

2004

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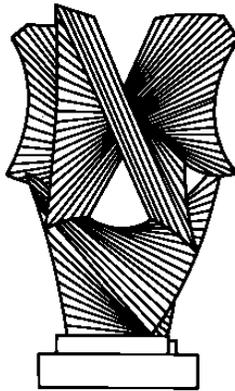
Recommended Citation

Derek Jinks, "The Declining Significance of POW Status" (University of Chicago Public Law & Legal Theory Working Paper No. 65, 2004).

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CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 65



THE DECLINING SIGNIFICANCE OF POW STATUS

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Forthcoming, *Harvard International Law Journal* 2004
June 2004

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The Declining Significance of POW Status

Derek Jinks*

Forthcoming, HARVARD INT'L LAW JOURNAL (2004)

What is the significance of prisoner-of-war (POW) status?¹ Drawing on the substance, universal acceptance, broad-based institutionalization, and enforcement machinery of the Geneva Convention for the Protection of Prisoners of War (POW Convention), conventional wisdom maintains that denial of POW status to combatants has drastic protective and policy consequences. Contrary to this conventional wisdom, this Article argues that denial of POW status carries few protective or policy consequences, and that the gap in protection for those classified as POWs and those not so classified (e.g., those designated “unlawful combatants”) is closing. The only gaps that persist are: (1) that POWs are “assimilated” into the legal regime governing the armed forces of the detaining state; and (2) that POWs enjoy “combatant immunity.” The scope and significance of these gaps are, however, also diminishing--from both a protection and policy perspective. The Article further argues that this emerging “protective parity” has important implications for humanitarian law and policy: (1) it clarifies and consolidates debates about coverage gaps in the Geneva law; (2) it recasts debates about the proper procedure for determining “status” in humanitarian law (procedurally, POW status might be understood only as an affirmative defense to

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¹ The four 1949 Geneva Conventions, by their terms, protect specific categories of persons. Each Convention defines, in some detail, the categories of persons protected by its substantive terms. *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 POW CONVENTION] (the third of the Geneva Conventions); 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 CIVILIANS CONVENTION] (the fourth of the Geneva Conventions). These definitions of “protected persons” are dense and are riddled with ambiguities and obscure terms of art. *See, e.g.,* Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the “War on Terror,”* 44 HARV. INT’L L.J. 301 (2003) (noting the interpretive difficulties occasioned by Article 4 of the POW Convention). The text of these provisions, coupled with the duration and intensity of the drafting debates on them at the Diplomatic Conference, strongly support two conclusions: (1) the Conventions writ large do not have broad, general applicability--the categories of protected persons are discrete; and (2) states could not agree, with great precision, on how best to delimit these categories. As a consequence, states retained substantial interpretive wiggle room on a question made central in the protective schemes of the Conventions--the question of who is protected. The POW Convention and the interpretive controversies arising out of the war on terrorism exemplify these difficulties. Article 4(A) of the POW Convention, in relevant part, defines “prisoners of war” as follows:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) That of being commanded by a person responsible for his subordinates;
 - (b) That of having a fixed distinctive sign recognizable at a distance;
 - (c) That of carrying arms openly;
 - (d) That of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

any prosecution for simple participation in hostilities); and (3) it underscores the escalating inefficiencies of approaches that calibrate treatment based on complex status determinations (and, in doing so, provides an explanation of why some states—including the United States—expressly incorporate elements of “protective parity” into their military policy). Finally, I offer a normative defense of “protective parity”—emphasizing whether it can be reconciled with the principle of distinction.²

Conventional wisdom maintains that denial of POW status to captured combatants has drastic consequences for the scope of applicable humanitarian protections. Indeed, the prevailing view is that denying captured enemy combatants POW status places them “at the mercy of the detaining power.”³ The ground-breaking Lieber Code of 1863, issued by President Abraham Lincoln as General Order 100 governing the conduct of U.S. forces in the Civil War, provided that persons engaged in hostilities without satisfying the requirements for POW status could be captured and summarily shot.⁴ The Hague Regulations of 1907 provided that the rights and obligations of war applied only to persons satisfying the criteria for POW status.⁵ Although no U.S. court has had occasion to address the question directly, some courts have suggested that the government may treat “unlawful combatants” summarily.⁶ Many foreign courts have expressly supported this view.⁷ Similar views are espoused by many commentaries,⁸

² See *infra* Part V.

³ 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> (last visited Apr. 23, 2004). See also Maj. Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 328 (1951). 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 opponent [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 (emphasis added).

⁴ 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).

⁵ HAGUE CONVENTION NO. IV RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter HAGUE CONVENTION] (Hague Regulations are annexed to the Convention).

⁶ See, e.g., *Ex parte Quirin*, 317 U.S. 1, 34 (1942).

⁷ See, e.g., *Mohamed Ali and Another v. Public Prosecutor*, 42 I.L.R. 458 (Malay., Judicial Comm. of the Privy Council, 1968) (ruling that accused saboteurs were not entitled to protection under laws of war, including fair trial rights, because they were not entitled to POW status); *Military Prosecutor v. Omar Mahmud Kassem and Others*, 42 I.L.R. 470 (Israeli Military Ct. at Ramallah, 1969) (holding the same for a group of guerrilla fighters).

⁸ See, e.g., Brough, *supra* note 3 (“Captured combatants who are not POWs are devoid of [Geneva Convention] 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”); McKeogh has written that

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*.

COLM MCKEOGH, *INNOCENT CIVILIANS: THE MORALITY OF KILLING IN WAR* 137 (2002) (emphasis added); see also INGRID DETTER, *THE LAW OF WAR* 148 (2d 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.”); Draper has written that:

Citizens 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.

G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, in *REFLECTIONS ON LAW AND ARMED CONFLICTS* 206, 208 (Michael A. Meyer & Hilaire McCoubrey eds., 1998); Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)*, in *INTERNATIONAL DIMENSIONS OF*

including several important treatises on the laws of war.⁹ In short, it is generally believed that the denial of POW status carries drastic protective consequences for captured combatants--some suggesting that denial of this status leaves captured combatants *unprotected* by the law of war.¹⁰

The controversy concerning the legal status of captured Taliban and Al Qaeda fighters reflects this conventional wisdom. The United States has expressly advanced the conventional view in this context, and has determined that these detainees do not qualify for POW status. This view deprives them of protection under humanitarian law. Of course, the U.S. position has been sharply criticized by allied governments, inter-governmental organizations, prominent human rights and humanitarian law organizations, and foreign courts.¹¹ This criticism, however, centers on the merits of the U.S. POW status determination and the procedures used to make that determination.¹² In classifying the detainees as unlawful combatants, the United States, it seems, asserts the right to treat the detainees in any way it deems appropriate--unencumbered by international legal obligation. For example, Secretary of Defense Donald Rumsfeld stated that the United States would, as a matter of *policy*, treat the detainees humanely, but made clear that the United States was under no legal obligation to do so.¹³ In addition, the formal

HUMANITARIAN LAW 93, 106 (Henry Dunant Institute, UNESCO ed., 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 . . .").

⁹ See, e.g., GEORG SCHWARZENBERGER, II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 115-17 (1968) (arguing that unprivileged belligerents are in the same position as "spies," and as such, are 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 OF 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. 'Non-combatants' who engage 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."); 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 257 (H. Lauterpacht ed., 1952) (1905) (arguing that unlawful combatants are "liable 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 trans., 1792) (1758) ("A nation attacked by such sort of [unlawful combatants] is not under any obligation to observe towards them the rules of wars in form.").

¹⁰ The "law of war" encompasses two distinct bodies of rules: the *jus ad bellum*--rules governing when use of force is 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 I, *supra* note 1; GENEVA CONVENTION II, *supra* note 1; POW CONVENTION, *supra* note 1; CIVILIANS CONVENTION, *supra* note 1; 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 ADDITIONAL PROTOCOL 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 ADDITIONAL PROTOCOL II]. Hague law, embodied principally in the 1899 and 1907 Hague Conventions, governs the means and methods of warfare, tactics, and the general conduct of hostilities. See, e.g., HAGUE CONVENTION, *supra* note 5. This is not to say that Geneva law includes no rules governing means and methods of warfare, or that Hague law includes no rules governing the treatment of war victims; indeed, each treaty series includes elements of the other. This terminology, although conceptually imprecise, emphasizes the distinction between the two kinds of regimes--one governing the treatment of persons subject to the enemy's authority (Geneva law), the other governing the treatment of persons subject to the enemy's lethality (Hague law). In contemporary parlance, "international humanitarian law" embraces the whole *jus in bello*, in both its "Geneva" and "Hague" dimensions. See generally DETTER, *supra* note 8, at x-xviii (surveying these terminological issues).

¹¹ See JENNIFER ELSEA, TREATMENT OF BATTLEFIELD DETAINEES IN THE WAR ON TERRORISM 1-5 (2003) (documenting the storm of controversy surrounding the POW issue); Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 10 n.24 (2002) (same); Bryan Bender, *Red Cross Disputes US Stance on Detainees*, BOSTON GLOBE, Feb. 9, 2002, at A1 (stating that the International Committee of the Red Cross (ICRC) considers "both the Taliban and Al Qaeda fighters held by US forces . . . to be prisoners of war."); Tamara Lytle, *Taliban, Al-Qaeda Captives Arrive as Rights Groups Fret*, ORLANDO SENTINEL, Jan. 12, 2002, at A1.

¹² See generally Sean Murphy, *Decision not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT'L L. 475 (2002) (summarizing debates). See also John Mintz, *Debate Continues on Legal Status of Detainees*, WASH. POST, Jan. 28, 2002, at A15; John Mintz, *On Detainees, U.S. Faces Legal Quandary*, WASH. POST, Jan. 27, 2002, at A22.

¹³ See U.S. Dep't of Defense News Transcript, Sec'y Rumsfeld Media Availability en Route to Camp X-Ray (Jan. 27, 2002), available at http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html (last visited Apr. 15, 2004).

proclamation of the U.S. policy concludes that the detainees are not protected by the Geneva Conventions, and that, as a consequence, the treatment to be accorded the detainees is solely a matter of policy.¹⁴

Predictably, the POW controversy has persisted and intensified. Indeed, the controversy has reached such proportions that it threatens to compromise the “war on terrorism.”¹⁵ Perhaps even more importantly, disagreement concerning the scope and content of fundamental humanitarian rules might impede cooperative security arrangements in general.¹⁶

The heart of this controversy is whether the detainees--enemy combatants captured in Afghanistan--are entitled to POW status as defined in the 1949 Geneva Convention for the Protection of Prisoners of War (POW Convention).¹⁷ Consider the details of the debate. The official U.S. government position is that neither Taliban nor Al Qaeda fighters qualify as POWs because they fail to satisfy international standards defining lawful combatants.¹⁸ In short, the United States maintains that assignment of POW status in this case would be incorrect as a matter of law and imprudent as a matter of policy. Specifically, the United States argues that neither group of captured fighters satisfies the express requirements of the POW Convention, and that POW protections would impede the investigation and prosecution of suspected terrorists.¹⁹ Of particular concern on the policy front are (1) restrictions on the interrogation of POWs;²⁰ (2) the criminal procedure rights of POWs (which might preclude trial by special “military commission”);²¹

¹⁴ Fact Sheet, White House Press Office, Status of Detainees at Guantanamo (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> [hereinafter Status of Detainees at Guantanamo] (last visited Apr. 15, 2004).

¹⁵ Because international cooperation is crucial to the effectiveness of U.S. antiterrorism policies, transnational disagreements about the treatment of detainees assume enormous importance. Routine aspects of transnational law enforcement have been complicated by the controversy. For example, some states are reluctant to extradite suspected Al Qaeda (or Taliban) fighters to the United States without assurances that they will not be held at Guantanamo. And, because the prisoners at Guantanamo are nationals of several co-belligerent states, the controversy has triggered diplomatic disputes between the United States and several important allies in the war against terrorism (including the United Kingdom and Australia). See generally Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Manooher Mofidi & Amy Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 CORNELL INT’L L.J. 59 (2003).

¹⁶ Following the controversy surrounding the treatment of the Guantanamo detainees, coalition military planning has involved sensitive negotiations on the proper interpretation of Geneva law. For example, prior to the invasion of Iraq, the United Kingdom sought and received assurances from the United States that all captured fighters would be treated in accordance with the POW Convention. George Jones & Ben Rooney, *U.S. “Will Adhere” to Geneva Convention*, LONDON DAILY TELEGRAPH, Feb. 4, 2003.

¹⁷ POW CONVENTION, *supra* note 1, art. 4.

¹⁸ See Press Release, Dep’t of Defense, DoD News Briefing: Secretary Rumsfeld and Gen. Myers (Feb. 8, 2002), available at http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html (last visited Apr. 15, 2004); Status of Detainees at Guantanamo, *supra* note 14.

¹⁹ 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 12. See also Joyce Howard Price, *Detainees Not POWs Insists White House*, WASH. TIMES, Jan. 27, 2002, at A1 (discussing interrogation rationale); Rowan Scarborough, *Geneva Rules for Taliban, not al Qaeda*, WASH. TIMES, Feb. 8, 2002, at A1 (discussing repatriation and military tribunals rationales); Rowan Scarborough, *Powell Wants Detainees To Be Declared POWs; Memo Shows Differences with White House*, WASH. TIMES, Jan. 26, 2002, at A1 (discussing leaked memo from White House Counsel Alberto Gonzales in which he states that the war against terrorism “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners . . .”).

²⁰ Under the POW Convention, the detaining authority may not subject POWs to coercive questioning, and POWs are required to provide only name, rank, and serial number to interrogators. See POW CONVENTION, *supra* note 1, arts. 17–18; Jeremy Rabkin, *After Guantanamo: The War over the Geneva Conventions*, NAT’L INTEREST 15 (Summer 2002) (defending denial of POW status to Taliban and Al Qaeda detainees, in part, on this ground); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328 (2002) (same).

²¹ See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, at 57,834 (Nov. 16, 2001), reprinted in 10 U.S.C. § 801 (2001) [hereinafter Military Order]. It is a fair reading of the POW Convention that POWs facing criminal charges are entitled to trial by court-martial or regular civil court. See POW CONVENTION, *supra* note 1, arts. 99, 102; 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); 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 POW Convention, that the Military Order must cover only unlawful belligerents); 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. Orentlicher & 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. For an evaluation of this claim in view of the arguments developed herein, see *infra* Part IV.C.1.

and (3) the right of POWs to release and repatriation following the cessation of hostilities.²² In short, the United States has concluded that the detainees are “unlawful combatants” (or “unprivileged belligerents”) and thus not protected by the Geneva Conventions.²³

Critics of the U.S. policy, on the other hand, argue that (1) the U.S. determination that the detainees are not POWs is flawed because it relies on a misreading of the POW Convention; and that (2) the United States must, irrespective of the merits of their classification, treat the detainees as POWs until a “competent tribunal” has determined that they do not qualify for POW status. The first criticism questions the U.S. interpretation of Article 4 of the POW Convention—relating to the identification of persons entitled to POW status (the “Article 4 issue”).²⁴ The second criticism, on the other hand, questions the U.S. interpretation of Article 5 of the treaty, which establishes presumptive POW status in all cases of “doubt” and prescribes the procedure for determining the legal status of captured fighters (the “Article 5 issue”).²⁵

²² See POW CONVENTION, *supra* note 1, arts. 117–18 (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 20 (defending denial of POW status to Taliban and Al Qaeda detainees, in part, on this ground); Wedgwood, *supra* note 20 (same).

²³ 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 Status of Detainees at Guantanamo, *supra* note 14 (“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.”).

²⁴ See, e.g., Paust, *Courting Illegality*, *supra* note 21, at 2–6. Recall that Article 4 of the POW Convention identifies several categories of persons protected by the Convention. See POW CONVENTION, *supra* note 1, art. 4. This provision, although somewhat detailed, leaves many crucial questions unresolved. For example, it is difficult to discern the degree to which these provisions protect irregular forces incorporated into the regular armed forces of a state. Whether or when these provisions protect members of private armed groups—including terrorist organizations—is also unclear. With respect to Article 4, one important question is whether the four criteria expressly applied to “militia and other volunteer corps” in paragraph (A)(2) also limit the scope of paragraph (A)(1) concerning members of the armed forces. That is, there is some question whether members of the regular armed forces must have a command structure, wear uniforms, carry arms openly, and generally comply with laws of war to qualify for POW status. As the current POW controversy illustrates, states and commentators take divergent views on this question. See, e.g., George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT’L L. 764, 768–69 (1981) (arguing that Article 4(A)(2) criteria apply only to certain “irregular” armed forces and that “[m]embers of regular, uniformed armed forces do not lose their [POW] entitlement no matter what violations of the law their units may commit, but the guerrilla unit is held to a tougher standard . . .”). Moreover, the text and drafting history lend some support to both views. See, e.g., G.I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* 52 (1958); 1 HOWARD S. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 13–14 (1986); RICHARD I. MILLER, *THE LAW OF WAR* 29 (1975). Indeed, there is good reason to doubt that standard interpretive methods can resolve this disagreement decisively. On the one hand, paragraph (A)(1) covers members of the “armed forces” of a state, and the drafting history of the provision suggests that this language covers only members of the *regular* armed forces. Hence, some have concluded that the four criteria of (A)(2) are implicitly embedded in (A)(1) because *regularization* of forces requires, at a minimum, these four characteristics. See generally HOWARD S. LEVIE, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT* 34–59 (U.S. Naval War College, International Law Studies, Vol. 59, 1977). On the other hand, the text of (A)(1) does not make reference to “regular” armed forces. Indeed, it extends coverage to “members of militia and other volunteer corps forming part of” the armed forces. Inexplicably, this reference to “militia and other volunteer corps,” unlike the reference in (A)(2), is not qualified by the four criteria. This textual anomaly suggests that the four criteria apply only to “militia and other volunteer corps” not part of the “armed forces” of the state, and that captured fighters covered by (A)(1) are POWs irrespective of whether they satisfy the four criteria.

²⁵ See, e.g., Inter-American Commission on Human Rights [Inter-Am C.H.R.], *Legal Status of the Detainees at Guantanamo Bay To Be Determined by a Tribunal* (Inter-Am. C.H.R., March 12, 2002), reprinted in 23 HUM. RTS. L.J. 15 (2002) (granting, in part, petitioners’ request for precautionary measures, and urging the United States “[to] take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal [in accordance with POW Convention, Article 5]”); Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT’L REV. RED CROSS 571 (2002). It is difficult, in many cases, to discern easily whether a captured combatant satisfies the requirements of Article 4—a point well understood by the drafters of the Convention. To address this problem directly, the POW Convention establishes that captured combatants, when their status is unclear, are presumptively entitled to POW status. Article 5 of the POW Convention provides that, [s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

POW CONVENTION, *supra* note 1, art. 5. Although this provision takes a useful approach—identifying a default rule—the application of the rule is qualified and the conditions under which it applies are poorly defined. More specifically, the applicability of Article 5 is triggered by “doubt” regarding the status of captured persons. The problem is that the text and drafting history provide little guidance on the meaning of this critical term. Once again, the current controversy illustrates that states and commentators define the term differently. See Naqvi, *supra* note 25 (surveying drafting history). Of course, the United States maintains that the status of Taliban and Al Qaeda

Two important points follow from this discussion. First, the current debate turns on competing interpretations of the qualifications for POW status and the procedures for assessing the status of individual combatants. Each interpretation enjoys non-trivial textual and historical support. Indeed, it is well understood in humanitarian law circles that the 1949 Geneva Conventions did little to resolve the long-standing dispute over whether and when irregular forces should qualify for lawful combatant status.²⁶ Some commentators note that the vagueness of the qualifications for this status, coupled with the ascendancy of irregular forces and guerrilla tactics, strongly suggests that belligerents will interpret these criteria “so as to eliminate most irregulars from their protection.”²⁷ Because these indefinite criteria invite “deliberate misconstructions,” the regime’s extension of POW status to some irregulars may be “disregarded completely.”²⁸ Second, the scope and content of the controversy make clear that both sides build upon the claim that POW status determinations carry significant protective and policy implications. All sides of the POW controversy, therefore, rely upon or presume that the conventional wisdom is, at least in part, correct.

The conventional view, however, requires substantial qualification. Without question, the Geneva Conventions guarantee POWs several important rights and privileges. It is a mistake, however, to infer from this proposition that the denial of POW status carries significant detrimental consequences for the scope and content of detainee rights. In fact, careful analysis of the text, structure, and history of the Geneva Conventions demonstrates that the Conventions provide a robust rights regime for all war detainees. Indeed, the rights extended to all detainees include those rights that the U.S. government suggests may undermine the war on terrorism.²⁹ In this Article, I argue that, irrespective of whether war detainees are assigned POW status, humanitarian law accords protections that mirror, in most important respects, the rights accorded POWs.³⁰ In short, I argue, contrary to conventional wisdom, that denying detainees POW status has no significant protective consequences (and, as a consequence, yields no important policy advantages to the detaining state). The text, structure, and history of the

detainees was not in doubt. *See, e.g.*, Katharine Q. Seelye, *Detainees Are Not P.O.W.’s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6 (quoting Secretary of Defense Rumsfeld that “[t]here is no ambiguity in this case”).

²⁶ *See, e.g.*, JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, A TREATISE ON THE JURIDICAL BASIS OF THE DISTINCTION BETWEEN LAWFUL COMBATANT AND UNPRIVILEGED BELLIGERENT 83 (1959) [hereinafter JAG, TREATISE] (“The changes wrought in the field of belligerent qualifications by the Geneva Convention of 1949, while they represent important innovations, did not reach the crux of the [‘unlawful combatant’] problem.”); KARMA NABULSI, TRADITIONS OF WAR: OCCUPATION, RESISTANCE, AND THE LAW 241 (1999) (“By the end of the Geneva negotiations in 1949, significant progress had been made in the codification of the laws of war However, the question of the distinction between lawful and unlawful combatants remained essentially unresolved.”).

²⁷ JAG, TREATISE, *supra* note 26, at 84–85.

²⁸ *Id.* at 82.

²⁹ *See supra* text accompanying notes 19 – 23 (surveying U.S. rationales for treatment of war detainees).

³⁰ In the interest of clarity, an important note on the scope of this analysis is in order. In this Article, I consider only the scope and content of protection accorded under *humanitarian law*. Some would, no doubt, argue that *international human rights law* protects “unlawful combatants” in all circumstances, and that these protections are, in all crucial respects, similar to POW rights recognized in the laws of war. *See, e.g.*, Fitzpatrick, *supra* note 22; Paust, *Courting Illegality*, *supra* note 21. Although this claim, on the merits, is one worthy of sustained reflection (a matter I will take up in subsequent work), the scope and content of humanitarian law nevertheless remains an important, open question. Indeed, over-reliance on human rights law as the source of protection for war detainees is problematic in several respects. Although it is beyond the scope of this Article to analyze this issue fully, consider a few deficiencies of human rights law vis-à-vis humanitarian law. First, international human rights law is not institutionalized in national law and policy to the same extent as humanitarian law. National military policy—embodied in national legislation, military manuals and formal military training—incorporates directly the requirements of humanitarian law. *See, e.g., infra* text accompanying notes 44–48 (describing the level of institutionalization of the POW Convention). Second, humanitarian law enjoys a more robust enforcement regime. For example, all serious violations of the laws of war give rise to individual criminal liability, and many violations of the laws of war come within the subject matter jurisdiction of special national and international tribunals. *See, e.g.*, KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW (2001); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2d ed. 2001). Third, the content of humanitarian law is both more detailed and more narrowly tailored to the realities of armed conflict. *See, e.g.*, G.I.A.D. Draper, *Humanitarian Law and Human Rights*, in REFLECTIONS ON LAW AND ARMED CONFLICTS (Michael A. Meyer & Hilaire McCoubrey eds., 1998). Fourth, the applicability of human rights law, particularly in international armed conflict, may be limited by “derogability, territorial scope, or . . . jurisdiction.” Gerald L. Neuman, *Humanitarian Law and Counterterrorist Force*, 14 EUR. J. INT’L L. 283, 292 (2003).

Geneva Conventions strongly support two conclusions: (1) Geneva law protects unlawful combatants; and (2) this protection very closely approximates that accorded POWs. Moreover, several recent developments in humanitarian law and policy suggest that this minimal protective gap is closing. The trajectory of international humanitarian law reflects an emerging “protective parity” across combatant status categories. This “protective parity” recasts debates about the legal status of unlawful combatants.

The argument is organized as follows: Part I outlines the direct protective consequences of POW status and explicates the general features of POW rights. Part II canvasses the rights of unlawful combatants--individuals who participate in hostilities without satisfying the minimum legal requirements to do so. In that Part, I analyze important structural features of the Geneva Conventions that have been under-examined (or, more commonly, misunderstood or misrepresented) in the current controversy. Part III clarifies the application of these overlapping protective schemes to varying categories of unlawful combatants. In Part IV, I argue that the Geneva Conventions, properly understood, afford POWs little in the way of unique procedural protections. In addition, I maintain that several overlapping developments suggest that the limited significance of POW status is declining. By way of illustration, I discuss the implications of this analysis for the current POW controversy and, more specifically, U.S. anti-terrorism policy. Finally, I offer some preliminary reflections on the conceptual integrity and normative attractiveness of “protective parity” in humanitarian law.

I. THE PROTECTIVE CONSEQUENCES OF POW STATUS

In one sense, the significance of POW status is obvious to any student of international humanitarian law. After all, POWs enjoy substantial international legal protection pursuant to the POW Convention.³¹ These protections include: (1) the right to humane treatment (including important limitations on coercive interrogation tactics);³² (2) due process rights;³³ (3) the right to release and repatriation upon the cessation of active hostilities;³⁴ and (4) the right to communication with (and the institutionalized supervision of) protective agencies.³⁵ The POW Convention also prohibits reprisals against POWs³⁶ and precludes the use of POWs as slave labor.³⁷ In addition, POWs may not be prosecuted for their participation in the hostilities--that is, they are entitled to “combatant immunity.”³⁸ Moreover, the POW Convention makes clear that POW rights are inalienable³⁹ and non-derogable.⁴⁰ Finally, the Convention requires that states suppress the mistreatment of POWs by investigating, prosecuting, and

³¹ POW CONVENTION, *supra* note 1.

³² *Id.* art. 13 (humane treatment); *see also id.* art. 17 (rules concerning interrogation), 21–48 (rules governing conditions of confinement).

³³ *Id.* arts. 99–108.

³⁴ *Id.* arts. 118–19.

³⁵ *Id.* arts. 8–11.

³⁶ *Id.* art. 13.

³⁷ *Id.* arts. 49–57.

³⁸ 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.”); Maj. Geoffrey S. Corn & Maj. Michael L. Smidt, “*To Be or Not To Be, That Is the Question*”: *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 14 (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 757, 1228–29 (1948). Moreover, the privilege may be inferred from several provisions of the POW Convention. *See* POW CONVENTION, *supra* note 1, arts. 82, 87–88.

³⁹ POW CONVENTION, *supra* note 1, art. 7.

⁴⁰ *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”).

punishing individuals responsible for “grave breaches” of the Convention.⁴¹

Nearly all states have now ratified this treaty,⁴² and many have incorporated its protections directly into domestic law.⁴³ Several influential national military manuals direct their armed forces to observe unconditionally the obligations embodied in the POW Convention.⁴⁴ These obligations are now also formally accepted by several international organizations supervising multinational force deployments, including the United Nations⁴⁵ and the North Atlantic Treaty Organization (NATO).⁴⁶ Moreover, these rules, unlike many international legal protections, have teeth; they are accompanied by an elaborate criminal enforcement regime. Under the POW Convention, for example, the mistreatment of persons entitled to POW status constitutes a “grave breach” of international humanitarian law⁴⁷--giving rise to individual criminal liability⁴⁸ and so-called “universal jurisdiction” over perpetrators.⁴⁹ The criminalization of violations of POW rules is now also recognized in many national penal codes,⁵⁰ as well as several important international agreements concerning the scope of international criminal law--including the International Criminal Court⁵¹ and the International Criminal Tribunal for the Former Yugoslavia.⁵² In short, the inquiry proposed above yields an incontestable, yet deceptively simple answer: the designation of a captured combatant as a POW carries significant protective consequences.

⁴¹ *Id.* arts. 129–31.

⁴² See ICRC, *States Party to the Geneva Conventions and Their Additional Protocols: Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977*, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/\\$File/Conventions%20de%20GenSve%20et%20Protocoles%20additionnels%20ENG-logo.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20GenSve%20et%20Protocoles%20additionnels%20ENG-logo.pdf) (last visited Mar. 7, 2004) (documenting 191 ratifications). See also ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 490 n.47 (Naval War College, Int’l L. Studies vol. 73, A.R. Thomas & James C. Duncan eds., 1999) (“[The POW Convention] is the universally accepted standard for treatment of [POWs]; virtually all nations are parties to it and it is now regarded as reflecting customary law.”).

⁴³ See ICRC, International Humanitarian Law, National Implementation Database, available at <http://www.icrc.org/ihl-nat.nsf/WebLAW2?OpenView> (last visited Mar. 7, 2004) (providing excerpts of implementing national legislation from over 50 countries).

⁴⁴ See, e.g., DEP’T OF THE ARMY, FM 27-10: DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE, ch. 3 (1956) [hereinafter FM 27-10] (U.S.), available at <http://www.osc.army.mil/others/Gca/files/FM27-10.pdf> (last visited Apr. 23, 2004);

JUDGE ADVOCATE GENERAL OF CANADA, LAW OF ARMED CONFLICT MANUAL (2001), available at http://www.forces.gc.ca/jag/training/publications/loac_man_e.asp (last visited Mar. 7, 2004); MANUAL OF MILITARY LAW, PART III: THE LAW OF WAR ON LAND (1958) (U.K.); THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (Dieter Fleck ed., 1999).

⁴⁵ See United Nations Secretariat, Secretary General’s Bulletin, Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), available at http://www.un.org/peace/st_sgb_1999_13.pdf (last visited Mar. 7, 2004).

⁴⁶ See NATO Parliamentary Assembly, Civilian Affairs Committee, Res. 287 (15 Nov. 1999), available at <http://www.naa.be/archivedpub/resolutions/99-amsterdam-287.asp> (last visited Apr. 23, 2004). As part of the IFOR/SFOR mandate under the Dayton Accords, NATO agreed to enforce the substantive commitments of the parties, including the commitment to observe the 1949 Geneva Conventions. See Stabilization Force, Framework Agreement, Annex 1A (authorizing forces to enforce the agreement), Annex 6 (outlining human rights obligations of the parties and enumerating the 1949 Geneva Conventions as part of the applicable law), available at <http://www.nato.int/sfor/basic/gfap.htm> (last visited Apr. 23, 2004). This institutional commitment to the Geneva Conventions is not surprising given that all NATO states are party to the four 1949 Conventions. Indeed, the only real difficulty regards the applicability of the 1977 Protocols to the Conventions in NATO operations. See *supra* note ___ (discussing this issue).

⁴⁷ See POW CONVENTION, *supra* note 1, arts. 129–31.

⁴⁸ *Id.*; see also JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 3 – 15, 27 – 43 (2d ed. 2000) (describing the emergence of individual criminal responsibility in the laws of war).

⁴⁹ Although I use the phrase “universal jurisdiction,” I invoke it in a limited sense. Of course, the “grave breach” regime of the Geneva Conventions does not formally confer “universal jurisdiction.” Rather, the Conventions require states to prosecute or extradite persons accused of grave breaches. See POW CONVENTION, *supra* note 1, arts. 129–31; see also Edward M. Wise, *Aut Dedere aut Judicare: The Duty To Prosecute or Extradite*, in II INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 15 (M. Cherif Bassiouni, ed.) (2d ed. 1999). These provisions do not purport to confer on states jurisdictional authority they would not otherwise enjoy. Rather, the “prosecute or extradite” obligation is aimed at securing international cooperation in the suppression of serious violations of the Conventions. *Id.* at 17–19.

⁵⁰ See, e.g., ICRC, *supra* note 43; Coalition for the Int’l Criminal Court, National Legislation Database (providing full text of national war crimes legislation from over 35 states), available at <http://www.iccnw.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates.html> (last visited Mar. 7, 2004).

⁵¹ See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 8, July 17, 1998, 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

⁵² See S.C. Res. 808, U.N. Doc. S/RES/808 annexed to The Secretary-General, *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*, U.N. Doc. S/25704, art. 2 (May 3, 1993), reprinted in 32 I.L.M. 1159 (1993).

Discerning, on the other hand, the *unique* protective significance of POW status presents several complications. What are the protective consequences of *denying* POW status? The problem is a thorny one in part because international humanitarian law also accords substantial legal protection to other status categories. For example, the Geneva Conventions provide detailed legal protection to “civilians”--a term of art in humanitarian law. As I shall explore in detail below,⁵³ the Civilians Convention entitles “civilians” to protections that, in most respects, are identical to those provided by the POW Convention.⁵⁴ In addition, the Civilians Convention enjoys the same international acceptance,⁵⁵ formal institutionalization,⁵⁶ and enforcement regime as does the POW Convention.⁵⁷ The upshot is that the denial of POW status in many cases arguably carries no unique protective consequences.⁵⁸

Of course, many persons captured in time of war do not neatly fit into the category of “civilians.” The central difficulty is what protections apply, and which should apply, to persons who have directly participated in the hostilities without satisfying the requirements for POW status. Such persons, often called “unlawful combatants” or “unprivileged belligerents,” pose an important challenge to the laws of war. The concern is that the conceptual and normative structure of humanitarian law requires a sharp distinction between combatants and civilians (or non-combatants)--strongly suggesting that persons taking up arms in time of war are not properly considered “civilians.” According to this view, combatants either qualify for POW status or fall outside the protective schemes of humanitarian law.⁵⁹ In addition, this so-called “rule of distinction” supports establishing minimum organizational and individual requirements for combatants so as to ensure that combatants, as a practical matter, remain sufficiently distinguishable from civilians. Combatants failing to satisfy these minimum requirements arguably are not properly classified as POWs (or “lawful combatants”). The important point is that the “rule of distinction” arguably necessitates a restrictive definition of both civilian status and, by implication, POW status.

Two additional points underscore the centrality of these issues. First, these tensions in humanitarian law likely will escalate over time. The number of combatants arguably falling outside the protective umbrella of international humanitarian law is substantial and likely to remain so. Irregular or guerrilla forces are commonplace in contemporary conflicts, and typically they do not satisfy the minimum requirements for POW status. Second, the potential gaps in humanitarian law are poorly understood, because of both the evolving character

⁵³ See *infra* Part II.A (discussing the Civilians Convention). The Geneva Conventions also prescribe important protections for sick and wounded combatants. See GENEVA CONVENTION I, *supra* note 1; GENEVA CONVENTION II, *supra* note 1. However, the definition of persons protected by these treaties makes clear that only persons who, if captured, would qualify for POW status are covered by the treaty. See GENEVA CONVENTION I, *supra* note 1, art. 4; GENEVA CONVENTION II, *supra* note 1, art. 4.

⁵⁴ Compare POW CONVENTION, *supra* note 1, arts. 21–42, 46–88 with CIVILIANS CONVENTION, *supra* note 1, arts. 79–149; see also *infra* Part II.A (summarizing the most important protections); ICRC, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 4–5 (Jean S. Pictet ed., 1958) [hereinafter ICRC, COMMENTARY IV] (“In general . . . the regulations applicable to civilians reproduce almost word for word the regulations relating to prisoners of war.”).

⁵⁵ See ICRC, *States Party*, *supra* note 42.

⁵⁶ See, e.g., ICRC, National Implementation Database, *supra* note 43; Coalition for the Int’l Criminal Court, National Legislation Database, *supra* note 50. See also sources collected in notes 42–46 (incorporating both POW Convention and Civilians Convention).

⁵⁷ See, e.g., CIVILIANS CONVENTION, *supra* note 1, art. 146 (establishing “grave breach” regime for Civilians Convention); see also sources collected in notes 47–52 (establishing enforcement mechanisms for both POW Convention and Civilians Convention).

⁵⁸ As I analyze in detail below, there is one cluster of POW rights that arguably provides unique protective benefits. Under the POW Convention, POWs are, for protective purposes, “assimilated” into the armed forces of the detaining power. See POW CONVENTION, *supra* note 1, arts. 82, 84, 87, 88, 95. As a consequence, POWs are subject to the same substantive law as the armed forces of the detaining power (giving rise to combatant immunity), and POWs are entitled to the same trial procedures as the armed forces of the detaining power (precluding the use of special military commissions to try POWs). See *infra* Part IV.C (assessing these claims).

⁵⁹ It should also be noted that Geneva law provides some important protections for all persons subject to the authority of a belligerent state. See *infra* Parts II.C, II.D (discussing Common Article 3 of the four Geneva Conventions [hereinafter Common Art. 3] and Article 75 of Additional Protocol I); see also *infra* Part IV (analyzing several important recent developments implicating the scope and content of these provisions).

and the complexity of its overlapping protective schemes. In this regard, systematic analysis of the legal situation of “unlawful combatants” would clarify the unique protective significance--or lack thereof--of POW status. If POW status matters, it will matter most in the case of unlawful combatants. Moreover, because they are not POWs (by definition), and their civilian status is problematic, the legal situation of unlawful combatants provides an opportunity to explore the contours of humanitarian law generally.

I next offer detailed consideration of the rights accorded “unlawful combatants” in Geneva law--that is, individuals who participate in hostilities without satisfying the requirements for POW status. There are, in general, two widely-endorsed approaches to this issue: (1) international law does not protect “unlawful combatants”; or (2) international law provides some relatively modest protection to “unlawful combatants,” but these protections are substantially below those accorded POWs. Part II evaluates the plausibility of these two approaches through a systematic analysis of other protective schemes that arguably apply to unlawful combatants.

II. UNLAWFUL COMBATANTS AND GENEVA LAW

In this Part, I identify four sources of potentially applicable humanitarian rules. The Geneva Conventions provide multiple discernible sources of procedural rights protections--only one of which is taken into account in the current controversy. First, the Geneva Conventions establish a dense network of guarantees for the four categories of “protected persons.”⁶⁰ The categories of “protected persons” include POWs and “civilians” (a much broader category), and both are entitled to extensive procedural rights protections and other guarantees.⁶¹ Second, the Conventions also prescribe the minimum procedural rights required in the prosecution of individuals charged with violating the substantive rules of the Conventions.⁶² Third, the Conventions identify the minimum humanitarian protections applicable to all persons rendered *hors de combat*--that is, all persons no longer taking active part in the hostilities.⁶³ Finally, Article 75 of Additional Protocol I recognizes several important protections that apply to all persons “in the power of” a belligerent state.⁶⁴

In this sense, international humanitarian law provides at least four sources of detainee rights, each with a distinct field of application. Humanitarian protections therefore apply to four categories of persons: (1) “protected persons” under the four Geneva Conventions (including “civilians” as defined in the Civilians Convention); (2) all persons charged with violations of the laws of war; (3) all persons no longer taking active part in the hostilities; and (4) all persons “in the power of” a party to the conflict. Because of the breadth of these categories, most significant humanitarian protections apply to all detainees--including “unlawful” or “unprivileged” combatants.

A. *Civilians Convention (the Fourth Geneva Convention)*

The Civilians Convention provides detailed rules governing the treatment of “civilians” in armed conflicts, and the substance of these rules in most important respects mirrors the rights of POWs. These protections include: due process rights

⁶⁰ See GENEVA CONVENTION I, *supra* note 1 (sick and wounded on land); GENEVA CONVENTION II, *supra* note 1 (sick, wounded, and shipwrecked at sea); POW CONVENTION, *supra* note 1; CIVILIANS CONVENTION, *supra* note 1.

⁶¹ CIVILIANS CONVENTION, *supra* note 1, arts. 65–78; POW CONVENTION, *supra* note 1, arts. 82–108.

⁶² See *infra* Part II.B.

⁶³ See *infra* Part II.C.

⁶⁴ See *infra* Part II.D.

(including the right to fair trial in the event of criminal prosecution);⁶⁵ the right to humane treatment;⁶⁶ freedom from coercive interrogation;⁶⁷ freedom from discrimination;⁶⁸ the right to repatriation (including the right to leave enemy territory voluntarily);⁶⁹ the right to internal camp governance;⁷⁰ 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).⁷¹

Although the Civilians Convention broadly defines the class of persons protected by its substantive provisions, the scope of its application is limited in several important ways.⁷² First, the full protections of the Convention extend only to persons who “find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁷³ Second, the Convention writ large protects only the nationals of states party to the Civilians Convention.⁷⁴ Third, the full protections of the Convention do not apply to nationals of a neutral state or nationals of a co-belligerent state “while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”⁷⁵ Fourth, most provisions of the Convention apply only in (1) the territory of a party to the conflict, and (2) occupied territory.⁷⁶

Moreover, the Civilians Convention by its terms applies *only* to persons *not* covered by the other Conventions (such as POWs).⁷⁷ That is, persons who do not qualify for POW status may nevertheless be “protected persons” under the Conventions. Furthermore, although the Geneva Conventions do not include an express definition of “civilians,” and despite the fact that it seems odd to characterize combatants as “civilians,” the text and drafting history of the Civilians Convention make clear that it does protect “unlawful” combatants (although to a lesser extent in some circumstances than non-combatant civilians), provided, of course, that they are enemy nationals.

1. *Applicability to Unlawful Combatants*

The Civilians Convention applies to all enemy nationals--including “unlawful” combatants--not protected by the other Conventions.⁷⁸ Although this point is often overlooked in current debates,⁷⁹ it enjoys broad support in the legal literature,⁸⁰ contemporary international war crimes jurisprudence,⁸¹ and national

⁶⁵ See CIVILIANS CONVENTION, *supra* note 1, arts. 64–76, 126, 146–47.

⁶⁶ *Id.* arts. 27–34.

⁶⁷ *Id.* arts. 31–32.

⁶⁸ *Id.* arts. 1, 3, 27.

⁶⁹ *Id.* arts. 35–38, 77, 132–35.

⁷⁰ *Id.* arts. 101–04.

⁷¹ *Id.* arts. 13–26.

⁷² It is important to point out, however, that the Convention does offer some protection to all civilian persons. See CIVILIANS CONVENTION, *supra* note 1, arts. 13–26 (establishing minimal protections for civilians and civilian objects--such as hospitals--located in combat zones); see also *infra* Parts II.B, II.C (discussing penal repression regime and Common Article 3 of the four Geneva Conventions); see also *infra* Part IV (analyzing several important recent developments implicating the scope and content of these provisions).

⁷³ CIVILIANS CONVENTION, *supra* note 1, art. 4. See also *infra* Part IV.B.1 (discussing recent developments that arguably relax these requirements).

⁷⁴ CIVILIANS CONVENTION, *supra* note 1, art. 4 (“Nationals of a State not bound by the Convention are not protected by it.”).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ CIVILIANS CONVENTION, *supra* note 1, art. 4.

⁷⁸ *Id.* 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 *infra* Part III.C; see also Common Art. 3, *supra* note 59; CIVILIANS CONVENTION, *supra* note 1, arts. 13–26, 146.

⁷⁹ See, e.g., Inter-Am. C.H.R., *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (Oct. 22, 2002), available at <http://www.cidh.oas.org/Terrorism/Eng/toc.htm> (last visited Mar. 24, 2004); Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 44, at 65, 67–68.

⁸⁰ See, e.g., 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); HILLARE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE

military manuals.⁸² Nevertheless, some dissent persists because (1) the consensus view is often asserted without any sustained defense;⁸³ (2) the contrary view--that the Convention covers civilians as distinguished from combatants--enjoys some intuitive appeal;⁸⁴ (3) the “protected person” classification question overlaps with--and is, as a consequence, often confused with--classification questions that arise under the rule of distinction;⁸⁵ and (4) the Convention’s derogation regime--invoked by some as definitive proof that the Convention covers unlawful combatants⁸⁶ and by others as definitive proof that it does not⁸⁷--generates several conceptual complications.⁸⁸ Notwithstanding these points, the best reading of the Civilians Convention is that it covers unlawful combatants who satisfy its nationality and territoriality requirements, and that this coverage is subject to qualifications delimited in the Convention’s derogation regime. Three points support these conclusions.

First, the text of the Civilians Convention suggests that it 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.”⁸⁹ This is, in my view, the strongest argument for the applicability of the Convention to unlawful combatants. The provision 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.”⁹⁰ 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.”⁹¹ And, as previously discussed, the Civilians Convention does not apply to persons protected by any of the other Conventions.⁹² The provision does not, however, expressly limit the application of the Convention to persons taking no part in the hostilities.⁹³ Indeed, the Convention prescribes, in some detail, rules governing the treatment of civilians “suspected of or engaged in activities hostile to the State.”⁹⁴ It is also important to note that the definitions of “protected persons” in the other Geneva Conventions are, without exception, quite detailed.⁹⁵ When read in light of the other Conventions, the Civilians Convention should not

137 (2d ed. 1998); Draper, *supra* note 8; George Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 893 (2002); Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. RED CROSS 849 (2003); 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).

⁸¹ See, e.g., Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 271 (Nov. 16, 1998) (“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.”).

⁸² See, e.g., FM 27-10, *supra* note 44, ¶ 73:

If a person is determined by a competent tribunal, acting in conformity with Article 5, [POW Convention] (par. 71), not to fall within any of the categories listed in Article 4, [POW Convention] (par. 61), he is not entitled to be treated as a prisoner of war. He is, however, a “protected person” within the meaning of Article 4, [Civilians Convention] (Par. 247).

See also BRITISH MILITARY MANUAL, PART III: THE LAW OF LAND WARFARE art. 94 (1958) (U.K.).

⁸³ See, e.g., Draper, *supra* note 8; Kalshoven, *supra* note 80; Rosenblad, *supra* note 80. Baxter is the exception here. Baxter, *supra* note 3, at 326–328. I assess his line of reasoning in detail below. See *infra* Part II.A.2.b.

⁸⁴ The relationship between these categories and the rule of distinction undergirds this intuition. As a consequence, this point ultimately collapses into the next. As I argue in the conclusion, this approach to the protective classification problem is misplaced. See *infra* Part V.

⁸⁵ See *infra* Part V.

⁸⁶ See, e.g., Dormann, *supra* note 80.

⁸⁷ See, e.g., Baxter, *supra* note 3, at 338. See also *infra* Part II.A.2.b (analyzing Baxter’s position).

⁸⁸ See *infra* Part II.A.2; see also *infra* Part V.

⁸⁹ CIVILIANS CONVENTION, *supra* note 1, art. 4.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* art. 5. I analyze the scope and content of these limitations below. See *infra* Part II.A.2.

⁹⁵ See GENEVA CONVENTION I, *supra* note 1, art. 4; GENEVA CONVENTION II, *supra* note 1, art. 4; POW CONVENTION, *supra* note 1, art. 4

be interpreted as *implicitly* excluding from its protection a broad category of individuals otherwise satisfying its definition of “protected persons.”

Second, the drafting history of the Civilians Convention makes clear that it protects unlawful combatants and that this protection is subject to important qualifications. At the Diplomatic Conference, some delegations, including those from the United Kingdom and Australia, expressed the view that unlawful combatants (spies or saboteurs, to be more precise) should not be protected by the Civilians Convention.⁹⁶ Others, including the Soviet Union, Scandinavian countries, and the International Committee of the Red Cross (ICRC), criticized this view.⁹⁷ Indeed, Australia proposed an amendment to Article 4 which read: “Provided persons definitely suspected of or engaged in activities hostile to the security of the State or the Occupying Power shall not be entitled to such rights and privileges contained in this Convention, as this would be prejudicial to the security of such State or Power.”⁹⁸ On the other side of the issue, the Soviet Union countered with a defense of the ICRC’s pre-Conference “Stockholm draft” (which would have extended the full benefits of the Convention to unlawful combatants)⁹⁹ and in the alternative proposed amendments to clarify that unlawful combatants were covered.¹⁰⁰ Both views were rejected by the Committee.¹⁰¹ Instead, the Committee steered a middle course by adopting draft Article 3A (Article 5 in the final text), which made clear that although unlawful combatants are “protected persons,” states may, in specified circumstances, deprive such persons of some of the protections of the Convention.¹⁰² When the Soviet delegate made his final plea to the Plenary to reject the Committee’s proposal,¹⁰³ several delegations responded that Articles 4 and 5, in their final form, reflected a “careful compromise solution” and urged the Plenary to endorse the Committee’s recommendation.¹⁰⁴ The U.K. delegate rejected the Soviet Union’s criticism of Article 5, in part, by pointing out that some important protections, including the right to humane treatment and fair trial rights of the Convention, would apply to persons covered by Article 5.¹⁰⁵ In the end, the Diplomatic Conference overwhelmingly approved the Committee’s proposed text.¹⁰⁶ Indeed, even Australia, the original sponsor of the amendment that would have left unlawful combatants completely unprotected, indicated that it supported the compromise reflected in the final version.¹⁰⁷ In short, the drafting history demonstrates that the Conventions were designed to cover unlawful combatants and that the extent of this coverage was made subject to the limitations embodied in Article 5.¹⁰⁸

Third, the text and structure of Additional Protocol I to the Geneva

⁹⁶ See 2A Diplomatic Conference Convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims, Apr. 21–Aug. 12, 1949, *Final Record*, 621–22 [hereinafter Diplomatic Conference]; ICRC COMMENTARY IV, *supra* note 54, at 52 (“Some people considered that the Convention should apply without exception to all the persons to whom it referred, while to others it seemed obvious that persons guilty of violating the laws of war were not entitled to claim its benefits.”).

⁹⁷ See 2A Diplomatic Conference, *supra* note 96, at 618–24, 814.

⁹⁸ See 3 Diplomatic Conference, *supra* note 96, at 100.

⁹⁹ See 1 Diplomatic Conference, *supra* note 96, at 113–30 (providing text of Stockholm draft). The drafting history of the “Stockholm draft” makes clear that the Civilians Convention would protect, to some extent, persons not protected by the other Conventions. See also ICRC, 17th International Red Cross Conference, Stockholm, Aug. 1948, *Draft Revised or New Conventions for the Protection of War Victims (No. 4A)*, 3; ICRC, Conference of Government Experts for the Study of the Conventions for the Protections of War Victims, Geneva, Apr. 14–16, 1947, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*; ICRC, Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross, Geneva, July 26–Aug. 3, 1946, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross*.

¹⁰⁰ 2A Diplomatic Conference, *supra* note 96, at 621–23.

¹⁰¹ See 2A Diplomatic Conference, *supra* note 96, at 814 (Committee Report to the Plenary).

¹⁰² See 3 Diplomatic Conference, *supra* note 96, at 101 (proposed by Austria, Sweden, Switzerland, and others).

¹⁰³ See, e.g., 2B Diplomatic Conference, *supra* note 96, at 377–79.

¹⁰⁴ See, e.g., 2B Diplomatic Conference, *supra* note 96, at 379 (U.S. delegate).

¹⁰⁵ *Id.* at 380. Compare the delegate’s remarks here with his remarks in the Committee where he insisted that no rights should apply to spies and saboteurs; the United Kingdom had clearly and unequivocally accepted the compromise. See 2A Diplomatic Conference, *supra* note 96, at 621–22.

¹⁰⁶ 2B Diplomatic Conference, *supra* note 96, at 377, 384.

¹⁰⁷ *Id.* at 382.

¹⁰⁸ See *infra* Part II.A.3.

Conventions suggest that the Civilians Convention applies to unlawful combatants. That is, subsequent refinements of Geneva law demonstrate how states and other important international actors such as the ICRC interpreted the scope of the 1949 Conventions. By the 1970s, several leading commentators, many international organizations, and most states discerned important deficiencies and gaps in Geneva law.¹⁰⁹ Broad-based efforts to address these concerns culminated in the drafting of the Additional Protocols to the Conventions. One important and, in part, controversial development was the redefinition of lawful belligerency as part of the overall effort to make the rules governing international armed conflicts applicable to non-international wars of national liberation.¹¹⁰ The relevant provisions of Additional Protocol I involve two conceptually distinct reforms: (1) these provisions relaxed the requirements for lawful combatant and POW status;¹¹¹ and (2) they clarified the protective consequences of failing to meet these relaxed requirements.¹¹² Although the advisability and proper interpretation of the first reform do not directly implicate the instant analysis,¹¹³ the precise contours of the second clearly require further consideration.¹¹⁴ Article 45 of Additional Protocol I provides in part:

Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held

¹⁰⁹ See BOTHE ET AL., *supra* note 80, at 3–10 (describing background to the Conference); ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS (Yves Sandoz et al. eds., 1987), at xxix–xxxv, 19–21; Christopher Greenwood, *Historical Development and Legal Basis of Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 44, at 1, 24–26 (summarizing important developments in Additional Protocol I); FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 72–137 (1987) (providing a more elaborate review of developments reflected in Additional Protocol I).

¹¹⁰ ADDITIONAL PROTOCOL I, *supra* note 10, arts. 1(4), 43–45.

¹¹¹ *Id.* arts. 43–44.

¹¹² *Id.* art. 45.

¹¹³ For critical evaluation of the Protocol's amendments of the definition of lawful combatants, see Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987), Abraham Sofaer, *The Rationale for the U.S. Decision*, 82 AM. J. INT'L L. 784 (1988).

¹¹⁴ Here I highlight only the interpretive relevance of Article 45. The substantive merits of this provision (and its companion provisions, Articles 43 and 44) are not important for these purposes. It should be noted that the United States is not party to either Additional Protocol. See Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess., III (1987), reprinted in 81 AM. J. INT'L L. 910 (1987); George Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1 (1991). Although the U.S. recognizes many provisions of these treaties as customary international law (indeed, the United States expressly supports many provisions as good law and policy), it specifically objects to the redefinition of combatant status in Article 44. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987); see also Aldrich, *supra*; Sofaer, *supra* note 113. The United States, however, views Article 45 "as either legally binding as customary international law or acceptable practice though not legally binding." Matheson, *supra*, at 420. Indeed, the U.S. military expressly acknowledges the centrality of the Protocols in the laws of war. See, e.g., JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, *Legal Framework of the Law of War*, in LAW OF WAR WORKSHOP DESKBOOK 25, 32 (Brian J. Bill ed., 2000), available at [http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/TJAGSAWeb.nsf/8f7edfd448e0ec6c8525694b0064ba51/9dc02ec45aba401d852569ad007c79df/\\$FILE/LOWW%20Master%20Document.pdf](http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/TJAGSAWeb.nsf/8f7edfd448e0ec6c8525694b0064ba51/9dc02ec45aba401d852569ad007c79df/$FILE/LOWW%20Master%20Document.pdf) (last visited Apr. 23, 2004):

Although the U.S. has never ratified either of these Protocols, their relevance continues to grow based on several factors:

- a. The U.S. has stated it considers many provisions of Protocol I, and all of Protocol II, to be binding customary international law.
- b. The argument that the entire body of Protocol I has attained the status of customary international law continues to gain strength.
- c. These treaties bind virtually all of our coalition partners.
- d. U.S. policy is to comply with Protocol I and Protocol II whenever feasible.

These themes, and the growing influence of the Protocols, are addressed more systematically below. See *infra* Part IV.B.4.

as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.¹¹⁵

Two aspects of this provision have bearing on the inquiry here. First, the provision conclusively establishes that *all* unlawful combatants are at least entitled to the minimum protections of Article 75, which I will analyze in Part II.D. The drafting history of, and official commentary on, Articles 45 and 75 reveal that these provisions sought to clarify several general, structural characteristics of the 1949 Conventions (such as the relationship between the POW Convention and the Civilians Convention)¹¹⁶ and to extend some minimum protections to persons expressly excluded from the scope of the Civilians Convention (such as nationals of co-belligerents, nationals of the detaining authority, and nationals of states not party to the Convention).¹¹⁷ That is, these provisions were *not* designed to extend protection to unlawful combatants as such. Rather, they were drafted to protect a subset of all unlawful combatants otherwise not protected under the Conventions.

The affirmative protective consequences of this provision are, for the purposes of this line of analysis, less important than the second salient aspect of the provision: its implicit recognition that other Geneva rules may apply to some unlawful combatants. That is, the provision makes clear that the Civilians Convention protects, to some as-yet-undefined extent,¹¹⁸ some unlawful combatants.¹¹⁹ Of course, as previously discussed, the Civilians Convention writ large clearly would not apply to unlawful combatants who fail to satisfy the nationality or territoriality constraints of Article 4. The important point is that the inapplicability of the Convention in such cases is a function of the nationality of the person in question or the nature of the territory in which the person is detained--not the designation of any such person as an unlawful combatant.

2. *Limitations*

So far, the analysis offered above demonstrates only that unlawful combatants were covered by the Civilians Convention *to some extent*. Two potentially significant qualifications of this protection require further analysis. First, the protection accorded unlawful combatants under the Civilians Convention was expressly conditioned by the derogation regime of Article 5. As discussed above, Article 5 of the Civilians Convention, by its terms, applies to all unlawful combatants and arguably authorizes derogation of some Convention obligations. Recall that states may suspend some Convention rights if the detainee in question poses a threat to the security of the detaining state. The scope of this derogation power, however, is less clear. I argue that Article 5 derogations, properly understood, are sharply limited. Second, the Civilians Convention may not provide any protection in “zones of active combat”--that is, on the battlefield. This is the interpretation of the Convention proposed by then-Major Richard Baxter in his famous article on the subject in the British Yearbook of International Law.¹²⁰ In this Part, I reject Baxter’s claim because it is predicated on a cramped reading of the Convention and its drafting history--one that generates several interpretive and normative anomalies.

¹¹⁵ ADDITIONAL PROTOCOL I, *supra* note 10, art. 45(3). The provision was adopted at the Diplomatic Conference by consensus. See 6 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, Geneva, 1974–77, *Official Record*, 155 CDDH/SR. 41 (1978).

¹¹⁶ See BOTHE ET AL., *supra* note 80, at 258–61.

¹¹⁷ *Id.*

¹¹⁸ As discussed *infra* in Part II.A.2, the scope of this protection is conditioned by Article 5 of the Civilians Convention. CIVILIANS CONVENTION, *supra* note 1, art. 5.

¹¹⁹ See, e.g., BOTHE ET AL., *supra* note 80, at 261–62; Dormann, *supra* note 80, at 50.

¹²⁰ See Baxter, *supra* note 3.

a. *Article 5 of the Civilians Convention: The “Derogation” Provision*

Application of the Civilians Convention to unlawful combatants is qualified by Article 5, the “derogation” provision. Specifically, this provision supplements the definition of “protected persons” provided in Article 4 by qualifying the applicability of the Civilians Convention to unlawful combatants. As a structural matter, Article 5 defines the scope of state authority to suspend the rights and privileges of persons otherwise protected by the Civilians Convention. Therefore, all categories of persons subject to Article 5 derogations are necessarily “protected persons” within the meaning of Article 4. In addition, all persons covered by Article 4 are “protected persons” *irrespective of whether their protection is qualified by Article 5*.¹²¹ 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].”¹²² In full, it provides that:

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

[2] 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.

[3] 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.¹²³

Although the provision clearly constitutes a broad authorization to derogate from the substantive commitments of the Convention, Article 5 conditions this authorization in several important respects. The provision establishes four types of constraints on the power to derogate: (1) derogations are permitted only in certain types of territory; (2) derogations are permitted only with respect to certain categories of persons; (3) derogations must be necessary to preserve certain state interests; and (4) derogations are permitted only with respect to certain rights and privileges.

First, the provision is subject to severe territorial restrictions. Indeed, the text suggests that it applies only in occupied territory and the territory of the detaining state.¹²⁴ That is, it does not expressly authorize derogations in non-

¹²¹ As I discuss above, this structural point is also important in discerning the territorial scope of the Convention.

¹²² CIVILIANS CONVENTION, *supra* note 1, art. 5.

¹²³ *Id.*

¹²⁴ *Id.*

occupied, enemy territory or in the territory of a co-belligerent. On this reading, the authority to derogate is most constrained in territory over which the derogating state exercises no sovereign or *de facto* authority. Conversely, this authority is at its apex in territory governed by the derogating state.

Indeed, the drafting history of the provision makes clear that it was motivated by concerns over *internal* security. The Swiss delegate introduced Article 5 by noting that “internal security was one of the main preoccupations of national leaders in time of war” and that “[i]t was essential . . . that the protection given by the Convention should not facilitate the subversive activities of ‘fifth columnists’.”¹²⁵ Article 5 was introduced “[i]n order to guard against that danger.”¹²⁶ The U.K. representative offered support for the provision by emphasizing that while his country “had given haven to refugees of all nationalities” and offered them the “same treatment as that accorded to its own citizens,” the United Kingdom refused “to jeopardize the lives of its own citizens . . . by omitting to take effective steps to counter, in time of war, the activities of those who abused its hospitality and conspired against its safety.”¹²⁷ The delegate further stressed that “[i]t should be possible to counteract the dangers to which a country could be exposed to in wartime by the activities of traitors and saboteurs . . . by the adoption of effective measures against individuals suspected of giving assistance to the enemy.”¹²⁸ The final drafting committee report to the Plenary emphasized “internal security” as the rationale for the provision, underscoring the necessity of Article 5 to counter effectively those “underground activities” that pose “a secret threat to the security of the State.”¹²⁹ These statements demonstrate that the purpose of the first paragraph of Article 5 was to empower states to restrict, as necessary for state security, the rights and privileges of spies, saboteurs, and other enemy agents operating in the *home territory of a belligerent power*.¹³⁰

Similar logic applies in the context of “occupied territory.” Spies, saboteurs, and other unlawful combatants threaten the capacity of the military authority to administer occupied territory. Because the occupying forces must, under the terms of the Convention, assume many essential governmental functions, threats to military security are roughly analogous to threats to state security.¹³¹ Hence, the second paragraph of Article 5, concerning occupied territory, authorizes derogations “where absolute military security so requires,” whereas the first paragraph, concerning the home territory of a belligerent state, authorizes only derogations from rights the exercise of which would “be prejudicial to the security of [the] State.”¹³²

Second, derogations are permitted only with respect to certain persons--namely, those engaged in activity hostile to the state or occupying power. Derogation therefore requires that the detaining state know or have good reason to suspect that a particular individual has engaged in hostile acts.¹³³ This requirement, in general, poses no great difficulty in the case of unlawful combatants who, by definition, have directly participated in hostilities against the detaining state. The important point for our purposes is that Article 5 is activated

¹²⁵ 2A Diplomatic Conference, *supra* note 96, at 796.

¹²⁶ *Id.*

¹²⁷ *Id.* at 797.

¹²⁸ *Id.* In the plenary debates, the U.K. delegate emphasized that Article 5 concerned [those] who have entered the country of the Home Power in time of peace and with their permission, and who have taken all that the country had to give them and have turned out to be conspirators and traitors in war-time against the country which has sheltered them.

2B Diplomatic Conference, *supra* note 96, at 380.

¹²⁹ *Id.* at 814.

¹³⁰ I do not mean to suggest that unlawful combatants are unprotected if captured in the home territory of the detaining state (or occupied territory). The point is only that the treatment accorded such persons is conditioned by the derogation regime of Article 5.

¹³¹ See, e.g., 2B Diplomatic Conference, *supra* note 96, at 379–81 (demonstrating the analogy drawn by several delegates).

¹³² CIVILIANS CONVENTION, *supra* note 1, art. 5.

¹³³ *Id.*

by the acts of, and directed to the treatment of, “individual persons.”¹³⁴ As the ICRC Commentary points out, “[t]he suspicion must not rest on a whole class of people; collective measures cannot be taken under this Article; there must be grounds justifying action in each individual case.”¹³⁵ That is, the provision requires individualized assessments with respect to (1) the applicability of Article 5 to any particular civilian, and (2) the necessity of specific derogations in each case.¹³⁶ The first of these requirements will obtain for each and every “unlawful combatant” because, by definition, such individuals have directly participated in the hostilities. The second, however, requires that the detaining state make individualized findings regarding the necessity of any contemplated derogations.

Third, the protections of the Convention may only be suspended if--and only for such time as--they are necessary to preserve state security in the territory of the derogating state or to preserve absolute military security of the occupying power in occupied territory.¹³⁷ This requirement limits sharply the range of permissible derogations. As the drafting history of Article 5 demonstrates, very few examples of lawful derogations were acknowledged:

As soon as the subject [Article 5] came up for discussion at the Diplomatic Conference several delegations explained that in their opinion provision would have to be made for certain exceptions in the case of spies and saboteurs. They pointed out that the effectiveness of the measures taken to deal with enemy agents and saboteurs depended on the secrecy of the proceedings; it was inconceivable that a State which had arrested one or more enemy agents should be obliged to announce their capture and let the persons under arrest correspond with the outside world and receive visits; the situation was the same in the case of saboteurs and also, in occupied territories, in that of members of underground organizations.¹³⁸

The ICRC Commentary concludes that:

The rights referred to are not very extensive in the case of protected persons under detention; they consist essentially of the right to correspond, the right to receive individual or collective relief, the right to spiritual assistance from ministers of their faith and the right to receive visits from representatives of the Protecting Power and the International Committee of the Red Cross. The security of the State could not conceivably be put forward as a reason for depriving such persons of the benefit of other provisions It should, moreover, be noted that this provision cannot release the Detaining Power from its obligations towards the adverse Party. It remains fully bound by the obligation, imposed on it by Article 136, to transmit to the official Information Bureau particulars of any protected person who is kept in custody for more than two weeks. This is not, in fact, a right or privilege of the protected person, but an obligation of the Detaining Power.¹³⁹

¹³⁴ *Id.*

¹³⁵ ICRC, COMMENTARY IV, *supra* note 54, at 55.

¹³⁶ *Id.* at 55–56.

¹³⁷ *Id.* at 56.

¹³⁸ *Id.* at 52–53.

¹³⁹ *Id.* at 56.

Although the significance of these derogable protections should not be minimized, the important point is that the necessity requirement constitutes an important limit on Article 5 derogations.¹⁴⁰

Finally, and most important for the purposes of this analysis, Article 5 imposes two express limits on the scope of derogations: (1) the third paragraph limits the scope of the first two paragraphs by enumerating non-derogable rights; and (2) the second paragraph, by its terms, limits the scope of derogations in occupied territory to “rights of communication.”

The third paragraph of Article 5 makes clear that “[i]n each case, such persons shall nevertheless be treated with humanity and, in the case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.”¹⁴¹ In short, the provision expressly identifies two categories of non-derogable protections--rights not subject to restriction even if the requirements of Article 5 are otherwise satisfied. These protections include: (1) the general right to “humane treatment” as defined in articles 27–29, 31–34 and 37;¹⁴² (2) the prohibitions on forced deportations and transfers;¹⁴³ (3) the provisions prescribing minimum conditions of confinement;¹⁴⁴ (4) the provisions requiring adequate food and water, clothing, and medical treatment;¹⁴⁵ and (5) the fair trial rights identified in Articles 64–76 in occupied territory and Articles 71–76 in the territory of the belligerent state--made applicable to non-occupied territory by Article 126.¹⁴⁶

In addition, the second paragraph, pertaining to derogations in occupied territory, only authorizes the suspension of “rights of communication.”¹⁴⁷ These rights include the right to communicate with the Protecting Power, ICRC, or other humanitarian organizations.¹⁴⁸ This category of rights clearly also includes the right to visits from ministers and other spiritual advisors,¹⁴⁹ as well as the general right to correspondence with the outside world.¹⁵⁰ According to this reading, Article 5 expressly limits potential derogations in occupied territory to these few rights.

Although this restrictive interpretation seems, at first glance, the most plausible reading of the second paragraph, interpretive difficulties become clear when it is read in light of the provision as a whole. As several commentators have pointed out, the central difficulty is how to square the text of the second paragraph with that of the third.¹⁵¹ Recall that the third paragraph provides that “in each case”--that is, in the situations described in both the first and second paragraphs--all persons must be treated humanely and granted all fair trial rights recognized in the Convention. The interpretive puzzle is this: “If only provisions relating to communication can be derogated from, why is there a need to indicate as minimum protections humane treatment and fair trial?”¹⁵² The solution typically offered is that the second paragraph is poorly drafted, and that it must constitute a broader authorization to derogate than the text read in isolation would suggest.

One possible alternative reading is that the second paragraph expressly

¹⁴⁰ *Id.* at 58.

¹⁴¹ CIVILIANS CONVENTION, *supra* note 1, art. 5.

¹⁴² *Id.* arts. 27–29, 31–34, 37.

¹⁴³ *Id.* arts. 45–49.

¹⁴⁴ *Id.* arts. 83–88.

¹⁴⁵ *Id.* arts. 89–92.

¹⁴⁶ *Id.* arts. 64–76, 126. The ICRC Commentary inexplicably misses this point, suggesting that “there are no special [fair trial] provisions applying to the territory of the conflict . . .” ICRC, COMMENTARY IV, *supra* note 54, at 58.

¹⁴⁷ CIVILIANS CONVENTION, *supra* note 1, art. 5.

¹⁴⁸ *Id.* arts. 30, 101, 143.

¹⁴⁹ *Id.* art. 93.

¹⁵⁰ *Id.* arts. 107–12; *see also* ICRC, COMMENTARY IV, *supra* note 54, at 57 (stating that the provision “obviously refer[s] to [rights governing] his relations with the outside world . . .”).

¹⁵¹ *See, e.g.,* DRAPER, RED CROSS CONVENTIONS, *supra* note 24, at 29–30; Dormann, *supra* note 80, at 64–66.

¹⁵² Dormann, *supra* note 80, at 66. The same puzzle applies, although in less acute form, to the interpretation of the first paragraph.

identifies communication rights only to underscore their derogability in occupied territory. This interpretation is, however, unsatisfying for several reasons. First, it is predicated on the view that the provision cannot mean what it says--a view I question below. Also, this interpretation does not adequately explain the textual discrepancies between the first and second paragraphs. For example, there is no good reason to suspect that the case for derogability of communication rights is stronger in occupied territory than in the home territory of the belligerent state; indeed, the opposite seems more accurate. That is, this interpretation does not provide any convincing explanation for the lack of a "communication rights" clause in the first paragraph. Moreover, there is no good reason to conclude that the general security interest recognized in the second paragraph is an insufficient authorization to curtail any communication rights, even if the need to do so is greater in occupied territory.¹⁵³ This interpretation does not adequately explain the value added by the "communication rights" clause in the second paragraph, particularly since the drafting history suggests that the first paragraph targeted this category of rights.¹⁵⁴

The problem with this strained reading is that it is founded on an impoverished reading of the plain text. Indeed, the interpretive puzzle itself issues from the conceptual mistake associated with this reading. The puzzle presumes that there is no meaningful overlap between communication rights and the rights protected by the third paragraph--humane treatment and fair trial rights. This view, however, does not withstand sustained scrutiny. First, some communication rights implicate "humane treatment." For example, the ICRC Commentary on Article 5 points out that "it would be really inhuman to refuse to let a chaplain visit a detained person who was seriously ill."¹⁵⁵ The important point is that Article 5 could be understood to authorize derogations of communication rights (second paragraph) unless doing so would constitute inhuman treatment (third paragraph). In addition, some communication rights are among the fair trial rights recognized in the Convention. For example, detainees facing criminal charges have the right to visit and communicate freely with defense counsel¹⁵⁶ and the right to communicate with the Protecting Power.¹⁵⁷ Therefore, the second paragraph of Article 5, on this reading, authorizes derogation from communication rights so long as all communication rights protected by the Convention's fair trial provisions are respected.

In short, the best reading of the second paragraph of Article 5, I submit, is that it authorizes derogations of *only* communication rights in occupied territory. Moreover, the scope of this authorization is conditioned by the third paragraph in that any deprivation of communication rights amounting to inhuman treatment or resulting in the denial of a fair trial is strictly prohibited.

b. Applicability to Non-Occupied, Enemy Territory

Irrespective of the scope of derogation authority, the Civilians Convention may not, in any case, apply in zones of active combat. Then-Major Richard Baxter famously defended this claim¹⁵⁸--suggesting that Article 5 implicitly supports the conclusion that the Convention writ large does not apply on the battlefield.¹⁵⁹ The argument proceeds as follows: The drafting history of Articles

¹⁵³ This is particularly puzzling given the lower security standard in occupied territory. See CIVILIANS CONVENTION, *supra* note 1, arts. 5, 41–43.

¹⁵⁴ See ICRC, COMMENTARY IV, *supra* note 54, at 52–54.

¹⁵⁵ ICRC, COMMENTARY IV, *supra* note 54, at 56.

¹⁵⁶ CIVILIANS CONVENTION, *supra* note 1, arts. 71–72; *see also id.* art. 126 (making articles 71–76 applicable in non-occupied territory).

¹⁵⁷ *Id.* art. 74; *see also id.* art. 126 (making articles 71–76 applicable in non-occupied territory).

¹⁵⁸ For much of the Cold War era, Baxter was one of the world's most prominent scholars of the laws of war. He was also principal author of the 1956 edition of the U.S. Army Field Manual 27-10, *supra* note 44, which implemented the Geneva Conventions into formal U.S. military policy.

¹⁵⁹ Note that this claim is not inconsistent with the claim that the Civilians Convention applies to

4 and 5 demonstrates that combatants failing to qualify for POW status are covered by the Civilians Convention.¹⁶⁰ The scope of this coverage is governed principally by Article 5. The derogation authority recognized in Article 5, however, only extends to two types of territory (as previously discussed at length): (1) the home territory of the detaining power; and (2) occupied territory. Because Article 5 does not address non-occupied, enemy territory (in other words, zones of active combat), Baxter concludes that the Convention does not apply in this context. There are, I maintain, several problems--conceptual, textual, historical, and normative--with this line of argument.

Before evaluating the claim on the merits, some clarification is in order. The fundamental problem is that there are two ways to understand the foundation of the argument. Perhaps the claim is, at bottom, that the territorial scope of Article 5 evidences the intentions of the treaty's framers. This variant of the claim emphasizes the *interpretive significance* of Article 5. On the other hand, the claim may be that unlawful combatants are covered under the Convention *in virtue of* Article 5. Put differently, it is Article 5 itself which protects unlawful combatants, so any limitations on the scope of Article 5 would also limit the scope of protection accorded such persons. This variant of the claim emphasizes the *substantive significance* of Article 5. Both variants are fatally flawed, though for slightly different reasons.

The second variant--emphasizing the substantive significance of Article 5--is flatly implausible. It is inconsistent with the text, structure, and history of Articles 4 and 5. Recall that Article 5 supplements Article 4--the definition of "protected persons"--by *limiting* the applicability of the Civilians Convention to unlawful combatants. That is, Article 5 defines the scope of state authority to derogate from rights and privileges *otherwise protected* by the Civilians Convention. Unlawful combatants are covered under Article 4, and this coverage is, in turn, conditioned by the derogation authority conferred by Article 5. Moreover, the text of Article 5 does not, by its terms, confer rights; it authorizes restriction of them. In this sense, the text of Article 5 and its structural relation to Article 4 demonstrate that all persons subject to Article 5 derogations necessarily must be "protected persons" within the meaning of Article 4.

Read in its best light, therefore, Baxter's claim should be understood as something like the first variant identified above--emphasizing the interpretive significance of Article 5. This variant nevertheless is flawed in that it relies on a misreading of Article 5 and an impoverished reading of Article 4. Because I outlined in detail (and offered a sustained defense of) my interpretation of Article 5 in the preceding Part, this assessment of Baxter's view draws liberally on claims that are more fully developed above. Specifically, Baxter argues that

[T]he failure of Article 5 to refer to areas where fighting is in progress outside occupied territory or the territory of the detaining state suggests that both Articles 4 and 5 were directed to the protection of inhabitants of occupied areas and of the mass of enemy aliens on enemy territory and that unlawful belligerents

unlawful combatants. In Baxter's view, the Convention covers unlawful combatants, but only within certain categories of territory and not in the territory where protection is most needed--the battlefield on enemy territory. Many commentators have addressed the question of the status of unlawful combatants who have been captured, but little analysis has been dedicated to their status on the battlefield. *See, e.g.,* Draper, *supra* note 8, at 208; Dormann, *supra* note 80, at 48-52; Albert J. Easgain & Waldemar A. Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations, and Deficiencies*, 41 N.C. L. REV. 537, 549-51 (1962); Kalshoven, *supra* note 80, at 70, 74; John Cerone, *Status of Detainees in International Armed Conflict, and Their Protection in the Course of Criminal Proceedings*, ASIL INSIGHTS (Jan. 2002), available at <http://www.asil.org/insights/insigh81.htm> (last visited Mar. 6, 2004); Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (January 2002), available at <http://www.hrw.org/backgrounder/usa/pow-bck.htm> (last visited Mar. 6, 2004); Wayne Elliott, *POW's or Unlawful Combatants? September 11 and Its Aftermath*, CRIMES OF WAR PROJECT, available at <http://www.crimesofwar.org/expert/pow-elliott.html> (last visited Mar. 6, 2004).

¹⁶⁰ See CIVILIANS CONVENTION, *supra* note 1, arts. 4-5; *see also supra* Part II.A.1.

in the zone of operations were not taken into account in connexion with the two articles.¹⁶¹

The argument here, put differently, is that the text of Article 5 suggests that the Civilians Convention does not protect unlawful combatants in the “zone of operations.” The logic behind this claim is not entirely clear. Baxter appears to be arguing that although Article 4 covers unlawful combatants, Article 5 recognizes that they present unique and grave security concerns, and that some of these concerns would be exacerbated by the protective scheme established in the Convention. Therefore, according to Baxter’s view, Article 5 expressly authorizes states to deprive otherwise protected unlawful combatants of certain Convention rights under certain circumstances. Although this derogation authority is itself obviously significant, Article 5 is also important for what it does not say. More specifically, Article 5 authorizes derogation only in two types of territory: the home territory of the detaining power and occupied territory. Article 5 does not authorize derogation of Convention rights in non-occupied enemy territory--that is, the battlefield or, as Baxter called it, the “zone of operations.” Because the security rationale undergirding Article 5 is, in Baxter’s view, equally if not more applicable to the zone of operations, this textual gap is inexplicable if unlawful combatants are protected in such circumstances. Indeed, it suggests that, for Baxter, the framers did not even consider application of the Convention to unlawful combatants on the battlefield; if they had, Article 5 would have authorized derogation in such circumstances as well.

Although the Convention’s drafting history provides non-trivial support for this line of reasoning, it is unsound. It rests on questionable or invalid assumptions, and it carries several anomalous interpretive implications.

First, Baxter’s reading of Article 5 is unconvincing. Baxter expressly assumes that the territorial limitations in Article 5 are inexplicable if the Convention protects civilians on the battlefield in enemy territory, suggesting that the Convention must not in any case apply to such territory. His tacit claim is that the justification for derogation is as compelling (if not more so) on the battlefield (in enemy territory) as it is in occupied territory or the home territory of the belligerent state. But, as demonstrated above, Article 5 was designed to address problems of *internal security and order maintenance*.¹⁶² That the provision authorizes no derogation in zones of active operations is therefore unsurprising. Additionally, the substantive protections accorded by the Convention suggest that derogation authority is in many respects unnecessary on the battlefield. The 1949 Geneva Conventions do not regulate the means and methods of warfare, nor do they protect all persons subject to the lethality of the enemy.¹⁶³ Rather, the Conventions govern only the treatment of “war victims” made subject to the authority of the enemy--the paradigmatic example being persons captured and detained. The Civilians Convention, in this sense, does not regulate the application of force on the battlefield, at home or abroad, against unlawful combatants or peaceful civilians. Therefore, persons covered by Article 5--persons committing hostile acts--may be targeted and killed on the battlefield irrespective of whether Article 5 applies. Finally, the individualized assessment contemplated by Article 5 suggests that valid derogation would prove difficult if not impossible on the battlefield. Recall that Article 5 requires an individualized determination as to whether and which derogation measures are necessary.¹⁶⁴ In other words, there is good reason to think that the Article 5 regime would not extend to circumstances in which its safeguards could not be implemented adequately.

Second, Baxter’s interpretation of Article 4 is similarly unconvincing. He contends that the drafters of Article 4 did not contemplate its application in zones

¹⁶¹ Baxter, *supra* note 3, at 328.

¹⁶² See *supra* Part II.A.1.

¹⁶³ See *infra* Part III.D.

¹⁶⁴ See *supra* Part II.A.1.a.

of combat. That is, Baxter claims that the Civilians Convention *writ large* is inapplicable to non-occupied, enemy territory--wherein it does not protect unlawful combatants or peaceful civilians. Rather, "protected persons" within the meaning of Article 4 are those who, in time of armed conflict or occupation, find themselves in the hands of an enemy state in either that state's territory or in territory occupied by that state.

This interpretation of the treaty's scope produces troubling anomalies when applied in other contexts. The sharp edge of this view is, of course, that the Conventions would afford *no protection* in zones of active operations in enemy territory. One problem is that Baxter does not offer any theory as to why the Conventions would be so limited. The claim cannot be that the special circumstances of the battlefield require special rules. After all, even on this view, the Conventions protect persons on the battlefield in the home territory of the detaining power, and the Conventions would also apply to the battlefield in the case of sporadic, guerrilla conflict in occupied territory. The claim cannot be that such circumstances did not occur to the delegates to the Diplomatic Conference--the record makes clear that they did.¹⁶⁵ The claim cannot be that excluding such territory from coverage reflects some judgment about whether the Convention should apply to unlawful combatants, for the delegates well understood that peaceful civilians often encounter the enemy in zones of active operations.¹⁶⁶ Ultimately, Baxter offers no reason why the Conventions would have been designed this way, and no good reason is readily apparent.

Moreover, there are good reasons to think that Article 4 is not limited in this way. The plain text of Article 4 suggests that it is not so limited. Article 4 defines protected persons as those who, "at any given moment and in any manner whatsoever" fall into the hands of the enemy.¹⁶⁷ In addition, Baxter's "implicit limitation" reading of this provision is discredited by comparing Article 4 of the Civilians Convention to the provisions defining "protected persons" in the other three 1949 Geneva treaties. Recall that the definitions of "protected persons" in the other Conventions are, without exception, quite detailed.¹⁶⁸ And the Civilians Convention itself prescribes, in some detail, rules governing the treatment of civilians "suspected of or engaged in activities hostile to the security of the State."¹⁶⁹ When read in light of the other Conventions, the Civilians Convention should not be interpreted as *implicitly* excluding from its protection a potentially broad category of persons otherwise satisfying its definition of "protected persons." The best reading of Article 4 is that it assigns "protected person" status to all individuals satisfying its express requirements. Indeed, Baxter's alternative reading--even assuming for the moment its textual and historical plausibility--introduces inexplicable asymmetries into the treaty's application. For example, in Baxter's view, a belligerent would have greater freedom of action in dealing with unlawful combatants fighting for the enemy in an international armed conflict on foreign soil than it would on its home territory. In addition, Baxter's view suggests that a state on whose territory battles are fought finds itself at a disadvantage vis-à-vis the belligerent who, by virtue of fighting on non-occupied enemy territory, enjoys greater latitude in dealing with irregular forces. In short, Baxter's tacit assumption that there are no plausible alternative readings of Article 5 proves inaccurate, and his interpretations of Articles 4 and 5 are flawed in several respects.

To summarize, the Civilians Convention protects unlawful combatants, and these protections closely resemble the rights accorded under the POW Convention. Although conventional wisdom suggests that these protections, even if applicable, are subject to severe derogation restrictions (Article 5) and territorial

¹⁶⁵ See *supra* Part II.A.1.

¹⁶⁶ See *id.*; see also *supra* note 159.

¹⁶⁷ CIVILIANS CONVENTION, *supra* note 1, art. 4.

¹⁶⁸ See GENEVA CONVENTION I, *supra* note 1, art. 4; GENEVA CONVENTION II, *supra* note 1, art. 4; POW CONVENTION, *supra* note 1, art. 4

¹⁶⁹ CIVILIANS CONVENTION, *supra* note 1, art. 5.

restrictions (Baxter's reading of the Convention), these restrictions, in fact, are illusory, overstated, and, in some respects, inconsequential.

B. Penal Repression Regime of the Geneva Conventions

In addition to the protections discussed above, the Geneva Conventions 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*.¹⁷⁰

Individuals prosecuted for violations of the Geneva Conventions, regardless of their status as "protected persons," must be provided with "safeguards of proper trial and defence, which shall not be less favourable than" those outlined in Articles 105 and following of the POW Convention.¹⁷¹ 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.¹⁷² These provisions also require, for example, that accused persons be granted the same right of appeal as that accorded members of the armed forces of the Detaining Power.¹⁷³

Although these protections apply formally only to prosecutions for violations of the rules established in the Conventions, they should also apply in any prosecutions brought under the laws of war. First, there is no principled reason to apply these protections only to breaches of the Geneva Conventions. It is, after all, important to note that the "grave breach" provisions and illustrative "simple breach" provisions are the only express criminal prohibitions in the Conventions. Consequently, these criminal provisions also make explicit the minimum procedural rights to be accorded in any prosecution under the "penal repression" regime of the Conventions. Thus, the express criminal provisions necessitate an express procedural rights regime.

Second, the structure of the Geneva Conventions' "penal repression" regime suggests that these procedural rights should apply to all prosecutions under the laws of war. Recall that the Geneva Conventions require states to punish acts constituting "grave breaches."¹⁷⁴ The Conventions, however, also provide that states must discharge this obligation through formal criminal proceedings in which fundamental procedural rights are respected.¹⁷⁵ In this way, the Conventions make clear that these procedural rights condition the efforts of states to repress serious violations of the Conventions. In addition, the text of Common Article 3, which is common to all four Geneva Conventions, supports this view. By its terms, that provision prohibits the imposition of criminal punishment "without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁷⁶

Finally, the structure of the Conventions as a whole suggests that fundamental judicial guarantees should apply to all prosecutions under the laws of war. As I have argued elsewhere, states enjoy wide discretion in triggering the application of the laws of war in both international and non-international armed

¹⁷⁰ See, e.g., CIVILIANS CONVENTION, *supra* note 1, art. 146.

¹⁷¹ GENEVA CONVENTION I, *supra* note 1, art. 49; GENEVA CONVENTION II, *supra* note 1, art. 50; POW CONVENTION, *supra* note 1, art. 129; CIVILIANS CONVENTION, *supra* note 1, art. 146.

¹⁷² POW CONVENTION, *supra* note 1, art. 105.

¹⁷³ *Id.* art. 106.

¹⁷⁴ See GENEVA CONVENTION I, *supra* note 1, art. 49; GENEVA CONVENTION II, *supra* note 1, art. 50; POW CONVENTION, *supra* note 1, art. 129; CIVILIANS CONVENTION, *supra* note 1, art. 146.

¹⁷⁵ See, e.g., CIVILIANS CONVENTION, *supra* note 1, art. 146.

¹⁷⁶ Common Art. 3, *supra* note 59.

conflicts.¹⁷⁷ This discretion promotes the humanitarian purposes of the Conventions by rendering the laws of war broadly applicable. At a high level of abstraction, the general structure of the Geneva Conventions may be discerned: the Conventions establish an extensive humanitarian code, including basic fair trial rights, with a low threshold of application. The Conventions, as a consequence, should not be read to provide states an anti-humanitarian incentive to recognize the existence of an armed conflict. That is, the substantive laws of war should be tightly coupled with the procedural rights recognized in the laws of war. Otherwise, the Conventions would give states an incentive to characterize hostilities as an “armed conflict” in order to decrease procedural rights protections. Therefore, the danger is that loose coupling of procedure and substance would arguably empower states to implement exceptional, draconian procedural devices by invoking the existence of an “armed conflict.” Therefore, any person charged with war crimes should receive, at a minimum, the fair trial protections established in the POW Convention.

C. 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.¹⁷⁸ 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.”¹⁷⁹ It is important to note that this provision is, by its 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;

¹⁷⁷ See Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1 (2003) [hereinafter Jinks, *September 11*]; Derek Jinks, *The Temporal Scope of Application of International Humanitarian Law, Policy Brief*, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (2003)[hereinafter Jinks, *Temporal Scope*], available at <http://www.ihlresearch.org/ihl/Session3.pdf> (last visited Apr. 10, 2004) (on file with the HARV. INT’L L.J.); see also POW CONVENTION, *supra* note 1, art. 2 (establishing that the Conventions apply if one of the states party to the hostilities determines that an “armed conflict” exists or if one state formally declares war).

¹⁷⁸ 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. Common Art. 3, *supra* note 59.

¹⁷⁹ Common Art. 3(1)(d), *supra* note 59.

(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.¹⁸⁰

Common Article 3, therefore, seemingly necessitates humane treatment and fair trial rights for all persons rendered *hors de combat* in non-international armed conflicts. Three issues require more sustained reflection. Does Common Article 3 apply only to non-international armed conflicts? What persons are protected by the provision? What legal protection does this provision afford? In Part II.C, I argue that Common Article 3: (1) applies to all armed conflicts; (2) covers unlawful combatants no longer taking active part in hostilities; and (3) confers on unlawful combatants important, even if abstract, legal protection. Although Common Article 3, when considered in isolation, does not provide a sufficiently precise body of rules to protect “unlawful combatants” effectively, this provision does establish a framework within which a more robust protective regime has evolved.

1. Application to International Armed Conflicts

In general, the laws of war are applicable only in the context of an international armed conflict between two or more nation states.¹⁸¹ The full protections of the Geneva Conventions, for example, expressly apply only in “armed conflicts involving two or more High Contracting Powers.”¹⁸² Similarly, the Hague Conventions and their annexed Regulations are applicable only in case of war between two or more of the Contracting Powers.¹⁸³ Common Article 3, by its terms, applies only to armed conflicts “not of an international character.”¹⁸⁴ The structure and history of the Conventions, however, make clear that the provision applies in *all armed conflicts*.

Traditionally, the laws of war did not apply to non-international armed conflicts.¹⁸⁵ These conflicts, even when prolonged and intense, were as a consequence exclusively governed by domestic law.¹⁸⁶ Interference by another state in such matters would have been deemed an unlawful intrusion into the internal affairs of the state¹⁸⁷ and might have been considered an act of war.¹⁸⁸ The atrocities perpetrated by the Nazi regime before and during World War II clearly demonstrated that internal matters presented grave threats to humanitarian

¹⁸⁰ Common Art. 3, *supra* note 59.

¹⁸¹ See generally EDWARD KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* (1992).

¹⁸² POW CONVENTION, *supra* note 1, art. 2.

¹⁸³ HAGUE CONVENTION, *supra* note 5, art. 2.

¹⁸⁴ Common Art. 3, *supra* note 59.

¹⁸⁵ See, e.g., Rosemary Abi-Saab, *Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern*, in *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD* 209, 210–11 (Astrid J. M. Delissen & Gerard J. Tanja eds., 1991).

¹⁸⁶ See LINDSAY MOIR, *LAW OF INTERNATIONAL ARMED CONFLICT* 4 (2002) (“No international restraints were applicable, and the rebels had no rights or protection in international law . . .”); HEATHER WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 23–24 (1988); Richard A. Falk, *Janus Tormented: The International Law of Internal War*, in *INTERNATIONAL ASPECTS OF CIVIL STRIFE* 185, 197 (James N. Roseneau ed., 1964).

¹⁸⁷ See, e.g., Abi-Saab, *supra* note 185, at 216–217.

¹⁸⁸ See, e.g., Erik Castren, *Civil War*, 142(2) *ANNALES ACADEMIAE SCIENTIARUM FENNICA*, 1, 179–81 (1966).

principles.¹⁸⁹ Also, the Spanish Civil War, which broke out in 1936, suggested to many that existing international law inadequately regulated internal armed conflicts.¹⁹⁰

Against the backdrop of these events and the general humanitarian trajectory of the laws of war,¹⁹¹ broad support for some sort of international regulation of non-international armed conflicts crystallized prior to the Diplomatic Conference in Geneva.¹⁹² Because states nevertheless resisted international regulation of wholly internal matters, there was little support at the Conference for the ICRC's pre-Conference proposal to make the entire text of the Geneva Conventions applicable to non-international conflict. Two alternative approaches enjoyed substantial support. One approach sought to apply all the rules of the Conventions to a narrow range of internal conflicts—those closely resembling interstate conflicts, such as the Spanish Civil War. A second approach sought to apply a more limited set of substantive principles to a much broader range of conflicts.¹⁹³ On this view, the core principles of the Conventions should apply even in the context of armed conflicts not of an international character.¹⁹⁴

The Diplomatic Conference, in the final text of Common Article 3, adopted the latter approach.¹⁹⁵ Utilizing language originally proposed as text for the preamble to the four Conventions, the drafters of the provision sought to invoke the core principles of the treaty that should pierce the veil of sovereignty and apply even in the absence of an international armed conflict. 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 Conventions, and from it each of them derives the essential provision around which it is built.¹⁹⁶

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.”¹⁹⁷ 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.”¹⁹⁸

Indeed, the applicability of Common Article 3 to international armed conflicts is now recognized in the jurisprudence of the International Court of Justice (ICJ),¹⁹⁹ the International Criminal Tribunal for the Former Yugoslavia (ICTY),²⁰⁰ the International Criminal Tribunal for Rwanda (ICTR),²⁰¹ and the

¹⁸⁹ See, e.g., RATNER & ABRAMS, *supra* note 30, at 5–14 (describing the importance of these events for the development of international humanitarian law).

¹⁹⁰ See NORMAN J. PADEFORD, INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE 18 (1939); Vernon A. O'Rourke, *Recognition of Belligerency in the Spanish Civil War*, 31 AM. J. INT'L L. 398 (1937); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 9, at 270–72.

¹⁹¹ See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

¹⁹² See, e.g., Abi-Saab, *supra* note 185, at 211–12.

¹⁹³ See 2B Diplomatic Conference, *supra* note 96, at 34–54; MOIR, *supra* note 186, at 21–31.

¹⁹⁴ Common Art. 3, *supra* note 59; ICRC, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 31–34 (Jean de Preux ed., 1960) [hereinafter ICRC, COMMENTARY III].

¹⁹⁵ Abi-Saab, *supra* note 185, at 217.

¹⁹⁶ ICRC, COMMENTARY IV, *supra* note 54, at 14.

¹⁹⁷ *Id.* at 44.

¹⁹⁸ Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment ¶150 (Feb. 20, 2001) [hereinafter Celebici Case].

¹⁹⁹ See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27).

²⁰⁰ See Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 87 (Oct. 2, 1995) [hereinafter Tadic Appeal].

²⁰¹ See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶601 (Sept. 2, 1998).

Inter-American Commission for Human Rights.²⁰² 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).²⁰³ The Judge Advocate General of the U.S. Army endorses this view as well.²⁰⁴ 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.²⁰⁵ 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 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.”²⁰⁶

2. *Applicability to Unlawful Combatants*

Common Article 3 governs the treatment of “[p]ersons 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.”²⁰⁷ In general, the provision covers “persons taking no active part in hostilities”—an expression that, by its terms, includes “members of the armed forces.” Common Article 3 therefore clearly applies to civilians who have not engaged in hostilities and members of the armed forces no longer engaged in hostilities. The central question is whether it also covers civilians and irregular forces who, despite the fact that they no longer take active part in the conflict, did at some point participate in the hostilities.

On this issue, there are at least two potential readings of Common Article 3: (1) the provision applies to all persons no longer taking part in the hostilities (including members of the armed forces *hors de combat*); or (2) it applies to all persons who did not take active part in the hostilities at any point and members of the armed forces no longer participating in the fighting. The second reading suggests that the provision protects only non-combatants and lawful combatants no longer fighting and excludes unlawful combatants.

The general character of the provision and its full text strongly suggest, however, that the first reading (the provision covers all persons no longer engaged in hostilities) is the best interpretation of Common Article 3. First, the purpose of the provision strongly suggests that it covers irregular combatants and others who have participated in the hostilities. As previously discussed, the provision makes some core principles of the Conventions applicable to *non-international* conflicts—that is, conflicts between states and sub-state, “irregular” armed groups—whose fighters have taken up arms against the state in question without the right to do so. In other words, the very purpose of the provision was to humanize, to some extent, hostilities between states and “unlawful combatants.” Indeed, the drafting history makes clear that states were primarily concerned that Common Article 3 would, if its threshold of application were too low, intrude on the sovereign

²⁰² See *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc 6 rev. ¶¶ 155–56 (1997) [hereinafter *Abella*].

²⁰³ See Dep’t of Defense, Dir. 5100.77, DoD Law of War Program, ¶ 5.3.1 (Dec. 9, 1998), available at http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf (last visited Apr. 9, 2004) (“[The Heads of the DoD Components shall:] “[e]nsure 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.”); see generally Major Timothy P. Bulman, *A Dangerous Game Disguised as Enlightened Policy: United States Law of War Obligations in Military Operations Other than War*, 159 MIL. L. REV. 152 (1999).

²⁰⁴ See JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, *Protection of Civilians During Armed Conflict*, in LAW OF WAR WORKSHOP DESKBOOK, *supra* note 114, 123, 129.

²⁰⁵ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75; see also *infra* Parts II.D, IV.B.4 (discussing Article 75 and its subsequent development).

²⁰⁶ *Celebici Case*, *supra* note 198, ¶ 143.

²⁰⁷ Common Art. 3, *supra* note 59.

prerogative of states to suppress internal rebellion.²⁰⁸ The Inter-American Commission on Human Rights, one of the few bodies to address the issue directly, has held that:

Common Article 3's basic purpose is to have certain minimum rules apply during hostilities for the protection of persons who do not or no longer take a direct or active part in the hostilities Individual civilians are . . . covered by Common Article 3's safeguards when they are captured or otherwise subjected to the power of an adverse party, even if they had fought for the other side.²⁰⁹

Second, the text of Common Article 3 strongly suggests that it covers “unlawful combatants.” For example, the text of the provision flatly imposes obligations on all parties to the conflict--both the state group and the non-state, irregular armed group.²¹⁰ In addition, the text makes clear that its applicability in no way affects the “legal status” of the parties to the conflict.²¹¹ At the 1949 Diplomatic Conference, states were concerned that application of the “laws of war” to insurgent forces would confer on the group international legal personality, and many states indicated that they could not support the provision at all absent some favorable resolution of this issue.²¹² To address this concern, the text specifies that the application of the provision does not formally constitute “recognition of the belligerency” of the armed group, and that the applicability of the provision therefore does not confer on the non-state armed group lawful combatant status.²¹³ States supported this language so that members of an irregular armed group could be subjected to domestic criminal prosecution *for their very participation in the hostilities even if conducted in accordance with the laws of war*.²¹⁴ In short, Common Article 3 makes clear that, although entitled to its protections and subject to its obligations, unlawful combatants nevertheless remain unlawful combatants.

3. Legal Protections

Common Article 3 mandates that all persons protected by the provision “shall in all circumstances be treated humanely.”²¹⁵ In general, this requirement directs the detaining authority to extend the protections of the Conventions’ broad “humane treatment” provisions to all persons not taking active part in hostilities.²¹⁶ Although important, without any further specification this general requirement would nevertheless offer only modest legal protection. Several more specific prohibitions give the provision a more concrete character. The provision prohibits certain acts “at any time and in any place”--including murder, torture, cruelty, humiliating or degrading treatment, and punishment without fair trial--directed against these persons.²¹⁷ It also requires that parties to the conflict collect

²⁰⁸ See, e.g., Jinks, *September 11*; *supra* note 177.

²⁰⁹ See Abella, *supra* note 202, ¶¶ 176, 189. The ICTY endorses this interpretation as well. See *Tadic Appeal*, *supra* note 200, ¶ 616 (holding that persons captured by opposing forces were entitled to the protections of Common Article 3 “[w]hatever their involvement in hostilities prior to that time”).

²¹⁰ Common Art. 3, *supra* note 59.

²¹¹ *Id.*

²¹² For an excellent summary of the debate and the range of concerns represented therein, see MOIR, *supra* note 186, at 52 – 58.

²¹³ See, e.g., Jinks, *September 11*, *supra* note 177; Jinks, *Temporal Scope*, *supra* note 177.

²¹⁴ Although Common Article 3 does not preclude such prosecutions, neither does it require or authorize them. As a consequence, any such prosecution would be brought under domestic law and not under the laws of war. This is an important point because it suggests that the law of war applicable in internal armed conflicts does not proscribe the very act of taking up arms against the state. See, e.g., Baxter, *supra* note 3, at 339 – 40, 344.

²¹⁵ Common Art. 3, *supra* note 59.

²¹⁶ See POW CONVENTION, *supra* note 1, art. 13; CIVILIANS CONVENTION, *supra* note 1, art. 27.

²¹⁷ In one sense, Common Article 3 identifies a category of “protected persons.” That is, the conceptual structure of the provision is similar to that of the Conventions as a whole, which establish an elaborate code

and provide care to the wounded and sick.²¹⁸

Although these protections are pitched in abstract terms, it is plain that the provision accords substantial legal protection to “unlawful combatants.” Similar to the protections accorded POWs, Common Article 3 expressly prohibits: (1) “violence to life and person,” including torture and cruel treatment; and (2) “outrages upon personal dignity,” including humiliating and degrading treatment.²¹⁹ The provision also mandates due process protections that in principle are difficult to distinguish from POW rights. Indeed, read in light of national practice and subsequent developments in humanitarian and human rights law, the protections of Common Article 3 closely approximate the most important protections accorded POWs.

With respect to due process rights, Common Article 3 prohibits “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.”²²⁰ Although the substance of this rule is difficult to discern with precision, considerable evidence suggests that it embodies protections at least as robust as the POW rules. Without question, the rule prohibits the sort of “summary justice” that had all too often characterized quasi-judicial battlefield tribunals.²²¹

In addition, the text of the provision suggests some important principles. For instance, the rule prohibits punishment without a “previous judgment”—suggesting that a formal adjudication is required.²²² Moreover, the body pronouncing this judgment must be “regularly constituted,” suggesting that it must be established in law and must not be convened especially for the punishment of the adversary.²²³ Furthermore, this body must be a “regularly constituted court,” (emphasis added) suggesting that there must be adequate safeguards in place to ensure the impartiality, independence, and fairness of the institution issuing the judgment.²²⁴

Moreover, the text of Common Article 3—specifically the reference to the opinions of “judicial guarantees which are recognized as indispensable by civilized peoples”²²⁵ establishes an evolving standard that, *by design*, tracks customary international law in this area.²²⁶ In addition to the developments embodied in Article 75 of Additional Protocol I (referenced above and detailed below), international human rights law has in the past fifty years elaborated a detailed body of due process norms that now arguably define the minimum requirements of procedural fairness. Several international human rights treaties,²²⁷

protecting certain categories of “protected persons,” such as “prisoners of war,” and “civilians.” This similarity prompted the United States to suggest that the “grave breach” provisions of the Conventions, which criminalize certain acts directed against “persons protected by the Conventions,” are also applicable to Common Article 3 violations. See *Amicus Curiae* Brief Presented by the Government of the United States of America at 35–38, *Prosecuter v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment (May 7, 1997) (on file with author). Despite the textual plausibility of this view, the drafting history of Common Article 3 and many commentators suggest otherwise. See generally MOIR, *supra* note 186.

²¹⁸ Common Art. 3(2), *supra* note 59. I have argued elsewhere that the September 11 terrorist attacks constituted violations of Common Article 3 (even if Al Qaeda acted without the assistance of a state). See generally Jinks, *September 11*, *supra* note 177; Jinks, *Temporal Scope*, *supra* note 177.

²¹⁹ See Common Art. 3, *supra* note 59.

²²⁰ *Id.*

²²¹ ICRC, COMMENTARY IV, *supra* note 54, at 224–26.

²²² Common Art. 3(1)(d), *supra* note 59.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Common Art. 3, *supra* note 59.

²²⁶ See, e.g., MOIR, *supra* note 186 at 203–208 (arguing that the judicial guarantees of Common Article 3 must be understood in light of international human rights treaties); Jordan Paust, *Judicial Power To Determine the Status and Rights of Persons Detained*, 44 Harv. Int’l L.J. 503, 511–12 n.27, 514 (2003).

²²⁷ See, e.g., CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987; Council of Europe, EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, arts. 5–7, Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. 5, *amended by* Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118 [hereinafter ECHR]; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, arts. 9, 14–15, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Organization of African Unity, AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS, arts. 3, 6–7, June 27, 1981, 21 I.L.M. 59, [hereinafter BANJUL CHARTER]; Organization of American States, AMERICAN CONVENTION ON HUMAN RIGHTS, arts. 7–9, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter

declarations,²²⁸ and resolutions²²⁹ establish minimum procedural protections for all individuals deprived of their personal liberty. Under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), no one shall be “subjected to arbitrary arrest or detention” or “deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”²³⁰ This provision also specifies that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”²³¹ Article 9(3) provides that all persons arrested or detained on a criminal charge “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”²³² As interpreted by the U.N. Human Rights Committee, the provision requires at a minimum that an individual must be brought before a judge or other officer within “a few days.”²³³ Finally, the ICCPR also provides for the right to habeas corpus, or *amparo*.²³⁴ Under this provision, anyone deprived of liberty by arrest or detention has the right to “take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”²³⁵ International human rights law also has established an extensive inventory of procedural rights for individuals facing criminal charges. The Universal Declaration of Human Rights,²³⁶ ICCPR,²³⁷ African Charter on Human and Peoples’ Rights,²³⁸ Inter-American Convention on Human Rights,²³⁹

ACHR].

²²⁸ See, e.g., UNIVERSAL DECLARATION OF HUMAN RIGHTS, arts. 9–11, G.A. Res. 217A, U.N. Doc. A/810 (1948) [hereinafter UDHR].

²²⁹ See, e.g., BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT, G.A. Res. 43/173, Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988); STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS, U.N. Doc. A/CONF/611, annex 1, E.S.C. Res. 663C, (XXIV)(July 31, 1957), U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended by E.S.C. Res. 2076, (LXII)(May 13, 1977), U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977); BASIC PRINCIPLES ON THE ROLE OF LAWYERS, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27–Sept. 7 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990); GUIDELINES ON THE ROLE OF PROSECUTORS, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27–Sept. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990); BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug. 26–Sept. 6, 1985, U.N. Doc. A/ CONF.121/22/Rev.1 at 59 (1985).

²³⁰ ICCPR, *supra* note 227, art. 9, ¶ 1.

²³¹ *Id.* art. 9, ¶ 2.

²³² *Id.* art. 9, ¶ 3. Note that Article 9(3) of the ICCPR applies only to individuals arrested or detained on a criminal charge, while the other rights recognized in the Article apply to all persons deprived of their liberty. People awaiting trial on criminal charges should not, as a general rule, be held in custody. See *id.* art. 14, ¶ 3. Of course, international standards explicitly recognize some circumstances in which authorities may detain an accused pending trial. See *id.* art. 9, ¶ 3; see also ACHR, *supra* note 227, art. 7, ¶ 5; BODY OF PRINCIPLES, *supra* note 229, princ. 39; TOKYO RULES: U.N. STANDARD FOR MINIMUM RULES FOR NON-CUSTODIAL MEASURES, G.A. Res. 45/110, princ. 6, U.N. Doc. A/RES/45/110 (1990).

²³³ Hum. Rts. Comm., gen. cmt. 8, art. 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at para. 2 (1994). Note that this provision does not explicitly recognize a right to counsel for all accused at this stage of the proceedings. The Human Rights Committee has stated, however, that “all persons arrested must have immediate access to counsel.” See Hum. Rts. Comm., *Concluding Observations on State Party Report: Georgia*, ¶ 28, UN Doc. CCPR/C/79/Add.74 (Apr. 9, 1997); see also BODY OF PRINCIPLES, *supra* note 229, princ. 18, ¶ 1; BASIC PRINCIPLES ON LAWYERS, *supra* note 229, princ. 1 (stating that “[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”); *id.* princ. 7 (requiring governments to ensure that all persons arrested or detained have access to a lawyer within 48 hours of arrest or detention); *id.* princ. 5 (providing that all persons arrested, charged or detained must be promptly informed of their right to legal assistance); *id.* princ. 8 (requiring authorities to ensure that all arrested, detained or imprisoned persons have adequate opportunities to be visited by, and to communicate with, their lawyers without delay, interception or censorship, in full confidentiality). It also has been widely recognized that prompt and regular access to a lawyer for all detainees is an important safeguard against torture, ill treatment, coerced confessions, and other abuses. See, e.g., Hum. Rts. Comm., gen. cmt. 20, art. 7, ¶ 11 (44th session, 1992), U.N. Doc. HRI/GEN/REV. 1 at 30 (1994); U.N. Econ. & Soc. Council, Commission on Human Rights--Special Rapporteur, *Question of the Human Rights of All Persons Subjected To Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 284, U.N. Doc. E/CN.4/1992/17 (Dec. 27, 1991)(prepared by P. Kooijmans).

²³⁴ ICCPR, *supra* note 227, art. 9, ¶ 4.

²³⁵ *Id.*

²³⁶ See UDHR, *supra* note 228, art. 10.

²³⁷ See ICCPR, *supra* note 227, art. 14.

²³⁸ See BANJUL CHARTER, *supra* note 227, arts. 7, 26. The African Commission on Human and Peoples’ Rights has adopted a Resolution on the Right to Recourse Procedure and Fair Trial, Doc. No. ACHPR/COMM/FIN(XI)/Annex VII (Mar. 9, 1992), which elaborates on Art. 7(1) of the African Charter and guarantees several additional rights, including: notification of charges, appearance before a judicial officer, right to

and the ECHR²⁴⁰ all include detailed fair trial provisions. Specifically, Article 14 of the ICCPR recognizes the right to “a fair and public hearing by a competent, independent and impartial tribunal established by law.”²⁴¹ This provision enumerates the minimum procedural requirements of a “fair trial,” including the right to be presumed innocent,²⁴² the right to be tried without undue delay,²⁴³ the right to prepare a defense,²⁴⁴ the right to defend oneself in person or through counsel,²⁴⁵ the right to call and examine witnesses,²⁴⁶ and the right to protection from retroactive criminal laws.²⁴⁷ Because these principles are recognized in numerous widely-ratified human rights treaties, several unanimously supported international resolutions, and nearly all national constitutions, they arguably reflect the “judicial guarantees which are recognized as indispensable by civilized peoples.”²⁴⁸ In short, these principles confer due process rights equivalent to, if not greater than, those accorded to POWs in the POW Convention.

In addition, subsequent developments in humanitarian law also suggest that the Common Article 3 standard embodies substantial due process rights. Article 75 of Additional Protocol I²⁴⁹ identifies the minimum rights of those who are not accorded any “more favorable treatment under the [Geneva] Convention or under this Protocol [I],” including fundamental due process rights that are “generally accepted principles of regular judicial procedures.”²⁵⁰ Article 75 requires, in all circumstances, trials by impartial and regularly constituted courts that, at a minimum, afford the presumption of innocence, the right to counsel before and during trial, the right of defendants to be present at proceedings and to call witnesses and examine witnesses against them, the right to be promptly informed of the charges or reasons for detention, the right to a public judgment, and the right of defendants not to testify against themselves or to confess their guilt, among other rights.²⁵¹

The procedural rights recognized in the ICTY, ICTR, and the ICC--tribunals empowered to try persons for serious violations of humanitarian law, including war crimes--provide further evidence of a broad consensus as to the essential (or “indispensable”) attributes of fair trials.²⁵²

D. Article 75 of Additional Protocol I

Building on the protective schemes identified above, Article 75 of

release pending trial, presumption of innocence, adequate preparation of the defense, speedy trial, examination of witnesses and the right to an interpreter.

²³⁹ See ACHR, *supra* note 227, art. 8.

²⁴⁰ See ECHR, *supra* note 227, art. 6.

²⁴¹ ICCPR, *supra* note 227, art. 14, ¶ 1.

²⁴² See ICCPR, *supra* note 227, art. 14, ¶ 2; ECHR, *supra* note 227, art. 6, ¶ 2.

²⁴³ See ICCPR, *supra* note 227, art. 14, ¶ 3(c); ECHR, *supra* note 227, art. 6, ¶ 1.

²⁴⁴ See ICCPR, *supra* note 227, art. 14, ¶ 3(d); ECHR, *supra* note 227, art. 6, ¶ 3(b).

²⁴⁵ ICCPR, *supra* note 227, art. 14, ¶ 3.

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

ECHR, *supra* note 227, art. 6, ¶ 3(c).

²⁴⁶ See ICCPR, *supra* note 227, art. 14, ¶ 3 (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”); ECHR, *supra* note 227, art. 6, ¶ 3(d); ACHR, *supra* note 227, art. 8 ¶ 2(f).

²⁴⁷ See ICCPR, *supra* note 227, art. 15, ¶ 1 (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”).

²⁴⁸ Common Art. 3, *supra* note 59.

²⁴⁹ See *infra* Part II.D.

²⁵⁰ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75.

²⁵¹ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75(4).

²⁵² See generally Paust, *Courting Illegality*, *supra* note 21 (summarizing these protections).

Additional Protocol I and Article 6 of Additional Protocol 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.²⁵³ Widely understood as the “gap filler” in Geneva law,²⁵⁴ 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.²⁵⁵ Because the issue under consideration is whether and to what extent humanitarian law protects unlawful combatants in international armed conflicts, the analysis in this Part centers on Article 75 of Additional Protocol I (the fundamental guarantees regime of Additional Protocol II mirrors this provision in all important respects). 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.²⁵⁶

Two points regarding the scope and content of Article 75 are relevant for present purposes. First, the text, structure, and drafting history of Additional Protocol I make plain that it covers unlawful combatants. Second, Article 75 provides specific and substantial protection, particularly to persons detained, arrested, or interned and to 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--the substance of Common Article 3.

1. *Applicability to Unlawful Combatants*

The text and structure of Additional Protocol I demonstrate that Article 75 protects unlawful combatants.²⁵⁷ As previously discussed, Article 45(3) of Additional Protocol I expressly makes the fundamental guarantees of Article 75 applicable to unlawful combatants.²⁵⁸ That provision specifies that Article 75 constitutes the minimum humanitarian protection to be accorded combatants, although the provision acknowledges that some unlawful combatants are protected by the Civilians Convention.²⁵⁹

In addition, Article 75 arguably applies to unlawful combatants of its own force. This view is explicitly endorsed (though often without extended analysis) by many commentators.²⁶⁰ In addition, by its terms, Article 75 covers all “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol”²⁶¹ The

²⁵³ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75; ADDITIONAL PROTOCOL II, *supra* note 10, art. 6.

²⁵⁴ See JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, *Protection of Civilians During Armed Conflict*, in LAW OF WAR WORKSHOP DESKBOOK, *supra* note 114, 123, 126–27.

²⁵⁵ As discussed above, the United States is not party to either Protocol. See *supra* note 114. I address in more detail the significance of this fact when I discuss various factors limiting the effectiveness of Article 75. See *infra* Part IV.B.3. Three points bear mentioning at this juncture. First, the United States does not object to Article 75 of Additional Protocol I or Article 6 of Additional Protocol II--indeed, the United States recognizes that these minimum protections are part of customary international law. See *infra* note 359. Second, the United States often does observe, as a formal matter, these provisions when it fights alongside other states (as part of a coalitional force) who are party to the treaties (such as the United Kingdom). See *infra* text accompanying note **Error! Bookmark not defined.** And third, the United States is, notwithstanding its status as a global superpower, only one state. Over 160 states are party to the Protocols. See *infra* text accompanying note 356.

²⁵⁶ BOTHE ET AL., *supra* note 80, at 460–61.

²⁵⁷ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75.

²⁵⁸ *Id.* art. 45(3).

²⁵⁹ See *supra* text accompanying notes 111–119 (analyzing Article 45).

²⁶⁰ See, e.g., Inter-Am. C.H.R., *Report on Terrorism*, *supra* note 79; Draper, *supra* note 8; Dormann, *supra* note 80; Christopher Greenwood, *International Law and the War on Terrorism*, 78 INT’L AFFAIRS 301, 338 (2002); Paust, *Courting Illegality*, *supra* note 21.

²⁶¹ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75(1). The provision protects such persons “[i]n so far

drafting history strongly suggests that the “in the power of” formulation includes all persons subject to detention by a party to the conflict.²⁶² The formulation clearly encompasses all instances in which “the power has been exercised in order to limit the freedom of the persons enjoying protection.”²⁶³ This language leaves open the question of whether the formulation should apply only to persons in such circumstances, or whether it should also cover all persons residing in territory subject to the party’s control. The best reading of the phrase seems to be that it encompasses all such persons. On this point, the ICRC Commentary concludes that “the expression covers not only persons who have fallen into the hands of a Party to the conflict, but also those over whom it exercises, or would be able to exercise, authority, for the sole reason that they live in territory under its control.”²⁶⁴

Critics of this view might suggest that *combatants* fall outside the purview of Article 75 because this provision is included in Part IV of Additional Protocol I concerning protection of the “civilian population.” However, this criticism is a non-starter because the definitions of “civilians” and “civilian population” in Additional Protocol I include all persons not classified as lawful combatants (as defined in Article 43 of the Protocol).²⁶⁵ Nevertheless, it is important to address this potential line of criticism so as to distinguish the conceptual linkages between the “lawful combatant” scheme of Additional Protocol I—a matter of some controversy—and the “fundamental guarantees” scheme. Critics might suggest that application of Article 75 to unlawful combatants is predicated on the controversial reformulation of lawful combatant status in Articles 43–45. Successful linkage of these schemes therefore could: (1) arguably deprive Article 75, as applied to unlawful combatants, of customary international law status; and (2) encourage states actively opposing the unlawful combatants scheme to resist application of Article 75 to unlawful combatants. The United States, for example, is not party to the Additional Protocols and specifically objects to the lawful combat regime elaborated therein. As a consequence, conceptual clarity on this matter is crucial. A proper reading of two provisions illustrates that the regime established in Articles 43–45 has no significant protective consequences with respect to rights recognized in Article 75. The difficulty is, of course, how best to classify irregular forces.

The important point here is that all such persons are entitled to protection equivalent to or greater than that recognized in Article 75. Any irregular fighters classified as “unlawful combatants,” irrespective of whether the POW Convention standard or the Additional Protocol I standard is used, are classified as “civilians” for protective purposes by Additional Protocol I. If, on the other hand, any such fighters are lawful combatants, then they are entitled to POW protections, including combatant immunity. In short, no view on the proper content of the “lawful combatant” category implicates, as a conceptual matter, whether any affected persons are entitled, at a minimum, to protections equivalent to those established by Article 75.

2. *Legal Protections*

The substance of these rules tracks closely the substance of Common

as they are affected by a situation” that constitutes an international armed conflict as defined in Article 1 of the Protocol. *Id.* Notably, Article 1 includes in the definition of international armed conflict so-called “wars of national liberation” even though these conflicts are, as a formal matter, non-international. *Id.* art. 1(4).

²⁶² BOTHE ET AL., *supra* note 80, at 460; ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 109, at 837–38.

²⁶³ BOTHE ET AL., *supra* note 80, at 460; ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 109, at 837–38.

²⁶⁴ ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 109, at 838, ¶ 2912; *see also* BOTHE ET AL., *supra* note 80, at 460.

²⁶⁵ ADDITIONAL PROTOCOL I, *supra* note 10, arts. 43, 50.

Article 3 of the 1949 Conventions.²⁶⁶ By its terms, Article 75 requires humane treatment in all circumstances and requires that its protections be provided without any adverse distinction based on “race, colour, sex, language, religion, or belief, political or other opinion, or on any similar category.” It also prohibits violence to the life, health, or well-being of all covered persons (including murder, torture, corporal punishment, and all “outrages upon personal dignity”), the taking of hostages, and collective punishments. Moreover, the provision requires several fundamental judicial guarantees in cases of arrest, detention, or internment.²⁶⁷

The inclusion of Article 75 in the Protocols, however, advances the protective scheme of Common Article 3 in two non-trivial respects. First, the Common Article 3 protections, made applicable in all armed conflicts by inference and implication, are expressly applied to international armed conflicts by Article 75.²⁶⁸ Article 6 of Additional Protocol II makes this protective scheme applicable in non-international armed conflicts as defined in that treaty.²⁶⁹ Second, Article 75 elaborates the “judicial guarantees” clause of Common Article 3 by enumerating several specific fair trial rights.²⁷⁰ Article 6 of Additional Protocol II does the same for non-international armed conflicts.²⁷¹ Echoing the language of Common Article 3, Article 75 provides:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure²⁷²

Unlike Common Article 3, Article 75 of Additional Protocol 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);²⁷³ (2) the right to be presumed innocent;²⁷⁴ (3) freedom from compelled self-incrimination;²⁷⁵ (4) the right to be advised of rights and available post-conviction remedies;²⁷⁶ (5) freedom from *ex post facto* application of the criminal law;²⁷⁷ and (6) recognition of the principle of *non bis in idem*.²⁷⁸

In summary, Article 75 of the First Additional Protocol: (1) protects unlawful combatants; and (2) provides detailed, substantial protection, particularly to persons detained and persons facing criminal charges.

III. DISAGGREGATING THE “UNLAWFUL COMBATANT” CATEGORY: PERMUTATIONS AND CORRESPONDING PROTECTIVE SCHEMES IN GENEVA LAW

The Geneva Conventions confer substantial protection on unlawful combatants. Because these protective schemes have varying fields of application, the Conventions protect differently situated unlawful combatants to varying

²⁶⁶ See *supra* Part II.C.2 (analyzing the legal protections accorded by Common Article 3).

²⁶⁷ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75(3)–(7).

²⁶⁸ *Id.* art. 1.

²⁶⁹ ADDITIONAL PROTOCOL II, *supra* note 10, art. 6.

²⁷⁰ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75(3)–(4).

²⁷¹ ADDITIONAL PROTOCOL II, *supra* note 10, art. 6(3).

²⁷² ADDITIONAL PROTOCOL I, *supra* note 10, art. 75.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

degrees. As such, no single protective scheme governs the treatment of unlawful combatants to the exclusion of all others. Consequently, a complete analysis of the protections accorded unlawful combatants requires disaggregation of this category along the lines suggested by the protective schemes under investigation. In this Part, I analyze several axes along which protection may vary in order to graft some conceptual organization onto these disparate, yet partially overlapping, schemes. These variables include: (1) the character of the hostilities; (2) the nationality of the unlawful combatant; (3) the territory in which the unlawful combatant is found; and (4) the jurisdictional nexus between the belligerent state and the unlawful combatant.

A. Character of the Hostilities

All unlawful combatants captured in non-international armed conflicts are entitled to Common Article 3 protections (and perhaps those of Article 6 of Additional Protocol II) *irrespective of their nationality or the territory in which they are found.*²⁷⁹ Any such persons charged with war crimes are arguably entitled to the fair trial protections identified in the Conventions’ penal repression regime.²⁸⁰ No such persons, however, are entitled to POW or Civilian status under the Geneva Conventions. That is, the Conventions writ large apply only in the context of international armed conflicts and occupation.²⁸¹ Persons captured in situations that do not constitute an armed conflict within the meaning of Geneva law are not entitled to any protection under the Conventions. If they are charged with committing a war crime, the crime in question must have been committed in a past armed conflict; war crimes, by definition, only occur in armed conflicts.

Table 1. Character of hostilities and potentially applicable protections

<i>International armed conflict (or occupation)</i>	<ul style="list-style-type: none"> • Civilians Convention • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime
<i>“Wars of national liberation”</i>	<ul style="list-style-type: none"> • Civilians Convention • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime
<i>Other non-international armed conflicts</i>	<ul style="list-style-type: none"> • Common Article 3 • Article 6 of Additional Protocol II (perhaps)
<i>No armed conflict</i>	<ul style="list-style-type: none"> • None

B. Nationality of the Unlawful Combatant

For the most part, the applicable Geneva rules cover unlawful combatants irrespective of nationality considerations. For example, Common Article 3, Article 75 of Additional Protocol I, and the Conventions’ penal repression protections apply without regard to the nationality of the combatant. The exception, of course, is the Civilians Convention. As discussed extensively in Part III, the applicability of the Civilians Convention writ large--recall that one section of the treaty applies to all civilians--turns on rigid nationality requirements.

²⁷⁹ See Common Art. 3, *supra* note 59; see also *supra* Part II.C (explicating the content and extent of Common Article 3 protections).

²⁸⁰ See *supra* Part II.B.

²⁸¹ Common Article 2 of the Four Geneva Conventions.

Nationals of a state “not bound by the Convention are not protected by it.”²⁸² 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.”²⁸³

Table 2. Nationality and potentially applicable protections.

<i>Enemy national</i>	<ul style="list-style-type: none"> • Civilians Convention • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime
<i>National or co-belligerent or neutral</i>	<ul style="list-style-type: none"> • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime
<i>National of detaining power</i>	<ul style="list-style-type: none"> • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime

C. Territory where Unlawful Combatant Is Found

In general, Geneva law’s territorial field of application is broad, encompassing the territory of all parties to the conflict as well as “occupied territory.” Moreover, some protections, such as Common Article 3 and Article 75 of Additional Protocol I, apply without territorial restrictions. Nevertheless, the scope and content of some potentially applicable protective schemes vary by territory in important respects. Two points--one significant, the other less so--bear mention.

First, some specific protections of the Civilians Convention are applicable only in certain types of territory. As discussed previously, the Civilians Convention expressly limits the applicability of many protections to “occupied territory.” It defines others in terms that make clear that the protections are applicable only in the home territory of a belligerent state. Of course, the significance of this variable protective scheme for the purposes of this analysis is sharply attenuated by Part III, Section IV of the Convention prescribing protections for all internees.²⁸⁴ These protections--which closely resemble POW protections--are applicable in both “occupied territory” and the territory of the parties to the conflict.

Second, the derogation regime of Article 5 of the Civilians Convention, which applies in principle to all unlawful combatants, is subject to important territorial limitations. Recall that Article 5 applies only in occupied territory and the territory of the detaining state²⁸⁵ and consequently does not expressly authorize derogations in non-occupied enemy territory or in the territory of a co-belligerent.²⁸⁶ In addition, Article 5, by its terms, authorizes the suspension only of communication rights in “occupied territory.”²⁸⁷

Table 3. Territory and potentially applicable protections

<i>Home territory of belligerent state</i>	<ul style="list-style-type: none"> • Civilians Convention • Common Article 3
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²⁸² CIVILIANS CONVENTION, *supra* note 1, art. 4.

²⁸³ *Id.*

²⁸⁴ See CIVILIANS CONVENTION, *supra* note 1, arts. 79–141.

²⁸⁵ See CIVILIANS CONVENTION, *supra* note 1, art 5; see also *supra* Part II.A.2.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

	<ul style="list-style-type: none"> • Article 75 of Additional Protocol I • Penal Repression Regime
<i>Territory of co-belligerent state</i>	<ul style="list-style-type: none"> • Civilians Convention • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime
<i>Non-occupied enemy territory</i>	<ul style="list-style-type: none"> • Civilians Convention • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime
<i>Occupied enemy territory</i>	<ul style="list-style-type: none"> • Civilians Convention • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime
<i>Territory of neutral state</i>	<ul style="list-style-type: none"> • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime

Table 4. Territory and the scope of derogation permitted under Art. 5 of Civilians Convention.

<i>Home territory of belligerent state</i>	Paragraph (1) as limited by (3) and Art. 75 of Additional Protocol I: restrictions necessary to state security
<i>Territory of co-belligerent state</i>	No derogation permitted
<i>Non-occupied enemy territory</i>	No derogation permitted
<i>Occupied enemy territory</i>	Paragraph (2) as limited by (3) and Art. 75 of Additional Protocol I: restrictions only to communication rights
<i>Territory of neutral state</i>	Civilians Convention not applicable

D. Jurisdictional Nexus between Belligerent State and Unlawful Combatant

The applicability of some Geneva law also turns on the character of authority that the belligerent state exercises over the would-be protected person. That is, states must exercise sufficient authority over an individual to trigger the application of some rules. This is, of course, not true for all Geneva rules. For example, Common Article 3 protects persons no longer taking active part in hostilities “in all circumstances.”²⁸⁸ In addition, many restrictions on the means and methods of warfare, particularly the prohibition on targeting civilians and civilian objects, do not require belligerents to exercise “authority” proper over the persons protected by their terms. Nevertheless, some protections require such a nexus between the protected person and the belligerent power against whom Geneva law is invoked. As previously discussed, the Civilians Convention, for example, protects “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.”²⁸⁹ In addition, Article 75 of Additional Protocol I governs the treatment of “persons who are *in the power of a Party to the conflict*”²⁹⁰

²⁸⁸ Common Art. 3, *supra* note 59.

²⁸⁹ CIVILIANS CONVENTION, *supra* note 1, art. 4 (emphasis added).

²⁹⁰ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75(1) (emphasis added). Recall that the provision protects such persons “[i]n so far as they are affected by a situation” that constitutes an armed conflict as defined in Article 1 of the Protocol. *Id.* Therefore, the requisite jurisdictional nexus must arise in connection with the armed

Analogously, the fair trial rights recognized in the Conventions' penal repression regime apply only in the case of an actual exercise of criminal jurisdiction, alleging violations of the laws of war.²⁹¹

These important requirements do not, however, present any significant difficulty for this analysis because, although the precise meaning of these requirements is somewhat unclear, the triggering conditions certainly include all circumstances in which the belligerent power arrests or detains the person in question.²⁹² Likewise, the problem does not arise in the context of the POW Convention because the nature of the obligations makes clear that the treaty governs only those circumstances in which a belligerent has captured and detained an enemy.

In the end, the applicability of the obligations analyzed in this Article does not vary by jurisdictional nexus because these rights, by their nature, protect persons in situations clearly satisfying each of these thresholds. The potentially applicable protections do nevertheless vary depending on whether the would-be protected person is subjected to criminal charges under the laws of war.²⁹³ If such charges are brought, defendants are entitled to the fair trial rights recognized in the Conventions' penal repression provisions, as clarified and augmented by Article 75(7) of Additional Protocol I.²⁹⁴ Also, the authority of belligerent states to detain captured combatants without criminal charge or trial does not vary significantly depending on the applicable rule. Common Article 3 does not purport to confer or condition the power to detain captured combatants. Article 75 of Additional Protocol I tacitly assumes that parties may detain combatants, requiring only that such persons "shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."²⁹⁵ Moreover, the Civilians Convention clearly acknowledges the authority of state parties to detain protected persons without charge or trial, even though such measures are allowed "only if the security of the Detaining Power makes it absolutely necessary."²⁹⁶ Note that this "necessity" standard is much more restrictive than the POW Convention's broad authorization to detain, wherein Article 21 provides that "[t]he Detaining Power may subject prisoners of war to internment."²⁹⁷ This difference, however, is not significant for the purposes of analyzing the protections applicable to unlawful combatants because detention of any person properly so designated would, without question, satisfy the "necessity" requirement.

Table 5. Potentially applicable protections in criminal proceedings.

<i>Charged with war crimes</i>	<ul style="list-style-type: none"> • Civilians Convention • Common Article 3 • Article 75 of Additional Protocol I • Penal Repression Regime
<i>Charged with other crimes</i>	<ul style="list-style-type: none"> • Civilians Convention • Common Article 3 • Article 75 of Additional Protocol I

Table 6. Authorization to detain combatants without criminal charge or trial.

conflict in question.

²⁹¹ See, e.g., CIVILIANS CONVENTION, *supra* note 1, art. 146; see also *supra* Part II.B (discussing this regime in detail).

²⁹² See BOTHE ET AL., *supra* note 80, at 460; ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 109, at 837–38, 866–71.

²⁹³ See, e.g., CIVILIANS CONVENTION, *supra* note 1, art. 146; see also *supra* Part II.B (discussing this regime in detail).

²⁹⁴ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75(7).

²⁹⁵ *Id.* art. 75(3).

²⁹⁶ CIVILIANS CONVENTION, *supra* note 1, arts. 42, 79.

²⁹⁷ POW CONVENTION, *supra* note 1, art. 21.

<i>Prisoner of war</i>	YES--until the cessation of hostilities (under POW Convention)
<i>“Civilian”</i>	YES--as long as necessary for state security until the cessation of hostilities (under Civilians Convention and Article 75 of Additional Protocol I)
<i>Non-civilian, unlawful combatant (not covered by Civilians Convention)</i>	YES--as long as necessary for state security until the cessation of hostilities (under Article 75 of Additional Protocol I)

E. Illustrations

Some concrete examples may help clarify the application of these overlapping schemes. Consider first the situation of an Afghan citizen captured in Afghanistan during Operation Enduring Freedom and detained at the U.S. military base in Kandahar, Afghanistan. Even if this fighter is an unlawful combatant--that is, he participated directly in the hostilities without the right to do so--he is covered by all the alternative protective schemes identified in this Article. He is protected by the Civilians Convention because he has “fallen into the hands of” a belligerent power of which he is not a national--that is, from the United States perspective, he is an “enemy national.” Moreover, because he is not detained in the home territory of the United States, the Article 5 derogation regime authorizes only minimal security-based restrictions on his rights as a “civilian.” Common Article 3 also protects him because he is no longer taking active part in hostilities--irrespective of the conditions surrounding his capture, the facts of his capture and subsequent detention render him *hors de combat*. Finally, Article 75 of Additional Protocol I obviously applies because he is “in the power of” the United States in virtue of his detention.

Next consider the situation of the same fighter detained at the U.S. Naval Base at Guantanamo Bay, Cuba. This change in circumstance has bearing only on the applicability of the Civilians Convention. As discussed previously, the substantive protections of the Civilians Convention writ large pertain only to occupied territory and to the territory of parties to the conflict. At first blush, it seems that Cuban territory falls outside both categories. More sustained reflection, however, suggests that Cuba is a party to the conflict within the meaning of the Civilians Convention. Hence, Guantanamo Bay would constitute the “territory of a party to the conflict.”²⁹⁸ More specifically, Cuba is arguably a co-belligerent for

²⁹⁸ It is important to note that Guantanamo Bay is not, as a formal matter, “occupied territory” even though the United States exercises de facto authority over this territory for war-related purposes. Indeed, Article 3 of the lease agreement defines the character of U.S. authority in the territory in terms of “complete jurisdiction and control,” notwithstanding Cuba’s “ultimate sovereignty” over the lands. See AGREEMENT BETWEEN THE UNITED STATES AND CUBA FOR THE LEASE OF LANDS FOR COALING AND NAVAL STATIONS, February 23, 1903, T.S. No. 418, art. 3, available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm> (last visited Mar. 13, 2004) [hereinafter AGREEMENT BETWEEN THE UNITED STATES AND CUBA]. When such authority is exercised by the military and the territory is made subject to military law, this situation indeed resembles “occupied territory.” Recall that the touchstone of “occupation” is the exercise of “de facto” (as opposed to formal), “provisional” (as opposed to sovereign) authority. See, e.g., HAGUE CONVENTION, *supra* note 5, art. 42; FM 27-10, *supra* note 44, ¶¶ 351 – 53. Nevertheless, the definition of “occupied territory” established in the Hague Regulations--and echoed in U.S. military manuals--excludes situations involving the administration of friendly or allied territory, except when such territory is recaptured from the enemy on behalf of the ally. See, e.g.

HAGUE CONVENTION, *supra* note 5, art. 42 (implying the capture of enemy territory by stating that “[t]erritory is considered occupied when it is actually placed under the authority of the *hostile* army”) (emphasis added); FM 27-10, *supra* note 44, ¶ 354 (distinguishing friendly territory administered by United States in virtue of civil agreement); *Id.* ¶ 352(d) (providing that occupation rules apply only in the context of “belligerently occupied areas”); *Id.* ¶ 352(c) (“Occupation . . . is invasion plus taking firm possession of *enemy* territory . . .”) (emphasis added). See also Paust, *Courting Illegality*, *supra* note 21, at 18, 21, 25 – 26 (arguing that Guantanamo Bay is not “occupied territory” within the meaning of the Geneva Conventions because the territory was not acquired in war or other war-related circumstances); Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc Rules of Procedure*, 23 MICH. J. INT’L L. 677, 681 (2002) (same).

the purposes of determining the applicability of the Convention. As argued above, the category of co-belligerents is best understood as encompassing states that knowingly allow the systematic, conflict-related use of their territory by a belligerent state. Recall that this understanding of co-belligerency is most consistent with the obligations of neutrals in laws of war and the broad definition of “armed conflict” in Geneva law. This understanding avoids the perverse results that issue from a narrow interpretation of co-belligerency. Cuba, therefore, is a party to the conflict because it has allowed the systematic use of its territory by the United States in the prosecution of the war.²⁹⁹ On this reading then, this hypothetical fighter would be protected by the Civilians Convention. According to this view, the Article 5 derogation regime would not authorize any restrictions on Convention rights because this hypothetical protected person is detained outside the territory of the United States.³⁰⁰

Other variants of the Guantanamo Bay scenario are also instructive. Consider the case of a Saudi national, Al Qaeda fighter otherwise in the same circumstances as the previous example. Because this detainee is not formally an enemy national, he is not protected by the Civilians Convention writ large. That is, he does not satisfy the nationality requirements of Article 4, in that he is the national of a neutral or co-belligerent state with which the United States has normal diplomatic relations.³⁰¹ Of course, Common Article 3 and Article 75 of Additional Protocol I would apply, as would the fair trial rights of the Conventions’ penal repression regime if the detainee were subjected to war crimes charges.

The same analysis is in order if an otherwise similarly situated detainee were a U.S. citizen. Again, the Civilians Convention would not protect this detainee because he is not an enemy national.³⁰² By its terms, “protected persons”

²⁹⁹ The lease agreement was signed with full knowledge that the United States would use the territory as a military base to facilitate force projection. Of course, the title of the agreement itself acknowledges that naval stations would be built there. See AGREEMENT BETWEEN THE UNITED STATES AND CUBA, *supra* note 298. Moreover, the agreement implements a Cuban constitutional provision concerning collective defense and, most interestingly, U.S. self-defense. The preamble of the lease provides that:

The United States of America and the Republic of Cuba, being desirous to execute fully the provisions of Article VII of the Act of Congress approved March second, 1901, and of Article VII of the Appendix to the Constitution of the Republic of Cuba promulgated on the 20th of May, 1902, which provide:

ARTICLE VII. To enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the Cuban Government will sell or lease to the United States the lands necessary for coaling or naval stations, at certain specified points, to be agreed upon with the President of the United States.

Id. at pmb1.

³⁰⁰ Conversely, if such a detainee were held in U.S. territory, the same protective schemes would apply except that his rights under the Civilian Convention would be subject to the nominally broader derogation authority recognized in Article 5(1). See CIVILIANS CONVENTION, *supra* note 1, art. 5(1) (authorizing derogation from rights that would “if exercised in the favour of such individual person, be prejudicial to the security of such State.”). The upshot is that such Guantanamo Bay detainees enjoy somewhat *greater protection, not less*, under the Civilians Convention than they would in U.S. territory. See *supra* Part II.A.1.a (explaining the rationale for augmented derogation authority in a belligerent state’s home territory).

³⁰¹ CIVILIANS CONVENTION, *supra* note 1, art. 4.

³⁰² This may well constitute an important difference between the Civilians Convention and the POW Convention. That is, the POW Convention may apply irrespective of the detainee’s nationality. The terms of Article 4 do not expressly make nationality variables relevant to defining “protected persons” under the Convention. POW CONVENTION, *supra* note 1, art. 4. Moreover, at least one U.S. court has held that U.S. citizenship is not a bar to POW status at the hands of U.S. forces. See *In re Territo*, 156 F.2d 142 (9th Cir. 1946) (note the date of the decision—the court accordingly analyzes the status question under the Hague Regulations and the 1929 POW Convention). Some commentators have supported this view. See, e.g., LEVIE, *supra* note 24.

Despite the surface appeal of this interpretation, there are several non-trivial reasons to question its validity. Indeed, the majority of commentators reject this view. See, e.g., OPPENHEIM, *supra* note 9. It should first be noted that the United States is an outlier on this issue—no other state recognizes POW status for its own nationals fighting on the side of its enemies. See, e.g., LEVIE, *supra* note 24. Second, several provisions of the POW Convention clearly presume that the protected person is not a national of the detaining power. See, e.g., POW CONVENTION, *supra* note 1, art. 87 (providing for leniency in punishment because POWs are not nationals of detaining power). Third, the drafting history of the POW Convention strongly suggests that it was intended to cover only enemy nationals. See, e.g., IIA Diplomatic Conference, *supra* note 96, at 291 – 94 (illustrating in the context of debate on penal and disciplinary sanctions, that delegates simply assumed that POWs would not be nationals of the “Detaining Power”). In addition, the negotiations surrounding the Civilians Convention implicitly support the same conclusion. See IIA DIPLOMATIC CONFERENCE, *supra* note 96, at 813 – 14 (summarizing debates in drafting committee). Given the controversy that arose surrounding the nationality requirements of the Civilians Convention,

under the Civilians 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.”³⁰³ Nevertheless, the other surveyed protective schemes apply. Indeed, as demonstrated previously, both Common Article 3 and Article 75 of Additional Protocol I were designed in large part to close this very gap in Geneva law.³⁰⁴ Likewise, the penal repression regime is not subject to any nationality restrictions. By its text, it applies “in all circumstances,” and its drafting history clearly indicates that delegations considered the prosecution of one’s own nationals the paradigmatic application of the “grave” and “simple” breach regimes.³⁰⁵

IV. THE DECLINING SIGNIFICANCE OF POW STATUS

The Geneva Conventions protect unlawful combatants, and these protections closely track the minimum requirements of the POW Convention. In Part III, I identified four overlapping, alternative protective schemes generally applicable to unlawful combatants. The nature of the protections recognized in these schemes strongly suggests that the denial of POW status does not sharply curtail the rights of war detainees. Although the analysis in Parts II and III also makes clear that the scope and content of these alternative protective schemes are subject to important limitations, subsequent developments have further eroded the significance of POW status. In this Part, I review these limitations and draw out these developments.

In the end, the unique protective significance of POW status is combatant immunity. In other words, POWs, as lawful combatants, may not be punished for their very participation in the hostilities. Despite marked convergence in the protective schemes of Geneva law, unlawful combatants are not entitled to participate in the hostilities and consequently may be prosecuted and punished for doing so. This so-called “immunity” accorded to lawful combatants is, however, often misunderstood. Proper specification of its scope, content, and implications suggests that its significance is limited. Moreover, several developments--including the changing character of armed conflict and the general trajectory of humanitarian law, both substantive and procedural--have diminished the importance of the privilege.

A. *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 Additional Protocol I. Furthermore, by 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. These provisions also make clear that unlawful combatants are presumptively covered by the full protections of the Civilians Convention--even if some of these protections may be

it seems highly improbable that the delegates, *without any debate on the matter*, concluded that the POW Convention should apply to a state’s own nationals (even though the very suggestion that the Civilians Convention might so apply generated vigorous, and ultimately fatal, opposition). Finally, the drafting history of Common Article 3 provides good reason to think that states in general did not support the application of humanitarian rules to their own nationals. Debate surrounding this provision demonstrates that states struggled to make clear that the application of humanitarian law to internal matters would not, in any way, compromise the power of the state to quash rebellion and maintain public order. *See, e.g.*, II. A DIPLOMATIC CONFERENCE, *supra* note 96, at 814 – 15.

³⁰³ CIVILIANS CONVENTION, *supra* note 1, art. 4 (emphasis added). Note that, because phrased in the negative, this language also seems to exclude dual (or poly-) nationals. That is, the requirement is that the would-be “protected person” must not be a national of the detaining state.

³⁰⁴ *See supra* Parts II.C, II.D.

³⁰⁵ *See supra* Part II.B.

suspended when (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. As demonstrated in Parts II and III, these provisions establish a level of protection for unlawful combatants that closely approximates the protection accorded POWs.

As demonstrated in Part I, the POW Convention provides a detailed inventory of rights and privileges. In addition, the Convention also prescribes robust enforcement measures including criminalization of grave breaches of the treaty’s rules. Nevertheless, the question remains whether there are any unique protective consequences of POW status. Although the analysis up to this point strongly suggests that 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. 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 unlawful combatants many of the rights recognized in the Convention if necessary to protect national security.

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 3.³⁰⁶ Recall that the persons protected by Common Article 3 are not, as a formal matter, “protected persons” within the meaning of the Conventions.³⁰⁷ 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 might result in individual criminal liability at all.³⁰⁸ Article 75 of Additional Protocol I gives rise to similar concerns. Although it protects all persons “in the power of” a belligerent state, Additional Protocol 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.³⁰⁹ Moreover, the legal status of Additional Protocol I in many conflicts is itself somewhat ambiguous. The problem is that many states of geo-strategic significance--including India, Pakistan, Afghanistan, Iran, Iraq, Israel, and the United States--have not ratified Additional Protocol I.³¹⁰ 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 and fail to establish any protection outside that context. In short, some gaps arguably persist in the coverage of each of these protective schemes.

B. The Progressive Convergence of Protective Schemes

In recent years, however, the gaps in protection have been narrowed significantly. Specifically, two developments have clarified and, as a

³⁰⁶ See *infra* Part IV.B.2 (discussing this issue).

³⁰⁷ See *supra* note 217 (noting the consensus view and evaluating the U.S. claim to the contrary).

³⁰⁸ See, e.g., MOIR, *supra* note 186, at 52–58; Jinks, *September 11*, *supra* note 177, at 10–12.

³⁰⁹ See Protocol I, *supra* note ____, art. 85 (“grave breaches” regime of Additional Protocol I does not include persons protected by Article 75); ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 109, at 992–93.

³¹⁰ See ICRC, *States Party to the Geneva Conventions and their Additional Protocols*, *supra* note 42.

consequence, extended the legal protection accorded unlawful combatants: (1) abstract provisions have acquired a more concrete meaning through the elaboration of general humanitarian principles such as “humane treatment,” “torture,” and “essential judicial guarantees”; and (2) the conditions under which the identified alternative schemes apply have been broadened.

1. *Civilians Convention*

The Civilians Convention, when applicable in its entirety, provides a level of protection that closely approximates that of the POW Convention. Indeed, the drafters of the Geneva Conventions well understood that the two protective schemes were essentially identical in substance.³¹¹ Given the broad language of Article 4, the Civilians Convention covers unlawful combatants so long as they satisfy the express nationality requirements.³¹² Two features of the Civilians Convention potentially limit the protection of unlawful combatants: (1) the nationality requirements of Article 4, which may exclude many potential unlawful combatants; and (2) the derogation regime of Article 5, which may authorize denying unlawful combatants many important protections. Subsequent developments, however, have considerably softened the impact of these limiting features.

First consider the nationality requirements of Article 4. Based on the “traditional state-centric, reciprocity-based approach,”³¹³ the Civilians Convention writ large applies only to persons who find themselves, in case of a conflict or occupation, “in the hands of a belligerent or occupying power of which they are not nationals.”³¹⁴ In such cases, only nationals of a state that is bound by the Convention are protected.³¹⁵ Moreover, nationals of a neutral state who find themselves in the territory of a belligerent state and nationals of a co-belligerent state are not protected persons while their state of nationality maintains “normal diplomatic representation” in the state where they are found.³¹⁶

As previously discussed, these rigid requirements exclude many persons, including unlawful combatants and peaceful civilians, from protection of the Convention. Several important developments in humanitarian law, however, strongly suggest that the nationality requirements have been relaxed. For example, the literal interpretation of Article 4 has been rejected by international criminal tribunals in several cases, and its viability is now unclear. In the *Celebici* case, the ICTY concluded that Bosnian Serbs who had fallen into the hands of Bosnian authorities were “protected persons” under the Civilians Convention notwithstanding the apparent nationality bar.³¹⁷ The ICTY, eschewing formal conceptions of nationality, reasoned that “the nature of the international armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949. In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt [a different] approach.”³¹⁸ The Civilians Convention, the Tribunal held, protected the Serbs in question “as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State.”³¹⁹ The ICTY Appeal Chamber

³¹¹ See *supra* note 54 (documenting this acknowledgement).

³¹² See CIVILIANS CONVENTION, *supra* note 1, art. 4.

³¹³ Meron, *supra* note 191, at 257.

³¹⁴ CIVILIANS CONVENTION, *supra* note 1, art. 4.

³¹⁵ It is important to note that this limitation is now irrelevant because all U.N. member states are parties to the Convention. See ICRC, *States Party to the Geneva Conventions and their Additional Protocols*, *supra* note 42.

³¹⁶ CIVILIANS CONVENTION, *supra* note 1, art. 4.

³¹⁸ Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, ¶ 263 – 66 (Nov. 16, 1998) [hereinafter *Celebici*].

³¹⁹ *Id.* ¶ 265.

elaborated the mature form of the view in the *Tadic* judgment:

Article 4 . . . , if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves Article 4 intends to look to the substance of relations, not to their legal characterisation as such.³²⁰

This redefinition (or relaxation) of the nationality requirements has now been upheld in several ICTY cases.³²¹ Moreover, the ICTY view finds implicit support in many national military regulations prescribing identical treatment to all civilian detainees without regard to nationality distinctions.³²² The ICC, which has concurrent jurisdiction over “grave breaches” of the 1949 Conventions, implicitly relaxes the nationality requirements of Article 4 along the same lines.³²³ Finally, the consensus of commentators now endorses this ICTY interpretation of Article 4.³²⁴

Next consider the derogation regime of Article 5. As discussed in detail in Part II, Article 5 of the Convention conditions its protection of combatants.³²⁵ As I demonstrated in Part II, the best reading of the provision is that it does not constitute a broad authorization to suspend the protections of the Convention. Nevertheless, Article 5 clearly limits, to some degree, the scope of protection the Convention accords unlawful combatants. Several developments in humanitarian and human rights law, however, have further eroded the significance of the provision: (1) the codification of prerequisites for lawful derogation from fundamental rights protections; and (2) the elaboration and concretization of non-derogable rights in both humanitarian and human rights law.

An extensive body of human rights law prescribes in some detail prerequisites for lawful derogation from fundamental rights. Much like the Civilians Convention, several widely ratified international human rights treaties expressly allow suspension of some rights in public emergencies, such as during times of war.³²⁶ Article 4 of the ICCPR, for example, provides that in situations

³²⁰ Prosecutor v. *Tadic*, Case No. IT-94-1-A, Judgement, ¶ 168 (Appeals Chamber, ICTY, July 15, 1999) [hereinafter *Tadic* Judgement]. See also Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 300 (2002) (arguing that the *Tadic* Appeals Chamber ruling gave the conventional reading of nationality requirement the “coup de grâce”).

³²¹ See, e.g., Prosecutor v. *Delalic*, Case No. IT-96-21-A, ¶¶ 56 – 85 (Appeals Chamber, ICTY, Feb. 20, 2001); *Id.* ¶ 83 (holding that Article 4 protects persons failing to satisfy its literal nationality requirements because “the victims may be ‘assimilated’ to the external State involved in the conflict, even if they formally have the same nationality as their captors”); Prosecutor v. *Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶ 151 (Appeals Chamber, ICTY, Mar. 24, 2000) (“Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors.”); *Tadic* Judgement, *supra* note 303, ¶ 169 (holding that “even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable”); *Celebici I*, *supra* note 301, ¶ 263.

³²² See, e.g., U.S. ARMY, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, AR 190-8 (1997), at 2, 18 – 30, available at http://www.usapa.army.mil/pdffiles/r190_8.pdf (last visited Apr. 23, 2004).

³²³ The relevant mens rea element of the “grave breach” offense requires only that the perpetrator be aware that the person was fighting for the enemy—not that the perpetrator must know or have reason to know the nationality of the victim. See Preparatory Commission for the International Criminal Court, *Finalized Draft Text of the Elements of Crimes*, at 18, n.33, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000). These draft elements now have been adopted by the Assembly of States Parties. See Assembly of States Parties to the Rome Statute of the International Criminal Court, *First Session, New York, Sept. 3 – 10, 2002, Official Records*, ICC-ASP/1/3, ¶ 22. See also *id.* at 10, 108 (Rules of Procedure and Evidence and Elements of Crimes).

³²⁴ See, e.g., KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 139 – 41 (2001); Meron, *supra* note 191, at 260.

³²⁵ See *supra* Part II.A.2.

³²⁶ The derogation provisions of the major human rights treaties are remarkably similar. See, e.g., ICCPR, *supra* note 227, art. 4(1); ACHR, *supra* note 227, art. 27(1), ECHR, *supra* note 227, art. 15(1). Note that the African Charter does not contain a provision authorizing States to derogate from their obligations under the treaty in times of public emergency. See Banjul Charter, *supra* note 227. For useful surveys of this area of law, see ANNA-

threatening the life of the nation, a government may issue a formal declaration suspending certain human rights guarantees provided that: (1) a state of emergency exists that threatens the life of the nation;³²⁷ (2) the exigencies of the situation “strictly require” such a suspension;³²⁸ (3) the suspension does not conflict with the nation’s other international obligations;³²⁹ (4) the emergency measures are applied in a non-discriminatory fashion;³³⁰ and (5) the government notifies the U.N. Secretary-General immediately.³³¹ Although these requirements obviously do not apply formally to derogations under Article 5 of the Civilians Convention, they do suggest that broadly endorsed rules and principles have emerged which might limit the scope of legitimate derogations in Geneva law. Recall that the negotiating history and ICRC Commentary IV suggest that the drafters of Article 5 sought only to authorize a narrow band of rights restrictions seen as absolutely necessary to the security of the state or the military security of the occupying power.³³² Indeed, the Commentary demonstrates that the conceptual structure of the provision mirrors that of human rights derogation regimes--and that this structure reflects the range of concerns of Geneva Conference delegates.³³³ In this sense, the derogation regimes of human rights treaties provide a useful schematic for the systematic evaluation of the lawfulness of any exercise of Article 5 powers.

In addition, the list of so-called “non-derogable” rights has expanded. As discussed previously, the protections accorded by Article 75 of Additional Protocol I expressly augmented the scope and content of rights immune from Article 5 derogation.³³⁴ Recall that these rights include robust due process protections and an implied right to repatriation.³³⁵ Furthermore, developments in international human rights law bolstered considerably the fair trial rights recognized in Common Article 3 and, by implication, strengthened the Article 5 regime that makes non-derogable all fair trial rights “recognized in the present Convention,” including those recognized in Common Article 3.³³⁶

2. Common Article 3

Common Article 3 establishes fundamental principles governing the treatment of all “war detainees”--a group that is, by definition, *hors de combat*.

LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION (1998); JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY (1994); JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992).

³²⁷ See *Lawless Case (Ireland)*, 1961 Y.B. Eur. Conv. On H.R. (Eur. Ct. H.R. 438, 472, 474) (holding that the ECHR’s derogation clauses may be invoked only in “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed”); SVENSSON-MCCARTHY, *supra* note 326, at 195 – 281; Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT’L L.J. 101, 103 (1995) (arguing that the concept of a “state of emergency refers to those exceptional circumstances resulting from temporary factors of a political nature, which, to varying degrees, involve extreme and imminent danger that threaten the organized existence of the state”). The concept of emergency does include circumstances other than armed conflict. For example, national disasters and extreme economic crises may constitute “public emergencies.” See R. St. J. MacDonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT’L L. 225, 235 (1997). Furthermore, the emergency must be temporary, imminent, and of such a character that it threatens the nation as a whole. See, e.g., ORAA, *supra* note 326, at 11 – 33.

³²⁸ This provision incorporates the principle of proportionality into derogation regimes, thus requiring that the restrictive measures be proportional in duration, severity, and scope. Implicit in this requirement is that ordinary measures must be inadequate, and that the emergency measures must assist in the management of the crisis. See, e.g., ORAA, *supra* note 326, at 143; MacDonald, *supra* note 327, at 233 – 35.

³²⁹ See SVENSSON-MCCARTHY, *supra* note 326, at 624 – 39.

³³⁰ *Id.* at 640 – 82.

³³¹ *Id.* at 683 – 718; ICCPR, *supra* note 227, art. 4(3); ECHR, *supra* note 227, art. 15(3); ACHR, *supra* note 227, art. 27(3). The Human Rights Committee has emphasized the importance of notification for effective international supervision of derogations in states of emergency. See Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex VII, at 110, U.N. Doc A/36/40 (1981).

³³² See *supra* Part II.A.2.a (summarizing this drafting history).

³³³ ICRC, COMMENTARY IV, *supra* note 109, at 52 – 58.

³³⁴ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75.

³³⁵ *Id.*

³³⁶ CIVILIANS CONVENTION, *supra* note 1, art. 5.

Despite this broad field of application, the provision, at the time of its drafting, exhibited several potentially important limitations. Take, for example, three oft-repeated criticisms of Common Article 3: (1) the conditions under which the provision applies are unclear;³³⁷ (2) the rules outlined in the provision are too abstract to constrain state practice in any meaningful way;³³⁸ and (3) the provision has not, until recently, benefited from the criminal enforcement regime of the Geneva Conventions.³³⁹ These concerns, however, require substantial qualification in view of recent developments.

First, the scope of application of the provision has been clarified in at least one important respect. Although the lower threshold of applicability for Common Article 3 remains poorly defined,³⁴⁰ there is now an emerging consensus on the upper threshold: Common Article 3 applies in both non-international and international armed conflict.³⁴¹ As such, all persons no longer taking active part in hostilities in any armed conflict must receive, at a minimum, humane treatment including the provision of fundamental judicial guarantees.

Second, the substantive rules of Common Article 3 have now acquired a more definite meaning. For example, Article 75 of Additional Protocol I (and Article 6 of Additional Protocol II) elaborate and clarify the meaning of Common Article 3 by specifying the minimum procedural guarantees for all persons subject to the authority of a belligerent. In addition, the vast reservoir of international human rights law discussed previously has clarified substantially the content of the seemingly abstract dictates of Common Article 3.³⁴² International human rights treaties and their supervisory organs have also made substantial progress in defining the scope of prohibitions on torture and cruel treatment.³⁴³ Similarly, international fair trial rules have identified,³⁴⁴ as a matter of positive law, those “judicial guarantees which are recognized as indispensable by civilized peoples.”³⁴⁵

Third, the enforcement of Common Article 3 has improved markedly in recent years. Until recently, the prevailing view was that violations of Common Article 3 did not entail individual criminal responsibility.³⁴⁶ However, recent developments in international criminal law make clear that violations of Common Article 3 are war crimes. For example, the ICC Statute, perhaps the most authoritative expression of the current state of humanitarian law, specifically criminalizes violations of Common Article 3.³⁴⁷ The ICTR Statute also imposes individual criminal liability for serious violations of the provision.³⁴⁸ Although the ICTY Statute does not expressly cover violations of Common Article 3,³⁴⁹ the Tribunal held that the statute’s provision concerning “violations of the laws and

³³⁷ See, e.g., MOIR, *supra* note 186; Jinks, *September 11*, *supra* note 177.

³³⁸ See, e.g., Tom Farer, *Humanitarian Law and Armed Conflicts: Toward a Definition of “International Armed Conflict,”* 71 COLUM. L. REV. 37 (1971).

³³⁹ See *infra* Part IV.B.2.

³⁴⁰ On the persistence of these problems, see Jinks, *September 11*, *supra* note 177; Jinks, *Temporal Scope*, *supra* note 177, at 2–8.

³⁴¹ See *supra* Part II.C.1.

³⁴² See Part II.C.3 (summarizing fair trial and humane treatment rights in human rights law and Additional Protocols).

³⁴³ See generally NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (2d ed. 2001) (surveying these developments).

³⁴⁴ See *supra* Part II.C.3 (summarizing these rules).

³⁴⁵ Common Art. 3, *supra* note 59.

³⁴⁶ As recently as 1994, the U.N. Commission of Experts on Former Yugoslavia seemed to have held this view. See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, ¶ 42, U.N. Doc. S/1994/674 (May 27, 1994) (stating that “in general . . . the only offences committed in internal armed conflict for which universal jurisdiction exists are ‘crimes against humanity’ and genocide, which apply irrespective of the conflicts’ classification.”).

³⁴⁷ ICC STATUTE, *supra* note 51. Articles 8(2)(c) and 8(2)(e) of the ICC Statute cover Common Article 3 and Article 4 of Protocol II, respectively. Article 8(2)(c) explicitly references Common Article 3 and its prohibitions, whereas Article 8(2)(e) addresses by implication the prohibitions of Article 4 in Protocol II. All acts prohibited in Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), are prohibited by Articles 8(2)(c) and 8(2)(e), respectively, of the ICC Statute. *Id.*

³⁴⁸ STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, art. 4, Nov. 8, 1994, 33 I.L.M. 1598, 1600 [hereinafter ICTR STATUTE].

³⁴⁹ STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, art. 3, May 25, 1993, 32 I.L.M. 1192 (1993) [hereinafter ICTY STATUTE].

customs of war” necessarily included violations of Common Article 3.³⁵⁰ Finally, the criminal law³⁵¹ and military manuals³⁵² of many countries, including the United States, recognize violations of Common Article 3 as war crimes.³⁵³

3. Article 75 of Additional Protocol I

Article 75 protects all persons who are “in the power of” a belligerent state, including unlawful combatants.³⁵⁴ As discussed in Part II, Article 75 is modeled on Common Article 3, though it constitutes an important advancement over the protective scheme of that provision. Recall that Article 75 substantially clarifies the Common Article 3 scheme by specifying the content of due process protections and making clear the applicability of its rules in international armed conflicts. This provision also expressly revises two other protective schemes by (1) narrowing the class of derogable rights in Article 5 of the Civilians Convention, and (2) bolstering the minimum procedural rights accorded persons facing criminal charges under the laws of war.³⁵⁵ In this sense, Article 75 of Additional Protocol I, drafted nearly thirty years after the 1949 Diplomatic Conference, is itself important evidence of the declining significance of POW status. In addition, the Article 75 protective scheme has, over the life of the provision, assumed an increasingly important position in Geneva law.

Two lingering problems potentially limit the utility of this protective scheme. First, as mentioned at the outset of this Part, whereas the 1949 Geneva Conventions now have universal participation, several important states are not party to Additional Protocol I. Second, violations of Article 75--like those of Common Article 3--are not expressly identified as war crimes in Geneva law. As such, the means and methods of enforcing this provision are not directly prescribed in or governed by Additional Protocol I.

The first of these concerns is diminishing in significance as the number of states party to Additional Protocol I rises (as does the number of states expressly incorporating Article 75, if not all of Additional Protocol I, into domestic law or policy). First, states party to Additional Protocol I are up. As of July 2003, 161 states are parties to Additional Protocol I including several major powers (e.g., China, Germany, North Korea, Russia, and the United Kingdom).³⁵⁶ That is, most states have formally accepted Article 75 as the benchmark for the proper treatment of persons in the hands of a belligerent. Second, multinational and so-called coalition deployments typically utilize Additional Protocol I rules as the legal baseline governing hostilities.³⁵⁷ Similarly, rules governing visiting forces--

³⁵⁰ See Tadic Appeal, *supra* note 200, ¶¶ 87–91 (interpreting Article 3 of the ICTY Statute).

³⁵¹ See Thomas Graditsky, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts*, 322 INT’L REV. RED CROSS 29 (1998) (collecting citations to penal codes).

³⁵² See *id.* (collecting citations to military manuals).

³⁵³ The U.S. War Crimes Act was amended in 1997 to cover expressly all violations of Common Article 3. See Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. No. 105–118, 111 Stat. 2386 (1997) (codified at 18 U.S.C. § 2441(c) (2000)) (amended in 1997 to replace the term “grave breaches” with “war crime” and to include violations of Common Article 3 within the definition of war crimes). Every U.S. court to consider the issue has classified violations of Common Article 3 as “serious violations of international law” and “war crimes.” See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Linder v. Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992) (“All of the authorities agree that torture and summary execution--the torture and killing of wounded non-combatant civilians--are acts that are viewed with universal abhorrence.”); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998). This view is also clearly endorsed in U.S. military law and policy. See, e.g., ARMY FM 27-10, *supra* note 44, ¶ 499; JUDGE ADVOCATE GENERAL, U.S. ARMY, LAW OF WAR WORKSHOP DESKBOOK, *supra* note 114, ch. 8 (“War Crimes”).

³⁵⁴ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75 (1).

³⁵⁵ See *id.* art. 75(1) — (7).

³⁵⁶ See ICRC, *supra* note 42.

³⁵⁷ These include U.N. peacekeepers and other multinational forces. With respect to U.N. forces, see United Nations Secretariat, Secretary-General’s Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), available at <http://www.nato.int/for/gfa/> (last visited Apr. 23, 2004) (Annexes 1A, 4, 6). With respect to multinational forces generally, see Michael N. Schmitt, *The Law of Armed Conflict as Soft Power*, in *International Law Across the Spectrum of Conflict* 454, 459 (Michael N. Schmitt ed., 2000) (stating, with specific reference to Protocol I, that typically the “greatest common normative

so-called Status of Forces Agreements (SOFAs)--also often define in terms of Article 75 the due process guarantees accorded persons arrested or detained by military forces.³⁵⁸ Perhaps most importantly, many states not party to Additional Protocol I have nevertheless incorporated Article 75 into their law or policy.³⁵⁹ Finally, many commentators and some states now suggest that Additional Protocol I is “customary international law.”³⁶⁰

The second of these concerns, however, persists. Of course, Additional Protocol I itself does not include violations of Article 75 in its “grave breach” regime. Neither violation of the provision is expressly identified as war crimes in the ICC, ICTY, or ICTR. Nevertheless, Article 75 is crucial to the proper interpretation of several provisions that do give rise to individual criminal liability, such as Common Article 3³⁶¹ and the “grave breach” regime of the Civilians Convention.³⁶²

4. Penal Repression Regime Fair Trial Rights

Two deficiencies have limited the significance of the enforcement provisions of the 1949 Conventions that specify the minimum fair trial rights applicable in war crimes prosecutions. Important recent developments, however, have substantially ameliorated these concerns.

First, the catalog of fair trial rights in these provisions--specifically only Articles 105 — 108 of the POW Convention--is arguably limited. Of course, as already discussed, these protections have been augmented substantially--formally through Article 75 of Additional Protocol I³⁶³ and, informally, through emerging international standards evidenced by the procedural rights regimes of international

denominator” will apply for multinational forces); Judge Advocate General, U.S. Army, Operational Law Handbook 70 (2003) (noting that combined rules of engagement (ROE) must be fashioned for multinational forces and that these rules may differ from U.S. ROE if coalition partners have different commitments under the law of war). Consider the example of NATO. There are no standing NATO ROE. Rather, NATO ROE are developed on a “mission specific” basis through a process of consensus. See Center for Law and Military Operations, Rules of Engagement (ROE) Handbook for Judge Advocates 2-11 to 2-12 (2000), available at <http://sja.hqmc.usmc.mil/JAO/sources/Files/ROEHB.pdf> (last visited Apr. 24, 2004); W. Hays Parks, International Humanitarian Law in Multinational Operations: How Do Multinational Forces Work Within Constraints Set by Differing Commitments of Individual States?, Paper Presented to EAPC Workshop on International Humanitarian Law and Multinational Forces, London, November 20 - 21, 2000, available at http://www.isn.ethz.ch/pfpdc/documents/2000/10-00_London/parks.htm (stating that NATO successfully incorporated Protocol I into its operational policy, notwithstanding the fact that the United States is not party to the treaty, through an extended consultation process in which troubling ambiguities in the treaty were clarified to the satisfaction of coalition members).

³⁵⁸ See, e.g., Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 65, 94 (Deiter Fleck ed., 1995).

³⁵⁹ Consider the example of the United States. According to Michael Matheson, then Legal Advisor to the U.S. Department of State, the United States views Articles 73–89 (concerning the treatment of persons in the power of a party to the conflict, women and children, and duties regarding implementation of Additional Protocol I) as either legally binding as customary international law or acceptable practice though not legally binding. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 420 (1987). This position is confirmed by U.S. military policy on the treatment of detainees and the due process rights recognized in the newly-minted military commissions. See U.S. ARMY, AR 190-8, *supra* note 322, at 19 – 26; DEP’T OF DEF. MILITARY COMM’N ORDER NO. 1 (Mar. 21, 2002) [hereinafter DOD ORDER], available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (last visited Apr. 24, 2004).

³⁶⁰ See, e.g., LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 586 (2d ed. 1999); Dormann, *supra* note 80, at 67; Greenwood, *supra* note 109, at 45; Abella, *supra* note 202, ¶ 162; Paust, *supra* note 21, at 5. As I made clear in the introduction, the argument presented here does not rely on assertions that any particular norm is customary international law. Hence, I am not suggesting that Article 75 now applies of its own force because it has assumed the status of customary international law. Rather, I claim only that the general (and increasing) acceptance of Article 75 as binding law suggests that the importance of its ratification deficit is diminishing.

³⁶¹ See *supra* Part IV.B.2 (outlining the progressive criminalization of violations of Common Article 3); see also *supra* Parts II.C.3, II.D.1 (arguing that fair trial protection in Common Article 3 must be interpreted in accord with Article 75).

³⁶² See CIVILIANS CONVENTION, *supra* note 1, arts. 146 – 49. For example, denial of a protected civilian’s fair trial rights is a “grave breach” of the Civilians Convention. *Id.* art. 146. As explained previously, Article 75 modifies the scope of derogable rights under Article 5 of the Civilians Convention; it establishes a floor for due process rights under the Civilians Convention. That is, denying a protected civilian (within the meaning of the Civilians Convention) the fair trial rights recognized in Article 75 would constitute a grave breach of the Civilians Convention.

³⁶³ ADDITIONAL PROTOCOL I, *supra* note 10, art. 75(6).

war crimes tribunals.³⁶⁴ The important point is that there is no meaningful gap between the fair trial rights accorded POWs under the Third Convention and those accorded all persons facing prosecution for war crimes.

Second, the provisions often failed to accord any protection in the very circumstances in which their protection was most needed. That is, the persons most in need of these protections--persons arguably not entitled to greater due process protections in Geneva law--are often prosecuted under the municipal law of the detaining authority, rather than the laws of war. Or, put differently, states could perhaps easily avoid the application of this regime by choosing to prosecute war criminals under domestic criminal law. This concern, despite its surface plausibility, is illusory on several levels. Consider that Article 75 of Additional Protocol I eliminates the problem by harmonizing the procedural rights regimes for all persons detained or punished in connection with an armed conflict at a level of protection that exceeds that of Articles 105–108 of the POW Convention. Of course, Common Article 3-- interpreted in light of Additional Protocol I, human rights law, and the fair trial regimes of international criminal tribunals--also establishes a comparable if not more robust rights regime. Furthermore, it applies to criminal prosecutions irrespective of the governing substantive law. Moreover, substantial evidence suggests that states are now more willing (and able) to initiate prosecutions under the laws of war. The proliferation of international criminal tribunals, by increasing the salience and symbolic force of humanitarian law, has triggered a cascade of national war crimes legislation.³⁶⁵ It is also important to note that state practice in the “war on terrorism” may signal greater willingness to invoke the laws of war when dealing with persons who may be fairly characterized as unlawful combatants.³⁶⁶

C. Toward a Bottom Line: Assessing the Unique Protective Significance of POW Status

Geneva law protects unlawful combatants, persons taking direct part in hostilities without satisfying the requirements for POW status, and these protections approximate those accorded POWs. In this Part, I have demonstrated that several developments in humanitarian law and policy have further narrowed the remaining protective inequalities. It is important, however, to address separately the unique protective consequences of POW status. Two potentially important protections merit extended consideration. These protections are derived from a curious feature of the POW Convention--that POWs must be “assimilated” into the armed forces of the detaining state.³⁶⁷ This generates a cluster of rights that is, as a formal matter, unique to the POW Convention. Many of these rules concern only the right of captured military personnel to treatment honoring their status as military personnel.³⁶⁸ These rules, as a consequence, have ambiguous protective consequences. For instance, the rule requiring that POWs be tried before military courts will have adverse protective consequences in most circumstances. Two specific applications of the “principle of assimilation” are nevertheless important in the context of the war on terrorism. First, the POW Convention prohibits trial of POWs by special military courts (such as military commissions).³⁶⁹ The Convention provides that POWs “can be validly sentenced

³⁶⁴ See *supra* Part II.D.1.

³⁶⁵ See ICRC, International Humanitarian Law, National Implementation Database, *supra* note 43 (providing excerpts of humanitarian national legislation from over 50 countries); Coalition for the Int'l Criminal Court, National Legislation Database (providing full text of national war crimes legislation from over 35 states), available at <http://www.iccnw.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates.html> (last visited Mar. 13, 2004).

³⁶⁶ See, e.g., Jinks, *supra* note 177, at 34 n.221; Fitzpatrick, *supra* note 22, at 353.

³⁶⁷ ICRC, COMMENTARY III, *supra* note 194, at 406–09 (discussing the “principle of assimilation”).

³⁶⁸ See, e.g., POW CONVENTION, *supra* note 1, art. 84 (requiring that POWs be tried by military--rather than civilian--courts).

³⁶⁹ See, e.g., Paust, *Courting Illegality*, *supra* note 21; Katyal & Tribe, *supra* note 21; Drumbl, *supra* note

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”³⁷⁰ Second, POWs enjoy a broad “combatant immunity” that precludes punishing them for their very participation in the hostilities.³⁷¹

1. Prohibition Against Ad Hoc “Military Commissions”

One potentially important consequence of POW status is that it precludes the use of specialized criminal proceedings. As discussed above, the POW Convention requires that POWs be tried by the same courts in which the armed forces of the detaining power would be tried.³⁷² Therefore, POWs held by the United States, for example, must be tried in U.S. courts-martial. This rule, for which there is no direct analog in the Civilians Convention, seemingly suggests that ad hoc military commissions are a viable prosecutorial option only if the detainees are not POWs.

Given the express prohibition on specialized procedures in the POW Convention, this claim is certainly correct on one level: POWs may not be tried by special military commission. It does not necessarily follow, however, that unlawful combatants (war detainees denied POW status) may be tried by special military commission. The idea here is simple: Even if unlawful combatants are not covered by the “principle of assimilation,” they may be entitled to procedural rights which would effectively preclude the use of ad hoc commissions.

As described in detail in Parts II and 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. That is, the rights of unlawful combatants would require procedural guarantees identical in all important respects 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.³⁷³ Moreover, this POW “right” to trial by regular military court is, in many instances, a disability. It is well understood that trial procedures utilized by military courts often fall short of international due process standards, and typically fall short of the rights recognized in the parallel civilian system.³⁷⁴ In other words, the “same procedures, same courts” right accorded POWs (derived from the principle of assimilation) has ambiguous protective consequences. Of course, the criminal procedural rights recognized in Geneva law establish a protective floor--no war detainee may be tried by procedures that fall short of the requirements outlined in the Conventions. The important point is that the procedures utilized in criminal proceedings must comport with the increasingly robust, increasingly precise body of international standards--irrespective of whether the tribunal is a “military court martial,” “military commission,” “national security court,” or “federal district court.”

The status of military commissions in U.S. law is, as a general matter, consistent with this analysis. That the U.S. Supreme Court has endorsed the use of military commissions to try unlawful combatants does not undermine the claims I advance here. In *Ex parte Quirin*, the Court held that Congress had authorized

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³⁷⁰ POW CONVENTION, *supra* note 1, art. 102.

³⁷¹ See *supra* text accompanying note 38 (explaining concept and collecting citations).

³⁷² See POW CONVENTION, *supra* note 1, art. 84.

³⁷³ See Common Art. 3, *supra* note 59; ADDITIONAL PROTOCOL I, *supra* note 10, art. 75.

³⁷⁴ See, e.g., U.N. Sub-Comm. on the Promotion and Protection of Human Rights, *Issue of the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/Sub.2/2002/4 (July 9, 2002) (prepared by Louis Joinet) (summarizing poor human rights record of military courts).

the President to try unlawful combatants by special military commission.³⁷⁵ Specifically, the *Quirin* Court concluded that “Congress [in what is now § 821 of Title 10] has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases,” and that “Congress [in what is now § 821] has authorized trial of offenses against the law of war before such commissions.” *Quirin* was, at bottom, a statutory interpretation case. Moreover, the statutory scheme at issue in *Quirin* strongly suggests that military commissions are authorized only insofar as they are consistent with the law of war. Section 821 provides:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.³⁷⁶

The issue in *Quirin* was whether the predecessor of this provision authorized the use of commissions. And, of course, the Court concluded that it does (a strained reading of the provision, to be sure). Nevertheless, the language of the provision makes clear that the use of military commissions, even under the *Quirin* court’s reasoning, is authorized only insofar as they are consistent with the law of war.

Two further points on the *Quirin* case are in order here: (1) the Court substantially relied on the then-prevailing “laws of war” in reaching its conclusion--this is a crucial point given that the case was decided seven years before the drafting of the Geneva Conventions--and (2) the “laws of war” did not, prior to the Geneva Conventions of 1949, afford any protection to “unlawful combatants”--a matter that was expressly taken up at the 1949 Diplomatic Conference.³⁷⁷ Even under the reasoning of the *Quirin* court, trial by military commissions must accord with the law of war, including, most importantly, the Geneva Conventions. Given the analysis offered at the beginning of this, “military commissions” are lawful only if the procedures utilized therein comport with the Geneva rules applicable to unlawful combatants. The upshot is that unlawful combatants may be tried by courts other than those in which members of the detaining state’s armed forces are tried, but these courts must be “regular courts” affording the minimum due process guarantees established in the Conventions.

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 one unique protective consequence of POW status is “combatant immunity.” Indeed, 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.

First, although POWs are entitled to engage in combat, they must comply with the laws of war.³⁷⁸ Accordingly, a POW may be prosecuted for pre-capture

³⁷⁵ *Ex parte Quirin*, 317 U.S. 1 (1942).

³⁷⁶ 10 U.S.C. § 821 (1994).

³⁷⁷ See *supra* Part II.A.1 (discussing drafting history of Article 5 of the Civilians Convention).

³⁷⁸ For example, McDougal has stated that:

[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 rules of warfare would be pointless . . . if every single act of war may by unilateral municipal fiat be made a common crime and

offenses only if his actions (1) rise to the level of a “war crime”³⁷⁹ or “crime against humanity”;³⁸⁰ or (2) are unrelated to the state of hostilities (i.e., are common crimes).³⁸¹ 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 crimes,³⁸² as are all attacks directed against the civilian population as such.³⁸³ In addition, violations of the rule of distinction are also war crimes,³⁸⁴ as are acts of perfidy.³⁸⁵ The point 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 civilians.

Second, POWs, even if immune from criminal prosecution, may be deprived of their liberty because of their participation in the hostilities.³⁸⁶ That is, *all* enemy combatants, even if POWs, may be detained without criminal charge for the duration of the hostilities.

Third, combatant status, in general, is also associated with an important disability: combatants, whether lawful or not, may be targeted, attacked, and killed by the enemy. That is, the laws of war expressly contemplate proportionate attacks aimed at overcoming the organized resistance of the opposition.

Up to this point, I have argued only that the policy and protective consequences of combatant immunity are minimal. Nevertheless, there is a non-trivial core of unlawful combatants for whom the rule has important protective consequences: unlawful combatants who have otherwise complied with the law of war. For these fighters, the combatant immunity issue is crucial because, if denied this protection, they may be prosecuted upon capture for their very participation in the hostilities (even if they otherwise scrupulously observed the rules of war). For this group, the denial of POW status means that they face the prospect of criminal prosecution and life imprisonment at the hands of the enemy (and perhaps the death penalty).

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.

MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 712 (1994) (citations omitted). *See also* DEP’T OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK OF NAVAL OPERATIONS 490 n.47 (Naval War College, Int’l L. Studies vol. 73, A.R. Thomas & James C. Duncan eds., 1999) (“The [POW Convention]’s underlying philosophy is that POWs should not be punished merely for having engaged in armed conflict”); *Id.* at 492 (“Prisoners of war may not be punished for hostile acts directed against opposing forces prior to capture, unless those acts constituted violations of the law of armed conflict.”)

³⁷⁹ Even if convicted for pre-capture offenses, enemy combatants retain the benefits of the POW regime of POW Convention 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.” POW CONVENTION, *supra* note 1, art. 85.

³⁸⁰ *See* ICRC, COMMENTARY III, *supra* note 194 (Commentary to Article 85 identifies “crimes against humanity” as crimes that pierce combatant immunity).

³⁸¹ *See generally* ICRC, COMMENTARY III, *supra* note 194, at 413 – 23 (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). The immunity does not, therefore, shield from prosecution enemy combatants charged with pre-capture terrorist offenses not related to the conflict.

³⁸² *See, e.g.,* Hans-Peter Gasser, *Acts of Terror, “Terrorism,” and International Humanitarian Law*, 84 INT’L REV. RED CROSS 547 (2002) (cataloging various war crimes provisions implicated by acts of terrorism). Consider that such acts typically violate several provisions of Geneva law including: (1) the prohibition of attacks on civilians and civilian objects, ADDITIONAL PROTOCOL I, *supra* note 10, arts. 51, 52; (2) the prohibition on indiscriminate attacks, *Id.* art. 51; (3) the murder of persons no longer taking active part in hostilities, Common Art. 3, *supra* note 59; ADDITIONAL PROTOCOL I, *supra* note 10, art. 75; and (4) the murder of persons “protected” by the Conventions. *See, e.g.,* CIVILIANS CONVENTION, *supra* note 1, art. 146 (“grave breach” provision of Civilians Convention). Moreover, acts of terrorism are now expressly identified as “war crimes” in Additional Protocol I and the Statute of the International Criminal Tribunal for Rwanda. *See* ADDITIONAL PROTOCOL I, *supra* note 10, art. 51(2) (“Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”); ICTR Statute, *supra* note 348, art. 4(d) (criminalizing “acts of terrorism”).

³⁸³ *See* ADDITIONAL PROTOCOL I, *supra* note 10, arts. 51(2), 52(1).

³⁸⁴ *See, e.g.,* ADDITIONAL PROTOCOL I, *supra* note 10, art. 45(1) (requiring combatants to distinguish themselves from the civilian population).

³⁸⁵ *See, e.g.,* ADDITIONAL PROTOCOL I, *supra* note 10, arts. 37–39.

³⁸⁶ POW CONVENTION, *supra* note 1, arts. 21 – 22.

Fourth, there are, however, 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.³⁸⁷ If all captured combatants failing to satisfy the requirements for POW status are subject to prosecution for any warlike acts, the law provides irregular fighters with no incentive to comply with its dictates. 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 many of the POW status requirements are collective, reflecting governmental or high command policies.³⁸⁸ In addition, it is inapposite to characterize as “criminal” the otherwise lawful warlike acts of civilians who take up arms to defend their country against an enemy to whom they owe no allegiance (as a formal or sociological matter).

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 it is necessary to deter such persons from taking up arms. 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 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.

To summarize: If combatants commit acts that constitute war crimes, they should be prosecuted (and they could be prosecuted regardless of whether they enjoy combatant immunity). Conversely, if combatants do not engage in such acts, they should not be punished for their very participation in the conduct of war. This protective logic helps explain why states sometimes choose to accord combatant immunity even in civil wars, as the United States did in the Civil War,³⁸⁹ and why some inter-governmental forces now assign all captured

³⁸⁷ See *infra* Part V.

³⁸⁸ See POW CONVENTION, *supra* note 1, art. 4. I discuss a few examples in some detail in Part V. See *infra* Part V.

³⁸⁹ See JUDGE ADVOCATE GENERAL, U.S. ARMY, *Prisoners of War and Detainees*, in LAW OF WAR WORKSHOP DESKBOOK 69, 70–71 (2000).

combatants POW status.

D. Illustration: POW Status and the “War on Terror”

Returning to the current controversy surrounding the international legal status of detainees in the “war on terror,” two points follow from the analysis offered here. First, the terms of debate in the current controversy are wrongly specified, which has obscured exactly what is at stake from a policy perspective. The conferral of POW status would not alter significantly the international legal duties owed the war detainees. Second, no pressing policy matters turn on the choice between the potentially applicable protective schemes. Consider the policy arguments advanced by the United States in the POW controversy. The United States suggests that POW status would impede the ongoing law enforcement investigation into the activities of Al Qaeda and other terrorist groups. However, the protection against coercive interrogation provided by the POW Convention is identical in all important respects to the protection accorded civilians under the Civilians Convention. Moreover, Common Article 3 and Additional Protocol I prohibit torture and other cruel treatment in all circumstances. The United States also argues that anti-terror efforts would be compromised by the obligation to release and repatriate POWs upon the cessation of active hostilities. However, civilians are entitled to the same protection under the Civilians Convention. The due process protections accorded by Common Article 3 and Additional Protocol I, coupled with widely-recognized international human rights obligations, would also preclude detention without charge or trial of “war detainees” beyond the end of the conflict. The United States also maintains that POW status precludes the use of specialized criminal proceedings, such as the contemplated military commissions, but for reasons canvassed above, this claim has no merit. Finally, the United States might resist assigning POW status to the detainees on the grounds that these fighters should not enjoy combatant immunity for acts of international terrorism. But, as I argued in the previous Part, POWs are not entitled to combatant immunity with respect to terrorist acts (or any other acts that violate the laws of war). Moreover, there are sound policy rationales for prosecuting only those captured combatants who have committed acts that violate the law of war.

V. CONCLUSION: TOWARD PROTECTIVE PARITY

The Geneva Conventions protect unlawful combatants, and this protection very closely approximates that accorded POWs. As demonstrated in Part IV, several recent developments in law and policy suggest the emergence of “protective parity” across combatant status categories. 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. Such an incentive structure would erode (if not eviscerate) the “principle of distinction” which, in turn, would undermine the broader humanitarian ambitions of the law of war. This “humanitarian” critique of protective parity assumes that protection is best understood as a carrot (and denial of protection, a stick) to induce law-abiding conduct in time of war.

Although a comprehensive normative defense of protective parity is beyond the scope of this Article, I want to highlight three points. First, this “denial of protection” approach is inconsistent with the structure of Geneva law. 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 Additional Protocol I requires states to accord certain due process rights to all persons accused of violating the Conventions.³⁹⁰ In addition, the POW Convention makes clear that POWs retain their protective status even if convicted of the most serious war crimes.³⁹¹

Second, protective schemes are conceptually distinct from enforcement schemes. Hence, protective parity can be paired with an effective enforcement strategy. Geneva law, as described above, provides for the criminal prosecution of persons committing war crimes. In this way, Geneva law provides actors with an incentive to comply with its substantive commitments, including the “principle of distinction.” Geneva law, in this sense, exhibits 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). 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.

Third, protective parity (coupled with a “war crimes approach” to enforcement) best promotes observance of the law of war, including the “principle of distinction.”

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). As discussed in Part IV, there are two structural problems with the first approach: (1) it creates perverse incentives for combatants; and (2) it targets for incentivization actors most resistant to the regime’s influence.³⁹² In addition, the “denial of protection” approach might lengthen and intensify conflicts by providing a disincentive to surrender. 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.³⁹³ Indeed, many scholars suggest that the institutional design of the POW Convention is best explained in these terms--that is, protecting the enemy serves the interests of the detaining authority.³⁹⁴ The important point here is that the same logic applies to the conduct of *all* combatants, regardless of whether they satisfy the requirements of POW status.

The second approach (protective parity coupled with the war crimes approach to enforcement), on the other hand, yields substantial benefits in that: (1) it provides unlawful combatants with some incentive to comply with the law

³⁹⁰ See *supra* Parts II.C, II.D. Compare these robust procedural rights with the minimal procedural protections accorded in status determination proceedings. See, e.g., POW CONVENTION, *supra* note 1, 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 Naqvi, *supra* note 25.

³⁹¹ POW CONVENTION, *supra* note 1, 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 the provision encompasses prosecution for “international” crimes. It is also important to note that the Civilians Convention does not have a direct analog to Article 85. However, this provision was considered necessary in the POW 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 catalog of protective consequences issuing from conduct. See CIVILIANS CONVENTION, *supra* note 1, arts. 4, 5; see also *supra* Part II.A.

³⁹² See *supra* Part IV.C.2 (discussing competing incentive structures in the context of combatant immunity).

³⁹³ See, e.g., U.S. ARMY, *History of the Law of War*, in LAW OF WAR WORKSHOP DESKBOOK, *supra* note 389, at 3, 12; WILLIAM E.S. FLORY, PRISONERS OF WAR: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW 39–70 (American Council on Public Affairs 1942) (documenting history).

³⁹⁴ See, e.g., U.S. ARMY, *Prisoners of War and Detainees*, *supra* note 389, at 79 – 80; Eric Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297 (2003); James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 INT’L ORG. 971 (2001).

of war (even after they have decided to participate in the hostilities); and (2) it is more narrowly tailored to punish only bad actors--persons who, with a culpable mental state, have committed acts causing or risking grave consequences for protected persons.

What difference does POW status make? Contrary to conventional wisdom (and the prevailing policy debates in the current "war on terrorism"), I maintain that POW status carries *no significant, unique protective consequences*. As a descriptive matter, the unique protective significance of POW status is minimal and in sharp decline. The text, structure, and history of the 1949 Geneva Conventions and the 1977 Additional Protocols thereto strongly support this conclusion. As a normative matter, the move toward "protective parity" maximizes, within the bounds of military necessity, the humanitarian protection accorded combatants without exacerbating the dangers faced by non-combatant civilians.

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