

2004

Protective Parity and the Law of War

Derek Jinks

Follow this and additional works at: [https://chicagounbound.uchicago.edu/
public_law_and_legal_theory](https://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

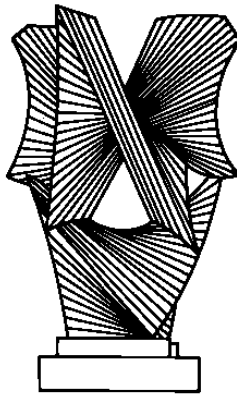
Recommended Citation

Derek Jinks, "Protective Parity and the Law of War" (University of Chicago Public Law & Legal Theory Working Paper No. 64, 2004).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 64



PROTECTIVE PARITY AND THE LAWS OF WAR

Derek Jinks

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

Forthcoming, 79 *Notre Dame Law Review* 2004
June 2004

This paper can be downloaded without charge at
<http://www.law.uchicago.edu/academics/publiclaw/index.html>

Protective Parity and the Laws of War

Derek Jinks[†]

Forthcoming, 79 NOTRE DAME LAW REVIEW (2004)

Traditionally, protective schemes in the laws of war are tightly coupled to rigid status categories.¹ The contours of these status categories (and the content of corresponding protective schemes) reflect the dual normative commitments of this body of law: military necessity and humanitarianism. Formal protection varies along a number of axes (including combatant status, nationality, territory, and the character of the conflict) because it is thought that these factors roughly track the vulnerability of and the security challenges posed by specific status groups. In early law of war treaties, specific status categories are defined in terms that

[†] Visiting Professor of Law, University of Chicago Law School; Associate Professor of Law, Designate, Arizona State University College of Law. Thanks to William Bradford, Adam Cox, Jack Goldsmith, Ryan Goodman, Harold Hongju Koh, Jordan Paust, Eric Posner, Kal Raustiala, Adrian Vermeule, and John Yoo for helpful comments. Thanks also to participants at faculty workshops at the University of Chicago Law School and Arizona State University College of Law.

¹ The “laws of war” encompass two distinct bodies of rules: the *jus ad bellum*—rules governing when uses of force are lawful; and the *jus in bello*—rules governing the conduct of war. “International humanitarian law” refers to the corpus of *jus in bello* (and perhaps some rules—such as the prohibitions on “genocide” and “crimes against humanity”—formally outside the *jus in bello*). The *jus in bello* itself has two principal subdivisions: “Geneva law” and “Hague law.” Geneva law, embodied principally in the four 1949 Geneva Conventions and the two 1977 Additional Protocols, prescribes an extensive body of detailed rules governing the treatment of the victims of armed conflict. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III or GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV or GC]. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. Hague law, embodied principally in the 1899 and 1907 Hague Conventions, govern the means and methods of warfare, tactics and the general conduct of hostilities. See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (Hague Regulations are annexed to the Convention) [hereinafter Hague Regulations or Hague Convention].

encourage protection-seeking states (and at times individuals) to orient their behavior in ways that promote the objectives of humanitarian law. Protection, in these treaties, is a carrot for rule-regarding behavior—harsh, summary treatment at the hands of the enemy, the stick. Such an approach, by design, includes coverage gaps.

Beginning with the 1949 Geneva Conventions, this understanding of status has been in decline. Over the last half century, protective schemes have converged and coverage gaps have closed. From the “human rights” perspective, these developments are all to the good. The “humanization of humanitarian law” reflects the progressive trajectory of international law in which universal human rights trump parochial state interests.² From the “traditionalist” perspective, the law of war has lost its compass. Protection of unlawful combatants (1) undermines the humanitarian ambitions of the law of war by compromising the protection of innocent civilians; and (2) undermines political and institutional support for the law of war by imposing on states obligations that are inconsistent with various security imperatives. Both views are flawed. Protection should, contra the “human rights” view, accommodate the realities of the battlefield. On the other hand, humane treatment of the enemy, irrespective of pre-capture conduct, furthers the military objectives of the capturing state.

My argument is that humanitarian protection in time of war should not vary by detainee status category—what I will call “protective parity.” The paper has a descriptive and a prescriptive dimension. Through an analysis of the legal situation of unlawful combatants, I illustrate that (1) protective schemes are converging; and (2) although the protective significance of POW status is declining, there are some persistent gaps in coverage.

The unique protective significance of POW status (and the claims that justify this extra increment of protection) suggests that POWs are systematically over-protected (even if only to a modest extent) and unlawful combatants are systematically under-protected. To make this case, I offer a cluster of offensive claims and one defensive claim. On the offensive side, I argue that various claims for expanding or contracting humanitarian protection do not track status categories. In this way, the claims that undergird these ostensibly competing schools of thought support “protective parity.” Consider the following related points. If protective schemes compromise legitimate security interests (think of the policy arguments advanced by the United States to justify its treatment of the detainees in Cuba), then some status categories (e.g., POWs) are systematically

² See Theodor Meron, *The Humanization of Humanitarian Law*, 96 AMER. J. INT’L L. (2000).

over-protected. That is, these security-based claims, if valid, would apply irrespective of whether the detainees were properly classified as POWs or not. If humane treatment of the enemy increases battlefield effectiveness (because poor treatment discourages surrender, encourages reprisals, decreases troop morale, and decreases political support for the war effort), then some status categories (e.g., unlawful combatants) are systematically under-protected.

On the defensive side, I argue that “protective parity” is consistent with the principle of distinction. Even if “irregularization” undermines distinction, the question is how best to encourage fighters to distinguish themselves from the civilian population. I maintain that protective status categories are an inefficient way to incentivize individual combatants because these categories necessarily trade on collective considerations—such as the organizational characteristics of the fighting force. The rule of distinction would be better served by an individualized “war crimes” approach that accorded all fighters substantial humanitarian protection and punished (in accord with basic requirements of due process) individual bad actors.

I. THE TRADITIONAL ROLE OF STATUS CATEGORIES IN THE LAW OF WAR

Individual status categories have played an important role in the laws of war. The scope and content of protective schemes have traditionally turned on whether affected persons are properly classified as “combatants,” “non-combatants,” “prisoners of war,” or “civilians.” Why this is so requires some explanation. The *jus in bello* governs the conduct of war (rather than the legality or legitimacy of the war itself); and is, in this sense, a second-best humanitarianism. Its rules promote humanitarian values within a context most inhospitable to such values: large scale, organized hostilities. Given this limitation, the law of war seeks to define and eliminate “unnecessary” suffering (and devastation) in time of war. Three types of rules promote this objective: (1) rules governing who and what may be attacked; (2) rules governing the means and methods used in executing lawful attacks; and (3) rules governing the treatment of persons subject to the authority of the enemy (e.g., persons captured and detained in time of war). Status categories play a central (though somewhat different) role all three regimes.

Type-1 rules build on a distinction between military targets and civilian targets—only the former may be made the object of an attack.³ Therefore, persons

³ See, e.g., Protocol I, *supra* note ____, arts. 49-50; see also JUDITH GAIL GARDAM, *NONCOMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW* (1993).

properly classified as “civilians” enjoy “non-combatant immunity” from attack.⁴ This is not to say that any attack resulting in the death of civilians is unlawful—the law prohibits directing attacks against civilians as such.

Type-2 rules, in part, build on the distinction between military and civilian targets—prohibiting means and methods that cause death and destruction disproportionate to the concrete military advantage issuing from the attack.⁵ Once again, the objectives of the law of war (and the interests it seeks to protect) require categorization of targets (including persons)—targets are assigned a status that determines the scope and content of protection accorded that potential target.

Type-3 rules are similar in some respects but also importantly different. These rules, embodied principally in the 1949 Geneva Conventions and their protocols, protect persons no longer participating in the hostilities who have been made subject to the authority of the enemy.⁶ For example, the prisoner-of-war Convention protects persons captured and detained by the enemy.⁷ Given the scope of their application, these rules (as a conceptual matter) do not rely upon the distinction between “military” and “civilian.” Nevertheless, these rules do apportion humanitarian protection along rigid status categories. Each treaty defines, with some precision, the categories of persons protected by it. Why this is so is less clear. Protection is apportioned across status categories even though the distinctions between these categories do not directly serve the objectives of Geneva law. These status categories—most importantly, “prisoner of war” and “civilian”—are defined so as to incentivize various actors (collective and individual) to promote the overall policy objectives of the law of war. That is, protection is offered as a carrot to encourage rule-regarding and rule-promoting conduct at the organizational and individual level. The protection accorded by Type-3 rules (Geneva law) is extended as a carrot to induce behavior that promotes the objectives of Type-1 and Type-2 rules (Hague law).

This point requires some clarification. Consider type-1 rules in more detail. The law of war requires that attacks be directed only against valid military targets. Therefore, no attack may be directed against civilians or civilian

⁴ See, e.g., Protocol I, *supra* note ____, arts. 49-50; see also GARDAM, *supra* note ____.

⁵ See, e.g., Protocol I, *supra* note ____, arts. 51-52; see also A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 14-19 (1996).

⁶ GPW, *supra* note [1], art. 4 (protecting specific categories of persons captured and detained by enemy forces); GC, *supra* note [1], art. 4 (protecting persons “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”); see also JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 29-49 (1985).

⁷ GPW, *supra* note [1], art. 4.

objects—even if doing so would serve the military interests of the attacking force. The law of war, in this sense, is predicated on the distinction between military and civilian objects. One important incidence of this general distinction is the distinction between combatants and non-combatants. Under the law of war, only combatants may be made the object of an attack, so as to spare the latter, as much as possible, the ravages of war. Non-combatants are granted immunity from attack so long as they do not participate directly in the hostilities. In this sense, the protection of non-combatants from attack is predicated on a clear distinction between combatants and non-combatants. If attacking forces cannot distinguish between enemy soldiers and civilians, this type of rule cannot work well. If so-called irregular fighters—those not part of the regular armed forces—are “lawful” combatants, then the distinction between soldier and civilian is blurred. It is the goal of protecting innocent civilians that requires a sharp line between combatants and non-combatants. The upshot is that “regularization” of armed forces is essential to the proper functioning of Hague law.

Of course, it does not necessarily follow from this point that irregular fighters should be denied humanitarian protection upon capture. Indeed, there are at least two ways to understand the relationship between Hague law (Types-1 and -2 rules) and Geneva law (Type-3 rules). On the one hand, the regimes could be completely decoupled. That is, Geneva law need not have any structural relationship to Hague law. On this view, all persons captured in time of war are entitled to humanitarian protection irrespective of whether their war-time conduct transgressed the rule of distinction. I will call this view, the “human rights” view. Or, as previously described, Geneva law could be oriented in such a way as to induce regularization of armed forces. To do so, Geneva law would delimit the categories of individuals qualifying for protection. On this view, post-capture protections would extend to two groups: those who do not fight (non-combatants); and those who fight in forces that are sufficiently regularized (lawful combatants).

“Irregulars”—the residual category of so-called unlawful combatants—would enjoy no protection. The idea is to deter “irregularization” by threatening the denial of any rights-bearing status. In the Hague Conventions of 1907, the “rights and obligations” of war extended only to those combatants satisfying the four criteria of regularization: operate under a responsible command structure; wear a fixed, distinctive emblem visible at a distance; carry arms openly; and conduct their operations in accordance with the laws of war. The 1929 and 1949 Geneva Conventions on the Protection of Prisoners of War, drawing on this tradition, defined the category of persons protected by it in roughly the same terms. This “traditionalist” perspective suggests that denial of POW status leaves

captured combatants largely *unprotected* by humanitarian law.⁸ In one influential writer's view, such persons were placed upon capture at the mercy of the detaining power.⁹

⁸ See U.S. Dep't of War, Instructions for the Government of the Armies of the United States in the Field by Order of the Secretary of War, General Orders No. 100, art. LVII (1863); Capt. Michael W. Brough, *The POW in a Time of Terrorism: An Investigation into Moral Status, in JSCOPE 2003: JOINT SERVICES CONFERENCE ON PROFESSIONAL ETHICS* (2003), available at <<http://www.usafa.af.mil/jscope/JSCOPE03/Brough03.html>> ("Captured combatants who are not POWs are devoid of GC protection, and they are at the mercy of the Detaining Power. The Detaining Power may agree to treat the captives as if they were POWs (as President Bush declared he would do for Afghan detainees), but they are not bound by international agreement to do so"); COLM MCKEOGH, *INNOCENT CIVILIANS: THE MORALITY OF KILLING IN WAR* 137 (2002) ("The formal approach to combatancy of the Hague Regulations yielded a clear delineation of the categories of combatant and civilian. However, this clear delineation also meant that there was a gap between the two lawful categories of combatant and civilian. There was a third category of person in war: the unlawful combatant. Those who did not abide by the rules set out in the [Hague Regulations defining lawful combatants] were unlawful combatants and were accorded *no protection.*") (emphasis added); INGRID DETTER, *THE LAW OF WAR* 148 (2nd ed. 2000) ("Unlawful combatants . . . though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status. . . . They are often summarily tried and enjoy no protection under international law."); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare, in REFLECTIONS ON LAW AND ARMED CONFLICTS* 206, 208 (Michael A. Meyer & Hilaire McCoubrey, eds. 1998) ("Civilians participating in combat ceased to be immune from attack. They might be killed in combat, and, on capture, were liable to be treated as marauders and executed summarily at the discretion of the captor commander. . . .[T]heir very participation, however conducted, was in itself a violation of the law of war, or, alternatively, conduct that put them outside its protection and left them at the mercy of the enemy."); Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague), in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 93, 105-06 (1988) (arguing that unlawful combatants "upon capture were not entitled to be treated either as prisoners of war or as peaceful civilians;" and that they "fell outside the protected categories"); GEORG SCHWARZENBERGER, *II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT* 115-117 (1968) (arguing that unprivileged belligerents are in the same position as "spies," and as such, entitled only to the "minimum requirements imposed by the standard of civilization"—which he suggests includes the right to "a [standardless] trial"); JULIUS STONE, *LEGAL CONTROLS ON INTERNATIONAL ARMED CONFLICT* 549 (1954) (maintaining that the distinction between unprivileged and privileged combatants "draws the line between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection. 'Noncombatants' who engaged in hostilities are one of the classes deprived of such protection Such unprivileged belligerents, though not condemned by international law, are not protected by it, but are left to the discretion of the belligerent threatened by their activities."); II OPPENHEIM'S *INTERNATIONAL LAW: DISPUTES, WAR, AND NEUTRALITY* 256 (H. Lauterpacht, ed. 1948) (arguing that unlawful combatants are "likely to be treated as war criminals, and shot."); J.M. SPAIGHT, *WAR RIGHTS ON LAND* 37 (1911) ("[W]ar law has a short shrift for the non-combatant who violates its principles by taking up arms."); *id.* at 35-72 (outlining long history of summary treatment accorded unlawful combatants). EMMERICH DE VATTEL, *THE LAW OF NATIONS* 481 (Luke White, ed. 1792) ("A nation attacked by such sort of

This is not to say that the 1949 Geneva Conventions (and certainly not the 1977 protocols thereto) take this approach. Indeed, in my view, they do so only to a limited extent. As I demonstrate more fully in Part II, the 1949 Geneva Conventions—though they draw on many structural features of traditional law of war treaties—lay the foundations for the “human rights” perspective that so clearly predominates in the 1977 protocols (and other important developments in humanitarian law). The Geneva Civilians Convention accords substantial protection, which tracks closely the protection accorded under the POW Convention, to all enemy nationals who have “fallen into the hands of the enemy.” Moreover, the Civilians Convention expressly applies to “unlawful combatants”—authorizing states in such cases to derogate, where necessary for security reasons, from certain rights recognized in the treaty. Common Article 3 of the Geneva Conventions, Article 75 of Additional Protocol I, and the procedural rights regime embedded in the Conventions’ grave breach regime provide important humanitarian protections to persons subject to the authority of the enemy—without regard to the “status” or pre-capture behavior of the individual in question.

These developments, without question, have blunted the sharp edge of status determinations. Nevertheless, they have not eliminated the protective consequences of status in the law of war. Only prisoners of war are entitled to combatant immunity—the rule that lawful combatants may not be subject to criminal prosecution for their very participation in the hostilities; and only POWs enjoy so-called “assimilation rights”—the rule requiring that lawful combatants be accorded the same rights as members of the detaining state’s armed forces. In addition, the application of the Civilians Convention to unlawful combatants is conditioned by Article 5 which authorizes states to restrict detainee rights where necessary to protect state security. Finally, the gap-filling provisions—Common

enemies [unlawful combatants] is not under any obligation to observe towards them the rules of wars in form.”).

⁹ Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 321, 328 (1952). Baxter concluded:

The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. . . . International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents. . . . [Privileged belligerents] have a protected status upon capture, whilst other belligerents not so identified *do not benefit from any comprehensive scheme of protection.*

Id. at 343.

Article 3 and Article 75 of AP I—do not provide a comprehensive protective scheme. In short, coverage gaps have narrowed, but nevertheless persist.

The question is how best to evaluate these developments. From the traditionalist perspective, they are counter-productive in that they erode the distinction between combatant and non-combatant by undermining the incentive structure of the law of war. From the human rights perspective, however, these developments represent a sensible compromise between humanitarian values and military necessity. As suggested in the Introduction, both views are unpersuasive. Note initially that both views calibrate treatment by combatant status category. Clearly this is so for the traditionalist view but it is also true for the human rights perspective. Contemporary Geneva law, even in its most progressive moments, does not contemplate “protective parity” across status categories.¹⁰ The primary reason for this is simple: graduated protective schemes, it is thought, promote humanitarian values by reinforcing the principle of distinction.

In this Article, I reexamine the assumptions embedded in this bit of conventional wisdom. In doing so, I ask what work we might reasonably expect combatant status categories to do; and how best to design the protective regimes in view of these potential functions. My claim is that the traditional notion of POW status should carry no protective implications. In other words, I suggest that unlawful combatants should be protected to the same extent as POWs (lawful combatants). Developments in humanitarian law, military (and law enforcement) policy, and the nature of organized hostilities favor “protective parity” across all categories of war detainees.

II. THE DECLINE OF STATUS: TOWARD PROTECTIVE PARITY

In this Part, I outline the aforementioned developments in Geneva law. My aim is to provide a brief overview of the concrete protective consequences that attach to combatant status determinations. Toward this end, I survey the rights of POWs and the rights of unlawful combatants—individuals who participate in the hostilities without satisfying the minimum legal requirements to do so. This survey supports two important propositions that will serve as the backdrop for my broader policy claim. First, Geneva law accord substantial legal protection to both lawful combatants (POWs) *and* unlawful combatants. Second, there are

¹⁰ Nevertheless, it is important to point out that Geneva law has moved in the direction of “protective parity.” I document in great detail the various developments in other work. *See* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L. J. (forthcoming 2004).

nevertheless important discrepancies in the protective schemes applicable to these status categories.

A. Protections Applicable to POWs

Prisoners of war (POWs) enjoy substantial international legal protection pursuant to the Geneva Convention on POWs (GPW or POW Convention).¹¹ These protections include: (1) the right to humane treatment (including important limitations on coercive interrogation tactics);¹² (2) due process rights;¹³ (3) the right to release and repatriation upon the cessation of active hostilities;¹⁴ and (4) the right to communication with (and the institutionalized supervision of) protective agencies.¹⁵ The GPW also prohibits reprisals against POWs;¹⁶ and precludes the use of POWs as slave labor.¹⁷ In addition, POWs may not be prosecuted for their participation in the hostilities—that is, they are entitled to “combatant immunity.”¹⁸ Moreover, the GPW makes clear that POW rights are inalienable¹⁹ and non-derogable.²⁰ Finally, the Convention requires that states suppress the mistreatment of POWs by investigating, prosecuting, and punishing

¹¹ Geneva Convention III, *supra* note ____.

¹² *Id.* art. 13 (humane treatment); *see also id.* arts. 17-19 (rules concerning interrogation); *id.* arts. 21-48 (rules governing conditions of confinement).

¹³ *Id.* arts. 99-108.

¹⁴ *Id.* art. 117-118.

¹⁵ *Id.* arts. 8-11.

¹⁶ *Id.* art. 13.

¹⁷ *Id.* arts. 49-57 .

¹⁸ This privilege is, as a formal matter, extra-conventional in that the Geneva Conventions do not expressly accord any such privilege. It is nevertheless universally recognized. *See, e.g.,* Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT’L L. 205, 212 (1977) (“[T]hose who are entitled to the juridical status of ‘privileged combatant’ are immune from criminal prosecution for those warlike acts which do not violate the laws and customs of war but which might otherwise be common crimes under municipal law.”); Georg Schwarzenberger, *Human Rights and Guerrilla Warfare*, 1 IS. Y.B. HUM. RTS. 246, 246 (1971); Geoffrey S. Korn & Michael L. Schmidt, “*To Be Or Not To Be, That Is The Question*” *Contemporary Military Operations and The Status of Captured Personnel*, 1999 ARMY LAW. 1, 14 (1999) (arguing that combatants, as privileged belligerents, are entitled to “a blanket of immunity for their pre-capture warlike acts”); United States v. List, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 757, 1228, 8 War Crimes Reports 58 (1948). Moreover, the privilege may be inferred from several provisions of the GPW. *See* Geneva Convention III, *supra* note ____, arts. 82, 87-89.

¹⁹ Geneva Convention III, *supra* note ____, art. 7.

²⁰ *Id.* art. 5 (providing that the Convention “shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.”).

individuals responsible for violations of the Convention.²¹ Aggravated mistreatment of persons entitled to POW status constitutes a “grave breach” of international humanitarian law²²—giving rise to individual criminal liability.²³ The criminalization of POW rules is now also recognized in many national penal codes²⁴ and several important international agreements concerning the scope of international criminal law—including the International Criminal Court²⁵ and the ad hoc U.N. criminal tribunal in the Former Yugoslavia.²⁶

B. Protections Applicable to Unlawful Combatants

I next outline the protective schemes governing the treatment of unlawful combatants in Geneva law—that is, individuals who participate in hostilities without satisfying the requirements for POW status. Traditionally, international law did not protect unlawful combatants but, as I describe below, all captured combatants enjoy substantial protection (even if some important discrepancies persist). Whether this convergence in protective schemes is normatively attractive is addressed in Part III.

1. Geneva Civilians Convention (the Fourth Geneva Convention)

The Geneva Convention Relative to the Protection of Civilian Persons (GC or Civilians Convention) provides detailed rules governing the treatment of “civilians” in armed conflicts; and the substance of these rules mirrors in most important respects the rights of POWs. These protections include: due process

²¹ *Id.* arts. 129-131.

²² *See* Geneva Convention III, *supra* note ____, arts. 129-131.

²³ *Id.*; *see also* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW (2nd ed. 2000) (describing the emergence of individual criminal responsibility in the laws of war).

²⁴ *See, e.g.*, Int’l Comm. Red Cross, International Humanitarian Law, National Implementation Database, available at <<http://www.icrc.org/ihl-nat.nsf/WebLAW2?OpenView>> (providing excerpts of implementing national legislation from over 50 countries); Coalition for the Int’l Criminal Court, National Legislation Database, available at <<http://www.cicc.org>> (providing full text of national war crimes legislation from over 35 states).

²⁵ *See* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 52d Sess., Annex II, U.N. Doc. A/CONF.183/9, art. 8 (1998), *reprinted in* THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed., 1998) [hereinafter ICC Statute].

²⁶ *See* U.N. S.C. Res. 808, *annexed to* Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Report by the Secretary-General, 48th Sess., Annex, U.N. Doc. S/25704, art. 2 (1993), *reprinted in* 32 I.L.M. 1159 [hereinafter ICTY Statute].

rights (including the right to fair trial in the event of criminal prosecution);²⁷ the right to humane treatment;²⁸ freedom from coercive interrogation;²⁹ freedom from discrimination;³⁰ the right to repatriation (including the right to leave enemy territory voluntarily);³¹ the right to internal camp governance;³² and the prohibition on attacks directed against civilian objects (including strict prohibition of attacks on hospitals and other facilities providing essential services to the civilian population).³³

The Civilians Convention applies to all enemy nationals—including “unlawful” combatants—not protected by the other Conventions.³⁴ Although this point is often overlooked in current debates,³⁵ it enjoys broad support in the legal literature,³⁶ contemporary international war crimes jurisprudence,³⁷ and national military manuals.³⁸ Moreover, the text of the Civilians Convention suggests that it

²⁷ See Geneva Convention IV, *supra* note ____, art. 64-76, 126, 146-47.

²⁸ *Id.* arts. 27-34.

²⁹ *Id.* arts. 31-32.

³⁰ *Id.* arts. 1, 3, 27.

³¹ *Id.* arts. 35-38, 77, 132-135.

³² *Id.* arts. 101-104.

³³ *Id.* arts. 13-26.

³⁴ As I develop more fully below, Common Article 3, the provisions of Part II, and the penal repression regime are applicable irrespective of the nationality of the person in question. See Geneva Convention IV, *supra* note ____, arts. 3, 13-26, 145-147.

³⁵ See, e.g., Knut Ipsen, *Combatants and Non-Combatants*, in *The HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 65, 67-68 (Deiter Fleck ed. 1995); Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, available at <<http://www.cidh.oas.org/Terrorism/Eng/toc.htm>>.

³⁶ See, e.g., HILLARE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE*, 137 (2nd ed. 1998); MICHAEL BOTHE, ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, 261-63 (1982); George Aldrich, *The Taliban, Al Qaeda, and the determination of illegal combatants*, 96 AMER. J. INT’L L. 893 (2002); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, BRITISH Y.B. INT’L L. 197 (1971); Frits Kalshoven, *The Position of Guerrilla Fighters under the Law of War*, 11 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 55, 71 (1972); Esbjorn Rosenblad, *Guerrilla Warfare and International Law*, 12 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 91, 98 (1973); Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, 85 INT’L REV. RED CROSS 849 (2003).

³⁷ See, e.g., Prosecutor v. Delalic et al., ICTY (Judgment), IT-96-21-T, 16 November 1998, para. 271 (“If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied.”).

³⁸ See, e.g., DEP’T OF THE ARMY, FM 27-10: DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE 31 (1956) (United States) (“If a person is determined by a competent tribunal, acting in conformity with Article 5 [GC III] not to fall within any of the

applies to unlawful combatants. Persons protected by the Convention are “those who, at any given moment and in any manner whatsoever, find themselves . . . in the hands of a Party . . . of which they are not nationals.”³⁹ The provision defining “protected persons” also makes clear that several categories of persons are not protected by the Convention. For example, nationals of a state “not bound by the Convention are not protected by it.”⁴⁰ In addition, nationals of “neutral” or “co-belligerent” states are not protected by the Convention “while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”⁴¹ And, as previously discussed, the Civilians Convention does not apply to persons protected by any of the other Conventions.⁴² The provision does not, however, expressly limit the application of the Convention to persons taking no part in the hostilities.⁴³ Indeed, the Convention prescribes, in some detail, rules governing the treatment of civilians “suspected of or engaged in activities hostile to the State.”⁴⁴ It is also important to note that the definitions of “protected persons” in the other Geneva Conventions are, without exception, quite detailed.⁴⁵ When read in light of the other Conventions, the Civilians Convention should not be interpreted as *implicitly* excluding from its protection a broad category of individuals otherwise satisfying its definition of “protected persons.”

Application of the Civilians Convention to unlawful combatants, however, is qualified by Article 5—the so-called “derogation” provision. The provision authorizes states, subject to important limitations, to deny protections to individuals “suspected of or engaged in activities hostile to the security of the State [or the Occupying Power].”⁴⁶ In full, it provides that:

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in

categories listed in Article 4 [GC III], he is not entitled to be treated as a prisoner of war. He is, however, a “protected person” within the meaning of Article 4 [GC IV].”); BRITISH MILITARY MANUAL, PART III: LAW OF LAND WARFARE 96 (1958) (United Kingdom).

³⁹ Geneva Convention IV, *supra* note ____, art. 4.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* art. 5.

⁴⁵ See Geneva Convention I, *supra* note ____, art. 4; Geneva Convention II, *supra* note ____, art. 4; Geneva Convention III, *supra* note ____, art. 4

⁴⁶ Geneva Convention IV, *supra* note ____, art. 5.

the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.⁴⁷

To summarize, the Civilians Convention protects unlawful combatants; and these protections (when applicable in full) closely resemble the rights accorded under the POW Convention. Of course, these protections are subject to derogation if necessary for state security. Three important discrepancies between POW and Civilian protections must be registered.

First, the rights of civilians taking part in hostilities—unlawful combatants—are subject to derogation in some circumstances: POW rights are not. Second, POWs are assimilated, for protective purposes, into the armed forces of the detaining state. As such, they are entitled to trial before the same courts, and according to the same procedure as members of the regular armed forces of the detaining state. Civilians enjoy no such protection. Third, POWs are entitled to combatant immunity—that is, they may not be punished for their very participation in the hostilities. Civilians who take up arms may be subject to criminal prosecution simply for having done so.

C. Supplementary Protections

Several other aspects of Geneva law confer some protection on unlawful combatants. These protective schemes are far less detailed than the Civilians Convention, nevertheless, because these regimes are broadly applicable, they illustrate the degree of convergence across status categories.

⁴⁷ *Id.*

1. Penal Repression Regime of the Geneva Conventions

The Geneva Conventions also protect all unlawful combatants facing trial for war crimes. Indeed, the Conventions prescribe a detailed inventory of procedural rights guarantees for prosecutions brought under its substantive provisions. That is, the Conventions provide for minimum procedural rights for any person charged with serious violations of its substantive rules *irrespective of the person's status under the Conventions*.⁴⁸ Any person prosecuted for violations of the Geneva Conventions, irrespective of their status as “protected persons,” must be provided with “safeguards of proper trial and defence, which shall not be less favorable than” those outlined in Articles 105 and following of the Third Geneva Convention (concerning POWs).⁴⁹ Article 105 specifically provides for basic fair trial rights including: the right to counsel of the defendant’s choice, the right to confer privately with counsel, the right to call witnesses, and the right to an interpreter.⁵⁰ These provisions also require, for example, that accused persons be granted the same right of appeal as that open to members of the armed forces of the Detaining Power.⁵¹

2. Common Article 3

The Geneva Conventions also specify fundamental humanitarian protections applicable to all persons subject to the authority of a party to the conflict. That is, the Conventions detail minimum protections to be accorded all persons no longer taking part in hostilities irrespective of: (1) the territory in which the affected person is located; (2) the nationality of the affected person; or (3) the character of the armed conflict. These principles, first codified in Common Article 3 of the Conventions, govern the treatment of persons no longer taking active part in the hostilities.⁵² All such persons are entitled to humane treatment and, in the case of criminal charges, fair trial by “a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁵³ It is also important to note that this provision is, by its

⁴⁸ See, e.g., Geneva Conventions IV, *supra* note ____, art. 146.

⁴⁹ Geneva Convention I, *supra* note ____, art. 49; Geneva Convention II, *supra* note ____, art. 50; Geneva Convention III, *supra* note ____, art. 129; Geneva Convention IV, *supra* note ____, art. 146.

⁵⁰ Geneva Convention III, *supra* note ____, art. 105.

⁵¹ *Id.* art. 106.

⁵² It is important to note that the provision expressly covers persons who take up arms against the state and applies even to persons who do not lay down their arms voluntarily. See Geneva Conventions, *supra* note ____, art. 3.

⁵³ Geneva Conventions, *supra* note ____, art. 3.

nature, applicable to “unlawful combatants” in that it governs the relations between states and informal armed opposition groups. The provision obligates states to apply, at a minimum, the following principles in armed conflicts “not of an international character”:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.⁵⁴

Of course, Common Article 3, by its terms, applies only to armed conflicts “not of an international character.”⁵⁵ The structure and history of the Conventions, however, make clear that the provision applies in *all armed conflicts*. Utilizing language originally proposed as text for the preamble to the four Conventions, the drafters the provision sought to invoke the core principles of the treaty--those principles that should apply even in the absence of an international armed conflict; those principles that would pierce the veil of sovereignty. Indeed, the character of Common Article 3 was well understood by the drafters of the Conventions as evidenced by the ICRC Commentary:

This minimum requirement in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts. It proclaims the guiding principle common to all four Geneva

⁵⁴ Geneva Conventions, *supra* note ____, art. 3.

⁵⁵ *Id.*

Conventions, and from it each of them derives the essential provision around which it is built.”⁵⁶

The purpose of Common Article 3 was, therefore, to “ensur(e) respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself.”⁵⁷ In short, “[i]t is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character.”⁵⁸ Indeed, the applicability of Common Article 3 to international armed conflicts is now recognized in the jurisprudence of the International Court of Justice (ICJ),⁵⁹ the International Criminal Tribunal for the Former Yugoslavia (ICTY),⁶⁰ the International Criminal Tribunal for Rwanda (ICTR),⁶¹ and the Inter-American Commission for Human Rights.⁶² It is U.S. military policy to apply Common Article 3 in all armed conflicts (and even in situations not rising to the level of an “armed conflict” such as internal disturbances).⁶³ The Judge Advocate General of the U.S. Army endorses this view as well.⁶⁴ Moreover, Additional Protocol I to the Geneva Conventions, now ratified by over 160 countries, clarifies that the protections codified in Common Article 3 apply, as a matter of positive international law, to all armed conflicts.⁶⁵ This avalanche of legal authority prompted the ICTY Appeals Chamber to proclaim that: “It is [now] indisputable that common Article 3, which sets forth a minimum core of

⁵⁶ ICRC COMMENTARY IV, *supra* note ____, AT 14.

⁵⁷ *Id.* at 44.

⁵⁸ Prosecutor v. Celebici, ICTY Appeals Chamber, (2001) at para. 150.

⁵⁹ See Military and Paramilitary Activities (Nicaragua v. U.S.), 1986 I.C.J. 14, at para. 218.

⁶⁰ See Prosecutor v. Tadic (a/k/a “Dule”), Case No. IT-94-1-AR72, para. 87 (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) (Int’l Crim. Trib. For Former Yugoslavia Appeals Chamber [hereinafter Tadic Appeal], *reprinted in* 35 I.L.M. 32 (1996).

⁶¹ See Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Judgment) (Int’l Crim. Trib. For Rwanda Trial Chamber Sep. 2, 1998), *reprinted in* 37 I.L.M. 1399 (1998).

⁶² See Abella Case, Inter-American Comm. on Human Rights, Report No. 55/97, Case No. 11.137, November 18, 1997, at paras. 155-156.

⁶³ See DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998). The directive states, in part: “The heads of the DOD Components shall: Ensure that the members of their Components comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.” *Id.* paras. 5.1, 5.3. See also Timothy P. Bulman, *United States Law of War Obligations in Military Operations Other than War*, 159 MIL. L. REV. 152 (1999).

⁶⁴ See U.S. Army, Judge Advocate General, *Protection of Civilians During Armed Conflict*, in OPERATIONAL LAW HANDBOOK 8-9 (2003).

⁶⁵ AP I, *supra* note ____, art. 75.

mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based.”⁶⁶

3. Article 75 of Additional Protocol I

Building on the protective schemes identified above, Article 75 of AP I and Article 6 of AP II clearly establish minimum humanitarian protections applicable to all persons “in the power of” a belligerent state—irrespective of whether any such person participated in the hostilities. Widely understood as the “gap filler” in Geneva law,⁶⁷ the “fundamental guarantees” provisions of the 1977 Protocols make clear that all persons subject to the authority of a belligerent are entitled to humanitarian protection. As discussed previously, the drafting history of Article 75 suggests that the provision was designed: (1) to clarify the scope and application of several fundamental guarantees recognized in the 1949 Conventions; (2) to extend greater protections to persons not covered by those Conventions—most notably, nationals of the detaining power, nationals of co-belligerents and neutrals, and stateless persons and refugees; and, by implication, (3) to condition the derogation powers conferred on states by Article 5 of the Civilians Convention by rendering a broader range of rights expressly non-derogable.⁶⁸

Two points regarding the scope and content of Article 75 are relevant for present purposes. First, the text, structure, and drafting history of AP I make plain that it covers unlawful combatants. Second, Article 75 provides substantial protection—particularly to persons detained, arrested, or interned and persons facing criminal charges. As mentioned previously and discussed more fully below, the substance of this provision is clearly modeled on and, as a consequence, closely resembles that of Common Article 3. The most important advances relate to criminal procedure rights. In this regard, the provision reads:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offense related to the armed conflict except pursuant to a conviction pronounced by an impartial and

⁶⁶ ICTY, *Prosecutor v. Zejnil Delalic (Celebici Camp case)*, Appeals Chamber, 2001, at para. 143.

⁶⁷ See U.S. Army, Judge Advocate General, *Protection of Civilians During Armed Conflict*, in OPERATIONAL LAW HANDBOOK 9 (2003).

⁶⁸ BOTHE, NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note ____, at 460-61.

regularly constituted court respecting the generally principles of regular judicial procedures⁶⁹

Unlike Common Article 3, Article 75 of AP I specifies many of these principles. They include: (1) provision of “all necessary rights and means of defence” (which almost certainly includes the right to counsel, the right to be present at the hearing, the right to compel process, the right to be informed of pending charges, the right to be accorded sufficient time and resources to formulate a defense, and the right to challenge alleged unfairness in the proceedings on appeal); (2) the right to be presumed innocent; (3) freedom from compelled self-incrimination; (4) the right to be advised of rights and available post-conviction remedies; (5) freedom from *ex post facto* application of the criminal law; and (6) recognition of the principle of *non bis in idem*.⁷⁰

D. Persistent Gaps and Deficiencies in Geneva Law

Geneva law provides substantial legal protection to all war detainees including unlawful combatants. All persons detained by the enemy are entitled to the minimum protections of Common Article 3 and Article 75 of AP I. And, in virtue of Articles 4 and 5 of the Civilians Convention, all enemy aliens are “protected persons” under the Conventions; and are entitled, at a minimum, to humane treatment and fair trial rights. This provision also makes clear that “unlawful combatants” are presumptively covered by the full protections of the Civilians Conventions—even if some of these protections can be suspended if (and so long as) necessary to protect state security. Moreover, all persons accused of “war crimes” are entitled to due process rights that mirror in most important respects the rights accorded POWs.

Does the denial of POW status carry any significant humanitarian consequences? Although the analysis to this point strongly suggests there are no such consequences, each alternative protective scheme is arguably deficient in important respects. Of course, the Civilians Convention writ large accords protection that in most important respects mirrors that of the POW Convention. And although the Civilians Convention protects unlawful combatants, its field of application is limited to enemy nationals (who must also be nationals of a state party to the Convention). In addition, the derogation regime of Article 5 empowers states to deny some unlawful combatants certain rights recognized in the Convention if necessary to protect national security.

⁶⁹ AP I, *supra* note ____, art. 75.

⁷⁰ *Id.*

The other alternative protective schemes also exhibit potentially significant deficiencies. Common Article 3 protects all combatants no longer taking active part in hostilities, but the substantive rules of the provision are cast in abstract terms—the precise contours of which are unclear. In addition, the provision does not expressly include a right to release and repatriation at the close of hostilities. Moreover, no express provision is made in the Conventions for the enforcement of Common Article 3.⁷¹ Recall that the persons protected by Common Article 3 are not, as a formal matter, “protected persons” within the meaning of the Conventions.⁷² As a consequence, violations of Common Article 3 do not constitute “grave breaches” of the Conventions; and, at the time the Conventions were drafted, it was unclear whether violations of Common Article 3 gave rise to individual criminal liability at all.⁷³ Article 75 of AP I gives rise to similar concerns. Although it protects all persons “in the power of” a belligerent state (and its substantive requirements are much more specific than Common Article 3), AP I does not prescribe an enforcement mechanism for this provision. That is, violations of Article 75, like those of Common Article 3, are not “grave breaches” of the Conventions; and it is unclear whether they give rise to individual criminal liability.⁷⁴ Moreover, the legal status of AP I in many conflicts is itself somewhat ambiguous. The problem is that many states of geo-strategic significance have not ratified AP I including France, India, Iran, Iraq, Israel, Pakistan, and the United States.⁷⁵ As a consequence, its legal status for these states is unclear. Finally, the penal repression regime of the Conventions protects all persons subject to prosecution for violations of the laws of war but these protections include only fair trial rights—failing to establish any protection outside this context.

In short, although Geneva law accords unlawful combatants substantial protection, some gaps in the coverage of these protective schemes persist. The current regime approximates, but falls short of, protective parity. In Part III, I assess the propriety of this regime (and its trajectory) through a sustained policy defense of protective parity.

⁷¹ See *supra* note ____ (discussing this issue).

⁷² See *supra* note ____ (noting the consensus view; and evaluating U.S. claim to the contrary).

⁷³ See, e.g., MOIR, *supra* note ____; Jinks, *supra* note ____.

⁷⁴ BOTHE, NEW RULES FOR VICTIMS OF ARMED CONFLICTS, *supra* note ____, at ____; ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note ____, at ____.

⁷⁵ See Int’l Comm. of the Red Cross, Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions, at http://www.icrc.org/eng/party_gc (last visited June 22, 2003).

III. THE CASE FOR PROTECTIVE PARITY

The unique protective significance of POW status (and the claims that justify this extra increment of protection) suggests that POWs are systematically over-protected (even if only to a modest extent) and unlawful combatants are systematically under-protected. I conclude that the best regime would subject all captured combatants to a uniform protective scheme. In this Part, I offer a conceptual and normative defense of “protective parity”—suggesting that, under current law, POWs are systematically over-protected and unlawful combatants are systematically under-protected. In making the case for protective parity, I evaluate the strengths (and potential weaknesses) of this approach. I also analyze whether protective parity can be reconciled with a strong commitment to the principle of distinction.

In Section A, I argue that the reasons for treating POWs fairly and humanely are equally applicable to unlawful combatants. That is, the policy claims favoring humane treatment are not tethered to the organizational characteristics that define POW status. In Section B, I argue that the security-based rationales for denying protections to unlawful combatants are equally applicable to POWs. Once again, policy claims are not linked to general organizational features of the fighting force in question.

Finally, in Section C, I reject the claim that some treatment differential is appropriate to enforce the principle of distinction. Even if “irregularization” undermines distinction, the question is how best to encourage fighters to distinguish themselves from the civilian population. I maintain that protective status categories are an inefficient way to incentivize combatants because these categories necessarily trade on collective considerations—such as the organizational characteristics of the fighting force. The rule of distinction would be better served, I submit, by an individualized “war crimes” approach that: accords all fighters substantial humanitarian protection; and punishes bad actors for failing to take adequate precautions under the circumstances.

A. Why Protect POWs?

As described in Part II, POWs enjoy substantial protection in Geneva law. Two kinds of claims justify this protection: (1) humanitarian; and (2) strategic. First, the core principles of humanitarian law provide one important rationale. All captured fighters are “victims of war” and, as human beings, are entitled to humane treatment.⁷⁶ Geneva law purports to protect only those combatants who have been rendered hors de combat—that is, combatants who, for whatever reason, are no longer taking part in the hostilities. In other words, the “status” of captured fighters lies somewhere between “combatants” proper and “non-combatants.” They are detainees at the mercy of the detaining authority. In the absence of some compelling reason to deny protection, Geneva rules should accord humanitarian protection to such persons.⁷⁷ The point here is that this kind of rationale proves too much—suggesting that all captured combatants should be accorded, as a presumptive matter, humane treatment. The foundation of this type of rationale is, in the end, the notion that certain entitlements issue from the very “human-ness” of the individual. Clearly, this type of claim does not track the definitional attributes of POW status—this type of claim would justify treating unlawful combatants humanely as well.

Second, there are compelling strategic reasons to treat the enemy well. The general consensus is that observance of these rules is, in most circumstances, in the interest of opposing forces. Indeed, there is a substantial, interdisciplinary literature documenting the strategic benefits of treating enemy POWs well.⁷⁸ Harsh treatment of the enemy over-deters surrender—encouraging enemy forces to fight to the death.⁷⁹ Some evidence also suggests that poor treatment of the

⁷⁶ See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS* (1974) (outlining and offering an extended defense of this line of thought).

⁷⁷ One such countervailing consideration is the structural claim that characterizes the traditionalist perspective. As discussed at length in the Introduction and Part I, the idea here is that fair treatment might be offered as a carrot to induce fighters to observe the law of war. In other words, the calibration of fair and humane treatment serves a crucial structural function in humanitarian law. I evaluate this claim below. Note for the moment, however, that this kind of point does not demonstrate that unlawful combatants are not entitled to humane treatment. The logic of this claim suggests only that the humanitarian ambitions of the law of war require the calibration of humane treatment accorded captured combatants.

⁷⁸ See, e.g., DAN REITER & ALLAN C. STAM, *DEMOCRACIES AT WAR* 58-83 (2002); James D. Morrow, *The Institutional Features of Prisoner of War Treaties*, 55 *INT’L ORG.* ___ (2001) (summarizing this research).

⁷⁹ See, e.g., REITER & STAM, *supra* note ___, at 67 (noting that “it is in the interest of *all* states to treat POWs well in order to seduce the enemy to surrender.”) (emphasis in original); Morrow, *supra* note ___, at 976 (“Rumors about how POWs are treated spread rapidly within armies and affect soldiers’ willingness to surrender. When POWs are reportedly treated poorly by a state, the opposing side’s soldiers are less likely to surrender, preferring to fight on even in unfavorable situations.”).

enemy undermines the morale of the capturing state's forces.⁸⁰ Other studies suggest that humane treatment of the enemy improves the ability of states to raise professional armies.⁸¹ And, so long as it is consistent with the efficient pursuit of military objectives, humane treatment minimizes various audience costs associated with waging modern wars: it is easier to build and sustain support for the war effort at home; and it is easier to build and sustain international operational (war-fighting) coalitions. In fact, Dan Reiter and Alan Stam utilize an extensive regression model (relying on an important, relatively-new data set) to make the case that humane treatment of POWs is correlated with battlefield effectiveness.⁸² These claims, considered in isolation, are unspectacular—indeed, the strategic benefits of treating POWs well have long been understood. The important point for our purposes is that these studies—whether they involve social psychological models of soldiers, interview data from combatants, comparative surrender and defection rates, or polling data—do not track the behavioral and organizational prerequisites of POW status. That is, these studies (and the claims that derive from them) document the importance of treating members of the opposing armed forces well—without regard to whether such persons satisfy the requirements for POW status. This cluster of claims also proves too much—the reasons for treating POWs well apply, in general, to unlawful combatants.

B. Why deny Unlawful Combatants (Certain) Protections?

Nevertheless, there may be good reasons to deny unlawful combatants some (or all) the protections accorded POWs. In Parts II and III, I demonstrated (1) that Geneva law protects unlawful combatants—persons taking direct part in hostilities without satisfying the requirements for POW status; and (2) that these protections approximate those accorded POWs. This Section in essence assesses the following hypothesis: the current regime—substantial protection with some important differentials—strikes the proper balance between humanitarianism and military necessity.

Consider again the case of the detainees in Cuba. Recall that the official U.S. government position is that neither Taliban nor al Qaeda fighters qualify as POWs because they failed to satisfy international standards defining lawful combatants.⁸³ In short, the United States maintains that assignment of POW status

⁸⁰ See, e.g., REITER & STAM, *supra* note ____, at 69.

⁸¹ See, e.g., Morrow, *supra* note ____, at 980-81.

⁸² REITER & STAM, *supra* note ____, at 58-83.

⁸³ See Press Conference, Department of Defense, Secretary Rumsfeld and General Myers, Feb. 8, 2002, *available at* <http://www.defenselink.mil/news/Feb2002>; Fact Sheet, White House Press Office, Feb. 7, 2002, *available at*

in this case would be incorrect as a matter of law and imprudent as a matter of policy. A brief summary of the policy arguments is useful for present purposes. Specifically, the U.S. argues that neither group of captured fighters satisfies the express requirements of the Geneva Convention for the Protection of Prisoners of War (GPW); and that POW protections would impede the investigation and prosecution of suspected terrorists. Of particular concern on the policy front are (1) restrictions on the interrogation of POWs;⁸⁴ (2) the criminal procedure rights of POWs (which might preclude trial by special “military commission”);⁸⁵ (3) the right of POWs to release and repatriation following the cessation of hostilities;⁸⁶ and (4) possible claims of “combatant immunity” that might shield individuals from prosecution for acts of terrorism. The U.S. position is that these rights are inconsistent with various security imperatives. On the strength of these claims (and the merits of its classification determination), the U.S. concluded that the

<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> [hereinafter *U.S. Policy on Guantanamo Detainees*]. For a summary of the government’s position, see Mike Allen and John Mintz, *Bush Makes Decision on Detainees*, WASH. POST, Feb. 8, 2002, at A1; Murphy, *supra* note ____.

⁸⁴ Under the GPW, the detaining authority may not subject POWs to coercive questioning; and POWs are required only to provide name, rank, and serial number to interrogators. See Geneva Convention III, *supra* note ____, arts. 17-18; Rabkin, *supra* note ____ (defending denial of POW status to Taliban and Al Qaeda detainees, in part, on this ground); Wedgwood, *supra* note ____ (same).

⁸⁵ See MILITARY ORDER, NOVEMBER 13, 2001 DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM §1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter MILITARY ORDER]. It is a fair reading of the GPW that POWs facing criminal charges are entitled to trial by court-martial or regular civil court. See Geneva Convention III, *supra* note ____, arts. 99, 102; Neal Kumar Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1263-66 (2002) (concluding, in view of rights recognized in the GPW, that the Military Order must cover only unlawful belligerents); Laura Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1423-24 (2002); Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT’L L. 320, 324-26 (2002); Diane F. Orenlichter & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL’Y 653, 659-63 (2002); Jordan Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1 (2001) [hereinafter Paust, *Courting Illegality*]. Under this view, denying POW status would appear to leave open the possibility of trying detainees before military commissions for violations of the law of war. See *supra* note ____.

⁸⁶ See Geneva Convention III, *supra* note ____, arts. 117-118 (recognizing the right to repatriation); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 353 (2002) (suggesting that this right is one procedural consequence of denying POW status); Rabkin, *supra* note ____ (defending denial of POW status to Taliban and Al Qaeda detainees, in part, on this ground); Wedgwood, *supra* note ____ (same).

detainees are “unlawful combatants” (or “unprivileged belligerents”) not protected by the Geneva Conventions.⁸⁷

I want to make two points general points; then say a bit more about a couple of these issues. First, some of these rights are not unique to POW status. Specifically, the Civilians Convention recognizes interrogation rights and the right to release and repatriation are accorded several categories of detainees—indeed, the language of the two treaties is identical. Moreover, several commentators and some military manuals infer these rights from Common Article 3 and Article 75 of AP I. Second, these security-based claims, if correct, prove too much. These security-based claims would apply irrespective of whether the detainees were properly classified as POWs or not. That is, if these protective schemes compromise legitimate security interests, then POWs are systematically over-protected.

To analyze whether the prevailing scheme over-protects unlawful combatants, it is important to examine more closely the unique protective consequences of POW status. Two potentially important protections highlighted by the U.S. position merit more extended consideration. First, the POW Convention prohibits trial of POWs by special military courts (such as military commissions).⁸⁸ The Convention provides that POWs “can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power”⁸⁹ There is no analogue in the Civilians Convention. Second, POWs enjoy a broad “combatant immunity” that precludes punishing them for their very participation in the hostilities.⁹⁰ Civilians enjoy no such immunity. Although these claims also prove too much (in that the logic that undergirds them would also apply to POWs), I have a bit more to say about each.

1. Assimilation Rights and *Ad Hoc* “Military Commissions”

⁸⁷ In addition, the U.S. government asserts that the Geneva Conventions do not, in any case, apply to al Qaeda fighters—because that group is a non-governmental, criminal organization not party to the treaties. *See U.S. Policy on Guantanamo Detainees*, *supra* note ____, at 1 (“Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.”).

⁸⁸ *See, e.g.,* Paust, *Courting Illegality*, *supra* note ____,; Katyal & Tribe, *supra* note ____,; Drumbl, *supra* note ____.

⁸⁹ Geneva Convention III, *supra* note ____, art. 102.

⁹⁰ *See supra* text accompanying notes ____ (explaining concept and collecting citations).

One potentially important consequence of POW status is that it precludes the use of specialized, ad hoc criminal proceedings (such as the contemplated military commissions). This point enjoys a surface plausibility in that the POW Convention requires that POWs be tried by the same courts in which the armed forces of the detaining power would be tried.⁹¹ POWs held by the United States, for example, must be tried in U.S. courts-martial. This rule, for which there is no direct analogue in the Civilians Convention, seemingly suggests that military commissions are a viable prosecutorial option only if the detainees are not POWs.

This claim, however, requires some qualification. As described in detail in Part III, unlawful combatants enjoy general criminal procedure rights that mirror the protections accorded POWs. If the policy value of military commissions derives from their summary procedures, then the protections afforded unlawful combatants would deprive the commissions of their value in any case. That is, the rights of unlawful combatants would require procedural guarantees identical to those of courts-martial. In addition, the Geneva Conventions arguably prohibit irregular “military commissions” irrespective of the procedural rights guaranteed in such proceedings. Recall that all persons facing criminal punishment are entitled to trial by “regular” courts.⁹² The Moreover, it is important to point out that this POW “right” to trial by regular military court is, in many instances, a disability. That is, trial procedures utilized by military courts often fall short of international due process standards.⁹³ When evaluated along this axis, the military commission procedures arguably fail to satisfy in several respects the minimum requirements of Geneva law. For example, the commissions themselves arguably do not constitute impartial, independent tribunals.⁹⁴ The commissions arguably do not qualify as “tribunals established by law,” and they clearly are not “regularly constituted courts.”⁹⁵ In addition, the Department of Defense procedures arguably

⁹¹ See Geneva Convention III, *supra* note ____, art. 82.

⁹² See Geneva Conventions, *supra* note ____, common art. 3; AP I, *supra* note ____, art. 75.

⁹³ See, e.g., U.N. Sub-Commission on the Promotion and Protection of Human Rights, Issue of the Administration of Justice through Military Tribunals, 9 July 2002, Doc. No. E/CN.4/Sub.2/2002/4 (Report of Louis Jonet) (summarizing poor human rights record of military courts).

⁹⁴ See, e.g., LAWYER’S COMMITTEE FOR HUMAN RIGHTS, TRIALS UNDER MILITARY ORDER: A GUIDE TO THE FINAL RULES FOR THE MILITARY COMMISSIONS 5 (2003) [hereinafter LCHR, TRIALS UNDER MILITARY ORDER] (arguing that the military commission scheme is “particularly susceptible to abuse because the entire process is limited to one branch of government (the executive) with no meaningful independent oversight or review by either the judiciary or the legislature, and none of the participants has both standing and an interest to challenge possible abuses.”).

⁹⁵ See, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677, 687-90 (2002) [hereinafter Paust, *Ad Hoc DoD Rules*].

deprive defendants of any meaningful right to counsel.⁹⁶ They also limit the defendant's ability to mount an effective defense by sharply qualifying the right to confront witnesses and compel process.⁹⁷ Finally, the procedures do not recognize a right to appeal to a higher tribunal.⁹⁸

2. Combatant Immunity

Another potentially significant protective consequence of POW status is combatant immunity. Indeed, comparison of the schemes analyzed in Parts II and III makes clear that the real purchase of POW status is combatant immunity and not the procedural rights protections attaching to the designation. That is, the most significant consequence of POW status is that lawful combatants cannot be punished for their otherwise lawful participation in the hostilities. This point of law, although firmly-established, requires some qualification.

Although POWs are entitled to engage in combat, they must comply with the laws of war.⁹⁹ Accordingly, a POW may be prosecuted for pre-capture

⁹⁶ One problematic aspect of the rules is that civilian counsel (the counsel chosen by the accused) can be excluded from "closed Commission proceedings" and denied "access to any information protected under [the procedure's security exclusion]." Dep't of Defense, Military Comm'n Order No. 1 (Mar. 21, 2002) §§ 4(C)(3), 6(B)(3), 6(D)(5) [hereinafter DOD Order], available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>; see also Paust, *Ad Hoc DoD Rules*, *supra* note __, at 690.

⁹⁷ The procedures drastically curtail the right of confrontation. Cross-examination of witnesses against the accused is authorized only with respect to witnesses "who appear before the Commission." DoD Order, *supra* note 21, § 5(I). Witnesses can also provide testimony "by telephone, audiovisual means, or other means," by "introduction of prepared declassified summaries of evidence," "testimony from prior trials and proceedings," "sworn [and even] unsworn written statements," and "reports." *Id.* § 6(D). See also Paust, *Ad Hoc DoD Rules*, *supra* note __, at 685-87.

⁹⁸ Verdicts issued by the military commissions may be appealed to specially established "Review Panels." See DoD Order, *supra* note __, § 6(H)(4); see also LCHR, TRIALS UNDER MILITARY ORDER, *supra* note __, at 5-6 (criticizing the absence of a right to appeal guilty verdicts to a civilian court).

⁹⁹ See, e.g., MYRES S. MCDUGAL, FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 712 (1961) ("[A]cts committed in war by enemy civilians and members of armed forces may be punished as crimes under a belligerent's municipal law only to the extent that such acts are violative of the international law on the conduct of hostilities. Clearly the rule of warfare should be pointless...if every single act of war may by unilateral municipal fiat be made a common crime and every prisoner of war executed as a murderer. International law delineates the outer limits of the liability of supposed war criminals; and conformity with that law affords a complete defense for the violent acts charged."); U.S. DEP'T NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF NAVAL OPERATIONS, NWP 9 (Rev. A), FM 1-10, at 5-9 & n.9, 11-14 & n.43 (1989) ("The Convention's [GPW] underlying philosophy is that POWs should not be punished merely for having engaged in armed conflict...." "Prisoners of war may not be

offenses only if his actions (1) rise to the level of a “war crime”¹⁰⁰ or “crime against humanity;”¹⁰¹ or (2) are unrelated to the state of hostilities (i.e., are common crimes).¹⁰² Properly understood, the scope of combatant immunity therefore underscores its relative insignificance on the policy front. Consider that acts of terrorism in the context of an armed conflict are always war crimes¹⁰³—as are all attacks directed against the civilian population as such.¹⁰⁴ In addition, violations of the rule of distinction are also war crimes¹⁰⁵—as are acts of perfidy.¹⁰⁶ The upshot is that there are no protective consequences associated with POW status for persons who have engaged in terrorism, attacked civilians, or committed warlike acts without adequately distinguishing themselves from

punished for hostile acts directed against opposing forces prior to capture, unless those acts constituted violations of the law of armed conflict.”)

¹⁰⁰ Even if convicted for pre-capture offenses, enemy combatants retain the benefits of the POW regime of GPW according to Article 85 of that treaty: “Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.” Geneva Convention III, *supra* note ___, art. 85.

¹⁰¹ See ICRC COMMENTARY III, *supra* note ___ (Commentary to Article 82 identifies “crimes against humanity” as a crime that pierces combatant immunity).

¹⁰² See generally ICRC COMMENTARY III, *supra*, at 413-423 (setting forth rule). See, e.g., *United States v. Noriega*, 746 F. Supp 1506, 1526 (S.D. Fla. 1990), *aff’d*, 117 F.3d 1206 (11th Cir. 1997), *cert. denied* 523 U.S. 1060 (1998) (prosecuting prisoner of war for drug trafficking). Therefore, the immunity does not shield from prosecution enemy combatants charged with pre-capture terrorist offenses not related to the conflict.

¹⁰³ See, e.g., Hans-Peter Gasser, *Acts of Terror, “Terrorism,” and International Humanitarian Law*, 84 INT’L REV. RED CROSS 547 (2002) (cataloguing various war crimes provisions implicated by acts of terrorism). Consider that such acts typically violate several provisions of Geneva law including: (1) the prohibition on attacks of civilians and civilian objects, AP I, *supra* note ___, arts. 51, 52; (2) the prohibition on indiscriminate attacks, AP I, *supra* note ___, art. 51; (3) the murder of persons no longer taking active part in hostilities, Geneva Conventions, *supra* note ___, common art. 3; AP I *supra* note ___, art. 75; and (4) the murder of persons “protected” by the Conventions. See, e.g., Geneva Convention IV, *supra* note ___, art. 146 (“grave breach” provision of Civilians Convention). Moreover, acts of terrorism are now expressly identified as “war crimes” in AP I and the Statute of the International Criminal Tribunal for Rwanda. See AP I, *supra* note ___, art. 51 (2) (“Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, 3453d mtg., U.N. Doc. S/RES/955 (1994), art. 4 (d) (criminalizing “acts of terrorism”).

¹⁰⁴ See AP I, *supra* note ___, arts. 51 (2), 52 (1).

¹⁰⁵ See, e.g., AP I, *supra* note ___, art. 45 (1) (requiring combatants to distinguish themselves from civilian population).

¹⁰⁶ See, e.g., AP I, *supra* note ___, arts. 37-39.

civilians. Moreover, POWs, even if immune from criminal prosecution, may be deprived of their liberty because of their participation in the hostilities.¹⁰⁷ That is, *all* enemy combatants, even if POWs, may be detained without criminal charge for the duration of the hostilities.

In short, the policy and protective consequences of combatant immunity are minimal. Combatant immunity, properly defined, confers protection on one important category of fighters: unlawful combatants who have otherwise complied with the law of war. These fighters—if denied POW status and therefore denied combatant immunity—may be prosecuted upon capture for their very participation in the hostilities. A complete defense of protective parity must demonstrate that all combatants should enjoy this immunity. In the balance of this Section, I take up this task.

There are sound policy reasons to accord all captured combatants immunity for their otherwise lawful warlike acts. Combatant immunity—given its contours as just described—could and should be used as a tool to promote compliance with the rules of war. If all captured combatants failing to satisfy the requirements for POW status are subject to prosecution for any warlike acts, then these fighters have no incentive to comply with the law of war in the conduct of hostilities. Although their very failure to satisfy POW status requirements suggests some conduct contrary to the laws of war, this conduct, in many instances, may not reflect any individual culpability. Recall that POW status turns on collective considerations.¹⁰⁸ In this sense, the rules are directed primarily to the high command and other policymakers. For example, it is inopposite to characterize as “criminal” (as a formal or sociological matter) the otherwise lawful warlike acts of: (1) civilians who take up arms to defend their country against an enemy to whom they owe no allegiance;¹⁰⁹ (2) soldiers fighting for a state that, as a matter of policy, does not issue uniforms satisfying the POW rules;

¹⁰⁷ Geneva Convention III, *supra* note ____, art. 21-22.

¹⁰⁸ *See id.* art. 4, 6 U.S.T. at 3320-22, 75 U.N.T.S. at 138-40.

¹⁰⁹ In some circumstances, such civilians are indeed entitled to POW status—irrespective of whether they are “regularized.” *See* GPW, *supra* note ____, art. 4 (a)(6) (accorded POW status to all “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”). The scope of this provision, however, is unclear because the spontaneity and “insufficient time to organize” elements are ambiguous. *See* ICRC COMMENTARY III, *supra* note ____, at 67- 68. The more broadly the provision is read, the more closely Geneva law more approximates protective parity. The important point is that these requirements only loosely track individual culpability. In addition, the very fact that these so-called *levées en masse* are accorded POW status suggests that, as a structural matter, Geneva law seeks to protect combatants who fight in a way that exhibits no culpability—even if this protection may compromise the principle of distinction.

or (3) soldiers fighting for a state that, as a general matter, has not complied with the rules of war. In addition, “unlawful” belligerency, fighting without satisfying the requirements for POW status, does not in all circumstances threaten the civilian population—that is, not all acts of “unlawful” belligerency undermine the principle of distinction. This is obviously true in some circumstances—think of an irregular fighter (who is out of uniform perhaps) manning a tank, armored vehicle, or fighter aircraft. In such circumstances, the fighter’s status as a combatant is clear to the attacking forces of the enemy; and, as a consequence, the structural capacity of these attacking forces to distinguish between civilians and combatants is not compromised. Consider two more nuanced examples: (1) irregular fighters positioned on the battlefield so as to make clear to the enemy their belligerent status; and (2) irregular fighters embedded in regular armed forces clearly deployed in an aggressive posture. These examples suggest that the criminal character of belligerent acts will depend on the circumstances surrounding the commission of any such acts. In other words, some conduct that results in the denial of POW status suggests culpability; some does not.

Protective parity provides the best approach to the problem. Captured combatants (irrespective of their status) should be subject to criminal prosecution only if they have committed acts that constitute war crimes. Conversely, if combatants do not engage in such acts, they should not be punished for their very participation in the conduct of war. As I develop more fully below, this rule is poses no grave danger to the principle of distinction if we define as war crimes all acts of irregularization that, given the circumstances, threaten innocent civilians.¹¹⁰ Critics of the view advanced here might defend the criminalization of unlawful belligerency on the grounds that (1) the irregularization of warfare resulting from such acts (irrespective of whether they exhibit a culpable mental state) poses a grave and generalized threat to civilians; and (2) the criminal sanction of is necessary to deter such persons from taking up arms.¹¹¹ Although plausible, this line of reasoning suffers from two structural defects. First, criminalization of belligerency creates perverse incentives for the unlawful combatants—because their very participation in the hostilities subjects them to criminal prosecution upon capture, they have no incentive to comply with the law of war. Protecting the victims of warfare, including civilians, might best be

¹¹⁰ This is, in general, the approach of Protocol I. *See* Protocol I, *supra* note __, art. 44 (3) (“In order to promote the protection of the civilian population from the effects of hostilities, 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.”).

¹¹¹ *See, e.g.,* YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 29 (2004). Here I analyze whether the provision of combatant immunity to all fighters would subvert the “principle of distinction.” In the next Section, I address the more general claim that the denial of humanitarian protection to unlawful combatants incentivizes fighters to observe the “principle of distinction.” *See infra* Section III.C

achieved by maximizing the incentives of combatants (those who are engaged in the fight) to comply with the law of war. As discussed above, the criminalization of belligerency eschews this type of incentive structure in favor of one that seeks to discourage would-be fighters from taking up arms in the first place. Second, criminalization of belligerency does not substantially alter the incentive structure of civilians contemplating participation in hostilities. All would-be combatants have non-trivial reasons to refrain from any direct participation in the hostilities. Recall that “peaceful” civilians are immune from lawful attack; all combatants, on the other hand, may be made the object of attack. In addition, “peaceful” civilians may be detained only in a narrow range of circumstances; whereas all combatants, upon capture, may be detained for the duration of the hostilities. In short, the structure of Geneva law discourages civilian participation in armed conflict. This is not to say that civilians participate in hostilities at a low rate. The point is that would-be fighters take up arms only if they are willing to assume substantial risk to life and liberty. The pool of civilians otherwise willing to fight includes only those who value highly the benefits they expect to issue from participation in the fight. For these individuals, the criminalization of belligerency adds only a modest disincentive (if any) to join the fight.

C. Protective Parity and the Principle of Distinction

The Geneva Conventions protect unlawful combatants; and this protection very closely approximates that accorded POWs. At first blush, this outcome might seem normatively unattractive. After all, if POW status is irrelevant, then combatants (and states) arguably have no incentive to comply with the organizational requirements of the POW Convention. And, of course, such an incentive structure would risk unraveling the fabric of international humanitarian law by eroding the “rule of distinction.” In short, over-protection of unlawful combatants risks systematic under-protection of “innocent” civilians as a whole.

Although there is much to recommend this line of argument, it is in the end predicated on a mistaken assumption about the relationship between protective status and conduct. That is, the humanitarian critique of protective parity assumes that protection is a carrot (and denial of protection, a stick) to induce law-abiding conduct in time of war. One could, perhaps, design a rational humanitarian regime around the principle that its protections should cover only those who comply with its substantive commands. That, however, is not an organizing principle of Geneva law. To the contrary, the scope, content, and trajectory of Geneva law clearly demonstrate that humanitarian protection is not

used as an incentive to comply with the laws of war. Indeed, the protective regimes of Geneva law expressly condition the authority of states to enforce its substantive rules. Consider that the penal repression regime of the 1949 Conventions and Article 75 of AP I require states to accord all persons accused of violating the Conventions certain due process rights.¹¹² In addition, the POW Convention makes clear that POWs do not lose their protective status even if convicted of the most serious war crimes.¹¹³ Nevertheless, this may only prove that Geneva law is incoherent and normatively suspect. In other words, these points do not address the deeper issue of whether “protective parity” is consistent with the principle of distinction.

Assume that the organizational and behavioral prerequisites for POW status would, if observed, promote the rule of distinction—a questionable but useful assumption. The only question then is how best to encourage fighters to comply with these standards. An important point here is that, although Geneva law provides substantial protection to unlawful combatants, it nevertheless provides incentives for individuals to comply with its rules. As discussed more fully in Parts I and II, persons violating the laws of war face the prospect of criminal prosecution. Geneva law, in this sense, might be understood as exhibiting a two pronged strategy: (1) it protects *all persons* subject to the authority of a belligerent state (or armed opposition group) irrespective of their “status” (what I have called “protective parity”); and (2) it subjects *all persons* violating its substantive rules to criminal prosecution irrespective of their “status” (what I will call the “war crimes approach” to enforcement).

¹¹² Compare these robust procedural rights with the minimal procedural protections accorded in status determination proceedings. See, e.g., GPW III, *supra* note ___, art. 5 (requiring only that “in the case of doubt”, status is determined by a “competent tribunal”). For a detailed analysis of Article 5, see Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT’L REV. RED CROSS 571 (2002).

¹¹³ Geneva Convention III, *supra* note ___, art. 85 (“Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”). Although the provision references “the laws of the Detaining Power”—which might be understood as distinct from the “laws of war,” the drafting history, ICRC Commentary, and interpretation of leading military manuals make clear that it encompasses prosecution for “international” crimes. It is also important to note that the Civilians Convention does not have a direct analogue to Article 85. However, this provision was considered necessary in the Third Convention because of the conduct elements embedded in the definition of POWs. See *id.* art. 4 (A) (2). No such provision is required in the Civilians Convention because: (1) its definition of “protected persons” does not include any conduct elements; and (2) the Article 5 derogation regime provides an exhaustive catalogue of protective consequences issuing from conduct. See Geneva Convention IV, *supra* note ___, arts. 4, 5.

Of course, critics of protective parity might suggest that these two commitments are not so easily separated. These critics might point out that some rules defining status categories (such as the definition of POWs) are themselves also primary rules of conduct. After all, when an enemy combatant removes his uniform (donning only civilian clothing) and conceals his weapons, he has committed conduct that arguably both (1) deprives him upon capture of POW status; and (2) transgresses the rule of distinction (and perhaps the prohibition on perfidy)—hence, endangering innocent civilians. That is, the same conduct determines whether the combatant is a POW and whether he has committed a war crime. This contention, so framed, is both accurate and important—though not for the reason our critics might suppose. It is correct to say that the same conduct might have both status consequences and criminal consequences, but this only underscores the conceptual integrity of protective parity. Consider again the case of the hypothetical combatant fighting in civilian clothes with arms concealed. There are, as just described, two consequences: denial of POW status and prosecution for war crimes. Under the principle of protective parity, the first consequence has no protective implications. The second consequence, as a formal matter, also has *no protective implications*. Throughout his confinement and any criminal proceedings (irrespective of the outcome), the fighter will enjoy the full protections of the Geneva law. On the other hand, our hypothetical fighter will face negative consequences—criminal punishment for his acts. Negative consequences issue from the fighter’s failure to comply with the laws of war, but the imposition of these negative consequences is itself governed by the protective schemes of Geneva law. The important point is that the scope and content of protective schemes are conceptually distinct from the scope and content of enforcement schemes. The former need not be inextricably connected to the latter. The upshot is that protective parity need not erode the rule of distinction—protection can coincide with the energetic suppression of war crimes.

Moreover, there are good reasons to prefer from a deterrence perspective the prevailing approach in Geneva law. Recall that there are at least two ways to build into humanitarian regimes structural incentives to comply: (1) denial of humanitarian protection to bad actors (coupled perhaps with criminal prosecutions); or (2) criminal prosecution of bad actors (all of whom nevertheless enjoy humanitarian protection). Geneva law—preferring war crimes prosecutions over denial of humanitarian protection—is narrowly tailored to punish only bad actors. That is, the “war crimes” approach targets persons who, with a culpable mental state, have committed acts causing or risking grave consequences for protected persons. The “denial of protective status” approach, on the other hand, punishes an unacceptably broad range of conduct including all acts which would have the effect of depriving captured persons of protective status.

The “war crimes” approach is preferable because it emphasizes culpability. Not all conduct depriving persons of POW status may be classified as war crimes (and the inverse is obviously false—not all conduct constituting a war crime would deprive a combatant of POW status). Indeed, the overlap encompasses only conduct that threatens the humanitarian values of Geneva law. Two examples illustrate the point. First consider that several categories of persons accompanying the armed forces—including civilian members of military aircraft crews, war correspondents, and supply contractors—are entitled to POW status provided they have express authorization to do so and carry an identification card documenting this authorization.¹¹⁴ Any such persons captured in battle without proper identification or without express authorization may well be denied POW status—although this conduct arguably would not rise to the level of a war crime. In addition, individual members of a fighting force that systematically violates the laws of war may well be denied POW status—even if the individual fighter has not committed and is not complicit in any violations himself.¹¹⁵ Loss of status, in short, cannot be equated with culpability. These examples demonstrate that the “war crimes” approach is a more exacting tool—directing punitive action toward culpable persons.

The “war crimes” approach also corrects some perverse incentives created by the “denial of protection” approach. Note first that the example of the law-abiding fighter in the law-disregarding fighting force (described in the previous paragraph) illustrates this point. Under the “war crimes” approach, the fighter has some incentive to obey the laws of war, whereas the “denial of protection” approach assures that he will suffer punitive measures at the hands of the enemy irrespective of his personal conduct. Moreover, the “denial of protection” approach might lengthen and intensify conflicts by providing a disincentive to surrender. As discussed above, military planners and soldiers have long understood that poor treatment of captured enemy fighters often backfires because it encourages the enemy to “fight to the death.”¹¹⁶ The important point here is that the same logic applies to the conduct of all combatants—whether they satisfy the requirements of POW status or not.

CONCLUSION

¹¹⁴ See Geneva Convention III, *supra* note __, art. 4 (A) (4).

¹¹⁵ See *id.* art. 4 (A) (2) (d).

¹¹⁶ See, e.g., U.S. ARMY, OPERATIONAL LAW HANDBOOK, *supra* note __, at ; FLORY, *supra* note __, at __ (documenting history).

Humanitarian protection in time of war should not vary by detainee status category. Through an analysis of the legal situation of unlawful combatants, I illustrate that (1) protective schemes are converging; and (2) although the protective significance of POW status is declining, there are some persistent gaps in coverage. Building on this descriptive base, I provide a comprehensive normative defense of protective parity. The unique protective significance of POW status suggests that POWs are systematically, though only modestly, over-protected and unlawful combatants are systematically under-protected. If protective schemes compromise legitimate security interests, POWs are systematically over-protected. That is, these security-based claims, if valid, would apply irrespective of whether the detainees were properly classified as POWs or not. If humane treatment of the enemy increases battlefield effectiveness (because poor treatment discourages surrender, encourages reprisals, decreases troop morale, and decreases political support for the war effort), then unlawful combatants are systematically under-protected. I also argue that protective parity is consistent with the principle of distinction. Even if “irregularization” undermines distinction, the question is how best to encourage fighters to distinguish themselves from the civilian population. I maintain that protective status categories are an inefficient way to incentivize individual combatants because these categories necessarily trade on collective considerations—such as the organizational characteristics of the fighting force. The rule of distinction would be better served by an individualized “war crimes” approach that accorded all fighters substantial humanitarian protection and punished (in accord with basic requirements of due process) individual bad actors.

University of Chicago Law School

Public Law and Legal Theory Working Paper Series

1. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (November 1999; *Ethics*, v. 110, no. 1).
2. Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process (November 1999; forthcoming *Yale Law and Policy Review* v.18 #1).
3. Cass R. Sunstein, Is the Clean Air Act Unconstitutional? (August 1999; *Michigan Law Review* #3).
4. Elizabeth Garrett, The Law and Economics of “Informed Voter” Ballot Notations (November 1999, *University of Virginia Law Review*, v. 85).
5. David A. Strauss, Do Constitutional Amendments Matter? (November 1999)
6. Cass R. Sunstein, Standing for Animals (November 1999)
7. Cass R. Sunstein, Culture and Government Money: A Guide for the Perplexed (April 2000).
8. Emily Buss, Without Peers? The Blind Spot in the Debate over How to Allocate Educational Control between Parent and State (April 2000).
9. David A. Strauss, Common Law, Common Ground, and Jefferson’s Principle (June 2000).
10. Curtis A. Bradley and Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent (May 2000; *Pennsylvania Law Review* v. 149).
11. Mary Ann Case, Lessons for the Future of Affirmative Action from the Past of the Religion Clauses? (May 2001, *Supreme Court Review*, 2000)
12. Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa (May, 2000).
13. Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations
14. Elizabeth Garrett, Institutional Lessons from the 2000 Presidential Election (May 2001).
15. Richard A. Epstein, The Allocation of the Commons: Parking and Stopping on the Commons (August 2001).
16. Jack Goldsmith, The Internet and the Legitimacy of Remote Cross-Border Searches (October 2001).
17. Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects? (October 2001).
18. Cass R. Sunstein, Of Artificial Intelligence and Legal Reasoning (November 2001).
19. Elizabeth Garrett, The Future of Campaign Finance Reform Laws in the Courts and in Congress, The William J. Brennan Lecture in Constitutional Law (December 2001).
20. Julie Roin, Taxation without Coordination (March 2002).

21. Geoffrey R. Stone, *Above the Law: Research Methods, Ethics, and the Law of Privilege* (March 2002; forthcoming *J. Sociological Methodology* 2002).
22. Cass R. Sunstein, *Is There a Constitutional Right to Clone?* (March 2002).
23. Emily Buss, *Parental Rights* (May 2002, forthcoming *Virginia Law Review*).
24. David A. Strauss, *Must Like Cases Be Treated Alike?* (May 2002).
25. David A. Strauss, *The Common Law Genius of the Warren Court* (May 2002).
26. Jack Goldsmith and Ryan Goodman, *U.S. Civil Litigation and International Terrorism* (June 2002).
27. Jack Goldsmith and Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes* (June 2002).
28. Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions* (July 2002).
29. Elizabeth Garrett, *Is the Party Over? The Court and the Political Process* (August 2002).
30. Cass R. Sunstein, *The Rights of Animals: A Very Short Primer* (August 2002).
31. Joseph Isenbergh, *Activists Vote Twice* (November 2002).
32. Julie Roin, *Truth in Government: Beyond the Tax Expenditure Budget* (November 2002).
33. Cass R. Sunstein, *Hazardous Heuristics* (November 2002).
34. Cass R. Sunstein, *Conformity and Dissent* (November 2002).
35. Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education* (December 2002).
36. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* (January 2003).
37. Adrian Vermeule, *Mead in the Trenches* (January 2003).
38. Cass R. Sunstein, *Beyond the Precautionary Principle* (January 2003).
39. Adrian Vermeule, *The Constitutional Law of Congressional Procedure* (February 2003).
40. Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice* (March 2003).
41. Emily Buss, *Children's Associational Rights? Why Less Is More* (March 2003)
42. Emily Buss, *The Speech Enhancing Effect of Internet Regulation* (March 2003)
43. Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron* (May 2003)
44. Elizabeth Garrett, *Legislating Chevron* (April 2003)
45. Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis* (April 2003)
46. Mary Ann Case, *Developing a Taste for Not Being Discriminated Against* (May 2003)
47. Saul Levmore and Kyle Logue, *Insuring against Terrorism – and Crime* (June 2003)
48. Eric Posner and Adrian Vermeule, *Accommodating Emergencies* (September 2003)

49. Adrian Vermeule, *The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory* (September 2003)
50. Cass R. Sunstein, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* (September 2003)
51. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally* (November 2003)
52. Jenia Iontcheva, *Nationalizing International Criminal Law: The International Criminal Court As a Roving Mixed Court* (January 2004)
53. Lior Jacob Strahilevitz, *The Right to Destroy* (January 2004)
54. Adrian Vermeule, *Submajority Rules (in Legislatures and Elsewhere)* (January 2004)
55. Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism* (January 2004)
56. Catharine A. MacKinnon, *Directions in Sexual Harrassment Law: Afterword* (January 2004)
57. Cass R. Sunstein, *Black on Brown* (February 2004)
58. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence* (February 2004)
59. Bernard E. Harcourt, *You Are Entering a Gay- and Lesbian-Free Zone: On the Radical Dissents of Justice Scalia and Other (Post-) Queers* (February 2004)
60. Adrian Vermeule, *Selection Effects in Constitutional Law* (March 2004)
61. Derek Jinks and David Sloss, *Is the President Bound by the Geneva Conventions?* (March 2004)
62. Derek Jinks and Ryan Goodman, *How to Influence States: Socialization and International Human Rights Law* (March 2004)
63. Eric A. Posner and Alan O. Sykes, *Optimal War and *Jus Ad Bellum** (April 2004)
64. Derek Jinks, *Protective Parity and the Law of War* (April 2004)
65. Derek Jinks, *The Declining Significance of POW Status* (April 2004)
66. Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility* (June 2004)
67. Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars {A Call to Historians}* (June 2004)