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IS THE GENEVA POW CONVENTION “QUAINT”?

R. J. Delahunty†

The straightforward answer to this question is No. The Third Geneva Convention Relative to the Treatment of Prisoners of War (“POW Convention”)¹ is a legally binding document which virtually all the nations of the world have ratified and which is foundational in the Law of War. It is undoubtedly applicable to interstate armed conflicts, whether declared wars or not, such as the 1980–88 War between Iran and Iraq, the 1982 Falkland Islands War between Great Britain and Argentina, and the First and Second Gulf Wars of 1991 and 2003 between the United States-led coalitions and Iraq. Equally, the POW Convention is applicable to civil wars, which have become the dominant form of armed conflict since the Convention was ratified in 1949.² In the event of a future interstate armed conflict, such as a war between India and Pakistan, the POW Convention would regulate the status and treatment of military personnel captured by either belligerent.

The more vital question, then, is not whether the POW Convention is “quaint,” but whether it should be modernized to meet the conditions

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² In 2001, Peter Wallensteen and Margareta Sollenberg found that of the total of 111 conflicts recorded for the period 1989–2000, only seven were interstate, while ninety-five were intrastate. Another nine intrastate conflicts were accompanied by foreign intervention. See Peter Wallensteen & Margareta Sollenberg, Armed Conflict, 1989–2000, 38 J. Peace Research 629, 632 (2001).
of early twenty-first century warfare. Here, not unexpectedly, opinions will differ. In the fifty-eight-year history of the POW Convention, calls for change have not been infrequent. During the 1960s and 1970s, for instance, many Third World countries argued that the POW Convention reflected the circumstances of warfare found in Europe in the mid-twentieth century, but was poorly adapted to the needs and modes of operation of guerrilla fighters in wars of decolonization and “national liberation.” That argument contributed to the widespread (although not universal) adoption of two new “Additional Protocols” to the Geneva Conventions in 1977. Article I(4) of Additional Protocol I specifically sought to extend the coverage of the POW Convention to “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.”

3. The four 1949 Geneva Conventions were themselves designed to update an earlier set of conventions, including the Geneva Convention of July 27, 1929, 47 Stat. 2021, relating to the treatment of prisoners of war. The State Department’s letter to the Senate, submitting the 1949 Conventions for its advice and consent to ratification, said that “in the light of experiences of World War II, there was recognized by all governments the urgent necessity for rather extensive revisions of the [earlier] conventions for the purpose of bringing them up to date . . . .” Message from the President of the United States Transmitting Copies of the Geneva Conventions for the Protection of War Victims, Senate Executives D, E, F, and G, 82d Cong., 1st Sess. (Apr. 26, 1951), at A3. There is nothing immutable about the 1949 Conventions, as their own origin shows.


7. The United States has ratified the second of these two Protocols, but consciously decided not to ratify the first of them. The State Department has, however, determined that certain provisions of Protocol I are customary international law. See
agreed almost thirty years ago that the POW Convention required significant modernization to fit the realities of (then) contemporary conflict, it would hardly be remarkable if the phenomenon that some scholars of military affairs call “the new war”\(^8\) should also require commensurable changes. After all, none of the drafters of the Convention in 1949 could have anticipated the emergence of a form of warfare between States on the one side and, on the other, transnational terrorist organizations that had global reach, were capable of waging war at a level of violence and lethality comparable to those of interstate conflicts, sought to acquire weapons of mass destruction and were prepared to use them against civilian centers, operated through highly decentralized and clandestine networks, relied on combatants who


[T]here was considerable controversy in the 1970s concerning non-conventional conflicts and irregular fighters, and in the end some significant changes to previous [Geneva] law were included in the Additional Protocols... . Some of the provisions of the Protocol [I] were rejected outright [by the United States] on the grounds that they unduly favored irregulars and terrorists, and would endanger the civilian population among whom such persons might attempt to hide. This included Article 1(4), which defined so-called wars of national liberation as international conflicts, and article 44, which recognized combatant and POW status for irregulars who [in certain crucial respects] failed to distinguish themselves from the civilian population. ... Yet, the Reagan Administration supported various other provisions of Additional Protocol I and accepted that they were either already a part of customary law or should become so.


purposefully did not distinguish themselves from civilians, had no identifiable territorial base and were not responsible for protecting any local population, and (in the view of some analysts) were not pursuing any of the traditional political objectives characteristic of rebels, insurgents, resistance fighters, or national liberation movements. 9

Before attempting to evaluate whether the POW Convention needs to be revised to accommodate conflicts of this novel kind, however, we must start with a basic understanding of the Convention and the interpretative problems to which it has given rise. Although almost any characterization of the POW Convention’s provisions will provoke objections, the description in Part I below can hopefully serve as a roadmap. Part II will briefly discuss some of the objections to the government’s position on the POW Convention. In particular, it will consider the position of the International Committee of the Red Cross (ICRC) and some advocacy groups that the concept of “unprivileged” or “unlawful” combatancy has no place in the Convention system, and the accompanying view that the POW Convention and the Fourth (Civilian) Convention are seamless, in the sense that persons not protected by the POW Convention must be protected by the Civilian Convention. 10 Part III considers the Supreme Court’s rulings on the government’s position in the Hamdan case, 11 and Congress’s swift and emphatic decision to reverse the Court legislatively. Finally, Part IV returns to the original question, whether the POW Convention stands in need of modernization. It offers both a proposal for consolidating the ongoing reform of the Convention system and a means for pursuing further efforts at reform.

I.
The POW Convention embodies three critical distinctions: between kinds of conflicts; between levels of protection; and between kinds of combatants.

First, the POW Convention differentiates between two kinds of conflict: those governed by Article 2, and those governed by Article 3. Article 2 refers, in effect, to interstate or international wars or other

10. For the ICRC’s position, see Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* 397 (2005). Some advocacy groups have also adopted this position, e.g., the Petitioners in the Supreme Court of Israel case, H.C. 769/02, Public Comm. Against Torture in Israel v. Israel, ¶ 5 (Dec. 11, 2006), *translation available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm.
armed conflicts between States, and adopts a functionalist (as opposed to formalist) approach by including undeclared as well as declared wars. By contrast, Article 3 (often called "Common" Article 3, because it is found in all four Conventions) refers to armed conflicts "not of an international character" (emphasis added) that "occur[] in the territory of one of the High Contracting Parties" to the Convention. What is operationally a single armed conflict can in some cases be legally bifurcated into an Article 2 conflict and an Article 3 conflict: thus, for a period, the United States treated the War in Vietnam as an Article 2 conflict insofar as it concerned the States of North and South Vietnam (the latter of which was being assisted by the United States), and as an Article 3 conflict insofar as it concerned the Viet Cong forces in South Vietnam.

Article 3's reference to non-international armed conflicts within the territorial boundaries of a State Party is, perhaps designedly, somewhat opaque. It is safe to say, however, that Article 3 was intended to cover internal (as opposed to interstate) wars, and was addressed primarily, perhaps entirely, to civil wars or insurgencies, such as the heavily internationalized Spanish Civil War of 1936–39, which the Convention's drafters had lived through and which unquestionably influenced their work, and the Chinese Civil War of 1927–50 and Greek Civil War of 1944–49, both of which were ongoing as the Convention was being drafted.

In four ways, the text of Article 3 supports a reading that confines its application to such internal or civil wars.

i) Article 3 distinguishes Parties to the Convention from Parties "to

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13. See Rubin, supra note 5, at 479.
16. Article 3 may also have been intended to reach wars of colonial rebellion (or, as they came to be called, wars of national liberation). See Geoffrey Best, War & Law Since 1945 177 (photo reprint 2002) (1994); François Bugnion, The Geneva Conventions of 12 August 1949: From the 1949 Diplomatic Conference to the Dawn of the New Millennium, 76 INT'L AFF. 41, 44 (2000). However, in the years that ensued, Great Britain refused to concede the applicability of Article 3 to such conflicts in Kenya, Malaya, and Cyprus, and France, at least for a period, denied the applicability of Article 3 to the conflict in Algeria. See Tom Farer, Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict", 71 COLUM. L. REV. 37, 52–54 (1971). Additional Protocol I was designed in part to cure this uncertainty.
the conflict"; the former term would naturally be understood to include the State whose de jure government had formally ratified the Convention, while the latter term would include the opposing side in the internal conflict which, as a mere claimant to governmental authority, could not have represented a State "Party" to the Convention.

ii) Article 3's coverage is limited to certain armed conflicts "occurring in the territory of one of the High Contracting Parties." Unlike most interstate conflicts, civil wars and national insurgencies are ordinarily fought out entirely within the territorial boundaries of the nation at war (allowing for some spillover, such as naval conflicts between government and rebel forces in international waters).

iii) Article 3 is also limited to armed conflicts "not of an international character." The distinction between "international" and "non-international" conflicts was deeply engrained in Western legal thought before 1949, and indeed goes back to Antiquity. The conduct of civil war by the de jure government affected was traditionally considered to be a purely internal or domestic matter, and thus outside the purview of international lawmaking. Equally, since rebels and insurgents were considered not to be subjects of international law, their manner of waging war was also thought to be beyond the reach of international regulation. Pre-1949 international conventions accordingly did not embody rules for the humanitarian regulation of civil war: the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land, for instance, applied solely to international warfare. Even now, the Rome

17. See Stephen C. Neff, War and the Law of Nations 250 (2005) ("In Western thought, there was a long tradition of regarding civil conflict as fundamentally different from true war. . . . Concretely, this meant that none of the rituals associated with war-making and war-waging was applicable to struggles against mere lawbreakers. Nor did the rules on the conduct of war apply.").


20. Neff, supra note 17, at 367 ("Not until 1949 . . . were rules on the waging of civil strife embodied in international conventions, and even then only in a very rudimentary fashion.").
Statute of the International Criminal Court perpetuates a form of the international/non-international distinction. Article 3's extension of even modest international humanitarian standards to some aspects of "non-international" war thus represented, for the time, a significant departure from legal tradition.

iv) Finally, Article 3's last clause states that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict." In the official commentary on the Convention by the ICRC, Jean Pictet emphasized that this language was designed to accommodate the fears of States that by agreeing to extend even minimal legal protections to their opponents in a civil war, they would implicitly be recognizing their legal status as "belligerents" or "insurgents." The understanding that Article 3 was to apply to civil war and insurgency—and not, accordingly, to all possible forms of armed conflict not covered by Article 2—has long been dominant among scholarly commentators, including Pictet.

21. See Stewart, supra note 12, at 321. For an explanation of the traditional legal doctrines of recognition of "belligerency" and "insurgency," see David A. Elder, The Historical Background of Common Article 3 of the Geneva Convention of 1949, 11 CASE W. J. INT'L L. 37, 38-41 (1979). Roughly, by recognizing the "belligerent" status of the parties to a civil war, a foreign State held those parties to be entitled to the full rights of war (as in an interstate conflict), and assumed all the obligations of the law of neutrality as between them. Recognition of belligerency was not, however, tantamount to the recognition of the insurgents as an independent State. Recognition of insurgency was a truncated form of recognition of belligerency: it did not trigger the application of the law of neutrality but it did entail treating the insurgents as belligerents within the boundaries of the country in which the civil war was occurring. "Within the territory of the afflicted country, ... insurgency and belligerency had much the same effect. The most obvious one was that captured insurgents were entitled to treatment as prisoners of war rather than as criminals, at least during the continuance of the hostilities." Neff, supra note 17, at 269.

22. Even after Article 3 had become settled law, its applicability to some aspects of civil war remained disputed. For example, "[t]he relationship between the opposition and the forces of a state intervening on behalf of the established government creates a[n] ... ambiguous legal situation" under that provision. W. Michael Reisman & James Silk, Which Law Applies to the Afghan Conflict?, 82 AM. J. INT'L L. 459, 466 (1988).

23. Pictet wrote: "This clause is essential. Without it Article 3 would probably never have been adopted. It meets the fear that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the de jure Government's suppression of the revolt by conferring belligerent status, and consequently increased authority and power, upon the adverse Party." Jean Pictet, Commentary, Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, available at http://www.icrc.org/ihl.nsf/COM/375-5900067?OpenDocument.

24. See, e.g., Oeter, supra note 18, at 201-03 ("Instead of extending the legal rules for international armed conflict to 'non-international armed conflicts,' as originally
Second, the POW Convention affords two different levels of protection for those whom it covers. Combatants in international, Article 2 conflicts, if they satisfy the qualifications laid out in Article 4, are legally entitled to POW status, which effectively includes all the substantive protections in the Convention. Thus, e.g., although their captors may interrogate them on any matter whatsoever, they are "bound to give only [their] surname, first names and rank, date of birth, and army, regimental, personal or serial number or, failing this, equivalent information." Art. 17(1). Further, "[p]risoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Art. 17(4). By contrast, captured combatants in non-international, Article 3 conflicts are not intended by the ICRC, the negotiators developed their own body of rules specifically adapted to civil war situations. This separate body of rules took the form of a minimum standard [in Article 3] that restricts the freedom of states to use force against civil war opponents by guaranteeing a series of safeguards for wounded, prisoners and members of the civilian population. . . . What is regulated by common Article 3 is not the behavior of states (or contracting parties) in their reciprocal relationship, but the behavior of states in their own sphere of jurisdiction."); Dietrich Schindler, Significance of the Geneva Conventions for the Contemporary World, 836 INT'L REV. RED CROSS 715 (1999), available at http://www.icrc.org/web/eng/siteeng0.nsf/html/57IQ6T ("Article 3 common to the four Conventions constitutes a kind of human rights provision; it regulates the relationship between governments and their own nationals in the event of an internal armed conflict."); ERIK CASTRÉN, CIVIL WAR 85 (1966) ("[Common Article 3] would be valid in a civil war, in insurrections, and in other internal disturbances in which it is not merely a question of riot, disorder or minor demonstrations, but where a warlike situation which the police forces are unable to quell has arisen. The Article has special significance in civil wars and uprisings where the insurgents have not been recognized as belligerents, since after such recognition the insurgents may avail themselves of all belligerency rights."); see also G.I.A.D. DRAPER, REFLECTIONS ON LAW AND ARMED CONFLICTS 108 (1998); Joyce Gutteridge, The Geneva Conventions of 1949, 26 BRIT. Y.B. INT'L L. 294, 300 (1949).

25. See Pictet, supra note 23 ("Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with 'armed forces' on either side engaged in 'hostilities'—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country."). Further, Pictet's commentary on Article 3 also enumerates a "list. . . of a certain number of criteria on which the application of the Convention would depend." These criteria plainly assume that Article 3 refers to civil war or domestic insurgency. For instance, the first criterion is:

That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

And Pictet's fourth criterion includes these elements:

(a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory . . . .
legally entitled to the status of POWs. Rather, they are legally entitled only to the modest (if indefinite) protections specifically enumerated in Art. 3(1)–(4)—in effect, to treatment in accordance with the bedrock humanitarian principles of the POW Convention. The plain language of Article 3 supports this conclusion: it states that parties to the conflict “should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.” By necessary implication, the “other provisions” of the POW Convention are not applicable (except by “special agreement”) when Article 3 applies.

Third, the POW Convention distinguishes—not in express terms, but by necessary implication—between two different kinds of combatants. Article 4 lays down a set of detailed requirements that must be met before a captive qualifies legally for POW status. These requirements, which derive from Article 1 of the 1899 Hague Convention with Respect to the Laws and Customs of War on Land, are designed to maintain and protect the distinction, fundamental to the Law of War, between combatants and civilians. Simplifying somewhat, captured combatants are only legally eligible for POW status under the Convention if they satisfy four tests: they must i) be commanded by a person responsible for his subordinates; ii) have a fixed, distinctive emblem recognizable at a distance; iii) carry arms openly; and iv) conduct their operations in accordance with the laws and customs of war. Article 4(A)(2)(a)–(b).

It is obvious that some combatants—perhaps even including members of a Party’s regular armed forces—will not satisfy all of these cumulative requirements, and hence will not qualify for POW status. For example, an undercover operative for the CIA who engaged in conflict in Afghanistan against the Taliban would not be entitled to POW status if he was captured while not wearing “a fixed distinctive sign recognizable at a distance.” Likewise, a regular U.S. Army officer who infiltrated

26. See Stewart, supra note 12, at 320 (“[T]here is no requirement in ... Article 3 ... that affords combatants prisoner-of-war status in non-international armed conflicts.”).
27. As indicated above, the requirements under Additional Protocol I are more relaxed.
28. Persons need not, however, be members of the regular armed forces of a party to the conflict in order to qualify for prisoner of war status: they may also include certain persons who accompany the armed forces without actually being members of them (such as war correspondents); certain crew members of the merchant marine or civil aviation; and certain combatants in the levee en masse.
29. Note, however, that “[t]he codified law of war for international armed conflict does not prohibit the wearing of a non-standard uniform. It does not prohibit the wearing of civilian clothing so long as military personnel distinguish themselves from the civilian
behind enemy lines in the Afghan War as a military spy, and who failed to carry his weapons openly, would also be ineligible for POW status. If these combatants are captured by the enemy in an Article 2 armed conflict, they must therefore fall outside the protections of the Convention (including those of Article 3, which refers only to non-international conflicts.) At best, if "any doubt" arises as to their legal status, they may enjoy the Convention’s full protections “until such time as their status has been determined by a competent tribunal.” POW Convention, Article 5. If no “doubt” has arisen about their status, or if a competent tribunal has determined that they do not fall within any of the categories of Article 4, then they fall outside the Convention. The drafters of the Convention devoted some attention to this matter, but reasonable readers can disagree over the interpretation of that evidence in the negotiating record.

Combatants in an Article 2 conflict who do not satisfy the tests of Article 4 and who therefore do not qualify for POW status are widely considered to be “unlawful” or “unprivileged” combatants. In the War in Afghanistan, the United States government took the position that although the POW Convention was indeed applicable to its conflict with the Taliban under Article 2, captured Taliban combatants were not entitled to POW status because they failed to meet all the requirement of Article 4 (specifically, the requirements of wearing a fixed distinctive emblem and of fighting in accordance with the laws of war).

population, and provided there is legitimate military necessity for wearing something other than standard uniform. The generally recognized manner of distinction when wearing something other than standard uniform is through a distinctive device, such as a hat, scarf, or armband, recognizable at a distance.” W. Hays Parks, Special Forces’ Wear of Non-Standard Uniforms, 4 CHI. J. INT’L L. 493, 542 (2003).

30. To be sure, the requirements have to be interpreted reasonably: if a U.S. Marine was captured while sleeping in his tent—and so not “carrying arms”—he would not therefore be disqualified from being a POW.


32. Accord Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 47–50 (2004)(“In light of close scrutiny of the war in Afghanistan by the world media—and, in particular, the live coverage by television of literally thousands of Taliban troops before and after their surrender—it is undeniable that, whereas Taliban forces were carrying their arms openly (condition (iii)), and possibly meeting other conditions of lawful combatancy, they did not wear uniforms nor did they display any other fixed distinctive emblem (condition (ii)). Since the conditions are cumulative, members of Taliban forces failed to qualify as prisoners of war under the customary international law criteria. These criteria admit of no exception, not even in the unusual circumstances of Afghanistan as run by the Taliban regime. . . . The legal
the government’s view, the captured Taliban were unlawful or unprivileged combatants.

A second kind of unlawful or unprivileged combatant will exist if there are armed conflicts that do not fall under either Article 2 or Article 3—that is, that are neither international wars nor non-international wars occurring within the territory of a State Party to the Convention. The United States government took the position that its conflict in Afghanistan with al Qaeda forces was of this kind. That is, the conflict against al Qaeda was not an Article 2 armed conflict, primarily for the reason that al Qaeda is not a State and could not be a treaty party. Further, the government argued, the conflict with al Qaeda did not fall under Article 3, because it was neither a civil war nor other internal conflict covered by that article. Consequently, in the government’s view, al Qaeda captives from the War in Afghanistan were also outside the protections of the Convention.

See also Raymund T. Yingling & Robert W. Ginnane, The Geneva Conventions of 1949, 46 AM. J. INT’L L. 393, 402 (1952) (“While the conditions imposed by the convention for treatment as prisoners of war of members of resistance movements would not have covered many persons acting as ‘partisans’ during World War II, nevertheless, it is believed that such conditions are the minimum necessary if regular forces are to have any protection against attacks by the civilian population and if any distinction is to be made between combatants and noncombatants. The farmer by day, assassin by night, type of ‘partisan’ cannot be condoned by international law, whatever other justification circumstances may give him.”); Michael C. Dorf, “What Is an ‘Unlawful Combatant,’ and Why It Matters: The Status of Detained al Qaeda and Taliban Fighters”, (Jan. 23, 2002), available at http://writ.news.findlaw.com/dorf/20020123.html.

33. Accord Military Prosecutor v. Kassem (Israel, Mil. Ct. 1969), excerpted in INTERNATIONAL COMMITTEE OF THE RED CROSS, HOW DOES LAW PROTECT IN WAR? 806 (Marco Sassoli and Antoine A. Bouvier eds., 1999) (rejecting claim that combatant belonging to the Popular Front for the Liberation of Palestine, despite wearing military dress and carrying a military pass when captured, was entitled to protection under Third Geneva Convention as a prisoner of war):

We agree that the Convention applies to military forces (in the wide sense of the term) which, as regards responsibility under International Law, belong to a State engaged in armed conflict with another State, but it excludes those forces—even regular armed units—which do not yield to the authority of the State and its organs of government. The Convention does not apply to these at all. They are to be regarded as combatants not protected by the International Law dealing with prisoners of war . . . .

See also Judith Tucker, The Prisoners of Israel, MERIP Reports, No. 108/109, The Lebanon War (Sept.–Oct. 1982), at 55–57 (noting that Israel refused to grant POW status to Palestinian prisoners captured in 1982 War in Lebanon).

34. The government’s conclusions were embodied in a Memorandum from the President to the Vice President et al., Subject: Humane Treatment of al Qaeda and Taliban Detainees, February 7, 2002, available at http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBBB127/02.02.07.pdf [hereinafter “Humane Treatment
The category of "unprivileged" or "unlawful" combatants was by no means invented by government lawyers during the current Administration, as some critics have mistakenly asserted. On the contrary, the category is well entrenched in the customary Law of War, and was not superseded by any of the 1949 Geneva Conventions. As William Howard Taft, IV, the then-Legal Advisor to the State Department, wrote in 2003, "the law of armed conflict itself disqualifies some fighters and categories of people seeking to fight from claiming certain privileges. But this is precisely what the law calls for, and it is a validation of long-standing elemental principles of the law of armed conflict, in particular distinguishing privileged from unprivileged belligerency." Even legal scholars who disagreed with the Administration’s application of the Convention to the Afghan conflict, including Professor Adam Roberts of Oxford University, firmly emphasized the continued existence of this category of combatants.

To be sure, under the traditional Law of War (even after the 1949

Memorandum").

35. John Bellinger, the current Legal Adviser to the State Department, has written that he “frequently hear[s] the charge in Europe and elsewhere that this term ['unlawful enemy combatants'] has no basis in national or international law, and I fear that this has become conventional wisdom among critics of U.S. policy. In fact, the distinction between lawful and unlawful enemy combatants (also referred to as 'unprivileged belligerents') has deep roots in international humanitarian law, preceding even the 1949 Geneva Conventions . . . and this distinction remains to this day.” [Opinio Juris], John Bellinger, Unlawful Enemy Combatants (posted Jan. 17, 2007), available at http://lists.powerblogs.com/pipemail/opiniojuris/2007-January/001111.html.

36. See, e.g., Ex parte Quirin, 317 U.S. 1 (1942).

37. William H. Taft, IV, The Law of Armed Conflict After 9/11: Some Salient Features, 28 YALE J. INT’L L. 319, 320 (2003). Referring to al Qaeda, Mr. Taft went on to say: “Terrorists are belligerents who lack the entitlements of those legitimately engaged in combat. No colorable argument has been put forward that terrorists are entitled to any special status under the law of armed conflict – and certainly not to the status of prisoners of war under the Third Geneva Convention. . . . It is of fundamental importance that Article 4, consistent with the maxim expression unius est exclusio alterius, imposes a distinction between the legitimate and the illegitimate combatant . . . The purposes of the law of armed conflict are not advanced by granting illegitimate fighters immunity for their belligerent acts . . .” Id. at 320–21.

38. See, e.g., Adam Roberts, The Prisoner Question; If the U.S. Has Acted Lawfully, What's the Furor About?, WASH. POST, Feb. 3, 2002, at B1 (“On the key question of whether there can be a category of detainee not qualifying for POW status, a press officer of the [ICRC] has been quoted as saying that the concept of an ‘unlawful combatant’ does not exist under international law. This is simply wrong. True, it is impossible to find the term ‘unlawful combatant’ in any treaty. But the concept of ‘unlawful combatant,’ or something very like it, is implicit in the definitions of unlawful combatants that appear in the key treaties.”).
Conventions), the protections that attached to a captured unlawful combatant were few. In his seminal 1952 work on the subject of unlawful combatancy, R. R. Baxter explained that

[the correct legal formulation is ... that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy.... International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents.]

Perhaps taking Baxter's broad references to international law at face value, critics of the Administration have also claimed that its legal position created a legal "black hole" into which al Qaeda and Taliban prisoners could disappear. Again, they are mistaken. In the years since Baxter wrote, general international law—if not the 1949 Convention itself—has developed in ways that afford basic humanitarian protections even to unlawful combatants. Foremost among these developments stands the 1984 Convention Against Torture, which applies not only to governments' treatment of their own nationals, but also to the captivity of all lawful or unlawful combatants in their hands. Other provisions of international law are also applicable. Although the United States has not ratified Additional Protocol I of 1977, it has designated certain provisions of that treaty as customary international law. Among these is Article 75 of that Protocol, which embodies a set of core humanitarian protections for "persons who are in the hands of a Party to the conflict" if those persons are "affected by a situation referred to in Article 1 of this Protocol." These protections arguably apply as a matter of customary law (if not of conventional or treaty law) to all prisoners from the War in Afghanistan. Further, the International Court of Justice (ICJ) has

41. See Taft, supra note 37, at 321 ("Certain minimum standards apply to the detention of even unprivileged belligerents—they are not 'outside the law.' Terrorists forfeit any claim to POW status under the laws of armed conflict, but they do not forfeit their right to humane treatment . . . . The customary law of armed conflict innovated a structure to deal with the situation of persons—like terrorists—who fall into 'enemy' hands without meeting the basic criteria of Article 4 of the [POW Convention].").
42. See id. at 322 ("While the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of the enemy are entitled."). The express restriction of Article 75 to "a situation referred to in Article 1 of this Protocol" should,
opined that Article 3 of the 1949 Convention itself now constitutes a rule of customary international law. That ruling could afford a basis in customary international law for extending the Article's protections to unlawful combatants from any kind of armed conflict, including those not reached directly by the Convention. Finally, the so-called "Martens Clause" of the 1899 Hague Convention on the Laws and Customs of War on Land might conceivably be invoked as a basis for protection.

The critics who claim that the Administration's position on the POW Convention created a legal "black hole" are, therefore, mistaken. International law, both through the Torture Convention and as a matter of custom, affords basic humanitarian protections to every variety of captured unlawful combatant. True, some writers, including the present one, have argued that the President is not constitutionally bound to comply with the requirements of customary international law. But that conclusion does not reach the United States' treaty obligations. Furthermore, even if the President has the constitutional power to override customary international law (as assumedly embodied in Article 3 of the POW Convention), there is nothing to indicate that he has in fact done so. On the contrary, on February 7, 2002, the President issued a Directive ordering the United States Armed Forces, "as a matter of policy... [to] continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." While there is certainly play in the

however, be noted. Article 1 of the Protocol refers to armed conflicts covered by Article 2 of the 1949 Convention, as expanded to include wars of national liberation and the like. Strictly, therefore, Article 75 may reach only Taliban captives, not al Qaeda members. As against this, however, one might argue that the al Qaeda captives are at least "affected by" an Article 2 conflict—viz., the United States' conflict with the Taliban.


44. That Clause, introduced by the Czarist diplomat Professor von Martens, is located in the Preamble to the treaty and states: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience." The Martens Clause has reappeared in later treaties, but has no generally accepted meaning. See Rupert Ticehurst, The Martens Clause and the Rules of Armed Conflict, 317 INT'L REV. RED CROSS 125 (1997), available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JNHY.


46. Memorandum from President George W. Bush, re Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), at 2, ¶ 3, available at
joints of this language, it could reasonably have been read as an order to the military to extend Article 3 protections to the unlawful combatants in their hands. In a memorandum of July 7, 2006, the Department of Defense apparently read it to have had that effect. Indeed, despite being unilateral, the President’s Directive might even have been considered, under the ICJ’s ruling in *Nuclear Test Case (Australia & New Zealand v. France)*, to constitute a binding obligation under international law.

Unlawful combatants, in short, do not fall into a legal “black hole.” Although not legally entitled to protection solely by reason of the Convention itself, they are otherwise protected both by conventional and customary international law, as well as by the Presidential Directive. In one respect, however, the Administration’s critics do have a valid point. The Presidential Directive and the later Defense Department memorandum applied in terms only to the United States Armed Forces. The CIA was not covered by those orders. The absence of any reference to the CIA could not, of course, absolve that agency from any obligations it had under international law, including the Torture Convention and (insofar as it is considered to be customary international law) Article 3 of the POW Convention. But it did mean that the CIA operated under fewer legal constraints than the Defense Department on the domestic side.

III.

So far we have proceeded without reference to the Supreme Court’s opinion last summer in the *Hamdan v. Rumsfeld* case, which overturned


47. In a memorandum dated July 7, 2006, Deputy Secretary of Defense Gordon England instructed “all DoD personnel [to] adhere to these standards [in common Article 3]. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3.” Deputy Secretary England’s memorandum also stated that, apart from the military commission procedures reviewed in *Hamdan*, “existing DoD orders, policies, directives, executive orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3.” See Office of the Secretary of Defense, Memorandum for Secretaries of the Military Departments, July 7, 2006, available at http://jurist.law.pitt.edu/pdf/genevaconsmemo.pdf.


49. The question of the CIA’s possible liability under domestic criminal law for some of the actions it is thought to have committed against al Qaeda or Taliban captives is illuminatingly discussed in A. John Radsan, *The Collision Between Common Article Three and the Central Intelligence Agency*, 52 CATH. U. L. REV. (forthcoming 2007).
part of the government’s legal position.\textsuperscript{50} Congress acted swiftly and decisively to overturn the Court in the Military Commissions Act of 2006 (MCA).\textsuperscript{51} We must now consider both that Court’s opinion and Congress’s subsequent decision to overrule it.

Hamdan was an al Qaeda combatant of Yemeni nationality who had been captured in November 2001 during the hostilities in Afghanistan and who was detained in Guantanamo awaiting trial on war crimes charges before a military commission. Hamdan did not deny that he was an enemy combatant. He sought judicial relief in a habeas petition claiming that the military commission before which he had been charged lacked the authority to try him. The D.C. Circuit Court of Appeals rejected Hamdan’s petition.\textsuperscript{52} All three members of the court agreed in ruling that the Convention was not judicially enforceable and that Hamdan was therefore not entitled to relief. Further, the majority opinion for the court discussed and accepted the proposition that “the 1949 Convention does not apply to al Qaeda and its members.”\textsuperscript{53} The majority’s opinion on the scope of the Convention, including the inapplicability of Article 3, was joined by then-Judge John Roberts, who was soon after to be appointed Chief Justice of the Supreme Court.

In a 5-3 opinion written by Justice Stevens (Chief Justice Roberts was recused because of his participation in the appeal below), the Supreme Court reversed the D.C. Circuit’s decision. In the part of his opinion most relevant here, Justice Stevens left undecided the question whether the Convention was inapplicable in its entirety to Hamdan because al Qaeda is not a State Party to it.\textsuperscript{54} But Justice Stevens did decide that Article 3 applied to Hamdan’s case.\textsuperscript{55} Justice Stevens reasoned that the “conflict not of an international character” to which Article 3 referred was distinguishable from the kind of conflict referred to in Article 2 “chiefly because it does not involve a clash between nations (whether signatories or not).”\textsuperscript{56} For Justice Stevens, “[t]he term ‘conflict not of an international character’ is used [in Article 3] in contradistinction to a conflict between nations.”\textsuperscript{57} In reaching that

\begin{itemize}
\item \textsuperscript{50} 126 S. Ct. 2749 (2006).
\item \textsuperscript{52} \textit{See} Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).
\item \textsuperscript{53} \textit{Id}. at 41.
\item \textsuperscript{54} \textit{Hamdan}, 126 S. Ct. at 2795. As discussed further below, however, the Court’s ruling that Article 3 covered the al Qaeda captives appears to necessitate the conclusion that the remainder of the POW Convention does \textit{not} apply to them.
\item \textsuperscript{55} \textit{Id}.
\item \textsuperscript{56} \textit{Id}.
\item \textsuperscript{57} \textit{Id}.
\end{itemize}
conclusion, Justice Stevens rejected the government’s view that Article 3 was not intended to be a catch-all that established standards for any and all armed conflicts not included in Article 2.

Justice Thomas, joined by Justice Scalia, disagreed with the majority’s ruling regarding Article 3. (Justice Alito, while dissenting, did not reach that issue.) Noting that the Court’s own precedents required it to give “great weight” to the President’s interpretation of that treaty clause, Justice Thomas reasoned that “[t]he President’s interpretation of Common Article 3 is reasonable and should be sustained.”

Further, Justice Thomas observed:

The Court does not dispute the President’s judgments respecting the nature of our conflict with al Qaeda, nor does it suggest that the President’s interpretation of Common Article 3 is implausible or foreclosed by the text of the treaty. Indeed, the Court concedes that Common Article 3 is principally concerned with “furnish[ing] minimal protections to rebels involved in . . . a civil war,” precisely the type of conflict the President’s interpretation envisages to be subject to Common Article 3.

Specifying the precise holding of Hamdan as to the scope of the Convention is not altogether easy. The Court plainly did not hold that the any provisions of the Convention other than Article 3 were applicable to al Qaeda captives. In view of the breadth of the Court’s language, however, it appears to have held that all al Qaeda captives are entitled to all Article 3 protections.

Hamdan undoubtedly represented a setback for the government; but how much of one? The Court was in error analytically about the applicability of Article 3. It signally failed to do justice either to the textual considerations mentioned in Part I above or to the extensive scholarly interpretation—including that of the ICRC—of that text. It gave no discernible meaning to the language of Article 3 that confined that provision’s application to armed conflicts internal to “the territory of one of the High Contracting Parties.” It ignored evidence from the negotiating history, including the Conference’s rejection of a proposal by the Italian delegation that would have made the Convention’s basic

58. Id. at 2846 (Thomas, J., dissenting).
59. Id. (citation omitted).
humanitarian principles applicable "at any time and in all places," i.e., to all non-international conflicts. It also ignored State practice under Article 3, including, e.g., a Belgian judicial decision holding Article 3 inapplicable to armed conflict among various Somali militia groups. It failed to consider the possibility that the scope of Article 3's reference to armed conflicts "not of an international character" coincides with that of Additional Protocol II, which is intended to "develop[] and supplement Article 3" of the Convention, and which is limited only to such conflicts on the territory of a High Contracting Party as involve both that Party's armed forces and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the High Contracting Party's] territory as to enable them to carry out sustained and concerted military operations and to implement" Additional Protocol II. And, as Justice Thomas pointed out, it refused to follow its own precedent in giving deference to the executive in a case in which treaty language admitted of different but reasonable interpretations. (Professors Posner and Vermeule have castigated the Court's approach to this last issue as "lawless.")

That said, does Hamdan's mistaken view of Article 3 really make a significant practical difference to the government's treatment of the captives from the War in Afghanistan? As far as the Armed Forces go, Hamdan should not have made any material difference, at least if the President's February 7, 2002 Directive and subsequent Defense Department instructions had been faithfully implemented: treatment that the Court held to be a matter of legal entitlement should have been accorded in any event as a matter of Presidential policy. The Court's

61. For the language of that proposal and an analysis of its intended effects, see Elder, supra note 21, at 45–46.
63. Additional Protocol II, supra note 6, art. 1(1). Concededly, the threshold for applying Additional Protocol II is widely considered to be higher than that for Common Article 3; but a comprehensive and convincing treatment of the Common Article 3 would at least have considered that question.
64. Justice Thomas should have pressed his point even harder. Not only did the Court fail to give deference to the executive's construction of the treaty, but it did give deference to the ICRC's interpretation of it. See Hamdan, 126 S. Ct. at 2796. Judicial deference to the executive's interpretation of a treaty has constitutional underpinnings, and reflects the executive's constitutional primacy in foreign affairs; deference to the construction of a non-governmental relief organization has no such constitutional foundation.
decision *might* have made a difference to the treatment of captives in the hands of the CIA, which was not covered by the President’s Directive; but as to that, we can only speculate.\(^{66}\)

Moreover, as Professor Kenneth Anderson has noted, *Hamdan’s* holding on Article 3 appears to entail some remarkable consequences that should be welcome to the government.\(^{67}\) First, given that the Court ruled that the conflict with al Qaeda was “not of an international character,” it follows directly that that conflict is *not* an “international” conflict under Article 2; and since the other protections of the Convention are applicable only in international conflicts, al Qaeda captives necessarily get no Convention protections other than the minimal ones specified in Article 3. As is frequently said, Article 3 is in itself a Convention in miniature; and those who enjoy *its* protections in non-international conflicts cannot enjoy the full Convention protections, which are tied solely to Article 2, international conflicts. (Remember that the text of Article 3 demonstrates elsewhere that when it applies, the other provisions of the POW Convention do not: that is why “special agreements” are needed in Article 3 situations to bring “all or part of the other provisions” into effect.)

Second, if the United States is bound to accord Article 3 treatment to al Qaeda captives, then al Qaeda, whether it consents or not, is bound to accord the same treatment to captured U.S. military personnel: the obligations are symmetrical. Accordingly, Article 3(1)(d)’s requirement that al Qaeda captives, if tried at all, must be tried “by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” would be satisfied if the United States provided the same kind of courts and judicial procedures that al Qaeda would provide in trying U.S. defendants—assuming that al Qaeda could meet the minimum standards here.

Third, as Anderson points out, it seems to follow also that al Qaeda captives cannot be entitled to the general protections of the Civilian Convention, because those protections too are applicable only in Article 2, international armed conflicts.\(^{68}\) As noted above, the ICRC, along with

\(^{66}\) See Radsan, *supra* note 49, for discussion of press and other reports of CIA activities.


\(^{68}\) To be more precise: the general protections of the Civilian Convention, other than those that are to be implemented in peacetime or during an occupation, apply only to conflicts of the kind mentioned in Article 2 of that Convention, which here coincides
some legal scholars and activists, rejects the notion of unlawful combatancy. The ICRC instead takes the position that the POW Convention and the Civilian Convention are seamless, in the sense that persons not protected by the POW Convention must be protected by the Civilian Convention. Thus, on the ICRC’s view, it appears that if Osama bin Laden is not a POW, he must be a civilian, entitled to all the protections that the Civilian Convention affords to persons with that legal status, subject only to the limited “derogations” permitted under Article 5 of that Convention. Hamdan implicitly rejects that (grotesque) conclusion.

69. The ablest presentation of this view of which I am aware is in Dormann, supra note 31. A summary treatment is found in Joseph Margulies, Guantánamo and the Abuse of Presidential Power 57–58 (2006). Note that there is in any case a “nationality” exclusion under Article 4(2) and (3) of the Fourth Convention.

70. Even the more nuanced view that al Qaeda terrorists should be considered to be “civilians” when they are not “directly” taking part in hostilities is unsound, and has rightly been rejected by the United States. In Public Comm. Against Torture in Israel v. Israel, the Supreme Court of Israel came to a different conclusion, rejecting the Israeli government’s claim that “people who take active and continuous part in an armed conflict . . . should be treated as [unprivileged] combatants . . . and . . . do not enjoy [either] the protections granted to civilians . . . [or] the rights and privileges of [lawful] combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war.” Supra note 10, at ¶27. The Israeli Court relied on Art. 51(3) of Additional Protocol I, which codifies the view that unprivileged combatants are civilians “unless and for such time as they take a direct part in hostilities.” Although Israel is not a party to that Protocol, the Israeli Court viewed the provision as customary international law, see id. at ¶ 30, which was therefore directly incorporated into the domestic law of Israel, see id. at ¶ 20.

The United States, which (like Israel) is not a party to Additional Protocol I, does not accept the view that Article 51(3) states customary law, and (unlike Israel) would not incorporate the provision into its domestic law even if it were so. Moreover, treating al Qaeda (or other) transnational terrorists as “civilians” except when they are taking a “direct part in hostilities” enables them to shift opportunistically between “combatant” and “civilian” status. This effect would substantially weaken the protections that the Law of War affords for peaceable civilians. Thus, if terrorists were free to pose as civilians when it served their purposes, but also retained the right to act as combatants when they chose to do so, the regular forces opposing them would have powerful incentives to view all enemy civilians as potential terrorists, and hence to treat them harshly. Indeed, the United States refused to ratify Additional Protocol I because (among other reasons) it had
Hamdan’s implicit rejection of the ICRC’s view concerning the applicability of the Civilian Convention may prove to be a signally important consequence of that decision. In effect, Hamdan seems to preserve the doctrine of unlawful belligerency, which has been one of the key conceptual elements of the government’s legal strategy. Moreover, in the wake of Hamdan, Congress has enacted the MCA, which explicitly affirms and codifies that doctrine. Before returning to the question whether the Convention should be modernized, we must briefly consider the MCA.

The MCA was, in substance, a Congressional decision to override the Hamdan decision by legislation. Of greatest relevance here, the MCA gutted one of the core holdings of Hamdan by expressly authorizing the President to establish military commissions for the prosecution of offenses committed by “unlawful enemy combatants”—a term defined to include “a person who is part of the Taliban, al Qaeda, or associated forces.” Further, the MCA specifically provided that “[n]o unlawful enemy combatant subject to trial by [these] military commission ... may invoke the Geneva Conventions as a source of rights.” The MCA also provided that “[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States ... is a party as a source of rights in any court of the United States or its States or territories.” In effect, then, the MCA makes all four of the Geneva Conventions—including Common Article 3—unenforceable either by the courts in civil cases or by the military commissions. Further, the MCA confirmed the President’s authority with respect to treaty interpretation. It stated: “As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions.” Rarely can a Supreme Court decision have been so swiftly, massively and stingingly rejected by the political branches as Hamdan was. From the point of view advocated in this paper, Congress’s determination to define and codify the concept of “unlawful enemy combat”—surely an exercise of Congress’s constitutional power to
define and punish offences against the Law of Nations— is critical: at least as far as the domestic law of the United States is concerned, there is such a legal category, and any argument that the Geneva Conventions do not recognize that category has little practical effect. Further, the MCA delineates, with far more detail and precision than Article 3, exactly what kinds of courts and judicial processes are to be furnished to the unlawful enemy combatants within the statute’s definition. Whatever one thinks about the sufficiency of those processes, the MCA makes an essential contribution to the Law of War by specifying standards that the Convention left inchoate and uncertain.

IV.

Finally, I turn very briefly to the question from which this paper started: Does the POW Convention require modernization? In one respect, it appears to this writer that the answer must be Yes. The POW and Civilian Conventions, taken together, do not in express terms recognize the customary law category of unlawful combatancy. True, it is generally accepted that the category survived the adoption of the Conventions and has remained applicable to certain combatants in certain types of armed conflict; but the omission of any reference to it in the treaty texts themselves has caused considerable uncertainty and may lead to the mistaken inference that combatants who are not POWs must therefore be considered civilians. Although the ICRC and some advocacy groups may endorse that inference, to the present writer it seems not only unwarranted from a legal point of view but also appalling from a humanitarian point of view.

The objective of the Conventions is and should be to protect honorable combatants who conduct themselves in accordance with the Laws of War on the one hand and peaceable civilians on the other, not terrorists who deliberately target civilian populations for death. To regard Osama bin Laden as an ordinary civilian, with a right to all the protections that civilian status entails, because under the standards of the POW Convention he is not entitled to the status of a POW, would be a travesty of law and of justice.

76. U.S. CONST. art. I, § 8, cl. 10.
77. Equally, it would be a travesty to treat bin Laden as a civilian “unless and for such time as [he] take[s] part in hostilities.” Additional Protocol I, supra note 6, art. 51(3). Among many other perverse implications of that view, the leadership of al Qaeda, which does not usually expose itself to the hazards of combat, would be more likely to be considered “civilians” than the organization’s operatives, who do more often assume such risks.
Realistically, there is no chance whatever of a new international convention or protocol codifying the customary law category of unlawful combatancy and providing standards for the treatment of unlawful combatants when captured. Nonetheless, national legislation like the MCA can accomplish much that cannot feasibly be done at present by treaty. Nations like the United States, the United Kingdom, Australia and Israel should coordinate efforts, based on their own unfortunate experiences with transnational terrorism, to frame legislative provisions that prescribe how their governments can deal with situations of unlawful combatancy in ways that are at once just, effective, and humane. Moreover, the process of formulating standards should be primarily legislative and political, rather than judicial: as Judge Richard Posner has argued, the Justices have “scant knowledge” of security issues, and Congress, which knows far more about such matters, is more likely to perform an “effective checking function” on overstated executive claims. Careful attention should also be given to refining the concept of unlawful combatancy, perhaps by distinguishing terrorists who select civilians as their principal targets from guerrillas or other kinds of combatants who target military objectives and attack civilians only collaterally. Steady, piecemeal reform of the Convention system is best accomplished through the legislative processes of the democratic nations that the post-9/11 phenomenon of mass terrorism has put at the greatest risk.

79. See Ayres, supra note 4, at 11–12.
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