in particular, might object that even if the goal of extending the principle of reciprocity to asymmetric armed conflicts is morally defensible, war rights should not be conferred on those who do not fight according to fundamental law of war principles that reciprocally bind soldiers: namely, that soldiers must distinguish themselves from the civilian population, must direct their operations only at military targets, and may not launch attacks that cause disproportionate harm to civilians.

These are valid concerns. But conferring war rights on a nonstate group in an other-governed space during times of armed conflict does not alter the duties that bind the nonstate fighters. Acts that violate the laws of war, including the intentional targeting of civilians or using civilians as shields, would not be privileged, even if the group whose fighters commit such acts is otherwise entitled to war rights with respect to operations that comply with *jus in bello* rules. Recognizing rights under the law of war for nonstate groups does not entitle such groups to kill the very noncombatants the law of war is meant to protect. Fighters who target civilians violate international humanitarian law and are subject to prosecution as war criminals. Similarly, members of a nonstate armed group who do not distinguish themselves from civilians and carry their arms openly forfeit their war rights, and may be prosecuted as unprivileged belligerents.

As such, those who carry out what might properly be described as acts of terrorism – the intentional killing of civilians for political purposes – would not be entitled to invoke war rights even if such rights are extended to the nonstate group to which they belong. But the mere fact that a nonstate group has engaged in armed conflict against a government – which officials in many governments reflexively label as terrorism, without regard to the means of warfare employed by the nonstate group – should not deprive a group waging war in an other-governed space from the reciprocal entitlement to war rights. Similarly, the fact that some, or even many, of the members of an organized armed group do not distinguish themselves from the civilian population, or may engage in prohibited means of waging war, does not mean that the group as a whole forfeits its war rights – just as the fact that members of state armed forces sometimes violate *jus in bello* rules, sometimes extensively, does not mean that the country's armed forces, in their entirety, lose their war rights. Rather, we treat those who have intentionally targeted civilians or committed other grave violations of the law of armed conflict as war criminals. The same approach should apply to nonstate armed groups if some of their members violate the rules governing the conduct of war. But those members of such a group who do comply with *jus in bello* rules should retain the combatant's privilege and the right to benevolent quarantine.

ENDNOTES

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[1] Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic Books, 2006), 47, 127.

[2] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010), 42.

[3] Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), 19.

[4] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949*, Articles 12 and 50, hosted at the International Committee of the Red Cross, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4825657B0C7E6BF0C12563CD002D6B0B.

[5] Brian Orend, *The Morality of War*, 2nd ed. (New York: Broadview Press, 2013), 116–119.

[6] There are important revisionist alternatives to the traditional just war view that reject the notion of the moral equality of soldiers. Jeff McMahan, for instance, believes that those fighting a just war, such as a war of self-defense against aggression, do not make themselves liable to being attacked by engaging in armed conflict. See Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).

[7] *Geneva Convention (I)*, Article 2, "Application of the Convention," https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=41229BA1D6F7E573C12563CD00519E4A; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Related to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977*, Article 1, hosted at the International Committee of the Red Cross, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?documentId=6C86520D7EFAD527C12563CD0051D63C&action=OpenDocument.

[8] *Article 3 Common to the Geneva Conventions; Protocol Additional to the Geneva Conventions of 12 August 1949, and Related to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977*, Article 4, "Fundamental Guarantees," hosted at the International Committee for the Red Cross, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F9CBD575D47CA6C8C12563CD0051E783.

[9] The one notable qualification is the inclusion within the scope of Additional Protocol I of "armed 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"; anticolonial fighters in such conflicts qualify as combatants and presumably possess war rights. *Protocol I*, Article 1, "General Principles and Scope of Action," https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?documentId=6C86520D7EFAD527C12563CD0051D63C&action=OpenDocument.

[10] *Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949*, Article 99, "Essential Rules. I. General Principles," hosted at the International Committee of the Red Cross, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=57CAB484520D699FC12563CD0051B2E2.

[11] Stephen W. Preston, "The Legal Framework for the United States' Use of Military Force Since 9/11," remarks at the Annual Meeting of the American Society of International Law, Washington, D.C., April 10, 2015, http://www.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911.

[12] *United States v. Khadr*, U.S. Military Commission Referred Charges (April 5, 2007), para. 23.

[13] *United States v. Hicks*, U.S. Military Commission Charge Sheet (June 10, 2004), para. 21. The initial 2004 charge against Hicks for attempted murder by an unprivileged belligerent stated that he "attempted to murder divers [*sic*] persons by directing small arms fire, explosives, and other means intended to kill American . . . and other Coalition forces, while he did not

enjoy combat immunity." This charge ultimately was not referred by the convening authority for trial by a military commission.

[14] *United States v. al Sharbi*, U.S. Military Commission Charge Sheet (Nov. 4, 2005), para. 13. The reference to murder by an unprivileged belligerent was removed from subsequent charges, but al Sharbi was charged with conspiracy to commit murder in violation of the law of war for the same acts for which he was initially charged with murder by an unprivileged belligerent: namely, building explosive devices "in order to attack United States and Coalition forces" in Afghanistan. See also *United States v. al Sharbi*, U.S. Military Commission Sworn Charges (January 12, 2009).

[15] *Protocol II*, Article 6, "Penal Prosecutions," https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=DDA40E6D88861483C12563CD0051E7F2.

[16] Allen S. Weiner, "Law, Just War, and the International Fight Against Terrorism: Is It War?" in *Intervention, Terrorism, and Torture: Challenges to Just War Theory in the 21st Century*, ed. Steven P. Lee (Dordrecht, The Netherlands: Springer Press, 2007), 137–153, 139.

[17] See Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan, quoted in *Department of Defense Law of War Manual* (Washington, D.C.: United States Department of Defense, June 2015), 488.

[18] Lotta Themnér and Peter Wallensteen, "Armed Conflict, 1946–2010," *Journal of Peace Research* 48 (2011): 525–536.

[19] Jonathan Parry, "Civil War and Revolution," in *Oxford Handbook of Ethics and War*, ed. Seth Lazar and Helen Frowe (Oxford: Oxford University Press, 2015).

[20] Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012).

[21] Christopher J. Finlay, "Legitimacy and Non-State Political Violence," *Journal of Political Philosophy* 18 (3) (2010), 287–312.

[22] Yitzhak Benbaji, "Legitimate Authority in War," in *Oxford Handbook of Ethics and War*, ed. Seth Lazar and Helen Frowe (Oxford: Oxford University Press, 2015).

[23] Finlay, "Legitimacy and Non-State Political Violence," 304–309.

[24] Parry, "Civil War and Revolution," 8.

[25] Benbaji, "Legitimate Authority in War."

[26] Christopher Kutz, "The Difference Uniforms Make," *Philosophy and Public Affairs* 33 (2) (2005): 148–180, 176–177.

[27] Benbaji, "Legitimate Authority in War," 4.

[28] Fabre, *Cosmpoolitan War*, 145–148.

[29] Jens David Ohlin, "The Combatant's Privilege in Asymmetric and Covert Conflicts," *Yale Journal of International Law* 40 (2015): 337–393.

[30] Benbaji, "Legitimate Authority in War," 11.

[31] Parry, "Civil War and Revolution," 3.

[32] Jean S. Pictet, *Commentary, III Geneva Convention* (Geneva: International Committee of the Red Cross, 1960), 50.

[33] International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* (Geneva: International Committee of the Red Cross, March 2008), 3.

[34] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, October 2, 1995, para. 70.

[35] International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, 3.

[36] Jean S. Pictet, *Commentary, I Geneva Convention* (Geneva: International Committee of the Red Cross, 1952), 49.

[37] Pictet, *Commentary, III Geneva Convention*, 43.

[38] *Protocol II*, Article 1, "Material Field of Application," https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=93F022B3010AA404C12563CD0051E738.

[39] Henry Wheaton, *Elements of International Law*, 8th ed., ed. Richard Henry Dana (Omaha: Gryphon Editions, 1866), 35.

[40] Pictet, *Commentary, I Geneva Convention*, 50.

[41] Preston, "The Legal Framework for the United States' Use of Military Force Since 9/11."