

# The Difference Uniforms Make: Understanding the Regulation of Collective Violence in Criminal Law and the Law of War

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Philosophy deals in abstract principles and politics in realities. Nevertheless, the two must continually meet: philosophy must address real problems and politics be guided, at least in part, by principle. In this paper, I offer a philosophical treatment of an essentially political phenomenon, namely war. My aim is two-fold: to complicate moral theory by confronting it with real-world exigencies, and to show how we might bring the actual world of varied, and often conflicting, moral responses to collective violence closer to the ideal world of uniform justice. Political violence poses a particular set of challenges to the application of moral principles. In particular, in what follows, I identify a conflict between two themes in our response to collective violence, which I will call themes of “inculcation” and “exculpation.” I begin with three stories derived from actual events.

## 1. Crime Story:

Smith and Daniels approach Taylor, drinking in a bar.<sup>1</sup> Daniels tells Taylor that Jax Liquor, up the street, has not yet emptied its cash register, and would be a good target for a robbery. Smith shows Taylor his gun, and says he’s confident they can get the owners, the Wests, to hand over the till with no problem. All they need is a car in which to get away, and Taylor has a car. If he is willing to do nothing more than sit outside the liquor store with the engine running, and then spirit Smith and Daniels away, he’ll get a third of the haul. If not, no problem: Daniels’ friend Haynes is sure to want a piece, and he has a Camaro. They don’t need Taylor, but he’s a friend and it’s an easy payoff. Taylor is in.

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<sup>1</sup> Based loosely on *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131 (1970).

Smith and Daniels come into the store, Smith waving his gun, both shouting, demanding the money. But the situation fails to unfold as planned. As Jack West, working the register, prepares to hand over the money, his wife Linda West, in the back of the store, reaches into her dress pocket for the gun she keeps. Fearing that Smith may shoot whatever her husband does, Mrs. West shoots and kills Smith, then shoots and wounds Daniels as he flees. Taylor and Daniels are later arrested.

Taylor, though he did nothing more in preparation for the robbery than sit in his car, prepared to drive away, is convicted of murder. Though Smith's death was at Mrs. West's hand, it is treated as flowing from his own and Daniels' reckless acts of brandishing the gun and scaring the Wests; hence Smith and Daniels are responsible for Smith's death. The killing, though not intended by Smith or Daniels, counts as murder in a jurisdiction willing to take brandishing a gun as an act manifesting extreme indifference to human life. Furthermore, by the logic of accomplice liability according to which any member of a criminal group is liable for any reasonably foreseeable acts done in furtherance of the group's common design by any other member, Taylor is also responsible for Smith's death. The result is Taylor's conviction for a murder he did not commit, nor even cause.<sup>2</sup>

## 2. War Story:

Imperioland has invaded its small but oil-rich neighbor, Petrostan, in order to seize its oil wells and gold reserves. The invasion is condemned by the world, but proceeds apace. Sergeant Blue, of Imperioland's volunteer Army, is aware that world opinion holds Imperioland's invasion to be a flagrant violation of international law, but he follows the judgment of his political leaders. The rules he is violating, known as "International Humanitarian Law" (or IHL), insist that soldiers, whatever the justice of their cause, proportion the violence they deploy to military necessity (*the principle of proportionality*), distinguish between combatants and civilians in the use of violence (*discrimination*), and respect the life and well-being of anyone not currently a threat, including enemy soldiers *hors de combat* through surrender or injury (*humanity*). Blue is sent to the front as leader of an advance infantry squad. His squad is ordered to capture an engineering building at one of the refineries. Blue, with some of his squad, stealthily enters the building. He himself shoots and kills the Petrostan soldiers standing guard. His mission appears successful.

Suddenly a company of Petrostan's soldiers arrive at the facility. They surround the building and capture Blue and his squad. The Petrostan commander convenes a military tribunal, which charges Blue with murder. Under Petrostan's criminal law, the case is clear: Blue did deliberately kill Petrostan citizens, not in defense of himself or others. He is sentenced to death.

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<sup>2</sup> In the actual case, Taylor was charged with first degree murder, and the court, in reviewing Taylor's information, sustained the reasonableness and probable cause of the first degree charge, based on what seems to be an erroneous interpretation of California's felony-murder statute, CA Penal Code §189. Properly, only a second degree murder charge, as a killing manifesting an "abandoned and malignant heart," should at most have been sustained.

However, before sentence is carried out, a member of Petrostan's foreign ministry arrives. Petrostan (like Imperioland) is a Geneva Convention participant. Blue, who was a regular member of Imperioland's armed forces, cannot be charged with murder. According to the Geneva Convention relative to the Treatment of Prisoners of War (GPW), Blue is instead a privileged combatant who can only be held as a Prisoner of War, and cannot be punished for his conduct (assuming it did not breach the laws of war). He may be held in captivity, but only until the cessation of hostilities.<sup>3</sup> Though Blue kills without justification, he is impunible.

### 3. Rebel Story:

The tide turns in the invasion, and Imperioland's troops begin to rout Petrostan's army. Remaining members of the army doff their uniforms, move to the back country, and become a partisan resistance. They are joined in their efforts by Petrostan citizens, and foreigners from the region who infiltrate the border and join the resistance in order to take a stand against Imperioland's aggression.

The partisans' resistance effort is classic guerrilla: they hide themselves among the population, they seek only small, low-intensity engagements with Imperioland's army, and they consider their strategy to be one of imposing unsustainable costs on their occupier over the very long term. To paraphrase Raymond Aron, they believe they will win so long as they do not lose their ability to inflict losses, and that Imperioland will lose so long as it does not wipe them out.<sup>4</sup> Their goal is to protect and restore the political institutions of Petrostan, as well as to defend a religious and cultural tradition they reasonably see as under threat by Imperioland's occupation. The partisans, moreover, are principled: they strike only at Imperioland military targets, and they are scrupulous about observing the principles of humanity, proportionality, and discrimination. They do not, however, reveal their identities as combatants because it would be certain death or capture. They engage in no public display, except when they arrive at the scene of a conflict and draw their weapons.

Gray is a foreigner who wants to join the partisans. She too crosses the border, affiliates with a partisan unit, receives weapons training, and is sent out to fight.<sup>5</sup> She and a group of comrades are planning an attack on a military depot when the house they are in is swarmed by a squad of Imperioland soldiers, as well as some apparent civilians, at least one of whom is equipped with highly sophisticated radio equipment. Gray is armed but not uniformed. Imperioland has ratified the GPW, which accords POW status only to those combatants who, among other restrictions, bear "a fixed distinctive sign recognizable at a distance." But it has not ratified the additional Protocol I to the

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<sup>3</sup> 1949 Geneva Convention relative to the Treatment of Prisoners of War (GPW).

<sup>4</sup> Raymond Aron, *On War* (New York: W.W. Norton, 1968), [cite].

<sup>5</sup> Cf. "Declaration of Michael H. Mobbs," Special Advisor to the Under Secretary of Defense for Policy, filed in *Hamdi v. Rumsfeld*, No. 2:02CV439 (E.D. VA) (stating factual basis for "battlefield capture" Yasser Hamdi's detention as an unlawful combatant) .

Conventions, which broadens combatant status to non-uniformed, “freedom fighting” members of the armed forces of a party to the conflict, and who (like Y) bear their arms openly while engaging in or preparing for military operations.<sup>6</sup>

Thus Gray is held as a member of a criminal conspiracy to commit murder and sabotage. Gray does receive elementary due process rights and rights to humane treatment accorded her by the Geneva Conventions and by customary international law, so she is at least spared the summary execution that has befallen partisans in other conflicts, and is given reasonably speedy notice of the charges against her and access to defense counsel. She is tried by an Imperioland military tribunal, which abstains from imposing the death penalty its regulations permit, and instead is sentenced to indefinite confinement at an Imperioland prison. (The Imperioland army fears, reasonably enough, that if she is released she will rejoin the active partisans.

#### **4. Two themes in the key of collective violence:**

These stories reflect the differential treatment in law and ethics of collective violence. Specifically, such treatment exhibits two conflicting themes. The first is the theme of complicity, and every jurisdiction in the world plays a variant of it. Ordinarily moral responsibility and criminal liability attach to an agent only on condition that the agent has performed a wrongful act, perhaps bringing about a wrongful result. This is a principle of individual culpability, and requirements (in Anglo-American terms) of the existence of a culpably done criminal act and proximate causation of a result undergird and limit the attribution of wrongs to individuals.. Complicity doctrine, however, attaches liability through a different route. Even though individuals might on their own have done nothing wrongful, if they are members of a group whose other members do

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<sup>6</sup> GPW 4(A)(2)(b); 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (PI), Art. 44(3). Under PI 1(4), only persons involved in inter-state conflicts or “conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination” have access to the relaxed standard of combatancy of PI 44(3). In addition, GPW 4(A)(6) extends battlefield privileges to citizens who, as a whole, rise up as a foreign invader arrives. This “*levée en masse*” clause is almost never triggered, and would not be triggered by partisans resisting an occupation. Non-privileged combatants may be killed on the battlefield, as well as be prosecuted after conquest for their belligerency.

wrong in furtherance of a joint plan, the wrong is attributable to them. To put the point more strongly yet, so long as any member of a group with a criminal project does wrong, each member of that group bears responsibility for the wrong.

Take Taylor, from the above Crime Story: driving a car to, and sitting in front of, a liquor store one hopes to rob is not itself wrongful. Those acts, on their own, would probably not support a conviction of attempted robbery in most jurisdictions, on the grounds that they fall short of what is often termed a “substantial step” towards the crime’s commission.<sup>7</sup> Taylor’s liability rests not on what he does, but on what he means to do – participate in a collective armed robbery – and what his fellow participants do – instigate a shooting. His individual responsibility is based on his participation in a collective illegal act. The complicity theme might also be called the theme of **collective inculcation**.

The second theme is evident in the context of war. The function IHL norms is to demarcate a zone of individually impunable killings. The boundaries of this zone are set chiefly by restrictions on proportionality and discrimination between combatants and non-combatants, but the central condition establishing the zone is the explicitly political, collective character of the violence: it must be committed by a member of the armed forces of a state or insurgent party to the conflict. So long as the individually violent acts take place within a context of collective violence, and so long as the collective character

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<sup>7</sup> See, e.g., *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927) (reversing attempt conviction for defendant who, with acknowledged intent to rob, cruised unsuccessfully while looking for his victim, as these acts did not “tend to effect” the commission of the crime, per N.Y.’s attempt statute). A jurisdiction making use of the Model Penal Code’s more generous definition of attempt, as requiring an act making a substantial step towards a crime’s commission, might or might not find Taylor’s arrival, on its own, sufficient. M.P.C. §5.01(1)(c).

of the violence is clearly manifest through shared uniforms or insignia, the individual agents of the violence cannot be punished.

Sergeant Blue, who kills by his own hand and without justification, would be guilty of murder if he were simply trying to rob the refinery office. But because he is a member of the Imperioland army, he is part of a group engaged in war— or, better, a nested set of groups – and so no individual liability attaches to him. Even if Blue’s is the only shot fired in the war, he bears no liability for the killing. Moreover, it does not matter that his army and nation are engaged in an unjust war. Blue’s permission to kill depends on the fact that others in his group mean to kill as well. This ought to be shocking but it is all too familiar: participants in normalized mass killing, territorial occupation, and political transformation enjoy permission to do together what would be infamous crimes if done alone or separately. Let us call this the theme of **collective exculpation**.

Now let us consider the case of non-uniformed fighters like Gray. Should Gray be inculpated or exculpated? Is she more like Taylor or more like Blue? Unlike Blue, Gray’s cause is presumptively just: the defense of Petrostan independence. Ironically, however, Gray, unlike Blue, may be criminally liable, and otherwise detained indefinitely (not just till the end of the conflict), for pursuing her cause through violence. Her legal status is the outcome of a two-step process: despite engaging in a collective resistance effort in which her actions make sense, Gray is first treated as an individual, charged with an individual crime. But then, her collective status is reasserted in the complicity or conspiracy charge.. Like Taylor, whether or not she fires a shot she is liable as a member of a group who tried to kill.

My subject, then, is the apparent contrast between the themes of collective inculpation and collective exculpation, and the tension that arises when the two themes encounter each other in the field of irregular warfare. The specific question I address is the appropriate normative status for those whom the U.S. calls “unlawful combatants,”<sup>8</sup> but who are probably better called “irregular combatants,” reserving the question of their privilege. These are individuals engaged in the ordinary business of war -- killing and destruction -- and who, if they wore uniforms, would enjoy immunity under international law norms for those acts. They are not necessarily war criminals, in the sense that they do not necessarily exceed the parameters of legitimate combat: they may proportion the violence they use to military necessity, and discriminate between civilians and combatants. (One of the pernicious features of the term “unlawful combatants” is that it effectively conflates killing civilians with not wearing a uniform in combat .)

The European partisans of W.W. II fighting Nazi occupation are exemplars of this category, including the storied Maquis of France. Other instances include many of the anti-colonial rebels of the developing world, . Their movements spurred the creation of the 1977 Protocols, which in part sought to deal with the question of irregular combatancy through article 44 of Protocol I. This protocol creates the combatancy privilege for members of insurgency and partisan armed forces who conceal their status generally but who engage openly in combat operations. Protocol I was widely ratified, but there remains a question whether the regime governing irregulars has crystallized into universally binding customary law, chiefly because of the U.S. objection to and non-

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<sup>8</sup> See, e.g., *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

compliance with that regime.<sup>9</sup> Other examples may include the Taliban and al Qaeda fighters in Afghanistan, and the Fedayeen and Baathist resistants in Iraq, the posses of Afghan and Somali warlords, and some of the Colombian anti-government rebels, in whose disputes U.S. forces are entangled. More pointedly, so are U.S. Special Forces soldiers and C.I.A. field operatives, who typically serve out of uniform and without clear insignias of their national affiliation. (Recall the dashing pictures during the Afghanistan war of these warriors riding horses down hillsides in the company of the Northern Alliance.<sup>10</sup>)

So the category of irregular combatants is not new but its instantiations are on the increase. As has been widely discussed, this is a consequence of three principal

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<sup>9</sup> Currently, 146 states have ratified PI, though many have made reservations to Art. 44. On the argument for the customary nature of Art. 44, see Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, *Pac. Basin L.J.* 3 (1985):55-118, pp. 72-73. On U.S. partial acquiescence in PI, see Tia Johnson, ed., *2003 Operational Law Handbook* (Charlottesville, VA: JAG School, 2003), p. 11: [T]he U.S. considers many of the provisions of the Protocols to be applicable as customary international law. . . . The U.S. views the following GP I articles as either legally binding as customary international law or acceptable practice though not binding: 5; 10; 11; 12-34; 45.”

Whether or not the U.S. is bound by PI44 as a customary norm, it is clearly bound by GPW Art. 5, which requires that a “competent tribunal” determine combatant status in dubious cases. Here the U.S. seems clearly in breach of law, except on the most strained understanding of what a dubious case is. On the failure to respect its obligations under the Geneva Conventions themselves, see Robert K. Goldman and Brian D. Tittmore, “Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law,” *ASIL Task Force Paper* (December 2002), p. 27, accessed at <[www.asil.org/taskforce/goldman.pdf](http://www.asil.org/taskforce/goldman.pdf)>; and Gabor Rona, “Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”” *FletcherForum for World Affairs* (Summer/Fall 2003): 55-70, p. 65. For a contrary view, see John C. Yoo & James C. Ho, “International Law and the War on Terrorism,” 44 *Va. J. Int’l L.* 207 (2004).

<sup>10</sup> Special Forces soldiers may well have dressed *distinctively*, however, in the garb of the militias with whom they were affiliated. That is, they may not have blended with the population, even though they were not officially uniformed. If so, and given a reasonably generous interpretation of the requirement of GC 4(a)(2), which requires that combatants wear “a fixed distinctive sign”, then they would qualify under GPW as lawful combatants. Ironically, however, this reading is denied by the US officially, as part of their ground for not treating captured Taliban as POWs. See W. Hays Parks, “Special Forces Wearing of Non-Standard Uniforms,” *Chicago J. Int’l L.* 4 (2003): 493-547, pp. 496-498; see also Goldman & Tittmore, “Unprivileged Combatants,” p. 30. It is unclear whether CIA personnel who took part in the hostilities wore any distinctive garb; since presumably they were already unlikely to gain POW status if captured, they did not.



“developments” in modern violence.<sup>11</sup> First, state military conflict today rarely occurs in the form of major battles between armies, but increasingly through the tactics of “asymmetrical” warfare, including guerrilla raids, hiding among either one’s own or one’s enemies’ populations, infiltration of enemy lines, sabotage, and joint operations with collaborating civilians. Second, recent conflicts are increasingly transnational in character, where the transnational element is not just a matter of coalitions among regular military units (or collaborations between intelligence units of one nation and military units of another), but also of foreign volunteers drawn into conflicts through ideological or religious affiliations with one party to the conflict. Again, this is not new – witness the Spanish Civil War – but it is resurgent with militant Islam. Relatedly, some recent conflicts have been neither internal to a state nor transnational, in that they have taken place in political conditions where, arguably, no state exists because power is too fragmented. Somalia is a prime example.

The third development in modern war is the renascent phenomenon of war through mercenary proxies, which predated the modern era of war, subsided during the consolidation of state power, emerged again during decolonization and then subsided. It is now again on the rise through the distinctly post-modern phenomenon of the “corporate warriors,” who provide outsourced logistical and “tactical” (read “lethal”) support to everyone from the U.S. Army to the U.N. to Sierra Leone to the petroleum

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<sup>11</sup> These developments are nicely surveyed by Herfried Münkler, “The Wars of the 21<sup>st</sup> Century,” *International Review of the Red Cross* 85 (2003): 7-22.

industry.<sup>12</sup> Modern combat, and modern combatants, look increasingly unlike the army regulars around whom the Geneva conventions were drafted.

The results of these developments are troubling. It is, to say the least, conceptually anomalous that an ever-increasing number of combatants in modern war fall outside the regime crafted to control war's violence. It poses a practical problem, in that if combatants lack impunity for engaging in violence bounded by the norms of proportionality and discrimination, they have no incentive not to transgress these bounds. And it is a legal problem, in that we lack criteria to assess the legitimacy of the treatment of the large number of irregulars captured on the battlefield and held indefinitely by occupying powers. Thus, as ever more warfare involves stipulatively unprivileged combatants, the normative systems controlling war become more and more strained. If lawlessness is a problem, an even deeper problem is normlessness.

What norms should we adopt? What difference should uniforms make? The answer I give draws on a tradition inaugurated by Rousseau, of conceiving political authority as resting in a special relationship among individuals. When individuals' wills are linked together in politics, this affects the normative valence of what they do individually as part of that politics, even to the point of rendering impunable what would

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<sup>12</sup> Civilian contractors, for example, routinely operate Predator aircraft, provide direct logistical support for weapons systems, operate combat zone radar equipment, and fly armed drug interdiction efforts in collaboration with the U.S. military. Many of these roles seem close enough to the criterion of "direct participation" in the hostilities to render them combatants under GPW4. For a survey of this phenomenon, see Peter Singer, *Corporate Warriors* (Ithaca: Cornell University Press, 2003). As Singer is at pains to point out, the new mercenaries can contribute to social peace (as they did in Sierra Leone – at least until their contract expired) as well as to escalate conflicts between weak states that would not otherwise be able to engage in sophisticated levels of violence. See also Major Michael E. Guillory, "Civilianizing the Force: Is the United States Crossing the Rubicon," *Air Force L.R.* 51(2001): 51-111, for doubts about the legality of current U.S. practice regarding civilian contractors.

otherwise be criminal. A significant consequence of this conception of political authority, I argue, is that it privileges individuals in terms of their internal relations to one another, and not any external sign of their obedience. Hence it makes no sense to condition the privilege of war on the wearing of a uniform.

In actual policy terms, this paper amounts to something of a brief for a normative regime like that of PI 44, although it is more radical than the current regime insofar as I argue for limiting the privilege in some cases of unjust war. Let me make clear, however, that my argument is founded in philosophical rather than institutional considerations. The questions posed by an international lawyer who acknowledges the weakness of current law and demands its reform properly concern the difficulties of institutionalizing an ethical framework. International lawyers work from an existing stock of legal norms. They try to determine what changes in those norms can be negotiated and then implemented by existing or feasibly created national and international institutions. They confront the problem of creating incentives for norm adoption, and with the related problem of sanctioning their derogation. Finally, international lawyers grapple with the problem that ambitious normative regimes, particularly ones drawing fine distinctions among actors, presume information that may be difficult or impossible to obtain.<sup>13</sup> These informational and operational issues are tremendously important. But they presuppose a determinate ethical conception as a first-

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<sup>13</sup> For example, the rule that combat privileges are only enjoyed by combatants with a responsible commander – a rule whose intended effect is to create valuable pressure towards discipline – might be difficult to implement if captured combatants must disclose strategically crucial information regarding the chain of command in their organization in order to prove their status. See Goldman and Tittlemore, “Unprivileged Combatants,” p. 14-16.

best solution, albeit one that may only be approximated under real constraints by second- or third-best strategies. I mean to offer here that first-best solution.

## 5. The paradoxes of war:

The specific puzzle about uniforms raises a broader set of philosophical questions. Indeed, the very idea of an ethical regime of war generates paradoxes.<sup>14</sup> The first paradox is substantive: even if a state is illegally engaged in war (in violation of the U.N. Charter now, or of just war principles in an earlier day), its forces enjoy a right to wound and kill enemy combatants within the bounds of proportionality and discrimination, and subject to humanitarian limitations on the killing methods used. (Combatants may use no chemical or biological weapons, or fragmenting bullets, for example.)<sup>15</sup> It is no crime in war, in other words, for an individual to participate in paradigmatically criminal actions, even in a criminal war, so long as the regulative norms of warfare are not themselves violated. In the domestic context, no one accused of murder could defend his conduct on the grounds that he had shown special restraint, à la Hannibal Lecter, in the manner of his killing. Yet it is a commonplace that the rules of IHL are independent of the justice of the war itself.<sup>16</sup>

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<sup>14</sup> An early and important philosophical discussion of this point is by Thomas Nagel, "War and Massacre," in his *Mortal Questions* (New York: Cambridge University Press, 1979), 53-74. I am also indebted to a manuscript by Jeff McMahan, "Unjust Wars" (MS. on file with author), which is especially perspicuous in pointing out the puzzles of IHL's normative authority. As I discuss below, I differ from these authors in my conclusions.

<sup>15</sup> See, e.g., Hague Convention of 1925, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; Declaration of 1899 Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body.

<sup>16</sup> See, for example, Rona, "Interesting Problems": "The very essence of *jus ad bellum* is the distinction between just and unjust cause-- between entitlement and prohibition to wage war. *Jus in bello*, on the other hand, rightfully recognizes no such distinction. While one party may be a sinner and the other a saint under *jus ad bellum*, the *jus in bello* must and does bind the aggressor and the aggressed equally." pp. 67-68. Michael Walzer puts the point somewhat differently: "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." *Just and Unjust Wars* (New

This commonplace obscures a deep puzzle: how can there be permissibly violent means of pursuing impermissible ends? The very premise of the normative independence of IHL brings into question the nature of its justification. Call this the paradox of **permitting the impermissible**.

A variant of this paradox has frequently provoked puzzlement among newcomers to the field of IHL: how can there be significant normative distinctions at all within the field of killing? If a war is unjust, then any killings done in its prosecution are unjust, even if they are permissible. It is therefore hard to see how a normative regime can determine that some of these unjust killings (for instance, killings not using dum-dum bullets, or killings by uniformed combatants) are categorically better than others, such that they are permitted and the others banned. Even in a just war, killing is a terrible thing, permitted out of necessity rather than utility. Once necessity is in play, one might think, distinctions among necessary killings seem somehow beside the point. In domestic criminal law while we sometimes grade punishment in relation to the manner of killing, reserving the most severe sanctions for the most heinous forms of killing, we do not distinguish among the varieties of justified killings. But international law promulgates precisely such distinctions.

Here an instrumental answer is more immediately forthcoming: the restrictions on methods and targets of killing in war reduce the suffering of the combatants, the risks to non-combatants, and the costs to states, and hence are directly justified in terms of the good consequences they promote. The permission to kill within the bounds of these restrictions is, in effect, the bribe paid to combatants to induce their compliance with

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York: Basic Books, 3<sup>rd</sup> ed. 2000), p. 21. This formulation, of course, leaves it ambiguous whether any strong substantive normative value attaches to the formal criterion of “playing by the rules.”

them. I raise this justification here to acknowledge its existence, but, for reasons I elaborate below, in Section 8, I do not believe it fully accounts for IHL's normative authority, and I think it particularly fails to justify a central feature at issue here, namely the categorical quality of the rules. To take one example, if a war might be shortened through relaxing criteria on discrimination, as Allied forces claimed in World War II when they initiated strategic bombing campaigns, then there is nothing in the instrumental rationale of IHL to block this. Presumably a shorter war causes less net death and suffering than a prolonged and discriminating war, and so must be permitted. But the strategic bombing campaigns are now widely regarded a grotesque moral error, whatever their strategic value.<sup>17</sup> For those who consider them a moral mistake, moreover, the mistake clearly does not consist in a failed long-term instrumental miscalculation, for instance in the prospect that relaxed restrictions would increase suffering in other conflicts. Rather, their wrongness stems directly from the wrongness of the wholesale slaughter of civilians per se. The instrumental account suffers the problems of any two-level form of consequentialism, according to which categorical rules are justified by their instrumental value in promoting good consequences: the categorical rules outrun their instrumental justifications, and the instrumental rationale for the rules seems incompatible with the intuitive judgments that support them.

There is a related historical /conceptual point: since many of the customary rules of IHL emerge from a tradition of chivalry, particularly rules regarding the treatment of those *hors de combat*, an instrumental account seems inadequate to the ethical resources

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<sup>17</sup> They may also have been strategic miscalculations, at least in Europe, where there is little evidence that they made a difference to already quickly declining German power. [Cites to Sherry, Garrett.]

on which they draw.<sup>18</sup> This last objection is not decisive, since a revisionary account of our intuitions might in fact provide the best justification of the norms these intuitions they support.<sup>19</sup> But it is a prima facie objection that an instrumental rationale fails to account for the foundational force of the norms it seeks to vindicate; it seems to be a case of “arguing back” to a conclusion more certain than the path of argument itself.<sup>20</sup> While instrumental considerations have force in justifying the permissibility and regulability of killing, they do not provide a full account of either their characteristic “feel” or their residual force, which remains even when the instrumental calculations are transparent.

Without these broader puzzles in sight, the question of whether to grant battle privileges to the irregular combatant appears easier than it is – just a matter of estimating the marginal costs and benefits of additional suffering that a change in the rule would impose. I think we need a deeper solution..

## **6. Conceptual sources of the combat privilege: the sovereignty strategy**

We can identify three sources of the conceptual foundation for the privilege of uniformed combatants. The first source is the early modern conception of sovereignty itself, where the concept of the state was wholly identified with its ruler. This notion, theorized most radically by Jean Bodin’s 1576 *Six Books of the Commonwealth* [Six

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<sup>18</sup> See Theodore Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (New York: Oxford University Press, 1998).

<sup>19</sup> As, for instance, John Stuart Mill argues in Ch. V of *On Utilitarianism*: categorical norms of justice rest in fact on utilitarian balancings; and the categorical quality of our judgments and intuitions is itself supported by utilitarian considerations. This argument has generally failed to convince those not already inclined towards utilitarianism.

<sup>20</sup> The phrase is Samuel Scheffler’s, “Individual Responsibility in a Global Age,” *Social Philosophy and Policy* 12 (1995): 219-36, p. 222.

livres de la République], was as much a logical and metaphysical claim as a prescription for political unity. According to Bodin, the very idea of political authority requires a distinction between the agent who exercises authority and the subject who receives it.<sup>21</sup> The idea of an agent who was at the same time a subject, or, alternatively, a subject who was bound by laws he himself imposed, was, for Bodin, a logical impossibility.<sup>22</sup> With a firm distinction between the state, embodied in its ruler, and its subjects, the moral qualities of the state do not flow logically to its inhabitants. Just as the fact that the sovereign might incur a debt does not mean that a given peasant in his realm is also liable for that debt, so the fact that the sovereign was at war with another state would not mean that his subjects were at war with the other state. War could not be – in moral terms – a relation between the soldiers actually doing the fighting. They are merely the technology for resolving the interstate dispute.

The moral and metaphysical separation of state from subjects thus opens up a logical space for a distinct code of ethics for soldiers, an ethics independent of the legitimacy of their sovereigns' dispute. The war is not *about* them, it is about their sovereign. Within the field of combat, there is room for codes of chivalry, especially with regard to the norms of respecting surrender and discriminating between civilians and soldiers. The permission to kill within these limits, under this theory, is not a deep justification of killing, in the sense that it does not justify the killing itself. Rather, the permission reflects the limited moral status of the soldier *qua* soldier, who was not

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<sup>21</sup> See Jean Bodin, *Bodin: On Sovereignty*, ed. Julian Franklin (New York: Cambridge University Press, 1992), Bk. I, Ch. 8, "On Sovereignty."

<sup>22</sup> Bodin, "For although one can receive law from someone else, it is as impossible by nature to give one's self a law as it is to command one's self to do something that depends on one's will." Bk. I, Ch. 8, {360-361}, p. 12.



expected to justify his role in the war before God or his conscience, but only his conduct in the war. Responsibility for the war itself belonged only to the sovereign, and for that only he was answerable.

A further norm restricting the privilege to the uniformed makes sense in the context of this conception of sovereignty, although to be sure the regular wearing of uniforms post-dates Bodin considerably. While uniforms were hardly unknown before the modern period, they did not feature prominently (at least in Europe) as the garb of national militias until the 17<sup>th</sup> century, when Oliver Cromwell dressed his citizen army uniformly; and the trend came to a head with the elaborate uniforms of Frederick the Great.<sup>23</sup> The uniforming of armies in fact tracks the post-Westphalian consolidation of state power and establishment of a system of international sovereignty of the early modern period; the disciplining of the army and the disciplining of the state go hand in hand.<sup>24</sup> A norm that war should be between uniformed combatants simply mirrors the claim that war is a relation between states, not citizens. Moreover, because the basic relation of sovereign to subject is an external relation, on this conception – a matter of the power of the sovereign to compel obedience<sup>25</sup> – it follows that the relation of privileged combatant to sovereign would also be established through external mark. The uniform is, in effect, the stamp of ownership the sovereign puts on his army, and it is this stamp that renders the external quality of what they do, namely killing others, attributable to the sovereign rather than to themselves.

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<sup>23</sup> See Anne Hollander, “Official Looking,” *City Journal* Winter 5 (Winter 1995) [new sources needed].

<sup>24</sup> See Münkler, “Wars of the 21<sup>st</sup> Century,” pp. 14-16.

<sup>25</sup> “From all this it is clear that the principal mark of sovereign majesty and absolute power is the right to impose laws generally on all subjects regardless of their consent.” Bodin, Bk. I, Ch. 7 (Tooley trans.)

The inadequacies of an account of the privilege grounded in Bodin-esque sovereignty need not be belabored: the separation between state and citizens it depends upon is not sustainable under conditions of democratic politics. But a second and more resonant conceptual source of the privilege emerges from the rival conception of sovereignty that superseded Bodin's in modern, post-Enlightenment thought. This is the conception we take from Rousseau, who rejects Bodin's claim of a necessary separation between sovereign and subject. For Rousseau, famously, in the *Social Contract*, argued that not only is it possible for a subject, collective or individual, to give itself law, but giving oneself law is a necessary condition of political freedom and legitimate authority. It follows from this, Rousseau thought, that a people is sovereign when and only when their individual agency, in the form of their wills, is linked in the structure he calls the "general will." A people whose wills are so linked are committed to acting together in the interests of all, on the basis of a distribution of rights and responsibilities that guarantee their equal freedom. When this is so, a people produces:

a moral and collective body made up of as many members as the assembly has voices, and which receives by this same act its unity, its common *self* [*moi commun*], its life and its will. The public person thus formed by the union of all the others formerly assumed the name *City* and now assumes that of *Republic* or of *body politic* which its members call *State* when it is passive, *Sovereign* when active, *Power* when comparing it to similar bodies.<sup>26</sup>

The sovereign, on this conception, is dependent upon but not reducible to the individual citizens taken together. This is because the sovereign is a relation among wills, not a set of persons. The individual citizens retain their personal wills, notwithstanding their voluntary commitment of their rights to their collective sovereignty. Indeed, this

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<sup>26</sup> Jean Jacques Rousseau, "The Social Contract," Bk. I, Ch. 7, par. 10, in *The Social Contract and Other Writings*, ed. Victor Gourevitch (New York: Cambridge University Press, 1997), pp. 50-51.

retention of their personal wills is what explains the self-evident strains of committing oneself to even a just polity: the temptations to free-ride for personal benefit do not disappear merely because one acknowledges the force of the public interest. Thus sovereignty reflects an aspect of the citizens of a state, their public face in a sense. Their relations as members of the sovereign -- or, better, as participants in the collective achievement of sovereignty -- to themselves as private individuals is what enables Rousseau's response to Bodin as to how a sovereign can bind itself.<sup>27</sup>

So war, conceived as a relation between peoples linked constitutively as sovereigns, can still be distinguished from a relation between individuals per se. What would seem to follow from Rousseau's account is that in war, soldiers relate to one another as citizens rather than as individuals. Thus, an ethics of international relations, not an ethics of interpersonal relations, constrains their conduct.

Interestingly, this is not what Rousseau says. What he says instead is this: "War is not then a relationship between one man and another, but a relationship between one State and another, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland, but as its defenders."<sup>28</sup> On its face, this is puzzling: why should men in war encounter each other only as soldiers and not as citizens? As with much of Rousseau's writing, answering this demands recognizing an imprecision forced by context. Rousseau's concern in the sentences above is to limit the power of victors by defining the scope of the relation of enmity. His specific task is to deny the traditional victor's right to enslave the vanquished. His

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<sup>27</sup> Rousseau, *Social Contract*, Bk. I, Ch. 7, par. 1 (p. 51).

<sup>28</sup> Rousseau, *Social Contract*, Bk. I, Ch. 4, par. 9 (pp. 46-47).

argument must therefore be that, if war is between states, and if states consist of citizens (appropriately bound), and if soldiers confront each other as citizens (as well as soldiers), then in prosecuting a war against another state it is not sufficient simply to disarm its soldiers; one must further kill or enslave its citizens. To deny this line of reasoning, then, Rousseau must show that in battle norms appropriate to the limited role of soldier, not the more expansive role of citizen, determines the range of actions permitted between individuals.

Rousseau has two arguments for doing so. The first argument is at work in his claim that

The foreigner, whether he be a king, a private individual, or a people, who robs, kills, or detains subjects without declaring war on their prince, is not an enemy, he is a brigand. . . . Since the aim of war is the destruction of the enemy State, one has the right to kill its defenders as long as they bear arms; but as soon as they lay down their arms and surrender, they cease to be enemies or the enemy's instruments, and become simply men once more, and one no longer has a right over their life.<sup>29</sup>

A declaration of war is a collective act, one reflecting the will of the sovereign to engage in hostilities with another state. The collective aspect of a citizen's agency in the domestic sphere lies in his participation in forming a general will. But on the battlefield, the collective aspect of his agency consists simply in fighting as part of a unit – that is, as a soldier. In the external relations of state to state in war, only the potential for belligerency is significant to the citizen's normative identity. Once a citizen-soldier is disarmed, that external aspect of the citizen's identity is destroyed, and hence he can no

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<sup>29</sup> Rousseau, *Social Contract*, Bk. I, Ch. 4, par. 10 (p. 47).

longer properly be considered an enemy of his victor. He is simply an individual, and there is no ground for the victor to claim any right to kill or enslave a private individual.

The second argument amplifies the first: “It is sometimes possible to kill the State without killing a single one of its members: and war confers no right that is not necessary.”<sup>30</sup> Since statehood consists not in the persons of the citizens themselves but in a relation of their wills, when that relation among their wills is broken, the state is “killed” (or at least transformed). A soldier taken *hors de combat* on enemy-controlled territory is, functionally speaking, no longer a part of the state; he can no longer perform the one relevant duty he owes the collective. The state has, through his surrender, already died a little death of sorts. Killing or enslaving him, as opposed to rendering him free after the war’s end, will cause no further blow to the state.

The logic of this position supports the permissibility and regulability of killing. While the citizen-soldier, *qua* member of the body politic, is at war and so bears a collective relation of enmity with the members of the other state, he does not *qua* individual engage in battle in the terms of that enmity. The general will in which he participates, and which defines the relation of war, does not create in him personally a relation of enmity, only an obligation of military service.<sup>31</sup> Since he has an obligation to fight, and since ought implies can, it must be permissible for him to fight. It also follows that since he engages in battle as a soldier, the chivalric ethics appropriate to the soldier’s role are appropriate. Thus, Rousseau’s account would seem to deliver an account of the normative autonomy of the battlefield, moreover one derived from the collective aspect

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<sup>30</sup> Rousseau, *Social Contract*, Bk. I, Ch. 4, par. 10 (p. 47).

<sup>31</sup> What I have called in other work a “participatory obligation” to do one’s part in a collective project to which one is committed. See my “The Collective Work of Citizenship,” *Legal Theory* 8 (2002): 471-494.

of war. That autonomy is a consequence of the fact that wars are relations between collectives, fought through individuals.<sup>32</sup>

Moreover, one can see how Rousseau's argument for the limited right of the victor, grounded in sovereignty as the product of the general will, can support even if it does not entail a requirement of uniformed belligerency. What drives his argument work is the isolation of the citizen's identity in the context of battle, and (as with Bodin) the construction of that identity in external terms. A citizen in uniform has permitted his identity to be reduced to the aspect of soldierhood. His relation to the state is not, as it was with Bodin, a mere tool of the sovereign's will; but it still limited to the functional role of "defender" obliged by the terms of the social contract to fight for the state. By contrast, a non-uniformed combatant would in effect be insisting that his identity, even on the battlefield, as a citizen outflows his identity as a soldier. Since reducing one's identity to that of soldier is, for Rousseau, a necessary condition of preserving a right to post-war freedom (that is, to impunity for normal acts of war), it would make sense to formally condition the right of impunity upon one's garbing as a soldier.

Rousseau's account is suggestive, but it will not, I think, actually justify the autonomy of the battlefield, much less the restriction of the privilege to the uniformed. For what links citizens to the state is an internal relation of will, not an external relation of power. Since that is so, garbing in uniform is mere window-dressing, irrelevant to the

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<sup>32</sup> My account of Rousseau's thought thus differs from that offered by George Fletcher, in his *Romantics at War* (Princeton: Princeton University Press, 2002). Fletcher argues that a Rousseau-an conception of war must be understood in essentially Romantic terms, as a form of self-expression by an organically united people. While I agree with Fletcher that Rousseau's thought featured prominently in later Romantic conceptions of peoples and their self-expression (as, for example, in J.G. Herder), this reading seems to me to ignore the Enlightened and contractarian aspect of Rousseau's own conception of sovereignty, as well as to ignore what Rousseau saw as the contingent nature of a politically united people.

link that makes individuals part of the collective project of war rather than individual brigands and murderers. Once one has taken a Rousseauian turn and grounded citizenship on will, it would seem that will, and not external marks of that will, should be the basis of privileged combatant status. That a group of soldiers wears uniforms might be external *evidence* of both internal collective organization and ties to a larger political community, and requirements of providing such evidence have clear instrumental value. But the evidence of the tie is not itself constitutive of such organization or ties; a squad of undisciplined mercenaries might be uniformly clothed.

A Rousseauian view of sovereignty does, however, pose a problem for the independence of *jus in bello* from *jus ad bellum*. The problem arises because the conceptual isolation of the identity of soldier from that of citizen cannot be maintained. The distinction is essentially artificial: under the victor's sword there is but one person, whose normative identity and relations have different aspects. A father does not cease to be a father when he becomes a soldier; it is simply that that aspect of his identity is not relevant on the battlefield. But an individual's identity as a citizen *does* seem relevant on the battlefield, as well as his identity as a soldier. Insofar as he has partly authorized a war, there would seem no reason not to hold him responsible for that choice, both in external and internal relations. If the collective decision to wage war is unjust, then he as a citizen is responsible for that injustice. True, as an individual member of the state he is obliged to fight in the service of the collective waging of war. But all that follows is that he should not be punished as an individual for his belligerency, assuming it meets with the norms of proper combat. (And even this point does not hold if he has a choice whether to fight.) It does not follow that he may not be punished as a member of a

collective – that is, he and his fellow soldiers may be held collectively responsible for the war they wage. One might think, by domestic analogy, of a criminal sentence passed on a business entity: if the sentence is just, then the costs of that sentence are legitimately borne by the business' members (its partners, for example, or shareholders, or employees), in virtue of their constitutive role in the entity. Though they are not being punished as individuals, they are punishable as members of the corporate entity.

## **7. Sources of the privilege: the instrumentalist strategy**

Thus a Rousseauian argument would seem to fail to account for a blanket privilege to kill in war, independent of the justice of the war itself. One might well respond, so much the worse for the privilege of collective, unjustified violence; but in the service of trying to make sense of current norms, we should pursue the matter further. Indeed, a third and now dominant strategy remains for defending the privilege: the consequentialist strategy I mentioned above, which plays a central role in the International Committee of the Red Cross's understanding of the case for IHL. This strategy effectively links a political realist premise – wars happen – with a normative premise demanding the minimization of suffering in their wake.<sup>33</sup> Since wars will happen whether or not IHL privileges battlefield killing, the question is what incentives are available to limit the killing. A grant of impunity for regulated killing, coupled with the special treatment in confinement and interrogation for POWs, is deemed a necessary

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<sup>33</sup> See, e.g., ICRC, "What is International Humanitarian Law," pamphlet available at <[http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNXM/\\$FILE/What\\_is\\_IHL.pdf?OpenElement](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNXM/$FILE/What_is_IHL.pdf?OpenElement)>, p. 1: "[The rules of IHL] strike a careful balance between humanitarian concerns and the military requirements of states."



incentive to induce restraint in combatants.<sup>34</sup> The further restriction of the privilege to the uniformed is then justified by its role in promoting the distinguishability of combatants from non-combatants.<sup>35</sup>

Like most consequentialist arguments, the force of this is difficult to assess. If, as is plausible, some combatants can be induced by the reward of impunity to discriminate and proportion in the violence they do, then substantial good flows from the privilege. And if yet more good is achieved at the margin by restricting the privilege to the uniformed, then that too is significant. But value of the privilege must be defended not only at the margin; it must be defended categorically. And here the assumptions underlying it are open to question. First, the argument assumes, roughly, that the amount of combat is fixed independently (this is the realist premise). But it is hardly clear that it is fixed; and indeed it might well be thought that the amount of combat is increased when all participants are guaranteed impunity, especially those fighting criminal wars. It is now widely thought that individual prosecutions for war crimes are necessary or at least useful in reducing the number of war crimes that might take place. Individual prosecutions for unlawful belligerency would also, by the same reasoning, tend to deter individual participation in that belligerency. This is especially true in states with volunteer armies; but even for conscript armies, the prospect of post-capture prosecution might well dampen the ardor of the soldier. (Moreover, in conscript armies individual

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<sup>34</sup> See, e.g., the comments of Gabor Rona, a Legal Advisor to the ICRC, in "Interesting Problems," p. 57: "The aims of humanitarian law are humanitarian, namely, to minimize unnecessary suffering by regulating the conduct of hostilities and the treatment of persons in the power of the enemy. But humanitarian law is a compromise. In return for these protections, humanitarian law elevates the essence of war--killing and detaining people without trial--into a right, if only for persons designated as "privileged combatants," such as soldiers in an army."

<sup>35</sup> See, e.g., Yoo & Ho, "War on Terrorism," pp. 12-13.

defenses of duress might be applicable, though they would involve relaxing the traditional limitation of that defense to crimes short of murder.)<sup>36</sup>

Granted, there will be profound disagreements about what constitutes an unjust war, and resolving those disagreements will be necessary to make the case for prosecutions for individual belligerency. But, first, those disagreements are already generated by the traditional customs and modern conventions of *jus ad bellum*; moreover, they already serve as a predicate for the prosecutions of national and military leaders for instigating acts of unlawful aggression that may, for all that, have been fully within the parameters of IHL. Second, that a prospective combatant might be uncertain about the permissibility of his status is a good thing, insofar as it will have a chilling effect on his efforts (and, more generally, on the recruitment and deployment of state militias). Cases of clear justification – self-defense in attacks on the homeland – will present no problem.<sup>37</sup> Third, it is unclear whether the privilege will function as an incentive at all. A soldier in combat cannot know in advance whether in fact he will receive the treatment he is due under IHL; and a little knowledge of history should make him dubious. (The Allied Forces' and Germany's treatment of their POWs appear to be historical exceptions.) To the contrary, a rational combatant conditioning his conduct only on the proposed carrot of POW status would have to discount that carrot greatly. By contrast, a

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<sup>36</sup> This point is nicely discussed by McMahan, "Unjust Wars," pp. 22, in the course of his argument that individual soldiers in unjust wars bear moral responsibility for any acts of killing. As will become clear, while I agree with McMahan that no argument for the privilege blocks the imputation of moral responsibility, there is an argument against the legitimacy of punishing combatants for their (morally) impermissible killings. Impunity, in other words, is not the same as justification or moral permissibility.

<sup>37</sup> Where a problem might arise is in the context of humanitarian military intervention by a national (as opposed to U.N.) army, especially if the intervention is controversial enough that no international certification can be had. Such cases are complex and troubling. I think it sufficient here to say that the benefits of expanded permission to engage in such missions have to be offset by the costs that that permission will underwrite clearly unwarranted interventions. In any event, my central point is that these questions cannot be resolved by instrumental calculus.

credible threat of greater marginal prosecution for violations of IHL, on top of a prosecution for belligerency itself, would seem more than sufficient to motivate compliance.

The consequentialist argument for the uniform rule seems even weaker. A rule demanding no visible distinctions between combatants and non-combatants *might* result in much higher civilian casualties than a rule requiring that combatants bear a “distinctive mark, visible at a distance.” But four further claims are also plausible. First, by the “in for a penny, in for a pound” rationale, non-uniformed combatants under the no privilege rule have little incentive anyway to refrain from indiscriminate violence; their incentive is just the marginal difference in punishment for war crimes over the punishment for belligerency itself.<sup>38</sup> Thus the gain in the ability of the uniformed side to discriminate comes precisely at the cost of a reduced interest on the non-uniformed side of discriminating themselves. Second, and conversely, if it makes sense to provide uniformed combatants killing privileges in order to induce IHL compliance, then it must make sense to offer the same incentive to non-uniformed combatants. The only question is the cost of that offer in reduced discrimination.

Third, a middle range of rules is clearly available, which provide for some, but less, discriminatory effect than a uniform. This is precisely the theory behind PI44’s requirement that, when exigencies exist, combatants need only distinguish themselves during combat by carrying their arms openly. Given the uncertainties involved, such a moderate rule is at least as likely to minimize net civilian casualties as the more

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<sup>38</sup> This assumes that they do not care independently about civilian casualties, as indeed they may not if fighting on enemy territory.

restrictive regime of GPW4.<sup>39</sup> Fourth, and most broadly, whatever humanitarian benefits flow from restricting combatancy have to be set off against the very real costs incurred by discouraging irregular resistance. In historical retrospect (and especially in the U.S.!), it certainly seems that some fights against alien occupation or for national self-determination – fights that can only be waged plausibly by guerrilla techniques – are worth fighting. Discouraging those fights by giving an asymmetric advantage to a uniformed occupier, whatever the justice of its occupation, risks enormous human costs. If one is in the business of reckoning costs, these must figure hugely.

So simply in its own terms, the consequentialist argument for the limited privilege is too indeterminate to serve. The costs and benefits of privileging combatancy are speculative and necessarily involve the kind of gross estimates of long-term consequences that invite contamination by wishful thinking. But this merely confirms a deeper point: if there is an objection to prosecuting combatants for IHL-consistent killings, that objection comes from the domain of right (or fairness), not cost-benefit calculation.<sup>40</sup> And if there is an argument for restricting the privilege to the uniformed, that argument must also speak in terms of fairness, not utility. There is an analogous

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<sup>39</sup> I would think that the real challenges to military capacities to discriminate between combatants and non-combatants would come in two settings. The first is urban combat, where I suspect that discrimination is already enormously difficult even between distinctively marked troops. (This may underestimate the difficulties faced by US troops in Vietnam, though it is notable that France, with similar guerrilla experience, ratified PI without reservation to Art. 44.) Second is the setting of the long-distance aerial strike, where small arms might not be visible to a target spotter. But since combatants, uniformed or not, might well be camouflaged in buildings or vehicles which require no distinctive marking, the problem of discrimination does not seem to me appreciably greater with PI44 than without.

<sup>40</sup> I will put aside one possible fairness argument, considered and decisively refuted by McMahan: that even unjust aggressors, once upon the battlefield, have a right to defend themselves with lethal force. As McMahan argues, apart from an immediately questionable claim that aggressors enjoy rights of self-defense against just defenders (i.e., a robber has a right to defend himself against the cop who's shooting back), the argument fails to cover the period of initial, undefended, aggression (which IHL covers), and it has no force whenever the aggressors could save their lives and surrender to just treatment by their enemies. "Unjust Wars," MS. pp. 28ff.

point as well, a familiar point in ethics: if the rules of IHL are justified instrumentally, then that fact must be kept from combatants. For a combatant who knows that IHL is justified on the basis of wholesale calculations of humanitarian advantage will always have reason to ask himself in a given instance whether playing by the rules makes sense, or whether it is a case of what J.J.C. Smart has famously called “rule-worship.”<sup>41</sup> What we want to inculcate instead is a combatant’s thought that the rules of IHL, and the system of values that sustain them, command categorically. And since soldiers, being human, are reflective creatures, this means that we must provide a non-instrumental argument for those rules.<sup>42</sup> So we must anyway exit the path of instrumental justification.

## **8. Another tactic: combatancy as complicity**

I began this argument by emphasizing the puzzling distinction between the themes of collective inculpation and collective exculpation. Why, in the context of war, should doing violence together make right what in the domestic context it makes wrong? But the discord of these two themes might also be taken as an invitation to harmonize them. In fact, as I argue now, the same logic of collective action that underwrites complicity law also underwrites the law of war. With some help from Rousseau – at least some help from what he should have said, rather than what he did say – we have the materials to explain and justify a limited form of the privilege of combat.

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<sup>41</sup> J.J.C. Smart, “An Outline of a Theory of Utilitarianism,” in Smart & Bernard Williams, *Utilitarianism: For and Against* (New York: Cambridge University Press, 1973).

<sup>42</sup> True, this argument would not work for Robosoldiers. Even so, we would want an argument for the soundness of the battle program we give them.

Take the ethics and law of complicity first, as well as its partner, conspiracy. Complicity functions not as an independent crime in its own right, but as a distinctive form of moral and legal responsibility that links agents to outcomes by way of their participation in a collective effort, and largely independently of their individual causal contributions.<sup>43</sup> Crime Story, at the beginning of this essay, is one example. Or consider the famous British case of *DPP for Northern Ireland v. Maxwell*<sup>44</sup>: James Maxwell, a standing member of the Ulster Volunteer Force (UVF), was asked by a fellow member of the UVF to help on a “job.” In Maxwell’s case, this meant driving his own car so as to guide a following car to the Crosskeys Inn. Maxwell drove past the inn, but was aware that the following car stopped there. In fact the occupants of the latter car had left a pipe bomb at the inn – a bomb which, fortunately, the son of the inn’s owner was able to defuse.

Though Maxwell did not know the specifics of the terrorist “job,” and though he neither touched nor saw the bomb himself, he was nonetheless convicted of possession and planting of an illegal bomb, a conviction upheld by the House of Lords on the grounds that while Maxwell did not know the details of the crime, he knew that some form of terrorist action was afoot. Knowledge that he was playing a role in facilitating some sort of violent crime, coupled with his voluntary participation in that crime, was sufficient to satisfy the mens rea requirement for liability. The actus reus requirement of liability was satisfied peripherally, from the incidental role he played in guiding the

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<sup>43</sup> I explain and defend this claim extensively in *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2001).

<sup>44</sup> [1978] 1 W.L.R. 1350.

bombers.<sup>45</sup> (As it took only general knowledge of the area and no special skill to guide the bombers, the bombing might well have happened without Maxwell's aid.) Maxwell is criminally liable for what was done by the group in which participated, despite segregated tasks and knowledge of what was about. When we act together, we individually bear responsibility for what we together bring about.

The logic of complicity is the logic of collective action more generally, and that logic pervades our social, ethical, and legal existence. It explains and justifies, I believe, much of the pride we take in our collective accomplishments, even when our own contributions lie at the insignificant margin. It explains the special importance we attach to the signal act of collective freedom, voting – an act whose individual significance is far outweighed by its costs.<sup>46</sup> And it explains and justifies much of the shame and guilt we feel when the groups – communities, nations – in which we live do wrong, even when we have been dissenting voices within. In all these cases, we begin with a group act and then derive and distribute the individual responsibilities thereof. Individual pride makes sense because of our participation in a collective accomplishment; the decision to vote makes sense because the collective selection of political authority is a necessary condition of freedom; our shame makes sense because the wrongs we do together are consequences of the collective systems and institutions to which we contribute.

Our individual responsibility for these collective acts is point one. Point two is that individual responsibility is not the same thing as collective responsibility. When I

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<sup>45</sup> Under the Modern Penal Code, the basis for accomplice liability is purely subjective: complicity requires only giving purposeful aid or agreeing or attempting to aid another in the commission of a crime. M.P.C. §2.06 (3)(2). The elimination of any independent act requirement has been strongly criticized by George Fletcher, in *Rethinking Criminal Law* (Boston: Little Brown & Co., 1978), pp. 634-649.

<sup>46</sup> I develop this argument in "Collective Work of Citizenship."

take pride in, say, my orchestra's brilliant performance, I do not regard myself as individually responsible for that brilliant performance. And when I feel shame for my nation's prosecution of an unjust war, I do not regard myself as personally responsible for that war. Recognition of my responsibility involves recognition that that responsibility is a relation in social space, one that links me in normative terms both horizontally to the other members of the group, and vertically, to those whom my group affects (or to the outcomes it produces). My response to, and responsibility for, what we together do is essentially mediated by membership in the group and grounded in my individual participation therein.

In the present case, the logic of collective action both enables and disables an account of the combatants' privilege. As Rousseau saw, under modern conditions of politics war is also something we do together, a normative relation we bear as a group to another group.<sup>47</sup> As an individual, I share in responsibility for the decision to go to war. But my responsibility as an individual is not identical with the responsibility of the group. My individual responsibility is, rather, a duty to serve if called and if the war is not clearly criminal, and to protest if it is (and perhaps to refuse service as well). The fact that my nation is at war, not me, does not absolve me of responsibility towards my enemy, but it does create a normatively distinct relation between us, one structured

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<sup>47</sup> This is one of many reasons why "terrorism," any more than "drugs" cannot be the opponent of a war. The point matters gravely: if the protean abstraction of global terrorism is the opponent, then anywhere terrorists act could be considered a scene of "battlefield" combat, governed only by the laws of war. Among other consequences, this could mean that states might target and kill virtually anyone suspected of terrorism, subject only to constraints of reasonable discrimination and proportionality. For discussion, see Rona, "Interesting Problems."

Questions about the proper legal analysis governing the conflict with terrorist groups such as al Qaeda are enormously complicated. They are also beyond the scope of my argument here, which concerns the existence of the combat privilege in unproblematic deployments of the idea of armed conflict and battle. For discussion, see Yoo & Ho, "War on Terrorism."



through a set of rules specific to our inter-relationship as individual members of warring nations in confrontation with one another. This is the logical space in which *jus in bello* can claim independence from *jus ad bellum*.

Specifically, the logic of collective action can make appropriate a limited scope for an essentially *political* permission to do violence, because when I do violence, I do it as a member of one group towards another. By political permission, I mean that the fact that my killing is not personal, is part of a collective act, logically constrains the enemy state from punishing me as an individual for what I do. The privilege to kill as part of a collective is not a moral permission attaching to the individual soldier. A soldier who kills as part of an unjust war wrongs those he kills, period.<sup>48</sup> If the end is wrong, the means must be wrong as well. But it does not follow from the fact that an individual soldier does wrong that an enemy state can legitimately punish him – even though it can kill him on the battlefield. The enemy state’s primary normative relations are with this soldier’s states, and so its legitimate responses are limited to the collective genre: prosecuting the war against its soldiers, or prosecuting the state’s leaders and demanding reparations after victory. Although soldiers confront each other as citizens, they do not confront the enemy state as a whole as citizens, but rather, as Rousseau says, as *defenders*.

Or as attackers, and there’s the rub. The argument I have just given seems to me the best case for the symmetrical privilege of killing that the full independence of IHL from *jus ad bellum* entails. As with Rousseau’s argument, which it parallels, it requires what I fear is an over-strong distinction between individual and collective responsibility.

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<sup>48</sup> This accords with McMahan’s conclusion in “Unjust War.”

For it certainly seems plausible, particularly on a retributive theory of punishment, to say that the soldier prosecuting an unjust cause, and who thereby wrongly kills another individual soldier, is a fit subject for punishment.<sup>49</sup> On this line of reasoning, a collective response to the enemy state does not preclude an individual response to the enemy soldier.

Perhaps this is the proper conclusion: that the collective decision to go to war confers no individual immunity from punishment. When the justice (or injustice) of the *casus belli* is clear, so too is the justice of prosecuting the participants in that war. Nonetheless, there is another aspect of the collective nature of war that tells against drawing too tight a link between the individual and the state for which he fights. Wars, like many of history's uglier monuments, come to look very different in retrospect than they do in prospect. Many belligerent acts, like many violent revolutions, are easily condemned at the time but become praiseworthy in retrospect. This is because history happens in messy ways, and it involves a kind of normative mistake to apply *ex post* the same criteria that one applies *ex ante*. To take some recent, albeit controversial, examples: Israel's 1981 preemptive destruction of Iraq's Osirak reactors seemed an outrageous violation of limits of aggression at the time, and now like a prudent and regionally responsible intervention. NATO's Kosovo 1998 intervention at the time also seemed legally and perhaps also prudentially questionable, but now seems one of the finest moments in NATO history.<sup>50</sup> And if the war in Iraq, which I now regard as

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<sup>49</sup> It is even more plausible on a deterrence theory, of course: a state has every legitimate interest in deterring attacks on its soldiers.

<sup>50</sup> For some prominent doubts about its lawfulness, though not about its prudence, see Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention,'" *Am. J. Int'l L.* 4 (1999), accessible at <<http://www.asil.org/ajil/kosovo.htm>>.

morally and legally mistaken, leads directly to a peaceful and democratic Middle East, then doubtless my retrospective judgment will shift.

This is not principally a point about the difficulty of establishing uncontroverted criteria for assessing the justice of war. It is, rather, a point about the vulnerability of judgments of a war's justice to an analogue of what Bernard Williams called "moral luck," and what we might call "political luck."<sup>51</sup> Williams' example was painter Paul Gauguin, who (in Williams' version) went to Tahiti to paint and in so doing abandoned his wife and children to poverty in Paris. According to Williams, if Gauguin's paintings had been an aesthetic failure, then his trip would have been a moral failure. But since they were (at least stipulatively) an aesthetic success, his trip cannot be condemned in moral terms. Williams' argument is probably less convincing in light of this example than it might be, for of course we might well come to a more complicated judgment: "Gauguin may be a louse, but he painted some beautiful pictures." In fact Williams is fairly non-specific about the normative consequences of the aesthetic triumph; he does not claim that the trip becomes morally justified, but only that condemning it is beside the point. In political and historical contexts, Williams' claim is ramified. Retrospectively we care less about the properties of actions and more about the possibilities and constraints laden in the outcomes they produce. The immoralities of act are swept with the economists' broom into the dustbin of sunk costs. Because politics is fundamentally about the question of what we together should do, its perspective is anchored in the now and moves forward, aggregating over collective interests and values. Conversely, its outcomes can only be assessed in retrospect, and that in the longer term. Nor is there

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<sup>51</sup> Bernard Williams, "Moral Luck," in *Moral Luck* (New York: Cambridge University Press, 1981) [cite]

reason to think that as further adumbrations of these outcomes become clear, the assessments will not shift again.

Criminal judgment also applies in retrospect, but the gap in time between act and judgment is too short to accommodate the vicissitudes in the judgments of the justice of many wars.<sup>52</sup> The normative autonomy of the battlefield, at least for the great range of conflicts in which judgment might reasonably be thought to vary in time, might then be thought to reflect the gap between the immediately post-war assessment of individual battlefield conduct and the longer-term assessment of the war's justification. It also might be thought to reflect the fact that wars' outcomes are to be judged by the criteria of the good, while individual soldiers are judged by the criteria of the right. To put the point another way, and more consistently with the Rousseauian argument above, the criteria for evaluating the justice of the collective act of war do not legitimate the punishment of individual participants, except in cases of the grossest injustice. It would be simply unfair to individual soldiers to punish them on the basis of a judgment grounded in the collective circumstances of politics.<sup>53</sup> By contrast, the act-related criteria of

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<sup>52</sup> Not all wars, obviously: some wear their firm, retrospective immorality on their face.

<sup>53</sup> This raises the question of the fairness of prosecuting national leaders for waging unjust wars, as was famously done in Nuremberg. They too, after all, may be prosecuted long before opinions are clear on the justification for their legitimacy. Nonetheless, a distinction between leadership and line prosecutions for IHL-consistent warfare seems to me acceptable. Prosecutions of national leaders are likely to be such rare events, involve so few persons, and to be so constrained anyway by the exigencies of international politics, that the risk of unfairness seems to me enormously lower than is courted by permitting routine prosecutions by one state of any enemy combatants who fall into its hands. Moreover, it seems appropriate to hold national leaders to higher standards of compliance with standards of just conduct than soldiers, whose views about the permissibility of their nation's conduct are likely to be more permeated by jingoistic false consciousness than their leaders'. (Of course, national leaders can be both consumers and producers of propaganda.)

In any event, uncontroversially unjust wars can be generate prosecutions, for both leadership and line. [This should be expanded into text.]

proportionality and discrimination can appropriately be deployed in judging individual conduct, and so the regulability of combat is preserved.

In any event, the question whether to expand combatancy's privilege to the non-uniformed can be resolved quickly and independently of resolving the precise scope of that privilege for the uniformed. On either of the accounts I have offered for the general combat privilege, the privilege is grounded in the fact of the relation of individual combatants to a collective decision to go to war. That relation, moreover, is a matter of individual commitments to the collective: their mutual orientation around each other as fellow agents in a collective project. If an essentially intentional relation among individuals grounds the privilege, then the privilege ought logically to be extended to any who together constitute a collective at war, whether or not they are uniformed. Instrumental considerations of the sort canvassed above might tip the decision one way or another; but if those considerations are as indecisive as I argued, then there is no reason not to extend the combat privilege and a good reason to do so. In particular, the moderate regime of PI 44, requiring only open carriage of weapons in deployment and combat, is justified.

This conclusion may seem a bit quick, however, for it cannot be that any group of individuals, merely because they act as a group, can earn for themselves the privilege of combat. This would, obviously, be to erase the line between criminal law and the law of war, in favor of the latter. We do want, surely, a way to distinguish between Taylor's gang and Gray's partisans. The Geneva Convention condition, per Common Article 2, of a state of "armed conflict" as fixed by criteria of intensity and duration of hostilities, must be considered a necessary but not sufficient condition, lest any long-enduring and

sufficiently powerful criminal gang would qualify. Rather, what was implicit above needs to become explicit: only political groups engaged in violence in support of political goals, in the sense of aiming at creating (or restoring) a new collective ordering, can rightly claim the privilege.

Whether a group is political, and whether it engages in political violence, turn principally on three factors: the existence (or not) of an internal ordering, the character of its aims, and the possibility of its success. The existence of internal order is necessary, because it is a legitimate condition of extending combat privileges to a group that it be itself capable of regulating its own conduct by the laws of war.<sup>54</sup> Groups on the verge of internal anarchy would thus fail to meet this condition. As to the second factor, the character of its aims, the substantive criteria of recognition created by PI 1(4) – that groups be engaged in projects of national liberation or self-determination – mark a reasonable starting point, albeit a contentious and perhaps overly restrictive one. For liberation and self-determination are paradigmatically political aims, and are *prima facie* the sort of causes that can justify violence if anything can; but so might also be disputes over regional autonomy or the flow of resources to particular regions, as with the Zapatistas, or struggles for religious or cultural autonomy, as with the Kurds. The second criterion, of the possibility of success, is more difficult. It recognizes both the practical need of state authorities to suppress disturbances to the peace that lack the legitimating force of broad popular support – support any potentially successful political movement must have. And it recognizes that engaging in politics is a matter not just a matter of positing wishes, but of creating a real field of values whose point is to effect a mutual,

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<sup>54</sup> As GPW 4(A)(2)(d) requires

social ordering, and which are anchored in actual social practices.<sup>55</sup> A group engaged in violence but whose aims are part of no actual or reasonably possible system of social ordering engages not in politics but rather in a deadly solipsistic fantasy.<sup>56</sup>

It is a feature of this account, indeed a virtue, that whether a group of irregulars engaged in combat count as political, and so entitled to combat privileges, may change over time. In fact, the status of those captured may turn from criminal to POW as their colleagues find success in the fields and in the towns. (Such transformations of status happen anyway as a matter of negotiations between states and increasingly powerful insurgencies.) In any event, the importance of POW status for groups on the margin of criminality may be oversold. As a matter of practice, states will deny them that status until the groups are sufficiently powerful to demand it (perhaps in exchange for granting protected status to captured government personnel), whether or not under some objective assessment the groups are entitled to the status as a matter of law. And since even lawful combatants may be held until the cessation of hostilities, which in civil or quasi-civil conflicts may be indefinite, and since they may also be interrogated exhaustively (but just not punished for failure to answer), the state loses little security by acknowledging combatant status. Moreover, since violations of IHL can be punished among lawful and unlawful combatants, granting POW status hardly precludes prosecution for terrorist acts. In short, while expanding the criteria of privilege to irregulars brings risks and disputed

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<sup>55</sup> Here I echo and extend into politics H.L.A. Hart's argument that the necessary and sufficient conditions of a legal system's existence are the acknowledgment among officials of the normative force of a system's rules, and a popular practice of obedience to those rules. *The Concept of Law* (New York: Oxford University Press, 2<sup>nd</sup> ed., 1994), 113 [check cite].

<sup>56</sup> It also follows from this account that there are good reasons to exclude mercenary militias, per PI 47. The question of civilian support for regular militias remains tricky, however.

judgments, it may actually be less disruptive than the resisters to the regime of PI fear, as well as more in consonance with the best case to be made for the foundations of IHL.

## **9. Conclusion**

By way of conclusion, I offer here a brief survey of the concrete implications of this view. Where under pre-PI standards Blue's is the easy case and Gray's is the hard case, the situation now reverses. Gray, though she is not a Petrostan national, is still a member of the group seeking Petrostan's liberation; she has linked her will with theirs and so inhabits a common normative space, in pursuit of a paradigmatic political goal. That she wears no uniform is irrelevant to the collective aspect of her individual action; and it is the collective aspect that underwrites her privilege. Assuming she has obeyed the laws of war, she ought to be impunable.

Blue's case is harder, because on my view the question of his privilege depends on whether the putative injustice of Imperioland's invasion is so great as to fall outside the scope of reasonable disagreement or reasonable retrospective re-assessment of Imperioland's case for war. On the bare facts I stipulated, this is unclear. An invasion to acquire another nation's resources looks clearly beyond the pale on its face, but the question becomes more complex for resources located near hastily drawn or colonially-imposed borders, or when legitimate international disputes about access to those resources have been blocked by bad faith bargaining or international politics. So long as some of these factors might plausibly be relevant to assessing Imperioland's case, and whether or not there is a clear, literal violation, of the U.N. Charter, it seems appropriate to defend a privilege for Blue as well. He may have acted badly, in moral terms, insofar



as he took part in collective violence on grounds he knew or had reason to know were morally dubious, and the deaths he caused should sit uneasily on his conscience. But the question of whether it is legitimate for Petrostan (or an international body) to punish him is independent, and more difficult.

Closer to home, it would seem that the Taliban, whether or not they were garbed distinctively, ought to receive lawful combatant status, once again assuming they complied with reasonable conditions about distinguishing themselves while in battle. Their regime may have been unjust, but self-defense even of a wicked regime must sit squarely within the scope of privilege-generating causes. So too, I think, combatant privileges could belong to members of al Qaeda fighting with the Taliban in conventional military engagements, as well as to the so called “Afghan Auxiliaries,” that is the foreign volunteers who came to Afghanistan to defend the Islamic Republic against its invaders. Whether they are actually entitled to such privileges will turn on whether they were collectively organized enough to exercise a capacity of self-regulation in accordance with IHL. It should not turn on the simple fact of their irregular status.

This is of course not at all an endorsement of the merits of their cause, but only a recognition that they too fought together, with the Taliban, for a cause of something like self-determination. Being a formal rather than substantive aim, as sincerity is a formal virtue, defending self-determination is consistent with defending regimes of great evil. There is, then, an asymmetry for soldiers of egregious regimes: those fighting voluntarily to extend their nations’ sway would not be privileged, even though they retain the privilege in defending their states. But since the privilege of killing comes with the correlative privilege of their enemies to kill them, this asymmetry is not such a benefit.

Moreover, because the privilege of lawful belligerency confers no immunity from prosecution for war crimes, including the forms of perfidy and hostage-shielding they are accused of, granting the privilege in form may mean little in substance.

Clearly these cases pose difficult questions of policy, and controversy will inevitably remain for any set of legal rules that might apply to them. Seeing the law of war through the lens of the criminal law of complicity reveals an underlying logic of collective action that can make sense of both bodies of law. And seeing that logic in the special collective context of politics can further help us understand a deeper rationale for the core of the law of war, the combatant privilege. More importantly, understanding war in terms of collective action forces us to reckon with the real individual responsibilities that come with participation in collective violence: relations of value that go beyond *dulce et decorum est pro patria mori*.