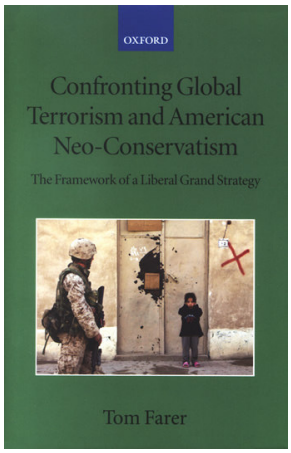

The War on Terror and the Problematique of the War Paradigm

By Dino Kritsiotis

Confronting Global Terrorism and American Neo-Conservatism: The Framework of a Liberal Grand Strategy. By Tom Farer. Oxford, UK: Oxford University Press, 2008.

This volume is not for the faint-of-heart. In Confronting Global Terrorism and American Neo-Conservatism: The Framework of A Liberal Grand Strategy (2008), Tom Farer reaches deep into psyche and soul of "a nation's humanistic culture" (79),[1] and examines the "fateful decision" of the Bush Administration after September 11, 2001, "to pursue its ends unconstrained by conventional interpretations of the applicable law" (82). He argues that "it would strain credulity if someone suggested that [the torture memoranda] were spontaneously generated by mid-level officials" and locates the heart of decision-making in the White House of the Bush Administration who, Farer writes, "requested legal advice both to determine the limits imposed by acts of Congress and the risk of criminal liability particularly for persons not in a position to deny responsibility if they went outside statutory law and their actions became public" (85). There is no mincing of words here, no recoiling from the charges or criticisms made, and it is a process that comes with its unflattering and hard-hitting historical parallels (64). Yet, it is also the case that a strong sense takes hold in Confronting Global Terrorism that the path trodden by the United States in these years need not have been so—that *this* particular democracy need not have compromised its moral standing and its authority, or its commitment to the rule of law.

These sentiments find fitting and frequent expression throughout Confronting Global Terrorism, and, in the sixth and conclusive chapter of the work, they are channeled into a "liberal grand strategy," or "a counter-terror strategy informed by liberal values" (6) and "the deep essence of human rights" (37).[2] Elsewhere, Farer has described this as his "liberal optic."[3] The "first of those

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[1] To elaborate: "For me the humanistic tradition is marked by a transcendent respect for human reason as a means of unending inquiry into the nature of the world and the right conduct of life, by a commitment to defend that search, by respect for knowledge and the layered cultural legacy that every civilization has produced, and by appreciation of the individual as searcher and creator of meanings. The tradition is by its nature cosmopolitan and regards violence and destruction as last resorts to preserve humanistic culture. It tolerates the warrior virtues and war itself only as a means to that end; it does not exalt them. In our age it is formally expressed in international law and, particularly, in the normative body of human rights" (80).

[2] To be distinguished from the "grand strategy of response" to September 11, 2001, of neo-conservatives in the United States, "one that in its very ambition and vision corresponded to the shock and fury of the U.S. public and to its congenital sense that wars should end in glorious, transformative victory" (34). Farer's concentration in this work is on the shaping of neo-conservatism in the United States in response to developments "beyond the country's borders" (29);

elements" associated with his grand strategy, Farer writes, is "to cease thinking and speaking of the terrorist challenge in terms of a 'war'":

> *Calling it "war" associates terrorists with the titanic clash of peoples, history-changing battles, and storied feats of arms by half-mythic figures like the great Muslim general Saladin who defeated the Crusaders by allowing them to achieve a key objective, which is glory and renown. It empowers them psychologically and, by enhancing their stature, it is bound to facilitate their efforts to recruit new members. Moreover, calling it "war" fosters a political environment in the United States supportive of increased investment in military instruments when a central principle of counter-insurgent doctrine, and insurgency is the closest analogy to the present threat, is the primacy of political and economic measures and information operations designed to isolate the violent. Calling it "war" activates what the historian Walter Russell Mead calls [in Special Providence: American Foreign Policy and How It Changed the World (2004)] the "Jacksonian" side of the American foreign policy culture, the side marked by wrath and blind hatred, an impulse to exterminate, a ferocious xenophobia, all-in-all a set of emotions not exactly conducive to the search…for political solutions to grievance that, if aggravated, can give the relatively few terrorists a whole sea of sympathizers in which to hide: empathy, after all, is one of war's first casualties. And calling it "war", and if war it is one that promises to be perpetual, will surely mean that at home we will have fewer freedoms to defend. (237)*

This passage seems to me to be a rich platform for one critique of the work because it contains two core assumptions that relate to other claims made in the volume. Let me identify them. One is the question of nomenclature, of how we go about describing or denominating things: in short, of how we "frame" them (Bai 2005). Though this passage does not articulate it thus, it is fair to say that the act of "calling" (with which the above excerpt commences) can and does occur on dual levels of interaction—the linguistic and the legal. We might wish to call something in terms not appreciated or accepted by others, but one that has no specific legal connotation or consequence (as in the designation of a "catastrophe" or of "tragic circumstances" or even of "imperialism" and "imperial domination" (65)). We might include in this class "a symbolically resonant phrase," a phrase such as the "war on terror," which evokes "the values, interests, identities, and policies that differentiate political factions" (Farer 2008a: 357).[4]

However, our "calling" of something might also occur within the context of an overarching juridical framework and vocabulary, so that what we are doing in fact is actually arguing for a

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for a detailed and enthralling account of developments and social history within the United States, see (Perlstein 2008). See, also, (Farer 2008a: 357-362).

[3] See (Farer 2008) or, as argued in Confronting Global Terrorism, "the optics of law and the moral values embedded in human rights norms (best expressed politically by American liberalism and European social democracy) which constitute a particular way of visualizing human dignity" (132). And, further still, "the idiom of our grand strategy must be the only idiom we have that connects our constitutional values with the values of peoples all over the globe, the idiom of international human rights and international law, the idiom of liberalism" (241).

[4] Farer's reference to a "symbolically resonant phrase" is to that of "human rights," as conscripted by the Democratic Party in the United States as well as by "liberal elites." And which has been pursued with obvious and deep societal connotations: see (Faludi 2007: 13), "We were also enlisted in a symbolic war at home, a war to repair and restore a national myth." "To the old rap sheet of feminist crimes—man hating, dogmatism, humorlessness—was added a new 'wartime' indictment: feminism was treason." See (Faludi 2007: 22).

particular legal appreciation of events, of the designation of a specific legal *condition*—something that might affect the status of the parties, or their interests, entitlements and obligations, or even the outcome of a given dispute (*e.g.* torture (98); "summary executions" (27) or, *pace* Art. 6 of the 1966 International Covenant on Civil and Political Rights, the arbitrary deprivation of life or an "armed attack" under the law of the United Nations Charter (46-48; 63)).[5] This exercise leads us to the second assumption—an assumption that is hard at work in these pages—and that relates to the freedom that parties must possess in order to be able to "call" things in one direction or another.[6] Implicit in the reasoning of the passage we have cited is the claim that the United States had such a freedom in its hands, as it were, when it invoked "war" as the organizing concept of its response to the events of September 11, 2001.

At the linguistic level, the choice of waging a "war on terror" reflected the exercise of this freedom, even though hindsight has made certain members of the Bush Administration question the full utility and appeal of this term.[7] That must be contrasted with the *extent* of the freedom to determine the legal relationship between the United States and al-Qaeda as "war" because, as Farer himself posited in a separate but related context a generation or so ago now, it must be open to serious question whether a "choice" of this order can still be "entrusted exclusively to national whim" (Farer 1971: 39). Farer made that point in his assessment of common Art. 2 of the 1949 Geneva Conventions—a provision common to all four Conventions because it ordained the circumstances of their application—and it is instructive to return to, and engage the precise details of, this provision which makes abundantly clear that *war* is no longer the trigger mechanism for the rules of warfare. "War" remains a condition known to international law, it is true (Greenwood 1987), but common Art. 2 ensures that it is subsumed as part of a much broader normative phenomenon—that of an international armed conflict: the Conventions announce that they "shall apply to all cases of declared war *or any other armed conflict which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them" (emphasis supplied). This formulation should therefore be critical to the parameters of the debate that has ensued since

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[5] Though Farer oscillates between terminologies, after an important discussion on the scope of an "armed attack" (46-48), he appears to regard the prompt for the right of self-defense as an "act of war" (55)—when that term might be considered to be somewhat broader than the notion of an "armed attack" ("Today [an 'act of war'] is used to describe all military operations, including those (such as the announcement of a blockade) which involve the threat of force, once the parties are in armed conflict" (Greenwood 1995: 49-50)).

[6] So the United States had no actual freedom to deny that it had used force against Afghanistan in October 2001, its "open military intervention" (85) was evident and plain for the world to see, and so it sought refuge in that justification for the use of force that is known as self-defense. Here, as the Security Council intimated with its Resolution 1268 of September 12, 2001, it had more plausible lines of argument, though an essential strength of Farer's work is his dissection—apart from these freedoms accorded by international law—of considerations relating to operational necessity and the (politically) desirable (85).

[7] Doubts did surface *within* the Administration as to the most appropriate "catchphrase of choice." See (Schmitt and Shanker 2005). President George W. Bush stood firm over alternative nomenclatures (such as the "global struggle against violent extremism" advocated by Defense Secretary Donald H. Rumsfeld, amongst others (Stevenson 2006)). In more recent times, note the efforts of the Bush Administration to secure affirmation and acknowledgment from the United States Congress that "again and explicitly…this nation remains engaged in an armed conflict with Al Qaeda, the Taliban, and associated organizations, who have already proclaimed themselves at war with us and who are dedicated to the slaughter of Americans" (Lichtblau 2008). Farer addresses the monumental ambiguities that surround the concept of terror (and all of its derivatives) as a matter of law. See the discussion of the question of State terrorism (28).

September 11, 2001: in introducing the paradigm of an *international armed conflict*,[8] the Conventions articulate in no uncertain terms that the law no longer confines its rules of warfare to occurrences of *war*—no more and no less than it does not discriminate between international armed conflicts of high or "low-intensity" (54).

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The purpose of this conceptual shift from war to armed conflict in August 1949 is well-rehearsed and it is well-known; it was to avoid technical denials that a "state of war" had come into existence and, at least as the authoritative International Committee of the Red Cross Commentary on common Art. 2 is concerned, "[t]he occurrence of *de facto* hostilities" is what is now "sufficient" to trigger the application of the rules of warfare (de Preux 1952: 23). The purpose, then, was to enhance the scope of application of *these* rules; it was to relax the circumstances that would make them relevant in the real world. We might want to question whether a certain *quantum* of violence is or ought to be required in order to satiate common Art. 2,[9] but, whatever position is held on this matter,[10] it is the case that the provision is much more explicit than antecedent formulations that this violence must occur between "High Contracting Parties." In regard of this stipulation, it might be thought that the overall freedom which States have to determine whether the Conventions are applicable to their relationship with non-State actors such as al-Qaeda is very much enhanced, for here, we are confronted with "[n]ot a State" and "[n]ot even an organization, if one thinks in terms of some entity with vertical lines of authority and responsibility" (2):

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[8] The qualification of the armed conflict as one of "international" character is important, given the juxtaposition of common Art. 2 with common Art. 3 in the Geneva Conventions—a provision that is unique in contrast to common Art. 2 since it makes the sole provision of common Art. 3 (rather than the Conventions as a whole) applicable "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." See (Roberts and Guelff 2000: 245).

[9] See (Levie 1988). According to the Commentary, however, "Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Art. 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Art. 4. *Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application.* The number of persons captured in such circumstances is, of course immaterial (emphasis supplied). See (de Preux 1952: 23). Evidently, this position takes a decidedly functional approach to the circumstances in which the Conventions become applicable as a matter of law.

[10] No such threshold is in fact articulated in common Art. 2 itself—or, indeed, in common Art. 3, *supra* note 8. Compare, however, Art. 1 (1) of the Second Additional Protocol of June 1977: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party *between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*" (emphasis supplied). See (Roberts and Guelff 2000: 484). Note that, in the *Tadic* judgment of October 2, 1995, the notion of a "protracted armed violence" was pressed into service for non-international armed conflicts, i.e. "between governmental authorities and organized armed groups or between such groups within a State." See (*Prosecutor v. Dusko Tadic* 1996: §70).

> *Rather, in al Qaeda, we seem to have a shifting cluster of self-starting grouplets, in loose association, answerable finally to themselves, drawing inspiration, perhaps, from the iconic personality of Osama bin Laden, bonded by a particular interpretation of the Islamic faith, by a narrative of redeemable humiliation, and by a perceived enemy. Having no authoritative leader, the phenomenon is immune to decapitation. Having no territorial base, it is immune to deterrence, for there is nowhere to send the deterring promise of massive retaliation and there are no critical capital investments at risk. Being nowhere, it could be anywhere. (2)*[11]

While it is clear that this ingredient of High Contracting Parties in common Art. 2 serves as an important qualification on the *meaning* of an international armed conflict as far as the Geneva Conventions are concerned,[12] it should be apparent that our construction of all the facts of a given instance will very much shape the decision as to whether the Conventions are, or ought to be, applicable from a certain point in time. It would matter, for example, where it is in the world that the United States finds, or targets, one of these "self-starting grouplets" professing allegiance to al-Qaeda; it is almost as if common Art. 2 requires us to contextualize the operations of al-Qaeda in terms of statist geography and politics. As far as the above passage is concerned, a certain phenomenon or perpetrator of violence is identified, but nothing more is supplied: we are not told of the specifics of each situation where al-Qaeda personnel have been engaged by the United States. We cannot therefore assume that the belligerent relationship between the United States and al-Qaeda has occurred free of all other contexts, free of all other realities. We might find, for example, that al-Qaeda has operated from a State such as Afghanistan that is at one with its ambitions and methods (48),[13] or it could be that a State is resistant to,[14] and perhaps even unaware of, the presence of al-Qaeda on its territory (77). There is also the possibility, of course, that developments occur outside the space of any of the other High Contracting Parties, where, for example, one of al-Qaeda's "grouplets" is located at some point on the high seas aboard a ship "flying no national flag" (76).

These examples are all rallied to powerful effect in Farer's commanding synthesis, but are done so more as part of his assessment of the entitlements states have under the *jus ad bellum* than under the *jus in bello*. Yet, their relevance for the *application* of the Geneva Conventions might have been tested and mapped out a touch further in this work, for these differing factual configurations might well lead to separate appreciations of whether an "international armed conflict" has come into being in relation to al-Qaeda in a given situation—or not.[15] This line of thinking, it seems to me, is

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[11] See, further, the excellent historical expositions of (Wright 2006). See, also, (Bobbitt 2008: 125; 128).

[12] See, further, the invocation of the State in Farer's assessment of the scope of the right of self-defense against "Libyan-organized attacks on U.S. installations and personnel" (54). Were it otherwise, and common Art. 2 of the Geneva Conventions specifically encompassed the actions of non-State actors, there would have been no need for the Bush Administration to declare such a "war on terror"—because declared wars continue to come within the framework of an international armed conflict as announced in common Art. 2 of the Conventions, and Osama bin Laden declared war on the United States in August 1996 ("Declaration of War Against the Americans Occupying the Land of the Two Holy Places"). See (Bobbitt 2008: 126).

[13] Or, in a felicitous turn of phrase by Farer, "whether by the State itself or by terrorists it might enable" (48).

[14] Consider, for instance, the position of Yemen (Printer 2003). However, we must enquire whether the consent of that other State was forthcoming for the use of force in question (Pincus 2002).

[15] As in the "close and respectful cooperation with other states and peoples" which Farer advocates, "at considerable

much more at one with the dispensation of the Geneva Conventions than what Farer describes (in a beautiful turn-of-phrase) as "simply folding Afghanistan into a generalized war against terrorism" (87), an approach that "could arguably legitimate targeted killing of al-Qaeda operatives all over the world, not simply in Western Asia" (87). One does wonder, though, whether the Bush Administration gave unremitting pursuit to this thought even if it had entertained it—whether, in its pleading, a "war on terror" initiated on one continent could then be sustained on all others by virtue of that status or designation. This reasoning would have suggested an interpretation of the *jus in bello* as the magical begetter of entitlements under the *jus ad bellum*, but what is important and interesting to note from the historical record is how the Bush Administration viewed each of these fronts in its "war on terror" as discrete episodes under international law—and that it went on to argue them as such under the *jus ad bellum*.[16] These arguments have taken different forms to be sure,[17] from the activation of the right of self-defense (Afghanistan) to the consent of the targeted State (Yemen) and the authorization of the Security Council (Iraq), acts of official justification that would have been rendered unnecessary if the belief was held that the "war on terror" served as a source of ongoing or perpetual legitimation.[18]

The upshot of this discussion is to emphasize the statist context in which al-Qaeda exists and undertakes it operations. It is for us to pay close heed to the full nature of the *modus operandi* of al-Qaeda, but also to the broader context in which its relationship with the United States has evolved. One can discern elements of this approach in the construction awarded to an *international armed conflict* in the Appeals Chamber of the International Criminal Tribunal in the Former Yugoslavia, when it said that "[i]nternational humanitarian law applies from the initiation of such [i.e. international] armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply *in the whole territory of the warring States* or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[19] At the same time, we cannot afford to elide the fact that the

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expense, and with a mix of means unlike the mix required to wage inter-state wars" (237).

[16] As Farer himself does in distinguishing between "each attack [against Americans] that can be fairly seen as analogous to a 'battle' in an ongoing war [and which] may be renewed at any time" by a terrorist group—and a situation in which that group has secured and plans to use weapons of mass destruction: see (Farer 2008b). Consider, however, the relevance of this consideration to overt as opposed to covert actions. See (Schmitt and Mazzetti 2008a).

[17] Arguments that have been very specific to the state targeted for intervention, and to its relationship with al-Qaeda—although here, as in other things, there have been realms of inconsistency. Here is President George W. Bush speaking on March 20, 2006: "I don't think we ever said—at least I know I didn't say that there was a direct connection between September 11th and Saddam Hussein. We did say that he was a state sponsor of terror—by the way, not declared a state sponsor of terror by me, but declared by other administrations. We also did say that Zarqawi, the man who is now wreaking havoc and killing innocent life, was in Iraq. And so the state sponsor of terror was a declaration by a previous administration. But I don't want to be argumentative, but I was very careful never to say that Saddam Hussein ordered the attacks on America" (Bush 2006).

[18] And made all the more clear from the various stances of the Bush Administration (including the right of hot pursuit) regarding its use of force *within* Pakistan (Shah, Schmitt and Perlez 2008). See, also, (Filkins 2008). As this article was being prepared for press, it was reported that, in July 2008, President Bush had approved orders for American Special Operations Forces to undertake ground assaults in Pakistan without the prior approval of the Government of Pakistan see (Schmitt and Mazzetti 2008).

[19] See (*Prosecutor v. Dusko Tadic* 1996: §70).

Geneva Conventions envisage a broad church of combatant actors on the field of an international armed conflict—on those who partake in hostilities. Note that, although common Art. 2 of the Conventions insists on an international armed conflict *as between* High Contracting Parties, Art. 4 of Geneva Convention (III) Relative to the Treatment of Prisoners of War does not limit the question of participation to regular combatants, combatants who are acting for their respective High Contracting Parties. This is made apparent from the inventory of combatants contained in Art. 4 of Geneva Convention (III)—which, alongside "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteers corps forming part of such armed forces" in Art. 4 (A) (1), mentions in Art. 4 (A) (2):

> *[m]embers of other militias and members of other volunteers corps, including those of organized resistance movements, belonging to a Party to the conflict and operation in or outside their own territory, even if this territory is occupied, provided that such militias or volunteers corps, including such organized resistance movements, fulfill the following conditions: (a) [t]hat of being commanded by a person responsible for his subordinates; (b) [t]hat of having a fixed distinctive sign recognizable at a distance; (c) [t]hat of carrying arms openly [and] (d) [t]hat of conducting their operations in accordance with the laws and customs of war.*[20]

Further corroboration of this stylization of hostilities might be obtained if we set this arrangement of August 1949 against Art. 1 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land,[21] which made no distinction between "regular" and "irregular" forces; and it is an approach that we see consolidated and developed when we turn to Art. 44 (3) of the First Additional Protocol of June 1977 (which standardizes the criteria for lawful combatant status irrespective of one's membership of regular or irregular formations).[22]

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[20] Though one must admit the possible complication that might arise from Art. 4 (A) (2)'s reference to the "belonging to a Party to the conflict" as an inference to the State. However, on this point, consider (Mallison and Mallison 1977: 55): "If they do 'belong' in such a meaning, they are no longer irregular forces under Art. 4 (A) (2) but are regular militias or volunteer corps under Art. 4 (A) (1) [of the 1949 Geneva Convention (III)]".

[21] Regarding "not only armies, but … militia and volunteer corps fulfilling the following conditions: 1. [t]o be commanded by a person responsible for his subordinates; 2. [t]o have a fixed distinctive emblem recognizable at a distance; 3. [t]o carry arms openly; and 4. [t]o conduct their operations in accordance with the laws and customs of war." See (Roberts and Guelff 2000: 73).

[22] Under the requirements of the Protocol, "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack," but Art. 44 (3) goes on to provide that "there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate." See (Roberts and Guelff 2000: 444-445).

Part of this resistance to the "war" paradigm that appears in Confronting Global Terrorism (237) must stem from the understanding that it develops of how the Geneva Conventions work or are intended to work in practice. That is an understanding that makes no equivocations—to be sure—of the importance of the canon of human rights in the normative architecture for warfare, notwithstanding the much later pedigree of this canon when compared with its humanitarian counterpart (i.e. the *jus in bello*). "What distinguishes the idea of human rights from earlier normative declarations concerning rights and human dignity is precisely its comprehensiveness in time and space. The rights adhere to people by virtue of their being born rather than being Englishmen or Christians or persons at different levels of the feudal hierarchy" (81). Nevertheless, it is also an understanding that appears to admit all combatants as prisoners-of-war under Geneva Convention (III)—or, in default of this classification, as "civilians" for the purposes of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War.[23]

Farer credits the Bush Administration with the development of a "third category of persons" beyond the dichotomization of the Conventions (91), those who were neither prisoners-of-war nor civilians under the Conventions and thus not entitled to any of their respective protections.[24] It has become common currency to view this interpretation of the Conventions as innovative—it is indeed undeniable that the Bush Administration has pedaled and made much of the notion of "enemy combatants" in its so-called "war on terror" (238)[25]—and, it seems to me, it is right to question what *legal* value can be obtained from promulgating such a designation: all combatants, after all, are *enemy combatants* depending on what position or perspective they are viewed from on the battlefield. Yet, it is a question worth asking after given the broader historical sweep of the Conventions (and, now, of course, the First Additional Protocol), which might in fact *require* us to distinguish between *lawful* and *unlawful* combatants—this, indeed, is the entire premise behind the concept of prisoners-of-war and the rules for the classification of combatants found in Geneva Convention (III),[26] which occurred

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[23] Pursuant to the interpretation of "the semi-official steward of the Conventions, the widely respected International Committee of the Red Cross" (89). According to Art. 4 of Geneva Convention (IV), "[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" (noted by Farer (90)). In this positive definition, there is a clear sense that the Convention develops of *who* constitutes a "protected person" for the purposes of the Convention; however, the Convention is equally clear who does *not* constitute such a person by the negative definition that appears later in Art. 4: "[p]ersons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention." See (Roberts and Guelff 2000: 302-303). Consider, however, Farer's later appreciation of the function of the Fourth Geneva Convention to "offer[] some floor for the population of the occupied territory to prevent their sinking into an abyss of rightlessness" (197).

[24] "On the theory that persons arrested for being parts of the terrorists conspiracy against the United States are, by definition, *unlawful combatants unprotected by the Geneva Conventions*, the President also claims the right to have such persons tried by military commissions created for this purpose rather than by civilian courts or courts martial under the Uniform Code of Military Justice" (125) (emphasis supplied).

[25] For an earlier circulation of the term, see, however, the ruling of the United States Supreme Court in *ex parte Quirin* in July 1942 (See also footnote 30 below).

[26] Art. 4 of Geneva Convention (III) developed the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (Arts. 1–3), itself invoked in Art. 1 (1) of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War. Art. 1 (2) further provided that, in addition "[t]o all persons referred to in Arts. 1,

within a tradition of the branding of unlawful combatants alongside lawful combatants (Dörmann 2003) (one can and should think here of the spy (Arts. 29–31 of 1907 Hague Regulations; Art. 46 of the First Additional Protocol) and the mercenary (Art. 47 of the First Additional Protocol) (Baxter 1951)).

It matters, then, how we go about making this distinction, and Farer proceeds to unpack the "dry lawyer's language" of Art. 4 of Geneva Convention (III) to argue against the incorporation of any of the criteria leveled for irregular forces in Art. 4 (A) (2) of the Convention for regular forces (in Art. 4 (A) (1) of the Convention) (91).[27] The Convention thus means what it says, as Farer concentrates on the wearing of "distinctive uniforms" (91) by regular forces and on their compliance with the laws and customs of war (92): "[t]he units of a regular army engaged in large-scale combat, armed with rockets and cannon, are pretty easy to distinguish from the general population whether or not they wear uniforms" (91). At 92–93:

> *In a large-scale conflict, some individuals and possibly whole units on each side may commit grave breaches, giving no quarter, killing prisoners when they become burdensome, or torturing them for information or for pleasure. Determining whether the delinquencies of some units should be imputed to all can be a complicated question, one unlikely to be resolved in favor of the captured in the middle of a bloody war. Arguably more humane outcomes will result from a bright-line rule that imputes POW status to all regular forces and then with due deliberation the captors can single out for prosecution those individuals who have committed grave breaches, for they are most certainly not immunized by POW status from severe punishment.*

The invocation of "distinctive uniforms" in this context is intriguing, given that the relevant rule for irregular forces in Art. 4 (A) (2) of Geneva Convention (III)) concerns a "fixed distinctive sign recognizable at a distance"; there is no provision made for the wearing of uniforms in this formulation,[28] and Farer is right to sense and reject this pastiche of the Bush Administration for differentiation from the civilian population can indeed be achieved *via* a multitude of means. (Note that Art. 44 (7) of the 1977 First Additional Protocol acknowledges "the generally accepted practice of States"—not the *universal* practice of States—"with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict" (Roberts and Guelff 2000: 445)). Uniforms can of course be important for members of regular armed forces if there is no other "fixed distinctive sign recognizable at a distance," as the four petitioners in *ex parte Quirin* discovered after landing at Amagansett Beach on Long Island, New York, in June 1942:

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2 and 3 of the Regulations annexed to the Hague Convention (IV) of 18 Oct. 1907," the Convention would also be applicable to "all persons belonging to the armed forces of belligerents who are captured by the enemy in the course of operations of maritime or aerial war, subject to such exceptions (derogations) as the conditions of such capture render inevitable. Nevertheless these exceptions shall not infringe the fundamental principles of the present Convention; they shall cease from the moment when the captured persons shall have reached a prisoners of war camp.

[27] See footnote 20 above.

[28] Or, indeed, under the arrangement of the First Additional Protocol—which, once it announces its principle of distinction from the civilian population in Art. 44 (3) (see footnote 22 above), does not become prescriptive as to how this might be obliged. This aspect of this provision has been regarded as a statement of customary international law: Rule 106 announces in part that "[c]ombatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack." See (Henckaerts 2005: 207).

> *Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.*[29]

This reasoning suggests that prisoner-of-war status for regular armed forces cannot be taken for granted and is revocable—that it is dependent on one of a series of unspoken assumptions the law makes so that the *presumption* of prisoner-of-war status for regular armed forces can be rebutted if these conditions are displaced or go unfulfilled.[30] So ruled the Federal Court of Singapore in October 1966, when faced with "a regular combatant who chooses to divest himself of his most distinctive characteristic, his uniform, for the purpose of spying or of sabotage thereby forfeits his right on capture to be treated as other soldiers would be treated i.e. as a prisoner of war,"[31] and it would have been good to have had some recitation of these and related authorities—of the same order we find accorded to torture under the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (105–107).[32] (The jurisprudence is not limited to the donning of uniforms, it must be said. In *Mohamed Ali and Another v. Public Prosecutor*, in July 1968, the Judicial Committee of the Privy Council considered whether members of the Indonesian armed forces "forfeited their rights under the Convention by engaging in sabotage in civilians clothes," but it hinted at the prospect of forfeiture of these rights "by breach of the laws and customs of war by their attack on a non-military building in which there were civilians").[33]

Having made this distinction, it matters, then, what is to become of the unlawful combatant—and we need to get beneath the claim that such combatants are "unprotected" as a matter of law (125), even accepting this dichotomization between lawful and unlawful combatants Can this actually be so? Or are we to treat them, as Farer maintains (89), in the same breath as civilians under Geneva Convention (IV)?[34] Here, a temporal consideration needs to be injected into

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[29] (See *Ex parte Quirin* 1942: 20–36): "The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City". In defense of its position, the Supreme Court made citations of Winthrop 1920:1196–1197, 1219–1221; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V.

[30] A formulation I owe to Professor Christopher J. Greenwood during his lectures at the University of Cambridge in the 1992 Lent Term.

[31] See (*Stanislaus Krofan* 1979) (regarding an armed conflict between Indonesia and Malaysia, on the assumption that the appellants in the case "were members of the armed forces of Indonesia, that they entered Singapore as saboteurs to commit acts of sabotage").

[32] Note, though, Farer's defense of this emphasis on torture (122). *Quaere* whether the law offers a generic treatment or understanding of torture—of whether its conceptualization divides between war (armed conflict)/peace lines: see (Sivakumaran 2005).

[33] See (*Mohamed Ali* 1968).

[34] See footnote 23 above. Note, however, the important qualifications entered to this position in (Dörmann 2005: 48–58).

our deliberations for, while the Privy Council concluded in *Mohamed Ali* that "[i]nternational law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents,"[35] what might have been the position at an one point in time might in fact be no more. We know this because of the "fundamental guarantees" articulated in Art. 75 of the First Additional Protocol,[36] guarantees that the United States has accepted as reflections of custom.[37] The

[35] See footnote 33 above.

[36] And whose contents are deserving of comprehensive study:

> 1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honor, convictions and religious practices of all such persons.
> 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
>
> (a) Violence to the life, health, or physical or mental well-being of persons, in particular:
>
> (i) Murder;
> (ii) Torture of all kinds, whether physical or mental;
> (iii) Corporal punishment; and
> (iv) Mutilation;
>
> (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
> (c) The taking of hostages;
> (d) Collective punishments; and
> (e) Threats to commit any of the foregoing acts.
>
> 3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
>
> (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
> (b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
> (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
> (d) Anyone charged with an offence is presumed innocent until proved guilt according to law;
> (e) Anyone charged with an offence shall have the right to be tried in his presence;
> (f) No one shall be compelled to testify against himself or to confess guilt;
> (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a

provision is significant because of the scope of its addressees ("persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol") and the nature of its protections, which somehow seem wholly germane to current circumstance ("[p]ersons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict") and which are neither tailored to, nor made conditional upon, considerations of military necessity or political expediency.[38] In addition, we might argue that Art. 75 is itself a testament to the diffuse and sublime influences of human rights thinking; that the protections bestowed as a matter of humanitarian warfare are not just a product of the attainment of a certain type of classification scheme or status, but can also result from the fact of a person "being born" *pace* Farer (81)—that is, by virtue of their humanity.[39] Importantly, it is around the nucleus of Art. 75—or, more properly, its customary incarnation—that the more recent attentions of the Bush Administration have been focused, due in no small measure to the efforts of John B. Bellinger III, the legal advisor of the Department of State (Barnes 2008).

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final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) Any such persons who do not benefit from more favorable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favorable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

[37] See (Taft 2003: 322): "While the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Art. 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.". On the broader empirical support for this proposition, consider (Hampson 2007).

[38] As intimated by President Bush in February 2002 (101). See, further, Office of the Press Secretary of the White House: Fact Sheet Status of Detainees at Guantanamo (2002): "The United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949." Curiously, no mention is made here of Art. 75 of the First Additional Protocol.

[39] See (Meron 2000). Hence the overarching stipulation of Art. 75 (1), that such persons "shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honor, convictions and religious practices of all such persons."

* * *

Reading Confronting Global Terrorism reminds us just how much of an exercise in the interpretation of treaties the "war on terror" has actually been and become, and how this exercise has traversed states as well as international institutions in their bids for persuasion and for "the dignified language of officialdom" (123). Farer's clever and compelling excursus rides a further thematic current, and that is the constant division it draws between liberal democracies and other states—how different the human rights demands are in these respective polities,[40] the nuances developed around terrorism in democratic States,[41] and how democracies regard hostilities in relation to one another (36; 75). To this, we might also add the tremendous sense of *expectation* that accompanies how liberal democracies comport themselves during warfare as well as in states of emergency (127),[42] a sense of expectation that is as great as it is enduring, and we come to fully appreciate why perpendiculars are run in this work between the Bush Administration's "war on terror" and the "iconic conflict" that has engulfed Israelis and Palestinians (the subject of the engrossing penultimate chapter of the book).[43] It is a sentiment that seems most boldly captured in recent times with the reflection that Senator Barack Obama made in August 2008 as he accepted the Democratic nomination for the Presidency of the United States, that "people have always been more impressed by the power of our example, than by the example of our power" (*Guardian*: 2008).

This is a crucial perspective to bring to bear on the "neo-conservative" elements of the thesis that Farer advances—of "the will of a right-wing Republican Administration" in contradistinction to "its Democratic predecessor" (85)—since, it will be recalled, the Bush Administration has not always acted alone in its engagements; instead, it has found a willing partner and co-participant in the "normally compliant" Prime Minister Tony Blair of the United Kingdom (242)—a premier who hailed from the left side of the political divide, from the British Labour Party. What imperatives impelled him to act thus are difficult to configure to be sure,[44] but it is not inconceivable that he saw opportunities good enough in these passings to exorcise perceptions of his Party's weakness on national security affairs and to acquit it favorably for the longer term.[45] The same specter might well

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[40] Compare the Islamic treatment of women and the criminalization of conversion in *Sharia* States like Iran and Saudi Arabia (13).

[41] Where "the definition [of terrorism] [was] expanded to incorporate politically motivated violence of any kind, including attacks on military and police targets. American officials have, moreover, labeled attacks on American armed forces, such as bombings of U.S. military facilities in the Middle East and of the *U.S.S. Cole*, a warship, as terrorism" (18).

[42] For a much fuller treatment of this particular point, see (Gross & Ní Aoláin 2006).

[43] Of course, amongst other considerations: "Since Israel is a rich, well-integrated state with powerful conventional and nuclear-armed forces utterly superior to those of its neighbors, while the Palestinians are a fractured community with a rag-bag of ill-armed, mutually antagonistic militias and a nominal, insolvent government lacking sovereignty much less true operational control over a single hectare of land, it is hard to envision more unequal parties to a negotiation. How is it possible, then, to negotiate an agreement that will be seen as a just, i.e. a 'legitimate' outcome?" (174).

[44] See, generally, (Naughtie 2004); perhaps with a view to influencing the greater conflict raging in the Middle East (242).

[45] As the book nears its end, Farer becomes quite masterful in his deployment of the possibilities of the "idiosyncratic" politician or political operator (247)—the politician or operator who trades places or is seen to trade places, as in the

hover over and haunt an incoming Democratic administration in Washington D.C. in January 2009,[46] so that Farer's remonstration for "grace under pressure" (79) for the world's most powerful democracy serves as much an inspiration for the critique he has shared with us in Confronting Global Terrorism as it does a clarion call for vigilance and for action in the years that lie ahead. To that end, the virtues of international law shine through time and again in this powerful and provocative volume; its "norms are the historical moment's synthesis of ideas and justness and shared national interests that, unlike the Bible or the Koran or any other text commanding the loyalty of only one community, transcends the fault lines of culture and faith" (174). And, for the good of the world, may it be so.

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"Right-wing appeasers" of the Nazi period who make an appearance in Kazuo Ishiguro, Remains of the Day (1990) (232), and in "the episodically triumphant Victorian Conservative leader" of Benjamin Disraeli (247).

[46] On the campaign trail during the 2008 Presidential Election, Senator Barack Obama threatened Pakistan with the use of force in order to strike al-Qaeda bases on its territory—and claimed that, as President, he would act against Pakistan without its consent. See (MacAskill 2007). Note, also, that in April 2008, Senator Hillary Clinton, Senator Obama's main rival for the Democratic nomination, announced that, with her as President, the United States would undertake a nuclear attack and "totally obliterate" Iran in the event of an attack upon Israel: see (MacAskill 2008). "Language," her main contender for the nomination, Senator Barack Obama, said was "reflective of George Bush." See, also, (Pilkington 2008).

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