

Exceptional Engagement: Protocol I and a World United Against Terrorism

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This article challenges the prevailing view that U.S. “exceptionalism” provides the strongest narrative for the U.S. rejection of Additional Protocol I to the 1949 Geneva Conventions. The United States chose not to adopt the Protocol in the face of intensive international criticism because of its policy conclusions that the text contained overly expansive provisions resulting from politicized pressure to accord protection to terrorists who elected to conduct hostile military operations outside the established legal framework. The United States concluded that the commingling of the regime criminalizing terrorist acts with the jus in bello rules of humanitarian law would be untenable and inappropriate. In effect, the U.S. concluded that key provisions of Protocol I actually undermine the core values that spawned the entire corpus of humanitarian law. Whether or not the U.S. position was completely accurate, it was far more than rejectionist unilateralism because it provided the impetus for subsequent reservations by other NATO allies. More than two decades after the debates regarding Protocol I, the U.S. position provided the normative benchmark for the subsequent rejection of efforts by some states to shield terrorists from criminal accountability mechanisms required by multilateral terrorism treaties. This article demonstrates that the U.S. policy stance regarding Protocol I helped to prevent the commingling of the laws and customs of war in the context of the multilateral framework for responding to transnational terrorist acts in the aftermath of September 11. In hindsight, the “exceptional” U.S. position was emulated by other nations as they reacted to reservations designed to blur the distinctions between terrorists and privileged combatants. U.S. “exceptionalism” in actuality paved the way for sustained engagement that substantially shaped the international response to terrorist acts. This article suggests that reservations provide an important mechanism for states to engage in second-order dialogue over the true meaning and import of treaties, which in turn fosters the clarity and enforceability of the text.

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I. INTRODUCTION

The United States was one of the influential drivers in the promulgation of the principles regulating hostilities which define the lawful scope of participation in armed conflicts. This line of treaties, derived from the strong political and military support of the United States, ended during the negotiations for the 1977 Protocols to the 1949 Geneva Conventions.¹ Protocol I is applicable to armed conflicts of an international character, but the final text incorporated highly controversial changes to the types of conflicts that could legally be characterized as interstate wars, with the attendant consequence of conveying combatant immunity to a far broader class of persons. Many Third World nations, supported by the negotiating muscle of socialist states, hijacked the Protocol to achieve explicitly political objectives. This treaty is accordingly unique in having been described as “law in the service of terror.”² The United States concluded that the most controversial aspects of

1. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) Annex I, Dec. 7, 1979, 1125 U.N.T.S. 3 [hereinafter Protocol I]; see also Douglas J. Feith, *Law in the Service of Terror*, 1 NAT’L INT. 36, 39–41 (1985) (discussing differences of opinion held by “Westerners” and “Socialists” during the negotiations for Protocol I and how arguments made by the United States ultimately did not prevail leading to their abstention from voting).

2. Feith, *supra* note 1, at 36–37; see also Abraham Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 901–03 (1986) (“At its worst the [international] law [applicable to terrorism] has in important ways actually served to legitimize international terror, and to protect terrorists from punishment as criminals.”).

Protocol I represented an impermissible altering of the cornerstone concepts of combatancy more than a natural and warranted evolution of the laws of war. The U.S. rejection of Protocol I represented far more than hypocritical “exceptionalism” however, as the underlying policy position provided the template for sustained engagement with other nations. The overwhelming solidarity of states sharing the U.S. position that international law affords no protection for the criminal acts of terrorists became clear over more than two decades and was revalidated following the shock of September 11.

Terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security, as well as perhaps the most pernicious threat to the fundamental human rights of private, peace-loving citizens. There is universal and strongly articulated support for the positivist legal premise that “any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned.”³ The U.N. General Assembly reaffirms that “no terrorist act can be justified in any circumstances.”⁴ By extension, this dominant consensus led to the modern framework of multilateral conventions obligating states to cooperate together in eradicating terrorism and to use their domestic legal systems to the fullest extent possible in the detection and prosecution of persons involved with the perpetration or support of terrorist activities. Article 6 of the International Convention for the Suppression of the Financing of Terrorism, *inter alia*, requires acceding states (169 at the time of this writing)⁵ to “adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”⁶ This bright line bar is replicated in every major multilateral terrorism convention. Furthermore, the modern conventions seeking to prevent and punish terrorist acts embody the broadest possible jurisdictional authority for domestic courts⁷ as well as

3. S.C. Res. 14565, Annex, U.N. Doc. S/RES/1456 (Jan. 20, 2003). The United Nations Global Counterterrorism Strategy expresses “strong condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes.” G.A. Res. 60/228, para. 2, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

4. Measures to Eliminate International Terrorism, G.A. Draft Res., at 3, U.N. Doc. A/C.6/62/L.14 (Nov. 13, 2007).

5. Status Report on International Convention for the Suppression of the Financing of Terrorism, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en.

6. International Convention for the Suppression of the Financing of Terrorism, 2175 U.N.T.S. 197, art. 6, U.N. Doc. A/RES/54/109 (Dec. 9, 1999) [hereinafter Terrorism Financing Convention].

7. *See, e.g., id.* art. 7 stating:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

- (a) The offence is committed in the territory of that State;
- (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;
- (c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

expressly removing terrorist acts from the class of political offenses that might otherwise hinder extradition or requests for mutual legal assistance.⁸

The clarity with which international law categorizes and condemns discrete manifestations of terrorism actually masks the indeterminacy of the underlying definitional framework. “Terrorism” is a concept caught in a kaleidoscope of conflicting sociological, political, psychological, moral, and yes, legal perspectives. The claim that “what looks, smells and kills like terrorism is terrorism”⁹ belies the reality that the international community has unsuccessfully sought to reach agreement on a comprehensive definition of the term for more than a century.¹⁰ No comprehensive definition has achieved universal acceptance, whether approached from a moral,¹¹ psychological,¹² or historical¹³ perspective. Despite the fact that non-

(a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;

(b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;

(c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;

(d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.
4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.
5. When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.
6. Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

8. *Id.* art 14.

9. U.N. GAOR, 56th Sess., 12th plen. mtg. at 18, U.N. Doc. A/56/PV.12 (Oct. 1, 2001).

10. See Thomas M. Franck & Bert B. Lockwood, Jr., *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69, 72–82 (1974) (tracing historical definitions of “terrorism” from the French Revolution to 1974).

11. See C. A. J. Coady, *The Morality of Terrorism*, 60 PHIL. 47, 52 (1985) (“As amended then, the definition of a terrorist act would go as follows: ‘A political act, ordinarily committed by an organized group, which involves the intentional killing or other severe harming of non-combatants or the threat of the same or intentional severe damage to the property of non-combatants or the threat of the same’. The term ‘terrorism’ can then be defined as the tactic or policy of engaging in terrorist acts.”).

state participants in a Common Article 3 conflict are fully subject to prosecution for their warlike acts,¹⁴ and will often be simultaneously subject to the jurisdiction of courts with substantive authority over terrorism, criminal law generally disfavors reliance on terms such as “terrorism” that are perceived to lack objectivity, precision, and emotive neutrality.¹⁵ Some have even argued that applying the label “terrorist” to a non-state actor in a non-international armed conflict carries a pejorative taint that creates an undesirable disincentive to abide by the laws and customs of war.¹⁶ The paradox in a post-September 11 world is that the United Nations Security Council *requires* nations to “accept and carry out”¹⁷ resolutions that oblige them to act against “terrorists” and “terrorism.”¹⁸ Giving operative legal significance to vaguely defined terms could be seen as undermining the world’s “normative and moral stance against terrorism.”¹⁹ As a result, rather than relying on an overarching definitional framework with uncertain pedigree and feigned international acceptance, the international community developed a patchwork of

12. Martha Crenshaw, *The Psychology of Terrorism: An Agenda for the 21st Century*, 21 POL. PSYCHOL. 405, 406 (2000) (“The problem of defining terrorism has hindered analysis since the inception of studies of terrorism in the early 1970s. One set of problems is due to the fact that the concept of terrorism is deeply contested. The use of the term is often polemical and rhetorical. It can be a pejorative label, meant to condemn an opponent’s cause as illegitimate rather than describe behavior. Moreover, even if the term is used objectively as an analytical tool, it is still difficult to arrive at a satisfactory definition that distinguishes terrorism from other violent phenomena. In principle, terrorism is deliberate and systematic violence performed by small numbers of people, whereas communal violence is spontaneous, sporadic, and requires mass participation. The purpose of terrorism is to intimidate a watching popular audience by harming only a few, whereas genocide is the elimination of entire communities. Terrorism is meant to hurt, not to destroy. Terrorism is preeminently political and symbolic, whereas guerilla warfare is a military activity. Repressive “terror” from above is the action of those in power, whereas terrorism is a clandestine resistance to authority. Yet in practice, events cannot always be precisely categorized.”).

13. Gilbert Guillaume, *Terrorism and International Law*, 53 INT’L & COMP. L.Q. 537, 540 (2004) (“In the context of international law, it would appear to me that the adjective ‘terrorist’ may be applied to any criminal activity involving the use of violence in circumstances likely to cause bodily harm or a threat to human life, in connection with an enterprise whose aim is to provoke terror. Three conditions thus have to be met: (a) the perpetration of certain acts of violence capable of causing death, or at the very least severe physical injury. Certain texts of domestic and European law go further than this, however, and consider that the destruction of property even without any danger for human life may also constitute a terrorist act; (b) an individual or collective enterprise that is not simply improvised, in other words an organized operation or concerted plan reflected in coordinated efforts to achieve a specific goal (which, for example, excludes the case of the deranged killer who shoots at everyone in sight); (c) the pursuit of an objective: to create terror among certain predetermined persons, groups or, more commonly, the public at large (thus differentiating terrorism from the political assassination of a single personality, such as that of Julius Caesar by Brutus).”).

14. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 31 (2d ed. 2004) (clarifying that *jus in bello* merely prescribes the offenses under which lawful combatants can be brought to trial. With regard to unlawful combatants, *jus in bello* “merely takes off a mantle of immunity from the defendant, who is therefore accessible to penal charges for any offence committed against the domestic legal system.”).

15. M. CHERIF BASSIOUNI, *INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937–2001)* 3 (2001).

16. M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. OF CRIM. L. & CRIMINOLOGY 711, 739 (2008).

17. U.N. Charter, art. 25.

18. S.C. Res. 1377, Annex, U.N. Doc. S/RES/1377 (Nov. 12, 2001).

19. The Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General’s High-Level Panel on Threats, Challenges, and Change*, para. 159 (2004), available at <http://www.un.org/secureworld/>.

norms and conventions that seeks to prevent and punish specific manifestations of terrorist activities.²⁰ By breaking down the macro problem of terrorism into identifiable manifestations, nation states have negotiated and ratified a web of occasionally overlapping multilateral conventions built on the cornerstone of sovereign enforcement of applicable norms. The persistence of transnational terrorism as a feature of the international community shows that the plethora of conventional approaches is no panacea.²¹ September 11 highlighted this striking systematic failure.

International law restricts the class of persons against whom violence may be applied during armed conflicts, even as it bestows affirmative rights to wage war in accordance with accepted legal restraints.²² Because of the central importance of these categorizations, the standards for ascertaining the legal line between lawful and unlawful participants in conflict provided the intellectual impetus for the evolution of the entire field of law relevant to the conduct of hostilities.²³ From the outset, states sought to prescribe the conditions under which they owed particular persons affirmative legal protections derived from the laws and customs of war.²⁴ The recurring refrain in negotiations can be described as “to whom do we owe such

20. See Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Hijacking Convention]; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Hijacking Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter Montreal Hijacking Convention]; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474 [hereinafter Montreal Protocol]; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter Diplomats Convention]; Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363 [hereinafter U.N. Personnel Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 [hereinafter Hostage-Taking Convention]; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256 [hereinafter Terrorist Bombing Convention]; Terrorism Financing Convention, *supra* note 6, at art. 7.

21. M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1837–2001) 6 (2001); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT. L. J. 83, 90–91 (2001).

22. Bassiouni, *supra* note 16, at 720.

23. The field is frequently described as international humanitarian law. This vague rubric is increasingly used as shorthand to refer to the body of treaty norms that apply in the context of armed conflict as well as the less distinct internationally accepted customs related to the treatment of persons. The core of the international law of war includes the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (replacing Hague Convention of 18 October 1907, 36 Stat. 2371); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021); Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilians Convention].

24. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 128–133 (1994).

protections?” The constant effort to be as precise as possible in describing the classes of persons entitled to those protections was essential because the same criteria prescribe the select class who may lawfully conduct hostilities with an expectation of immunity. Terrorists commit criminal acts and are liable for those acts; they cannot hide behind a shield of combatant immunity in the same manner as lawful combatants.

The declarative norm that the “right of belligerents to adopt means of injuring the enemy is not unlimited”²⁵ is one of the organizing principles that unifies the framework of the law of armed conflict. Persons outside the framework of international humanitarian law who commit warlike acts do not enjoy combatant immunity and are therefore common criminals subject to prosecution for their actions.²⁶ The imperative that logically follows is that the right of *non-belligerents* to adopt means of injuring the enemy is *nonexistent*. Those persons governed by the law of armed conflict derive rights and benefits but are also subject to bright line obligations. Prisoners of war, for example, enjoy legal protection *vis-à-vis* their captors; because they are legally protected, they have no right to commit “violence against life and limb.”²⁷ Conversely, lawful combatants become “war criminals” only when their actions transgress the established boundaries of the laws and customs of war.²⁸ Taken together, these principles form the backbone of the law of armed conflict, and terrorist acts represent the precise point of tension between the law of armed conflict and the default norms of international criminality. Lawful combatants use violence to achieve sociologically and legally permissible ends while terrorists use some of the same techniques impermissibly in violation of established criminal norms.

Nevertheless, the lack of a specific and all-encompassing definition of the term “terrorism” has a sinister potential that could allow states to exploit the existing norms of treaty interpretation, endangering civilian lives and objects by creating legal confusion over agreed treaty terms and thereby preventing effective and timely prosecution of terrorists. As noted above, the United States chose not to adopt the Protocol based on policy conclusions that its provisions were the result of politicized

25. Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, Annex art. 22, Jan. 26, 1910, *reprinted in* ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAWS OF WAR 73, 77 (3d ed. 2000) [hereinafter 1907 Hague Regulations].

26. In a classic treatise, Professor Julius Stone described the line between lawful participants in conflict and unprivileged or “unprotected” combatants as follows:

The . . . distinction draws the line between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection. “Non-combatants” who engage in hostilities are one of the classes deprived of such protection . . . Such unprivileged belligerents, though not *condemned* by international law, are not protected by it, but are left to the discretion of the belligerent threatened by their activities.

JULIUS STONE, LEGAL CONTROLS ON INTERNATIONAL CONFLICT 549 (1954).

27. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 23, art. 93.

28. 42 INTERNATIONAL LAW REPORTS 481 (E. Lauterpacht ed., 1971) (“Similarly, combatants who are members of the armed forces, but do not comply with the minimum qualifications of belligerents or are proved to have broken other rules of warfare, are war criminals as such”); Protocol I, *supra* note 1, art. 85 (“Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.”).

pressure to accord protection to terrorists who elected to conduct hostile military operations beyond the accepted legal framework. In effect, the United States concluded that Protocol I actually undermined the humanitarian goal of protecting innocent civilian lives and property because its most contentious provisions could provide a legal smokescreen behind which transnational terrorists could kill with impunity. Every commander in chief since 1977 has shared this assessment. Whether the U.S. position was based on an accurate assessment of Protocol I, U.S. opposition to the treaty framed the debate regarding the relative status of the new categories of conflict and of combatants.

This Article challenges the prevailing view that American exceptionalism provides the strongest rationale for the posture taken regarding U.S. accession to Protocol I to the 1949 Geneva Conventions. The United States endured scathing criticism for these positions that has waned only marginally with the passage of time. U.S. opposition to Protocol I served as the catalyst for subsequent reservations taken by other NATO allies, which in turn provided a vital impetus for clarifying those norms as newly prescribed treaty provisions rather than preexisting customary international law. Rather than representing a rejection and withdrawal of the international legal regime, the U.S. position provided the normative benchmark against which other states measured later attempts to deliberately shield terrorists from criminal accountability mechanisms in the aftermath of September 11.

This Article puts this instance of so-called “exceptionalism” into proper perspective by identifying the substantively identical positions that became manifest in the wake of September 11 as several of the most important multilateral terrorism treaties entered into force on the heels of a wave of state accessions. Several states used the pretext that Protocol I had established expansive protections for non-state actors engaged in hostilities to propose reservations effectuating that same language in the multilateral terrorism conventions. Nearly thirty years after the United States rejected Protocol I, many other nations reacted decisively to reject the attempts to redefine to the treaty definition of “terrorism.” The U.S. policy stance regarding Protocol I presaged the line drawn by many other nations to prevent the commingling of the laws and customs of war with the multilateral framework for responding to terrorist acts. U.S. “exceptionalism” represented a principled policy decision based on national interests which provided the impetus for deeper engagement in shaping the legal norms applicable to terrorist acts. The U.S. position accurately reflected underlying community interests of states engaged in a struggle against terrorists and thus established the normative standards that prevented later attempts to blur the distinctions between terrorists and privileged combatants.

In the case of Protocol I, what has been framed as U.S. “exceptionalism” was in fact proven over time to represent the overwhelming policy consensus of states. The mosaic of reservations and reactions by other states demonstrated a substantive solidarity with the underlying U.S. concerns. The experience with the definition of terrorist acts demonstrates that an a priori reliance on the process of diplomacy during negotiations would place the weight of multilateral enforcement on an uncertain and perhaps shifting fulcrum. Rather than accepting a treaty definition that is the product of compromise and consensus, the patterns of state practice, reaction to the diplomatic forays of other states, and the context of real world events provides a far more reliable gauge to measure the real depth of international agreement and the real meaning of otherwise vague treaty terms. This Article concludes by suggesting that eliminating the opportunity for states to make

reservations as the tools of a second order dialogue over the true meaning and import of treaty provisions endangers the utility of multilateral treaties. An ex ante preference for prohibiting reservations serves to short circuit healthy dialogue of diplomatic perspectives that minimizes uncertainty in the adoption and application of multilateral treaties. Rather than sole reliance on the words accepted by the negotiators, subsequent state practice based on overarching objectives is the best measure for the true agreement of states. The United States paved the way for this process through the politically disadvantageous steps taken in reaction to the objectionable provisions found in Protocol I.

Part II of this Article will review the development of the law related to belligerent status in order to provide the necessary predicate to understanding the revolutionary developments enshrined in Protocol I. Part II will also review the actions of the United States in response to Protocol I and examine the responses of other states, as well as briefly considering the counterarguments that potentially undercut the U.S. position. Part III suggests that some exceptionalism is a necessary and healthy component of lawmaking between sovereign states. In retrospect, the U.S. response to Protocol I provided the platform for an extended international dialogue and accurately predicted the larger global priorities that manifested themselves in the wake of September 11. Part IV documents the attempted redefinitions of terrorism and the reactions of states from around the world. In the final analysis, the rigid distinction between the laws and customs of armed conflict and terrorist acts has been solidified and clarified. Protocol I provides an example of global engagement in the guise of American exceptionalism.

II. FRAMING THE PROBLEM OF UNLAWFUL BELLIGERENCY

A. *The Pragmatic Context*

Military commanders and their lawyers do not approach the law of armed conflict as an esoteric intellectual exercise. The foundational principle of military necessity defines the necessary predicate for the lawful application of force in pursuit of the military mission, but it cannot concurrently serve as a convenient rationale for any level of unrestrained violence in the midst of an operation.²⁹ The law of armed conflict developed as a restraining and humanizing necessity to facilitate commanders' ability to accomplish the military mission even in the midst of fear, moral ambiguity, and horrific scenes of violence.³⁰ The incremental development of what became a complex body of law from the baseline of foundational necessity prompted one of the Nuremberg prosecutors to muse that "the law of war owes

29. See Francis Lieber, WAR DEP'T., ADJT. GEN. OFFICE: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863), reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 6, art. 16 (Dietrich Schindler & Jiri Toman eds., 2004) [hereinafter Lieber Code] (a reproduction of texts on armed conflicts and the law as it applies to U.S. armies).

30. See THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS vi (Dietrich Schindler & Jiri Toman eds., 2004) ("During the second half of the nineteenth century, a growing conviction spread over the Western world that civilization was rapidly advancing and that it was therefore imperative 'to restrain the destructive forces of war'.").

more to Darwin than to Newton.”³¹ In fact, the laws and customs of war originated from the unyielding demands of military discipline under the authority of the commander or king whose orders must be obeyed. Writing in 1625, Hugo Grotius documented the Roman practice that “it is not right for one who is not a soldier to fight with an enemy” because “one who had fought an enemy outside the ranks: and without the command of the general was understood to have disobeyed orders,” an offense that “should be punished with death.”³² The modern law of armed conflict is nothing more than a web of interlocking protections and legal obligations held together by the thread of respect for humankind and a reciprocal expectation that other participants in armed conflict are bound by the same normative constraints. This explains its historical roots in conflicts between states and those acting under the authority of states.

Nevertheless, the detailed provisions of the laws and customs of war relate back to the basic distinction between persons who can legally participate in conflict and the corresponding rights and obligations they assume. The courts of many ancient nations punished those who violated these norms, and the king’s right to punish those who “excessively violate the law of nature or of nations in regard to any persons whatsoever” was well established.³³ Beginning in 1874, states accepted the principle that “the laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.”³⁴ During the Thirty Years’ War, the Swedish king mandated that “no Colonel or Captain shall command his soldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judge.”³⁵ By 1907, this concept morphed into the phrase “the right of belligerents to adopt means of injuring the enemy is not unlimited.”³⁶ The modern formulation of this foundational principle is captured in Article 35 of Protocol I as follows: “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”³⁷ Military codes and manuals across the planet communicate the gravity and importance of such behavioral norms.³⁸

The law of armed conflict emerged as the benchmark for military professionalism because its precepts are intended to restrain the application of raw power and bloodlust, even in the midst of chaos, mind-numbing fear, and

31. Thomas F. Lambert, *Recalling the War Crimes Trials of World War II*, 149 MIL. L. REV. 15, 23 (1995).

32. 3 HUGO GROTIUS, DE JURE BELLI AC PACIS, ch. 18 (1625), available at <http://www.lonang.com/exlibris/grotius/gro-318.htm>. Grotius explained the necessity for such rigid discipline as follows: “The reason is that, if such disobedience were rashly permitted, either the outposts might be abandoned or, with increase of lawlessness, the army or a part of it might even become involved in ill-considered battles, a condition which ought absolutely to be avoided.” *Id.*

33. EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 105 (2008) (quoting 2 HUGO GROTIUS, DE JURE BELLI AC PACIS 504 (F. Kelsey trans., 1925) (1625)).

34. The Brussels Project of an International Declaration Concerning the Laws and Customs of War art. 12, reprinted in DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 21–28 (2d ed. 1981) [hereinafter Brussels Declaration].

35. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 59 (2d. ed. 1999) (quoting GUSTAVUS ADOLPHUS, ARTICLES OF WAR TO BE OBSERVED IN THE WARS (1621)).

36. 1907 Hague Regulations, *supra* note 25, art. 22 and accompanying text.

37. Protocol I, *supra* note 1, art. 35.

38. W. Michael Reisman & William K. Leitzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Laws of Armed Conflict*, THE LAW OF NAVAL OPERATIONS, 64 NAVAL WAR COL. INT’L. L. STUD. 1, 5–6 (Horace B. Robertson, Jr. ed., 1991).

overwhelming uncertainty. Hence, the law of war is integral to the very notion of professionalism because it defines the class of persons against whom professional military forces can lawfully apply violence based on principles of military necessity and reciprocity.³⁹ Each individual military actor remains an autonomous moral figure with personal responsibility, and there is accordingly no defense of superior orders in response to allegations of war crimes.⁴⁰ The current context of armed conflict presents commanders with the challenge of implementing humanitarian restraints in an environment marked by an adversary's utter disregard for those bounds.⁴¹ The overall mission will often be intertwined with political, legal, and strategic imperatives that cannot be accomplished in a legal vacuum or by undermining the threads of legality that bind together diverse aspects of a complex operation. The U.S. doctrine for counterinsurgency operations makes this clear in its opening section:⁴²

Globalization, technological advancement, urbanization, and extremists who conduct suicide attacks for their cause have certainly influenced contemporary conflict; however, warfare in the 21st century retains many of the characteristics it has exhibited since ancient times. Warfare remains a violent clash of interests between organized groups characterized by the use of force. Achieving victory still depends on a group's ability to mobilize support for its political interests (often religiously or ethnically based) and to generate enough violence to achieve political consequences. Means to achieve these goals are not limited to conventional forces employed by nation-states.

The objective of asymmetric warfare is achieved when professionalized military forces confront an enemy who seeks to gain an otherwise impossible military parity through a deliberate disregard for humanitarian law.⁴³ Even against a lawless enemy,

39. See generally Leslie C. Green, *What is—Why is There—The Law of War?*, in *ESSAYS ON THE MODERN LAW OF WAR* (2d. ed. 1999) (providing a historical account of how and why the law of war developed).

40. Report of the International Law Commission Covering its Second Session, June 5–July 29, 1950, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS, at 1265–66 (Dietrich Schindler & Jiri Toman eds., 1988).

41. See, e.g., Letter from Gen. David H. Petraeus, Commanding Officer of Multi-National Force-Iraq, to Multi-National Force-Iraq (May 10, 2007), *available at* <http://www.humanrightsfirst.org/blog/torture/2009/02/general-petraeus-what-sets-us-apart.asp> (addressing a letter to all coalition forces serving in Iraq, “Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen serving in Multi-National Force-Iraq: Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy. This fight depends on securing the population, which must understand that we—not our enemies—occupy the moral high ground. This strategy has shown results in recent months. Al Qaeda’s indiscriminate attacks, for example, have finally started to turn a substantial proportion of the Iraqi population against it.”).

42. DEP’T OF THE ARMY, FIELD MANUAL NO. 3-24, MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5, COUNTERINSURGENCY 1 (2007).

43. Walter Laquer, *The Terrorism to Come*, 126 POL’Y REV 58–59 (Aug.–Sept. 2004):

there are two essential questions professional military forces must ask in this new style of conflict:

- (1) How may we properly apply military force?
- (2) If lawful means of conducting conflict are available, against whom may we properly apply military force?

The centrality of these themes in the development of the laws and customs of war cannot be overlooked when explaining the competing state interests embedded in the multilateral conventions that regulate conflicts. These themes also provide the golden thread of insight that is essential to understanding that the modern law of terrorism and the most fundamental aspects of humanitarian law are interrelated but distinct.

B. Early U.S. Leadership in Distilling the Law

Because only states enjoyed the historical prerogative of conducting warfare, the principles of lawful combatancy developed from the premise that only states had the authority to sanction the lawful conduct of hostilities.⁴⁴ Propelled by the classic view that “the contention must be between States” to give rise to the right to use military force,⁴⁵ the concept of combatant status developed to describe the class of persons operating under the authority of a sovereign state to wage war.⁴⁶ The intellectual roots of combatant immunity are thus grounded in the soil of state sovereignty. Then, as now, there was a stigma attached to being an unlawful combatant because the term carried implicit recognition that the sovereign power of the state was being thwarted without legal cause. For example, from 1777 to 1782, the British Parliament passed an annual act declaring that privateers operating under the license of the Continental Congress were pirates, *hosti humanis generis*, and as such could be prosecuted for their acts against the Crown.⁴⁷

Combatant status conveys the necessary implication that lawful combatants enjoy protection under the laws of war to commit acts that would be otherwise be unlawful, such as killing persons and destroying property. Two essential implications follow from the conceptual foundation of combatant immunity as an offshoot of

When regular soldiers do not stick to the rules of warfare, killing or maiming prisoners, carrying out massacres, taking hostages or committing crimes against the civilian population, they will be treated as war criminals.

If terrorists behaved according to these norms they would have little if any chance of success; the essence of terrorist operations now is indiscriminate attacks against civilians. But governments defending themselves against terrorism are widely expected not to behave in a similar way but to adhere to international law as it developed in conditions quite different from those prevailing today.

Terrorism does not accept laws and rules, whereas governments are bound by them; this, in briefest outline, is asymmetric warfare. If governments were to behave in a similar way, not feeling bound by existing rules and laws such as those against the killing of prisoners, this would be bitterly denounced.

44. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 203 (H. Lauterpacht ed., 7th ed. 1952).

45. *Id.*

46. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 23.

47. ALFRED P. RUBIN, *THE LAW OF PIRACY* 154 (1988).

state sovereignty. First, although the application of international humanitarian law has expanded from international to non-international armed conflicts,⁴⁸ the concept of “combatancy” has been strictly confined to international armed conflicts. Even as the law expanded to grant combatant immunity for irregular forces that do not line up in military uniforms on a parade field, participants in non-international armed conflicts remain completely subject to domestic criminal prosecution for their warlike acts. Protections found in domestic law are grounded not on the status of a person, but on the basis of actual activities, because no one has an international law “right to participate in hostilities” in a non-international armed conflict.⁴⁹

Even during the Civil War era, the tactical uncertainty faced by Union forces waging a campaign against rebel forces thrust lawyers and the importance of sound legal analysis into the spotlight. The first comprehensive effort to describe the law of war in a written code, the Lieber Code, began as a request from the General-in-Chief of the Union Armies, based on his confusion over the distinction between lawful and unlawful combatants.⁵⁰ General Henry Wager Halleck recognized that the law of armed conflict never accorded combatant immunity to every person who conducted hostilities and also could not provide pragmatic guidance to adapting to the changing tactics of war.⁵¹ He knew, however, that the war could not be won without clear delineation to the forces in the field regarding the proper targeting of combatants and a correlative standard for the treatment of persons captured on the battlefield based on the legal characterization of their status. On August 6, 1862, General Halleck wrote to Dr. Francis Lieber, a highly regarded law professor at the Columbia College in New York, to request his assistance in defining guerrilla warfare.⁵²

This request, which can be described as the catalyst that precipitated more than one hundred years of legal effort resulting in the modern web of international agreements regulating the conduct of hostilities, read as follows:

My Dear Doctor: Having heard that you have given much attention to the usages and customs of war as practiced in the present age, and especially to the matter of guerrilla war, I hope you may find it convenient to give to the public your views on that subject. The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders and spies they will retaliate by executing our

48. See, e.g., Rome Statute of the International Criminal Court art. 8(2)(e), July 1, 2002, 2187 U.N.T.S. 90, 139 [hereinafter Rome Statute].

49. MARCO SASSOLI & ANTOINE BOUVIER, HOW DOES LAW PROTECT IN WAR? 208 (Int'l Comm. of the Red Cross 1999).

50. Letter from General Halleck to Dr. Francis Lieber, Aug. 6, 1862, *reprinted in* FRANCIS LIEBER, LIEBER'S CODE AND THE LAW OF WAR 2 (Richard Shelly Hartigan ed., 1983).

51. *Id.*

52. *Id.*

prisoners of war in their possession. I particularly request your views on these questions.⁵³

The Union Army issued a disciplinary code governing the conduct of hostilities, known worldwide as the Lieber Code, as “General Orders 100 Instructions for the Government of the Armies of the United States in the Field” in April 1863.⁵⁴ General Orders 100 was the first comprehensive military code of discipline that sought to define the precise parameters of permissible conduct during conflict.⁵⁵ From this baseline, the principle endures in the law today that persons who do not enjoy lawful combatant status are not entitled to the benefits of legal protections derived from the laws of war, including prisoner of war status,⁵⁶ and are subject to punishment for their warlike acts.⁵⁷

Lieber’s description of unlawful combatancy is notable in light of operational uncertainties that have been prominent in current anti-terrorist operations. Though this language is dated, it suggests the al-Qaeda tactics in evocative terms:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.⁵⁸

While the military forces serving sovereign states enjoyed combatant status as an indisputable right, treaty provisions later developed in response to the changing face of warfare. There have been over sixty conventions regulating various aspects of armed conflict and a recognizable body of international humanitarian law has emerged from this complex mesh of conventions and custom.⁵⁹ In embarking on the

53. *Id.*

54. Lieber Code, *supra* note 29, at 3. For descriptions of the process leading to General Orders 100 and the legal effect it had on subsequent efforts, *see generally* Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224 (1998); George B. Davis, *Doctor Francis Lieber’s Instructions for the Government of Armies in the Field*, 1 AM. J. INT’L L. 13 (1907).

55. Lieber Code, *supra* note 29, at 3.

56. This statement is true subject to the linguistic oddity introduced by Article 3 of the 1907 Hague Regulations, which makes clear that the armed forces of a state can include both combatants and non-combatants (meaning chaplains and medical personnel), and that both classes of military personnel are entitled to prisoner of war status if captured. *See* 1907 Hague Regulations, *supra* note 25, art. 3 (“[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.”).

57. *See infra* note 66 (discussing the U.S. Military tribunal at Nuremberg’s finding that resistance groups were not entitled to be treated as prisoners of war).

58. Lieber Code, *supra* note 29, art. 82.

59. *See generally* M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (Kluwer Law Int’l 2d ed. 1999) (offering discussions of sources for the law of armed conflicts, the world’s major criminal justice systems, and the Charter of the International Military Tribunal for the Prosecution of the Major War Criminals of the European Theater).

age of positivist legal development, states attempted to clarify the line between lawful combatants and unlawful criminals when they perceived gaps between humanitarian goals and the operational realities and the legal framework therefore appeared unresponsive to changing military requirements.

C. *The 1949 Geneva Conventions*

The provisions for according combatant status and for treating those entitled to combatant immunity must be followed unless states voluntarily expand the normative boundaries of the law. The Lieber Code provided the core around which the law developed, much like the grit around which a pearl is created layer by layer. The *franc-tireur* resistance during the Franco-Prussian War forced reexamination of the line between legally protected civilians and partisan combatants.⁶⁰ The topic of belligerency conducted by private citizens in occupied territory was much debated but little settled during the period, and the subject was therefore omitted from the Brussels Declaration of 1874, the Oxford Manual of 1880, and the 1907 Hague Regulations.⁶¹

As of 1907, the scope of lawful combatancy included the so-called *levée en masse*, when the populace spontaneously organized to fight against an oncoming enemy.⁶² Once the occupation was successfully effected, local civilians in occupied territory no longer enjoyed a *de jure* right to fight the enemy occupier.⁶³ Otherwise, lawful combatancy applied only to forces fighting for a state. The Hague Regulations embodied this legal regime as follows:

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

60. See generally Major R.R. Baxter, *So-Called Unprivileged Belligerency: Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323 (1951) [hereinafter Baxter] (examining acts of "unlawful belligerents operating in areas which are not under belligerent occupation").

61. DORIS APPEL GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914*, 79 (Columbia Univ. Press 1949).

62. This concept brings to mind the uprising of Russian peasants in opposition to Napoleonic invaders. It was enshrined in Article 2 of the Hague Regulations and remains unchanged. 1907 Hague Regulations, *supra* note 23, art. 2 ("The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.").

63. See 1907 Hague Regulations, *supra* note 25, arts. 1-2 (stating that inhabitants not covered by Article 2 are governed by the text of Article 1 and are no longer considered lawful combatants).

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."⁶⁴

This formulation enshrined the traditional linkage of the armed forces to the sovereign power of the state and included affiliated militia units that met the established criteria derived from customary international law. This language survived in essentially the same form until the 1977 Additional Protocols to the Geneva Conventions of 1949.

Because Hague Regulations extended protected status only to a defined subset of militia and volunteer forces but not to other irregular forces, the provision of the Lieber Code that unlawful combatants could be executed survived both in the letter of the law⁶⁵ and in the practice of courts⁶⁶ until after World War II. Private citizens in occupied territory therefore had no legally protected rights to rise up and oppose the forces of the occupying power.⁶⁷ Hence, rather than presuming that they represented the sovereign authority of the occupied state, private citizens were categorized as unlawful combatants subject to the penalty of death.⁶⁸

The 1907 Hague delineations remained with only slight modifications until 1977, despite the wholesale evolution of warfare.⁶⁹ However, the patriotic resistance of partisan fighters to the German occupations in World War II and the horrific

64. *Id.*

65. Lieber Code, *supra* note 29, art. 85 ("War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or to armed violence.").

66. For example, the U.S. Military tribunal at Nuremberg stated:

The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralized command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovitch and the Edes of General Zervas. It is evident also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. *No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs.*

The Hostages Trial (Trial of Wilhelm List and Others) (U.S. Military Trib., Nuremberg July 8, 1947–Feb. 19, 1948), *reprinted in* 8 The United Nations War Crimes Comm'n, Law Reports of Trials of War Criminals 34, 57 (emphasis added) [hereinafter The Hostages Trial].

67. See 1907 Hague Regulations, *supra* note 23, arts. 1–2 (stating that inhabitants not covered by Article 2 are governed by the text of Article 1 and are no longer considered lawful combatants).

68. A. PEARCE HIGGINS, WAR AND THE PRIVATE CITIZEN: STUDIES IN INTERNATIONAL LAW 42 (P.S. King & Son 1912).

69. See 1907 Hague Regulations, *supra* note 25; Protocol I, *supra* note 1 (presenting the 1977 changes); Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13, para. 2, 1125 U.N.T.S. 1 [hereinafter Protocol II] (presenting more 1977 changes).

crimes committed by German forces against the civilian populace in response⁷⁰ forced states to update the legal standards for obtaining combatant status during occupation. The fact that the provisions for regulating the status of irregular fighters did not become part of the 1949 Fourth Geneva Convention (designed to protect the civilian population) is itself legally significant. As one eminent commentator noted,

The whole point about the lawful guerrilla fighter, so far as he could be identified and described, was that he was not a civilian. The Civilians Convention was for protecting civilians who remained civilians and whose gestures of resistance, therefore, would be punished as crimes, just as would any acts of guerrilla warfare which lay outside whatever lawful scope could be defined.⁷¹

Accordingly, the 1949 Geneva Conventions restated and updated the law of combatant status within the Third Geneva Convention on Prisoners of War. Under the Third Convention, the class of civilians entitled to prisoner of war status was described *inter alia* as:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.⁷²

This language reproduced the qualifications drawn from the 1907 Regulations, with the express addition of those operating on behalf of the displaced sovereign. The treaty also added a requirement for the detaining state to convene a “competent tribunal” to consider the facts relevant to a particular person’s status, when that

70. See, e.g., United States v. Otto Ohlendorf (The Einsatzgruppen Case), 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW, NO.10 (Military Tribunal II-A, Nuremberg, Germany, July 8, 1947–Feb. 19, 1948), reprinted in HOWARD LEVIE, DOCUMENTS ON PRISONERS OF WAR 408 (1979) (describing directives that ordered the imprisonment and mass-murder of civilians); Italy, Sansoli and Others v. Bentivegna and Others, Court of Cassation, 24 INT. L. REP. 986 (1958), reprinted in SASSOLI & BOUVIER, *supra* note 49, at 701 (upholding the legal status of Italian irregulars in fighting against German occupation).

71. GEOFFREY BEST, WAR AND LAW SINCE 1945, 127–28 (Oxford Univ. Press 2002) [hereinafter BEST, WAR AND LAW].

72. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 23, art. 4. This is only a partial listing of the provisions most relevant for determining the status of terrorists and their supporters.

status is in doubt.⁷³ This provision was intended to “avoid arbitrary decisions by a local commander,”⁷⁴ and in practice may be accomplished by three officers with expeditious thoroughness.⁷⁵

The addition of an entirely new international convention in 1949, designed to create legal entitlements on behalf of the civilian population, gave rise to the dualistic view of status that persists in some quarters to this day. The International Committee of the Red Cross (ICRC) took the position in its official commentary that because there “is no intermediate status” between combatant and civilian, every person in enemy hands “must have some status under international law.”⁷⁶ Though the ICRC explicitly recognized that “[m]embers of resistance movements must fulfill certain stated conditions before they can be regarded as prisoners of war,”⁷⁷ its dualist position was premised on an unstated assumption that the civilian unlawfully participating in the conflict lived in the territory occupied by another sovereign state. Modern transnational terrorist acts by definition belie this assumption, even if the ICRC premise reflected an accurate view of the law shortly after the conclusion of the Geneva Conventions in 1949.⁷⁸

Despite overturning several centuries of legal development and judicial practice,⁷⁹ the ICRC noted that this dualism would be “satisfying to the mind”

73. *Id.* art. 5.

74. FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 VOL.II-B 270 (Fed. Political Dep't, 1949).

75. DEPARTMENT OF THE ARMY, FM 27-10: DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE 30 (1956).

76. INTERNATIONAL COMMISSION OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: VOLUME 4, 51 (Int'l Comm. of the Red Cross 1958) [hereinafter ICRC COMMENTARY ON GENEVA CONVENTION] (“Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.”).

77. *Id.* at 50 (“of resistance movements must fulfill certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who have fallen into enemy hands do not fulfill those conditions, they must be considered to be protected persons within the meaning of the present Convention. That does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions of Article 64 and the Articles which follow it.”).

78. Kristopher K. Robinson, Edward M. Crenshaw & J. Craig Jenkins, *Ideologies of Violence: The Social Origins of Islamist and Leftist Transnational Terrorism*, 84 Soc. F. 2009, 2013 (2005) (“To qualify as a *transnational* terrorist attack, the attack must involve multiple nationalities (defined in terms of country of origin) in terms of its victims, the primary actors, and/or the location of the attack relative to the actor and target. They must also be conducted by an autonomous non-state actor (i.e., a group that is not directly controlled by a sovereign state), have political goals, make use of extra-normal violence, and at least ostensibly be designed so as to induce anxiety among various targets, including the general public.”).

79. *See, e.g.*, The Hostages Trial, *supra* note 66, at 57–58 (“Guerilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganised forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applied to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept

because of its simplicity and humanitarian scope.⁸⁰ Insofar as it applied to the legal status of civilians under the occupation of a foreign power, the ICRC view accurately reflected the law. However, extrapolating this simple dualism beyond the narrow question of legal duties owed by an occupier to the citizens under its occupation reduces to obsolescence the historic practice of considering unlawful belligerents as unprotected participants in combat and therefore beyond the reach of international law. However, the dualist ICRC view did not accurately reflect the negotiating record of the 1949 Geneva Conventions, nor the practice of states in applying its provisions.

For example, the plain reading of the legal criteria ultimately accepted by delegates during the 1949 Diplomatic conference reveals that although the two conventions might appear to cover all the categories concerned, irregular belligerents were not actually protected.⁸¹ As a matter of pure logic, extending the protection of international law to all civilians who take up arms in violation of international law would undermine the legitimacy and enforcement of such law. Granting legal protection to any civilian who takes up arms would create a perverse incentive to defy the conventions regulating conduct and deliberately conduct hostilities outside the bounds of the law all the while relying on the good will of the enemy to apply that same body of law. Some delegates pushed for a broader interpretation of the textual provisions that would have protected illegal combatants based on the understanding that the “categories named in Article 3 [the present Article 4 of the Third Geneva Convention] cannot be regarded as exhaustive, and it should not be inferred that other persons would not also have the right to be treated as prisoners of war.”⁸² This position was politely but firmly rejected by the delegates in favor of the view that the text itself is the exclusive source to “define what persons are to have the protection of the Convention.”⁸³

A number of other delegations explicitly confirmed that the text of the Geneva Conventions did not foreclose the traditional category of unlawful combatants. The Dutch delegate pointed out that a summary conclusion to the effect that combatants who did not meet the criteria for prisoner of war status “are automatically protected by other Conventions is certainly untrue.”⁸⁴ The ICRC dualist view is not warranted based on the view of the delegates that negotiated the provisions that convey combatant status. The Dutch delegate further clarified, with no evidence of disagreement from any national delegation, that the Fourth Geneva Convention (the Civilians Convention) “deals only with civilians under certain circumstances; such as civilians in an occupied country or civilians who are living in a belligerent country, *but it certainly does not protect civilians who are in the battlefield, taking up arms*

the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured.”).

80. ICRC COMMENTARY ON GENEVA CONVENTION, *supra* note 76, at 49; *see also supra* text in note 72.

81. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 23, art. 4.

82. FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949: VOL. II-B, *supra* note 74, at 268 (quoting the Danish delegate who argued that “the cases not provided for by Article 3 must be treated separately and in accordance with present-day international law”).

83. *Id.*

84. *Id.* at 271.

against the adverse party.”⁸⁵ Furthermore, the U.K. delegate observed that “the whole conception of the Civilians Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms, who could not expect full protection under rules of war to which they did not conform.”⁸⁶

Rather than simply extending blanket protections to every person, the drafters established some fundamental protections that are applicable to all individuals in times of armed conflict, even as they carefully crafted definitions for the categories of persons entitled to receive specific rights and protections.⁸⁷ Thus, the position of unlawful combatants as unprotected participants in conflict remained unchanged by the 1949 Geneva Conventions, with the narrow caveat that the Fourth Geneva Convention did provide residual protection for the citizens of occupied territory *vis-à-vis* the occupying power. This state of legal development became particularly important in light of the national responses to the purported expansion of combatant status to unprivileged belligerents in the textual provisions adopted as part of Protocol I, as will shortly be demonstrated.

D. Protocol I as an Evolutionary Vehicle

The ink was hardly dry on the texts of the 1949 Geneva Conventions when the ICRC began to advocate a further expansion of the law. As noted above, the law of war continually evolves in response to the needs of states conducting conflict. While the 1949 Conventions regulate armed conflicts conducted between “two or more of the High Contracting Parties,” the law applicable to non-international armed conflicts does not provide for combatant status nor does it define combatants or specify a series of obligations inherent in combatant status.⁸⁸ Under the Geneva principles, anyone operating outside the authority of a state who participates in hostile activities can expect no form of automatic legal license or protection from prosecution.⁸⁹ Indeed, introducing the concept of “combatant immunity” in the context of non-international armed conflicts would grant immunity for acts which would be perfectly permissible when conducted by combatants in an international armed conflict, such as attacks directed at military personnel or property.⁹⁰ This

85. *Id.* (emphasis added).

86. *Id.* at 621. Brigadier Page noted that illegal combatants “should no doubt be accorded certain standards of treatment, but should not be entitled to all the benefits of the convention.” *Id.* The Swiss delegate expressed an almost identical view that “in regard to the legal status of those who violated the laws of war, the Convention could not of course cover criminals or saboteurs.” *Id.*

87. FRANCOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 302 (Laura Brav ed. & trans., 2002).

88. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 23, art. 2.

89. *Id.*

90. In light of the current military operations in the Gaza strip at the time of this writing, it is apropos to note that Professor Bassiouni posits that:

It is almost always the case that an attack by Israeli armed forces against Palestinian targets is presented in the public discourse as being legitimate both in purpose and in means, while a Palestinian attack upon on [sic] Israeli targets is almost invariably described in opposite terms. An attack upon military targets is permissible under IHL. Thus, if the Palestinians attack Israeli armed forces, they are legitimate targets. However, Israel always describes such attacks as terrorist attacks. For Israel to recognize the legitimacy of such attacks upon its armed forces would be a major political concession to Palestinian nationalistic claims and would add significantly to the legitimacy of their conflict against Israel as being a war of national

striking silence in the law applicable to non-international armed conflicts means that any effort to describe a “combatant engaged in a non-international armed conflict” is an oxymoron. There simply is no legal category of “combatant” in a non-international armed conflict, irrespective of the moral imperatives claimed by one party or the other to warrant hostile activities.⁹¹ This premise remains valid even when non-state actors perpetrate violence seeking to accomplish goals similar to those of the sovereign state.⁹²

These perceived inadequacies in the law of armed conflict began to surface in the context of the colonialist struggles of the 1960s. The ICRC convened a conference of government experts in 1971 to consider two draft Protocols ostensibly designed to reaffirm and develop the corpus of the laws and customs of war.⁹³ In the

liberation. Geneva Convention Protocol I would apply to such a conflict, thus giving the Palestinian combatants the status of POWs, which Israel has denied to date. The analogy in this case extends only with respect to Israeli armed forces. With respect to Israeli attacks on Palestinian targets, the target may be a civilian one, which is not authorized under IHL, or a legitimate military target, but attacked with disproportionate use of force that causes civilian casualties and destruction of private property, which would be prohibited by IHL. In both of these cases, the attack would be a violation of IHL, but is almost always presented as justified. Conversely, when the Palestinians attack a legitimate military target, it is almost always labeled an act of terrorism. Without question, if Palestinians attack a civilian target, that violates IHL.

Bassiouni, *supra* note 16, at 786 n.307 (2008).

91. In fact, a wide range of states coalesced around the effort to defeat the diplomatic draft applicable to non-international armed conflicts that was tabled in 1975 by the ICRC and supported by the United States and other Western European nations. The group of states, which included Argentina, Honduras, Brazil, Mexico, Nigeria, Pakistan, Indonesia, India, Romania, and the U.S.S.R., succeeded in raising the threshold for the application of Protocol II (designed to regulate non-international armed conflicts) precisely because of fears that extending humanitarian protections to guerillas and irregular forces might elevate the status of rebel groups during such conflicts. David P. Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 AM. J. INT’L L. 272, 284 (1978). See also ELEANOR C. MCDOWELL, 1976 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 697 (1976) (documenting the U.S. success in eliminating subjective qualifiers such as “significant” or “important” that might have permitted some states to selectively apply the provisions of Protocol II).

92. This article defines terrorism as the use or threat of use of anxiety inducing extranormal violence for political purposes by any individual or group, whether acting for or in opposition to established governmental authority, where such action is intended to influence the attitudes and behavior of a target group wider than victims. EDWARD F. MICKOLUS ET AL., INTERNATIONAL TERRORISM IN THE 1980S: VOLUME II 1984–1987 xiii (1989). For the purposes of this work:

[T]errorist incidents are restricted to actions that purposely seek to spread terror in the population either by directly targeting noncombatants or by destroying infrastructures that may affect the life and well-being of the civilian population at large . . . Insurgent, revolutionary, and right-wing terrorism are generally included under the terrorism rubric. Insurgent terrorism refers to violent acts perpetrated by identifiable groups that attack governmental or other targets for short-term goals aimed at sparking widespread discontent toward the existing government. This kind of terrorism is often grounded on a defined ideology, and it seeks to unleash a process of revolution. Revolutionary terrorism defines terrorist actions that take place during existing struggles against a determined regime and develop as a guerrilla tactic. Right-wing terrorism refers to acts perpetrated by outlawed groups that do not seek a social revolution but resort to violence as a way to express and advance their political goals, such as ultranationalism and anticommunism.

Andreas E. Feldmann and Maiju Perala, *Reassessing the Causes of Nongovernmental Terrorism in Latin America*, 46 LATIN AM. POL. AND SOC’Y 101, 104 (2004).

93. ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAWS OF WAR 387 (3d ed. 2000).

political sphere, the United Nations General Assembly adopted language that strikingly foreshadowed the international consensus against terrorism in the wake of September 11 by declaring that the continuation of colonialism “in all its forms and manifestations . . . is a crime and that colonial peoples have the inherent right to struggle by all necessary means at their disposal against colonial Powers and alien domination in exercise of their right of self-determination.”⁹⁴

By a vote of 83 to 13 with 19 abstentions, the General Assembly admonished the colonial powers that the moral basis for partisan struggles by civilians to reclaim their freedom from foreign powers warranted the application of the full array of rights under the 1949 Geneva Conventions:

The armed conflicts involving the struggle of peoples against colonial and alien domination and racist régimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons engaged in armed struggle against colonial and alien domination and racist régimes.

The combatants struggling against colonial and alien domination and racist régimes captured as prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949.⁹⁵

This position assumed a moral equivalence between private citizens fighting to free a people from colonial dominance and those who fought to restore the sovereign authority of an occupied sovereign state. The General Assembly urged the extension of the 1949 Conventions in order to achieve the protections of combatant immunity, along with the corollary status as Prisoners of War, for the local population in the context of internal armed conflicts in Southern Rhodesia, Angola and Mozambique, South Africa, and Namibia.⁹⁶ This in turn buttressed the efforts of the ICRC to gain the widest possible applicability for the principles of Geneva Law.⁹⁷ The effort to extend these political positions into binding textual provisions proved to be far more contentious and problematic during the negotiations of Protocol I.⁹⁸ The Protocols Additional to the Geneva Conventions resulted from four widely attended diplomatic conferences held from 1974 to 1977. The Protocols culminated the efforts to provide textual application of the Geneva Conventions even in the context of armed conflicts between a High Contracting

94. Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3103 (XXVII), U.N. Doc. A/RES/3103 (XXVIII) (Dec. 12, 1973).

95. *Id.* paras. 3 & 4.

96. See, e.g., U.K. MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT, para. 15.2.3 (2004) (explaining that the background to this development was the emergence of a large number of post-colonial states, many of which gained independence from their former colonial rulers after long struggles and wished to see some ongoing struggles recognized as essentially international in character).

97. BEST, WAR AND LAW, *supra* note 71, 331–43.

98. See MCDOWELL, *supra* note 91, at 695–96 (indicating that the issue of prisoner of war status for guerilla fighters or irregular fighters was not quickly solved at the beginning of the series of diplomatic conferences).

Party and non-state actors (guerrillas, insurgents, and so-called freedom fighters). These fundamental modifications to the well-established law of combatant immunity would have arguably been impossible without the backdrop and international division caused by the Cold War. However, as in previous efforts to shape the law of war around the reality of ongoing military and political realities, the effort to draw sharp legal distinctions between protected civilians and persons who could be lawfully targeted was the driving concern behind the modern evolution embodied in the 1977 Protocols.⁹⁹

Protocol I was intended to be an all-encompassing source of updated rules for determining combatant status, as it was meant to govern international armed conflicts and to supplement the 1949 Geneva Conventions.¹⁰⁰ Protocol I combined the Hague strand of international humanitarian law (dealing with constraints on the means and methods for conducting hostilities) with the Geneva strand (primarily focused on achieving humanitarian goals). It represented the end state of the law of combatancy by attempting to reduce the combatant category to its irreducible minimum while maximizing the class of protected civilians.¹⁰¹

In perhaps its most controversial provision, the Protocol amended the concept of an international armed conflict beyond its previously clear application only to conflicts between two or more High Contracting Parties in its very first article. Article 1(4) of Protocol I purports to redefine international armed conflicts 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, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁰²

The effect of this language would be to internationalize the actions of non-state actors, thereby conveying combatant immunity and immunity from prosecution for crimes committed against the military and police forces of the sovereign state or

99. BEST, WAR AND LAW, *supra* note 71, at 257.

100. Protocol I, *supra* note 1, art. 1, para. 3.

101. See Civilians Convention, *supra* note 23, art. 4. The legal category of protected persons is not intended to be an all-inclusive category of civilians even on the face of the Convention. Article 4 provides a definition of the legal term of art, protected persons, that limits the applicability of the protections afforded by the other provisions of the Convention as follows (using admittedly odd grammar):

Art. 4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

Civilians Convention, *supra* note 23, art. 4.

102. Protocol I, *supra* note 1, art. 1, para 4.

colonial power. This provision in turn spawned two other controversial and key texts in order for the Protocol to maintain intellectual consistency.

On its surface, Protocol I appeared to protect previously unlawful combatants with two innovations. The era of colonial wars in no way eliminated the undercurrent of deep unease felt by states whose professional military forces require a clear articulation of the grounds for achieving combatant status, as those principles remain the backbone of military discipline and professionalism. However, the Protocol created textual uncertainty over the circumstances in which the laws of war operate to protect civilians and their property from the effects of hostilities by undermining the clarity of its application. In the first place, Article 44 eroded the traditional qualifications for achieving combatant status by accepting the notion that there may be some circumstances “owing to the nature of the hostilities” in which combatants cannot distinguish themselves from the civilian population.¹⁰³ In such circumstances, the duty to distinguish may be watered down to the point that the combatant need only carry his arms openly “[d]uring each military engagement” or when “[d]uring 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.”¹⁰⁴

This text appears to pave the way for any person, irrespective of an organized chain of command or manifestation of state authorization, to take up arms whenever the fancy strikes. Technically, any non-state actor could claim combatant status (and accompanying immunity from criminal prosecution) based on a declaration by an “authority representing a people engaged against a High Contracting Party.”¹⁰⁵ A literal reading of these provisions leads one to suppose that a person could engage in hostilities, put down his or her weapons, hide among the innocent civilian populace, strike at will, and yet claim combatant status for those warlike acts provided that a weapon is visible to an enemy at the precise moment it is used. This on/off combatant status, akin to the proverbial revolving door, would corrode the law of unlawful combatancy to its vanishing point.

Protocol I employed a second, somewhat more subtle, means of appearing to define away the principle of unlawful combatancy. In attempting to gain the broadest possible protections for civilians, the text implicitly eroded the 1949 notions

103. *Id.* art. 44, para. 3. The text does contain some qualifiers by which Protocol I proponents sought to legitimize this erosion of traditional principles. For example, Article 44, para. 7 specifies that “[t]his Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.”

104. *Id.* art. 44, para. 3.

105. *Id.* art. 96, para. 3:

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.

of combatancy by virtue of an exclusive dualist definition. For the first time in international law, Protocol I attempts to define the term civilian purely in contradistinction to the opposing status of combatant. Article 50 embodied the ICRC dualist view by defining a civilian as “any person who does not belong” to one of the specified categories of combatant.¹⁰⁶ This provision was intentionally inclusive in contrast to the categories of protected persons defined in the Fourth Geneva Convention of 1949. Thus, a literal reading of the plain text means that a civilian is anyone who is not a combatant. An unlawful combatant would therefore be legally equated to a civilian and hence entitled to the panoply of protections accorded to that class of persons.

In theory, the ICRC dualist view enshrined in Protocol I would protect any non-state actor who elected to participate in hostilities from the effects of their misconduct. By definition, an unlawful combatant falls outside the traditional characterizations that would otherwise entitle him or her to prisoner of war status. Article 50 seems to embody a system in which there is no theoretical gap; a person is either a combatant or a civilian. This leads to the ineluctable presumption that an unlawful combatant who fails to qualify as a prisoner of war must be a civilian entitled to protection. Being legally classified as a civilian puts the military forces opposing terrorist activities into the quandary of either supinely permitting the planning and conduct of terrorist activities or violating the clear legal norm that the “civilian population as such, as well as individual civilians, shall not be the object of attack.”¹⁰⁷

1. The United States Response

The United States joined the consensus on the final texts and signed both Protocols on December 12, 1977, the day they were opened for signature¹⁰⁸ (though the U.S. delegation narrowly missed being forced to walk out of the conference in 1975).¹⁰⁹ With respect to Protocol I, the United States stated at the time that:

1. It is the understanding of the United States of America that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.
2. It is the understanding of the United States of America that the phrase “military deployment preceding the launching of an attack” in Article 44, Paragraph 3, means any movement towards a place from which an attack is to be launched.¹¹⁰

106. *Id.* art. 50, para. 1.

107. *Id.* art. 51, para. 2.

108. International Committee of the Red Cross, International Humanitarian Law—State Parties/Signatories to Protocol I, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S> (last visited Sept. 6, 2009).

109. See George Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1, 4 n.11 (1991) (explaining that Secretary of State Kissinger had ordered the U.S. delegation to leave if the National Liberation Front of South Vietnam (the Vietcong) were admitted to the conference and that their admission was defeated by a tie vote).

110. ROBERTS & GUELF, *supra* note 93, at 512.

The second of these understandings was clearly intended, even from the outset, to demonstrate the strong U.S. view that Article 44 could provide excessive protection to terrorists that would actually facilitate their criminal acts.¹¹¹ The wave of terrorist acts that provided the context for the negotiation of the 1977 Additional Protocols was conducted by “the alphabet-soup terrorists of the past, the IRA, ETA, PLO, RAF, and others [that] were essentially political organizations with political goals.”¹¹²

Nevertheless, apologists for Protocol I point out that the provisions of Article 44 are contingent on the actors attaining the previous status as a lawful combatant.¹¹³ In addition, the prerequisite combatant status envisaged by Article 44 remains contingent on “being under a command responsible” to a state Party to the conflict.¹¹⁴ Professor Yoram Dinstein has observed, “one cannot fight the enemy and remain a civilian.”¹¹⁵ Just as it is possible to lose combatant status (by becoming a prisoner of war, for example) and the immunity that goes with it (by failure to comply with the law of war), the terrorist cannot properly be termed a civilian in the same sense as those innocents who huddle in their homes while combat rages round them. By choosing to participate in hostilities, particularly in a manner that defies the very notions of human decency and compassion, modern terrorists should not be protected by a shield of combatant immunity derived from the very body of law that they deliberately flout.

Though the textual changes in Protocol I introduced new elements of ambiguity in defining the line between protected civilians and unlawful combatancy, they by no means eliminated the distinction. Even as these new provisions remain practically inapplicable in the real world of state practice, they do not vitiate the other requirements for lawful combatant status set forth in the Hague Regulations and Article 4 of the Geneva Convention on Prisoners of War 1949 (i.e., The Third Convention). Consequently, the official ICRC commentary to Protocol I specified that “anyone who participates directly in hostilities without being subordinate to an organized movement under a Party to the conflict, and enforcing compliance with these rules, *is a civilian who can be punished for the sole fact that he has taken up arms. . .*”¹¹⁶ The Official ICRC Commentary further restates the long-established principle that “anyone who takes up arms without being able to claim this status [of a “lawful combatant”] will be left to be dealt with by the enemy and its military tribunals in the event that he is captured.”¹¹⁷

111. *See id.*

112. RALPH PETERS, *NEW GLORY: EXPANDING AMERICA’S GLOBAL SUPREMACY* 155 (2005) (“No matter how brutal their actions or unrealistic their hopes, their common intent was to . . . gain a people’s independence or to force their ideology on society.”).

113. Christopher Greenwood, *Terrorism and Humanitarian Law: The Debate over API*, 19 *ISR. Y.B. HUM. RTS.* 187, 203–04 (1989); George H. Aldrich, *New Life for the Laws of War*, 75 *AM. J. INT’L L.* 764 (1983).

114. Protocol I, *supra* note 1, art. 43, para. 1. This provision does contain a moderate victory for the Third World states that sought expanded legal protections through Protocol I in that the government need not be recognized by the opposing state party in order for its forces to achieve combatant status.

115. Yoram Dinstein, “*Unlawful Combatants*”, 32 *ISR. Y.B. HUM. RTS.* 247, 248 (2002).

116. INTERNATIONAL COMMISSION OF THE RED CROSS, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, 514 (Yves Sandoz et al. eds., 1987) (emphasis added) [hereinafter ICRC Commentary on Protocols].

117. *Id.* at 510.

Despite its apparent clarity, Protocol I preserves the principle of unlawful combatancy because it implicitly accepts the limitations inherent in civilian status. The Protocol emphasizes the limits of the traditional principle of combatant immunity by restating the traditional rule that only combatants “have the right to participate directly in hostilities.”¹¹⁸ In addition, the definition of combatant status incorporated the accepted categories from Article 4 of the Third Geneva Convention by reference.¹¹⁹ Hence, the ICRC commentary correctly observed that the uncontroversial “provisions of Article 4 of the Third Convention are fully preserved.”¹²⁰

Finally, in one backhanded, but extremely important provision, Protocol I sustained the existing law of unlawful combatancy by specifying that civilians enjoy the protections embodied in the Protocol “unless and for such time as they take a direct part in hostilities.”¹²¹ The simplistic dualist position becomes unsustainable in light of this language because by definition a person who takes part in hostilities is not a civilian, but at the same time is not automatically entitled to prisoner of war status.¹²² Accepting the reality that such persons are unlawful belligerents who may be prosecuted for their warlike acts, Protocol I describes a minimum set of due process obligations applicable to such prosecutions.¹²³ Article 45(3) provides that “[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.”¹²⁴

Eschewing these fine-grained technical distinctions, the United States categorically refused to accept the expanded classifications of combatancy promulgated in Protocol I.¹²⁵ From the U.S. perspective, the many positive developments in Protocol I failed to outweigh its “fundamentally and irreconcilably flawed” revisions to the classic law of combatancy.¹²⁶ President Reagan concluded that Article 1(4) and Article 44(3) would actually undermine the very purposes of

118. Protocol I, *supra* note 1, art. 43, para. 2 (“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains. . .) are combatants, that is to say, they have the right to participate directly in hostilities.”).

119. *See id.* art. 44, para. 6 (discussing the status of combatants and prisoners of war) (“This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.”).

120. ICRC Commentary on Protocols, *supra* note 116, at 522.

121. Protocol I, *supra* note 1, art. 51, para. 3.

122. *See id.* art. 50, para. 1 (defining civilian in a way that excludes all definitions in art. 43 of Protocol I and Article 4 of the Third Convention). At the same time that an individual engaged in combat is not a civilian, however, this individual’s conduct must also meet certain conditions to qualify him or her for prisoner of war status, if captured. *See id.* art. 44, para. 3 (specifying guidelines of combatant conduct which, if met, will qualify one for prisoner of war status, if captured).

123. *Id.* art. 45, para. 3.

124. *Id.*

125. Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess., III (1987), *reprinted in* 81 AM. J. INT’L L. 910, 911 (1987) [hereinafter Reagan Protocols Letter of Transmittal].

126. *Id.*; *see also* MARCO SASSOLI & ANTOINE BOUVIER, HOW DOES LAW PROTECT IN WAR? 603, 604 (Int’l Comm. of the Red Cross 1999) (discussing flaws in the Protocol, justifying it should not be forwarded to the Senate for consideration).

the Protocol and unnecessarily endanger civilians during armed conflicts.¹²⁷ The Department of State Legal Advisor declared that, regardless of the time and diplomatic energy spent negotiating a major multilateral instrument, U.S. approval “should never be taken for granted, especially when an agreement deals with national security, the conduct of military operations and the protection of victims of war.”¹²⁸ The Joint Chiefs of Staff unanimously opined that Protocol I would further endanger the lives of U.S. military personnel, even as its provisions would increase the danger to innocent civilians (in whose midst terrorist combatants could hide until the opportune moment to strike).¹²⁹

In political terms, Protocol I was achieved only because Third World states ignored the views of the United States and its European allies in order to grant combatant status (and the lawful right to claim the benefits of the Third Convention) to terrorist groups fighting for the causes subjectively deemed to represent a moral imperative.¹³⁰ The Third World political agenda caused the conference to drag on for four years rather than one and revealed the naïveté of the ICRC and the Swiss government which failed to anticipate the hijacking of the agenda.¹³¹ The diplomatic dialogue from 1974–1977 was a “political event as well as a legal and humanitarian one” that was different from other multilateral negotiations in “the nakedness of its political pursuits and the grossness of its General Assembly-style conduct.”¹³² The ICRC and Swiss government faced the dilemma of whether to lock in the many positive legal developments in the text at the cost of agreeing to the more malodorous aspects. The United States, on the other hand, simply could not accept that grievous war crimes and offenses against law and order could be both justified and immunized based on the moral imperatives of self-determination marshaled by other states that advocated extending combatant status even to a non-state actor that “displays a callous and systematic disregard for the law.”¹³³

Because of the political climate surrounding the negotiations, it was quite plausible for the United States to conclude that the real agenda behind the Protocol was to permit a one-sided extrapolation of combatant immunity. Thus, terrorists could be expected to derive the benefits from the laws and customs of war without also assuming the concomitant obligations under that body of law. In fact, wrote the U.S. Department of State Legal Advisor (in 1987),

The experience of the last decade confirms the hypocrisy of the regime established by Article I(4). Having achieved a political victory by “internationalizing” their own internal conflicts, so-called liberation groups have shown little interest in following through on the obligations of the Protocol. They have not acted in accordance with the existing requirements of customary international law, nor have they even bothered

127. See Reagan Protocols Letter of Transmittal, *supra* note 125.

128. Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT’L L. 784, 787 (1988).

129. *Id.* at 785–86.

130. *Id.* at 784–86.

131. CHRISTOPHER GREENWOOD, *ESSAYS ON WAR IN INTERNATIONAL LAW* 206 (2006). Apart from the victories in Article I(4) and Article 44, Third World states also secured a provision that banned the participation of mercenaries in armed conflict. Protocol I, *supra* note 1, art. 47.

132. BEST, *WAR AND LAW*, *supra* note 71, at 406, 415–16.

133. *Id.* at 486.

to file declarations with the Swiss Government accepting the obligations of the Protocol (as contemplated in Article 96). They have been content to cite the Protocol (e.g., in the United Nations) for the proposition that they must be accorded the benefits of humanitarian law (e.g., prisoner-of-war status) without fulfilling the duties expected. In practice, they have continued to make indiscriminate attacks on innocent civilians.¹³⁴

Although the head of the U.S. delegation later wrote that neither Article 1 nor Article 44 would “provide any solace or support for terrorists,”¹³⁵ President Reagan concluded that succumbing to pressure from other nations to accept Protocol I would extract “an unacceptable and thoroughly distasteful price.”¹³⁶ The Commander-in-Chief accordingly declared that the United States “must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.”¹³⁷ Some states, such as Argentina, attempted to ameliorate the same concerns using interpretive declarations:

With reference to Article 44, paragraphs 2, 3 and 4, of the same Protocol, the Argentine Republic considers that these provisions cannot be interpreted:

- a) as conferring on persons who violate the rules of international law applicable in armed conflicts any kind of immunity exempting them from the system of sanctions which apply to each case;
- b) as specifically favouring anyone who violates the rules the aim of which is the distinction between combatants and the civilian population;
- c) as weakening respect for the fundamental principle of the international law of war which requires that a distinction be made between combatants and the civilian population, with the prime purpose of protecting the latter.¹³⁸

President Reagan nevertheless concluded that the problems with Protocol I “are so fundamental in character that they cannot be remedied through reservations,

134. Sofaer, *supra* note 131, at 786.

135. Aldrich, *supra* note 109, at 10:

Finally, it should be obvious that neither the provisions of Article 1, paragraph 4, nor those of Article 44, nor those of the two in combination provide any solace or support for terrorists. Failure by combatants to distinguish themselves from the civilian population throughout their military operations is a punishable offense. Terrorist acts are all punishable crimes, including attacks on civilians, the taking of hostages, and disguised, perfidious attacks on military personnel, whether committed by combatants or by noncombatants, and whether the perpetrator is entitled to POW status or not. Assertions that ratification of Protocol I would give aid to, or enhance the status of, the PLO or of any terrorist group are totally unfounded. That such assertions should have been made by a President of the United States and those who advised him is regrettable.

136. Reagan Protocols Letter of Transmittal, *supra* note 125, at 911.

137. *Id.*

138. Protocol I, Argentina: Interpretive Declarations Made at the Time of Accession, Nov. 26, 1986, <http://www.icrc.org/ihl.nsf/NORM/1F3EE768E1F92B5FC1256402003FB24B?OpenDocument> (last visited Nov. 24, 2009).

and I have therefore decided not to submit the Protocol to the Senate in any form.”¹³⁹ He sent Protocol II to the Senate for its advice and consent on the basis of its “expansion of the fundamental humanitarian provisions contained in the 1949 Geneva Conventions.”¹⁴⁰

2. The National Reservations of NATO Partners

For a period of some years following the adoption of the text in 1977, the United States deliberated internally over the relative merits of reservations, understandings or declarations in remedying the attempt to expand international protections to insurgents seeking self-determination.¹⁴¹ The second sentence of Article 44(3), which has been the subject of so much debate through the decades, has been described by one of the most eminent international lawyers as a last-minute compromise that proves the truism that a treaty is “a disagreement reduced to writing.”¹⁴² As noted above, the rejection of Protocol I was based on the assessment that its expansive text could provide a pretext for terrorist acts and that the legal links of national reservations and understandings would be insufficient protection against the temptation of many states to protect terrorist acts under the rhetoric of lawful combatancy.¹⁴³ Phrased another way, the U.S. concluded that adherence to Protocol I in any form would serve to legitimize the subjective assessments of terrorists seeking public support for otherwise criminal acts.¹⁴⁴

However, the articulated rationale for rejecting Protocol I provided the template for sustained U.S. engagement with other nations. U.S. diplomats met regularly with NATO members in Brussels related to the formulation of appropriate diplomatic responses to preserve the humanitarian benefits of the Protocol while minimizing its potentially corrosive effects on military equities.¹⁴⁵ NATO allies of the United States shared a common sense of disappointment at the disingenuous manner that Protocol I purported to protect unlawful acts committed by non-state actors, but they also sought to preserve its genuinely progressive measures.¹⁴⁶ Despite a common abhorrence for terrorist acts, the NATO allies ultimately disagreed with the U.S. decision to abstain from the Protocol based on a different assessment of the modalities for achieving that desired end state.¹⁴⁷ Pursuant to their commitment to

139. Reagan Protocols Letter of Transmittal, *supra* note 125, at 911.

140. *Id.* at 910.

141. Aldrich, *supra* note 109, at 2.

142. GREENWOOD, *supra* note 131, at 217.

143. Reagan Protocols Letter of Transmittal, *supra* note 125, at 911.

144. *Id.* at 911–12.

145. Aldrich, *supra* note 109, at 2–3.

The only contentious issue at that time within the U.S. Government was whether we should reserve certain rights of reprisal that would otherwise be prohibited by the Protocol. When I left Washington in May 1981, the ultimate submission of Protocol I to the Senate for advice and consent to ratification seemed merely a matter of time. It also seemed entirely probable that, like the 1949 Geneva Conventions, Protocol I would eventually achieve nearly universal acceptance, with only a few exceptions.

146. See Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 680–81 (1994) (explaining that while some NATO members shared U.S. concerns with Protocol I they felt it was not fundamentally flawed).

147. *Id.* at 680–81.

the multilateral instrument in its own right, they issued authoritative diplomatic statements that comported with the humanitarian goals of the Protocol, but would serve to limit future interpretations of its most contentious provisions should disputes arise over their meaning and normative import.¹⁴⁸ Rather than simple rejectionist “exceptionalism,” the U.S. position vis-à-vis Protocol I framed the debate with key allies that, in turn, engaged in a second-order style of diplomacy to attempt to limit the deleterious effects of Article 44 in their own manner.¹⁴⁹

At the time of this writing, 168 nations have ratified or acceded to Protocol I.¹⁵⁰ In the wake of extensive discussions with the United States, NATO allies Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain and the United Kingdom all ratified Protocol I subject to the following reservations¹⁵¹ (using the example of the United Kingdom reservation):

It is the understanding of the United Kingdom that:

The situation in the second sentence of paragraph 3 can only exist in occupied territory or in armed conflicts covered by paragraph 4 of Article 1;

“Deployment” in paragraph 3(b) means any movement towards a place from which an attack is to be launched.¹⁵²

This language sought to inhibit terrorist operations by making the duty to carry one’s arms openly as broad as possible¹⁵³ (deliberately paraphrasing the U.S. definition of “deployment” from December 1977¹⁵⁴). At the same time, the NATO allies sought to restrict the coverage of Article 44 to a very limited context¹⁵⁵ (arguably no more extensive than the levée en masse provisions previously found in Article 4 of the 1949 Geneva Convention on Prisoners of War¹⁵⁶). This narrow

148. See *id.* at 681 (stating that NATO allies produced interpretive statements and reservations limiting the Protocol).

149. See Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT’L L. 912, 920–21 (1987) (providing a description of how various nations issued understandings to provisions of Article 44).

150. International Committee of the Red Cross, International Humanitarian Law—State Parties/Signatories, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P#ratif> (last visited Nov. 10, 2009). With the caveat that though the Swiss government received a letter on June 21, 1989 to the effect that the Executive Committee of the Palestine Liberation Organization had decided on May 4, 1989 “to adhere to the Four Geneva Conventions of August 12, 1949 and the two Protocols additional thereto,” the Swiss Federal Council was not in a position to decide whether the letter constituted an instrument of accession, “due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine.” *Id.*

151. Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims*, 849 INT’L REV. OF THE RED CROSS 143 (2003).

152. Ratification of Protocol I by the United Kingdom of Great Britain and Northern Ireland, Jan. 29, 1998, 2020 U.N.T.S. 75, 76–77.

153. See Rene Kosirnik, *The 1977 Protocols: a Landmark in the Development of International Humanitarian Law*, 320 INT’L REV. OF THE RED CROSS 483 (1997), available at <http://www.cicr.org/web/eng/siteeng0.nsf/htmlall/57jnuz?opendocument>.

154. See Aldrich, *supra* note 109, at 2.

155. See ICRC Commentary on Protocols, *supra* note 116, at 530 n.43 (providing a statement by the United Kingdom and a summary of considerations by other countries).

156. See *id.* at 526 n.21 (explaining that one of the levée en masse provisions requires members of a levée en masse to act in accordance with the laws and customs of war in their operations).

construction would protect an authentic struggle for self determination to reclaim sovereignty from an occupying power that temporarily displaced sovereignty.¹⁵⁷ On the other hand, the subjective assessments of non-state actors who merely rebelled against the legitimate authorities of a sovereign state would be excluded from the umbrella of lawful combatancy on the basis of this interpretation.¹⁵⁸ The NATO allies sought to ensure that the provisions of Article 44 could not be extended by analogy to provide legal coverage that could otherwise serve to facilitate the commission of terrorist acts.¹⁵⁹ Other major non-NATO allies, such as Australia,¹⁶⁰ Japan,¹⁶¹ Korea,¹⁶² and New Zealand¹⁶³ reached substantively identical conclusions and made nearly identical statements at the time of ratification.¹⁶⁴ The NATO allies and the United States simply selected different pathways to manifest identical substantive concerns.

In the wake of these diplomatic demarches, the drumbeat of criticism of the U.S. position intensified.¹⁶⁵ The Legal Advisor to the ICRC assailed President Reagan's determination as a "political" and "partisan" position that would deprive the world community of a "common framework" and "hinder the development and acceptance of universal standards in a field where they are particularly needed."¹⁶⁶ This criticism ignored the explicit language of the presidential statement rejecting Protocol I, which was intended to represent

a significant step in defense of traditional humanitarian law and in opposition to the intense efforts of terrorist organizations and their

157. *Id.* at 529–31.

158. *See id.*

159. *See* Aldrich, *supra* note 109, at 10.

160. Ratification of Protocol I by Australia, June 21, 1991, 1642 U.N.T.S. 473 ("It is the understanding of Australia that in relation to Article 44, the situation described in the second sentence of paragraph 3 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1. Australia will interpret the word 'deployment' in paragraph 3(b) of the Article as meaning any movement towards a place from which an attack is to be launched. It will interpret the words 'visible to the adversary' in the same paragraph as including visible with the aid of binoculars, or by infra-red or image intensification devices.").

161. Ratification of Protocol I by Japan, Aug. 31, 2004, 2283 U.N.T.S. 265 ("The Government of Japan declares that it is its understanding that the situation described in the second sentence of paragraph 3 of Article 44 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1. The Government of Japan also declares that the term 'deployment' in paragraph 3 (b) of Article 44 is interpreted as meaning any movement towards a place from which an attack is to be launched.").

162. Ratification of Protocol I by South Korea, Jan. 15, 1982, 1271 U.N.T.S. 408 ("In relation to Article 44 of Protocol I, the situation described in the second sentence of paragraph 3 of the Article can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1, and the Government of the Republic of Korea will interpret the word deployment in paragraph 3 (b) of the Article as meaning any movement towards a place from which an attack is to be launched.").

163. Ratification of Protocol I by New Zealand, Feb. 8, 1988, 1499 U.N.T.S. 358 ("The government of New Zealand will interpret the word 'deployment' in paragraph 3 (b) of the Article as meaning any movement towards a place from which an attack is to be launched. It will interpret the words 'visible to the adversary' in the same paragraph as including visible with the aid of any form of surveillance, electronic or otherwise, available to help keep a member of the armed forces of the adversary under observation.").

164. *Compare* Ratification of Protocol I by the United Kingdom of Great Britain and Northern Ireland, *supra* note 152, *with* Ratification of Protocol I by Australia, *supra* note 160, Ratification of Protocol I by Japan, *supra* note 161, Ratification of Protocol I by South Korea, *supra* note 162, *and* Ratification of Protocol I by New Zealand, *supra* note 163.

165. *See, e.g.*, Gasser, *supra* note 149.

166. *Id.* at 924.

supporters to promote the legitimacy of their aims and practices. The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.¹⁶⁷

The message from within the ICRC hierarchy was that the U.S. position was merely a pretext for a predetermined desire to avoid commitment to a multilateral treaty.¹⁶⁸ The presumption seemed to be that Protocol I embodied an inherent multilateral correctness based only on the twin realities that its text had been agreed upon under the sponsorship of the ICRC and because that text later entered into force based on the ratification of a number of states.¹⁶⁹ In other words, the very *fact* of the multilateral treaty created a logical and legal imperative for states to consent to the entire treaty regime, irrespective of their fundamental policy goals.

Echoing this political correctness, the United Nations General Assembly became a recurring forum for a reflexive reaffirmation that the United States' refusal to ratify Protocol I served to undermine both respect for humanitarian principles and international law. In 2006, the delegate from Kenya noted that accession of states to Protocol I is of "paramount importance in ensuring the safety of civilians" and proceeded to commend the work of ICRC in its efforts to "consolidate a legal reading of the complex questions bound up with the fight against terrorism, including the development of guidelines on the detention of persons."¹⁷⁰ Many resolutions in the years following the Reagan decision implicitly attacked the U.S. position by calling upon "all States parties to the Geneva Conventions that have not yet done so to consider becoming parties to the Additional Protocols at the earliest possible date."¹⁷¹ The Organization of American States and the European Union used slightly softer language to make the same point—opposition to Protocol I is couched internationally as a divisive point that continues to hinder international unity of purpose on the basis of common values.¹⁷²

Despite the fact that the United States and its NATO allies shared an identical concern that terrorist acts should not be commingled within the rubric of protected combatant activities (though they may have selected differing methodologies for expressing it), there has been no substantive public engagement by states in the United Nations debates to examine the relative merits of the U.S. policy perspective with respect to Protocol I. Rather, the flood of resolutions from UN organs simply assumed that the U.S. stance against terrorism in the context of Protocol I was misplaced and based on a misapprehension of the underlying utility of Protocol I.

167. Reagan Protocols Letter of Transmittal, *supra* note 125, at 912.

168. See Sofaer, *supra* note 131, at 784 (restating the ICRC's belief that the U.S. position on Protocol I was politically motivated).

169. See Organization of American States, Promotion and Respect for International Humanitarian Law, June 5, 2001, O.A.S.T.S. AG/RES. 1771 (stating that for international treaties like Protocol I to work, all the states involved have to consent).

170. U.N. GAOR, 61st Sess., 8th mtg., para. 67, U.N. Doc. A/C.6/61/SR.8 (Nov. 15, 2006).

171. G.A. Res. 66/1, para. 2, U.N. Doc. A/C.6/61/L.9 (Nov. 2, 2006).

172. Organization of American States, *supra* note 169; Ceta Noland, Legal Counsel, Permanent Mission of the Kingdom of the Netherlands, EU Presidency Statement: Status of Protocols Additional to the Geneva Conventions (Oct. 18, 2006), available at http://www.europa-eu-un.org/articles/en/article_3902_en.htm.

Protocol I became one of the litany of commonly cited examples of American exceptionalism and resistance to a multilateral world based on a commonality of values and consensus lawmaking. These arguments overlook the reality that the United States and its NATO allies were in fact engaged in sustained diplomatic efforts to achieve the precise purposes articulated in the letter of transmittal.

III. THE PRACTICE OF PRINCIPLED EXCEPTIONALISM

Alexis de Toqueville was the first observer to note the distinctiveness in the U.S. approach to the world. Writing in 1830, Toqueville referred to the United States as exceptional in a sense “that is, qualitatively different from all other countries.”¹⁷³ The U.S. ethos of rugged individualism in some sense originated with the rejection of European social structures and value systems and the success of colonists against the greatest military and economic power on the planet. The Revolution spawned an enduring sense that the U.S. institutions, values, and intentions are unique and thus immune from an automatic assimilation within international discourse that is based on a presumed homogeneity. George Washington, for example, warned against “the insidious wiles of foreign influence” in his farewell address to the nation on September 19, 1796.¹⁷⁴ U.S. political and legal debate has since been inescapably affected by this enduring sense of uniqueness and national destiny.

The debate over the reasoning and implications of what has been labeled “American exceptionalism” has spawned a vast literature.¹⁷⁵ A search of English-language law review articles published between 1990 and 2006 identified nearly 1,300 articles referencing American “exceptionalism” or “unilateralism,” a glut of writing that compares to fewer than ten pieces identified as addressing the reluctance of European nations to accept multilateral legal instruments.¹⁷⁶ The predominant academic argument denounces U.S. resistance to immersion and adherence to internationalized norms and legal institutions; such “exceptionalism” is often postulated to arise from American hypocrisy.¹⁷⁷ The U.S. stance towards Protocol I is frequently noted in this regard, but is accompanied by a substantial list of other examples such as the refusal of the United States to join the International Criminal Court, the Kyoto Protocol on Climate Change, the Ottawa Convention on Anti-Personnel Landmines, the United Nations Convention on the Rights of the Child,

173. SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE EDGED SWORD* 18 (1996); see also Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1481 n.4 (2003) (describing the historic basis of American exceptionalism).

174. George Washington, *Farewell Address*, in *GEORGE WASHINGTON: WRITINGS* 962, 974 (John Rhodehamel ed., 1997) (concluding that the primary interests of Europe would cause “frequent controversies” and that “it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities”).

175. See, e.g., Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 *MICH. L. REV.* 391 (2008); MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004); MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004); PETER HUCHTHAUSEN, *AMERICA’S SPLENDID LITTLE WARS: A SHORT HISTORY OF U.S. MILITARY ENGAGEMENTS—1975—2000* (2003).

176. Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 *VAND. J. TRANSNAT’L L.* 1307, 1309–10 (2008).

177. *Id.* at 1310–14.

and other international human rights agreements.¹⁷⁸ Indeed, awareness of a global audience that carries a keenly critical predisposition has affected U.S. jurisprudence as judges address charges of “exceptionalism” in both explicit and implicit ways.¹⁷⁹

Most scholarship on legal exceptionalism accepts a binary approach: Has a country acceded to a convention, or, in the alternative, has it refused to join or joined but sought to evade core treaty norms by using reservations? In the human rights context, international criticism has centered on the “number and far-reaching nature of reservations taken by the United States.”¹⁸⁰ The Human Rights Committee, for example, expressed regret at the number of U.S. reservations to the International Covenant on Civil and Political Rights and expressed its belief that “taken together, they intended to ensure that the United States has accepted only what is already the law of the United States.”¹⁸¹ Dean Koh described this approach as a sort of “flying buttress” mentality whereby America attempts to support the cathedral of international human rights from the outside based on incomplete adherence and adoption rather than as a strong supporting pillar fully embedded within the multilateral treaty regime.¹⁸² From a superficial perspective, this could describe the U.S. attitude towards Protocol I whereby there was perceived to be a glib expression that humanitarian law should be expanded and enforced, although the U.S. policy was in fact intended to avoid the application of those norms to its own forces.¹⁸³

The U.S. position towards Protocol I did presage a litany of multilateral instruments that would later be termed as “fatally flawed”¹⁸⁴ or “fundamentally

178. *Id.* at 1310; see also Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 4–5 (Michael Ignatieff ed., 2005); Koh, *supra* note 173, at 1485–86. As an example of the difficulties posed by the federalist structure of our Republic with regard to multilateral instruments, the much-criticized U.S. refusal to join the Convention on the Rights of the Child can be rationally explained by examination of the Convention’s applicability to numerous issues usually left to the states. These include many aspects of family law and juvenile justice, such as family separation and reunification, child custody, and child abuse and neglect. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 175–77 (2006).

179. See generally, Margaret E. McGuinness, *Sanchez-Llamas, American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47 (2007) (explaining how “judges—implicitly and explicitly—respond to arguments for and against exceptionalism”).

180. Martin Scheinin, *Reservations by States Under The International Covenant on Civil and Political Rights and its Optional Protocols, and the Practice of the Human Rights Committee*, in RESERVATIONS TO THE HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME: CONFLICT, HARMONY, OR RECONCILIATION 41, 46 (Ineta Ziemele ed., 2004) (noting that the United States report to the Human Rights Committee came some six months following the adoption of its General Comment 24 and was therefore “the first test for the practical application of the Committee’s approach as presented in the General Comment”).

181. *Report of the Human Rights Committee*, U.N. Doc. CCPR/C/79/Add.50, reprinted in Human Rights Committee, Annual Report of the Human Rights Committee, para. 279, U.N. Doc. A/50/40 (Oct. 3, 1995).

182. Koh, *supra* note 173, at 1484–85.

183. *Id.* at 1485–87.

184. See, e.g., Jonathan Weisman, *Ex-Clinton Aides Admit Kyoto Treaty Flawed*, USA TODAY, June 11, 2001, at 7A.

flawed”¹⁸⁵ by a succession of U.S. presidents, from all points of the political spectrum.¹⁸⁶ It is also no coincidence that many of the treaties that the United States has rejected outright have been accompanied by a clause prohibiting reservations.¹⁸⁷ Reflexive acceptance of the proposition that U.S. resistance to multilateral instruments flows primarily from a hypocritical desire to enjoy differing standards from the rest of the world is accordingly misplaced and superficial. By way of illustration, U.S. delegates to the negotiations leading up to the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction¹⁸⁸ sought agreement on a regime that would preserve the U.S. obligations to deter armed conflict along the Korean demilitarized zone, while also advancing the stated purpose of preventing the loss of innocent life caused by unrecovered landmines globally.¹⁸⁹

The United States refrained from joining both Protocol I and the Ottawa Convention, not because of a kneejerk exceptionalist mantra or a visceral distrust of multilateral instruments, but because delegates adopted a treaty that disregarded the legitimate equities of the United States.¹⁹⁰ The Ottawa Convention does not allow reservations¹⁹¹ and completely ignores the special military interests of a major military power with a substantial troop presence deployed to prevent a numerically superior enemy from crossing an international border clearly marked by the high fences, guard towers, and emplaced mine fields.¹⁹²

185. JANET R. HUNTER & ZACHARY ALDEN SMITH, PROTECTING OUR ENVIRONMENT: LESSONS FROM THE EUROPEAN UNION 101 (2005); *see also* Reagan Protocols Letter of Transmittal, *supra* note 125 (arguing that “Protocol I is fundamentally and irreconcilably flawed”).

186. On December 31, 2000, the last day that the Rome Statute was open for signature, Ambassador David Scheffer signed the Rome Statute of the International Criminal Court, but President Clinton’s signing statement expressed the U.S. resistance to accession as follows:

In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty but also claim jurisdiction over personnel of states that have not. . . . Given these concerns, I will not, and do not recommend that my successor, submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.

President Clinton, *Statement on the Rome Treaty on the International Criminal Court*, 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001), *reprinted in* SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW, VOLUME 1: 1999–2001 at 381–85 (2002).

187. *See, e.g.*, Rome Statute, *supra* note 48, art. 120 (providing that “No reservations may be made to this Statute.”).

188. The meeting resulted in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Mar. 1, 1999, 2056 U.N.T.S. 211 [hereinafter Ottawa Convention].

189. *See* Andrew C.S. Efav, *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 MIL. L. REV. 87, 98–102 (1999) (discussing the dilemma of “balancing military needs against humanitarian consideration” and mentioning the potential benefit of U.S. landmines on the demilitarized zone of the Korean peninsula).

190. *Id.* at 149–51.

191. Ottawa Convention, *supra* note 188, art. 19.

192. Efav, *supra* note 189, at 101; Phillip Bobbit, *American Exceptionalism: The Exception Proves the Rule*, 3 U. ST. THOMAS L.J. 328, 330 (2005) (concluding that “[n]o realistic conventional force could be protected from such a huge North Korean force without mines”); *National Defense Authorization Act for Fiscal Year 1999: Hearing Before the H. Comm. on National Security*, 105th Cong. (1998) (statement of Gen. Henry H. Shelton, Chairman, Joint Chiefs of Staff), available at http://www.globalsecurity.org/military/library/congress/1998_hr/2-5-98shelton.htm (testifying that “[i]n

Commenting on the unfortunate choice required by a treaty that does not permit reservations yet undermines U.S. interests, President Clinton remarked that:

One of the biggest disappointments I've had as President, a bitter disappointment for me, is that I could not sign in good conscience the treaty banning land mines, because we have done more since I've been President to get rid of land mines than any country in the world by far. We spend half of the money the world spends on de-mining. We have destroyed over a million of our own mines.

I couldn't do it because the way the treaty was worded was unfair to the United States and to our Korean allies in meeting our responsibilities along the DMZ in South Korea, and because it outlawed our anti-tank mines while leaving every other country intact. And I thought it was unfair.

But it just killed me. But all of us who are in charge of the nation's security engage our heads, as well as our hearts.¹⁹³

Just as in the Ottawa Convention context, the United States exercised principled exceptionalism in rejecting Protocol I. Protocol I blurred the lines circumscribing lawful combatants by creating new legal rules without rigorous articulation of the rationale for why such protections should flow to “[a] category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications.”¹⁹⁴ As the International Court of Justice noted in the *Nuclear Weapons* case, the law of war is *lex specialis* that takes precedence over some otherwise applicable human rights provisions during an armed conflict.¹⁹⁵ Thus, the corpus of humanitarian law cannot be said to necessarily subsume the most important aspects of the international law related to terrorist acts.

The United States concluded that commingling of the regime criminalizing terrorist acts with the *jus in bello* rules of humanitarian law would be untenable and inappropriate.¹⁹⁶ Rather than accepting the veiled assertion repeated through the

Korea . . . where we stand face-to-face with one of the largest hostile armies in the world, we rely upon anti-personnel landmines to protect our troops.”).

193. See Press Release, The White House, Office of the Press Secretary, Clinton Remarks on Comprehensive Test Ban Treaty (Oct. 6, 1999), available at <http://www.fas.org/nuke/control/ctbt/news/991006-ctbt-usia1.htm>.

194. Baxter, *supra* note 60, at 328.

195. See Michael J. Matheson, *The Opinion of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L. L. 417, 422 (1997) (“the test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”); see also Osman Bin Haji Mohamed Ali and Another Appellant and the Public Prosecutor, (1969) 1 Law Rep. 430 (P.C.) (appeal taken from the Fed. Ct. of Malay.), reprinted in MARCO SASSOLI & ANTOINE BOUVIER, HOW DOES LAW PROTECT IN WAR? 767, 771–73 (Int'l Comm. of the Red Cross 1999) (rejecting combatant status for members of the Indonesian armed forces who failed to comply with the four criteria laid out in Article 4 of the Geneva Convention).

196. See Matheson, *supra* note 195, at 421–22 (the United States argued that the law of armed conflict, rather than peacetime human rights law, should determine what constitutes an “arbitrary’ deprivation of life”).

years in U.N. channels that the only appropriate approach to Protocol I is complete adherence to its principles,¹⁹⁷ the U.S. perspective was that a technical and lawyerly approach based on discrete reservations and interpretive instruments between sovereign states would be both inadvisable and ultimately impossible.¹⁹⁸ The very act of accepting the principles enshrined in Articles 1(4) and 44(3) would, in the U.S. view, grant terrorists a psychological and legal victory that would later be used to undermine the peace and security of innocent and peace-loving citizens.¹⁹⁹ In other words, even a partial acknowledgement of the propriety of terrorists' claims to combatant status presented an unnecessary risk to innocent lives and property.

American exceptionalism with regard to Protocol I was in fact a policy determination based on national self-interests that reflected the underlying community interests of states engaged in a struggle against terrorists. Governments across the globe share the duty and desire to protect innocent citizens from threats to their lives and liberty posed by terrorist acts. The NATO allies concurred completely with the substance of the U.S. desire to withhold any recognition of privileged status to terrorists or to accord their crimes any sphere of legal protection.²⁰⁰ Rather than establishing an exceptionalist rejection of internationalist rhetoric, however, the U.S. position formed the benchmark for continued engagement with other nations in addressing common concerns. The U.S. rejection of Protocol I was a principled position that took political courage in the face of nearly unrelenting criticism in subsequent decades, although in fact the NATO position differed only in form and modality. U.S. leadership in shaping this normative framework became clear as states around the world hurried to ratify the most modern terrorism conventions in the aftermath of September 11.

IV. THE POST-SEPTEMBER 11 LEGAL CONTEXT

As shown above, the U.S. policy stance regarding Protocol I helped to prevent the commingling of the laws and customs of war. In the aftermath of September 11, the "exceptional" U.S. position formed the substantive benchmark around which other nations rallied in reaction to reservations designed to blur the distinctions between terrorists and privileged combatants. September 11 destroyed the naïve notion that there is a bright legal line that neatly divides a combat zone into innocent civilians (who are legally protected from deliberate hostilities) and combatants who may lawfully be targeted and killed.²⁰¹ The attacks transformed an esoteric problem that was important only to specialists in the law of armed conflict into a tactical and legal problem highly relevant to current operations. The dualistic International

197. See GREENWOOD, *supra* note 131, at 209 (stating that Protocol I is firmly embedded in international law).

198. *Id.* at 202.

199. See *id.* (quoting a U.S. government official calling Protocol I "law in the service of terror"); see also Feith, *supra* note 1 (accusing the U.N. General Assembly of issuing a "pro-terrorist treaty masquerading as humanitarian law").

200. See Feith, *supra* note 1 (discussing Western European representatives' opposition to the Additional Protocols during the Diplomatic Conference debate).

201. This dualistic view of the law was privately expressed by the International Committee of the Red Cross and publicly expounded by a number of commentators on the law of armed conflict. Article 48 of Protocol I, *supra* note 1, reflects this simple dualism with the basic rule that Parties to the conflict must distinguish "at all times" between civilians and protected civilian objects and "shall direct their operations only against military objectives."

Committee of the Red Cross (ICRC) view of legal status noted above simply does not square with the facts related to the war against transnational terrorist operations. Al Qaeda and its supporters acted as private citizens in declaring war on U.S. citizens and values,²⁰² and carried out their attacks with a purposeful intensity that rises to the level of armed conflict by any common sense definition. Moreover, the conflict against al Qaeda and its supporters is an armed conflict governed by the law of armed conflict as defined by the International Criminal Tribunal for the Former Yugoslavia.²⁰³ Invoking the mutual defense obligations of Article 5 for the first time in NATO history, NATO accepted the legal conclusion that al Qaeda committed an armed attack on the United States.²⁰⁴ Despite al Qaeda rhetoric alluding to a struggle for liberation and self-determination, no nation would ever accept the normative proposition that the private group of terrorists acted with a legally cognizable expectation of combatant immunity. Al Qaeda and its supporters forfeited the rights that would normally accrue to civilian persons caught in the midst of hostilities, chief among them the right to be free from deliberate efforts at targeting them.²⁰⁵

202. Osama bin Laden has made more than fifty declarations of war against the United States (summary of statements on file with author). In the official fatwa signed by Bin Laden and four others on February 23, 1998, *THE AL QAEDA READER* 13 (Raymond Ibrahim, ed. and trans., 2007), he declared his objective:

The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty God, “and fight the pagans all together as they fight you all together,” and “fight them until there is no more tumult or oppression, and there prevail justice and faith in God.”

This is in addition to the words of Almighty God: “And why should ye not fight in the cause of God and of those who, being weak, are ill-treated (and oppressed)?—women and children, whose cry is: ‘Our Lord, rescue us from this town, whose people are oppressors; and raise for us from thee one who will help!’”

We—with God’s help—call on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid on Satan’s U.S. troops and the devil’s supporters allying with them, and to displace those who are behind them so that they may learn a lesson.

203. See *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995) (“[A]n 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.”).

204. Lord Robertson, NATO Secretary General, Statement on September 11 Attacks (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm> (announcing NATO’s determination that the September 11 attack “shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all”).

205. The law of armed conflict provides that lawful attacks may only be directed at military objectives (which includes enemy combatants). Civilians may not be deliberately attacked unless they directly participate in hostilities. See Protocol I, *supra* note 1, art. 51, paras. 2–3. Celebrated in international law as the principle of distinction, the President of the ICRC opined that this principle is “crucial.” Dr. Jakob Kellenberger, *International Humanitarian Law at the Beginning of the 21st Century, The Two Additional Protocols to the Geneva Conventions: 25 Years Later—Challenges and Prospects*, Statement at the 26th

Above all, September 11 proved that some private terrorist groups are undeterred by existing criminal law prohibitions and treaty obligations designed to apply to sovereign states in a world governed by respect for the rule of law. The United States took the view that the inherent right of self-defense permits the United States to seek “justice” using its military power.²⁰⁶ The attacks provided graphic affirmation of Justice Jackson’s famous truism from the Nuremberg Tribunal that “wars are started only on the theory and in the confidence that they can be won. Personal punishment . . . will probably not be a sufficient deterrent to prevent a war where the warmakers feels the chances of defeat to be negligible.”²⁰⁷ Transnational terrorism challenges the community of civilized nations precisely because a group of private persons linked by shared ideology is now waging war in direct defiance of international law. The classic style of terrorist sought short-term political gain through revolution, national liberation, or secession;²⁰⁸ the new terrorist seeks to transform the world and is motivated by religious and ideological imperatives under the influence of a larger transcendental mythology.²⁰⁹ This approach is a far cry from the anti-colonial efforts against a specific government conducted by organized gangs that provided the impetus for Protocol I.

The U.S. response to the terrorist attacks reshaped the paradigm for dealing with terrorists from an exclusive reliance on judicial mechanisms to address criminal conduct into a war-fighting model. International terrorism constitutes a national security problem as well as a law enforcement problem because it is a unique form of transnational crime in which private actors seek to unravel the fabric of civilized society and thereby undermine state, regional, and global security.²¹⁰ This new paradigm required an interface between established law of armed conflict norms and existing judicial mechanisms capable of prosecuting those perpetrators who are not eliminated or emasculated by the application of military power.²¹¹

In that sense the war on terrorism is more than a politically convenient concept. Without applying the law of armed conflict to transnational terrorists, it would be a non-sequitur to even consider whether they are entitled to combatant immunity for their warlike acts. Despite the widespread ratifications of Protocol I, no domestic court in the world has accepted the claims of terrorists to immunity that are unwarranted under existing international law.²¹² Al Qaeda and its operatives

Round Table in San Remo on the Current Problems of International Humanitarian Law (Sept. 5, 2002), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/EFC5A1C8D8DD70B9C1256C36002EFC1E>.

206. See generally Jack M. Beard, *America’s New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J. L. & PUB. POL’Y 559, 559–60 (2002).

207. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 153–54 (1947).

208. See Martha Crenshaw, *The Psychology of Terrorism: An Agenda for the 21st Century*, 21 POL. PSYCHOL. 405, 411 (2000) (describing “old” terrorism as it is compared to “new” terrorism).

209. *Id.*; see also Michael J. Stevens, *What is Terrorism and Can Psychology Do Anything to Prevent It?*, 23 BEHAV. SCI. & L. 507, 508 (2005) (discussing the psychology of today’s terrorism).

210. Stevens, *supra* note 209, at 517–18.

211. See generally William L. Waugh, Jr. & Richard T. Sylvester, *Organizing the War on Terrorism*, 62 PUB. ADMIN. REV. 145 (2002) (discussing the United States’ efforts to redefine the relationship between law enforcement and national security agencies after September 11).

212. See, e.g., *Her Majesty the Queen v. Mohammed Momin Khawaja*, [2008] Ontario Superior Court of Justice 04-G30282; see also *CrimA 6659/06, 1757/07, 8228/07, 3261/08, A & B v. State of Israel* [2008]; *Munaf v. Geren*, 128 S.Ct. 2207, 553 U.S. (June 12, 2008); *The Military Prosecutor v. Omar Mahmud Kassem and Others*, 41 I.L.R. 470 (1971) (Israeli Military Court, Ramallah, April 13, 1969), reprinted in 60

scattered across the world cannot meet the Geneva Convention requirements for treatment as prisoners of war under any scenario.²¹³ The European Parliament accepted that reality by adopting a resolution recognizing that the terrorists “do not fall precisely within the definitions of the Geneva Convention.”²¹⁴ By the accepted definition, also found in Protocol I, they became lawful targets for military action because the “destruction, capture or neutralization” of al Qaeda and its supporters “offers a definite military advantage.”²¹⁵ They relinquished the protections afforded innocent civilians, who are protected from being targeted, and simultaneously forfeited the legal protections enjoyed by lawful combatants who fall into the hands of the enemy.

A. *The Changing Face of Terror*

Following September 11, the European Parliament opined that the law of armed conflict must “be revised to respond to the new situations created by the development of international terrorism.”²¹⁶ In hindsight, Protocol I failed to bring closure to the persistent international efforts to define the boundaries of the class of “unprivileged belligerents”²¹⁷ who forfeit their protection from attack by conducting hostile activities without the privileges accruing to “combatants” under the established laws of war. If Protocol I embedded the meanings intended by its most progressive supporters, then such evolution would be unnecessary because the law would already establish an accepted legal right for al Qaeda to claim combatant status. On the other hand, the United States’ reliance on the *jus in bello* paradigm

HOWARD LEVIE, DOCUMENTS ON PRISONERS OF WAR, NAVAL WAR COL. INT. L. STUD. 771, 780 (1979) (rejecting the claim of combatant immunity raised by a member of the “Organization of the Popular Front for the Liberation of Palestine”); Osman Bin Haji Mohamed Ali and Another Appellant and the Public Prosecutor, *supra* note 195, at 767 (rejecting combatant status for members of the Indonesian armed forces who failed to comply with the provisions of Article 4 of the Geneva Conventions).

213. See George H. Aldrich, *The Taliban, Al Qaeda and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 893 (Oct. 2002) (“Al Qaeda does not in any respect resemble a state, is not a subject of international law, and lacks international legal personality.”). With respect to terrorists in the post-September 11 era, the Legal Advisor of the U.S. State Department mirrored the concerns voiced by previous administrations in the context of Protocol I by writing that:

The purposes of the law of armed conflict are not advanced by granting illegitimate fighters immunity for their belligerent acts, for that would undermine the law’s fundamental purpose, bring the entire body of law into disrepute, and strip it of credibility. The positive incentives of the existing normative system require that soldiers follow the rules and, most importantly, distinguish combatants from civilians. To recognize terrorists as lawful combatants would upend the entire system and cause predictably grim humanitarian consequences.

William H. Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 321 (2003).

214. Resolution on the Detainees in Guantanamo Bay, EUR. PARL. DOC. B5-0066 (2002) [hereinafter European Parliament Resolution].

215. Protocol I, *supra* note 1, art. 52, para. 2.

216. European Parliament Resolution, *supra* note 214.

217. Baxter, *supra* note 60, at 343 (“The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. ‘Unlawful belligerency’ is actually ‘unprivileged belligerency.’”).

necessitated discussion of combatant status as debates swirled around the proper categorization of terrorist acts and of captured terrorists.²¹⁸ Some international law scholars would argue that lawyers interpreting and applying the treaties governing the conduct of hostilities must extrapolate from the text to fashion legal advice that focuses on the “high purposes which are the *raison d’être* of the convention.”²¹⁹ From this vantage point, Protocol I would provide the baseline from which the law would evolve in response to new forms of transnational terrorism.

In practice, September 11 provided the impetus for precisely the opposite legal development. The international community refocused on the matrix of existing terrorism conventions as the acceptable starting point for analysis when assessing the conduct and status of suspects accused of terrorist acts.²²⁰ Only three states had become parties to the Convention for the Suppression of Terrorist Financing at the time of the attacks, in contrast to the 171 parties at the time of this writing.²²¹ Likewise, though the Terrorist Bombing Convention entered into force on May 23, 2001, it boasted only twenty-four participating states as opposed to 164 at the time of this writing.²²² September 11 caused a reevaluation of the multilateral framework for criminalizing terrorist acts which in turn resulted in emphatic international rejection of arguments that the legal accountability for terrorist acts can be shrouded by resort to subjective and shifting justifications or by resort to arguments based on moral equivalency.²²³

218. See, e.g., Gilbert Guillaume, *Terrorism and International Law*, 53 INT’L. COMP. L.Q. 537, 547 (2004) (discussing the same issue and focusing on the status of captured terrorists).

219. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 23 (May 28) (“The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.”).

220. See, e.g., Terrorist Financing Convention, *supra* note 6; Terrorist Bombing Convention, *supra* note 20.

221. The Convention entered into force on April 10, 2002 in accordance with Article 26 that states:

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Terrorist Financing Convention, *supra* note 6. The Convention entered into force for the United States on July 25, 2002, in accordance with Article 26, cited above. The United States deposited its instrument of ratification on June 25, 2002; the same day President Bush signed the Convention’s implementing legislation, 18 U.S.C. § 2339C, into law. See Terrorist Bombings Convention Implementation Act of 2002, H.R. 3275, 107th Cong. (2d Sess. 2002) (“An Act to implement . . . the International Convention of the Suppression of the Financing of Terrorism, to combat terrorism and defend the Nation against terrorist acts . . .”).

222. See Terrorist Bombing Convention, *supra* note 20 (requiring twenty-two states to have ratified, accepted, approved, or acceded to the Convention for the treaty to enter into force).

223. See, e.g., Martha Crenshaw, *The Psychology of Terrorism: An Agenda for the 21st Century*, 21 POL. PSYCHOL. 405, 406 (2000):

The problem of defining terrorism has hindered analysis since the inception of studies of terrorism in the early 1970s. One set of problems is due to the fact that the concept of

The U.S. position vis-à-vis Protocol I that there must be a bright line between the applicable jus in bello and the status accorded to terrorist suspects has been emphatically validated in the diplomatic dialogues accompanying state ratification of the key post-September 11 terrorism conventions.²²⁴ International law is clear that terrorist acts will *always* be punishable under the criminal codes of one or more domestic states.²²⁵ While the U.S. rejection of Protocol I has been portrayed as exceptionalist and hypocritical, all nations shared the underlying substantive assessment that terrorists could expect no immunity for acts that undermine the protection of human life and the goal of minimizing damage to civilian property.²²⁶ These common concerns are the source of humanitarian law, and states have resoundingly rejected challenges to this shared conception of the international legal order.²²⁷

On the other hand, Protocol I provides an articulable textual basis purporting to legitimize acts of non-state actors seeking self-determination or conducting hostilities against domination by foreign sovereigns. Some states sought to extrapolate from its provisions by analogy in an attempt to redefine terrorism in the context of the Terrorist Financing Convention and the Terrorist Bombing Convention. Sovereign states overwhelmingly rejected the attempts by Egypt, Syria, and Jordan to introduce subjective elements drawn from Protocol I into the definition of terrorism. In so doing, they followed the example that the United States had provided nearly thirty years previously in the context of its rejection of Protocol I.²²⁸ The United States was prescient in its position that the law of terrorism and the jus in bello applicable to status determinations cannot be commingled. The rejection of reservations that sought to weave the Protocol I standards into the law of terrorism marked the definitive adoption of the U.S. position.

terrorism is deeply contested. The use of the term is often polemical and rhetorical. It can be a pejorative label, meant to condemn an opponent's cause as illegitimate rather than describe behavior. Moreover, even if the term is used objectively as an analytical tool, it is still difficult to arrive at a satisfactory definition that distinguishes terrorism from other violent phenomena. In principle, terrorism is deliberate and systematic violence performed by small numbers of people, whereas communal violence is spontaneous, sporadic and requires mass participation. The purpose of terrorism is to intimidate a watching popular audience by harming only a few, whereas genocide is the elimination of entire communities. Terrorism is meant to hurt, not to destroy. Terrorism is preeminently political and symbolic, whereas guerilla warfare is a military activity. Repressive "terror" from above is the action of those in power, whereas terrorism is a clandestine resistance to authority. Yet in practice, events cannot always be precisely categorized.

224. See, e.g., International Convention for the Suppression of the Financing of Terrorism, Argentina Communication Concerning the Declaration Made by Jordan Upon Ratification, Oct. 10, 2005, C.N.1034.2005.TREATIES-35 [hereinafter Argentina Communication Concerning Jordan] (providing an example of support for a bright line declaration that all terrorist acts are criminal, regardless of motives).

225. See, e.g., Terrorist Financing Convention, *supra* note 6, art. 4.

226. See, e.g., Argentina Communication Concerning Jordan, *supra* note 224.

227. See Lea Brilmayer & Geoffrey Chepiga, *Ownership or Use? Civilian Property Interests in International Humanitarian Law*, 49 HARV. INT'L. L. J. 413, 419 (2008) (stating that the protection of the civilian person and civilian property are principles "firmly embedded in modern international humanitarian law").

228. See Reagan Protocols Letter of Transmittal, *supra* note 125 (describing the need to distinguish international and non-international conflicts in objective terms and avoid subjective terms that are ill-defined and threaten to politicize humanitarian law).

B. Evolution of the Multilateral Framework Regulating Terrorism

1. Reservations to the Terrorist Financing Convention

The essence of the Terrorist Financing Convention is its core criminal prohibition found in Article 2:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.²²⁹

The object and purpose of the Terrorist Financing Convention is to hinder *all* acts of terrorism by holding *all* persons²³⁰ and legal entities liable using the broadest range of remedies available.²³¹ These remedies include criminal sanctions for persons, and civil, criminal, and administrative sanctions for legal entities that collect or provide funds to be used in terrorist acts defined in Article 2 of the Convention.²³² Like other multilateral terrorism conventions, the Terrorist Financing Convention specifically provides that none of the defined offenses “shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political

229. Terrorist Financing Convention, *supra* note 6, art. 2. The Annex referenced in subpart (a) sets forth the entire universe of applicable terrorist conventions: 1. Convention for the Suppression of Unlawful Seizure of Aircraft, 2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 4. International Convention against the Taking of Hostages, 5. Convention on the Physical Protection of Nuclear Material, 6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 9. International Convention for the Suppression of Terrorist Bombings. *Id.* Annex.

230. The Convention adopts a broad construction of personal and subject-matter jurisdiction. Terrorist Financing Convention, *supra* note 6, art. 7, para 2.

231. *See, e.g., id.* art. 5, para. 1 (“Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.”).

232. *See, e.g., id.* art. 5, para. 3 (“Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.”).

motives.”²³³ Finally, in the clearest possible language, the Convention sweeps broadly in attempting to eliminate any room for affirmative defenses based on justification.²³⁴ Article 6 of the Convention requires ratifying states to “adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”²³⁵

Some states attempted to erode the manifest intent of the Terrorist Financing Convention through the use of reservations and declarations. A reservation is “a unilateral statement . . . made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”²³⁶ Egypt’s “explanatory declaration” is a unilateral statement made at the time of ratification of the Convention that purports to exclude or modify the legal effect of the Convention. Drawn from the substantive soil of Protocol I, article 1, paragraph 4, the “explanatory declaration” states:

Without prejudice to the principles and norms of general international law and the relevant United Nations resolutions, the Arab Republic of Egypt does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning of article 2, [paragraph 1] subparagraph (b), of the Convention.²³⁷

Article 3 of the Terrorist Financing Convention limits its applicability in situations where “the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction”²³⁸ Hence, if the Egyptian declaration represents a valid interpretation of the Convention, Egypt would become a sanctuary state for terrorists who sought to plan, finance, and conduct operations around the world. The declaration states that Egypt does not consider all acts of national resistance as terrorism. Such a statement can be seen as permitting funding from within Egypt with the objective of bankrolling Taliban operations in Afghanistan, the murderous Badr brigades in Iraq, Palestinian activities, or even Hezbollah activities in Lebanon and northern Israel. The “explanatory declaration” also purported to limit the definition of acts for which Egypt would have to hold accountable under Article 4 of the Convention any person who committed such acts, which may be seen as undercutting the universality of international cooperation in the fight against terrorist acts.²³⁹ The explanatory declaration would modify Article 6 of the

233. *Id.* art. 14.

234. *Id.* art. 6.

235. *Id.*

236. Vienna Convention on the Law of Treaties art. 2, para. 1(d), May 23, 1969, 1155 U.N.T.S. 331.

237. International Convention for the Suppression of the Financing of Terrorism, Egypt: Ratification, Mar. 1, 2005, C.N.176.2005.TREATIES-3 [hereinafter Egypt Ratification].

238. Terrorist Financing Convention, *supra* note 6, art. 3.

239. See Egypt Ratification, *supra* 237 (limiting the definition of terrorist acts).

Convention by creating a defense of political and ideological justification derived from the subjective assessments of the terrorist for acts that would otherwise fall within the definition of Article 2 of the Convention.

Echoing the U.S. position from the Protocol I debates, at the time of this writing twenty-one states have opposed such an extrapolation into the Terrorist Financing context using virtually identical language and reasoning to state emphatic and unequivocal rejection of Egypt's position.²⁴⁰ The German response is typical and follows in its entirety:

With regard to the explanatory declaration made by Egypt upon ratification:

The Government of the Federal Republic of Germany has carefully examined the declaration made by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism upon ratification of the Convention relating to Article 2 paragraph 1 (b) thereof. It is of the opinion that this declaration amounts to a reservation, since its purpose is to unilaterally limit the scope of the Convention. The Government of the Federal Republic of Germany is furthermore of the opinion that the declaration is in contradiction to the object and purpose of the Convention, in particular the object of suppressing the financing of terrorist acts wherever and by whomever they may be committed.

The declaration is further contrary to the terms of Article 6 of the Convention, according to which States Parties commit themselves to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Federal Republic of Germany recalls that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a convention are not permissible.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned declaration by the Arab Republic of Egypt to the International Convention for the Suppression of the Financing of Terrorism. This objection shall not preclude the entry into force of the Convention as between the Federal Republic of Germany and the Arab Republic of Egypt.²⁴¹

Joining the Germans, the following states objected to the declaration on the same legal basis: Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia,

240. See United Nations Treaty Collection, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=XVIII-11&chapter=18&lang=en (listing the objecting states).

241. International Convention for the Suppression of Financing of Terrorism, Germany: Objection With Regard to the Explanatory Declaration Made by Egypt upon Ratification, Aug. 16, 2005, C.N.677.2005.TREATIES-24; see United Nations Treaty Collection, *supra* note 240.

Finland, France, Hungary, Ireland, Italy, Latvia, The Netherlands, Poland, Portugal, Spain, Sweden, the United Kingdom, and of course, the United States of America.²⁴²

Some states added their own insights supporting their position. Argentina, for example, added with respect to the Egyptian declaration, or any future such pronouncement by any other state that “the Government of the Argentine Republic considers that all acts of terrorism are criminal, regardless of their motives, and that all States must strengthen their cooperation in their efforts to combat such acts and bring to justice those responsible for them.”²⁴³ Ireland admonished that it is “in the common interest of States that treaties to which they have chosen to become party are respected as to their object and purpose and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.”²⁴⁴

Against this array of diplomatic solidarity, only Syria and Jordan entered reservations that could even be remotely construed as ideologically similar.²⁴⁵ The Syrian Arab Republic wrote that “acts of resistance to foreign occupation are not included under acts of terrorism.”²⁴⁶ Other than Argentina and Ireland, every nation that rejected the Egyptian declaration used very similar language to reject the Syrian effort, with the additions of Japan and Norway.²⁴⁷ Finally, the Jordanian declaration read as follows: “The Government of the Hashemite Kingdom of Jordan does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people’s right to self-determination as terrorist acts within the context of paragraph 1 (b) of article 2 of the Convention.”²⁴⁸ Predictably, this declaration was rejected by twenty states—those listed above and the notable addition of the Russian Federation.²⁴⁹

In the context of Protocol I, all NATO allies, except the United States (for the policy reasons noted above), attempted to constrain a lawful right to internationalize an armed conflict on behalf of non-state participants to the context of occupation.²⁵⁰ By rejecting the Egyptian, Syrian, and Jordanian declarations, they echoed the position that the United States had proclaimed nearly three decades prior. Hence, apart from three states, whose feeble attempts were scattered like the detritus of the World Trade Towers, international law is clear as a matter of both *opinio juris* and conventional text in that there is simply no articulable justification for the financial

242. United Nations Treaty Collection, *supra* note 240.

243. International Convention for the Suppression of the Financing of Terrorism, Argentina: Communication Concerning The Explanatory Declaration Made By Egypt Upon Ratification, Aug. 22, 2005, C.N.1034.2005.TREATIES-35.

244. International Convention for the Suppression of the Financing of Terrorism, Ireland: Objection Relating to the Explanatory Declaration Made by Egypt upon Ratification, June 23, 2006, C.N.555.2006.TREATIES-21.

245. See International Convention for the Suppression of the Financing of Terrorism, Syrian Arab Republic: Accession, Apr. 24, 2005, C.N.326.2005.TREATIES-6 [hereinafter Syrian Accession] (stating reservations similar to Egypt’s); International Convention for the Suppression of Financing of Terrorism, Jordan: Ratification, Aug. 28, 2003, C.N.910.2003.TREATIES-32 [hereinafter Jordanian Accession] (stating reservations similar to Egypt’s).

246. Syrian Accession, *supra* note 245.

247. See United Nations Treaty Collection, *supra* note 240.

248. Jordanian Accession, *supra* note 245.

249. See United Nations Treaty Collection, *supra* note 240.

250. Protocol I, *supra* note 1.

facilitation of terrorist acts. In hindsight, the world reacted to validate and reinforce the U.S. effort to prevent commingling of the jus in bello protections afforded to lawful combatants with the bright line international condemnation of terrorist acts irrespective of their context or subjective motivations.

2. Reservations to the Terrorist Bombing Convention

The International Convention for the Suppression of Terrorist Bombings presents an even more striking example of the prescience of the United States' position at the time of Protocol I. The material penal provision in Article 2 provides that

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:
 - a. With the intent to cause death or serious bodily injury; or
 - b. With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.
2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.
3. Any person also commits an offence if that person:
 - a. Participates as an accomplice in an offence as set forth in paragraph 1 or 2 of the present article; or
 - b. Organizes or directs others to commit an offence as set forth in paragraph 1 or 2 of the present article; or
 - c. In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.²⁵¹

The Convention was originally intended to fill lacunae in the normative structure, but even in its Preamble it reinforces the dichotomous approach to the prevention and prosecution of terrorist acts. It specifically notes “that the activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws[.]”²⁵² The object and purpose of the

251. Terrorist Bombing Convention, *supra* note 20, art. 2.

252. *Id.* p.mbl.

Terrorist Bombing Convention is to regulate terrorist bombings,²⁵³ it does *not* aim to provide a basis for invoking a moral equivalency between terrorist acts and the conduct of operations by armed forces.

One of the most important and widely agreed-upon provisions, Article 19(2) of the Terrorist Bombing Convention, reinforces the division between the law of terrorism and the *ius in bello* applicable to armed conflicts:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.²⁵⁴

Recent international practice has reinforced the notion that the deliberate use of terror as a military tactic would violate international law. Both Protocol I and Protocol II prohibit acts or threats of violence, whose primary purpose is to “spread terror among the civilian population[.]”²⁵⁵ The International Criminal Tribunal for the Former Yugoslavia opined that “the prohibition against terror is a specific prohibition within the general prohibition of attack on civilians,” the latter of which constitutes a “peremptory norm of customary international law.”²⁵⁶ The ICRC Commentary notes that military operations that seek to inflict terror “are particularly reprehensible, . . . occur frequently, and inflict particularly cruel suffering on the civilian population.”²⁵⁷ More recently, in upholding the convictions in the AFRC Case, the Appeals Chamber of the Special Court for Sierra Leone accepted that convictions for “acts of terrorism” could lie for the three appellants who engaged in a “common plan to carry out a campaign of terrorizing and collectively punishing the civilian population of Sierra Leone . . . in order to achieve the ultimate objective of gaining and exercising political power and control over the territory of Sierra Leone.”²⁵⁸ As this article goes to press, Bosnian Serb leader Radovan Karadzic is being tried at The Hague, *inter alia*, on the charge of unlawfully inflicting terror upon civilians.²⁵⁹

Just as it did in the context of the Terrorist Financing Convention, Egypt attempted to blur the lines between differing legal regimes. One of its reservations stated that “[t]he Government of the Arab Republic of Egypt declares that it is bound by Article 19, paragraph 2, of the Convention insofar as the military forces of the State, in the exercise of their duties do not violate the rules and principles of

253. *See id.*

254. *Id.* art. 19(2).

255. Protocol I, *supra* note 1, art. 51(2); Protocol II, *supra* note 69, art. 13, para. 2.

256. Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Opinion, para. 98 (Dec. 5 2003), available at <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>.

257. ICRC Commentary on Protocols, *supra* note 116, at 1453.

258. Prosecutor v. Alex Tamba Brima, et al., Case No. SCSL-2004-16-A, para. 70 (Feb. 22, 2008), available at <http://www.sc-sl.org/CASES/ArmedForcesRevolutionaryCouncilAFRCComplete/AFRCJudgment/tabid/173/Default.aspx>.

259. The Prosecutor v. Radovan Karadzic, Case No. IT-95-5, Amended Indictment, paras. 44–52 (Feb. 18, 2009), available at <http://www.icty.org/x/cases/karadzic/ind/en/090218.pdf>.

international law.”²⁶⁰ The response of the United Kingdom exemplifies the language and approach taken by other states (which included Canada, France, Germany, Italy, The Netherlands, the Russian Federation, Spain, and the United States) in opposition to the Egyptian effort.

With regard to the reservation made by Egypt upon ratification:

The Government of the United Kingdom of Great Britain and Northern Ireland have examined the declaration, described as a reservation, relating to article 19, paragraph 2 of the International Convention for the Suppression of Terrorist Bombings made by the Government of the Arab Republic of Egypt at the time of its ratification of the Convention.

The declaration appears to purport to extend the scope of application of the Convention to include the armed forces of a State to the extent that they fail to meet the test that they “do not violate the rules and principles of international law.” Such activities would otherwise be excluded from the application of the Convention by virtue of article 19, paragraph 2. It is the opinion of the United Kingdom that the Government of Egypt is entitled to make such a declaration only insofar as the declaration constitutes a unilateral declaration by the Government of Egypt that Egypt will apply the terms of the Convention in circumstances going beyond those required by the Convention to their own armed forces on a unilateral basis. The United Kingdom consider this to be the effect of the declaration made by Egypt.

However, in the view of the United Kingdom, Egypt cannot by a unilateral declaration extend the obligations of the United Kingdom under the Convention beyond those set out in the Convention without the express consent of the United Kingdom. For the avoidance of any doubt, the United Kingdom wish to make clear that it does not so consent. Moreover, the United Kingdom do not consider the declaration made by the Government of Egypt to have any effect in respect of the obligations of the United Kingdom under the Convention or in respect of the application of the Convention to the armed forces of the United Kingdom.

The United Kingdom thus regard the Convention as entering into force between the United Kingdom and Egypt subject to a unilateral declaration made by the Government of Egypt, which applies only to the

260. International Convention for the Suppression of Terrorist Bombings, Egypt: Ratification, Aug. 9, 2005, C.N.6 34.2005 TREATIES-1 (The following articulation was made by Egypt at the time of ratification of the Terrorist Bombing Convention:

1. The Government of the Arab Republic of Egypt declares that it shall be bound by article 6, paragraph 5, of the Convention to the extent that the national legislation of States Parties is not incompatible with the relevant norms and principles of international law.
2. The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, paragraph 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law.).

obligations of Egypt under the Convention and only in respect of the armed forces of Egypt.²⁶¹

The French added that “the effect of the reservation made by the Government of the Arab Republic of Egypt is to bring within the scope of the Convention activities undertaken by a State’s armed forces which do not belong there because they are covered by other provisions of international law. As a result, the reservation substantially alters the meaning and scope of article 19, paragraph 2 of the Convention.”²⁶²

The net effect of these consular notifications is to reinforce the bright line distinction between the relevant bodies of law. The military forces representing sovereign states are subject to the limitations of the laws and customs of war—they cannot be demeaned as terrorists because they are not operationally or legally equivalent to terrorists.²⁶³ This principle in no way undermines the right of states to prosecute as war criminals those combatants who transgressed the boundaries of the law of war.²⁶⁴ Terrorists, on the other hand, are subject to the criminal sanctions of domestic laws,²⁶⁵ especially those deriving from the definitions and condemnations enshrined in the plethora of multilateral conventions that proscribe their tactics. States are absolutely united in opposing any efforts to erode the core prohibition that all acts of terrorism are—and ought to be—criminalized and that any attendant claim to combatant immunity is unfounded and ill-advised.²⁶⁶

V. CONCLUSION

In the modern vernacular, those who commit acts in contravention of the applicable conventions are termed terrorists, regardless of their ideological or religious motivations.²⁶⁷ State practice since 1977 reinforces the clarity and enforceability of the agreed prohibitions against the diverse manifestations of terrorist ideology.²⁶⁸ Protocol I attempted to elevate non-state actors to the status of lawful combatants, but the efficacy of those textual promises has been eroded to a

261. International Convention for the Suppression of Terrorist Bombings, United Kingdom of Great Britain and Northern Ireland: Objection to the Reservation Made by Egypt Upon Ratification, Aug. 3, 2006, C.N.655.2006.TREATIES-11.

262. International Convention for the Suppression of Terrorist Bombings, France: Objection to the Reservation Made by Egypt Upon Ratification, Aug. 15, 2006, C.N.667.2006.TREATIES-13.

263. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 23, art. 4.

264. *See id.* art. 85 (relating to prisoners of war who are prosecutable under the laws of the detaining authority).

265. Official Statement, International Committee of the Red Cross, The Relevance of IHL in the Context of Terrorism (July 21, 2005), *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>.

266. *See, e.g.*, Terrorist Financing Convention, *supra* note 6, art. 6 (requiring acceding states to “adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”).

267. Coady, *supra* note 11, at 47 (stating that the “ism” (in terrorism) indicates “no more than a relatively systematic nature of a method or a tactic.” It is not itself an ideology.).

268. *See, e.g.*, Terrorist Bombing Convention, *supra* note 20, art. 2 (providing an example of the codification of state practice in opposition to terrorist acts post-1977).

vanishing point by states' unified and repeated opposition.²⁶⁹ In the real world, the effort to decriminalize terrorists' conduct—so long as it complied with applicable *jus in bello* constraints in the context of wars of national liberation—has run aground on the shoals of sovereign survival. In practical terms, the Protocol I provisions mean little because they have never been applied or accepted, and their only residual value is as “agitational or rhetorical” tools.²⁷⁰

The core problem in defining and proscribing transnational terrorism is that residual uncertainty over the lawful scope of violence to achieve political ends would have the inevitable result of inducing more individuals to commit more terrorist acts. This danger becomes exponentially greater if such politicized violence were conducted with state sponsorship or umbrella authorization. Persons who employ violence amounting to the conduct of hostilities governed by the law of war do so unlawfully unless they can find affirmative legal authority for their acts under international law. Under the law of armed conflict, individuals acting with the requisite legal authority have historically been termed belligerents or combatants. Persons who have no legal right to wage war or adopt means of inflicting injury upon their enemies have been described synonymously as non-belligerents, unprivileged belligerents, unlawful combatants, or unlawful belligerents.²⁷¹ Terrorists remain in this class notwithstanding the efforts of some states to extend the protections derived from the laws and customs of war. This article has demonstrated the U.S. engagement in these essential debates began with the decision to oppose Protocol I in its entirety. In the intervening thirty years, states have overwhelmingly adhered to the substantive preference of the United States by opposing all reservations seeking to blur the line between criminal acts of terrorism and lawful acts inherent in the conduct of hostilities.

The law of armed conflict was never intended to provide a shield behind which terrorists would be free to gnaw away at the values of freedom and peace. Private efforts to wage war fall outside the structure of law that binds sovereign states together on the basis of reciprocity and shared community interests.²⁷² Thus, as noted above, no state in the world willingly accepts the normative proposition that international law bestows upon private citizens an affirmative right to become combatants whose warlike activities are recognized and protected. This is more than a residual appendage of sovereignty. It reflects the very essence of sovereign survival and respect for the dignity and individual worth of humans in the context of civilized society.

Words matter, particularly when they are charged with legal significance and purport to convey legal rights and obligations. Elevating to the status of combatants those non-state actors whose warlike activities indiscriminately target and terrorize innocent civilians would discredit the law of armed conflict even further in the eyes

269. See, e.g., *Kasem*, 41 I.L.R. 470 (rejecting the claim of combatant immunity raised by a member of the “Organization of the Popular Front for the Liberation of Palestine”); see generally Aldrich, *supra* note 109.

270. BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 76 (2006) (stating that “Protocol I provisions mean little as they have never been applied or accepted.”).

271. See, e.g., Stone, *supra* note 26, at 549.

272. II OPPENHEIM'S *INTERNATIONAL LAW*, *supra* note 44, at 574 (“Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces, and the enemy has, according to a customary rule of International Law, the right to treat such individuals as war criminals.”).

of a cynical world. Though incomplete compliance with the *jus in bello* is the regrettable norm, knowledge of the law and an accompanying professional awareness that the law is binding remains central to the professional ethos of military forces around our planet.²⁷³ For example, entitlement to prisoner of war status was limited to persons “captured by the enemy” under the 1929 Geneva Conventions.²⁷⁴ Based on the text of the convention, the thousands of Germans who surrendered during World War II were categorized as “Surrendered Enemy Persons” not automatically entitled to the rights and privileges accorded to prisoners of war.²⁷⁵

Unless the world is prepared to accept terrorist acts justified wholly on the subjective, political, or religious motivations of the perpetrator, there must be a strict bulwark between the laws and customs of war regulating the authorization to conduct military operations and the legal framework regulating terrorism. The semantic label applied to captured Germans made little difference in their treatment or their attitudes. In the context of transnational terrorism, even a partial acknowledgement of the propriety of terrorist claims to combatant status presents an unnecessary and ill-advised risk to innocent lives and property. The legal regime governing terrorist conduct should remain fixed in its clarity of purpose and principle rather than being reduced to a subjective and indeterminate mass of text and pretext. U.S. exceptionalism in the context of Protocol I represented an act of leadership based on national self-interest that in reality reflected the underlying community interests of states engaged in the larger struggle for the international rule of law. The United States concluded that the commingling of the regime criminalizing terrorist acts with the *jus in bello* rules of humanitarian law would be untenable and inappropriate. Though no state has formally acknowledged the wisdom of the U.S. rejection of the most politicized provisions of Protocol I, states’ actions in demonstrating a cohesive legal front to deflect efforts to protect terrorists from prosecution provide implicit acceptance and accolade. By rejecting the principles embodied in Articles 1(4) and 44(3), the United States led the world and thereby denied terrorists a psychological and legal victory that was reinforced by the international cohesiveness against efforts to undermine the multilateral terrorism conventions.

273. See W. Michael Reisman, *supra* note 38, at 5–6 (stating that military codes and manuals across the planet communicate the “gravity and importance” of such behavioral norms).

274. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 23, art. 1.

275. JAGK-CM 302791 (1946), *reprinted in* 8 BULL. OF THE JUDGE ADVOCATE GEN. OF THE ARMY 262 (Sept.–Oct. 1946).