

**PROTOCOL ADDITIONAL TO THE GENEVA
CONVENTIONS OF 12 AUGUST 1949, AND RELATING
TO THE TREATMENT OF TERRORIST COMBATANTS
(PROTOCOL IV)—A PROPOSAL**

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TABLE OF CONTENTS

I. INTRODUCTION	346
II. THE LAW OF ARMED CONFLICT AND THE GENEVA CONVENTIONS	349
<i>A. The Geneva Conventions of 1949 and their Precursors</i>	350
<i>B. The Additional Protocols</i>	360
III. TERRORISM AND THE LAW OF ARMED CONFLICT	366
<i>A. The Problem of Military Engagement with Terrorists</i>	366
<i>B. Legal Confusion</i>	371
IV. A NEW LAW OF WAR FOR A NEW AGE	375
<i>A. Wisdom and Consensus</i>	377
<i>B. Confrontation</i>	377
<i>C. Legitimacy</i>	379
<i>D. Humanity and Uniformity</i>	380
<i>E. Integrity</i>	381
V. ISSUES FOR DISCUSSION	381
<i>A. When and Who?</i>	382
<i>B. Detention of Combatants</i>	387

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<i>C. Treatment of Combatants, and Relevance of the Geneva Conventions' Existing Body of Law on POWs</i>	389
<i>D. Reiteration of the Vitality of Existing International Law</i> ...	390
<i>E. Different Treatment for Different Combatants</i>	390
<i>F. Special Treatment Relating to the Unique Situation of Terrorists</i>	391
<i>G. Other Possible Issues for Discussion</i>	392
VI. CONCLUSION	395

I. INTRODUCTION

Military historians distinguish those advancements in the means and methods of warfare that are a “revolution” and those which are an “evolution” in military affairs. Both dramatically change the way wars are fought in the new era, but a revolution takes a fundamentally different course from what existed before, whereas an evolution is a progression, a great step forward from how things were done before.¹

The conduct of the “war on terrorism” requires neither a revolution nor an evolution in military affairs. Claims have been made that fighting a war on terrorism means throwing away everything we once knew about fighting a war.² Scholars of the law of armed conflict have expressed alarm about these claims, stating that such claims may suggest unawareness of history.³ It is certainly true that terrorist tactics are as old as war itself, and the problems created by engagement with groups that do not observe humanitarian considerations have existed for centuries immemorial.⁴

And yet, in the dawning twenty-first century there is something new under the sun in the law of armed conflict, and a new solution is needed in fighting global terrorism. The twentieth century was marked

1. See Phillip L. Ritcheson, *The Future of “Military Affairs”: Revolution or Evolution?*, 24 STRATEGIC REV. 31, 31 (1996).

2. See, e.g., GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 81 (2010) (discussing the comments and claims of former U.S. Attorney General Alberto Gonzalez that fighting terrorism may involve setting aside provisions of the Geneva Conventions).

3. *Id.* at 81-83.

4. See, e.g., *THE HISTORY OF TERRORISM: FROM ANTIQUITY TO AL QAEDA*, at vii-viii (Gérard Chaliand & Arnaud Blin eds., Edward Schneider, Kathryn Pulver, & Jesse Browner trans., 2007).

by the greatest expansion of humanitarian protections in wartime in all of human history, including the Geneva Conventions of 1949 and their 1977 Protocols.⁵ The widespread recognition of combatant and civilian rights to fair treatment in wartime is an advancement of morality that is concomitant with the deadly advances in technology, and it reflects a great achievement of the international community. There are, however, always new challenges in both the application of technology and morality when it comes to war. One of the greatest challenges to emerge is the application of a decades-old body of humanitarian law to the global scope of the war on terror. It is a moral challenge because the international community must ask how to humanely treat those who act inhumanely in turn. Further, it challenges the old legal regime on war because the existing body of the law of armed conflict must adapt to the way wars are now being fought. In the spirit of the twentieth century expanding concern for humanitarianism, I propose a twenty-first century solution.

It is an oft-repeated observation in post-9/11 America that the terrorists have the advantage because, while the United States observes the law of war and restrains itself from taking certain military actions in order to protect civilians and combatant human rights, the terrorists do not. Indeed, the entire model for terrorism is one that is based on flouting the most basic humanitarian protections of the law of war: targeting civilians, executing prisoners of conflict, hostage-taking, exacerbating rather than minimizing casualties, and concealing membership in the terrorist organization rather than wearing a uniform or other distinctive sign.⁶ Terrorist combatants do not likely believe they could effectively spread their political message or use their small forces to such an advantage without using these unconventional methods.

The next step after making this observation is to ask why Americans, or the people of any other civilized nation, should observe the law of war if their opponents do not. If terrorists have no qualms about killing American civilians then does it make sense to worry about the conditions of terrorist confinement and interrogations that do not live up to outdated or ill-adapted international standards made to fit the wars of the past? Does unilateral observance of the law of

5. See discussion *infra* Part II.

6. BRUCE HOFFMAN, *INSIDE TERRORISM* 229-57 (rev. and expanded ed. 2006).

war equate to the United States tying one arm behind its back in a struggle against an enemy that will not restrict its means of warfare in any way? Isn't the obligation of the U.S. leaders and its military to protect American citizens great enough to set aside some of the more archaic and clearly inapplicable Geneva rules?

The answer to any question about the propriety of setting aside the totality of the law of armed conflict must be "no." Many of us are proud Americans who are grateful to live in a country that is incorporated under the rule of law. If that is so, then we must believe in the strength and flexibility of the legal system and of legal solutions. The solution for changing a legal regime that can no longer offer the correct solutions for a law of war problem is not to set aside the entirety of the law of war, but to modernize it.

The law of armed conflict must be updated to reflect the world's conundrum over how to deal with terrorist combatants. It is a moral good in and of itself to act within the scope of our own laws, rather than to engage a lawless enemy with lawlessness. To be a society of justice under the rule of law is a great end and objective of the United States and, I imagine, all modern democracies. In fact, retired Air Force Major General Charles J. Dunlap, Jr.'s response to this observation of the terrorist's advantage is, "interesting, but irrelevant."⁷ He recounts that the Germans, signatories to the Geneva Conventions, disregarded the law of war during World War II when they engaged the Russian Army on the Eastern Front.⁸ The result was a loss in military discipline that led to the Germans executing thousands of their own men.⁹ Such a story is an insight into the "culture of lawlessness" that can be created when there are no clear rules of engagement. So too is the cautionary tale of the human rights abuses at Abu Ghraib.¹⁰ The United States does practice rules of engagement that prescribe humane methods of combat; however, it

7. Retired Major Gen. Charles J. Dunlap, Jr., Address at the American Bar Association Standing Committee on Law and National Security: Legal Issues Related to Targeted Killings (Apr. 22, 2010).

8. *Id.*; see generally OMER BARTOV, HITLER'S ARMY: SOLDIERS, NAZIS, AND WAR IN THE THIRD REICH (1991) (arguing four distinct theses to provide insight into the Nazification of Germany's soldiers).

9. BARTOV, *supra* note 8, at 180-86; Dunlap, *supra* note 7.

10. Dunlap, *supra* note 7 (expressing the speaker's opinion that the greatest tactical setback in the war on terror was the abuses committed at Abu Ghraib).

has been more difficult for the United States to determine the appropriate legal requirements for terrorist combatant detention and treatment. American soldiers strive to follow the law, but neither the community of states nor academics can agree or easily determine what the law is.

If we agree with two ideas—first, that the current law of war framework does not fully provide a set of humanitarian laws for engagement with unlawful or terrorist combatants; second, that proceeding under a comprehensive legal framework will promote our most fundamental legal ideals and provide proper guidance, rather than categorical murkiness, to our military—then the question is how to proceed.

I argue in this Article that the international community should again take up the question of the state of the law of war, as it did in response to the era of global wars and again to the era of insurgency and decolonization. If this is the age of terrorism in that terrorism is one of the most prevalent forms of international violence then the law must reflect the realities of the age.¹¹ I argue that rather than each state addressing these questions piecemeal in their own territories, the states of the world should convene and discuss the questions that the international community has failed to satisfactorily answer, including the best way to engage and humanely treat terrorists, suspected terrorists, and civilians who support them.

II. THE LAW OF ARMED CONFLICT AND THE GENEVA CONVENTIONS

There are many, significantly better historical accounts than the brief one that I am about to give,¹² but I do wish to briefly trace the

11. The “age of terrorism,” if that is how this time shall be known in military history, represents one advancement in military-political affairs: the relative peacefulness and cooperation of the interstate system and the decreased number of individuals who are in danger of losing their lives or being affected by war. Terrorism is brutal and frightening; yet, the fact that terrorism is the greatest security threat of this age is a great achievement of the interstate system. Moreover, if this is the “age of terrorism” in military affairs then maybe we should be grateful that it is not the age of terrorism in overall society. In other words, our cultural, technological, and social lives are not so impacted by terrorism that it characterizes the whole of this time in history.

12. See generally STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* (2005) (providing a history of war from the beginning of history

350 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

development of the twentieth century codes on the law of armed conflict. This will demonstrate how the current body of law is impacted by the complexities of the twenty-first century.

A. The Geneva Conventions of 1949 and their Precursors

Customary international law arguably had a role in minimizing civilian casualties long before there were any attempts at comprehensive codification.¹³ Historical codifications themselves are quite old. The first treaty regarding treatment of prisoners of war (“POWs”) may have been between Egypt and its neighbors in 1269 B.C.E.¹⁴ The first recorded war crimes trial was purported to have occurred in 1474, in Germany, where a military commander was executed by a rival coalition for brutalizing the civilian population in an occupied territory.¹⁵

In more modern times, beginning in the 1860s, there was great recognition for the effects of war—particularly of new, more destructive technologies—on combatants and civilians.¹⁶ This led to the creation of: the Lieber Code, a law of war manual guiding the conduct of the Union Army in the American Civil War; the Oxford Manual, a codification by the Institute of International Law meant to provide guidance on the law of war; and, the St. Petersburg Declaration of 1868, a sentiment of the international community that the methods of warfare should be limited to prevent suffering.¹⁷ The

to the present day); 1-2 THE LAW OF WAR: A DOCUMENTARY HISTORY (Leon Friedman ed., 1972) (detailing the origin, development, and enforcement of the laws of war).

13. THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, at v (Dietrich Schindler & Jiri Toman eds., 2004).

14. JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 7-8 (1985).

15. Edoardo Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, 835 INT’L REV. RED CROSS 531, 532-33 (1999).

16. THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra* note 13, at v-vi.

17. *Id.*

first attempt at comprehensive international codification was in Geneva in 1864.¹⁸

But the greatest and most comprehensive code for international humanitarian law up until that point was the adoption of the Hague Regulations in 1899¹⁹ and 1907.²⁰ Up until the nineteenth century, technology generally limited wars to those within the reach of a sword; wars were geographically limited to the area of a battlefield, short in time, low in casualties, and a contest between political rulers that did not involve or necessarily interest the civilian population.²¹ Prior to World War I, modern technologies of war were emerging and caused great suffering to wounded combatants, as well as greater

18. *Id.* at vi.

19. Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779; Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864, July 29, 1899, 32 Stat. 1827; *see also* THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 12, at vol. I, 204-50 (providing the text of the 1899 regulations).

20. Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199; Convention Respecting the Limitation of Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241; Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310; Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907, 205 Consol. T.S. 305; Convention Relating to the Conversion of Merchant Ships into War Ships, Oct. 18, 1907, 205 Consol. T.S. 319; Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332; Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351; Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371; Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396; Convention Relative to the Creation of an International Prize Court, Oct. 18, 1907, 205 Consol. T.S. 381; Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 205 Consol. T.S. 395; *see also* THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 12, at vol. I, 270-396 (providing the text of the 1907 regulations).

21. EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 7 (2010); *see also* SOLIS, *supra* note 2, at 46.

civilian damage.²² The Hague Regulations provide basic rules for the conduct of land warfare and the protection of civilians.²³

The international community later revisited the law of war after World War I with the adoption of the Geneva Conventions of 1929.²⁴ Though technologies increased the destructiveness of war throughout the nineteenth and twentieth centuries, it was the end of the Industrial Revolution that proved capable of supporting a massive, highly technological war that utilized previously unimaginable weapons, including machine guns, biological weapons, aircraft, and submarines.²⁵ Nearly ten million people perished in World War I.²⁶ The brutality with which both sides treated POWs spurred revision of the law of war with the Geneva Conventions of 1929.²⁷ Protections for sick and wounded combatants were also greatly expanded from a 1906 treaty.²⁸

However, it is the Geneva Conventions of 1949 that are the most comprehensive and normatively powerful regulations for the conduct of armed conflict. They were drafted as a reaction to the extremely destructive scale of World War II—over fifty-five million people died, the majority of which were civilians.²⁹ World War II involved the unfathomable destruction of millions of civilians in German concentration camps,³⁰ and the first use of atomic weapons that caused untoward collateral damage to achieve the military objective.³¹ Thus,

22. See CRAWFORD, *supra* note 21, at 7; SOLIS, *supra* note 2, at 46.

23. See sources cited *supra* notes 19-20.

24. Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

25. SOLIS, *supra* note 2, at 51, 74.

26. *Id.* at 74.

27. *Id.* at 78.

28. *Id.*

29. *Id.* at 80.

30. DORIS L. BERGEN, WAR AND GENOCIDE: A CONCISE HISTORY OF THE HOLOCAUST 232 (2d ed. 2009).

31. See generally THE MANHATTAN ENGINEER DISTRICT, THE ATOMIC BOMBINGS OF HIROSHIMA & NAGASAKI (2004).

the movements to create permanent bodies of human rights law and international criminal law were born from World War II.³²

The law of war was somberly reevaluated after World War II. Drawing on and revising the Hague Regulations and previous Geneva Conventions, the conventions of 1949 created a unified code for the law of armed conflict.³³ The First Geneva Convention, *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (“GCI”),³⁴ updated the 1864, 1906, and 1929 versions of this Convention.³⁵ The Second Geneva Convention, *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (“GCII”),³⁶ replaced portions of the 1907 Hague Regulations.³⁷ These first two Geneva Conventions closely followed and developed their predecessors. The Third Geneva Convention, *Convention Relative to the Treatment of Prisoners of War* (“GCIII”),³⁸ replaced the *Prisoners of War Convention of 1929*,³⁹ and greatly expanded and detailed the protections of POWs.⁴⁰ The Fourth Geneva Convention, *Convention Relative to the Protection of Civilian Persons in Time of War* (“GCIV”),⁴¹ broke new ground by setting comprehensive protections

32. THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 6 (2006).

33. The Geneva Conventions of 1949 do not cover every issue of engagement that the Hague Regulations do: they do not address permissible weapons, command responsibility, the principle of distinction, and military necessity. SOLIS, *supra* note 2, at 82-83.

34. Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I].

35. *The Geneva Conventions of 1949 and their Additional Protocols*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> [hereinafter *The Geneva Conventions of 1949*].

36. Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II].

37. *The Geneva Conventions of 1949*, *supra* note 35.

38. Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

39. *Convention Relative to the Treatment of Prisoners of War*, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

40. *The Geneva Conventions of 1949*, *supra* note 35.

41. Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter “Geneva Convention IV”].

for civilians that had been relatively sparse in the past.⁴² World War II made clear the disastrous effects of failing to regulate civilian protective measures. In particular, GCIV aimed to protect civilians in occupied territories. The Geneva Conventions of 1949 have been ratified by every country in the world, and many provisions are regarded as customary international law.⁴³

Common Article 2 is replicated verbatim in all four Geneva Conventions, and it specifies that the Geneva Conventions only apply to interstate wars.⁴⁴ The only exception is found in Common Article 3, which applies in cases of conflict “not of an international character.”⁴⁵ At the time of drafting, most states believed Common Article 3 covered only cases of civil war (the two main forms of armed conflict at the time being interstate and civil war),⁴⁶ although the commentaries to the Conventions specify that Common Article 3 is meant to apply “as widely as possible.”⁴⁷ Subsequently, Common Article 3 is now interpreted to apply to either any conflict that is not interstate, and therefore not covered by the other Geneva Conventions,⁴⁸ or it is deemed a minimum baseline for all armed conflicts, regardless of whether they are international or not.⁴⁹ Common Article 3 ensures adequate medical care and mandates humane treatment for all persons not directly taking part in hostilities, including combatants who are sick, injured, or captured.⁵⁰ It also

42. *The Geneva Conventions of 1949, supra* note 35.

43. SOLIS, *supra* note 2, at 82.

44. *See* Geneva Convention I, *supra* note 34, at art. 2; Geneva Convention II, *supra* note 36, at art. 2; Geneva Convention III, *supra* note 38, at art. 2; Geneva Convention IV, *supra* note 41, at art. 2.

45. *See, e.g.*, Geneva Convention I, *supra* note 34, at art. 3.

46. ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 49 (2010).

47. INT’L COMM. OF THE RED CROSS, *COMMENTARY I: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED AND SICK IN ARMED FORCES IN THE FIELD* 50 (Jean Pictet ed., 1952).

48. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006). A debate exists over whether the term “international” should be interpreted as referring to interstate or to the geographic scope of the conflict. *See* note 155 and accompanying text.

49. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 143 (Int’l Crim. Trib. For the Former Yugoslavia Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

50. Geneva Convention I, *supra* note 34, at art. 3.

prohibits certain acts at all times: arbitrary deprivation of life, cruel treatment, torture, hostage-taking, and “the passing of sentences and 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.”⁵¹ However, Common Article 3 has been criticized for its scarce protections,⁵² as well as for its extremely infrequent use by states, which seem to prefer to apply domestic laws even when an armed conflict is relatively widespread.⁵³

The whole of the Geneva Conventions are intended to cover interstate wars, so only Common Article 3 can be said to give any protections to combatants in any other kind of conflict. GCIII provides protections to combatants, but these protections are only available to certain defined groups listed in Article 4, which provides that POW protection will only be given to:

- (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, fulfill the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;

51. *Id.*

52. See U.N. Secretary-General, *Minimum Humanitarian Standards: Report of the Secretary-General*, ¶ 74, U.N. Doc. E/CN.4/1998/87 (Jan. 5, 1998) (observing that Common Article 3 is unclear in its application and does not address the means and methods of non-international warfare).

53. See, e.g., LINDSAY MOIR, *THE LAW OF ARMED CONFLICT* 67 (2002) (noting contemporary observations that Common Article 3 has been scarcely applied); HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 47, 152-62 (1988) (discussing the unwillingness of the European countries to apply Common Article 3 in their colonies, and in cases of secession); see also U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 384 (2004) (“[S]tates have been, and always will be, reluctant to admit that a state of armed conflict exists.”).

(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.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.⁵⁴

While the Geneva regime itself does not make distinctions between lawful and unlawful combatants,⁵⁵ it is clear under Article 4 that terrorists, or any insurgent group not observing the law of war, will be refused POW status or treatment by the Geneva Conventions under any article other than Common Article 3. However, Common Article 3 is prone to restrictive readings because it only enumerates a few select protections, and it fails to explain these protections.⁵⁶ It also fails to provide a full regulation on the treatment of those detainees who are not classified as POWs.⁵⁷

54. Geneva Convention III, *supra* note 38, at art. 4(A).

55. See JENNIFER ELSEA, TREATMENT OF "BATTLEFIELD" DETAINEES IN THE WAR ON TERRORISM 13 (2003).

56. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1325 (Yves Sandoz, Christine Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

57. See Geneva Convention III, *supra* note 38, at art. 3.

GCIH built on previous conventions for the protection of combatants, and it had the benefit of being informed by two massive world wars, so it offers a comprehensive regime for the regulation of POWs. In today's interstate model, the rights to POW treatment belong to the state for which the combatants fight. The combatants have no ability under GCIH to renounce their rights, and it is their state of nationality that espouses their rights to POW treatment.⁵⁸ Prisoners may directly complain about conditions of treatment to their captors or to their representatives from their state of nationality.⁵⁹

POWs must be given humane treatment; they cannot be exposed to medical experimentation, reprimanded for the bad conduct of their nation, humiliated, or exhibited to satisfy public curiosity.⁶⁰ POWs are entitled to medical treatment, to hold onto all personal possessions except for weapons or other military paraphernalia, to be evacuated from any area where they are endangered by combat, and to be kept in a humane and hygienic detention facility.⁶¹ POWs do not have to answer any questions in interrogation except to provide their name, rank, date of birth, and serial number.⁶² "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever."⁶³ POWs are guaranteed access to food and water, adequate clothing, and living conditions at least as good as those of the state's military.⁶⁴ They are also to enjoy "complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities."⁶⁵

GCIH preserves, as much as possible, the POWs military structures that were in place prior to capture. Military doctors and chaplains are entitled to continue to exercise their functions to benefit

58. *Id.* at arts. 7, 8.

59. *Id.* at art. 78.

60. *Id.* at art. 13.

61. *Id.* at arts. 15, 18-19, 22.

62. *Id.* at art. 17.

63. *Id.*

64. *Id.* at arts. 25-27.

65. *Id.* at art. 34.

their POW forces.⁶⁶ Senior military leaders are also held responsible for regulating their subordinates, although POWs must salute their captors as if superiors.⁶⁷ POWs are allowed to make and prepare their own food.⁶⁸ They may be compelled to work in a safe environment and occupation, but they are to receive pay or any other money sent to them, which they can spend at a canteen.⁶⁹ A POW must be permitted to write to his or her family, and to send and receive mail, including packages with extra food, clothes, books, musical instruments, etc.⁷⁰ “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”⁷¹ These are only some of the regulations of GCIII, which has 143 articles and five annexes.⁷²

Since the first adoption of the Hague Regulations in 1899, the law of war has been updated three times to reflect changes in technology and combat—first after eight years, then after twenty-two years, then again after another twenty years. Yet, the current Geneva Conventions have stood unchanged for the last sixty years, supplemented only by the Additional Protocols in 1977,⁷³ a number of smaller piecemeal treaties (such as the Conventional Weapons Conventions⁷⁴), and the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*.⁷⁵

66. *Id.* at art. 33.

67. *Id.* at arts. 39, 44-45, 49.

68. *Id.* at art. 26.

69. *Id.* at arts. 28, 49-56, 58-68.

70. *Id.* at arts. 70-72.

71. *Id.* at art. 118.

72. See Geneva Convention III, *supra* note 38.

73. See discussion *infra* Part II.B.

74. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; Protocol on Non-Detectable Fragments (Protocol I), Oct. 10, 1980, 1342 U.N.T.S. 168; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), *as amended* May 3, 1996, 2048 U.N.T.S. 133; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, 1342 U.N.T.S. 171; Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, 2042 U.N.T.S. 171; Protocol on Explosive Remnants of War (Protocol V), Nov. 28, 2003, 45 I.L.M. 1348.

75. May 14, 1954, 249 U.N.T.S. 240.

The law of armed conflict is reactive, and it is often about preventing the reemergence of the abuses seen in the last atrocity. There has not been a massive, violent confrontation of all the world's powers since World War II. That is not to say the world has been at peace: the nuclear stockpiling and proxy warfare of the Cold War raised new and unique questions about law and security, but perhaps did not generate much need for a new code for war. Instead the twentieth century was plagued by deadly, incessant, internal conflicts: wars of national liberation, insurgencies, and civil wars.⁷⁶ The need to revise and update the law of war to meet these forms of conflict, combined with increasing concerns for humanitarian issues and human rights, led to the adoption of Additional Protocols I, II, and III.⁷⁷

One reason the Geneva Conventions may not have been substantially revised is because of their enduring ability to address most of the concerns of international armed conflict. Perhaps there is a more practical reason: there has not been a cataclysmic world war in the past sixty years to bring the international community together with the same gravitas and aim to achieve perpetual peace and renovate humanitarian protections. Yet, there is no denying that war, and war technologies, have changed since the close of World War II.

The Additional Protocols to the Geneva Conventions were drafted and ratified in response to these changes. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* ("API")⁷⁸ increased humanitarian protections for possible victims of interstate violence, like those of World War II,⁷⁹ although API is also relevant for wars of national liberation.⁸⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* ("APII")⁸¹ responded to the shift to low-level conflicts and wars of

76. See generally KLAUS JÜRGEN GANTZEL & TORSTEN SCHWINGHAMMER, *WARFARE SINCE THE SECOND WORLD WAR* (Jonathan P.G. Bach trans., 2000).

77. See discussion *infra* Part II.B.

78. June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

79. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, at 31.

80. Additional Protocol I, *supra* note 78, at art. 1(4).

81. June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

360 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

national liberations that were common to the Cold War and the era of decolonization.⁸² API was signed by 165 states, and APII was signed by 170 states.⁸³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)* (“APIII”)⁸⁴ was written in 2005 and is extremely compact.⁸⁵ It provides a new and secular “red crystal” symbol to replace the previous red cross symbol for the International Committee of the Red Cross (“ICRC”), and other affiliated national relief forces, hoping to forestall the use of an infinite number of religious symbols.⁸⁶

B. *The Additional Protocols*

To say that the law of war has not been revamped in the last sixty-odd years would be misleading considering the ratification of the Additional Protocols of June 8, 1977, which expanded humanitarian protections to the types of armed conflicts that were more common in the later part of the twentieth century. However, these accords still leave many problems attendant to conflict with terrorist combatants unaddressed.

API and APII were negotiated at the same time to expand the protections of the Geneva Conventions in cases of international and non-international conflict.⁸⁷ In essence, API provides greater protections than the Geneva Conventions in cases of interstate and other international wars, and APII expands the protections of Common Article 3 in situations of non-international conflict. These Protocols crystallize a distinction between international and non-

82. *See id.* at art. 1.

83. *State Parties to the Following International Humanitarian Law and Other Related Treaties*, INT’L COMM. OF THE RED CROSS (Jan. 27, 2011), [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

84. Dec. 8, 2005, S. TREATY DOC. NO. 109-10 [hereinafter *Additional Protocol III*].

85. *See id.*

86. SOLIS, *supra* note 2, at 136-37; *see also* *Additional Protocol III*, *supra* note 84, at arts. 1-5.

87. *See* *Additional Protocol I*, *supra* note 78, at pmb1.; *Additional Protocol II*, *supra* note 81, at pmb1.

international conflict that many believe should not have become so prominent.⁸⁸ The Protocols also modify the concepts of what the Geneva Conventions deem international. However, because API and APII both purport not to modify the scope of Common Article 2 and Common Article 3,⁸⁹ there could be disagreement as to whether and how the Geneva Conventions' distinction between international and non-international was modified.

API expands civilian and combatant protections in international armed conflict.⁹⁰ API advances protections for medical facilities, cultural objects, places of worship, and resources relied on by the civilian population.⁹¹ API forbids area bombing, and it instills strong command responsibility to superiors for the acts of their service members.⁹²

API also extends the category of "international" conflict beyond interstate war to "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"⁹³ However, this definition fails to apply to all forms of insurgencies. The wars that are now deemed an "international" conflict may have been considered internal before 1977, and covered only by Common Article 3.⁹⁴ Non-signatories to API will most likely still view these conflicts as only covered by Common Article 3.

However, API adapted to conflict conditions in an insurgency by providing special rules for the treatment of captured insurgent combatants. Article 4 clarifies that providing protection to insurgency

88. See CULLEN, *supra* note 46, at 88 (noting that many of the negotiators at the diplomatic conference favored consolidating API and APII into one protocol).

89. See Additional Protocol I, *supra* note 78, at art. 1(3); Additional Protocol II, *supra* note 81, at art. 1(1).

90. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, at 31.

91. SOLIS, *supra* note 2, at 122.

92. *Id.*

93. Additional Protocol I, *supra* note 78, at art. 1(4).

94. KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING 178-79 (Peter Willetts ed., 1984) (noting that there is no real comprehensive regulation of guerilla warfare); COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 56, at 1323 (stating that wars of liberation have always had an international character).

362 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

groups does not affect the legal status of their claims to the territory.⁹⁵ Article 5 continues GCIII's state espousal requirement, and it provides the mechanism for recognizing a liberation organization as a quasi-state authority for negotiating and espousing POW rights.⁹⁶ API also has provisions allowing non-state movements to essentially act as a signatory to API:

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

(a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.⁹⁷

Relating to the special nature of insurgent combatants, Article 37(1)(c) clarifies that it is still forbidden for combatants to feign civilian status.⁹⁸ Article 44(1) extends POW status to the following captured persons described in Article 43⁹⁹:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not

95. Additional Protocol I, *supra* note 78, at art. 4.

96. *Id.* at art. 5.

97. *Id.* at art. 96(3); *see also* WILSON, *supra* note 53, at 170 (commenting on the capacities of an insurgency that Article 96(3) seems to imply).

98. Additional Protocol I, *supra* note 78, at art. 37(1)(c).

99. *Id.* at art. 44(1).

recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.¹⁰⁰

Article 44(2) goes on to state that combatants are “obliged to comply with the rules of international law applicable in armed conflict,” but that individual violations do not deprive a combatant of POW status.¹⁰¹ Article 44(3) obliges combatants to distinguish themselves from the civilian population during military operations, but as an interesting compromise and acknowledgment of the nature of insurgent warfare,¹⁰² it also provides:

that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.¹⁰³

100. *Id.* at art. 43; *see also* WILSON, *supra* note 53, at 166 (crediting the reasonableness of some groups to the existence of an organized command structure).

101. Additional Protocol I, *supra* note 78, at art. 44(2).

102. WILSON, *supra* note 53, at 173.

103. Additional Protocol I, *supra* note 78, at art. 44(3).

A combatant who fails to meet these mitigated requirements forfeits his or her right to POW status, but is still entitled to equivalent POW treatment.¹⁰⁴

Commanders have a duty to ensure the compliance of their subordinates under the law of armed conflict.¹⁰⁵ Article 45 reiterates GCIII, stating that any person apprehended for taking direct part in hostilities is entitled to POW treatment until a judicial tribunal can determine his or her status.¹⁰⁶ Any person not entitled to POW status is entitled to the minimum protections given in Article 75 of API.¹⁰⁷

Article 75 enumerates “fundamental guarantees” for persons in enemy hands who do not receive more favorable treatment elsewhere in the treaty.¹⁰⁸ Article 75 requires that arrested persons be immediately informed of the cause of their arrest and detention, released as soon as possible if no penal charges are pending, and prohibits murder, torture, corporal punishment, mutilation, hostage-taking, and collective punishments.¹⁰⁹ Arrested persons must be provided with: minimum standards for penal trial, including the right to information about the charge; individual penal responsibility; no *ex post facto* charges; the presumption of innocence; the right to be tried in one’s presence; the right against self-incrimination; the right to cross-examination and to put on a defense; double jeopardy; public judgment; and, information about post-conviction remedies.¹¹⁰ API excludes mercenaries, spies, and defective combatants from POW protections, so Article 75 appears to apply to them.¹¹¹ Article 75 provides a baseline that gives a rather incomplete set of regulations for POW treatment, and it basically expands Common Article 3, except that Article 75 applies to international conflicts only.

APII is by contrast relatively short and adds little new to the law of armed conflict. Unlike Common Article 3, which applies to

104. *Id.* at art. 44(4).

105. *Id.* at art. 87.

106. *Id.* at art. 45(2).

107. *Id.* at art. 45(3).

108. *Id.* at art. 75(1).

109. *Id.* at art. 75(2)-(3).

110. *Id.* at art. 75(4).

111. *See id.* at arts. 46-47; *see also* CRAWFORD, *supra* note 21, at 54.

conflicts “not of an international character,”¹¹² APII jurisdictionally applies to all armed conflicts not covered by API, and only riots and other low level disturbances are not considered armed conflicts.¹¹³ Therefore, this jurisdictional article challenged what some had believed: that the whole of the Geneva Conventions applied to interstate war, Common Article 3 applied only to civil wars, and any other form of armed conflict was ungoverned by the Geneva regime. APII expands the protections of Common Article 3, but not in a meaningful or systemic way because it fails to provide POW-style protections and regulations for other combatants seized in conflicts governed by this Protocol.¹¹⁴ The rules for conduct of war are not extensive under APII.¹¹⁵ As with Common Article 3, the provisions of APII are generally only enforceable by self-regulation.¹¹⁶

API applies to wars of national liberation because self-determination is a concern of international peace and security, and, therefore, not solely a domestic matter.¹¹⁷ In contrast, civil wars are treated in APII.¹¹⁸ Terrorism is typically domestic because it is committed nationally on a criminal activity level. However, the international community has reiterated many times that terrorism is a threat to international peace and security.¹¹⁹ Thus, it is difficult to determine which Protocol should apply to terrorism. There is a certain appeal to uniform application of a simple, dualistic characterization of conflict: international or non-international. However, neither Protocol directly envisioned modern, international terrorism that is not tied to

112. Geneva Convention I, *supra* note 34, at art. 3.

113. Additional Protocol II, *supra* note 81, at art. 1.

114. *Id.* at arts. 1, 4.

115. DOCUMENTS ON THE LAWS OF WAR 482 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

116. ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM, AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 75 (1996); *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 64-65 (June 27) (noting that the Geneva Conventions are customary international law and thus apply without condition of reciprocity); *accord* Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶¶ 511, 517-18 (Int'l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

117. *See* Additional Protocol I, *supra* note 78, at art. 1(4).

118. Additional Protocol II, *supra* note 81, at art 1.

119. *See, e.g.*, S.C. Res. 1566, ¶1, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

wars of liberation. It is therefore necessary to directly legislate a solution to this problem.

The Geneva Conventions and the Additional Protocols are not exactly outdated. The Additional Protocols are a great step in acknowledging new forms of war, and they continue the endeavor to give the broadest humanitarian protections possible.¹²⁰ But states have struggled to achieve consensus regarding the requirements of the Geneva Conventions involving situations of conflict that do not resemble World War II—terrorism being the most dissimilar engagement problem, particularly the detention and treatment of terrorist combatants.¹²¹ While API expands POW protections to new combatants in Articles 43 and 44, and even provides new baseline protections to non-POWs in Article 75, it does not provide a uniform method of handling combatants who are not entitled to POW status.¹²² This absence of clear and direct law has become painfully apparent in our modern engagement with terrorists.

III. TERRORISM AND THE LAW OF ARMED CONFLICT

A. The Problem of Military Engagement with Terrorists

Terrorism is hardly new to the world or the law. But “modern terrorism” was not a major concern of the United Nations (“UN”) or the international community until the 1960s when a wave of decolonization occurred throughout the globe.¹²³ This “early” modern age of terrorism consisted of national liberation movements. The African National Congress, the National Liberation Front in Algeria, the Irish Republican Army, and the Palestinian Liberation Organization are arguably some of the most iconic examples of national insurgencies or nationalistic terrorist organizations.¹²⁴ These

120. LIEUTENANT COLONEL DAVID P. CAVALERI, THE LAW OF WAR: CAN 20TH-CENTURY STANDARDS APPLY TO THE GLOBAL WAR ON TERRORISM? 2-3 (2005).

121. See discussion *infra* notes 143-56 and accompanying text.

122. Additional Protocol I, *supra* note 78, at arts. 43, 44, 75.

123. CHADWICK, *supra* note 116, at 15-42, 92-128.

124. These organizations were also all in attendance at the negotiation of the Additional Protocols. See SOLIS, *supra* note 2, at 120.

“terrorists” were sometimes also called “insurgents” or “guerillas,” though the terms are often distinguished.¹²⁵

The pervasive use of terrorist tactics in modern times was first wedded to the world of decolonization and self-determination.¹²⁶ National liberation movements can appear in a variety of circumstances, but the typical story generally begins in the past when a group of militarily superior colonizers settle in and dominate the political system of a land not their own.¹²⁷ The indigenous population may be politically disenfranchised, discriminated against, or otherwise unequally treated, even though the indigenous population may form a majority. Ultimately, some members of the indigenous population grow tired of the disparate treatment of the colonizers, invaders, or racist regime in control of the country. Despite the colonizer’s superior military power, members of the indigenous group decide to use asymmetric violence to achieve political independence. These groups do not engage in open rebellion against their oppressors, which they would surely lose. Instead, they hide in the indigenous civilian population and attack the colonizing force only at the most opportune times. These attacks often violate the basic rules of the law of armed conflict and humanitarianism: for example, by targeting civilians.¹²⁸

The UN and the international community did not unequivocally discourage this. Ambivalence over the definition and application of the term “terrorist” has always faltered in the UN because of general popular support for self-determination, even by violent means.¹²⁹ The UN was also willing to debate issues of self-determination and

125. NATO defines “insurgency” as “[a]n organized movement aimed at the overthrow of a constituted government through the use of subversion and armed conflict,” and “Guerilla warfare” is defined as “[m]ilitary and paramilitary operations conducted in enemy-held or hostile territory by irregular, predominantly indigenous forces.” U.S. ARMY TRAINING AND DOCTRINE COMMAND, *A MILITARY GUIDE TO TERRORISM IN THE 21ST CENTURY*, at glossary 5, glossary 7 (2005).

126. JAMES M. LUTZ & BRENDA J. LUTZ, *TERRORISM: ORIGINS AND EVOLUTION* 84-99 (2005).

127. Iconic examples of this typical story include the campaigns of the Irish Republican Army and the Algerian National Liberation Front. *See generally* ALISTAIR HORNE, *A SAVAGE WAR OF PEACE: ALGERIA 1954-1962* (2006); ALAN J. WARD, *THE EASTER RISING: REVOLUTION AND IRISH NATIONALISM* (2d ed. 2003).

128. *See* SUTER, *supra* note 94, at 142-43 (recounting the different perceptions at time of negotiation).

129. BEN SAUL, *DEFINING TERRORISM* 69-128 (2006).

368 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41]

independence after violent means had been used to publicize the conflict. For example, the UN considered the “Algerian question” after native Algerians had staged a number of attacks on the colonizing French civilian population as part of a bid for independence.¹³⁰ Numerous modern democracies celebrate their past wars of independence, independence that was often achieved by willingness to engage the enemy by asymmetric and ungentlemanly means. This is true of the United States, as well as many other countries.

API was adopted by a world that faced this kind of terrorism where fighters used asymmetric tactics to achieve national liberation and decolonization. Yet, these combatants, though they often deliberately flouted the law of armed conflict and humanitarian considerations, were in many ways easier to engage than today’s terrorists. Today’s terrorists form a new era, an era I fear may in the future be referred to as “middle” modern terrorism because I am sure terrorists will continue to hone their tactics. Early modern terrorists had achievable agendas, civilian populations of their own to protect, and hierarchical command structures; these terrorists wanted to negotiate, and they could be negotiated with, even though problematically.

Today, the African National Congress no longer considers the use of terrorist tactics because South Africa is no longer a racist regime.¹³¹ All but the smaller and more fringe strands of the Irish Republican Army have also disbanded, now that they have achieved political

130. The United Nations General Assembly first considered the “question of Algeria” in 1955, and independent Algeria was ultimately granted admission into U.N. membership in 1962. *See* G.A. Res. 909 (X), U.N. Doc. A/RES/909(X) (Nov. 25, 1955); G.A. Res. 1012 (XI), U.N. Doc. A/RES/1012(XI) (Feb. 15, 1956); G.A. Res. 1184 (XII), U.N. Doc. A/RES/1184(XII) (Dec. 10, 1957); G.A. Res. 1573 (XV), U.N. Doc. A/RES/1573(XV) (Dec. 19, 1960); G.A. Res. 1650 (XVI), U.N. Doc. A/RES/1650(XVI) (Nov. 15, 1961); G.A. Res. 1724 (XVI), U.N. Doc. A/RES/1724(XVI) (Dec. 20, 1961); G.A. Res. 1754 (XVII), U.N. Doc. A/RES/1754(XVII) (Oct. 8, 1962). *See generally* MARTIN WINDROW, *THE ALGERIAN WAR 1954–62* (1997) (discussing the insurgency tactics of the Algerian independence movement).

131. *See generally* ROBERT ROSS, *A CONCISE HISTORY OF SOUTH AFRICA* 114–97 (1999).

participation in the future of Northern Ireland.¹³² The National Liberation Front is now simply a domestic political party in independent Algeria, independence from France having been achieved decades ago.¹³³ Other national liberation groups, such as the Palestinian Liberation Organization, continue their work, but over time they may arguably develop increasing accountability and restraint in their tactics as their political voice is better heard (although many will still consider groups of this kind to be terrorists). One estimate is that one-third of terrorist organizations currently on the State Department's Foreign Terrorist Organization list are national liberation movements that fit this "early modern" terrorism paradigm.¹³⁴

The "modern" terrorist groups currently emerging are not hierarchical, they do not have clear territorial objectives.¹³⁵ They may conceive of themselves as tied to a civilian group, but that connection is arguably much more tenuous than that of the Irish Republican Army to Northern Irish Catholics or the African National Congress to native South Africans. They lack clear objectives to negotiate, there is not a command structure to negotiate with, and there is no incentive to act reasonably because they are not advancing the interests of any civilian population.¹³⁶ These groups operate on general ideologies often as simple as disdain for the policies, people, or existence of a country such as the United States or Israel, and they seek maximum destructiveness.¹³⁷ Even if there are political objectives, such as the creation of a world Islamic state,¹³⁸ the objectives are wildly unrealistic at best, and do not conceive of real, immediate political

132. *Full Text: The IRA Statement*, GUARDIAN (JULY 28, 2005), <http://www.guardian.co.uk/politics/2005/jul/28/northernireland.devolution> (U.K.).

133. Bureau of Near Eastern Affairs, *Background Note: Algeria*, U.S. DEP'T OF ST., Feb. 17, 2011, <http://www.state.gov/r/pa/ei/bgn/8005.htm>.

134. HOFFMAN, *supra* note 6, at 35.

135. IAN O. LESSER, BRUCE HOFFMAN, JOHN ARQUILLA, DAVID RONFELDT & MICHELE ZANINI, COUNTERING THE NEW TERRORISM 1-2 (1999).

136. *Id.* at 8-9.

137. BRUCE RIEDEL, THE SEARCH FOR AL QAEDA: ITS LEADERSHIP, IDEOLOGY, AND FUTURE 116-34 (2008).

138. Most groups that fit the modern paradigm for terrorism are Islamic fundamentalist groups, but they are scarcely the only modern terrorists using this new structure. See HOFFMAN, *supra* note 6, at 229-57.

370 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

change. Engagement with these terrorists, who often act individually, has traditionally been handled through criminal law.¹³⁹ However, the United States' international wars against al-Qaeda in Afghanistan and Iraq involve a perhaps historically unique problem: al-Qaeda has engaged in what would otherwise be criminal acts, but these acts are orchestrated from across the globe, and they have the support of a friendly regime in a failed state.¹⁴⁰

It may not be likely that other countries will devote many future military campaigns to fighting wars against terrorist supporting organizations in failed states and exporting prisoners for detention outside their own territory. Then again, this current war raises issues that will reappear in new factual situations. Will we continue engaging with international terrorists in armed conflict situations, or in other situations? Will armed conflicts be carried out against relatively small groups of individuals? Will there be more failed states in the future that can be exploited by terrorist groups? Will there be more groups that seem like national liberation groups, but that have splintered or adopted hard-line positions, or have otherwise diverged from the "early modern" terrorist model? Will we continue engaging with international terrorists in armed conflict situations in a way that decreases the role for domestic law enforcement? If so, the law of armed conflict must play a role, and it must be redefined in order to be effective.

It is noted above that the Geneva Conventions of 1949 contain no provisions for internal wars except for the bare minimum protections of Common Article 3. This was because, at that time, matters other than interstate war were considered to be matters of state sovereignty, and they were not subject to international regulation.¹⁴¹ This Westphalian¹⁴² view of "interstate or not" applies imperfectly to the

139. *See generally* U.N. LEGISLATIVE SERIES, NATIONAL LAWS AND REGULATIONS ON THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, U.N. Doc. ST/LEG/SER.B/22, U.N. Sales No. E/F.02.V.7 (2002) (providing compilations of the world's national laws and regulations regarding terrorism).

140. RIEDEL, *supra* note 137, at 116-34.

141. *See* SOLIS, *supra* note 2, at 97.

142. The existence of the modern state system is generally credited to the Peace of Westphalia in Europe in 1648 when the rulers agreed to maintain complete and exclusive control over their own territories, without any rights in others. *See*

war on terror, and particularly against large insurgency movements. Making matters all the more complicated, as seen from the questions raised above, no two terrorist movements are alike. The scale can vary from individual acts to full civil war, and the geography can vary from a small territory to one of international scope. The terrorists themselves can be from the targeted country, or wholly outside the country; they can conduct their attacks on their targets from inside or outside the country. The domestic law enforcement actions and conflicts that common Article 3 envisioned may be better subjects for domestic law rather than terrorist movements, which are all unique hybrids of the war and law enforcement paradigms.

B. Legal Confusion

The sections above demonstrate that there are no directly applicable provisions of the Geneva regime to address the conditions of treatment and detention for sub-state organizations that do not abide by the law of war. Some have claimed that the Geneva Conventions conceive only of civilian or combatant: that there is no unprotected person under the Geneva Conventions.¹⁴³ That view is untrue because otherwise the provisions regarding the treatment of spies and mercenaries, who are neither POWs nor civilians, would not exist.¹⁴⁴

James Caporaso, *Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty*, in *CONTINUITY AND CHANGE IN THE WESTPHALIAN ORDER* 1, 1 (James Caporaso ed., 2000). The concept of “Westphalian sovereignty” has now been exported to all other parts of the globe and is a mainstay of the modern state system. *See id.*

143. Françoise J. Hampson, *Detention, the “War on Terror” and International Law*, in *THE LAW OF ARMED CONFLICT: CONSTRAINTS ON THE CONTEMPORARY USE OF MILITARY FORCE* 131, 148 (Howard M. Hensel ed., 2005).

144. *See* Additional Protocol I, *supra* note 78, at arts. 46-47; *see also* Convention Between the U.S. and Other Powers Respecting the Law and Customs of War on Land arts. 29-31, Oct. 18, 1907, 36 Stat. 2277 (withdrawing POW protections from spies and saboteurs). Spies and mercenaries dress as civilians, and as a result they do not have combatant immunity, are not entitled to POW status or treatment, and can be tried for war crimes. Additional Protocol I, *supra* note 78, at arts. 46-47. Thus, the Geneva regime clearly conceived of an “unlawful combatant” before the term came into common parlance. Terrorists are similar to spies and mercenaries because they also do not distinguish themselves from civilians, and they do not obey the law of war. Therefore, spies and mercenaries are the closest analogue to terrorists in the Geneva Conventions.

372 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

Article 75 of API also makes clear that the international community conceived of a need for minimum protections for certain unprotected people.¹⁴⁵ Therefore, there are plainly classes of non-civilians whose protections are not envisioned by the Geneva Conventions.

Uncertainty over the subtleties of application of the seemingly binary rules of the Geneva Conventions has caused many problems. The Geneva regime does not directly address the gray area between international versus non-international conflict, having at first only addressed civil wars and interstate wars, even though there are many other forms of armed conflict. It also fails to address distinctions between civilian and combatant, and classes of fighting forces contained within the term “combatant.” The fact that the Conventions were not designed for situations within these gray areas has led to confusion even where the answers seem ascertainable.

For example, as noted above, GCIII extends POW protections to the regular armed forces of states, and to militias that follow certain rules.¹⁴⁶ It may seem clear from the plain text of Article 4 that this militia subsection is only meant to apply to militias.¹⁴⁷ However, over time it has become viewed by many, including some in the ICRC and the United States, that the militia requirements, including wearing a distinctive sign of combatant status, also apply to regular militaries.¹⁴⁸

Additionally, the Geneva Conventions allow civilians to be legitimate targets of attack when they take direct part in hostilities. *See* Geneva Convention IV, *supra* note 41, at art. 5; Additional Protocol I, *supra* note 78, at art. 51(3). These provisions also demonstrate a gray area because civilians are able to remain classified as civilians even while they are acting as combatants; a nod to the complexities of war. *See generally* NILS MELTZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 16-17 (2009) (providing recommendations concerning the interpretation of international humanitarian law as far as it relates to the notion of direct participation in hostilities). For more on the subtleties of this taxonomy see Anthony Rogers, *Combatant Status*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 101, 115-27 (Elizabeth Wilmschurst & Susan Breau eds., 2007).

145. *See* Additional Protocol I, *supra* note 78, at art. 75(1).

146. Geneva Convention III, *supra* note 38, at art. 4.

147. *See id.*

148. *See* Memorandum from John Yoo, Deputy Assistant Attorney Gen., to William J. Haynes II, Gen. Counsel of the Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *available at*

Thus, the United States maintained that the irregularly-formed regular fighting forces of the state of Afghanistan, the Taliban, are not entitled to POW status.¹⁴⁹ Interpretations of this provision vary rather widely.¹⁵⁰ Adding to the confusion over how to respond to the unique circumstances of the Taliban, the Geneva Conventions do not address whether the highest level fighting force in an otherwise failed state constitutes the state's regular fighting forces, or whether a regular fighting force or militia can exist in a state of co-belligerency with a sub-state fighting force, such as the Taliban was with al-Qaeda. Even if the Geneva Conventions do apply, there is still confusion over whether GCIV, regarding the protection of civilians, should apply to captured combatants who are not entitled to POW status or combatants who contest their combatant status.

A number of legal issues flowed from the non-recognition of the Taliban as the regular military of Afghanistan. The United States executive branch originally posited that the Geneva Conventions did not apply because the conflict was with al-Qaeda, and non-state organizations could not be parties to the Geneva Conventions.¹⁵¹ The United States then stated that its position was that the Geneva Conventions would otherwise provide protection to the Taliban, except that GCIII did not apply because the Taliban did not comply with the rules prescribed in Article 4.¹⁵² Initially, the U.S. administration also suggested that Common Article 3 did not apply because the conflict was "international," in the sense that it geographically involved multiple territories,¹⁵³ which is another

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>; *see also* Rogers, *supra* note 144, at 116-19.

149. Memorandum from George Bush, U.S. President, to U.S. Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. This interpretation was internally contested. *See* Memorandum from William H. Taft, IV, Legal Adviser of the U.S. Dep't of State, to Counsel for the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), *available at* <http://www.american-buddha.com/911.memocounselpres2.2.02.htm>. It was also internationally contested. *See* ELSEA, *supra* note 55, at 2.

150. *See* Rogers, *supra* note 144, at 117-18.

151. *See* Memorandum of John Yoo to William J. Haynes II, *supra* note 148.

152. Memorandum of President George Bush to U.S. Vice President, *supra* note 149.

153. *Id.*

374 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41]

commonly confused point regarding what makes a conflict “international” when the simple paradigm of civil versus interstate war is not illustrative. Without either the Geneva Conventions or Common Article 3 as guidance, it was not clear whether any bodies of law, including prohibitions on torture, applied to U.S. detention and treatment of persons captured in hostilities. The U.S. government subsequently affirmed that common Article 3 does apply to the conduct of hostilities against irregular fighters in Afghanistan and Iraq.¹⁵⁴ However, even with that baseline, GCIII and API do not apply in whole, so there is no comprehensive code, and numerous questions are left unanswered. How should these detainees be treated? How should their combatant status be determined? When should they be released? How should their rights be vindicated? GCIII answers all these questions, but neither Common Article 3 nor APII were ever intended to supply comprehensive protections for combatants in wars that are not international.

One solution may be to flush out a set of combatant protections for conflicts that are not international in character. However, past attempts to do just that have proved problematic, and led to the relatively toothless APII. The complex issues related to sovereignty in a state’s own territory have obstructed a permanent solution for non-international conflicts. Moreover, some of the confusion is created by maintaining the binary distinctions of the Geneva Conventions—international war or not, POW status or not. Thus, what I suggest, taking into account the American experience of the war on terror, is a protocol that is specifically attuned to terrorism in particular that would knock out any confusion from the Geneva regime.

Many do not approve of creating major distinctions between humanitarian protections in international versus non-international conflicts.¹⁵⁵ Conflicts involving terrorism can obscure questions of scope even further because counterterrorism operations could

154. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).

155. Most notably, the ICRC, a preeminent nongovernmental commentator on the law of armed conflict, has advocated that humanitarian protections remain largely the same whether the conflict is international or non-international. *See generally* MICHELLE MACK WITH CONTRIBUTIONS BY JELENA PEJIC, INT’L COMM. OF THE RED CROSS, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS (2008) (discussing how international humanitarian law should be imported to non-international conflicts).

conceivably range from domestic law enforcement, to non-international, to international in scale. Some commentators have even suggested that there should be uniform treatment for all combatants.¹⁵⁶ Terrorism would still stand apart even if the law of war were to be rewritten tomorrow to unify international and non-international standards and combine interstate, insurgent, guerilla, and civil wars. Therefore, special rules for terrorism are needed to ensure minimum treatment of detainees.

The different factual contexts and changing nature of the terrorist enemy make envisioning a uniform approach to combatant protections difficult. Yet, we must respond to the challenges created by the current, early twenty-first century form of terrorism as the Additional Protocols attempted to adapt to the wars of the late twentieth century.

IV. A NEW LAW OF WAR FOR A NEW AGE

How should those states that have adopted the Geneva Conventions react to the challenges created by unorganized or thinly-organized combatants, who deliberately flout the law of war? It is not an option for a civilized society to say that it owes no humanitarian duties to these combatants. However, it is often not feasible to simply apply the whole of the Geneva Conventions to them because either the requirements cannot be met without reciprocity (espousing a claim), or the requirements create a disconnect (imprisonment for the remainder of the hostilities when there is no clear end to the hostilities). In light of this confusion in the law about how to detain and treat terrorist combatants, I propose the creation of a new protocol for the international system.

The first question that must be addressed is this: why are states not permitted to individually define for themselves, in the frame of their own law, which protections should be applied, modified, or not given? There is flexibility to this approach because it takes into account the individual characteristics of all the unique situations that occur when a state confronts a terrorist group in an armed conflict setting. It is possible that state practice and public conscience would ultimately determine an appropriate basic set of considerations when dealing with lawless or unorganized combatants.

156. See CRAWFORD, *supra* note 21, at 153-69.

On the other hand, treaties carry a number of innate dangers. First off, it would be incredibly difficult to convene the nations of the world at the negotiating table in order to modify the Geneva Conventions, absent a world war. Treaties are inflexible in their ability to change over time, and they are only reactive to the situations that the states are confronting at the time of drafting. Treaties are often written very narrowly because of this danger, which can make them less useful in future situations. Therefore, it is possible that a new protocol would not be helpful in the future as we confront the new forms and configurations of terrorist violence. Treaties can also potentially be overbroad: for example, issues pertaining to terrorism that may have been better handled by the criminal justice system may now be swept up into a new law of war treaty. There is also the potential problem of a low level of ratification, in which case all of the work done to write a good treaty will be for naught. However, many of these risks can be reduced with the best efforts at careful drafting.

In the face of these challenges, and the viable option of allowing states to read the current body of international humanitarian law and come up with a workable approach of their own, why should states consider the option of creating a new protocol to the Geneva Conventions addressing the specific problems posed by terrorist combatants under the law of war?

I argue that there are at least five values, two procedural and three substantive, to the exercise of negotiating a new protocol that specifically addresses the problem of humanitarian law and terrorism. They are: (1) taking the opportunity to glean the wisdom of all in response to the problem and coming to a consensus; (2) confronting states that have not engaged terrorists and who may be very critical of responses to terrorism, and asking them to participate in determining the best approach, so that the results will also bind these states in the future; (3) legitimizing a particular method of treating terrorists; (4) establishing a uniform method of treatment that is sensitive to the internationally conceived minimum standards of treatment; and, (5) preventing a decline in humane standards of treatment that could happen, even in democratic states, as a response to increasing security concerns.

A. Wisdom and Consensus

There is a simple procedural value to the international community agreeing that, while the existing body of the law of war does help to inform the problem of terrorist combatants, the current codes do not directly address the point. From this not-quite *tabula rasa*, the international community can then discuss how international humanitarian law should be expanded and adapted to this emerging legal problem. There is value in at least discussing the issues even if consensus cannot be reached in all areas.

Where consensus can be reached, there can be crystallization or codification. Where it cannot, there can at least be discussions concerning the nature of the problems and their alternatives. Difficult problems in international law often require long contemplations by the international community, but there is value in prioritizing legal solutions to the challenges of armed conflict with terrorists, rather than more pragmatism-oriented solutions. There is value in drawing attention to the legal problems now and asking what approach is best before a practice emerges, particularly a practice that might be suboptimal and difficult to back-track. Of course, there will be many benefits if consensus can be reached on any significant number of points, including legitimacy, humanity, uniformity, and integrity.

B. Confrontation

There are many kinds of power distributed across the international system. Political theorist, Joseph Nye, famously distinguished hard power (military abilities) from soft power (moral influence).¹⁵⁷ It is noteworthy that many influential countries that lack a high level of hard power nonetheless exercise extensive soft power, including Japan and countries in Europe.¹⁵⁸ Many countries that exercise moral influence, and some countries that have not yet confronted extensive terrorism due to their small size or other individual geopolitical circumstances, can be critical of the counterterrorism policies of

157. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 5-11 (2004).

158. *Id.* at 75-87.

terrorism-beleaguered or hard power states, such as the United States, Israel, or India.¹⁵⁹

Criticism is good. Criticism for situations in which there are possible humanitarian abuses should be encouraged in the international system. Criticism increases compliance with international standards, and causes states to reevaluate and constantly improve their policies. Yet, as it is often and accurately said, where one stands depends on where one sits. While it may be easy for other states to criticize the humanitarian choices of states like the United States, Israel, and India, who are confronting terrorist threats, it may be helpful to ask these other states how they would respond differently. It is possible to criticize without giving a concrete alternative; it is also possible that the solutions put forth by other states would create different criticisms and pose contradictory solutions. Small democratic states may err on the side of urging “maximum humanitarianism” believing there is no harm in giving more human rights protections to combatants or suspected terrorists.¹⁶⁰ In fact, there is often a very real and likely harm. If a fair reading of either the text or the spirit of the law of war is that terrorists do not need to be released from preventative detention until the hostilities are concluded, criticism may cause some states dealing with terrorism, perhaps even specially-affected states,¹⁶¹ to release some detainees earlier than necessary. These detainees may then rejoin hostilities and cause more deaths, which is a great harm to be avoided.

However, this does not mean that casualties can be avoided by any means necessary, such as by degrading basic standards of detainee

159. See Arunabha Bhoomik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India*, 33 DENV. J. INT’L L. & POL’Y 285, 308-40 (2005) (discussing the counterterrorism policies in all three states, and noting some of the criticisms each has received).

160. See LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 176-215 (2007) (discussing the development of human rights theory).

161. The doctrine of “specially affected states” holds that customary and other forms of international law can generally only be made by states that are affected by the legal situation if the effects are not widespread. See *North Sea Continental Shelf* (Ger./Den./Neth.), 1969 I.C.J. 4, 43 (Feb. 20). For example, nuclear powers are sometimes considered to be specially-affected states in regard to the formation of customary international law against the use of nuclear weapons. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 535-36 (July 8).

treatment. The law of war itself exists to strike a balance between obtaining military objectives, such as protecting civilians from future casualties, and guaranteeing basic human rights, such as never using torture on detainees to achieve a military objective.¹⁶² The law of war is thus less protective of rights than the laws of peacetime. Therefore, humanitarians arguably do not approve. But the law of war exists for a very utilitarian reason: it protects civilians and combatants during situations where military advantages can take precedence over concern for the well-being of these groups. Security through just means entails compromises in both allowing means of achieving military objectives, and the procedural protections of peacetime justice.

C. Legitimacy

Agreement on substantive provisions for a protocol will help resolve the “no man’s land” of legal standards for terrorist detention and treatment, while sustaining the benefits of our rule of law culture. One of the most obvious values of reaching a substantive agreement on how to adapt the law of war to armed conflict with terrorist or other unlawful combatants is that the creation of a single unified code will guide the whole of the international community in a directly applicable, flushed out manner of action. This clarity will limit the transactional costs of confusion, such as the costs associated with the gradual process of complaint and redesign, and piecemeal negotiation. Complying states will have the legitimate approval of the international community, which will help quell the use of detention stories as tools of recruitment and propaganda by terrorists. It will also ease cooperation, communication, and the transfer of terrorists between complying states.

If the agreement is widely, or perhaps even moderately, ratified, then moral pressure will be exerted on noncompliant states to apply the standards of the protocol to the greatest extent possible in their territories. Even if some countries do not sign a new protocol, as the

162. The preambles of the Hague Conventions of 1899 and 1907 demonstrate the desire to create this balance. See *THE LAW OF WAR: A DOCUMENTARY HISTORY*, *supra* note 12, at 204-50, 270-396 (providing the text of the 1899 and 1907 Hague regulations).

United States did not ratify API and APII¹⁶³ or the Rome Statute of the International Criminal Court,¹⁶⁴ widespread participation nevertheless means that nonsignatory states are more likely to be normatively bound.¹⁶⁵ Reaching substantive agreement is of procedural value and a tool to help the spread of a uniform legitimate means of treating terrorist combatants.

D. Humanity and Uniformity

Certainly not deserving fourth billing in importance, the primary objective of the new protocol must be humanitarianism. Uniform standards assure a minimum baseline of humane treatment for future conflicts. In assuring protections for the enemy combatants of armed conflict, even terrorist combatants who do not apply the most minimum protections of the law of war to their own conduct, we preserve the fundamental humanity and the rule of law in the modern democracies of the world. This is a positive benefit to the states themselves, independent of any tangential benefits such as creating legitimacy abroad or decreasing terrorist recruitment. It is a moral good, even outside of the benefits to the combatants themselves and the rehabilitation that may be possible when detainees are humanely treated. Law abiding behavior advances the central objectives of our society, preserves military discipline, preserves our moral advantage

163. The United States objected to what it perceived as special treatment for insurgents. Abraham D. Sofaer, *Agora: The U.S. Decisions Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd): The Rationale for the United States Decision*, 82 AM. J. INT'L L. 784, 785-86 (1988).

164. See *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on Int'l Operations of the S. Comm. on Foreign Relations*, 105th Cong. 11 (1998) (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues, Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court).

165. See Michael J. Matheson, Deputy Legal Advisor, U.S. Dep't of State, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, Remarks Before the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions (Jan. 22, 1987), in 2 AM. U. J. INT'L L. & POL'Y 415, 422-30 (1987) (announcing that the U.S. considered itself normatively bound to fifty-nine of the ninety-one substantive articles in Additional Protocol I as customary international law).

in conflict, and limits recruitment potential and international sympathy for the opposing side.

E. Integrity

A drawback to codification is its inflexibility to change. However, cultures that follow the rule of law should recognize the benefit to codifying today and amending tomorrow: flexibility must sometimes be sacrificed in order to preserve transparency and justice in rule-making practices. The codification of rules for treatment of terrorist combatants will ensure for the most part that minimum standards are not compromised to meet the many emergencies, exigencies, and advantages that can arise in armed conflict. This is not to suggest that democracies intentionally do not apply the spirit of the law of war when the text is unclear. Change over time is often effected by many considerations: the effect of day to day pragmatism in taking the most efficient path; acting in a manner that seems to be of the greatest benefit to the country—for example, protecting civilians by using questionable interrogation tactics; or doing what seems reasonable, such as indeterminate detention because there is no clear end to hostilities. Guidance is crucial over the long run to ensure that nations do not forget the proper understanding of what the law of war should be when they are engaging terrorists. Of course, states can ensure integrity by adopting strong national laws. However, international regulations have the advantage of promoting greater integrity against change, though they are less flexible.

V. ISSUES FOR DISCUSSION

The law of war was not created to address modern terrorism, but it has been successful in many other respects. For example, the rules of battlefield engagement, that were adopted from engaging guerrilla groups, provide effective guidance in Iraq and Afghanistan.¹⁶⁶ However, there is no doubt that the treatment of relatively unorganized fighters, who are unaffiliated with a state or territory, has

166. See THE U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL (2007); see also John A. Nagl & Nathaniel C. Fink, *Foreign Policy: Counterinsurgency Field Manual: Afghanistan Edition*, CENTER FOR NEW AM. SECURITY (Jan. 12, 2009), <http://www.cnas.org/node/648>.

created a great challenge for states applying the Geneva Conventions and their Protocols. Governments and commentators have disagreed over which provisions apply to these combatants. Commentators have interpreted some of the most central provisions—such as Common Article 3 and GCIII Article 4, the latter defining who is entitled to POW status—in very different ways.¹⁶⁷ This discord is, to some extent, due to the near complete silence of the Geneva Conventions on anything analogous to terrorism. The legal community itself has been overwhelmed with numerous interpretations and suggestions for how to fit terrorist combatant treatment into the current Geneva framework.¹⁶⁸ Rather than sift through those many volumes of opinions and notes, perhaps the solution is to agree to disagree on how terrorists should be treated under the current law of war, and begin writing clearer guidelines.

If the international community can agree on the points that were raised above—including: the law of war is not clear and does not specifically resolve the matter; the law of war provides a proper way to address the issue in some situations; and codification is in the best interests of the international community—then the next question is: what should be codified? Setting aside traditional interpretations of what the law of war suggests for combatant treatment in other circumstances, though always seeking guidance from the law of war's rich history, we must ask: how should unlawful and terrorist combatants, particularly once captured, be detained and treated?

A. When and Who?

The first questions in this inquiry are jurisdictional: when, and to whom, will the new protocol apply? How will situations of normal domestic law enforcement be distinguished from those situations to which the new protocol will apply? Will the protocol only apply once there has been a certain level of armed conflict? What level of

167. See, e.g., Memorandum from William H. Taft, IV to Counsel for the President, *supra* note 149 (noting the disagreement between U.S. government officials about whether to apply the provisions of the Geneva Conventions to the Taliban or al-Qaeda).

168. For example, a search of the terms “Geneva Conventions” and “Guantanamo” in HeinOnline, a database for legal scholarship, generates over 1,700 results as of Jan. 30, 2011.

violence shall be sufficient to declare a state of armed conflict between a state and a terrorist organization?¹⁶⁹ Should the level of violence be the only triggering factor for the protocol, or are there other factors that have a special role in situations of terrorism?¹⁷⁰ Do the act or acts of terrorism have to be international to trigger the protocol or will purely domestic terrorism suffice? Should the protocol distinguish between situations of international and non-international conflict as the Additional Protocols do? Should the terrorists be required to control territory, and does it matter if the territory is inside or outside the victim state? Does it matter that the country is capable of suppressing terrorism by means of normal law enforcement? If not, or even if so, where shall the law enforcement objectives cease and the law of war resume?

This issue of jurisdiction over the type of conflict leads to additional questions: who will be deemed an unlawful or terrorist combatant for the purposes of maximizing the utility of the new protocol? Is it any person willing to disregard the law of war? For example, is it enough that the combatants simply violate “the principle of distinction,” which is the oldest and most enshrined rule of the law of war, and states that civilian persons and objects shall not be the subject of military targeting?¹⁷¹ Will the protocol cover all violent actors who are not affiliated with a state, seceding territory, or national liberation movement (the conflicts covered by the first two protocols)? Will it cover any combatant who does not meet the requirements of GCIII Article 4 or the special insurgency POW provisions of API? Is there a distinction to be made between a criminal terrorist and a combatant terrorist? Does the difference between national versus international terrorism, an issue that arises

169. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 97-98 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>; CHADWICK, *supra* note 116, at 92-128; CULLEN, *supra* note 46, at 174.

170. *See* Tadic, Case No. IT-94-1-A at ¶¶ 97-98.

171. *See* 1 JEAN-MARIE HENCKAERTS & LOUSIE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3-8 (2005).

384 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41]

frequently in national and international law,¹⁷² play any role in distinguishing the two?

These distinctions are important, and I would scarcely rush to any conclusions without submitting these questions to the state parties interested in signing an additional protocol. My own suggestion, which I humbly submit for the consideration of the international community, is that for the purposes of this protocol, a terrorist combatant should be defined as any combatant not covered by either GCIII Article 4 or the special POW provisions of API (for those states who have ratified API). This approach is less tailor-made to the specifics of the current stage of modern terrorism, and it may have negative effects in the future if a new form of fighter enters the global scene and the paradigm does adequately apply. But, new factual problems inevitably arise. The solution may simply be to adjust the law when the time comes and create a mechanism to cover all currently unprotected fighters. This approach will ensure minimum protections for all.

There is an absence of clear law or practice for when an armed conflict with terrorists exists, and which kinds of conflicts should be governed by international accords. One of the most seminal decisions about when a state of armed conflict exists is the International Criminal Tribunal for the Former Yugoslavia's determination in *Prosecutor v. Tadic*.¹⁷³ In that case, the tribunal analyzed the Geneva Conventions stating, "we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."¹⁷⁴ This definition seems to be somewhat backward-looking to the insurgency-style

172. For example, in the U.S. extradition law regime national terrorists can receive political protection for deportation, but international terrorists generally cannot, and they are seen more unfavorably. See *In re Mackin*, 668 F.2d 122, 137 (2d Cir. 1981); *In re Doherty*, 599 F. Supp. 270, 277 (S.D.N.Y. 1984). It is international terrorism that has most often been decried as an explicit threat to international peace and security. See S.C. Res. 1373, ¶ 3, U.N. Doc. S/RES/1373 (Sep. 28, 2001).

173. Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 97-98 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

174. *Id.* ¶ 70.

internal conflicts of the twentieth century. While it seems undisputed that any level of conflict between states is a sufficient prerequisite to international armed conflict, it is unclear what level of violence between a state and a sub-state group is sufficient. Does it matter whether the sub-state group is organized, as insurgency movements often are, and are required to be under API? Would a high level of loosely-affiliated fighters that lack a strong command structure still be capable of creating enough violence within the territory of a state to be deemed an armed conflict?

Moreover, what is the relevance of the distinction between international and non-international conflict in writing a new protocol? Should there be different rules when the fighting is not wholly within the territory of one state? Some have suggested that the international versus non-international dichotomy in humanitarian law has been a great disservice to the international community, obscuring the application of both bodies of law and limiting humanitarian protections that should otherwise be available.¹⁷⁵

My suggestion is to apply the protocol in all cases of fighting that occur outside the territory of the state, such as when the state's criminal or other domestic jurisdiction does not usually apply, and in cases inside the territory of the state, when a state of armed conflict clearly exists. For example, I would recommend that, in the United States, the law of armed conflict cannot supplant the normal functioning of domestic, peacetime law unless there is a conflict sufficient for a state of martial law to exist.¹⁷⁶ Other possible triggering events might include constitutional declarations of rebellion, insurrection, or a state of emergency.¹⁷⁷ The protocol should also apply in all cases where a military is engaged in operations in a

175. See *id.* ¶¶ 97-98; see also CHADWICK, *supra* note 116, at 92-128; CULLEN, *supra* note 46, at 88, 174.

176. For an interesting historical analysis of the use of martial law in American history see generally Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i, 1941-1946*, 19 U. HAW. L. REV. 477 (1997); ROBERT S. RANKIN, *WHEN CIVIL LAW FAILS: MARTIAL LAW AND ITS LEGAL BASIS IN THE UNITED STATES* (1965).

177. Additional Protocol I covers combatants in insurrections and rebellions. Additional Protocol I, *supra* note 78, at art. 1(4). However, a new protocol must be designed not only for states that have not ratified Additional Protocol I, but also for groups and combatants who do not meet the more lax requirements for combatants described in Additional Protocol I.

386 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

state where they do not usually play a domestic law enforcement role. The language of the protocol should make clear that the level of fighting in-country must be similar to that of a declared civil war, or vastly exceed the normal law enforcement capabilities of the state.

However, great care must be taken to describe triggers that can be adopted by states with different constitutional designs, but that do not permit overreliance on the law of war when the criminal law is still capable of being applied. It is desirable to apply the more comprehensive personal protections of peacetime domestic law, rather than the more practical compromises that the law of war necessarily imposes. The new protocol should not give license to states to unnecessarily restrict human rights. Its endeavor should be entirely opposite: to apply at least minimum protections to unprotected combatants, with the objective of assuring our own humanity and adherence to the rule of law.

The protocol should also state that the included protections provide a baseline of protections even in peacetime.¹⁷⁸ These minimum peacetime protections will ensure a general minimum level of treatment by providing a service not unlike the role of Common Article 3 in the era of interstate war.

If we set aside the distinction between international and non-international armed conflict and the problems this distinction creates for engaging terrorism, then we should also set aside the old Westphalian jurisdictional trigger of the Geneva Conventions: the requirement that the conflict must occur in the territory of a state-party.¹⁷⁹ The new protocol should not be determined in this territorial way. A state engaged in force should have to observe the provisions of the accord regardless of where they encounter the enemy. As discussed above, a high threshold of violence for internal armed conflict is acceptable because domestic law is otherwise capable of

178. There are numerous U.N. guidelines on proper treatment of prisoners and detainees that could be substantially drawn upon in determining peacetime protections. *See, e.g.*, Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, U.N. Doc. A/RES/45/111 (Dec. 14, 1990); Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988); Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 2076 (LXII), U.N. Doc. E/RES/2076 (May 13, 1977).

179. *See Geneva Convention I, supra* note 34.

administering the violence. However, given that states are generally incapable of exercising their law enforcement capabilities outside their territories, there should be a low threshold for engagement abroad.

B. Detention of Combatants

The area where the international community most struggles to apply current law of war principles to terrorist combatants is undoubtedly captive detention and treatment. Without a state or other military organization to rationally negotiate the claims of POWs, the reciprocal administration of POW treatment that existed in the past—for example, between Germany and the Allied powers in World War II¹⁸⁰—is impossible. There may always be new combatants entering or perpetuating a state of armed conflict when there is not a state or organization to declare victory, defeat, or an end to hostilities. This makes it difficult to determine when terrorist combatant captives should be released. It is difficult to even recognize who is a combatant. In traditional interstate war, soldiers are easily identified in uniform; yet, terrorists wear civilian clothing and may not readily admit combatant status once captured. Thus, more developed procedures should be negotiated for the espousal of claims, determination of combatant status, and termination of combatant status.

I propose several recommendations, drawing upon lessons learned from the legal ambiguities that have arisen from U.S. detention and internment of terrorists. Note that I am not commenting on how the law of war might have affected or prescribed such ambiguities; instead, I propose rewriting the law to fit these demonstrated needs.

First, all captured suspected combatants should receive a status determination, either in-country before they are moved to a site of permanent detention or within a certain fixed time from capture. This will ensure that civilians are not interned without cause, and that evidence as to whether a suspected combatant was engaged in hostile

180. See generally *History of the ICRC: the Second World War*, INT'L COMM. OF THE RED CROSS, <http://www.icrc.org/eng/who-we-are/history/second-world-war/index.jsp> (last updated Feb. 17, 2011).

388 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

operations will not be stale or unavailable at the time of the determination.¹⁸¹

Second, there should be a fixed end time or outer bound to the total time of possible detention. This may be accomplished by defining when hostilities with terrorists or unlawful combatants are considered to end, in order to bring the application of the end of hostilities in line with the Geneva Conventions.¹⁸² The time of release can also be determined another way. For example, hostilities can be deemed to end when the armed conflict is no longer international or when it is within the state's capability to turn all detainees over for criminal trial. The law may also be written to provide multiple triggers, the first or last of which to occur will mean the release of preventatively detained captives. The states may also wish to include special circumstances when captives will not be released, even if all other conditions are met. For example, there could be a special carve-out for rehabilitative detention.¹⁸³

Third, the protocol must give detainees the personal rights to assert claims of mistreatment or noncompliance with the protocol. While the representative state or libertarian organization may espouse claims in interstate wars, and even wars of national liberation,¹⁸⁴ most unlawful or terrorist combatants are ineligible for normal POW status or treatment due to a substandard level of organization that renders them incapable of having their interests protected by anyone other than themselves.¹⁸⁵ The rights created under the protocol must be personal as they are in the criminal justice system.

Fourth, the fact that there is no combatant privilege for unlawful or terrorist combatants should be preserved; the rights of aggrieved

181. Determinations of this kind have historically been easy to make and do not overtax military capacity, such as the determinations done in Vietnam. See Military Assistance Command, Vietnam, *Inspections and Investigations: Prisoners of War—Determination of Eligibility*, Directive 20-5 (May 17, 1966), reprinted in 62 AM. J. INT'L L. 577, 768-70 (1968).

182. See Geneva Convention III, *supra* note 38, at art. 118.

183. See discussion *infra* Part V.F.

184. Additional Protocol I, *supra* note 78, at art. 96.

185. See WILSON, *supra* note 53, at 170 (interpreting the language of Additional Protocol I).

states to criminally try the terrorists who attack them must continue.¹⁸⁶ The acknowledgment of civilized states that certain basic rights are accorded to even the most vicious and violent of combatants accords them no other special statuses or protections. These combatants should remain liable for trial as war criminals, as well as under provisions of domestic law.

C. Treatment of Combatants, and Relevance of the Geneva Conventions' Existing Body of Law on POWs

By addressing numerous legal issues that have arisen in the detention of unlawful or terrorist combatants, I am not saying that many of the Geneva rules for POW treatment noted above—such as exercise, religious observance, etc.—are not useful. However, differences in the character of the combatant need to be considered. For example, the Geneva regime sometimes relies on internal hierarchy (e.g., letting a commander retain control over his people while in the POW camp)¹⁸⁷ and provides certain reciprocal privileges that anticipate military discipline (e.g., the privilege not to give information in interrogation).¹⁸⁸ But, terrorist and unorganized combatants require greater supervision and intervention in their daily operations, so the privilege against interrogation should not apply. While Westphalian states and other organizations generally observe the law of armed conflict,¹⁸⁹ terrorist organizations deliberately do not, and military and civilian authorities have a duty to use humane methods to discover information that may prevent future attacks on civilians. This should be enshrined in the protocol.

Protections for exercise, religious worship, and so on, should be directly imported from the Geneva Conventions. There will, however, need to be some modifications to the terms of GCIII, which was written with the expectation of an organized state military, as discussed above.

186. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1987) (discussing the passive personality principle).

187. Geneva Convention III, *supra* note 38, at arts. 44-45, 49.

188. *Id.* at art. 17.

189. WILSON, *supra* note 53, at 51 (noting that national liberation organizations generally observe the law of war).

D. Reiteration of the Vitality of Existing International Law

Importantly, many of the issues that have generated confusion and scholarship in international law since the beginning of the United States' post-9/11 war on terror are not issues generated by legal ambiguities. There has been much debate about whether, and to what extent, Americans may have committed torture, and whether certain interrogation tactics constitute torture or otherwise cruel, inhuman, or degrading treatment,¹⁹⁰ but, there was already a rich body of international law that flushed out the parameters of allowable interrogation tactics.¹⁹¹ The now famous "torture memos"¹⁹² are not the product of a genuinely confusing regime, but are widely considered to be a grave misreading of the state of the law.¹⁹³ I do not believe that there should be debate on whether the use of torture or "enhanced interrogation tactics" should be permitted. However, states may wish to discuss codifying allowable methods of interrogation.¹⁹⁴

E. Different Treatment for Different Combatants

The protocol should not favor better treatment, or even equivalent treatment, for terrorist combatants over combatants who observe the law of war under GCIII and API. While endeavoring to be humane at all times, the protocol should provide incentives for greater

190. See generally MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004); THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL INDEPENDENT PANEL AND PENTAGON REPORTS ON THE SHOCKING PRISONER ABUSE IN IRAQ (Steven Strasser ed., 2004); THE TORTURE DEBATE IN AMERICA (Karen J. Greenberg ed., 2006).

191. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec 10, 1984, 1465 U.N.T.S. 85.

192. To view all the torture memos, see generally THE TORTURE PAPERS (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

193. SOLIS, *supra* note 2, at 443-46.

194. The U.S. has already compiled a list of permissible interrogation techniques for torture. Memorandum from Donald Rumsfeld, Sec'y of Def., to the Commander of U.S. S. Command, Counter-Resistance Techniques in the War on Terrorism, (April 16, 2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf> (including tactics such as the use of incentives, playing on the interrogated person's love or hate for another person, attacking or boosting the ego of the interrogated person, and other methods that run from common to controversial in the repertoire of any police officer).

compliance with the law of armed conflict. This principle is upheld in criminal law in the United States by reserving the death penalty only for homicide.¹⁹⁵ When the United States Supreme Court rejected the use of the death penalty for extremely sadistic crimes such as rape, assault with serious disfigurement, and other such crimes, it did so by acknowledging that reserving the death penalty for homicide only creates a uniform incentive for violent criminals to at least spare the life of their victims.¹⁹⁶ Likewise, the best POW treatment should be reserved for combatants, whether of states or other organizations, who observe the laws of war.

However, death is a debatable deterrent for criminals, just as poor treatment scarcely frightens terrorists. Greater compliance with the law of war cannot be forced by threatening extremely inhumane treatment. Historically, brutal conditions of confinement in armed conflict had the opposite effect: those who fear detention fight to the bitter end rather than surrendering, and the use of brutal tactics fuels recruitment and sympathy for the other side, driving away potential allies of the state.¹⁹⁷ It has been said that there were no better recruitment tools for al-Qaeda than reports of treatment at Abu Ghraib and Guantanamo Bay.¹⁹⁸ The brutal repression of the National Liberation Front in Algeria and the Easter Rising in Ireland both provide lessons in history where small armed movements, without popular support, were transformed into massive independence movements.¹⁹⁹ Neither the United States nor any other country needs to convince the broader Islamic world that al-Qaeda and other terrorist groups are right to continue their work.

F. Special Treatment Relating to the Unique Situation of Terrorists

Special treatment may be necessary in the detention of unlawful or terrorist combatants. Unlike soldiers, guerrillas, and liberators, the violence of “middle modern” terrorists is feckless, and could suggest

195. *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion).

196. *Id.*

197. *See SOLIS, supra* note 2, at 8-9.

198. Jim Davenport, *McCain Advocates New Tactics: Program Would Teach Languages, Strategic Interrogation*, WASH. POST, Dec. 16, 2007.

199. *See generally* HORNE, *supra* note 127; WARD, *supra* note 127.

possible mental and social instability.²⁰⁰ A number of international rehabilitative programs around the world have had some success at reintegrating young, Muslim fundamentalist jihadists into society.²⁰¹ While soldiers serving their own countries generally have no such delinquency or criminal disposition to remedy, many young men who are drawn to terrorist organizations may. Therefore, to protect the safety of the international community, certain vocational, social, psychological, and other forms of training and rehabilitation should be strongly urged in the protocol. The protocol should also consider whether there should be other types of special treatment for terrorist combatants.

G. Other Possible Issues for Discussion

This protocol for the treatment and detention of unlawful or terrorist combatants can be expanded more comprehensively to embrace the problems attendant to engaging terrorists. For example, the protocol can address one of the recurring problems in the law of armed conflict: the fact that civilians taking direct part in hostilities cannot be targeted except at the time of taking part in the hostilities. This can be addressed by adopting a definition of unlawful or terrorist combatant that incorporates the ICRC's formulation of "continuous combat functions."²⁰² This doctrine envisions that even though terrorists may technically be considered civilians taking direct part in hostilities, and despite the fact that they are not traditional combatants, they can still be legitimately targeted at any time because of the continuous nature of their combat operations, and not merely at the exact moment when directly taking direct part in hostilities as GCIV

200. Daniel Byman & Christine Fair, *The Case for Calling Them Nitwits*, ATLANTIC MAGAZINE, July-Aug. 2010; Soraya Sarhaddinson, *Disabled Often Carry Out Afghan Suicide Missions*, NPR, Oct. 15, 2007, <http://www.npr.org/templates/story/story.php?storyId=15276485>; see also LAWRENCE WRIGHT, *LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11*, at 304 (2006) (discussing social instability).

201. Christopher Beam, *Jihadis Anonymous: What Happens in Terrorist Rehab?*, SLATE, Jan. 23, 2009, <http://www.slate.com/id/2209616>.

202. Nils Melzer, Int'l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 872 INT'L REV. RED CROSS 991, 1007-08 (2008).

otherwise requires.²⁰³ This policy may have already been adopted in practice,²⁰⁴ but has not been codified in the Geneva regime.

Other issues of engagement with terrorists can be addressed as well. For example, should targeted killings of unlawful combatants be permitted? Should there be any restrictions as to whether unlawful combatants can be targeted outside a zone of combat or in a state that has ratified the new protocol? The protocol can also consider the issue of state-sponsored terrorism by defining when state sponsorship renders the conflict interstate and capable of direct military action against the sponsoring state. The protocol could codify or reconsider international court rulings on the subject.²⁰⁵

The protocol should also address the problem of how to engage in counterterrorism operations in failed states, and when combat in a failed state is considered “international” in nature. Further, it should define what is legal regarding issues of anticipatory self-defense, preemptive attacks, and preventative strikes against terrorist groups in other countries. The protocol could address issues of co-belligerency, raised by the relationship of al-Qaeda and the Taliban, to determine how terrorist organizations, and those they fight with, should be classified for law of war and combatant detention purposes. For example, should a national liberation organization that generally abides by the laws of armed conflict be stripped of its API POW protections if it assists a terrorist organization? What level of interconnectedness would render all combatants lawful or unlawful? The protocol could address how to treat civilians who cooperate with terrorists. For example, how should willing human shields be treated?

Another important issue for consideration is interstate cooperation under the protocol. The protocol envisions attacks launched against

203. SOLIS, *supra* note 2, at 205-08.

204. See Melzer, *supra* note 202, at 1007-08.

205. The International Court of Justice uses an “effective control” test to determine state-sponsorship. It requires a state of dependence by the non-state organization and control by the state; thus, the non-state organization is effectively and legally an organ of the state. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 109 (June 27). The International Criminal Tribunal for the Former Yugoslavia adopted a less strict “overall control” test that does not require the state to specifically request the non-state organization to undertake certain actions. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 120-23 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

394 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

one country from another. How should the exchange and movement of suspected, admitted, or convicted combatants be handled? Will hot pursuit into the territory of another sovereign be allowed? What actions will be allowed in other countries for purposes of self-defense? What actions will be permitted within another state's boundaries during pursuit of a particular unlawful combatant target? Should extraordinary rendition be banned under the protocol? Will new detainee exchange provisions govern in place of normal extradition law? Should transfer of combatants to certain countries, either not party to the protocol or not observing other humanitarian protections, be banned?

Issues regarding peacetime engagement with terrorists may also need to be addressed. Perhaps there should be special considerations for domestic criminal trials, domestic use of preventative detention, or restitution and damages. *Al-Marri v. Pucciarelli*²⁰⁶ raised the issue of how to apply the law of war to a person outside the zone of hostilities, particularly a person who may fall within the domestic law enforcement capabilities of the state.²⁰⁷ Should the criminal laws or the law of armed conflict be applied against such a person?

There may be issues other than detainee treatment that need to be specially adapted to terrorism. General reformations of the law of armed conflict and the law of torture are not among them. If these legal regimes need to be altered in light of what has been learned from engaging with terrorists, then this should be done separately at a different diplomatic conference. There are also many other issues related to the conduct of combat that I recommend should not be taken up in this protocol, such as damage to cultural property or the environment. These kinds of issues should only be considered by the states if new general warfare methods and technologies have recently emerged, as opposed to methods that specifically pertain to terrorists. Our commitment to protecting cultural property, the natural environment, and so on is applicable in all situations of armed conflict, and it is wholly unrelated to the nonexistence of international regulation for the detention of unlawful combatants.

206. 534 F.3d 213 (4th Cir. 2008).

207. *Id.* at 285-89 (holding that the President of the United States has the power to detain a designated enemy combatant arrested inside the United States).

VI. CONCLUSION

The protocol that I suggest does not have to become a part of the tradition of the Geneva Conventions. In some ways the Geneva regime is itself a very long-living entity in a body of law that was scarcely codified before, and once it was codified it began constantly replacing and modernizing itself. There are many alternatives for how to refashion the law of armed conflict to meet modern needs. Common Article 3, the Additional Protocols, and the myriad weapons conventions and other treaties could be scrapped in favor of a new code that takes account of the prevalence of civil war, insurgency, and terrorism, while keeping beneficial rules for interstate engagement. Such a code could revisit the classifications of war as simply international or non-international and adopt a new taxonomy.

Alternately, it would be acceptable if the proposed protocol simply becomes the protocol for the treatment of non-POW combatants; or applies to all cases of armed conflict, internal or international; or sets minimum baseline protections for war or peace. I do not foreclose any questioning on how to create a law of maximum utility. It may very well be that a new treaty or law on the subject fits better into the tradition of anti-terrorism treaties,²⁰⁸ rather than ones pertaining to the law of armed conflict, though I do not believe that to be the case. The experts on the law of war, especially the ICRC, should be consulted despite the manner of classification. A comprehensive treaty for the treatment of terrorists that covers both war and peace will benefit from these experts, who understand the many historical compromises contributing to the evolution of the law of war that balance both humanity and security.

We live in a world where drastic changes in the law are hard to accomplish, and they have almost always been precipitated by great need and an extremely high level of conflict and casualties.

208. See *Text and Status of the United Nations Conventions on Terrorism*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG (providing examples of anti-terrorist treaties, including the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Diplomatic Agents; the 1979 International Convention against the Taking of Hostages; the 1997 International Convention for the Suppression of Terrorist Bombings; the 1999 International Convention for the Suppression of the Financing of Terrorism; and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism).

396 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 41

Acknowledging this, I admire all that the Geneva Conventions and their progeny have been able to accomplish. However, there seems to be a small hole in the Geneva Conventions that modern times have illustrated: worldwide engagement with terrorists. This issue was perhaps unforeseeable in 1949, or it was more likely deemed unimportant relative to the scale of conflict in World War II.²⁰⁹ The international community must set a minimum level of treatment for the kind of combatants it is currently fighting in order to preserve the highest level of humanitarian protections and vindicate the rule of law and democratic peace. The international community should also be prepared for the current regime to change again. More importantly, it should continue to be ready to lift the pen to preserve security through just means.

209. SUTER, *supra* note 94, at 12, 14 (noting modern guerrilla warfare existed at this time, but had not taken current form, and discussing the relative historical rarity of guerrilla movements).