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COMBATANTS – LAWFUL AND UNLAWFUL

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The September 11 attacks led many Americans to believe that Al-Qaeda had plunged the U.S. into a new type of war, already familiar to some of the country's closest allies. Subsequent debates over modern terrorism often involve a sort of lamentation for the passing of old-fashioned wars.[1] Paul Gilbert's *New Terror, New Wars* suggests that at least when it came to old wars we knew when they were taking place, who were fighting them, and what they were fighting about. Most significantly is that in the past, as Gilbert reminds us, a state of war existed between sovereign states, whereas 'new wars' exist 'between a state, or a combination of states, on one side, and non-state actors on the other'.[2] As George Fletcher puts it, we are in 'a world beset with nontraditional threats from agents we call ''terrorists'''.[3]

This paper focuses on the new type of agents involved in contemporary armed conflicts and their rights. Following Michael Walzer, Terrorism is understood here as a particular form of political violence: the intentional random murder of defenseless non-combatants, many of whom are innocent even by the assailants' own standards (e.g. infants, children, the elderly and infirm, and foreign nationals), with the intent of spreading fear of mortal danger amidst a civilian population as

[1] George Fletcher, *Romantics at War – Glory and Guilt in the Age of Terrorism* (Princeton, New Jersey: Princeton University Press, 2003). Paul Gilbert, *New Terror, New Wars* (Edinburgh: Edinburgh University Press, 2003).

[2] Gilbert, 3, pp. 7–8.

[3] Fletcher, 6.

a strategy designed to advance political ends.[4] The targeting of random civilians, Walzer argued, sets terrorism apart from guerrilla warfare, which (as a rule) confronts armies, and political assassination, which targets particular officials.[5] In what follows, for the sake of argument, I will avoid the legal and scholastic controversy over the definition of the term 'terrorism' as distinct from other forms of irregular warfare such as guerrilla (or freedom) fighters, assassins, and the like. The argument advanced in this paper concerns irregular warfare in general, and it is therefore unnecessary here to delve into the various scholarly arguments over the precise legal or moral definition of the term ''terrorism'' properly so called. The thesis defended here is that irregular belligerents whether 'terrorists' or otherwise, are 'unlawful combatants' and as such are ineligible either for the immunities guaranteed to soldiers by international conventions of war or for the protections of the criminal justice system. This point about lawless combat in the course of battle is stressed, first as a point of law, but second, and more significantly, as a moral position. Section I addresses the historical development of the lawful rules of combat and argues that the distinctions that underlie the laws of war serve

[4] Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 197, 203. This definition of terrorism is admittedly controversial. Jeremy Waldron, 'Terrorism and the uses of Terror', *The Journal of Ethics*, 2004, Vol. 8, 5–35, offers many different legal as well as academic definitions of ''terrorism''. C.A.J. Coady, 'Defining Terrorism', in *Terrorism – The Philosophical Issues* (Igor Primoratz ed.), Palgrave Macmillan (New York and London, 2004), 3–14, p. 4, suggests there are over 100 modern definitions of terrorism. George Fletcher, 'the Problem of Defining Terrorism', mentions dozens of such definitions, concluding that no one categorization of this phenomenon is definitive. George Fletcher, 'the Problem of Defining Terrorism', delivered at a conference on 'Terrorism – Philosophical Perspectives', at Tel-Aviv University (organized by the department of Political Science, & the Minerva Center for Human Rights, Tel-Aviv University's Law Faculty), March 2003. For wider definitions, see: Ted Honderich, *After The Terror*, (Edinburgh: Edinburgh University Press, 2002) 98–99; Jacques Derrida, in Giovanna Borradori, *Philosophy in a Time of Terror, Dialogues with Jurgen Habermas and Jacque Derrida* (Chicago & London: The University of Chicago Press, 2003), 85–136, esp. 102–110.

[5] See Michael Walzer, *Just and Unjust Wars*, Chap. 11–12, pp. 176–206.

the weak as well as the strong and ought to be upheld *inter alia* for that reason.[6]

There is, at least in theory, a notion of fair play at work in the laws of *jus in bello*, which concerns who may legitimately be targeted in wartime. The laws of *jus in bello* express an, albeit romanticized, perception of war as conducted between equally matched opponents. Section II argues first, that irregular combatants do not play by the rules, and therefore are not entitled to their protection. At the same time, they remain belligerents, unenlightened to the procedural rights granted to criminals in civil law. Second, I argue that the distinction between lawful and unlawful combatants, which specifies those who may legitimately carry out an attack, serves the more basic distinction between combatants and non-combatants. Irregulars, I suggest, do not merely breach the formal reciprocal rules of fair play, their tactics of camouflage and disguise take advantage of the very code they breach. Irregulars are, to say the least, free riders on the prohibitions civilized nations adhere to. Furthermore, by acquiring a hybrid identity of combatant-civilian, they also blur the more basic moral distinction between those who may and those who may not be targeted in wartime. Thus, the more fundamental vice of irregular combatants is not merely their formal lawlessness, or even unfairness, but rather the threat they pose to the ''civilized'' conduct of war and the protections it affords to an identifiable defenseless civilian population.

How should irregulars be treated? Two immediate cases of confronting irregular warfare come to mind. The first is Israel's policy of assassinating terrorist leaders often described disparagingly as 'extra-judicial execution', a practice not unknown to the American 'war effort' as well.[7] The second concern is purely American. If Gilbert's description of the uncertainties of *New Terror, New Wars* is telling, the cover photo of his book by that

[6] The prohibitions stated in Article 23 of the Hague convention are a case in point.

[7] For this type of disparagement, see, for example, *B'tselem – The Israeli Information Center for Human Rights in the 'Occupied Territories'*, at http://www.btselem.org. For a more scholarly account of this objection, prevalent on the Israeli left, see Michael Gross, 'Assassination: Killing in the Shadow

title is surely worth a thousand words. The photograph depicts a group of detainees captured in Afghanistan and held in the U.S. Naval base at Guantanamo Bay, Cuba. Hardly unrelated are the military tribunals provided for in an executive order issued by President Bush in November 2001 concerning the trial of any of the terrorists or Al-Qaeda members captured in the subsequent war in Afghanistan. Like Israel's assassinations, these new extra-judicial measures met with fierce criticism in left-leaning circles,[8] although they were not unanimously criticized by liberals.[9] Section III analyzes these two contemporary debates and argues that the belligerents in both cases are legitimately regarded as unlawful, and duly denied the rights of soldiers.

Once captured and disarmed, however, irregular combatants, even the terrorists among them, must be guaranteed some minimal standard of humanitarian treatment which ought to be specified and guaranteed by the international community. There are certain things, I suggest towards the end of this essay, like outright torture, that we may not do to any other person, regardless of his own actions.

I. A HISTORY OF LAWLESSNESS IN COMBAT

In the months after September 11 a small band of conservative lawyers within the Bush administration staked out a forward-leaning legal position regarding the unfolding war in Afghanistan. It was, these lawyers said, a conflict against a vast,

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of Self-Defence', forthcoming in J. Irwin (ed.), *War and Virtual War: The Challenges of Communities* (Amsterdam: Rodopi); Michael Gross, 'Fighting by Other Means in the Mid-East: a Critical Analysis of Israel's Assassination Policy', *Political Studies*, Vol. 51, 2003, 350–368; Gad Barzilai, 'Islands of Silence: Democracies Kill?', forthcoming in *Journal of Law and Policy*. On some assassinations carried out by the U.S., see Alan Dershowitz, 'Killing Terrorist Chieftains is Legal', *The Jerusalem Post*, April 22, 2004.

[8] For example, Ronald Dworkin, 'The Threat of Patriotism', *New York Review of Books*, February 28, 2002; Jeremy Waldron, 'Security and Liberty: The Image of Balance', *The Journal of Political Philosophy*, Vol. 11, No. 2 (2003), pp. 191–210; Fletcher, 112–116.

[9] See, for example, Fletcher, *Romantics at War,* pp. 115–116, where the criticizes Laurence Tribe and Cass Sunstein for publicly supporting this deviation from constitutional practice.

outlawed, international enemy, in which the rules of war, international treaties, and even the Geneva conventions did not apply. While the administration has avoided taking any clear official stand on these issues, the emergent approach appears to have been that America's enemies in this war were 'unlawful' combatants, without rights.[10]

Many Americans agreed that Al-Qaeda could not be fought according to traditional rules. The relevant rules, those agreed on at the Hague and Geneva conventions, stipulate the conditions under which combatants are entitled to the war rights of soldiers, specifically the right to prisoner-of-war (POW) status when captured.[11] Crucially, POWs can refuse to answer questions beyond name, rank and serial number, and are guaranteed basic levels of humane treatment.[12] On the assumption that they are not personally responsible for atrocities or other war crimes, they are immune from any personal culpability and criminal proceedings.[13] The legal criteria for attaining the war rights of soldiers appear simple and clear-cut. According to the Hague Convention of 1907, in order to be

[10] See, for example, 'The Roots of Terror – The Road to Abu Graib began After 9/11, when Washington wrote new rules to fight a new kind of war: A Newsweek investigation', *Newsweek*, May 24, 2004. George Fletcher, *Romantics at War*, 112–113, also suggests a link between the Bush administration's legal approach and the concept of ''unlawful combatants''. Nevertheless, Fletcher stresses that the defense regulations from 28 February 2003, regarding the military tribunals – originally authorized by President Bush on November 13 2001 to try any terrorists or AL-Qaeda member captured in the ongoing war – make no explicit claims about ''unlawful combatants''.

[11] The Hague Convention (18 October 1907), Annex to the Convention, Section I 'On Belligerents', Chapter II 'Prisoners of War'. Geneva Convention relative to the Treatment of Prisoners of War, adopted on 12 August 1949.

[12] The Hague Convention (18 October 1907), Annex to the Convention, Section I 'On Belligerents', Chapter II 'Prisoners of War', on humane treatment, Art. 4 and throughout. On questioning and information, see: Art. 9. Geneva Convention relative to the Treatment of Prisoners of War, adopted on 12 August 1949, esp. Part III – Captivity, Section I – Beginning of Captivity, Article 17.

[13] The Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949), Article 99.

entitled to POW status fighters must wear 'a fixed distinctive sign visible at a distance' and must 'carry their arms openly'.[14] Two further important conditions are that the combatants in question must form part of a 'chain of command' and that they themselves obey the customs and the laws of war. These provisos were intended primarily to distinguish between soldiers on the one hand and spies or saboteurs, and perhaps also guerrilla fighters in civilian clothes, on the other.[15] The law is relatively silent, however, regarding this latter category: what, if any, are the rights and immunities of combatants who do not abide by these terms, that is, who do not abide by the rules of war, who wear no insignia and carry their arms in secret?

In *Romantics at War*, George Fletcher supplies a detailed description of a 1942 case in which eight German would-be spies were captured on U.S. territory shortly after they entered it and before carrying out any part of their mission. Fletcher looks carefully at the landmark U.S. Supreme Court opinion in which Justice Harlan Stone took on the task of retroactively explaining and excusing the swift trial and execution of six of these German infiltrators without due process of law. Crucially, Justice Stone labeled these Germans 'unlawful combatants', observing that they had buried their uniforms on arrival and did not bear arms openly. Although at the time of their capture they had not yet carried out any acts of sabotage and espionage, Stone argued that in view of their 'lawlessness', stemming from their civilian appearance, they were 'subject to trial and punishment by military tribunals for acts which render their belligerency unlawful'.[16] Fletcher's in-depth legal analysis of the case is insightful in recognizing the judicial opinion that followed it as the theoretical precedent for President Bush's controversial makeshift military tribunals. He claims that Chief Justice Stone, writing this after-the-fact opinion, was in fact the

[14] The Hague Convention (18 October 1907), Annex to the Convention, Section I 'On Belligerents', Chapter I 'The Qualifications of Belligerents', Article 1. Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949), Part I – General Provisions, Article 4. See also: Fletcher, *Romantics at War*, 106; Walzer, 182.

[15] Ibid.

[16] Fletcher, *Romantics at War,* p. 107.

first to use the term 'unlawful combatant', which is never explicitly employed either in the Hague Convention or elsewhere in international law,[17] although Stone had argued that his opinion represented 'universal agreement and practice'.[18]

Arguing for the rights of insurrectionists, Palestinian historian Karma Nabulsi rejects the stark distinctions drawn by modern laws of war between civilians and combatants and the derivative distinction between lawful and unlawful combatants.[19] Her rejection is closely linked to a more general disdain for the traditional dichotomy drawn between *jus ad bellum* and *jus in bello*, which she regards as artificial, suggesting that the justness of cause applies with equal force to both the origins and the conduct of war.[20] Nabulsi states, unarguably, that the distinction between types of combatants was ultimately never resolved in international law.[21] 'In the traditional laws of war, only professional soldiers were granted belligerent status. ...Accordingly, all civilians who participated in hostilities were considered outlaws.'[22] This was precisely U.S. Supreme Court Justice Stone's point when he spoke of 'universal agreement and practice' in his opinion on the case of the eight German saboteurs.[23] But according to Nabulsi this 'agreement and practice' regarding so-called lawless combatants was not entirely universal. 'In contrast, those contesting the legal norm [at Geneva in 1949] argued that all citizens who bore arms for the nation were legitimate combatants. Equally controversial was the issue of prisoners of war. Small countries sought to

[17] Fletcher, *Romantics at War,* p. 107. This fascinating and relevant case is discussed and analyzed by Fletcher at length on pp. 96–112.

[18] Fletcher, *Romantics at War,* p. 107. See for example Nabulsi's description of the treatment of irregulars during the Napoleonic wars; Nabulsi, 32.

[19] Nabulsi, *Traditions of War*.

[20] Nabulsi, 242. This view is phrased in terms of 'The Republican Tradition of War', 177–240, which Nabulsi primarily describes rather than defends but with which she clearly identifies.

[21] Nabulsi, 15–18, 241.

[22] Nabulsi, 16.

[23] See Fletcher, 107.

have all armed defenders protected from reprisals if captured (as professional soldiers already were).'[24]

Throughout her fascinating project, Nabulsi traces this failure to reach an internationally agreed distinction between those who may legitimately partake in combat and those who may not, to the existence of three incommensurable traditions of war: martial, Grotian, and republican. Nabulsi argues against the predominantly Grotian influence, which resulted objectionably in a body of law that effectively serves the powerful and favored the strong.[25] Crucially, she suggests that the Grotian emphasis on the distinction between *jus in bello* and *jus ad bellum*, and the very attempt to codify and regulate war with reference solely to the former, is at the heart of the distinction between lawful and lawless combatants that she contests. She argues adamantly throughout her work that the distinction which legitimizes combatants only of regular armies is part and parcel of the reluctance to look beyond the conduct of war into the justness of wars themselves, specifically wars for national liberation carried out by conquered peoples.[26] Accordingly, international law adopted a formalistic and legalistic style, allegedly aspiring to 'neutrality' or 'objectivity' towards the reasons for combat. Relatedly, it is said to adopt a form of (false) moral relativism with respect to conflicting national ideologies, attempting solely to regulate the conduct of armed conflict rather than delving into its source.[27] The age-old distinction between *jus ad bellum* and *jus in bello*, the distinction of combatants from civilians and the derivative, non-codified, discrimination between lawful and unlawful combatants, are presented as inherent to this built-in legal slant favoring states and their standing armies, particularly occupying powers, even when waging unjust wars, over irregulars who defy *jus in bello*, even if engaged in a just struggle, say for national independence.[28]

[24] Nabulsi, 17.
[25] Nabulsi, 175.
[26] This argument is presented right at the outset of the book, Nabulsi, p. 1.
[27] Nabulsi, 128, 142, 156, 166, 167, 170, 171, 176.
[28] This is the gist of Nabulsi's argument throughout.

Nabulsi's discussion is historical and political rather than philosophical in the strict sense, and nowhere does she propound or defend normative arguments to be contended with. While she rejects a variety of well-entrenched distinctions within international law or convention, she does little more to discredit them than to repeatedly restate the accusation that they favor the strong and powerful at the expense of the oppressed. From a philosophical perspective, Nabulsi traces the specific concept of justness in war that has underlain international law back to the Hobbesian–Grotian aspiration for peace and order above all (even at the expense of liberty).[29] As befits a good work of history (rather than philosophy), she concentrates on the questionable origins of the international laws and practices that she rejects – the biased and self-interested motivations involved in their enactment – as well as critically describing the historical figures responsible for modern laws of war. Nonetheless, her thesis is partly normative rather than purely descriptive, alleging that the laws of war inherently favor the stronger party by adopting a form of (false) moral relativism towards conflicting national ideologies and attempting solely to regulate the conduct of armed conflict rather than delving into its source.[30]

II. THE PHILOSOPHY OF LAWLESSNESS IN COMBAT

Jeff McMahan's "The Ethics of Killing in War", also challenges the distinction drawn by the traditional theory of war between principles governing the resort of war (*jus ad bellum*) and those governing the conduct of war (*jus in bello*).[31] Not unlike Nabulsi, he too proceeds to question the related combatant non-combatants dichotomy upheld by the rules of war.[32] McMahan argues that at the deepest moral level, considerations governing the justness of the war and those

[29] Nabulsi, Chap.5, e.g. 163, 172.

[30] Nabulsi, 128, 142, 156, 166, 167, 170, 171, 176, 242.

[31] Jeff McMahan, 'The Ethics of Killing in War', *Ethics*, 2004, Vol. 114, 693–733.

[32] McMahan, ibid, p. 2 & sec. VIII, 38–43.

governing its conduct necessarily converge and are not independent of one another. Contra Walzer, McMahan denies the possibility of a war meeting the requirements of *jus in bello* while violating those of *jus ad bello*. Morally speaking, he argues one cannot fight "justly" in an unjust war (though one can fight a just war unjustly).[33] Ideally, McMahan aspires to place greater responsibility on the individual soldier for his participation in any given war.[34] As for the traditional distinction between combatants and civilians, his thesis explicitly implies that in a just war, 'it can be permissible, on occasion, to attack and even to kill non-combatants'.[35] Moreover, this license is not presented as a case of overriding the rule about non-combatants immunity, rather, McMahan argues that civilians may at times be legitimate targets because noncombatants are in some cases morally responsible for wronging the enemy and therefor liable to force or violence in war.[36]

This however, is as far as the similarity between McMahan and Nabulsi goes. Ultimately, McMahan distinguishes between 'the deep morality of war' on the one hand, and the laws of war on the other. On the deeper, purely moral, level, he argues, one cannot separate considerations of *jus ad bellum* and *jus in bello*, nor can one free soldiers or civilians from responsibility for partaking in unjust wars. Crucially, however, he observes that 'it is entirely clear that the laws of war must diverge significantly from the deep morality of war... Perhaps most obviously, the fact that most combatants believe that their cause is just, means that the laws of war must be neutral between just combatants and unjust combatants, as the traditional theory insists that the requirements of *jus in bello* are'.[37]

[33] McMahan, sec. V, pp. 18–29. In summary, McMahan argues that unjust wars, by definition, can never fulfil the *jus in bello* requirement of proportionality, so that unjust wars will always, by their very nature, defy the laws that govern the conduct of battle as well. Consequently, according to McMahan (and specifically contra Walzer), "an unjust war cannot be fought 'in strict accordance with the rules'.

[34] McMahan, sec. IV 10–18, sec. VII 34–38.

[35] McMahan, Sec. VIII, p. 42.

[36] McMahan, Sec. VIII, 38–43

[37] McMahan, 44.

Why make any distinctions regarding the means of war rather than empowering the just side to enlist all measures that help it gain its desired end? The rationale behind the moral distinction civilians and soldiers and the subsequent differentiation between the causes of war and who may be targeted within it, as well as between types of combatants do not rest on the questionable proposition that morality, in war or otherwise, is a relative matter. Moral relativism (true or false) has nothing to do with it. The distinctions in question rest purely on the empirical, and indisputable, observation that warring parties have contesting views of justice which they each hold to represent objective truth. The convictions of one side may be objectively correct while the other side is engaged in an unjust act of aggression based on an erroneous creed. Often, each combatant has some justice on its side, and in many cases particular issues of justice may be less discernible in absolute terms. The distinction between the principles of just war and the laws of war does not deny an objective answer to the question of *jus ad bellum*. It represents a good moral reason for concentrating on the laws of war so long as the question of the war's justness is still being violently contested.[38]

If Nabulsi's normative argument has one moment of truth, this concerns the notion of *levee on masse*.[39] When discussing the Vietnam War, Walzer argues that in those cases in which an insurgent movement definitively wins the 'hearts and minds' of a people, judgments of *ad bellum* and *in bello* seem to converge. According to Walzer, when an invading army faces a resistance movement that enjoys sincere popular support, the anti-Guerrilla forces will necessarily fight an unjust war because such a war cannot be fought justly – the anti-insurgents are at war with an entire people, not with an army or a movement.[40] Similar arguments are popular among the Israeli left with regard to Israel's presents in the territories concurred from

[38] As McMahan observes, what is most important is that "wars, when inevitable, should be fought as decently as with as little harm to the innocent as possible", McMahan, 46.

[39] I am grateful to Michael Walzer for pointing this out to me. See Nabulsi's references to *levee en masse*: 17, 46, 49, 53–54, 168, 173, 235.

[40] Walzer, 187.

Jordan in 1967. While such arguments might facilitate Nabulsi's political agenda, they can hardly uphold her theoretical stance on justice in war. Note that Walzer's reasoning for regarding this type of anti-Guerrilla warfare as immoral rests entirely on its inability to uphold the distinction between combatants and civilians, which he, unlike Nabulsi, regards as vital. If Nabulsi rejects this traditional distinction to begin with, she can hardly return to enlist it as ammunition against combating popular insurrections.

As for Walzer's argument itself, it suggests that popular support for a violent uprising renders its opposition unjust. Walzer assumes that *levee en masse* lends the guerrilla struggle a form of democratic legitimacy, which consequently places a moral barrier on combating it. While Walzer's argument may apply in the case of Vietnam, it is doubtful whether the use of force against all popular movements is always *ipso facto* unjust. Popular support is sometimes granted to morally dubious leaders, at times to oppressive and aggressive organizations, and often to terrorists. While popular will and self-determination of peoples is undoubtedly an important moral consideration in evaluating political movements and their causes, it is less clear that 'democratic' support for a belligerent movement should automatically render its opposition unjust or bestow legitimacy on its irregular combatants.

There is, in any event, no legal basis for the proposition that wars against popular guerrillas are necessarily unjustified or that widespread support for irregulars endows them with ''belligerent'' status. As Walzer himself admits, 'the military handbooks neither pose nor answer such questions.'[41] As for international law, the legal exceptions to the rules made on behalf of irregular combatants in the case of *levee on masse* are very restrictive. According to Walzer, the provisions requiring combatants to wear distinctive dress and reveal their weapons in order to qualify for the war rights of soldiers 'are often suspended, particularly in the interesting case of a popular uprising to repel invasion or resist foreign tyranny. When the people rise *en masse* they are not required to put on uniforms. Nor will they carry

[41] Walzer, 187.

their arms openly, if they fight, as they usually do, from ambush: hiding themselves they can hardly be expected to display their weapons'.[42] Walzer cites Francis Lieber who believed that captured fighters in such cases ought to be treated like prisoners of war.[43] According to the Hague convention, however, the only qualification that is suspended in the case of *levee en masse* is the requirement to 'have a fixed distinctive emblem recognizable at a distance'.[44] And even this liberty to fight in civilian dress is limited both temporally and spatially. It applies only to popular insurrections launched at the moment of invasion and carried out on territories not yet subject to occupation.[45] Even under these restrictive circumstances, the law (unlike Walzer) does not free any combatants from the requirement to display their weapons openly if they wish to qualify as ''belligerents'', entitled to POW status if captured.[46] Moreover, Walzer himself, like the Hague convention, does not release irregulars engaged in a popular uprising from the obligation to respect the customs and laws of war, specifically the requirement to refrain from targeting civilians.[47]

When discussing the criteria specified in the Hague conventions (1907) for attaining POW status, George Fletcher explains

[42] Walzer, 183.

[43] Walzer, 183, with reference to: Francis Lieber, Guerrilla Parties Considered With Reference to the Laws and Usages of War (New York, 1862).

[44] The Hague Convention (18 October 1907), Annex to the Convention, Section I 'On Belligerents', Chapter I 'The Qualifications of Belligerents', Article 2. See also Nabulsi, 17.

[45] The Hague Convention (18 October 1907), Annex to the Convention, Section I 'On Belligerents', Chapter I 'The Qualifications of Belligerents', Article 2. My emphasis. The reference to Article 1 refers to the requirement to wear a distinctive emblem.

[46] Ibid.

[47] See Walzer, Chapters 11: 'Guerrilla Warfare', 176–196; Chapter 12: ''Terrorism'', 197–206. The logic of Walzer's illuminating three-ply distinction between Guerrilla warfare, political assassination and terrorism suggests that he might have us distinguish between illegal combatants who nonetheless discriminate between civilians and soldiers and those who do not. While Walzer's distinction between guerrillas and terrorists is invaluable, I think it ought not to come into play at this early stage of defining the category of lawless combatants which is a legal status rather than a moral appraisal of their specific deeds and causes.

the distinction between types of combatants by associating it with the more basic protection accorded to civilians in wartime. 'To understand the position of the Hague Convention we must consider the reasons for the distinction between combatants and noncombatants. This distinction ultimately serves the interests of civilians by separating them, in principle, from the field of battle.'[48] While Nabulsi argues that states adopted these distinctions purely in order to pacify conquered populations and prevent them from resisting oppression, she too admits that regularizing armies and distinguishing between combatants and civilians could be more sympathetically construed as directed against some possible interests of the military, most crucially by preventing armies from slaughtering civilians.[49] Walzer takes this line in defending the distinction between the rights of soldiers and those of irregulars, laid down, at least implicitly, by The Hague and Geneva Conventions. The distinction between soldiers and guerrillas, he argues, is morally valid even in situations of unjust occupation faced with admirable resistance, in view of the protection it accords to civilian populations (rather than their oppressors). This also explains why the license to refrain from distinctive dress granted to irregulars at the time of foreign invasion does not apply to irregulars in occupied territories.[50] As Walzer puts it later on, distinguishing between soldiers and civilians by means of external insignia is essential in order to protect civilians from attack: 'soldiers must feel safe among civilians if civilians are ever to be safe from soldiers.'[51]

In fact, Nabulsi acknowledges right at the outset that her opposition to the distinction between lawful versus unlawful combatants strikes at the very basis of humanitarian laws of war as it entails the rejection of the more basic distinction between combatants and civilians as well.[52] Like Fletcher and Walzer, she associates this controversial distinction with the more basic separation within the modern laws of war between combatants and non-combatants, which lies at the core of humanitarian

[48] Fletcher, 107.
[49] Nabulsi, 163.
[50] Walzer, 178.
[51] Walzer, 182.
[52] Nabulsi, 1.

laws of war. Yet she believes these principles ought to be disregarded in view of their bias against irregular insurgents.

Defending the basic distinction between combatants and civilians in wartime is well entrenched within international law and has been the topic of numerous volumes.[53] At the most minimal level of justification, this fundamental distinction represents the morally worthy aspirations of minimizing the suffering inevitably involved in the hellishness of war and of preventing wars from becoming total. While Nabulsi admits that her rejection of lawlessness in combat challenges the more basic distinction between civilians and soldiers, I doubt that even she would accord armies the right to ignore non-combatant immunities altogether; she certainly never presents any argument to this effect. As for the more controversial, derivative, distinction, Fletcher continues his explanation of the criteria specified at the Hague convention for attaining POW status and other war rights (over and above the aspiration to distinguish clearly between civilians and soldiers) as follows:

> ...there is also at play a subtle principle of reciprocity between combatants...When two soldiers from opposing armies encounter each other on the front lines, they each acquire a privilege and expose themselves to an additional risk. The privilege is to be able to kill the opponent at will, whether the opponent is attacking, at rest, or even sleeping. The risk however is reciprocal: each side is in danger of being killed just because each is wearing a certain uniform. Those who refuse to wear a uniform or a 'distinctive emblem recognizable at a distance', do not expose themselves to this reciprocal risk. They claim the right to be aggressors in wartime without paying the price, and this they may not do...The unlawfulness derives from the deliberate refusal to share in the risks of warfare.[54]

Describing guerrilla warfare, Walzer makes some similar points, tying the legal criteria for attaining war rights to the protection of civilian populations and stressing the notion of reciprocity. According to Walzer, regardless of the justness of their cause, guerrillas in civilian disguise generate a moral

[53] For just a few obvious examples, see Michael Walzer: *Just and Unjust Wars*; George Fletcher, *Romantics at War*. For the legal distinction and protections accorded to civilians in wartime, see: Protocol 1 – Addition to the Geneva Conventions, 1977, Part IV: Civilian Population. Even Nabulsi, p. 1, admits this rational.

[54] Fletcher, *Romantics at War,* p. 108.

hazard by subverting the most fundamental rules of war, whose purpose is to protect the civilian population by specifying for each individual a single identity: either soldier or civilian. He cites *The British Manual of Military Law*, which makes the point with special clarity: 'both these classes have distinct privileges, duties and disabilities...an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both....'[55]

The upshot of both Fletcher's and Walzer's comments seems to be that irregulars in civilian camouflage are doubly at fault. First, they threaten the well being of the surrounding population by blurring the distinction between soldier and civilian. As Walzer puts it, if the partisans don't maintain the distinction of soldiers and civilians, why should the occupying forces do so?[56] Guerrillas in disguise invite their enemy to subvert the war convention. 'By refusing to accept a single identity, they seek to make it impossible for their enemies to accord to combatants and non-combatants their ''distinct privileges and disabilities''.'[57]

Furthermore, disguised partisans defy the rules of 'fair play', by attempting to gain the advantages of both statuses. According to Walzer: 'The key moral issue, which the law gets at only imperfectly, does not have to do with distinctive dress or visible weapons, but with the use of civilian clothing as a ruse and a disguise. (The case is the same with the wearing of civilian clothing as with the wearing of enemy uniforms).'[58] This 'feigning of civilian, non-combatant status', is regarded by international law as an incident of 'perfidy', explicitly prohibited by the 1977 Protocol Addition to the Geneva Conventions (Protocol I).[59] The crucial point with civilian disguise, as

[55] Walzer, 179.
[56] Walzer, 179.
[57] Walzer, 180.
[58] Walzer, 183.
[59] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Part III: Methods and Means of Warfare – Combatants and prisoner-of-war status #Section I – Methods and means of warfare, Article 37 – prohibition of perfidy, (c) the feigning of civilian, non-combatant, status.

Walzer describes it, is 'the kind and degree of deceit involved: the same sort of deceit that is involved when a public official or party leader is shot down by some political enemy who has taken on the appearance of a friend and supporter or of a harmless passer-by'.[60] Walzer readily admits that some such incidents may be justified in terms of their cause. Nonetheless, 'assassins cannot claim the protections of the rules of war; they are engaged in a different activity'.[61] The same applies to disguised guerrillas, as it does to a variety of other hostile acts such as espionage and sabotage carried out in disguise behind enemy lines, which Fletcher also mentions apropos lawless combatants.[62] As far as the secret agents of conventional armies are concerned, Walzer tells us: 'It is widely agreed that such agents posses no war rights, even if their cause is just. They know the risks their efforts entail, and I see no reason to describe the risks of guerrillas engaged in similar projects any differently.'[63]

Aside from the danger they pose to non-combatant immunity, then, unidentified combatants are also involved in a related type of dubious rule-breaking: an attempt to enjoy the benefits of a certain situation without engaging in its burdens, that is, the risks and hazards involved in overt and identified warfare. The success of an irregular deceitful enterprise depends to a large extent on the existence and maintenance of the rules it defies. Furthermore, the type of deceit that involves civilian attire and concealed weaponry is related to the fundamental distinction between combatants and civilians because the rules it flouts are those designed specifically to protect the surrounding population. Hence the dual charge leveled by Fletcher and Walzer against non-reciprocal behavior and defying the fundamental distinction between combatants and non-combatants, thus endangering the immunity of the latter. Irregulars in civilian disguise do not abide by the rules of war

[60] Walzer, 183.

[61] Ibid.

[62] Walzer, 183. Fletcher, Chap. 5, pp. 92–116 – the 1942 case of the eight German saboteurs which he insightfully ties to the issue of unlawful combatants.

[63] Walzer, 183–184.

and are therefore ineligible for its protection. Furthermore, their non-compliance is far from incidental: breaking the rules that their adversaries rely on and adhere to is the very essence of their tactic.

Someone may respond here by observing that there are worse things in the world than free riding: oppression, persecution, occupation, economic exploitation, to name just a few. The disguised irregular, however, is no ordinary rule breaker whose moral transgression consists solely of playing unfairly, or gaining an undeserved advantage. Worse still is that, in contrast with the spies and saboteurs of conventional armies that penetrate foreign soil, disguised guerrillas or partisans fighting on their own terrain (however justifiably) blur the distinction between soldier and civilian and threaten to draw their stronger adversary into a conflict that makes no such distinction. Not only do they hitch a morally dubious free ride on their adversaries' moral code, they specifically defy those rules that lie at the very heart of humanitarian conventions and are vital to the well being of civilians, above all to the welfare of the members of the weaker population. While the soldier–civilian dichotomy and the derivative distinction between lawful and unlawful combatants might be convenient for occupying armies, it is absolutely essential for the protection of defeated populations. Such distinctions ought not to be dismissed, particularly by those who have the latter's interests at heart, even in exchange for a temporary strategic advantage. It is hard to believe that even under extreme circumstances the suspension of any limitations on war and military reprisals in the name of a just cause, even national independence, would end up overall serving the party with the lesser artillery. Those who are concerned with the interests of the weak and vulnerable as opposed to those of the strong and powerful might, on reflection, consider embracing the restrictions of *jus in bello* rather than rejecting them.[64]

[64] The prohibitions stated in Article 23 of the Hague convention are a case in point.

It could admittedly still be argued that in some particular circumstances it might be worth while for the civilian population to assume the risk involved in irregular warfare. Recall Walzer's argument whereby it may at times be justified to resort to perfidy.[65] This would depend on the kind of aggression or oppression that is the *casus belli*, and on the chances of successfully opposing this aggression weighed against the risk of enemy retaliation. In the case of a cruel and long oppressing regime (or an occupying force), it is not at all unlikely that the chances of liberation would make it worth endangering the well-being of the civilians in one's own collective. This point is readily conceded. Walzer admits that some instances of irregular warfare, most notably the partisan struggle against the Nazis, were justified; in spite of the danger it posed to the surrounding population. Nevertheless, the point remains that belligerents involved in such activity, must assume the accompanying risks for themselves, just as they assume the dangers to their civilian population. However, noble in the particular incident, partisans, are unprotected by international laws of war, which are designed to deter irregular tactics in general and with the good cause of narrowing the violence and protecting civilians.[66] In the case of the noble partisan, we would be justified in applauding his behavior, without reproaching his opponent (who may be reprehensible on other accounts) for denying him the rights of a regular soldier.

On a more practical level, once again, any cruel and oppressive regime confronted with resistance, would in turn act unlawfully using its full force against the illegal insurgents. Assuming this regime or occupier is the stronger power, it would render the unlawfulness of the freedom fighters practically futile. The weak can only benefit from rule breaking if it is relatively one sided, hence the charge of free riding. The partisan struggle against Hitler's Germany is a case in point. The short-term success of resistance operations relied on the rules of war themselves (e.g., a surprise attack by belligerents disguised as unarmed French farmers relied on the assumption that

[65] Walzer, 183.
[66] Walzer, 182.

conquered people in civilian clothing do not pose a military threat). In the long term, the very fact that the Nazi's defied many of the rules of war, particularly those regarding non-combatant immunity, rendered the partisans struggle militarily insignificant. Terrorists or freedom fighters can only succeed if their stronger enemy is not extremely oppressive and unjust, respects the rules of war, and does not retaliate in kind.

To sum up: The rationale behind the distinctions examined here – both the basics and their derivatives – is the morally worthy humanitarian aspiration to protect the defenseless, alongside the utilitarian objective of narrowing the cycle of violence in the course of combat by singling out a certain class of agent, namely, soldiers who are exclusively susceptible to attack.[67] I suggested that the controversial distinction between lawful and unlawful combatants ultimately serves the weaker party better than any morally credible alternative. None of the parties – neither the meek nor the mighty – can legitimately pick and choose among these distinctions, demanding their protections without assuming their burdens. Since selective application of the rules of war (or any other principle) is not a morally viable option, all parties (the weaker side in particular) are better off assuming the burdens and limitations which derive from these distinctions, alongside their protections, rather than rejecting them both. I suggested that certain types of irregular combatants most often dubbed 'terrorists' are in fact guilty of 'free riding' in

[67] The basic distinction of jus in bello is between combatants and non-combatants. Its explanation is a source of scholarly debate. Walzer, Chapter 9, argues that non-combatants are, in an important sense, innocent and are therefore entitled to a type of moral immunity which soldiers are not entitled to. Richard Norman, *Ethics, Killing, and War* (Cambridge: Cambridge University Press, 1995), Chapter 5, argues that there is no difference of blameworthiness between soldiers and civilians, but that killing civilians expresses a particular disrespect for human life. The combatant–non-combatant distinction, Norman argues, is intended to reduce the dehumanization and depersonalization that characterizes war in general. George I. Mavrodes, 'Conventions and the Morality of War', 4 *Philosophy and Public Affairs*, (1975), 117, argues that the basis for the distinction has no intrinsic basis and is purely conventional. The basis for the distinction, according to Mavrodes, is the mutual interest of the warring parties to narrow the cycle of violence by limiting their ability to fight.

the following sense: they seek to gain the protections offered by these distinctions for themselves and their populations without assuming the responsibilities that inherently go with them. It is precisely this option that must be categorically denied by the international community and its legal system if we are to retain any type of limitations in wartime whatsoever.

III. TWIN TROUBLES: AMERICA'S DETAINEES AND ISRAEL'S ASSASSINATIONS

International law and practice effectively leave irregular combatants virtually unprotected, though their "unlawful" identity is not in itself a criminal offense. As George Fletcher points out, the very notion of lawless combat invokes a legal status rather than a crime. Fletcher makes this point by drawing our attention to the jurisprudential distinction drawn by H. L. A. Hart in the early 1960s between a rule defining a crime (such as spying) and a norm generating the possibility of achieving a legal status (becoming a lawful combatant).

> The basic difference is that the violation of the first kind of rule generates liability and punishment. The breach of the second kind simply means the actor does not secure the legal results she desires. For example, she tries to become a licensed pharmacist and fails. She tries to write a valid will and fails. She tries to enjoy the privileges of being a combatant and fails.[68]

While the hybrid identity of combatant-civilian is not in itself a prosecutable offence, many of the specific acts of war attributed to irregulars are prosecutable as 'war crimes', perhaps as 'terrorism'. Two familiar examples are the events of September 11 and the Palestinian attack on civilians in Israel. The targeting of non-combatants in the course of an armed conflict has long been recognized as a war crime by the Geneva Conventions and more recently by the Rome Statute.[69] Needless to say, murder is

[68] Fletcher, *Romantics at War,* p. 109.

[69] Fletcher, *Romantics at War,* p. 57; Walzer, e.g. 136–137; See also, Protocol I, Additions to the Geneva Conventions, 1977, Part IV: Civilian Populations, Chapter II: Civilians and Civilian Population, Article 51: Protection of the Civilian Population, 2. ...Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

prohibited by both American and Israeli law. It is equally obvious that the pilots of 9/11, like the homicide bombers in Israel, did not abide by the requirements of the Hague Convention. They did not show up for the flight in military dress and they naturally kept their weapons, such as they were, concealed. These omissions do not in themselves constitute a crime; nonetheless, it is precisely this non-compliance, rather than fiendish deeds, which are at the crux of the terrorist's unprotected status. Furthermore, unlike the case of unlicensed pharmacists or invalid wills, the practical consequences of a combatant's legal incapacity will at times be more severe than those associated with any specific crime.

On 13 November 2001 President Bush issued an executive order authorizing military tribunals to try any of the terrorists or the Al-Qaeda members who might be captured in the ongoing war in Afghanistan. 'The Tribunals Bush had in mind.... would be staffed by military officers subject to command influence, the proceedings would be in secret, and they could use any evidence they thought relevant. Of course, there would be no jury. The judges could decide by a two-third vote to impose the death penalty.' There would be no appeal, accept by the President or the Secretary of Defense.[70]

It is likely that this form of prosecution lies in store for the detainees of Guantanamo Bay, whom the Bush administration has, not implausibly, categorized as 'unlawful combatants'.[71] At present, these tribunals have been put on hold pending the outcome of an appeal to the US high court on behalf of Salim Ahmed Hamdan, challenging the tribunal's procedures against terror suspects. President Bush declared Hamdan an ''enemy combatant'', a status that makes him ineligible for the privileges accorded to prisoners of war.[72]

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[70] Fletcher, *Romantics at War,* pp. 112–113.

[71] At present there is one such trial in the works, involving three defendants. See, e.g.: Washington Post 9 July, 2004.

[72] 34 year old Hamdan, alleged to have been Al-Qaeda leader Osama Bin Laden's personal driver and body guard, was captured in Afghanistan in November 2001 and has since been held by the US in Guantanamo bay.

Two distinct concerns regarding the treatment of irregulars are at stake here. The first concerns the legalitcy and justness of the tribunals; the second concerns the humanity of the preceding detention. Perhaps the most deplorable aspect of the detention is its lack of transparency. As things stand, the American public remains virtually uninformed about the current fate of those irregulars held indefinitely by the U.S. military in Cuba. Recent reports about the treatment of conventional soldiers in Abu Ghraib prison, Iraq, cannot but invoke nightmarish speculations concerning the fate of 'unlawful' militants from America's previous campaign.

Regarding the tribunals, Fletcher points out that one particularly disturbing aspect concerns this notion of 'unlawful combatants', which underlies President Bush's executive order. The people who would be subject to summary trials are 'either members of Al Qaeda, someone who engaged in or assisted international terrorism against the U.S., or anyone who has harbored an Al Qaeda member or an international terrorist'.[73] However, as Fletcher points out:

> There is no way of knowing who is a member of this network without first making a judgment about who is guilty of an act of terrorism – and that is precisely the question at stake in the summary proceedings before the military tribunal. The circularity of using 'terrorism' twice – first as the criterion of jurisdiction and second as the definition of the crime – should make one wonder if justice is possible in tribunals so defined.[74]

One can only guess at the reasoning behind this circularity. The notion of illegal combatants is indeed vital to its logic. Bush's lawyers seem to have attributed a different meaning to the term 'terrorism' in each of its uses. In the first instance, the term is invoked in order to convey a certain inferior status on the accused, namely, that of an unprotected 'lawless combatant'. In the second instance, the term 'terrorism' is used to describe a list of prosecutable crimes – belonging to certain illegal organizations or partaking in the killing of civilians. Although the order never says so, it is clear that the criterion for jurisdiction is based on the status attributed to irregular combatants – the assumption that they are

[73] Fletcher, *Romantics at War,* p. 113.
[74] Fletcher, *Romantics at War,* p. 114.

by virtue of their omissions entitled neither to the immunities of soldiers nor to the rights accorded by law to civilian criminals. Later, the term 'terrorism' refers to a specific crime: not the failure to wear a uniform or carry one's arms in the open, but specified criminal activity such as assisting Al-Qaeda or aiding and abetting the murder of Americans. If we bear in mind the notion of 'unlawful combatants', it is apparent the President's order has its own internal logic. Its drafters had two distinct meanings of 'terrorism' in mind: the lawless status of terrorists as unprotected 'unlawful combatants', which renders them subject to summary trial, and 'terrorism' as a crime for which they are to be judged at these trials.

This understanding does not get Bush's lawyers off the hook. The order's circular terminology is not primarily a logical flaw but rather a moral one. The trouble with the tribunals remains, as Fletcher warns, one of identifying the class of individuals subject to this inferior brand of justice – that is, Al-Qaeda members – rather than any foreigner whom the Bush administration regards as suspicious.[75] Even if one accepts the administration's legal assessment whereby 'unlawful combatants' may be denied due process of law and tried with fewer procedural guarantees, these procedures must at least be employed in order to guarantee that the individual brought before the tribunal is indeed an 'unlawful combatant'.

Earlier in 2001 – before the planes hit New York and Washington and President Bush ordered his tribunals – Palestinian attacks on civilians in Israel had escalated. The previous year had seen Israel's hasty withdrawal from Lebanon, the collapse of the Camp David accords and the Palestinian rejection of the Clinton-Barak offer. This had set off the Second Palestinian uprising – the '*Al-Aqsa Intifada*' –, which began in September 2000. In response, Israel exhilarated an old tactic of assassinating mid- to upper-level Palestinian militants. Between 29 September 2000 and the end of 2005 Israeli military forces assassinated over 187 Palestinians accused of leading terrorist activity.[76]

[75] Fletcher, *Romantics at War,* pp. 113–114.

[76] *B'tselem – The Israeli Information Center for Human Rights in the 'Occupied Territories'* http://www.btselem.org

Prominent Palestinian targets have included: Ibrahim Bani Odeh, a well-known bomb maker; Fatah leader Hussein Abayyat; Yahiya Ayyash, the famous 'engineer', assassinated in Gaza in 1996; Tanzim leader Raed Karmi; Mahmoud Abu Hanoud, a high-ranking Hamas commander assassinated in November 2001; Hamas leader Salah Shhada, assassinated by Israel in July 2002, and more recently, Hamas's 'spiritual leader', Sheik Ahmed Yassin, and his successor, Dr Abdel Aziz Rantisi (March 2004).

Many moral, legal and practical arguments have been put forward in condemnation of Israel's assassination policy, all of which deserve close scrutiny. It had been dubbed 'extra-judicial execution'[77] and even equated with the terrorism it purports to combat.[78] Others question whether we ought to entrust military and political personnel with making such crucial decisions, or whether the practice, even if justified, ought to be placed under judicial review.[79] Some, who are less opposed in principle to this strategy, nonetheless point accusingly at the civilian

[77] This is the term used by B'tzelem, ibid, and is prevalent among the Israeli left.

[78] For example, *After the Terror*, 151. Noam Chomsky, *9–11* (New York: Seven Stories Press, 2001), p. 72.

[79] Aside from the fact that this worry may well be outweighed by the concern to save human life, it is most important to note that imposing judicial restrictions on anti-terrorist operations, however feasible and justified in the abstract, would place targeted killing totally out of step with all other forms of military action, for reasons that remain curious. Military and political personnel are normally authorized to make a wide range of on-the-spot decisions which include, for instance, waging war, embarking on particular battles, and a vast array of tactical and strategic decisions made and carried out within belligerent situations. Any such decision, will usually affect the lives of numerous individuals, most of whom are totally innocent. The unsupervised authority vested in generals and politicians in all such situations is subject to potential abuse and misuse in a variety of ways not dissimilar to those which raise concerns vis -a-vis targeting terrorists, and on a far larger scale. Nevertheless, in the name of 'national security' or personal safety, we resign ourselves to these negative side effects and remain satisfied with retaining only the power to punish gross moral digressions in military decision-making and action (such as massacres or other extreme violations of human rights), if they are uncovered. It is puzzling that the lives of terrorists in particular warrant calls for extra-ordinary protection.

casualties incurred in the course of such operations. Others question the policy's effectiveness as a means of combating terrorism, concluding that it is merely a form of revenge or retaliation rather than of self-defense. As such, it is also suggested, these operations quicken rather than reduce the cycle of violence and bloodshed. Legally speaking, however, it is unclear, for all the rhetoric, that targeting irregular combatants, whether terrorists or otherwise, is in any sense illegal or that the rules of war contain any basic principles that should render this practice unlawful.

Clearly, the underlying principle at the basis of Israel's assassination policy is the familiar distinction between lawful and unlawful combatants. Active terrorists, it is assumed, are not entitled to the protection of due process of law any more, and perhaps less, than soldiers are. Terrorists, or guerrillas, clearly operate within the military, rather than the civil, sphere. Aside from the obviously warlike character of the activity in which they are engaged and for which they are pursued by their assassins, they themselves do not deny the military nature of their deeds or their direct role in the ongoing hostilities; indeed, they take pride in it. As such, they do not qualify for the protections accorded to civilians by the Geneva Conventions.[80] More often than not, guerrilla leaders bear militaristic titles of command. On no account can they be considered civilian criminals, or as any type of protected 'persons taking no active

[80] Protocol 1 added to the Geneva Conventions, 1977, Chapter II: Civilians and Civilian Population: Article 51: Protection of the Civilian Population, states clearly that: " (3) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities". The controversial term here as far as Israel's assassinations are concerned is the phrase "direct part". There are admittedly those who would argue that some of Israel's targets, (most notably the notorious Hammas "spiritual leader" Sheik Ahmed Yassin), did not take a "direct part" in hostilities, and were therefor "civilians" protected by International law. In fact, all targets, without exception, (most definitely including Yassin), were directly involved in the militant struggle against Israel, either by instigating, or organizing, planning, personally inciting to, actively recruiting for, or carrying out, attacks against Israeli civilians, as well as soldiers. They themselves would be the last to deny this.

part in the hostilities'; indeed, they do not profess to this status.[81] They controversially regard themselves as 'freedom fighters' or guerrilla warriors, but never claim to be unengaged in combat.

On the other hand, as irregulars who do not uphold the war conventions, terrorist, or guerrillas, are equally not entitled to the war rights of soldiers.[82] Thus, Israel assumes, they are never immune from attack, not even in their homes or in their beds. Like soldiers, they may be killed during armed conflict at any time, whether armed or unarmed, whether posing a grievous threat or idly standing by.[83] Unlike regular soldiers, however, they may also be killed in purely civilian settings. Aside from their unprotected legal status, the moral rationale for this license concerns the lack of reciprocal rule keeping discussed in the previous section. Irregulars do not expose themselves to conventional risks, nor do they themselves uphold any conventions concerning the appropriate contexts for combat. The opportunity to combat terrorism on the conventional front line will, by definition, never arise at all. The terrorist, on her part, will not recoil from combating her enemy in unconventional settings. There seems, therefore, to be little, if any, moral reason to uphold conventions regarding optimal battle settings in the case of irregulars who do not themselves abide by these rules.

[81] The phrase 'Persons taking no active part in the hostilities', referring to a protected status, is taken from the Geneva Convention 1949 and includes civilians as well as prisoners of war who have laid down their arms. See: Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, Part 1: General Provisions, Article 3, (1).

[82] For the qualifications for attaining these rights, such as POW status, specifically the accumulative requirements to abide by the rules of war, wear identifying dress and carry ones arms openly, see once again: The Hague Convention (18 October 1907), Annex to the Convention, Section I 'On Belligerents', Chapter I 'The Qualifications of Belligerents', Article 1. Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949), Part I – General Provisions, Article 4. See also: Fletcher, *Romantics at War*, 106; Walzer, 182.

[83] On the broad notion of self-defense in wartime and on the many contexts in which it is legal to kill enemy soldiers, see Fletcher, 107; Walzer, 139–142; Dershowitz, 'Killing Terrorist Chieftains is Legal', *The Jerusalem Post*, April 22, 2004; Daniel Statman, 'Targeted Killing', *Theoretical Inquiries in Law*, Vol. 5: 179–198, p. 195.

In contrast to the problem of accurately identifying Al-Qaeda members, Israel faces virtually no practical or moral difficulty identifying those responsible for the violent strikes against it. I assume there is little disagreement among Western liberals concerning the immorality of terrorists and their abhorrent deeds, regardless of the justness of their cause.[84] Nor is there usually any doubt as to the culpability of the pursued targets. On the contrary: terrorist chieftains and the organizations they represent are always proud to publicly accept responsibility for the atrocities they plan and execute. Yassin, Rantisi, Yahiya Ayyash, Raed Karmi, and Salah Shhada are all cases in point. Transparency is also not an issue in these cases. It is possible to withhold information regarding the conditions under which prisoners are detained, even the identity of the specific detainees, but one can hardly conceal the assassination of a prominent figure. While some operations may be carried out covertly, no secrecy surrounds their consequences.

When defending Israel's assassination policy, Daniel Statman relies on the common moral and legal view according to which the killing of enemy combatants in wartime is allowed even if they are not posing a direct and imminent threat.[85] It is admittedly illegal to target enemy commanders in civilian settings, say, when vacationing at a hotel, suggesting that, while Israel may target combatants in military settings, she may not do so in civilian contexts. Why is it legitimate to kill an enemy officer in his office or on the way to it but totally illegitimate to kill him in a hotel?[86] How does the change in location serve to provide a moral immunity to a person who might otherwise be legitimately killed under our broad understanding of self-defense in wartime?[87] Statman explains this distinction as grounded purely in convention, but he nonetheless attributes weighty moral significance to such conventions as they

[84] There are admittedly exceptions to this putative consensus; for example, Ted Honderich, *After the Terror*. This is at least partly due to Honderich's dissent from liberal morality: *After the Terror*, 46–51 and *passim*.

[85] On this license to kill soldiers, see: Fletcher, *Romantics at War,* pp. 107–108; Walzer, 142.

[86] Statman, 'Targeted Killing', 195.

[87] Ibid.

contribute to reducing the killing, the harm, and the destruction of war.[88]

Fletcher's *Romantics at War* suggests a slightly different explanation of the significance of changing location. A soldier in uniform, Fletcher explains, assumes a collective identity as an enemy agent, which renders him threatening to the other side and thus vulnerable to attack.[89] On the other hand, Fletcher's thesis suggests that, while vacationing, the same individual resumes his civilian identity and as such cannot be targeted personally. Either way, it is clear that such distinctions are conventional in nature, requiring some form of artificial construction (such as the notion of 'collective identity'). It is equally apparent, however, that the conventions of war are morally grounded in the aspiration to minimize suffering by confining the fighting to a distinct class of individuals – namely, soldiers – and protecting civilian populations from direct attack.

How do these conventions apply to irregular combatants who do not abide by them? Recall Fletcher's characterization of unlawfulness in combat as arising from the deliberate refusal to share in the reciprocal risks involved in warfare, that is, identifying oneself as vulnerable to attack by wearing a uniform and carrying one's arms openly.[90] David Sussman expresses a similar intuition when he argues in his recent article explaining "What's Wrong With Torture?" that it is nonetheless morally reasonable to require a captured terrorist to divulge information that will thwart his cause. The terrorist, Sussman argues, disregards the laws of war and thereby forfeits the conventional right of soldiers to surrender without compromising their cause. While a regular captured combatant retains the right to withhold evidence that would obstruct his countries goal, we need not respect the terrorist's reluctance to compromise his sense of integrity, camaraderie and objectives.

> The terrorist disregards the principle of just combat, striking at his enemies' loved ones simply because they are dear to him. The terrorist makes no effort to distinguish himself from civilians and other non-combatants,

[88] Statman, 196.
[89] Fletcher, *Romantics at War,* pp. 107–108.
[90] Fletcher, *Romantics at War,* p. 108.

forcing his foe into the terrible choice of either waging war against innocents or failing to protect himself and those near to him. Given as the terrorist attacks his enemy's own integrity this way, it is hard to see how he is entitled to terms of surrender that do not require him to in any way compromise his cause, Plausibly, such terms should be reserved for combatants who accept certain risks (by wearing uniforms, living apart from civilian populations, and so on).[91]

The targets of Israel's assassinations, as well as America's non-conventional enemies, are guilty of a further breach of morally significant conventions. While this need not be true of all unlawful combatants, the irregular organizations confronted by Israel and the U.S. do not refrain from attacking soldiers in civilian settings or even from targeting civilians directly. Should the very rules of war they thwart nonetheless apply to them? I believe the complicated reality of the matter is that some should and some should not.

IV. WHAT THE RULES DON'T SAY AND WHAT THEY SHOULD SAY

We saw that the prohibition against targeting combatants in civilian locations is the product of convention, though one with a morally significant rationale, that is, limiting the amount of suffering in wartime. Israel's policy of assassinating the self-professed commanders and instigators of irregular warfare in non-conventional settings can indeed be criticized for violating this convention. However, as Statman points out:

...like all conventions, the moral force of this convention is contingent on its being followed by all sides. Hence, if one side violates the convention, the other is no longer committed to adhering to it. In this regard, rules based on convention differ from rules founded on strict moral grounds, which are obligatory regardless of what the other side does. Since the killing of children is subject to such a strict moral prohibition, it is forbidden even if the enemy takes such a horrendous course of action. But killing officers in their homes (during war) is not, in itself, morally worse than killing them in their headquarters; therefore, if one of the sides violates this convention, it loses its moral force.[92]

[91] David Sussman, 'What's Wrong With Torture?', *Philosophy and Public Affairs*, Vol. 33 (1), 1–33, 18.

[92] Statman, 196.

The convention against targeting combatants in civilian settings may be useful in reducing the horrors of war and as such morally worthy even if it is not intrinsically valid. The case is much the same with other conventions of war.[93] 'Conventions, however, require mutuality; otherwise, the side adhering to them would simply be yielding to the side that refuses to follow them. Since groups like Al-Qaeda, the Tanzim and the Hamas, have no regard whatsoever for the conventions of war, the party fighting against them is released from these conventions too, though not from the strict moral rules of conduct.'[94]

Statman's distinction between rules based on convention and those founded on strict moral grounds is crucial to the issue at hand. The previous sections showed that, while no distinction between lawful and unlawful combatants is explicitly laid down within international law, the status of lawless combatantcy can be deduced negatively from the positive definition of soldiers eligible for POW status under the Hague Convention of 1907 and the Geneva Convention of 1949. The last section suggested that combatants who bear no external insignia and carry their arms in secret fail to achieve a particular legal status – that of a soldier – and are therefore ineligible for the specific privileges that accompany this legal status. The breach of certain norms, specifically wearing uniforms and carrying arms openly, as well as generally abiding by the rules and customs of war, means that the combatant in question does not secure the legal immunities granted to those who fulfill these requirements. He defies certain conventions and therefore cannot enjoy the specific privileges accorded by them to those who abide by their norms.[95] Since conventions are based on a reciprocal, or

[93] Jeff McMahan's 'The Ethics of Killing in War' suggests another useful example. 'It is not obvious, for example, that poison gas is inherently more objectionable morally than artillery, provided that its use is confined to the battlefield; yet the convention that prohibits its use is widely obeyed, mainly because we all sense that it would be worse for everyone, ourselves included, were the taboo to be breached'. (McMahan, 46).

[94] Statman, 196. McMahan makes the same point about the limited binding force of conventions: "it is widely accepted that the violation of a convention by one side tends to release the other side from its commitment to respect the convention". (McMahan, 47).

[95] Fletcher, *Romantics at War,* p. 109.

mutual, relationship, non-compliance on one side – in this case, refusal to share in the risks of covert warfare – frees the other party from its commitments. As far as those rules of war that are conventional in nature are concerned, whatever their moral rationale, they do not apply to combatants who fail to abide by their specifications.

It is admittedly difficult to propose precise guidelines for distinguishing sharply between norms based on convention and those founded on strict moral grounds. As far as the rules of war are concerned, we saw that this distinction is not always a stark one. Even conventional rules of war will sometimes have a strong moral rationale, such as the aspiration of limiting modern warfare. Nonetheless, it seems clear that some distinction along these lines is necessary and that some relatively easy cases can be agreed on. Statman's example of the prohibition on targeting high-ranking combatants in resort hotels is a case in point. There is no doubt about the legitimacy of the target or the license to kill him off-guard or even in his sleep; nonetheless, we have good reasons for contracting to refrain from targeting combatants in certain contexts, but these reasons are nullified if the agreement is not mutually adhered to. The same is true, for instance, of the use of mustard gas on the battlefield. As McMahan points out, there is no independent moral reason to believe that it is morally worse to use gas (on the battlefield) than bullets. The agreement to refrain from its use is grounded in the morally praiseworthy aspiration, as well as our self-interest, to reduce the amount of overall suffering in wartime. It is reasonable to assume, however, that if one side were to violate this convention, the other side would be released from its contractual commitment to respect it.[96]

The same logic applies to attaining POW status if captured. While these rules are presumably grounded in a morally significant concern for the humane treatment of prisoners, the specific rights accorded by the Hague and Geneva conventions assume a mutual relationship and the undertaking of reciprocal risks. They do not apply legally to those who do not live up to their stipulated standards, nor can they be demanded on moral

[96] Cf: McMahan, 46–47.

grounds by those who do not share in the burdens associated with upholding these norms.

The case is different with those norms that refer more directly to strict moral prohibitions and defend basic human rights. Consider the crime of gassing civilians in extermination camps, as opposed to releasing lethal gasses on the battlefield. If, during WWII either of the warring parties had reverted to using poison gas against soldiers, the other side would have presumably been justified in retaliating in kind. On the other hand, the Allied-forces would not have been justified in avenging the horrors of the Nazi death camps by setting up their own gas chambers for German ex-patriots in the United States. In keeping with this logic, Protocol 1, added to the Geneva convention, 1977, does not release states from their legal obligation to respect civilians and civilian populations even if these obligations are violated by their adversaries.[97] Correspondingly, Statman's example of targeting children is a point well taken. Even when states, or terrorists, blatantly defy such rules, their opponents may not retaliate in kind.[98] This, I would venture to add, is presumably also true of a variety of human rights violations such as the use of outright torture, seclusion and the long-term detention of individuals who have not freely assumed responsibility for the actions attributed to them or been publicly proven guilty. The latter is most directly related to the basic moral prohibition on punishing the innocent, while the former reflects a basic moral commitment to uphold a bare minimum of humane treatment of individuals as such, whatever their crime. Once again, the task of specifying a list of basic human rights that ought to be upheld in wartime regardless of the enemy's course of action is beyond the scope of this paper. Notwithstanding this, I suggest that, while combatants who are not soldiers cannot reasonably demand the right to be targeted only on the battlefield, or to reveal only their name rank and serial number when captured, they ought

[97] Protocol 1, Additional to the Geneva Conventions, 1977, Part IV, Section II, Article 51, #8.

[98] Statman, 196.

to retain a minimum of basic human rights that are not the product of convention.

V. CONCLUDING REMARKS

The distinction between lawful and unlawful combatants is inherently tied to the more basic differentiation between combatants and civilians and is essential for protecting the latter. As such it is a morally worthy distinction, which ought to be specified in law and upheld in practice rather than remaining in a permanent state of legal limbo. International law ought to step up to the plate and explicitly recognize the distinction between combatants who play by the rules of war and share in its risks, and those who disregard them. Essentially, this involves specifying, rather than merely implying, the criteria for lawful behavior in combat and the benefits that attach to it, along with those benefits withheld from combatants who do not abide by the rules. On the most practical level, it comes down to drawing the appropriate conclusions regarding the rights of irregulars, and lack thereof, in battle and in its aftermath.

In doing so, international lawyers should pay special attention to the distinction between the rights and privileges stemming from convention and those based on strict moral grounds. Although this paper does not put forward any particular policy or proposal regarding the treatment of irregulars, it does suggest that the rights founded in convention presuppose mutuality and should therefore be accorded only to those combatants who abide by them. On the other hand, certain basic human rights must be accorded to all human beings as such, regardless of convention or the suspect's legal status or alleged crime. Such are, for example, the right of a captured combatant not to be subjected to grievous physical pain and pressure, the right to receive proper food, medical and dental care, to be kept in a humane environment, as well as to avoid false imprisonment, or endless concealed incarceration. Consequently, while the lawless status of irregular combatants ought to be legally distinguished from their lawful counterparts, this distinction will not necessarily bear the precise

significance that some self-interested state leaders wish to accord to it, nor should it always supply them with the licenses they seek to acquire.

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