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Combatant Privilege in Asymmetrical Warfare: A Reexamination of Belligerent Equality

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The legal equality between belligerents is one of the core principles of International Humanitarian Law ("IHL"). Belligerent equality standardly entails that IHL rules regulating the conduct of hostilities apply symmetrically among enemy belligerents regardless of whether they are fighting war that is ad bellum lawful or unlawful. It is a corollary of the principle of separation between jus ad bellum and jus in bello. Belligerent equality has been at the center of contemporary debates regarding the regulation of asymmetrical conflicts and "new wars."

In this Article, I argue, first, that despite the fact that IHL rules apply symmetrically to different belligerents, there is a deeper sense in which this regime treats enemy belligerents unequally—namely, by conferring only some of them the status of combatants. In effect, combatant "privilege" (or "status") is distributed unevenly among participants in armed conflicts. I hereby offer here a unified account of combatant privilege that can, on the one hand, explain some of the normatively appealing features of the existing IHL regulation while, on the other, provide some critical bite to advance particular legal reforms.

Second, I argue that combatant privilege ought not to be construed as a legal right (permission) to fight but, rather, as a legal immunity against being prosecuted for acts of war in compliance with IHL. I identify an underlying rationale that accounts for the distribution of combatant privilege as a matter of law, and explains this distribution on the basis of deeper normative considerations. Ultimately, I suggest that such privilege is grounded on the epistemic credentials of an individual's decision to take part in armed conflict (the evidence he or she had at her disposal). These credentials are largely determined by the function of authoritative directives, the empirical context

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in which decisions to resort to force are adopted, including the cognitive biases at play, as well as the salience of the justness of particular wars.

Accordingly, the argument I favor accounts for the privilege of state armed forces by reference to the normative weight of state authorization in the empirical conditions in which individuals must decide to take part in asymmetrical wars—including, notably, the persisting influence of cognitive biases and the circumstances that constitute the "fog of war." These same considerations, in turn, account for the unequal treatment traditionally afforded to non-state armed groups under IHL. They also account for particular instances of non-state forces being conferred this privilege, such as individuals taking part in a levée en masse, *or fighting national liberation wars, and even those militias and resistance movements acting as de facto organs of the state.*

Finally, I suggest that this argument accounts for the conditions under which participants in asymmetrical wars, such as foreign fighters, members of private military security companies, and child soldiers, ought to be conferred some form of immunity for taking part in armed conflict.

The resulting framework not only identifies the precise normative basis of combatant privilege, its connection with ad bellum considerations, and its implications as an immunity against prosecution; it also brings IHL more in line with its fundamental normative commitments concerning agency, responsibility, and the reduction of wrongful harm.

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Introduction

The equality between belligerents is considered a "cardinal principle" of modern International Humanitarian Law ("IHL").[1] It is derived from the principle of separation between ad bellum and in bello considerations.[2] Standardly, the principle of belligerent equality entails that IHL applies symmetrically to all participants in armed conflict, irrespective of whether they are fighting for an aggressor state or for a belligerent acting in legitimate self-defense.[3] IHL prohibits all parties to an armed conflict from directly attacking civilians and certain civilian objects, using certain weapons, engaging in indiscriminate attacks, mistreating prisoners of war, and conducting attacks that cause incidental harm to non-combatants which is disproportionate to the concrete military advantage expected.[4] Furthermore, belligerent equality helps ground the principle of distinction between combatants and non-combatants, and the latter's immunity from direct attack.[5] This principle has been traditionally advocated as a critical way to reduce overall harm in armed conflict.

At the core of the legal equality between belligerents is the notion of combatant privilege. Being classified as a combatant under IHL not only entails being considered a legitimate target but also affords captured participants in armed conflict the protections warranted to prisoners of war. These include a number of rights concerning protection against questioning, conditions of internment, access to food, clothes, and work.[6] Critically, combatant status signifies that those who are considered prisoners of war cannot be punished for participating in the armed conflict. They can be detained through the duration of the war, but they are neither held accountable as perpetrators of any type of wrongdoing, nor can they be criminally sanctioned in any way for being a combatant.[7]

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1. Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 Int'l Rev. Red Cross 931, 936 (2008).

2. *See* Emmerich De Vattel, The Law of the Nations, or the Principles of Natural Law §§ 190–91 (Joseph Chitty ed. & trans., 5th ed. 1916).

3. Roberts, *supra* note 1, at 933.

4. *Id.* at 949.

5. The principle of distinction essentially provides that armed forces must "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].

6. See the detailed provisions in the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GCIII].

7. *See* Rogier Bartels, *Combatant Privilege vs. Criminal Responsibility for Organized Armed Groups*, *in* Armed Groups and International Law 64 (Katharine Fortin & Ezequiel Heffes eds., 2024).

Nevertheless, a deeper look at the structure of IHL shows that not every participant in armed conflict is entitled to this privileged treatment. For one, combatant privilege only applies in international armed conflicts ("IACs"). This means that although IHL typically confers this privilege to states' regular armed forces[8] (irrespective of whether their side is violating the jus ad bellum or not), members of non-state armed groups are generally not afforded this treatment. Unlike military and security state forces, guerrilla groups, terrorist organizations, and other insurgencies are typically liable to be prosecuted and punished even if their actions comply with the requirements of IHL. Although they are not war criminals, their actions will be considered prohibited, and they can be held accountable and ultimately be punished for taking part in the war.[9] This broad bifurcation, captured by the differentiated regulation of IACs and non-international armed conflicts ("NIACs"), is further complicated by a number of relevant exceptions. For instance, IHL confers combatant privilege to members of non-state armed groups fighting wars of national liberation, militias or volunteer groups, and even resistance movements who act as de facto organs of the state, as well as those who simply take up arms as part of a *levée en masse* against a foreign invasion.[10] In contrast, state armed forces can forfeit their privilege for a number of reasons, such as not wearing uniforms, or failing to comply with the requirements of IHL, thereby becoming unprivileged combatants.[11] Accordingly, accounting for the precise contours of belligerent equality and its normative foundations is at the core of IHL scholarship.

Furthermore, equality between belligerents has been under increasing pressure in light of some of the specific features of contemporary asymmetrical armed conflicts and the increasing relevance afforded to ad bellum considerations. One of the salient characteristics of this type of conflict is the increased participation of a myriad of different actors, each with different claims and bases of legitimacy. As Michael Schmitt eloquently put it:

> [T]here are more contractors in Iraq . . . than all non-U.S. Coalition forces combined. At the same time, consider the variety of forces facing the Coalition: the regular army, Republican Guards; Special Republic Guards; Fedayeen Saddam paramilitary forces; civilians impressed into service; groups led by tribal leaders whose authority was at risk; religious zealots fighting

8. The "armed forces" of a (state) party to an international armed conflict consist of "all organized armed forces, groups and units which are under a command responsible to that [p]arty." *See* API, *supra* note 5, art. 43(1); GCIII, *supra* note 6, arts. 3, 4(A)(1).

9. *See* Int'l Comm. Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* ¶ 1719 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

10. *See* Laurie R. Blank, *Combatant Privileges and Protections*, Leiber Institute (Mar. 4, 2022), https://lieber.westpoint.edu/combatant-privileges-and-protections/ [https://perma.cc/6ABN-7YEW].

11. *See infra* note 73 and accompanying text.

> the Christians; those who wanted a political voice (Sadr and his Mahdi Army); those who had a relative killed, wounded, or insulted during the fighting; foreign jihadists; and pure criminals.[12]

This type of scenario creates a number of additional challenges for the legal principle of equality between belligerents. How should IHL treat each of these groups? Can we provide a principled argument that can account for and help us critically evaluate the main legal provisions regulating their legal status? To what extent, if at all, are ad bellum considerations relevant to determine how each of these actors should be treated?

This Article addresses these two sets of challenges by articulating a unified account of combatant privilege that addresses both the traditional debates on the regulation of IACs and NIACs, as well as the more recent challenges highlighted by asymmetrical wars. It thereby makes a substantial contribution to various contemporary debates. First, it engages with influential claims on the impact, both *de lege lata* and *de lege ferenda*, of ad bellum considerations on the laws of armed conflict.[13] "New wars"[14] have put this issue at the forefront of existing sensibilities.[15] Second, it addresses the legal and normative challenges posed by those defending the bifurcation between the regulation of IACs and NIACs, and those advocating greater convergence between these regimes. In particular, this debate has focused on the question of whether combatant privilege must also be conferred upon non-state armed groups on an equal basis with regular armed forces.[16] Third, it tackles the relationship between IHL and its underpinning normative considerations. The principle of equality between combatants has been at the center of contemporary debates on the ethics of war,

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12. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. Rev. 1, 38–39 (2008) (internal citations omitted).

13. *De lege lata* standardly refers to law as it currently is or is applied, while *de lege ferenda* indicates law as it should be (from a normative perspective).

14. *See* Mary Kaldor, *In Defence of New Wars*, *in* Stability 1, 1 (Mar. 2013) (explaining that "new wars" is a loose term reflecting a general sense that "twenty-first century organised violence" is different from those in the twentieth century).

15. *See, e.g.*, Eyal Benvenisti, *Rethinking the Divide between* Jus ad Bellum *and* Jus in Bello *in Warfare Against Nonstate Actors*, 34 Yale J. Int'l L. 541, 541–48 (2009); Eliav Lieblich, *Internal* Jus ad Bellum, 67 Hastings L. J. 687, 687–748 (2016). For a parallel challenge to the equality of combatants in the domain of targeting, see Gabriella Blum, *The Dispensable Lives of Soldiers* 2 J. Legal Analysis 115, 115–70 (2010).

16. *See, e.g.*, Anthony Dworkin, *Individual, Not Collective: Justifying the Resort to Force against Members of Non-State Armed Groups*, 93 Int'l L. Studies 476, 476–525 (2017); Claus Kreβ, *The Regulation of Non-International Armed Conflicts: Can a Privilege of Belligerency Be Envisioned in The Law of Non-International Armed Conflicts?* 96 Int'l Rev. Red Cross 29, 29–66 (2014); Frédéric Mégret, *Response to Claus Kreβ: Leveraging the Privilege of Belligerency in Non-International Armed Conflict Towards Respect for the* Jus in Bello, 96 Int'l Rev. Red Cross 44, 44–66 (2014); Emily Crawford, The Treatment of Combatants and Insurgents under the Law of Armed Conflict (2010).

between those who are in the orthodox and the revisionist positions.[17] Finally, this Article illuminates the contemporary literature on asymmetrical warfare by identifying the precise legal and normative challenges that this scenario presents in terms of legal regulation.[18]

This Article puts forward three main, important claims. First, it identifies the main consideration at the core of privileged combatancy, which is specifically tailored to the fact that it constitutes an immunity against prosecution. Second, it develops a normative argument which accounts for the central features of existing IHL regulations on the conferral of combatant privilege *de lege lata*. Finally, it also provides us with a critical edge that allows us to favor certain interpretations of the existing legal framework in ways that better track the underlying normative considerations, while also providing a precise roadmap for legal reform. Ultimately, this Article is an important step in the direction of aligning the application and interpretation of IHL with our most fundamental normative commitments concerning agency, responsibility, and the reduction of wrongful harm in armed conflict.

Part I provides a conceptual analysis of combatant privilege under IHL and its normative underpinnings. It argues that this privilege is an immunity against prosecution for acts of war which are lawful under IHL. Part II, in turn, posits a novel account of combatant privilege focused on the position of members of states' regular armed forces. Parts III to VI examine, respectively, the relative claim to privilege of members of non-state armed groups, foreign fighters, private military security companies, and child soldiers.

I. The Structure of Combatant Privilege

As indicated, the notion of combatant privilege is at the core of belligerent equality. However, there is substantial disagreement about the conceptual features and precise implications of this notion. Some authors argue that combatant privilege entails that IHL *permits* combatants on both sides to take part in armed conflict, thereby authorizing killing and maiming. Francis Lieber, for

17. For the orthodox position, see Michael Walzer, Just and Unjust Wars (2000) and the recent articulation in Yitzhak Benbaji & Daniel Statman, War By Agreement: A Contractarian Ethics of War (2019). For the revisionist position, see Jeff McMahan, Killing in War (2009); Cécile Fabre, Cosmopolitan War (2012); C.A.J. Coady, *The Status of Combatants*, *in* Just and Unjust Warriors: The Moral and Legal Status of Soldiers 155 (David Rodin & Henry Shue eds., 2008).

18. *See, e.g.*, Mary Kaldor, New and Old Wars: Organized Violence in a Global Era (1999); Antonia Chayes, Borderless Wars: Civil Military Disorder and Legal Uncertainty (2015); David Kennedy, Of War and Law (Princeton Univ. Press 2006); Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., Targeted Killings: Law and Morality in an Asymmetric World (Oxford Univ. Press 2012).

instance, considered military killing in war permissible and justified by necessity.[19] Recently, Marcela Prieto Rudolphy has further claimed that combatants in armed conflict do not merely hold a "Hohfeldian privilege" to fight, but further a "positive permission."[20] Eliav Lieblich construes IHL as a "facilitating" regime, whose main function is ultimately to legitimize those actions in war which are not covered by formal prohibitions.[21]

IHL gives some credence to this position. At its most explicit, Article 43(2) of Additional Protocol I to the Geneva Conventions ("API") states that combatants "have the right to participate directly in hostilities."[22] Its 1987 Commentary by the International Committee of the Red Cross further indicates that this means that combatants are "entitled to do so."[23] Similarly, the (non-binding) Commentary to Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War ("GCIII") speaks of civilians as not having "a right to participate directly in hostilities."[24] Some scholars and organizations further characterize the position of combatants as "authorized" by international law to fight.[25] These statements appear to treat combatant privilege as a positive permission, à la Prieto Rudolphy.[26]

The problem with this position, however, is that IHL by itself lacks the authority to establish the ultimate *permissibility* of given conduct in war as a matter of international law. The reason for this is that there are other regimes of international law that regulate behavior by participants in armed conflict. To illustrate, it is now broadly accepted that International Human Rights Law also applies during armed conflict, and that this legal regime also has

19. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, arts. 14–15, Gen. Orders No. 100 (1863). Note, however, that Isabel Hull has suggested that in the 20th century, necessity, as Lieber understood it, was whittled down to a "mere excuse," where unforeseen circumstances prevented an actor "physically from fulfilling the letter of the law." Isabel V. Hull, A Scrap of Paper: Breaking and Making International Law During the Great War 68 (2014).

20. Marcela Prieto Rudolphy, War, Law, and Murder 37, 28 (2023). Following Kelsen, she characterizes positive permissions as those in which a particular prohibition is derogated or excepted by another norm.

21. Eliav Lieblich, *The Facilitative Function of* Jus in Bello, 30 Eur. J. Int'l L. 321, 321–40 (2019).

22. *See* API, *supra* note 5, art. 43(2).

23. *See* Int'l Comm. Red Cross, *supra* note 9, ¶ 1677.

24. Int'l Comm. Red Cross, Commentary of 2020: Convention (III) Relative to the Treatment of Prisoners of War, art. 4, ¶ 1048.

25. Knut Ipsen, *Combatants and Non-Combatants*, *in* The Handbook of International Humanitarian Law 79, 81 (Dieter Fleck ed., 2d ed. 2008); Nils Melzer, Interpretative Guidance on the Notion of Direct Participation in Hostilities 83 (2009).

26. Even Prieto Rudolphy recognizes that "there is no individual provision codified in IHL that explicitly states something like 'combatants have a privilege to kill' or 'combatants have a permission to kill enemy combatants.'" *See* Prieto Rudolphy, *supra* note 20, at 37.

bearing on whether a particular action in war is permissible or not.[27] At its most basic, International Human Rights Law grants every individual a human right against being "arbitrarily" deprived of her life.[28] Although it is often suggested that whether a deprivation of life would be arbitrary in armed conflict is determined by whether it violates the rule of IHL,[29] this need not always be the case. The U.N. Human Rights Committee, for instance, has clearly stated that "[s]tates parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto the right to life" under the International Covenant on Civil and Political Rights, irrespective of whether they comply with IHL rules.[30]

Similarly, it has also been argued that a particular deprivation of life is arbitrary, and thereby impermissible, if it violates the law on the use of force (the jus ad bellum) or other rules of international law, despite it being consistent with the rules of IHL.[31] To illustrate, some scholars recently argued that this made the killing of Qassem Soleimani at Baghdad International Airport a violation of his human right to life, despite the fact that his combatant status meant that IHL was not violated.[32] Irrespective of the legal implications of these violations (who can be held accountable, before which body, and what the content of their responsibility would be), it is thereby unpersuasive to claim that IHL can ultimately *permit*, in either the Kelsenian strong sense or the Hohfeldian weak sense,[33] killing enemy combatants in (an unlawful, or aggressive) war. The more plausible reading of combatant privilege is, by contrast, to conceptualize it as a procedural immunity against prosecution for participating

27. *See, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 106 (July 9).

28. *See, e.g.*, *International Covenant on Civil and Political Rights* art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171.

29. *See, e.g.*, Gus Waschefort, *The Alchemy of the Right to Life During the Conduct of Hostilities: A Normative Approach to Operationalizing the 'Supreme Right'*, 34 Eur. J. Int'l L. 615, 624 (2023). Waschefort provides an overview of the ICJ *Nuclear Weapons* advisory opinion and scholars that support this prevailing view.

30. *See* U.N. Hum. Rts. Comm., General Comment No. 36, Article 6: Right to Life, U.N. Doc. CCPR/C/GC/36, ¶ 70 (Oct. 30, 2018); *see also* Eliav Lieblich, *The Humanization of* Jus ad Bellum*: Prospects and Perils*, 23 Eur. J. Int'l L. 579, 579–612 (2021); Gus Waschefort, *The Alchemy of the Right to Life During the Conduct of Hostilities: A Normative Approach to Operationalizing the "Supreme Right,"* 34 Eur. J. Int'l L. 615, 615–46 (2023); Chile Eboe-Osuji, *Military Necessity and Aggression*, 65 Ger. Y.B. Int'l L. 11, 11–36 (2022).

31. *See, e.g.*, Christopher Greenwood, *The Relationship Between* Ius ad Bellum *and* Ius in Bello, 9 Rev. Int'l Stud. 221, 221–24 (1983).

32. This claim finds support in Agnès Callamard (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Use of Armed Drones for Targeted Killings*, U.N. Doc. A/HRC/44/38 (2020).

33. *See* Claudina Orunesu & Jorge L. Rodríguez, *A Revision of the Theory of Fundamental Legal Concepts*, 39 Revus 7, 8–12 (2019).

in war for individuals, which does not necessarily reflect upon the substantive legality of the conduct itself.

According to this proposition, domestic courts, as well as international tribunals, will have a procedural bar precluding the prosecution of combatants for taking part in the war. Knut Ipsen explicitly states that combatants "shall not be called to account for their participation in lawful military operations."[34] Existing practice by belligerents largely supports this proposition. Combatants are not investigated or prosecuted only to have their actions considered justified, or at least permissible by a legal authority. In Arthur Ripstein's words, "the thing that needs to be explained is not how a trial would end, but rather why the captured combatant cannot be put on trial at all."[35]

An anticipated key architectural feature of IHL is that this immunity is not distributed evenly among belligerents. In principle, state armed forces—including "all organized armed forces, groups and units which are under a command responsible to that [p]arty for the conduct of its subordinates"[36]—are entitled to combatant status. Under certain circumstances, combatant status may also be granted to irregular armed forces such as members of "militias or volunteer corps forming part of such armed forces."[37] By contrast, members of non-state armed groups, mercenaries, and civilians taking direct part in hostilities typically are not considered combatants, and as a result are not entitled to key protections.[38] Furthermore, it is generally accepted that combatants such as state regular armed forces can lose or forfeit their privilege, thereby becoming liable to be sanctioned for acts which are not in violation of IHL. Notably, it is also widely accepted that whether the war that a belligerent is fighting is considered permissible or impermissible from an ad bellum perspective has no bearing on the question of whether such belligerent is entitled to combatant privilege.

Accordingly, a persuasive normative account of combatant privilege must be able to account for at least three core implications. First, this privilege *pro tanto* applies to certain participants in armed conflict yet not to others. The account must therefore provide a consistent rationale *and reason* for which actors in armed conflict are entitled to this immunity. Second, any account of this privilege must be compatible with the fact that combatants can lose or forfeit their privilege and become liable to prosecution and punishment for acts which would not be unlawful under IHL—they thereby become "unprivileged"

34. Ipsen, *supra* note 25, at 95.
35. Arthur Ripstein, Kant and the Law of War 168 (2021).
36. API, *supra* note 5, art. 43(1).
37. GCIII, *supra* note 6, art. 4.
38. *See* Parts III–VI below.

combatants.[39] Finally, the normative basis of this privilege cannot amount to a blanket amnesty from prosecution, as it must allow for combatants being liable to be prosecuted for crimes such as crimes against humanity, genocide, or war crimes.[40]

II. State Armed Forces

A. State Armed Forces as Public Officials

Any plausible account of combatant privilege must be able to explain why it is conferred upon states' regular armed forces. This Section examines two prominent accounts. Consider, first, the conceptualization of soldiers as "public officials" as defended by Malcolm Thorburn and Arthur Ripstein. Thorburn argues that for the purposes of understanding combatant privilege, we should not look at the status of the underlying conduct. Rather, we should look at "who has the moral standing to dictate how others should act and to back up these orders with coercive enforcement measures."[41] This standing is reserved to public authorities, i.e., those who enact laws and enforce them through coercion. "If a private citizen took up arms against [the enemy], by contrast, she would be a vigilante," and thereby lack protection against external judgment.[42] Similarly, "[i]n accepting employment as a soldier for hire, the mercenary does not represent a conflict between two independent legal orders; he acts exclusively on his own."[43] The decisive question, therefore, is whether the relevant participant in armed conflict acted in a public capacity, and within the scope of her official role, or not. When these conditions are met, no other authority can call her to account irrespective of whether her actions were wrongful.

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39. The notion of unprivileged combatant stands on fairly firm grounds under international law. Dinstein, for instance, considers the distinction between privileged and unprivileged combatants a corollary of the distinction between combatants and civilians—the purpose of the former being precisely to preserve the latter. *See* Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 29 (2016). Kennedy suggests that in the 19th century it referred to those who committed hostilities without being part of an organized and hostile armed force. Kennedy, *supra* note 18, at 93; *see also* Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45, 46 (2003); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 Va. J. Int'l L. 1025, 1025–72 (2004); Richard Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, Brit. Y.B. Int'l L. 323–45 (1951).

40. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII].

41. Malcolm Thorburn, *Soldiers as Public Officials: A Moral Justification for Combatant Immunity*, 32 Ratio Juris 395, 403 (2019).

42. *Id*. at 410.

43. Ripstein, *supra* note 35, at 167.

These positions account precisely for combatant privilege's core legal implication—namely, combatants' immunity against being held accountable. In effect, Thorburn suggests that we can fruitfully think of combatant privilege as "parallel to the doctrine of sovereign immunity" under international law.[44] This type of immunity renders the acts of any state immune from legal proceedings before the courts of another state. This sovereign immunity, Thorburn adds, constitutes "one of the structural features of the international legal order within which it is possible for a public authority to coexist with others."[45] To put it briefly, states should treat other states as sovereigns, i.e., as entities not subject to the legal authority of any superior. As a result, states and their officials are not subject to the authority of each other's courts.[46]

There are, however, a number of problems with this account. First, it is unable to capture certain normatively sound features of the existing legal framework, namely the privilege conferred to members of certain non-state armed groups, such as those fighting against racist or colonial domination and to participants in a *levée en masse*.[47] A second problem with this account is that it implies that combatant privilege belongs to the state, and not to the individual soldier. Sovereign immunity under international law is not only a right which belongs to states, but also one states may freely dispose.[48] This means, for instance, that in cases of regime change a state would be entitled to waive its soldiers' privilege, and allow for foreign courts to prosecute them. Such an implication seems not only implausible under international law, but normatively unacceptable, for it will have to consider it justified that an unjust belligerent that manages to secure regime change would be entitled to prosecute regular fighters if the new

44. Thornburn, *supra* note 41, at 410. Ripstein in turn, prefers to make an analogy between combatant privilege and diplomatic immunity. Ripstein, *supra* note 35, at 157–60. When a diplomat commits a criminal offense in the receiving state, he illustrates, such state can revoke the diplomat's accreditation; it can expel her, but it cannot call the diplomat to account. *Id.* at 159. Nevertheless, insofar as diplomatic immunity is grounded on the mutual consent of the sending and the receiving state, see Vienna Convention on Diplomatic Relations art. 2, Apr. 18, 1961, 500 U.N.T.S. 95, it seems to be a worse fit than sovereign immunity as the most adequate conceptual characterization of combatant privilege, which obtains as a matter of course. For a good overview, see Tom Ruys et al., The Cambridge Handbook of Immunities and International Law (2019).

45. Thorburn, *supra* note 41, at 411.

46. Ripstein further suggests that the separation between these two orders is ultimately justified on the Kantian insight that it contributes to both achieving and securing peace. Ripstein, *supra* note 35, at 8. Combatant privilege, he suggests, "preserves minimal elements of legality in the barbaric context of war by preserving the independence of legal orders who are at war with each other." *Id.* at 167.

47. *See* GCIII, *supra* note 6, art. 4(A)(6); *see also* Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10, 52–53 (2001) (commentary to art. 9).

48. *See Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 61 (Feb. 14).

regime authorizes them to do so. By contrast, as I suggest in the next Section, the more promising view is that combatant privilege is an immunity which belongs to certain individuals taking part in the armed struggle, not to their political organizations.

A second, relevant argument for conferring combatant privilege to state regular armed forces stands on the logic of collective action, as separate from individual action. In this regard, Christopher Kutz explains: "[W]hen I feel shame for my nation's prosecution of an unjust war, I do not regard myself as individually responsible for that war."[49] Echoing Rousseau, he claims that politics is something we "do together, a normative relation we bear as a group to another group."[50] Accordingly, Kutz argues:

> 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 [myself and my enemy], one structured through a set of rules specific to our interrelationship as individual members of warring nations in confrontation with one another.[51]

This separation entails that the responsibility of individual soldiers who go to war is relevantly different from the responsibility of the group. Under these conditions, the individual responsibility of citizens necessitates "a duty to serve if called," but only "if the war is not clearly criminal."[52] Namely, even if individual soldiers who participate in an aggressive war wrong those whom they kill, and bear a share of the *collective* responsibility for so doing, they cannot be punished for their acts, for they are not *individually* responsible for fighting.

This argument allegedly identifies the specific consideration that accounts for the privilege of combatancy conferred upon the armed forces of states *qua* political organizations. However, there are two important shortcomings to this position. First, as Kutz recognizes, there is no meaningful difference between state armed forces and other groups (for example, non-state armed groups) insofar as each of them acts collectively as a political organization.[53] This extension again sits uncomfortably with the existing norms under IHL which in principle do not provide such privileges to non-state armed forces except in rather exceptional circumstances (as we shall see below).[54] Nevertheless, the second and main problem with his account is that it begs the fundamental question.

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49. Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFF. 172, 172 (2005).

50. *Id.*

51. *Id.* at 173.

52. *Id.*

53. This extension would apply, he argues, as long as they may be considered a political group. *Id.* at 176.

54. *See infra* Part III.

That is, it assumes rather than explains how political decision-making accounts for soldiers' privilege. Furthermore, Kutz states, but fails to explain why these same soldiers would lose their privilege if they participated in "clearly" unjust wars, but retain it when they fight in wars that they "knew or had reason to know were morally dubious, and the deaths [they] caused should sit uneasily on [their] conscience."[55] As a result, we must now turn to explain the relationship between political authority and the individual decision-making process of members of state armed forces.

B. A Compound Argument for Combatant Privilege

Thorburn, Ripstein, and Kutz are on the right track. Their sensitivity to the importance of political decision-making is at the core of the privilege of regular state armed forces. However, I believe we must pay closer attention to how political decision-making affects soldiers' liability to be held accountable for participating in war. I suggest that combatant privilege is connected to the specific empirical situation of soldiers and the way in which context affects their capacity to evaluate the reasons that apply to them. I will address these two limbs of the argument, the institutional and the empirical, in turn.

Many just war theorists have argued that combatants who operate under a legitimate authority are under a duty to fight even in a fact-relative unlawful war. They provide different justifications for this "democratic duty" or "duty of citizenship," but the upshot of this position is that fighting in such a war is, all things considered, the right thing to do.[56] These positions are advocated for on the basis of different claims yet they illustrate an important insight which underlines the account I advocate here. Namely, state armed forces operate under specific institutional constraints that have a significant bearing on how we should assess their behavior. But how are authoritative directives connected with combatant privilege, understood as an immunity against being held accountable for taking part in an armed conflict?

Joseph Raz has influentially defended the normative force of authoritative directives on their epistemic function. He argued that a reason why anyone should comply with an authoritative directive is that it would allow them to comply with reasons that already, objectively apply to them more often if they follow the directives than if they try to follow those reasons directly

55. Kutz, *supra* note 49, at 179.

56. For different versions of this argument, see David Estlund, *On Following Orders in an Unjust War*, 15 J. Pol. Phil. 213, 213–34 (2007); Cheyney Ryan, *Democratic Duty and the Moral Dilemmas of Soldiers*, 122 Ethics 10, 10–14 (2011).

by themselves.[57] In short, following the authoritative directive makes it more likely that those subject to that authoritative directive would "get it right." This argument straightforwardly explains doctors' authority over nurses, courts' authority over prison guards, and legislatures' authority over citizens. I argue that it also helps us account for state armed forces' combatant privilege. State authorities are typically in a better epistemic position to determine when going to war is the right decision as compared to individuals reasoning on their own. The decision to go to war usually entails judgments concerning normative considerations and empirical facts which depend on confidential information and complex analysis well beyond the reach of those subject to this political authority.

Raz's account is connected with the main practical implication of recognizing someone as an authority, namely, that it provides those who are subject to this authority with "content-independent" reasons for action.[58] This means both that the force of these reasons does not depend on the merit of what is commanded—whether the directive actually "gets it right"—and that these reasons are not merely to be added to other reasons, but that they have some kind of special, protected status.[59] The underlying picture is quite familiar: As individuals, we normally act on the basis of first-order reasons that apply to us. When an authority issues a directive, it provides a second-order reason which overrides most of the first-order reasons that apply in the situation. This accounts for the fact that authoritative directives can be binding even if they are ultimately mistaken—that is, when they ultimately do not track or reflect the first-order reasons that were applicable to the relevant agents.[60]

The normative force of authoritative decisions rests on three further considerations that are worth fleshing out here.[61] First, the normative force only applies to decisions we have reasons to leave to a centralized authority, rather than allow individuals to decide on their own judgment. Unlike personal decisions over health treatments, it seems likely that the decision to go to war is

57. *See* Joseph Raz, The Morality of Freedom 53 (1998). *See generally* Joseph Raz, *The Problem of Authority*, 90 Minn. L. Rev. 1014 (2006).

58. Raz, The Morality of Freedom, *supra* note 57, at 35 ("A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason.").

59. *Id.* (Raz argues that authoritative directives pre-empt individual decision-making). I need not take such a demanding notion of authoritative directive. I believe that Raz's conceptual understanding of authority is compatible with a slightly less rigid notion of protected reasons, such as "presumptive" (e.g., defeasible) reasons for action. For a recent defense of "presumptive" reasons in this context, see Massimo Renzo, *Political Authority and Unjust Wars*, 99 Phil. & Phenomenological Research 1, 13 (2018). For similar "quasi-protected" reasons, see David Enoch, *Authority and Reason-Giving*, 89 Phil. Phenomenological Rsch. 296 (2014).

60. Raz, The Morality of Freedom, *supra* note 57, at 47–48, 61.

61. It also requires de facto authority, but I shall assume for present purposes that the government has this.

a kind of decision that is better left to a centralized authority.[62] One way to account for this proposition is through the way in which authorities facilitate coordination. War is a complex enterprise that requires handling vast amounts of information together with the articulation and coordination of different actions by large numbers of individuals. Even within the complex machinery of the state it is chaotic, opaque, and subject to enormous uncertainty.[63] As a result, it is the kind of enterprise best coordinated by a centralized authority, rather than left to the whims, decisions, and calculations of each soldier/participant in accordance with her best judgment.

Second, if an authoritative directive is to provide a minimum level of coordination any such body or person must also have sufficient "de facto authority."[64] Without this kind of de facto recognition, authorities would not be able to provide the benefits that ultimately justify empowering a centralized authority in the first place, i.e., providing individuals under it with greater coordination and cost reduction.[65] The scope of the authority of the state extends to those who benefit from the public goods this state creates, notably citizens and possibly also permanent residents. In turn, this helps to account for the fact that the duty of citizenship or the democratic duty does not apply to foreigners.[66]

Third, the fact that these state authorities make these decisions public indicates a commitment to accountability.[67] In fact, public institutions such as states are uniquely positioned to have their decisions, and decision-making procedures, challenged by their constituencies in full. This includes opposition within the relevant institutions, as well as in the media, social networks, and even on the streets. The more robust this type of public deliberation and contestation, the greater normative weight this decision shall carry.[68]

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62. The question of individual (private) citizens having the authority to initiate warlike actions was much debated at the start of the American republic. Thomas Jefferson, for instance, eloquently rejected this possibility by suggesting that:

> If one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of its citizens) has a right to go to war, by the authority of its individual citizens. But this is not true either on the general principles of society, or by our Constitution, which gives that power to congress alone and not to the citizens individually.

Ryan, *supra* note 56, at 37 (quoting Letter from Thomas Jefferson, Secretary of State, August 16, 1793). Admittedly, this statement ultimately begs the relevant question.

63. *See* David Luban, *Knowing When Not to Fight*, *in* The Oxford Handbook of the Ethics of War 190 (Helen Frowe & Seth Lazar eds., 2018).

64. Raz, The Morality of Freedom, *supra* note 57, at 56.

65. *Id.* at 30–31.

66. On foreign fighters, see *infra* Part V.

67. *See, e.g.*, Philip Pettit, On the People's Terms: A Republican Theory and Model of Democracy (2010); Cristina Lafont, Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy (2019).

68. *See, e.g.*, Roberto Gargarella, El Derecho a La Protesta: El Primer Derecho (2014).

At this point it is important to identify with precision the normative implication I draw from this general account. That is, the Razian conception of authority as well as the arguments of a "democratic duty" or "duty of citizenship" are used to account for an *obligation* to obey an authoritative directive. However, as per our conceptual understanding of combatant privilege as an immunity, we need not be committed here to the strong(er) claim that these individuals are bound to comply with such a directive to fight, or that fighting is, all things considered, permissible. The only implication we need to draw from the normative weight of states' authoritative directives is that it provides members of their armed forces with epistemic reasons which are strong enough that they defer their own judgment to that of the state authorities.[69] The fact that states have an epistemic advantage, are capable of coordinating the actions of a large number of people, and state their position publicly, making themselves accountable for it, explains why soldiers subject to this type of authority are entitled to rely on their directives to act as requested. Crucially for our purposes, it follows from these propositions that rank-and-file soldiers are *pro tanto* entitled to act on the basis of a decision of a political authority that satisfies these requirements, even if that decision is ultimately mistaken, and the war or the specific mission turns out to be impermissible.

This practical argument about the weight and scope of authoritative directives operates together with an empirical point. That is, many believe that individuals living in open, democratic societies, with a robust protection of freedom of speech and open press are required to accurately assess when the war they are required to fight is impermissible in all but the most opaque contexts. However, empirical research casts a significant doubt as to whether this is in fact something we would be right to require from individuals. In particular, recent research has shown how our cognitive abilities, i.e., our perception of the relevant facts and normative considerations, are deeply biased by things that are beyond our control, even in contexts in which people have access to information.[70] Joshua Greene has influentially argued that this is, to a large extent, the result of perception biases.[71] One type of relevant bias is simple self-serving bias.[72] Namely, "[w]hen the facts are at all ambiguous, people favor the version of the facts that best suits their interests."[73] Similarly, egocentric bias makes us

69. Victor Tadros, for instance, seems to mistakenly derive from the fact that an argument fails to provide a sufficient reason to justify a duty to fight, that it has no significant normative weight in justifying a belief that the war is just. *See* Victor Tadros, To do, To die, To Reason Why: Individual Ethics in War (2020).

70. Joshua Greene, Moral Tribes: Emotion, Reason and The Gap Between Us and Them (2013).

71. *Id.* at 66–69.

72. *Id.* at 66.

73. *Id.*

far "more aware of the pain we suffer at the hands of others than of the pain that others suffer by our hands."[74] This dynamic tends to result in the escalation of conflicts.[75]

More significantly for our discussion, people's perception of the relevant facts is also deeply biased by the political, social, and moral commitments individuals have, or to the "tribal" groups they belong to.[76] This type of process is reinforced by "informational and reputational influences" which affect both factual judgments and political views, and can lead to group polarization and even to conspiracy theories.[77] Greene illustrates these phenomena through an example that is particularly apposite for our purposes. Namely, the fact that most critics of the U.S. invasion of Iraq in 2003 could not understand why so many Americans supported the war was the result of them not fully appreciating that "a majority of Americans at the time believed that Saddam Hussein had been personally involved with the [9/11] attacks."[78] Similarly, he adds, "a majority of people in Jordan, Egypt, and the Palestinian territories believe that someone other than Al Qaeda (typically the U.S. or Israeli government) was behind the 9/11 attacks."[79] This type of phenomena can be also seen in several other domains, such as climate change, or mechanisms for the disposal of nuclear waste, among others.[80]

Factual propositions which might be obviously incorrect to experts may be deeply counterintuitive for the layperson. As Greene argues, once false beliefs "become culturally entrenched . . . [they] are very difficult to change, and changing them is no longer simply a matter of educating [or informing] people."[81] Accordingly, it would seem that access to a free press and a robust public sphere is insufficient for individuals to be aware of the relevant non-moral facts in this type of politically charged scenario, let alone to require that they are aware. There are standardly severe limitations on the press' and civil society's access to classified information related to the war, making the quality

74. *Id.* at 70.

75. *Id.* at 69–70.

76. Briefly put, "tribal bias" refers to the deep and pervasive influence that groups exercise over individuals who belong to them in terms of these individuals' moral and non-moral (empirical) beliefs. Cory J. Clark & Bo M. Winegard, *Tribalism in War and Peace: The Nature and Evolution of Ideological Epistemology and its Significance for Modern Social Science*, 31 PSYCH. INQUIRY 1, 7 (2020). Furthermore, this type of bias tends to favor groups with which individuals identify. *Id.* at 2.

77. *See* Cass Sunstein, *The Law of Group Polarization* 9 (John M. Olin Law & Econ. Working Paper No. 91, 2d ser., 2002).

78. GREENE, *supra* note 70, at 66; *see also* Cass Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes and Cures,* 17 J. POL. PHIL. 202, 202–27 (2008).

79. GREENE, *supra* note 70, at 66.

80. *Id.* at 66–69.

81. *Id.*

of the information available often low or distorted.[82] It is therefore often, though not necessarily, unlikely that ordinary soldiers (for example, young nationals of the relevant states, usually from socio-economically underprivileged backgrounds) are in a position to second-guess the order of their government with the necessary degree of certainty to put them under an obligation not to fight.[83] These soldiers operate in a context of great uncertainty—the so-called fog of war—not only regarding the underlying factual situation, but also the guiding rules determining legitimate or illegitimate military action. They are usually exposed to overwhelming propaganda by the state, as well as under social and legal pressure to take part in the national war efforts. As Michael Williams claims, soldiers are not in an epistemic position to assess the sovereign's decision to resort to warfare.[84]

These two central claims—the normative and the empirical—are therefore at the core of the privilege afforded to state armed forces. They account for why rank-and-file soldiers are generally not liable to be prosecuted and punished merely for taking part in the war. Admittedly, each of them will have different weight under different circumstances, depending on the specific traits of the incumbent political regime. In democratic states, which enjoy greater freedom of the press and other civil liberties, the institutional claim will carry greater weight. In more authoritarian states, by contrast, where information is far more controlled and biased, the empirical argument will ultimately carry comparatively more normative weight. But in almost all states, with the exception of genocidal or manifestly criminal states, the combination of these two separate arguments will account for combatant privilege.[85] The reason for this is simply that insofar as ordinary soldiers are epistemically justified in believing that the war was permissible, it is unfair that we require that they should know better, and they must not be held accountable for participating in it.

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82. Eyal Benvenisti & Amichai Cohen, *War is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective*, 112 MICH. L. REV. 1363, 1374–76 (2014). *But see* Yoram Perri, *The Media and The Military: From Collusion to Collision*, *in* DEMOCRATIC SOCIETIES AND THEIR ARMED FORCES: ISRAEL IN A COMPARATIVE PERSPECTIVE 122 (Stuart Cohen ed., 2000).

83. *See also* WHEN SOLDIERS SAY NO: SELECTIVE CONSCIENTIOUS OBJECTION IN THE MODERN MILITARY (Aandrea Ellner, Paul Robinson & David Whetham eds., 2014). Note that even state authorities can get it entirely wrong in this type of context. Luban recalls, for instance, that in "the wake of the 1994 Rwandan Genocide, the French military intervened on the wrong side, providing safe passage for genocidaire forces escaping to eastern Congo." *See* Luban, *supra* note 63, at 193.

84. Michael Williams, *Unnatural Doubts: Epistemological Realism and the Basis of Skepticism,* 97 MIND 415, 415–39 (1995); *see also* Michael Williams, *The Problems of Knowledge: A Critical Introduction to Epistemology,* 57 ERKENNTNIS 127, 127–32 (2001).

85. Luban, *supra* note 63.

C. The Scope of Combatant Privilege

One of the key features of the argument just provided is that the authoritative force of states' commands is not absolute, but defeasible. This means that privilege should not be conferred upon combatants fighting a war they had sufficiently strong reasons to know is impermissible. When they take part in an openly genocidal campaign, or a clearly aggressive war, or when they are ordered to fight through abhorrent or criminal means, no amount of propaganda would suffice for them to be justified in following the order to fight.

This means that the account of combatant privilege hereby advanced is not a mere rationalization of existing legal rules, but it provides a critical bite. Under IHL, state armed forces do not forfeit their combatant privilege if they are fighting clearly or patently unjust wars from an ad bellum perspective, but only when they "fail to carry arms openly," wear a "fixed distinctive symbol recognizable from a distance," operate under responsible command, and be part of an organization that respects "the laws and customs of war."[86] The ad bellum legality of the war is not one of the considerations on the basis of which state armed forces forfeit their privilege. The U.S. Department of the Air Force *Commander's Handbook on the Law of Armed Conflict*, for instance, states that regular armed forces hold combatant privilege "even if the side they serve is clearly the aggressor and has been condemned . . . by the United Nations."[87] The reason for this, it argues, is that "nations claim that their wars are wars of self-defense" and courts are "unwilling to punish officials for waging aggressive war if they were not at the policy-making level of government."[88] To this extent, my account challenges this legal reasoning. Such drastic separation between ad bellum considerations and the privilege of combatancy is normatively unwarranted and, as I argue in this Section, inconsistent with other fundamental traits of this legal regime.

Most, if not all, defenders of the duty of citizenship agree that it may be permissible, and sometimes even mandatory, to disobey an authority's order to go to war. Decisions by state authorities do not simply displace the duties of individual soldiers to take into consideration the broader range of evidence that they may have at their disposal. The duty of citizenship is therefore only a

86. GCIII, *supra* note 6, art. 4; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 1, 18 October 1907, 187 Consol. T.S. 227 [hereinafter Convention (IV)]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 13, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 13, 1125 U.N.T.S. 609.

87. U.S. Department of the Air Force, Commander's Handbook on the Law of Armed Conflict, Pamphlet AFP 110–34, ¶ 1–4(b)(2) (1980) (rescinded).

88. *Id*. at ¶ 1–4(b)(3).

pro tanto duty, and it can be overridden under certain circumstances, such as when the war is "an aberration,"[89] "utterly irrational or even disingenuous,"[90] or at least when combatants are sufficiently confident that the war is unjust.[91]

Augustine, Vitoria, and Suárez endorsed a position similar to the one advanced here, arguing that soldiers were expected to fight unless "the cause in which they were enlisted was patently unjust."[92] Vitoria even added that if the relevant participant knows or has sufficient reason to know that the war is unjust:

> [T]he subject . . . must not fight, even if he is ordered to do so by the prince. This is obvious, since one may not lawfully kill an innocent man on any authority, and in the case we are speaking of the enemy must be innocent.[93]

This caveat goes to the center of what is at stake here. Most theorists agree, and it seems necessary to the account I defend, that soldiers fighting in a criminal war should not be entitled to combatant privilege under IHL precisely because the war is criminal or genocidal. Any plausible account of authority must provide us with the theoretical resources to accommodate disobedience even to legitimate authorities under certain circumstances. Raz, for instance, acknowledges that protected reasons can be defeated—outweighed, canceled, and even excluded.[94] Others, in turn, advocate weaker notions of protected reasons such as "presumptive" or "quasi-protected" reasons, that is, reasons which do not fully exclude or cancel other competing reasons but which have substantially more weight.[95] This move provides enough conceptual space to put individuals under a duty to disobey the command of an authority to fight in a criminal or genocidal war.

One helpful way to think about when disobedience would be required is by distinguishing manifest from non-manifest criminality.[96] Salience would be the critical criterion through which the duty of soldiers not to fight would

89. Ryan, *supra* note 56, at 31.

90. Estlund, *supra* note 56, at 232.

91. *See* Fabre, *supra* note 17, at 136. Unlike Renzo and Estlund, however, I do not think that authoritative directives provide soldiers with decisive reasons to fight only when these authorities act "in good faith" or make an "honest mistake." *See* Renzo, *supra* note 59, at 11; Estlund, *supra* note 56, at 221.

92. Stephen Neff, War and The Law of Nations 57 (2005); *see supra* note 68; *see also* Francisco Suárez, *De Bello*, *in* The Ethics of War: Classic and Contemporary Readings 257–59 (Gregory M. Reichberg et al. ed., 2006); Thomas Cajetan, Summula 246 (1524).

93. Francisco de Vitoria, On The Law of War, Political Writings 307 (A. Pagden & J. Lawrence eds., 1991) (1539).

94. Joseph Raz, Practical Reasons and Norms, 47 (1999).

95. *See* Enoch, *supra* note 59; Renzo, *supra* note 59.

96. This is largely similar to Raz's distinction of clear and unclear mistakes in Raz, *supra* note 94, at 62. *See also* Luban, *supra* note 63.

be based. Yoram Dinstein precisely clarifies that the superior orders, which are not manifestly unlawful, affect individual "awareness of the illegality of [an] act."[97] Accordingly, in cases of manifestly or patently unjust wars it would be mandatory for individual soldiers to disobey. By contrast, rank-and-file soldiers fighting an unjustified war from a fact-relative, but not from an evidence-relative, perspective would not be liable to be prosecuted. Legal privilege protecting against prosecution for their conduct stems from the fact that authoritative directives, together with cognitive biases, provided them with decisive reasons to fight. In fact, their epistemic position cannot be easily distinguished (if at all) from that of fact-relative just enemy state armed forces, since the latter too are relying on the judgment of their relevant authorities. Any of them would very seldom be certain that they are fighting permissibly.

Notably, the standard of manifest illegality has been explicitly adopted for similar purposes in related areas of international law. For example, the provision on the crime of aggression which was adopted as a proposed amendment to the Rome Statute provides that the act of aggression must be a "manifest" violation of the U.N. Charter.[98] Furthermore, the defense of superior orders under the Rome Statute also requires inter alia that the "order was not manifestly unlawful."[99] More in line with the proposal defended here, Robert Cryer suggests that "the manifest illegality test is a way of determining if the defendant ought to have known that the order was illegal."[100] Regular armed forces fighting in this type of patently criminal conflict should not be conferred combatant privilege.[101]

III. Non-State Armed Groups

A. Non-State Forces Under IHL

Contemporary armed conflicts are characterized by the involvement of a large number of non-state fighters acting against or beyond the authority of states. They include partisans, guerrillas, insurgents, terrorists, rebels, bandits

97. Yoram Dinstein, The Defence of 'Obedience to Superior Orders' in International Law 27–28 (1965).

98. Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression art. 8bis(1), June 11, 2010.

99. Rome Statute of the International Criminal Court, art. 33(1)(c), July 17, 1998, 2187 U.N.T.S. 90.

100. Robert Cryer, *Superior Scholarship on Superior Orders: An Appreciation of Yoram Dinstein's The Defence of 'Obedience to Superior Orders' in International Law*, 9 J. Int'l Crim. Just. 959, 959–72 (2011).

101. Elsewhere, I have argued that they ought to be subjected to a legal regime not entirely dissimilar to that prescribed for war criminals. *See* Alejandro Chehtman, *Revisionist Just War Theory and the Concept of War Crimes*, 31 Leiden J. Int'l L. 171, 171–94 (2018).

(including freebooters), brigands, hackers, and cyber mercenaries.[102] Organized armed groups also include irregular state forces, such as militia, volunteer, or paramilitary groups. According to a study by the Small Arms Survey, there were 236 separate armed groups operating in just one city—Misrata, Libya—in October 2011.[103] Similarly, at one point ISIS spearheaded a "countercultural" movement, gathering the largest and most diverse volunteer force since World War II.[104] In places as diverse as Colombia, Nigeria, Mexico, Russia, and Syria, a large number and variety of non-state actors have recently taken and continue to take part in armed hostilities. At the time of writing Israel is fighting non-state armed groups, such as Hamas and Hezbollah, in what arguably constitutes one of the most sensitive contemporary conflict scenarios.[105]

Unsurprisingly, perhaps, there has been significant and long-standing bias against this type of actors in the laws of armed conflict. The contemporary notion of non-state armed groups largely overlaps with the conception of irregular fighters, which emerged during the French Revolutionary Wars, and was prevalent in a significant number of conflicts during the 19th and 20th centuries.[106] In her detailed study, Sibylle Scheipers confirms that "the marginalization of irregular fighters" emerged from the consolidation of the state system, and from states' "attempt to eliminate non-state competitors in the field of military power and war."[107] Private armies, mercenaries, and privateers, David Kennedy adds, "were outmoded, not only because they were part of an aristocratic past, but because they did not fit with the new, exclusively *public* nature of sovereign war."[108] Interestingly, though, this marginalization was also connected to reactions against the "politicization" of military action that had characterized the American and the French revolutions, and the threat that democratizing or revolutionary movements posed to the status quo.

At the time, the dominant approach to this type of actor was already more nuanced. Indeed, early codification efforts in international law recognized certain non-state armed forces as privileged participants in armed conflict. Lieber,

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102. *See, e.g.*, Nicolo Bussolati, *The Rise of Non-State Actors in Cyberwarfare*, Cyber War (2015).

103. Small Arms Survey, Armed Groups in Libya: Typology and Roles 2 (2012).

104. *See* Scott Atran, *Mindless Terrorists? The Truth About Isis Is Much Worse*, Guardian (Nov. 15, 2015), http://www.theguardian.com/commentisfree/2015/nov/15/terrorists-isis [https://perma.cc/K663-2LWQ].

105. *See, e.g.*, Tom Dannenbaum & Janina Dill, *International Law in Gaza: Belligerent Intent and Provisional Measures,* Am. J. Int'l L. (forthcoming 2025) (on file with author).

106. There were, admittedly, some differences in feudal times between knights, who were subject to the code of chivalry and peasants, who were subject to national military codes. *See* L.C. Green, The Contemporary Law of Armed Conflict 125 (3d ed., 2008).

107. Sibylle Scheipers, Unlawful Combatants: A Genealogy of the Irregular Fighter 43 (2015); *see also* Kennedy, *supra* note 18, at 61.

108. Kennedy, *supra* note 18, at 64 (emphasis in the original).

for instance, considered "partisans," "free corps," and individuals "rising *en masse*" as lawful belligerents.[109] Article 9 of the Brussels Declaration (1874) similarly conferred legal privilege on "militia and volunteer corps" who were "commanded by a person responsible for his subordinates," had "a fixed distinctive emblem recognizable at a distance," "carri[ed] arms openly," and "conduct[ed] their operations in accordance with the laws and customs of war."[110] Article 10 further conferred privilege upon participants in a *levée en masse*, providing that "[t]he population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war."[111] Similarly, Article 2 of the Oxford Manual (1880) included among privileged belligerents, "national guards, landsturm, free corps, and other bodies . . . under the direction of a responsible chief," who also wore "a uniform, or a fixed distinctive emblem recognizable at a distance."[112] In the Conference of 1899 at the Hague, a similar compromise was reached, allowing certain groups that did not officially belong to the army, as well as civilians spontaneously resisting an invading army, to benefit from combatant privilege.[113] Finally, non-state armed groups were considered lawful combatants upon recognition of belligerency by state forces, as inter alia, the United Kingdom recognitions in the Spanish-American

109. Francis Lieber, Lieber's Code and the Laws of War 34 (Richard S. Hartigan ed., 1983).

110. Project of an International Declaration Concerning the Laws and Customs of War. Brussels art. 9, Aug. 27, 1874 [hereinafter Brussels Declaration], *available at* https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874 [https://perma.cc/U35D-225C]. As Eyal Benvenisti and Doreen Lustig suggest, these requirements were tailored to serve the powerful governments in Europe. *See* Eyal Benvenisti & Doreen Lustig, *Monopolizing War: Codifying the Laws of War to Restore the European Order 1856–1874*, Univ. of Cambridge Faculty of L. Research Paper No. 28/2017, 34 (2017).

111. Brussels Declaration, *supra* note 110, art. 10. Katharine Fortin notes that in 1874, Belgium, Switzerland, the Netherlands and other self-styled *Petit États* fought for belligerent rights being conferred upon also on insurgents *during* an occupation. *See* Katharine Fortin, *Unilateral Declaration by Polisario Under API Accepted by Swiss Federal Council*, Armed Grps. & Int'l L. (Sept. 2, 2015), https://armedgroups-internationallaw.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/ [https://perma.cc/DDR6-YNPY]. The final text that we know, she adds, "is but a compromise solution that satisfied no one. Not the Germans, who wanted civilians to stay put in their homes, not the *Petit États*, who wanted occupied insurgents to be recognized as full belligerents." *See id.*

112. The Laws of War on Land, art. 2(2), Oxford, Sept. 9, 1880, https://ihl-databases.icrc.org/en/ihl-treaties/oxford-manual-1880 [https://perma.cc/E7QS-62CQ].

113. *See* Winston Williams & Robert Lawless, *Levée en Masse in Twenty-First Century Armed Conflict*, *in* Prisoners of War in Contemporary Conflict 97 (Michael N. Schmitt & Christopher Koschnitzky eds., 2023).

war (1814–25) and the insurgency in Madagascar (1895), or the U.S. recognition of belligerency in Cuba (1868–78), Colombia (1885), and Brazil (1893–94).[114]

The 1907 Hague Convention, by contrast, was silent regarding other military organizations included in the Oxford Manual (though it retained privilege for participants in a *levée en masse*).[115] As a result, irregular fighters stood outside the law and were only protected, if at all, by the weak and vague terms of the Martens clause ("the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience").[116] Scheipers recalls "denying [them] the status of legal combatants and shooting them on the spot [was] common practice."[117] They were standardly "regarded as marauders or bandits and [might] be tried as such if captured by the adverse party."[118]

The 1949 Geneva Conventions again granted privileged status to certain members of non-state armed groups such as "militias and . . . volunteer corps, including those of organized resistance movements," even operating in occupied territory.[119] In order to be entitled to this privilege, they needed to fulfill the standard conditions: operate under a unified command, "carry arms openly," wear a "fixed distinctive symbol recognizable from a distance," be part of an organization that "respects the laws and customs of war,"[120] as well as require belonging to a party to the conflict.[121] The notion of "organized resistance

114. *See, e.g.*, Sandesh Sivakumaran, The Law of Non-International Armed Conflict 9, 17–20 (2012). On this issue, see further Ingrid Detter, The Law of War 43 (2000).

115. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague art. 2, Oct. 18, 1907, *available at* https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907 [https://perma.cc/7NQK-EE93]. The 1856 Paris Declaration had eliminated "privateering," an institution authorizing private vessels to conduct belligerent operations. Declaration Respecting Maritime Law. Paris, Apr. 16, 1856.

116. This clause first appeared in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, Preamble, July 19, 1899, *available at* https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899/preamble? [https://perma.cc/69BE-SKTG].

117. Scheipers, *supra* note 107, at 125. Neither the 1907 Hague Convention on the Laws and Customs of War on Land nor the 1929 Geneva Convention on Prisoners of War prohibited this practice.

118. Green, *supra* note 106, at 131.

119. GCIII, *supra* note 6, art. 4(A)(2).

120. *See supra* note 86.

121. This provision is very similar to the one agreed to in 1899 and incorporated into the Hague Regulations of 1899 and 1907 (which otherwise did not refer to resistance movements). *See supra* notes 115, 116. Doswald-Beck comments: "The addition of a specific reference to resistance movements in occupied territory in 1949 was motivated by the contribution of such movements during the Second World War." Louise Doswald-Beck, *PMCs Under International Humanitarian Law*, *in* From Mercenaries to Market: The Rise and Regulation of Private Military Companies 119 n.12 (Simon Chesterman & Chia Lehnardt eds., Oxford, 2007; online ed., Oxford Academic, 2009).

movements" even in occupied zones, captured the situation of partisan or guerrilla units fighting Axis powers in World War II, for which there was ample agreement about the units' legitimacy and, in turn, entitlement to protection against legal prosecutions.[122] By contrast, the issue of irregular fighters not acting on behalf of states was not squarely addressed.[123] Common Article 3 reflects a compromise solution: It provides some protection to irregular armed forces, yet falls short of conferring upon them combatant privilege.[124]

Indeed, the majority of conflicts between states and non-state armed groups, or between these latter groups, are regulated by the law of NIACs. This regulation does not provide for combatant status, so members of non-state armed groups are typically *not* entitled to an immunity against prosecution for acts which are lawful under IHL. Accordingly, although IHL does not itself crystallize an asymmetrical legal treatment between the regular armed forces of the state and these non-state armed groups—for it does not make the latter liable to be punished for acts that constitute taking part in armed conflict, such as killing and maiming—it allows for domestic law doing so, which it typically does under states' domestic criminal law. Unlike state armed and security forces who act under some form of domestic cover—after all, it is standardly assumed that the state has the monopoly on the legitimate use of force—non-state armed groups and other participants are liable to be prosecuted under the domestic law of the state for crimes such as murder, sedition, or insurgency, and thereby are not treated as legal equals.[125]

By contrast, the 1977 API extended combatant privilege to members of non-state armed groups taking part in "armed 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."[126] This controversial outcome was largely the result of new countries coming out of the decolonization

122. Green, *supra* note 106, at 130.

123. Yet the robust protection vis-a-vis civilian populations in occupied territory, as provided for in the Fourth Geneva Convention, were intended to "curb the excesses of the suppression of armed resistance and anti-partisan warfare." Scheipers, *supra* note 107, at 144.

124. GCIII, *supra* note 6, art. 3. Briefly, in "armed conflict not of an international character," it requires humane treatment for all persons "taking no active part in the hostilities," prohibiting certain specific acts, and requiring that the "wounded and sick shall be collected and cared for." *Id.*

125. This is true even if APII encourages belligerents to dictate "the broadest possible amnesty to persons who have participated in the armed conflict." APII, *supra* note 40, art. 6(5). This provision in fact presupposes that they lack any such protection in accordance with international law. On this issue, see Dworkin, *supra* note 16; Kreβ, *supra* note 16.

126. API, *supra* note 5, art. 1(4). *But see also id.*, art. 96(3) (with regards to the acceptance by these groups to apply the Geneva Conventions and API). In June 2015, Switzerland for the first time accepted a unilateral declaration deposited by the Polisario Front, in these precise terms. *See* Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, Gen 4/15, (June 26, 2015) (on file with author).

process propagating an "international moral consensus around self-determination as a central human right (and as a corollary, colonialism as an international crime)."[127] Yet this sensibility was arguably not new. Alejandro Álvarez had already commented in 1909 that while European countries considered emancipation wars as civil wars, the "new" countries maintained that they were legitimately "exercise[ing] a right."[128] This meant that the issue was not "a question of civil struggle but of international war" (between equals).[129]

Most controversially, perhaps, these privileged non-state belligerents would maintain their privilege even if they do not fully comply with the conditions IHL required from states' regular armed forces. It was acknowledged that it cannot be plausibly demanded from those fighting this type of war that they distinguish themselves at all times if they are to have a chance to survive (and succeed).[130] Thus, in such circumstances, IHL "only" requires them to "carr[y] [their] arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."[131] Article 44 in API further relaxed the requirement that they wear a fixed distinctive emblem identifiable from a distance.[132] Decolonized states wanted the standard requirements fully relaxed or eliminated on grounds of military bias in the law, but they still had to comply with the other requirements of API, such as acting under a unified command and complying with IHL.[133]

B. Arguments Against Recognizing Combatant Privilege to Non-State Actors

As indicated, the prevailing attitude vis-à-vis this type of actor has generally been exclusionary—they are, in principle, not covered by the legal privilege afforded to regular armed forces—even if there are, under IHL, important exceptions to this overall position. Four main arguments have been put forward in support of this restrictive approach. Nevertheless, each of these arguments fails to account for the purported conclusion, as they rest on considerations

127. Giovanni Mantilla, Lawmaking Under Pressure 129 (2020).

128. Alejandro Álvarez, *Latin American International Law*, 3 Am. J. Int'l L. 274, 274–75 (1909).

129. *Id.* at 275.

130. *See, e.g.*, Mantilla, *supra* note 127, at 137.

131. API, *supra* note 5, art. 44(3). Admittedly, some of these propositions are complicated by the fact that those states that have not ratified API are still bound by the more restrictive rules of GCIII. Yet I am concerned here only with the normatively soundest rendering of the rules under IHL, not with whether it is in force for all relevant belligerents.

132. *See* API, *supra* note 5, art. 44.

133. Mantilla notes that Western calculations were precisely that liberation movements would not be able to demonstrate compliance with API, and as a result, they would not be protected. Mantilla, *supra* note 127, at 164.

which are independent from the state or non-state character of the group, and are thereby contingent. This Section examines each of them in turn.

First, it has been suggested that non-state armed groups produce more morally wrongful harm than regular state armed forces. Lieber, for instance, suggested that irregular fighters are more prone to pillage since they receive no funding nor can they expect any of the "regular fruits of victory."[134] However, this hardly covers all relevant state armed groups. Some, for instance, receive most funding by donors, or levy taxes in areas under their control in ways that are largely analogous to state forces.[135] Similarly, strategic or tactical choices are not necessarily dependent on the state or non-state character of a belligerent. State drone operators are often located thousands of kilometers away from the battlefield, in areas that may well be surrounded by non-military buildings, and blend with the civilian population during much of the day.[136] Some states have even stated their willingness to resort to asymmetrical tactics of this type as part of their official position concerning possible war scenarios.[137]

Second, it has been argued that the problem with irregular forces is that they fight "unfairly," or are even "cowardly."[138] Again, Lieber complained that irregulars are connected "to the idea of necessitated murder, because [they] cannot encumber themselves with prisoners of war; they have, therefore, frequently, perhaps generally, killed their prisoners."[139] Yet, many irregular groups in different types of armed conflict have been disciplined and not prone to commit random criminal acts. For instance, partisan organizations in many countries during World War II included large numbers of officers and troops who had not been demobilized or detained, and had received adequate training.[140] Others, such as Ukrainian paramilitaries, included a rigorous discipline and training with political and historical lessons, as did Tito's partisan forces.[141] There often seems to be bold hypocrisy, or strategic behavior, in this type

134. *See* Lieber, *supra* note 109, at 39.

135. *See, e.g.*, William Ortiz Jiménez, *Los Paraestados en Colombia. A Propósito de una Investigación Culminada,* 5 Ratio Juris 77, 77–97 (2017).

136. Alejandro Chehtman, *The* Ad Bellum *challenge of Drones: Recalibrating Permissible Use of Force*, 28 Eur. J. Int'l L. 173, 173–97 (2017).

137. *See, e.g.*, Brazil National Security Strategy 2008, approved by Decree no. 6703 (Dec. 18, 2008), at 28, https://www.files.ethz.ch/isn/154868/Brazil_English2008.pdf [https://perma.cc/S2AT-HP3B].

138. Scheipers, *supra* note 107, at 40, 206.

139. *See* George B. Davis, *Doctor Francis Lieber's Instructions for the Government of the Armies in the Field*, 1 Am. J. Int'l L. 13, 16 (1907).

140. Scheipers, *supra* note 107, at 130.

141. Larysa Zariczniak, *Major Stepan Stebelski of the Ukrainian Insurgent Army: Examples of Insurgency Leadership and Tactics*, 22 Small Wars & Insurgencies 441 (2011); Henri Michel, The Shadow War: European Resistance, 1939–1945, at 277 (1972) (Tito's forces acquired a significant degree of political legitimacy, and his partisans became the dominant military force in Yugoslavia, strong enough that they succeeded in liberating their own country.).

of underlying characterization. For example, the Bush Administration denied Taliban fighters the status of lawful combatants while many of those fighting with the United States for the Northern Alliance in Afghanistan had a record of atrocities that reportedly was as comprehensive as that of the Taliban.[142]

Third, members of non-state armed groups have been often accused of not being motivated by political objectives but, rather, by "greed."[143] Accordingly, they were often characterized as "bandits," and particularly "brigands," namely, straightforward criminals.[144] Yet, there is ample empirical evidence that both state and non-state participants in armed conflict have a large array of motivations. In the American Civil War, irregular bands included a wide spectrum of people and motivations that went from "petty criminals to West Point graduates and members of the upper stratum of society," and some even chose to take part in irregular warfare to be "closer to their homes."[145] Michael Fellman further notes that many irregular fighters saw themselves as "noble knights . . . saving desperate civilians just in the nick of time, slaying the foe, avenging wrong, defending the southern cause."[146] Admittedly, in contemporary asymmetrical conflicts, it is often alleged that individual fighters are recruited in guerrilla or paramilitary groups on ideological grounds. Yet, according to recent empirical research, in Colombia, only thirteen percent of members of paramilitary groups joined on ideological grounds. Most of them joined for economic reasons, just as members of state armed forces do in most countries.[147] Eloquently, Scheipers remarks that the exclusion of irregular forces from more robust legal protections occurred *before* the argument that they endanger civilians even carried any normative weight—the exclusion was meant to serve regular combatants, not protect non-combatants.[148]

Finally, it is argued that non-state armed groups challenge and undermine the state's monopoly on the legitimate use of force.[149] This is important because states are considered to provide value as "sites of self-determination or collective

142. *The Truth About Dasht-i-Leili*, N.Y. Times (July 13, 2009), https://www.nytimes.com/2009/07/14/opinion/14tue2.html [https://perma.cc/W8TT-76VA]; *see also* Joseph Blocher, *The Guantanamo Three-Step*, 117 Yale L.J. 1 (2007).

143. Scheipers, *supra* note 107, at 62.

144. *See, e.g.*, David Bell, The First Total War: Napoleon's Europe and the Birth of Warfare as We Know It 143–44 (2007); *see also* Alan Forrest, *The Ubiquitous Brigand: The Politics and Language of Repression*, *in* Popular Resistance in the French Wars, 37 (Charles J. Esdaile ed., 2004).

145. Scheipers, *supra* note 107, at 77–78.

146. Michael Fellman, Inside War: The Guerrilla Conflict in Missouri During the American Civil War 139 (1989).

147. Agustín Ibañez et al., *Outcome-Oriented Moral Evaluation in Terrorists*, 1 Nature Hum. Behav. 4 (2017) (and references therein).

148. Scheipers, *supra* note 107, at 13.

149. *See, e.g.*, Paul Robinson, *The Moral Vigilante and Her Cousins in The Shadows*, U. Ill. L. Rev. 406 (2015).

politics" and, even when they are less benign, "there are few threats to human welfare and human rights greater than state failure."[150] Nevertheless, such a blanket argument in favor of state authorities based on the value of status quo and political stability obscures the fact that in certain cases, states are not the site of collective politics, nor of the protection and enhancement of individual and collective rights. Cécile Fabre illustrates this type of scenario through Charles de Gaulle's decision to organize the Resistance to face the Nazi's brutal rule and genocidal policies.[151] Claus Kreß, in turn, recalls that there are a number of constitutions that entrench a right to armed resistance.[152] In short, it is hardly obvious that support for existing state authorities is always the best strategy to maximize wellbeing and the protection of human rights in all contexts. By contrast, the relevant question seems to be precisely when the decision to disobey the authoritative directives of the state ought to be protected by an immunity from prosecution.

C. Non-State Armed Groups, Authority, and Justification

The argument advocated in this Article suggests that the key normative difference between state armed forces and non-state armed groups is that the latter lack proper authorization. In Part II above, I argued that the reason why state armed forces are entitled to combatant privilege is that in the fog of war, individuals have sufficient, even decisive, reasons to follow the directives of a centralized, public authority. On the basis of both normative and empirical considerations, I suggested that individuals belonging to the state's armed forces have reasons to comply with the order they are issued, unless taking part in such a war is manifestly impermissible. On the same grounds, I now suggest that insofar as they lack the legitimate credentials of states, non-state armed groups cannot appropriately provide individuals with decisive reasons to take up arms against the state, or against other non-state groups. Georg von Martens reflects this insight:

> Soldiers, by the order of their commanders, and such other subjects as may obtain express permission for the purpose from their sovereign, may lawfully exercise hostilities, and are looked upon by the enemy as lawful enemies; but those, on the contrary who, not being so authorized, take upon them to attack the enemy are treated by him as banditti; and even the state to which they belong ought to punish them as such.[153]

150. Tom Dannenbaum, War Crimes and Just War Theory, The Palgrave Handbook of Applied Ethics and the Criminal Law 777–78 (Kimberly Kessler Ferzan & Larry Alexander eds., 2019).

151. Fabre, *supra* note 17, at 153.

152. Kreß, *supra* note 16, at 43 (with a reference to Art. 20(4) of the German Constitution).

153. Green, *supra* note 106, at 127.

This Section provides a principled rationale for rejecting the simple extension of combatant privilege to all non-state armed groups in NIACs, as some scholars have advocated.[154]

Admittedly, these presumptive reasons against individuals fighting on behalf of non-state armed groups are also defeasible. Vattel, for instance, allowed for the legitimacy of rebellion against tyranny, arguing that: "Whenever a large body of citizens believe themselves justified in resisting the sovereign, and are sufficiently strong to take to arms, war should be carried on between them and the sovereign in the same manner as between two different Nations."[155] Similarly, Frédéric Mégret suggests that the "privilege of combatancy should be reserved for bona fide combatants, not violence entrepreneurs."[156] By contrast, I do not think that it suffices that members of non-state armed groups "*believe themselves justified*"—even if this belief is bona fide—to confer upon them an immunity from being held accountable for their decision. Since their actions challenge the state's claim to the legitimate monopoly on the use of force, they can at most be excused or pardoned. Nevertheless, this consideration hardly suffices as a justification for an immunity against being prosecuted.

Scheipers, in turn, considers these presumptive reasons defeated when a non-state armed group ultimately fights with just cause: "[T]he irregular has to be a 'rebel with a (just) cause' in order to be recognized as a lawful combatant."[157] In this circumstance, the acts of a member of a non-state armed group may be ultimately considered permissible, even praiseworthy. Any such individual should not be punished for taking up arms. However, such an individual could not legitimately claim that she should be granted combatant privilege and therefore spared judgment of her actions. She should be required to provide a detailed explanation of the grounds of permissibility.

In sum, I suggest that combatant privilege for members of non-state armed groups can be advocated only when such a group is involved in a manifestly or patently permissible war.[158] Again, it is the salience of the permissibility that justifies why it is not required from them to explain such grounds, as the immunity provides. Notably, this conclusion is compatible with the parallel claim made above, that an authoritative directive cannot justify an immunity when the decision is to fight a manifestly illegal, or patently criminal, war.

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154. Kreß, *supra* note 16, at 29–43; *see also* Emily Crawford, The Treatment of Combatants and Insurgents Under the Law of Armed Conflict (2010) (favoring "universal combatant status"). For an earlier proposal, see also Int'l Comm. Red Cross, *Protocols Additional to the Geneva Conventions of 12 August 1949* (2010); Int'l Comm. Red Cross, *Draft Protocol II Additional to the Geneva Conventions of 12 August 1949*, art. 10(5).

155. Vattel, *supra* note 2, § 294.

156. Mégret, *supra* note 16, at 64.

157. Scheipers, *supra* note 107, at 16.

158. For support to this claim, *see* Frédéric Mégret, *Civil Disobedience and International Law? Sketch for a Theoretical Argument*, 46 Can. Y.B. Int'l L. 143, 143–92 (2010).

Unless individuals can be required to know that the war is either permissible or impermissible (because it is manifestly so), they are only justified in relying on the centralized decision of public authority, at least at their peril.

D. Privileged Non-State Forces

The normative account of combatant privilege I develop in this Article can thereby make sense of the three main scenarios in which members of non-state armed groups are legally entitled to combatant privilege, namely, non-state armed groups acting de facto as organs of the state, groups taking part in a *levée en masse*, and those fighting against colonial domination and racist regimes to defend their right to self-determination.

First, it can account for the privilege conferred to members of non-state armed groups fighting for the state to which they belong.[159] Much like the state's *de jure* armed forces, militias, or volunteer corps provided under Article 4 of the GCIII are entitled to rely on the authorization of their state.[160] Second, the argument hereby advocated can readily make sense of the privilege conferred upon those taking part in a *levée en masse*. In such a situation, individuals can arguably fight on the presumption that they have a right to resist military invasion by a foreign power. Louise Doswald-Beck recalls that the argument put forward by weaker nations advocating for this solution in the 1899 Conference "was that they had the right to resist invasion and that persons genuinely fighting for their nation [in this particular type of situation] should not be tried as common criminals."[161] Third, the argument can also account for the rules under API allowing non-state belligerents to fight "against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[162]

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159. GCIII, *supra* note 6, art. 4; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 1, 18 October 1907, 187 Consol. T.S. 22; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 13, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 13, 1125 U.N.T.S. 609.

160. GCIII, *supra* note 6, art. 4.

161. Doswald-Beck, *supra* note 121, at 116.

162. API, *supra* note 5, art. 1(4). API is not as widely ratified as the four Geneva Conventions of 1949, and these provisions in particular have been actively resisted by certain states, including the United States and Israel. *API State Parties*, ICRC, https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties [https://perma.cc/2XN6-J8D7]. But the underlying distinction has been further defended by other institutions. For instance, the U.N. Human Rights Committee has argued that the prohibition on "propaganda for war" in the International Covenant on Civil and Political Rights does not "prohibit advocacy of the sovereign right of self-defense or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations." *See* U.N. Hum. Rts. Comm., General Comment No. 11: Prohibition

Finally, the normative argument I put forward also accounts for the relaxation of some of the requirements that international law imposes on non-state armed groups fighting for self-determination and participants in a *levée en masse* (both of whom, I claimed, fight in principle for manifestly just causes). These requirements are—as has often been complained—significantly less demanding than those required of state regular forces to carry their arms openly, and to wear a fixed distinctive emblem identifiable from a distance. Yet, they are not simply done away with.[163] If these requirements were not relaxed, taking part in this type of conflict would be tantamount to suicide for most members of non-state armed groups.[164] This brings us back to the classic dilemma characterizing asymmetrical conflicts between allowing belligerents to fight at the cost of putting civilians at greater risk, and making it impossible for them to fight at all. Given what ex-hypothesis is at stake for these groups fighting a manifestly permissible war, it seems that we have reason to prefer the first horn of the dilemma.

IV. Foreign Fighters

Another relevant participant in contemporary asymmetrical wars is the category of foreign fighters. Despite their recent notoriety for their role in the conflicts in Iraq and Syria, participation of foreign fighters has become a relatively stable feature of modern wars.[165] There are numerous examples of this phenomenon. Foreign troops were recruited to fight the war against the revolutionary and Napoleonic France.[166] A significant number of European nationals fought in the armies of Simón Bolivar against the Spanish in the late 1810s and 1820s.[167] In the Spanish Civil War, commanders of the International Brigades were in most cases active Red Army officers, who were themselves former transnational

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of Propaganda for War and Inciting National, Racial or Religious Hatred, art. 20, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1983).

163. Antonio Cassese, *Should Rebels be Treated as Criminals? Some Modest Proposals for Rendering International Armed Conflicts Les Inhumane*, *in* Realizing Utopia: The Future of International Law 17, 17 (Antonio Cassese ed., Oxford Univ. Press 2012) (online ed., Oxford Academic Sept. 20, 2012).

164. Gerhard von Glahn, *The Protection of Human Rights in Times of Armed Conflict*, 1 Isr. Y.B. Hum. Rts. 223 (1971).

165. Foreign fighters were the rule, rather than the exception in the Middle Ages. For it was wise for monarchs to hire outsiders, instead of using their vassals. *See* Arielli, *infra* note 172, at 12 (Each "foreign soldier was worth three men, one more for France, one less for the enemy, and one Frenchman left to pay taxes."); *see also* Hew Strachan, European Armies and The Conduct of War (1983).

166. Roger Norman Buckley, Slaves in Red Coats: The British West India Regiments, 1795–1815 (1979).

167. Mathew Brown, Adventuring through Spanish Colonies: Simón Bolívar, Foreign Mercenaries and the Birth of New Nations (2006).

volunteers in the Russian Civil War (it perhaps is less well-known that some of General Franco's troops were Moroccans, White Russians, and even Irish Catholics).[168] Indeed "[i]n 1948–1949, more than 3000 nationals of the United States, Canada, South Africa, Britain, and elsewhere volunteered to fight for the newly established State of Israel."[169] Ukrainian President Zelensky created the International Legion for the Territorial Defense of Ukraine, and issued a call to foreign volunteers to join.[170] Foreign fighters have included many renowned figures from André Malraux to Ernesto "Che" Guevara, and from George Orwell, Giuseppe Garibaldi, and Lord Byron, to Earnest Hemingway. This is perhaps the reason why they have not only been reviled as terrorists, but also, and very often, romanticized as heroes.

It has often been suggested that there are different types of foreign fighters. David Malet distinguishes between "diasporas," who "[j]oin with nationalist rebels to advance common nationalist goals"; "liberationists," who "[d]efend anticolonial rebels"; "encroachers," who "[j]oin with secessionist rebels . . . to expand political control to neighboring territory"; and "true believers," who "[j]oin with ideological rebels to preserve institutions of shared transnational identity."[171] Nir Arielli, in turn, distinguishes between "self-appointed ambassadors," who act in the way they believe their home state should be acting; "diaspora volunteers," who enroll in conflict in their country of heritage; "cross-border volunteers," who share "national or ethnic [or religious] ties with a neighboring group engaged in conflict"; and "substitute-conflict volunteers," who fight abroad in order to later bring the fighting to their home state.[172] These complex pictures show that foreign fighters are, in principle, a heterodox group, including phenomena with varying configurations. This feature raises the question of which are the relevant considerations that determine their normative position under IHL, namely, their entitlement to legal privilege.

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168. Nir Arielli & Bruce Collins, *Introduction: Transnational Military Service since the Eighteenth Century*, *in* Transnational Soldiers: Foreign Military Enlistment in the Modern Era 1, 6 (Nir Arielli & Bruce Collins eds., 2013).

169. Nir Arielli & Bruce Collins, *Conclusions: Jihadists, Diasporas and Professional Contractors – The Resurgence of Non-state Recruitment since the 1980s*, *in id.* at 254.

170. Russian President Putin has also announced that foreigners volunteered to fight on the Russian side. *See* Tanya Mehra & Abigail Thorley, *Foreign Fighters, Foreign Volunteers and Mercenaries in the Ukrainian Armed Conflict*, Int'l Ctr. for Counter-Terrorism (July 11, 2022), https://www.icct.nl/publication/foreign-fighters-foreign-volunteers-and-mercenaries-ukrainian-armed-conflict [https://perma.cc/HDJ7-WWRU].

171. David Malet, Foreign Fighters: Transnational Identity in Civil Conflicts 43 (2013).

172. Nir Arielli, Thoughts of Home: A Typology of Volunteer–State Relations, Foreign Fighters. Transnational Identity in Civil Conflicts 94–120 (2018). The latter category is the one which poses a greater threat to states. For yet another classification, see Guy Rowlands, *Foreign Service in the Age of Absolute Monarchy: Louis XIV and His Forces Étrangères*, 17 War in History 141, 141–65 (2010).

A. The Differentiated Legal Treatment of Foreign Fighters

Traditionally, foreign fighters have received differentiated legal treatment vis-à-vis nationals. For instance, Giuseppe Garibaldi was arrested upon (illegally) returning to his native Piedmont, because authorities considered that he had forfeited his citizenship by fighting for Rome, a foreign state.[173] The Soviets often characterized foreign fighters as "bandits," treated them as traitors, and tried them in courts of lay "people's representatives."[174] The Russian Federation has maintained the policy of killing any foreigner found fighting in its territory on the side of insurgents, which it had adopted during the civil war in Chechnya.[175] Furthermore, the Hague Convention (V) prohibits states from forming "[c]orps of combatants . . . [or opening] recruiting agencies . . . on the territory of a neutral [p]ower to assist [a] belligerent[]."[176] Finally, foreign fighters are characteristically liable to being punished in their home state. In 1794, for instance, the United States passed the Neutrality Act, making it illegal for citizens to fight in foreign forces, or work to enlist or recruit others.[177] In 1817, the law was expanded to also include fighting for colonies, districts, or peoples.[178] By 1939, two-thirds of the states in the world had laws against foreign military service.[179] Many more countries have adopted this approach since.[180]

This differentiated treatment does not seem to be grounded on foreign fighters' motivations, as these vary widely. Admittedly, some organizations—most notably ISIS—have fostered a reputation as "a revenger organization employing extreme violence in retaliation for Muslim suffering."[181] But this type of extreme violent credo is not shared by many other organizations, including some groups labeled as terrorists whose members are generally considered unprivileged. Nor do purely ideological/religious fanaticism or greed seem to figure prominently among their motivations.[182] In the most recent wave of foreign fighters in Afghanistan, only a very small minority arguably came from

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173. LUCY RIALL, GARIBALDI: INVENTION OF A HERO 71 (2008).

174. MALET, *supra* note 171, at 36.

175. Interestingly, in the Spanish Civil War captured foreign insurgents were given preferential treatment over locals. MALET, *supra* note 171, at 36.

176. Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 4, 18 Oct. 1907, 5 Consol. T.S. 299.

177. Neutrality Act, 22 U.S.C. § 230 (1794).

178. *See* Albert H. Washburn, *The American View of Neutrality*, 2 VA. L. REV. 165, 165–77 (1914).

179. JANICE THOMSON, MERCENARIES, PIRATES, AND SOVEREIGNS 80–82 (1994).

180. ARIELLI, *supra* note 172, at 120. He recalls that all types of foreign fighters pose, albeit to different extents, some threat towards their state of nationality.

181. Günes Murat Tzcür & Clayton Besaw, *Jihadists Waves: Syria, the Islamic State, and the Changing Nature of Foreign Fighters*, 37 CONFLICT MGMT. PEACE SCI. 227 (2020).

182. Yoram Dinstein, for instance, refers to Al Qaeda militants simply as "an assemblage of Moslem fanatics from all parts of the world." *See* DINSTEIN, *supra* note 39, at 49.

religious families.[183] As Evan Kohlmann puts it, "the whole notion of 'Passionate jihad' . . . is useless."[184] Of those foreigners fighting against Soviet troops in Afghanistan, many came from higher socio-economic groups: "more than sixty percent of them were university graduates, mainly in technical studies—engineering, medicine, architecture (i.e., not religious studies)"[185] The data from diverse situations further confirms that recruiters explicitly inform potential fighters that "their services will bring minimal, nonguaranteed payments, often in a nonconvertible currency."[186]

Nor are foreign fighters necessarily or decisively motivated by moral or selfless considerations. Admittedly, some empirical research suggests that a relevant drive for foreign fighters is the defense of larger (ethnic or religious) communities of which they perceive themselves as taking part.[187] Some foreign fighters "genuinely believe that they are fighting in a defensive war rather than an elective war."[188] But, as Arielli puts it, usually "[i]dealists for whom the moral pull was strong were accompanied by opportunists and lawless adventurers."[189] Many, he recalls, act following a "desire to affirm [their] masculinity," or a mandate to fulfill "their families' military traditions," and some even joined for purely contingent, strategic reasons to escape from an uncomfortable political or social situation.[190] Most prevalently, he adds, they generally leave for personal reasons, such as a "search for a sense of purpose and meaning," the improvement of their self-esteem, as well as for the recognition from their peers.[191] In sum, there are a significant number of push and pull factors that decisively influence the decision to participate in foreign armed conflicts.

By contrast, we need to "deconstruct the romantic view of [foreign fighters as] self-determined young men (and women, in smaller numbers) who moved

183. Marc Sageman, Leaderless Jihad: Terror Networks in The Twenty-First Century 157 (2008). To illustrate, Yusuf Sarwar and Mohammad Ahmed, both twenty-two, from Birmingham were arrested when they returned from Syria and charged with terrorist acts. *See* Vikram Dodd, *Two British Men Admit to Linking Up with Extremist Groups in Syria*, Guardian (July 8, 2014), https://www.theguardian.com/world/2014/jul/08/two-british-men-admit-linking-extremist-group-syria [https://perma.cc/C3DE-ETDN]. During the proceedings it transpired that, as part of their preparations before leaving for Syria, they had ordered books online such as *Islam for Dummies* and *The Koran for Dummies. Id.*

184. Malet, *supra* note 171, at 195 (quoting Evan F. Kohlmann, Al-Qaida's Jihan in Europe: The Afghan-Bosnian Network 1–3 (2007)).

185. Arielli & Collins, *supra* note 168, at 253.

186. Malet, *supra* note 171, at 17.

187. *Id.* at 198.

188. *Id*. at 213.

189. Arielli, *supra* note 172, at 180.

190. *Id.* at 94. Gustav Regler and several others allegedly left for Spain in order to escape the claustrophobic climate in the USSR, during the times of the Show Trials. *See* Lisa Kirschenbaum, International Communism and the Spanish Civil War 135 (2015).

191. Arielli, *supra* note 172, 87–88.

around . . . at will" to fight.[192] Taking part in a foreign conflict usually depends, or heavily relies, upon the involvement of political organizations and groups. Foreign fighters need help to cross borders without passports or any form of identification. According to Malet, half of foreign fighters of the civil conflicts that occurred between 1816 and 2015 "arrived from noncontiguous states, indicating extensive recruitment and mobilization efforts."[193] That is, although personal motivation is often an important prerequisite, it is clearly insufficient to explain how people traveled long distances, and crossed increasingly regulated borders, in order to fight. Accordingly, we may infer from this picture that foreign fighters are individuals who have been actively recruited by organized networks, and who are generally motivated, at least in part, on personal grounds, rather than purely moral, ideological, religious, or economic reasons. On the basis of these considerations, they largely overlap with other individuals fighting for state armed forces and non-state armed groups.

A more promising explanation for the differentiated approach taken towards foreign fighters is that they cannot invoke the bond of nationality as a substantive consideration to fight. In effect, it seems that at its most basic core, foreign fighters are distinguished from members of state armed forces on the grounds that they do not belong to the political community for which they fight, and thereby not entitled to combatant privilege. This is the other side of the coin to the view that citizens must serve only in the armed forces of their own country, on the grounds of the loyalty they owe to their nation.[194] Furthermore, many people believe that the bond of nationality grounds special duties of a particularly stringent force towards the political community or to fellow nationals.[195] These duties, in turn, allow individuals to give greater weight to the interests of their co-nationals vis-à-vis the interests of foreigners. As a result, the distinctive feature of foreign fighters would be that they are simply unable to invoke the partiality argument that nationals can claim when acting in defense of the state to which they belong.

However, this consideration cannot account for whether state armed forces are themselves entitled to combatant privilege. For one, the moral traction that partiality affords is very limited indeed, at least if based exclusively on nationality as opposed to, for instance, family ties. Also, and perhaps more importantly, states are not the only group membership to which individuals can claim partiality towards. There are other collectives, such as religious, political, social, or ethnic groups, that provide their members with substantial benefits,

192. *Id.* at 221.

193. MALET, *supra* note 171, at 44.

194. ARIELLI, *supra* note 172, at 121.

195. *See, e.g.*, DAVID MILLER, ON NATIONALITY (2015); YAEL TAMIR, LIBERAL NATIONALISM (1992). On associative duties, see, for example, Seth Lazar, *Associative Duties and the Ethics of Killing in War*, 1 J. PRAC. ETHICS 3, 3–48 (2013).

which may be at least equivalent to those of the state. Accordingly, no relevant distinction can be drawn between fighting for one's state, and fighting for one's tribe, religion, or other type of valuable community to which foreign fighters typically adhere.

B. The Authority of a Foreign State?

I have argued that what ultimately makes a relevant difference in terms of an individual's privilege to take part in the armed conflict is not merely the reasons for which she fights, but rather the (epistemic) grounds upon which these reasons rely. Accordingly, even if foreign fighters genuinely believe they are acting on defensive grounds, I suggest that they are not entitled to trust the order of a non-state organization or a foreign state to fight. That is, they should not be considered privileged participants in armed conflict unless they act on the basis of evidence that they have sufficient grounds to rely upon—namely they join a state or non-state party that is fighting a manifestly or patently permissible war.

The clearest situation would be when foreigners fight for a non-state armed group. As indicated earlier, directions from religious, community, or other types of representatives do not carry enough weight by themselves to justify participating in the collective killing of individuals that characterizes war.[196] In this respect, there is little difference in the authoritative credentials of insurgent groups and other transnational organizations.[197] Furthermore, insofar as the knowledge these foreign fighters have of the situation is more mediated as compared to that of locals, they tend to see the conflict they wish to fight in overly simplified terms, or largely through the prism of the political, economic, and social confrontations they face at home.[198] If anything, they should be even more wary of being manipulated by these non-state armed organizations.

The more difficult question is whether individuals can rely on the authority of a foreign state to take part in an armed conflict on its behalf. This scenario is not uncommon. To illustrate, Irishmen were prominent among the *San Patricios* Battalion that fought for Mexico during the U.S.-Mexican War of 1846–47.[199] During WWII, the otherwise racist Wehrmacht ended up recruiting foreigners among its prisoners of war, and from many civilian populations, including Azerbaijani, Ukrainian, Georgian, and Turkestani. Whereas foreign volunteers

196. *See supra* Part III.

197. In many cases, insurgent groups *are* transnational organizations, such as in the case of ISIS, Al Qaeda, but also the Comintern.

198. *See* ARIELLI, *supra* note 172, at 72–76. He illustrates the latter situation by reference to pamphlets distributed among "leftist black Americans" exhorting them to join the Republic during the Spanish Civil War, linking together "the lynching of Negroes in America, discrimination in education and on jobs" with the fates of the poor peasants of Spain. *Id.* at 73.

199. *Id.* at 213.

fighting for non-state armed groups lack combatant privilege, IHL makes no distinction with respect to the nationality of combatants fighting in, or as part of, the state armed forces, provided they are not nationals of the detaining power.[200] Accordingly, they may be considered privileged combatants. But is this rendering of the law normatively sound?

Even if we assume that states have no authority to bind foreigners to fight on their behalf, this only means that foreigners do not have a duty to fight. By contrast, the issue of privilege is distinct insofar as it is only concerned with whether they can claim immunity for fighting. Again, the relevant question here is whether foreign individuals are entitled to rely on a directive of a foreign state that authorizes them to take part in armed conflict on its behalf. In Part II, I argued that one element that significantly contributed to accounting for the right of individuals to trust the judgment of the political authorities under which they live is not only that these authorities improve their capacity to make the "right" call, but that the authorities are accountable to their citizens. By contrast, national authorities are not accountable to foreign fighters, or at least not nearly to the same extent that they are to their nationals. These authorities are typically not required to justify before foreigners the spending of large amounts of resources, the risking of the lives of their citizens, the harming of enemy soldiers and civilians on their behalf, etc. If these authorities get a decision wrong, they would not be liable to be politically challenged in elections or legitimately removed from office by these foreigners. Indeed, defenders of the "democratic duty," or "duty of citizenship," ultimately connect these authorities' prerogative to the special relationship between political authorities and their citizens, not purely on their privileged epistemic credentials.[201]

Nor can combatant privilege be grounded in the epistemic biases that affect the decision-making processes of these foreign fighters. In Part II, I argued that individuals living under illegitimate authorities were nonetheless *pro tanto* entitled to combatant privilege on the grounds that their empirical situation generally made it unfair to demand that they know that the war they are required to fight is unjust. This conclusion rested not only on the epistemic capacities of these young soldiers and cognitive biases that influence their judgments, but also on the control to the access of information that authoritarian states characteristically exercise. However, the position of foreign fighters is entirely dissimilar to those individuals living under de facto authorities. In comparison, foreign fighters are typically able to exercise greater agency than those nationals living in authoritarian contexts such that it ultimately does not seem unreasonable to demand that they challenge the message of the organization that is recruiting them, even when this organization is recruiting them to fight for a state.

200. DINSTEIN, *supra* note 39, at 40.
201. *See supra* Part II.

In sum, I argue that, unless they fight for a manifestly permissible cause, foreign fighters should not be considered privileged combatants under IHL. This is regardless of whether they fight with state armed forces or non-state armed groups. Although this position does not clearly reflect their treatment under IHL, it seems largely consistent with an important number of domestic provisions criminalizing the participation of nationals in foreign wars. For instance, the United Kingdom's approach towards prosecution for foreign enlistment has been "cause-dependent."[202] In 2014, the U.K. Home Office declared that "U.K. law makes provisions to deal with different conflicts in different ways - fighting in a foreign war is not automatically an offense but will depend on the nature of the conflict and the individual's own activities."[203] Similarly, volunteers for the Spanish Republic were originally arrested by the U.S. Federal Bureau of Investigation upon their return, though "Attorney General Robert H. Jackson ordered their indictments withdrawn," and "the Franklin Roosevelt administration opted to revert to a flexible approach" on the grounds of the threat against European democracies.[204] Although the fit between these decisions and taking part in "broadly recognized" permissible war is hardly perfect (for example, Sweden decided not to prosecute its nationals taking part in the Waffen SS during World War II), I suggest that the fact that the specific war is considered legitimate, mediated by politics and public opinion, accounts for most instances of the refusals to hold foreign fighters accountable for taking part in war.

V. Private Military Security Companies

Private military security companies ("PMSCs") are also prevalent participants in contemporary asymmetrical wars. The contemporary industry of PMSCs arguably started developing in the 1970s but expanded significantly in the 21st century as a result of American-led invasions of Afghanistan and Iraq.[205] In 1993, the government of Angola contracted Executive Outcomes to fight the rebel movement *União Nacional para a Indepêndencia Total de Angola*.

202. To illustrate, the British Foreign Enlistment Act does not prohibit all forms of foreign enlistment, limiting itself to service in wartime against a government at peace with His or Her Majesty. Foreign Enlistment Act 1870, 33 & 34 Vict. c. 90, § 4 (Eng.). Similarly, Margaret Thatcher argued at the House of Commons that the decision of British Jews to participate in the Yom Kippur War was "understood by everyone." Arielli, *supra* note 172, at 131.

203. *See Iraq Crisis: PM Urges UK Kurds Not to Travel to Fight IS*, BBC News (Sept. 3, 2014), https://www.bbc.com/news/uk-29038981 [https://perma.cc/9U8T-7VSB].

204. Arielli, *supra* note 172, at 134.

205. Arielli & Collins, *supra* note 168, at 255. In Iraq, there were more than 20,000 individuals performing protective security functions for private firms under U.S. government contracts by the end of 2006. *See* Mirko Sossai, *Status of Private Military and Security Company Personnel in the Law of International Armed Conflict*, *in* War by Contract: Human Rights,

Sierra Leone also hired Executive Outcomes to help them defeat the rebels of the Revolutionary United Front in 1995.[206] The so-called Wagner Group employed hundreds of Russian nationals fighting alongside the government's armed forces against the rebels in Syria and have been later deployed in Ukraine.[207] Many humanitarian bodies, including U.N. agencies, NGOs, as well as multinational corporations, have increasingly relied on PMSCs to provide protection in conflict zones.[208] By 2004, Haliburton "alone had been awarded 11.4 billion dollars in contracts for Iraq and Afghanistan."[209]

The identification and functions of PMSCs are sufficiently well defined in the contemporary literature. Francesco Francioni and Natalino Ronzitti, for instance, define them as "corporations offering security, defense and/or military services to states, international organizations, non-governmental organizations, and private companies and/or armed groups."[210] Their functions spread along different war-related activities, including the "guarding of military bases, checkpoints, work sites and embassies"; protection of high-ranking officials and events; "evacuation planning, escorts for convoys moving weapons, equipment and supplies"; security for individuals; and maintenance of equipment, including drones and other sophisticated weapons systems.[211]

Yet, they have also been directly involved in armed conflict. According to the U.N. Working Group on the use of mercenaries, "former military personnel and ex-policemen are recruited as 'security guards', but once in low-intensity armed conflicts or post-conflict situations, they become in fact private soldiers militarily armed."[212] In the war in Iraq, PMSCs maintained and loaded weapons on B-2 stealth bomber and the Apache helicopters.[213] Blackwater was hired by the U.S. Central Intelligence Agency ("CIA") to assemble and load Hellfire

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Humanitarian Law, and Private Contractors, 197, 203 (Francesco Francioni & Natalino Ronzitti, eds. 2011).

206. Marina Mancini et al., *Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-First Century?*, *in* War by Contract: Human Rights, Humanitarian Law, and Private Contractors 321, 330 (Francesco Francioni & Natalino Ronzitti eds., 2011).

207. *See, e.g.*, *Grupo Wagner, El Misterioso Ejército de Mercenarios Rusos que Luchan y Mueren en Siria*, Infobae (Feb. 15, 2018), https://www.infobae.com/america/mundo/2018/02/15/grupo-wagner-el-misterioso-ejercito-de-mercenarios-rusos-que-luchan-y-mueren-en-siria/ [https://perma.cc/Y4ST-54W8].

208. Sossai, *supra* note 205, at 208–09.

209. Michael Schmitt, *Humanitarian Law Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 514 (2005).

210. War by Contract, *supra* note 205, at 1. Contemporary private military security companies ("PMSCs") include a number of large corporations such as Blackwater (recently renamed Academi), CynCorp International, MPRI, Triple Canopy, EOD Technology, Aegis, ArmorGroup, Control Risks, and Erinys. *See* Mancini et al., *supra* note 206, at 331.

211. Sossai, *supra* note 205, at 207, 211.

212. Mancini et al., *supra* note 206, at 332 (internal citations omitted).

213. Peter W. Singer, *Can't Win With 'Em, Can't Go to War Without 'Em: Private Military Contractors and Counterinsurgency*, Policy Paper No. 4, Foreign Pol'y at Brookings (2007).

missiles and 500 lb. laser-guided bombs onto Predator drones, at the CIA hidden bases in Afghanistan and Pakistan.[214] PMSCs have also been involved in gathering and analyzing information from interrogations and electronic means, and even participating in covert operations.[215] In Angola, Executive Outcomes personnel often engaged in combat alongside Angolan troops.[216]

A. The Legal Treatment Afforded to Members of PMSCs Under IHL

Although they often share some relevant features with non-state armed groups and with foreign fighters, PMSCs' normative credentials are relevantly different from each of these actors from the perspective I defend.[217] Most significantly, PMSCs are licensed by states and essentially provide combat and logistical services for profit.[218] They also receive salaries which are significantly higher than those of regular state armed forces. So much so that the U.S. Special Forces have been allegedly experiencing a "brain drain" on accounts of PMSCs.[219]

Their legal position is also quite distinct. Many scholars have argued that members of PMSCs inhabit a legal "grey zone."[220] PMSCs have been legally characterized as civilians, as combatants, and as mercenaries, depending on different understandings of the law, who they work for, and what their specific roles in armed conflict have been. On the one hand, GCIII confers status as prisoners of war to "persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, [and] supply contractors."[221] Thus, members of PMSCs can see themselves as non-liable to be sanctioned provided they do not directly participate in hostilities. Relevantly, this is not because they are considered privileged participants in armed conflict, but rather because they are equated

214. *See* James Risen & Mark Mazzetti, *C.I.A. Said to Use Outsiders to Put Bombs on Drones*, N.Y. Times (Aug. 20, 2009), http://www.nytimes.com/2009/08/21/us/21intel.html [https://perma.cc/ENA8-CQ2M]; *see also* Mark Mazzetti, *Blackwater Loses A Job For The C.I.A.*, N.Y. Times (Dec. 11, 2009), http://www.nytimes.com/2009/12/12/us/politics/12blackwater.html [https://perma.cc/E9FT-X9M5]. The contract was subsequently cancelled. In December 2009, the New York Times reported that some of its operatives took place in CIA raids against individuals suspected of insurgency in Iraq and Afghanistan. James Risen & Mark Mazzetti, *Blackwater Guards Tied to Secret C.I.A. Raids*, N.Y. Times (Dec. 10, 2009), https://www.nytimes.com/2009/12/11/us/politics/11blackwater.html [https://perma.cc/35ZJ-YM3U].

215. *See, e.g.*, James Carroll, *Outsourcing U.S. Intelligence*, N.Y. Times (Sept. 27, 2007), http://www.nytimes.com/2007/08/27/opinion/27iht-edcarroll.1.7272205.html [https://perma.cc/5AB7-4P5U].

216. Mancini et al., *supra* note 206, at 330.

217. Some argue that they typically wear some kind of uniform, while others claim that the bulk of their operatives are recruited locally. *See* Arielli & Collins, *supra* note 169, at 255.

218. *See* Int'l Comm. Red Cross, *supra* note 9, art. 47, ¶ 1807.

219. Schmitt, *supra* note 209, at 515.

220. Mancini et al., *supra* note 206, at 340.

221. GCIII, *supra* note 6, art. 4(A)(4).

to civilians not taking part in it. Nevertheless if, or when, they are expected to take direct part in the hostilities, they *would* be liable to legal sanctions.[222] As illustrated above, many of the activities performed by PMSCs have been found, unequivocally, to amount to direct participation in hostilities.[223]

On the other hand, many argue that under certain conditions members of PMSCs may be entitled to legal privilege.[224] Some require formal incorporation by the state (unincorporated agencies are civilian in nature for the purposes of IHL). Others require that they are authorized by a state to participate directly in hostilities on its behalf. In both situations they would be considered part of their military forces.[225]

A third possibility has been to identify members of PMSCs as the "new mercenaries."[226] Under IHL, a mercenary is someone who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[227]

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222. Ipsen, *supra* note 25, at 108.

223. Sossai, *supra* note 205, at 211. This proposition may be illustrated by the incident in Nisoor Square, Baghdad, in September 2007, when Blackwater personnel killed seventeen civilians. Matt Apuzzo, *Blackwater Guards Found Guilty in 2007 Iraq Killings*, N.Y. Times (Oct. 22, 2014), https://www.nytimes.com/2014/10/23/us/blackwater-verdict.html [https://perma.cc/XE8X-64XZ].

224. Doswald-Beck, *supra* note 121, at 124. She reports that there is a view in the United States to the effect that PMSCs members would retain their prisoners of war statuses provided that they conformed to the conditions in GCIII art. 4(A)(2). Yet she acknowledges that the "preponderant view, however, is that there is no basis for this, and that this article cannot be interpreted in such a strange fashion." *Id.* n.29.

225. Sossai, *supra* note 205, at 200. There is, admittedly, disagreement as to the conditions that must be satisfied for members of PMSCs to be considered part of the armed forces of the state. *See* Doswald-Beck, *supra* note 121, at 121–23.

226. Nihal El Mquirmi, Private Military Security Companies: A New Form of Mercenarism? 3 (Policy Center for the New South 2022).

227. API, *supra* note 5, art. 47. The only exception to the fourth criterion is when he is a national of the detaining power. In that case, she will forfeit her legal privilege. According to the

There is ample agreement that mercenaries are unprivileged participants in armed conflict.[228]

B. The "Parity" Thesis Between PMSCs and Regular Armed Forces

Faced with these different legal characterizations, it seems particularly useful to better understand the conditions under which members of PMSCs ought to be entitled to legal privilege. Fabre argues that there is nothing in the private character of PMSCs that precludes them from justifiably offering their services to actors fighting a permissible war.[229] She argues that when a belligerent can defend itself against an unjust aggression only with the help of PMSCs, to deny it and its people the right to do so simply on the basis of the status of PMSCs is by an unwarranted "piece of fetishism."[230] I agree. She further claims that members of PMSCs should be treated on a par with uniformed state soldiers—she calls this, the "parity thesis."[231] To claim otherwise, she suggests, "is tantamount to conferring upon membership in a given group (here, a state army or a private corporation) decisive weight when granting or denying individuals rights to kill."[232] If participating in war is warranted for state armed forces, it must also be warranted for PMSCs (and vice versa).

I believe, by contrast, that the "parity thesis" is ultimately inadequate to determine the conferral of combatant privilege to members of PMSCs. The reason for this is that it seems to be providing an answer only to the question of whether members of PMSCs are ultimately acting permissibly. By contrast, combatant privilege is about immunity from prosecution, not merely about ultimate, fact-relative permissibility. To that extent, I have argued that it is largely based on epistemic considerations. Namely, it is generally accepted that combatant privilege ought to be conferred on some participants in armed conflict who are ultimately acting impermissibly, and not be conferred upon certain participants who are ultimately acting permissibly. The relevant question

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International Committee of the Red Cross' study on customary IHL, the definition of mercenary in API has obtained customary status (Rule 108). *Rule 108. Mercenaries*, IHL Databases, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule108 [https://perma.cc/3VMR-SFKG]. It has been generally recognized that Article 47 is very restrictive insofar as it is not easy to satisfy all four main requirements. *See e.g.*, *Mercenaries*, Medecins Sans Frontieres, https://guide-humanitarian-law.org/content/article/3/mercenaries/ [https://perma.cc/6GFT-Y52H].

228. Furthermore, under the 1977 OAU Convention for the Elimination of Mercenaries in Africa (1977) and the 1987 U.N. International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (which came into force in 2002), a mercenary who takes direct part in hostilities is not merely stripped from her privilege but commits a specific criminal offence. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries art. 3, Dec. 4, 1989, 2163 U.N.T.S. 75.

229. Fabre, *supra* note 17, at 215.

230. *Id.* at 228.

231. *Id.* at 234

232. *Id*. at 233.

is the basis on which these individuals make their decision to fight. As indicated, the situation of individual members of PMSCs is significantly different from that of state armed forces in this particular respect. Individuals are typically not in a position to decide whether they are justified in fighting on their own, nor are these private corporations in a position to make such a decision authoritatively. Accordingly, on this critical dimension PMSCs and state armed forces are not on a par.

Additionally, Deborah Avant has argued that PMSCs ought to be considered as authorized by the state even when they have been hired by private actors, such as multinational corporations.[233] She believes that state incorporation should suffice for their members to consider themselves justified in fighting wherever they are sent to do so.[234] Insofar as PMSCs would have to be considered analogous to state armed forces in this relevant sense, this implies that they would forfeit their privilege only when they fight manifestly impermissible wars, such as genocidal wars, or fail to comply with the requirements imposed on privileged belligerents (wear uniforms, carry arms openly, and so on).[235]

However, this reasoning is flawed. There is an important gap between a state licensing a given organization that uses military force as a lawful business, and a state authorizing that organization to actually fight in a given situation. Such licensing only involves recognition as a legitimate business, but typically does not confer upon the PMSC the prerogative to decide when resorting to military force would be permitted.[236] Furthermore, insofar as members of the corporation are ordered to fight by representatives of a *private* corporation, that order seems more akin to the order of a leader of a non-state armed group, than to the order of a state authority, in terms of its political legitimacy and epistemic

233. Deborah Avant, The Markets of Force 310 (2005). Take, for instance, Shell Oil's hiring PMSC operatives to protect its facilities in the Nigerian delta. *Id.*

234. *Id.*

235. *See supra* note 86.

236. Members of PMSCs taking part in armed conflict must be recruited by state authorities if they are not to be considered mercenaries, and ipso facto liable to be prosecuted as such. *See, e.g.*, Ian M. Ralby, *Private Military Companies and the Jus ad Bellum*, *in* The Oxford Handbook of the Use of Force in International Law 1150–51 (Marc Weller ed., 2015). Notably, the UN Human Rights Council open-ended intergovernmental working group in their most recent draft instrument identifies "prohibited activities" as "conducting and engaging in combat operations . . . and any activity that International Humanitarian Law explicitly assigns to a State agent or authority or that would result in acts of aggression or other activities prohibited under the United Nations Charter." OEIGWG on PMSCs, Revised Fourth Draft Instrument on an International Regulatory Framework on the Regulation, Monitoring of and Oversight over the Activities of Private Military and Security Companies art. 1(f) (Mar. 5, 2025), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-military/session6/IGWG-PMSCs-Revised-fourth-draft-PMSCs-clean-version-copy.pdf [https://perma.cc/PUU3-BR9M]. In turn, art. 8(3) further indicates that "Home States" (i.e. where a PMSC is licensed) shall "ensure that their licensing system prohibit the provision of military and security services in a Territorial State without the permission of that State." *Id.* art 8(3).

credentials. Furthermore, unlike political authorities, the CEO of a PMSC is not accountable to their personnel in the way state officials are accountable to their citizens. To that extent, the orders of PMSCs executives cannot provide on their own their operatives with a decisive reason to fight. In turn, such an order cannot confer upon these operatives a shield against being held accountable for taking part in an armed struggle, on a par with state armed forces.

In order to better grasp what is the specific normative challenge raised by members of PMSCs, I believe we may profit from looking at the different arguments traditionally put forward against mercenaries. Three arguments can be identified to this effect. First, in the 19th century's United Kingdom, fears were expressed that mercenaries would be employed without control of Parliament, as a tool of executive despotism "to the detriment of liberty."[237] Second, a standard argument against mercenaries has been that they fight for private gain.[238] It may be thought that this translates well to the case of members of PMSCs. There is ample empirical evidence confirming this proposition in the case of PMSCs, including the fact that they usually receive wages significantly higher than those of regular armed forces.[239] Third, some authors suggest that the fact that mercenaries are motivated by private gain could make the conflict "longer and bloodier than it needed to be, and peace much harder to attain."[240]

Interestingly, all these propositions assume that the underlying concern with mercenaries stems from the possible conflict of interests between mercenaries and the political constituency. It seems almost definitional that the loyalty of members of PMSCs is contractually to their employers and not necessarily to the interest of the state for which they fight.[241] The argument I advocate is that this conflict of interest ultimately undermines the claim of members of PMSCs to combatant privilege except when they fight wars that are manifestly or patently permissible.[242] As already indicated, individuals are not justified in treating as decisive reasons to kill the orders received from a corporation whose primary interest is to maximize private monetary gain. Orders or

237. Kevin Linch, *The Politics of Foreign Recruitment in Britain during the French Revolutionary and Napoleonic Wars*, *in* TRANSNATIONAL SOLDIERS, *supra* note 168, at 60–61.

238. Mancini et al., *supra* note 206, at 323.

239. *See* Zoe Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT'L L. & POL. 885 (2008); Michael Scheimer, *Separating Private Military Companies from Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support That Reflects Customary International Law*, 24 AM. U. INT'L L. REV. 627 (2009).

240. Linch, *supra* note 237, at 60. Henry Fox was the leader of the opposition in the House of Commons in 1794. Linch recounts that these fears turned out to be remarkably accurate.

241. This kind of weaker link between them and the belligerent they represent seems to have contributed to undermine the legality and credibility of mercenaries. Arielli & Collins, *supra* note 168, at 4.

242. Thorburn, *supra* note 41.

directions provided by hierarchical personnel of these organizations do not carry the normative weight of the state's authorization, insofar as the specific task being ordered need not be aligned with the objectives of the political authority. As employees of PMSCs, they have contractual obligations which would require them to go against the interests or reasons that the public authority is obliged to follow when fighting the war. As Massimo Renzo suggests, albeit in a different context, sometimes individuals have reason to believe that an authority is "biased or prone to make mistakes," and that their directives "could lead to the perpetration of serious injustice."[243] In that type of situation we may require of them a higher degree of certainty concerning the fact that they are permitted to comply with the orders of such organization. PMSCs are such a type of organization to a far larger extent than states.

In conclusion, the reason why members of PMSCs should not be entitled to legal privilege except in those cases fighting for manifestly just causes, or as de facto organs of the state in accordance with Article 4 of GCIII, is not connected to *their* individual financial motives. Again, the motives of individual members are not necessarily different from the economic motives of other individuals taking part in armed conflicts, both as part of state armed forces as well as part of non-state armed groups.[244] Rather, it is the fact that they follow orders from organizations which are centrally concerned with maximizing profit which makes their orders insufficiently reliable to justify taking part in collective killing. The problem hereby highlighted only gets worse when, as Schmitt reports, the degree of "independence" grows, "as one moves from contractor to subcontractor to firms without affiliation to a party to the conflict."[245] Or even more, as it has been observed, when "contractors were actually supervising governmental personnel, instead of the other way round."[246]

VI. Child Soldiers

Before concluding, let me further test the account of privileged combatancy hereby articulated by considering legal attitudes towards child soldiers. The use of child soldiers is also a prevalent, albeit appalling, feature of contemporary

243. Renzo, *supra* note 59, at 13.

244. *See generally* Tony Lynch & A.J. Walsh, *The Good Mercenary?*, 8 J. Pol. Phil. 133 (2000). The focus on the motives of the individual mercenary has been identified as one of the main weaknesses of the U.N. Convention against mercenarism, insofar as this motive being difficult to prove in a court of law deprives the convention of any real bindingness. *See* Mancini et al., *supra* note 206, at 327.

245. Schmitt, *supra* note 209, at 529.

246. Sossai, *supra* note 205, at 202. This consideration is only made worse by the extraordinary difficulties faced when trying to call members of PMSCs to account for their behavior as compared to their military counterparts. *See* Schmitt, *supra* note 209, at 516.

asymmetrical wars, even if child soldiering also dates back a long while.[247] The total population of children involved in hostilities worldwide at the beginning of this century has been calculated between 300,000 and 500,000.[248] In the Democratic Republic of the Congo, for example, some argue that there were 30,000 children involved in fighting at one time.[249] Similarly, according to Human Rights Watch, at least one in four participants in the Colombian armed conflict were children.[250] This picture includes an important number of girls.[251] Once recruited, children are required to perform a variety of roles, including as cooks, messengers, shields, spies, and porters, but they are also required to fight.[252] The question for us here is not only whether child soldiers are entitled to legal protection against prosecution for participating in an armed conflict, and when, but most importantly, why.

Child soldiers have been characterized as "monsters" and "barbarians," but also as "victims," and even as "heroes."[253] International law somewhat reflects this ambivalence. On the one hand, children are often treated as perpetrators—they are held accountable, and sometimes even punished as adults for taking part in armed conflict. On the other hand, they are also construed as victims—indeed, it is broadly accepted that it is forbidden under IHL that children take part in armed conflict. The prohibition of recruiting children was established in the 1977 Additional Protocols to the Geneva Conventions.[254] The Optional

247. Consider, for instance, the case of Joan of Arc, the Napoleonic Wars, and the Nazi conscription of the *Hitlerjugend* and its use of girls as anti-aircraft gunners. *See generally* Helen Brocklehurst, Who's Afraid of Children: Children, Conflict and International Relations (2006); David Rosen, Armies of the Young: Child Soldiers in War and Terrorism (2005).

248. *See* Vesselin Popovski & Karin Arts (eds.), International Criminal Accountability and the Rights of Children (2006); Peter W. Singer, Children at War (2005); *see also* Mark Drumbl, Reimagining Child Soldiers in International Law and Policy (2012).

249. Maria Bell, Democratic Republic of Congo: Report on Children Caught in War (2006) (on file with author).

250. Hum. Rts. Watch, Aprenderás a No Llorar: Niños Combatientes en Colombia 1, 5 (2000).

251. Between 1990 and 2003, girls were active participants in armed conflict in thirty-eight countries, and were involved more broadly with fighting forces in fifty-five countries. Susan McKay & Dyan Mazurana, Where Are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War (2004).

252. Studies indicate that only a minority of children take direct part in hostilities. *See, e.g.*, Singer, *supra* note 248.

253. For present purposes, I will define as a child a person who is under eighteen years of age. *See* Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3; *see also* Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups 2.1 (Feb. 2007). This definition has been heavily criticized on different grounds. *See, e.g.*, Myriam Denov, Child Soldiers: Sierra Leone's Revolutionary United Front 2–5 (2010).

254. API, *supra* note 5, art. 77; APII, *supra* note 40, art. 4(3)(c).

Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict establishes that states "shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities," and prohibits compulsory recruitment of anyone under eighteen.[255] Conscription of child soldiers under fifteen is currently a war crime under International Criminal Law.[256] These rules have been acknowledged even by some non-state armed groups. For instance, the internal rules passed by the *Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo* (FARC-EP) stipulate since 1999 that no children under fifteen years are to be recruited. Paramilitary forces in Colombia established the limit as eighteen years.[257] These further considerations largely reflect the view that child soldiers are also considered victims of armed conflict.

A. Against a "Blanket" Immunity

Mark Drumbl, for one, has influentially criticized accounts of child soldiering that portray them merely as "faultless passive victims," with no agency, which are ultimately considered "damaged goods."[258] He particularly rejects the image of the "child soldier as a helpless object manipulated locally by adult malevolence, yet at the same time to be rescued transnationally by adult humanitarianism."[259] Alcinda Honwana similarly suggests that even if it does not seem defensible to treat child soldiers as fully responsible for their actions, they should not be considered as fully deprived of agency.[260] Tamar Schapiro even connects the demand that a child takes responsibility for her actions as a way of showing respect for her in an important sense.[261] On these grounds, these scholars suggest that child soldiers ought to be recognized as having some form or degree of agency. In consequence it is admissible to subject them to some form accountability mechanism, even if they are not considered criminally liable to being punished as adults.

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255. Although the language of the Protocol is exceedingly cautious, it has been ratified by 172 states. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, arts. 1–2, May 25, 2000, 2173 U.N.T.S. 222.

256. The Rome Statute makes conscription of children under fifteen years of age a war crime. ICC, ELEMENTS OF CRIMES, Art. 8(2)(b)(xxvi) (2013). The 2002 Optional Protocol to the 1989 U.N. Convention of the Right of the Child, in turn, bans coercive recruitment of persons under eighteen into armed groups. G.A. Res. 54/263, art. 2 (Mar. 16, 2001). There are several domestic provisions criminalizing this conduct. *See, e.g.*, Código Penal [C.P.] [Criminal Code] art. 162 (Colom.).

257. Admittedly, none of these groups have reportedly complied with their own regulations. *See* HUM. RTS. WATCH, *supra* note 250, at 8.

258. DRUMBL, *supra* note 248, at 168.

259. *Id*. at 6.

260. ALCINDA HONWANA, CHILD SOLDIERS IN AFRICA 69 (2006).

261. Tamar Schapiro, *Childhood and Personhood*, 45 ARIZ. L. REV. 575, 578 (2003).

In effect, the fact that they are victims of armed conflicts does not preclude child soldiers from also being perpetrators of serious moral wrongs, including taking part in a wrongful, aggressive war. Although children cannot currently be tried at certain international courts such as the International Criminal Court,[262] it would not be *unlawful* to prosecute them before an international court.[263] Furthermore, they can and have been prosecuted before domestic courts, at least those who fight for non-state armed groups. Sometimes they are treated through processes of restorative justice, sometimes through traditional ceremonies of accountability and rehabilitation, but often they are treated as fully responsible agents, and convicted and punished very much like adults.[264] For example, Omar Kahdr, a Canadian citizen, was imprisoned for more than ten years at Guantanamo Bay, and convicted by a U.S. Military Commission as an adult, for allegedly killing a U.S. soldier in Afghanistan at the age of fifteen. Even if this treatment of child soldiers has been more the exception than the rule it seems largely the case that they lack a right against prosecution.[265]

At the same time, making children liable to sanctions as if they were adults seems inappropriate. The Amnesty Law passed by the Colombian Congress with regards to FARC, for instance, recognizes that prosecution of minors may be suspended even for crimes unsuitable for amnesties, such as war crimes and crimes against humanity.[266] There are different reasons that have been articulated to account for this special regime. Drumbl, for one, has influentially advocated truth commissions and traditional ceremonies as ways to favor reintegration, rehabilitation, and reparation of child soldiers.[267] His justification for this type of treatment is thereby largely consequentialist. Namely, he argues that this type of accountability contributes to protecting children from the negative image that societies normally have about them.[268] This process is particularly important given that often soldiering breaks the relationships between children and their communities.[269]

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262. International Criminal Court, Understanding the International Criminal Court 15 (2020).

263. Children under eighteen were prosecuted neither before the Nuremberg and Tokyo Tribunals, nor the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

264. *See* Jean C. Kiyala, Child Soldiers and Restorative Justice (2019).

265. United Nations, Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), Rule 4.1, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) (encourages states to bear in mind the emotional, mental and intellectual maturity to determine the scope of criminal responsibility).

266. L. 1820/16, diciembre 30, 2016, *Por medio de la cual se dictan disposiciones sobre amnistía, indulto y tratamientos penales especiales y otras disposiciones* [By means of which provisions are issued on amnesty, pardon, special penal treatment and other provisions], art. 28(10), (Colom.).

267. Drumbl, *supra* note 248, at 2.

268. *Id.* at 6.

269. Kiyala, *supra* note 264, at 466.

Although I find his institutional proposal appealing, I ultimately do not think that it captures the situation of child soldiers as compared to that of adults. In short, the goal of providing reintegration, rehabilitation, and reparation would also be valuable for adult soldiers who are often also, themselves, victims of the conflict in some measure. Similarly, in many contexts we should try to protect adult fighters from the negative image that society has of them in order to favor fruitful ways forward. This type of solution is advocated in much of the literature on transitional justice.[270]

Others have argued that leniency towards children is grounded on the fact that their culpability is significantly diminished because they are coerced into joining the armed group or the military forces.[271] Indeed, many child soldiers are kidnapped or abducted by the relevant groups, usually at a very young age. Nevertheless, others join armed groups "voluntarily."[272] Alice Schmidt usefully defines voluntary enrollment in this context merely as cases of children who "take the initiative of joining armed groups themselves, without being under immediate physical threat."[273] This is not surprising. There are relevant push and pull factors that drive them towards the war. Among the former, we can mention poverty, inadequate or insufficient education, lack of paying work, the war context, and motivations such as revenge for previous wrongs, search for safety, and the pursuit of wealth.[274] Among the latter, the availability of light and easy-to-use weaponry, familiarity with war from a very young age, the weakening of protective structures—including a social ethos to protect children—and a reality that "crushes their hopes and expectations for a good life."[275] Accordingly, coerced enrollment cannot account for the differentiated treatment of children, since not all of them have been subjected to this type of treatment and, equally, many adults are also forced to serve or are victims of similar contextual factors.

Similarly, it may be further argued that children should not be liable for participating in unjust wars on grounds of the conditions under which they

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270. *See, e.g.*, Jon Elster, Closing the Books: Transitional Justice in Historical Perspective (2009).

271. *See, e.g.*, Sonja C. Grover, Child Soldier Victims of Genocidal Forcible Transfer 133 (2012).

272. *See, e.g.*, Michael Wessels, Child Soldiers: From Violence to Protection (2006). In Colombia, some reports indicate that they account for the majority of child soldiers. *See* Hum. Rts. Watch, *supra* note 250, at 9.

273. Alice Schmidt, *Volunteer Child Soldiers as Reality: A Development Issue for Africa*, 2 N.Y. Sch. Econ. Rev. 49, 56 (2007). Admittedly, sometimes they "volunteer" because of a lack of morally acceptable options, which on some accounts of coercion would suggest that those children are in fact coerced. But this does not challenge the claim that some child soldiers do join voluntarily, i.e., uncoerced. I am grateful to Cécile Fabre for this clarification.

274. *See, e.g.*, Kiyala, *supra* note 264, at 74.

275. *Id.* at 75–81.

fight, the options they face, and how their free will is undermined by the treatment they receive when they join an armed group. Indeed, many child soldiers are subjected to extreme forms of duress. If they try to escape, they are severely punished, when not summarily executed.[276] Furthermore, often these children have nowhere to go: Their families have been killed, and the communities to which they belong will reject them. Child soldiers often suffer from direct violence from members of their groups, are forced to ingest vast quantities of drugs, see their families and friends killed, they themselves suffer violent training, and are often victims of sexual violence.[277] Belligerents usually work hard to "break" their will so they will obey any order they receive. Notably, some children spend years in psychiatric facilities after leaving armed conflict, before being able to return with their families.[278] These are terrible features of contemporary abuses towards child soldiers. Again, insofar as not all children are subjected to this type of treatment, and insofar as some adults are also subjected to this type of treatment, this argument cannot help us identify what is distinct about child soldiers in terms of their liability to being held accountable or sanctioned.

B. Giving Child Soldiers "a Break"

I suggest that the main reason why children warrant differentiated treatment, or to use Gideon Yaffe's expression, we ought to "give them a break," is precisely that they are children.[279] A unifying feature that largely accounts for the treatment they are owed is precisely that due to their young age they lack the full capacity for moral and rational agency.[280] This idea has a long history in philosophical thought, going back at least to Aristotle, but it has recently been articulated by Schapiro in a clear and persuasive way.[281] One implication of this fact is that children are not entitled to exercise the full range of rights recognized to adults, including in most contemporary societies, the right to vote, to marry, and to decide that they do not want to be protected from harm or rescued by adults. To use Peter Vallentyne's terminology, children have

276. *See supra* note 251 and accompanying text.

277. *See, e.g.*, Tilman Rodenäuser, *Squaring the Circle? Prosecuting Sexual Violence Against Child Soldiers by their 'Own Forces'*, 14 J. Int'l Crim. Just. 171 (2016); Rosemary Grey, *Sexual Violence Against Child Soldiers*, 16 Int'l Feminist J. Pol. 601 (2014).

278. Kiyala, *supra* note 264, at 91.

279. Gideon Yaffe, The Age of Culpability: Children and The Nature of Criminal Responsibility (2018).

280. Cécile Fabre, *Children and War*, *in* The Routledge Handbook on the Philosophy of Childhood and Children 412, 412 (Gareth Calder, Jurgen de Wispelaere & Anca Gheaus eds., 2018).

281. *See, e.g.*, Aristotle, Politics 1–21 (C.D.C. Reeve trans., 1998); John Locke, Second Treatise of Government 33–35 (C.B. Macpherson ed., 1980); *see also* Tamar Schapiro, *What Is a Child?* 109 Ethics 715, 726 (1999).

primarily "interest-protecting rights" rather than "choice-protective rights."[282] We must thereby protect their fundamental interests of not being used to fight an armed conflict, on account of the horrible harms that will be inflicted upon them, even if we do not recognize their right to choose to be part of it. This view largely accounts for the fact that children are not entitled to join even "voluntarily" a belligerent armed organization, and that enlisting them is thereby prohibited, and even criminalized.

A second implication of their lack of full capacity for moral and rational agency is that children are not responsible to the same extent as adults. In Schapiro's words, the fact that a person is "a child (aside from any further exculpating or inculpating conditions) should mitigate the stringency with which he is held responsible for crimes of which he is convicted."[283] When a child commits a moral wrong, we normally take the opportunity to teach him how he should behave. This approach is significantly more common with younger children, but it remains in the background even with older ones.

There are different arguments that account for why this is the case. Schapiro helpfully distinguishes between the claim that children are not fully capable of making good choices (the "proficiency argument"), from the claim that children are not fully capable of making their own choices, regardless of good or bad (the "attributability argument").[284] She ultimately advocates a version of the attributability argument as the only one available for anyone endorsing strong forms of anti-paternalism.[285] For anyone holding this type of position, asking whether children are in a position to make good or bad choices would seem to be asking a question which, by definition, has already been answered.[286] Nevertheless, regardless of whether one accepts the "proficiency argument" or the "attributability argument," the implication of both of them is precisely that children are to be subjected to a less stringent test than adults as to whether they were required to know that the war is impermissible.

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282. Peter Vallentyne, *Equality and the Duties of Procreators*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 197, 197 (David Archard & Colin Macleod eds., 2002).

283. Schapiro, *supra* note 261, at 577.

284. She notes that a significant part of the literature favors different versions of the proficiency argument. *Id.* at 579. *See, e.g.*, S. Brennan, *Children's Choices or Children's Interests: Which Do Their Rights Protect?*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 197, 197 (David Archard & Colin Macleod eds., 2002); DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 58–69 (1993); Rosalind Ekman Ladd, *Paternalism and the Rationality of the Child*, 6 THINKING: J. PHIL. CHILD. 15, 15–19 (1985); David Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555 (2004); Michael Tiboris, *Blaming the Kids: Children's Agency and Diminished Responsibility*, 31 J. APPLIED PHIL. 77–90 (2014). Empirical studies indicate that group influences and peer pressure have greater effects on children than on adults. *See* M.D. Reed & P.W. Roundtree, *Peer Pressure and Adolescent Substance Abuse*, 13 J. QUANT. CRIMINOLOGY 143, 143–80 (1997).

285. Schapiro, *supra* note 261, at 585.

286. *Id.* at 584.

This implication applies most clearly to those child soldiers fighting for state armed forces, but even to those fighting—as is most common—for non-state armed groups. We may require that they know that participating in armed conflict is impermissible only when the war itself is manifestly criminal or aberrant. Furthermore, the argument of reduced responsibility also accounts for another important implication, namely, that even if we hold them accountable, children should be instructed and guided, not merely blamed and punished. Accordingly, this argument helps us explain why it is appropriate to use restorative justice mechanisms, truth commissions, or other mechanisms to address their wrongs, rather than imprisonment or other harsh penalties. To that extent, this argument provides us with a critical bite vis-à-vis existing practices in many countries.

In sum, this approach to child soldiers fits well with the account of combatant privilege advocated in this Article. I have argued that liability to being criminally sanctioned for participating in an armed conflict ultimately rests on whether the individual can be required to have known that they were taking part in wrongful action, such as an aggressive or genocidal (a manifestly impermissible) war. The inappropriateness of calling child soldiers to account as adults is thereby explained on precisely the same grounds as the relevant position of other participants in armed conflict, including state forces, non-state armed groups, foreign fighters, and members of PMSCs. Namely, it is based on whether and the extent to which we can legitimately demand that they knew that they were fighting an impermissible war, not on whether they were acting, all things considered, impermissibly.

Conclusion

This Article offers a unified account of combatant privilege under IHL, providing a much more granulated and nuanced picture of the scope and contours of the principle of belligerent equality. It argues, first, that this privilege must be centrally construed as an immunity against being prosecuted, or even being held accountable, for actions that, though harmful, are not formally prohibited by IHL. This understanding, in turn, suggests that allocating this type of protection must be connected to questions of responsibility. Or better, privileged combatants are those who cannot be required to have known that their actions were impermissible. Under this reasoning, I have argued that state regular armed forces ought to be *pro tanto* recognized this form of protection, on the grounds of the specific work the authorization by a public institution, such as the state, together with the effect of cognitive biases upon them. On these same considerations, those who are not acting under a public authority or within these tight epistemic constraints, such as members of non-state armed groups, are *pro tanto* not entitled to be immune from being prosecuted for taking part

in war. Importantly, both these propositions are defeasible. That is, those who act under the directive of a state authority can be required to disobey if they are ordered to do something which is patently or manifestly impermissible. By contrast, those who cannot rely on any authoritative directive, should be entitled to this type of protection if they are fighting for a war that is patently or manifestly permissible.

This account of combatant privilege has a number of important strengths, as compared with any of the alternatives in the literature. For one, it is based on the type of consideration (individual responsibility) that can precisely account for a protection against prosecution (immunity). Second, it can account for the central features of the existing legal framework, and accommodate most, if not all, of its normatively appealing implications. For instance, it can explain why regular state armed forces have been conferred combatant privilege, but also why this privilege has been also extended to non-state participants in a spontaneous *levée en masse*, or those fighting national liberation wars, or militias acting under the de facto authority of the state. It can even explain why it is acceptable that the requirement to maintain the privilege in these latter cases is less demanding than those imposed on state armed forces. Similarly, this account is able to explain why typically non-state armed groups are not afforded this type of immunity, nor are members of PMSCs or foreign fighters. Finally, the account of privilege developed in this Article provides us with a principled argument to challenge some of the features of the existing law, such as recognizing combatant privilege to state armed forces taking part in manifestly impermissible wars, or prosecuting child soldiers as if they were fully responsible adults. In connecting belligerent equality with notions of agency, responsibility, legitimate authority and the salience of permissible action in war, this Article seeks to bring IHL closer to our most fundamental normative commitments.