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# PRISONERS OF WAR AND HYBRID CONFLICTS: RETHINKING THE THIRD GENEVA CONVENTION OF 1949

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**Abstract**

Hybrid warfare has transformed the character of armed conflict in ways that strain the traditional legal categories on which the Geneva Conventions were built. It blends conventional forces with irregular tactics, proxy groups, cyber operations, and information warfare. Hybrid conflict deliberately obscures the lines between soldier and civilian, war and peace, and state and non-state actors. This paper examines how these developments challenge the structure and assumptions of the Third Geneva Convention of 1949 (GC III), particularly its narrow criteria for combatant status and entitlement to prisoner of war protections. The Convention presumes identifiable armed forces, fixed command hierarchies, and transparent participation in hostilities, conditions that rarely hold in modern conflicts. As a result, captured fighters in hybrid settings are frequently denied POW status and subjected to prosecution or mistreatment. Drawing on case studies from Ukraine, Syria, and Afghanistan, the paper demonstrates how states exploit legal ambiguity by refusing to acknowledge armed conflict or by categorising opponents as terrorists or unlawful combatants. These practices erode the humanitarian purpose of POW protections. The paper argues for a more flexible and purposive interpretation of GC III (1949), stronger use of Article 5 tribunals, voluntary extension of Geneva-standard protections, and enhanced access for monitoring bodies such as the ICRC. It concludes by suggesting that future reforms, whether interpretive, institutional or treaty-based, are necessary to uphold the core humanitarian principle that all persons captured in conflict must be treated with dignity, regardless of the form warfare takes. The paper also proposes a new Additional Protocol IV. It would define the Offender State, the Victim State and the Hybrid Combatant, treat sustained cyber operations as a continuing wrongful act, and set up a Hybrid Conflict Determination Tribunal to declare whether a conflict is hybrid and from what date.

**Keywords** –Hybrid warfare, Prisoners of war, International humanitarian law, Third Geneva Convention, Additional Protocol IV, Hybrid conflict determination.

## I. INTRODUCTION

Warfare, like all human activities has undergone a profound evolution. From the pitched battles of the classical era to the manoeuvre-based strategies of the World Wars, the conduct of armed conflict has reflected the technological, political, and philosophical milieu of its times. The advent of the 21st century, however, has witnessed a transformation so fundamental that it has unsettled the very conceptual categories upon which traditional laws of war were premised.

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In the contemporary world, warfare is no longer confined to the physical battlefield nor restricted to open, declared conflicts between uniformed armies. Instead, conflict manifests itself through a mosaic of conventional engagements, irregular tactics, cyber operations, information warfare, and the use of proxy forces. This amalgamation of strategies, commonly referred to as hybrid warfare, has blurred the line between peace and war, soldier and civilian, lawful combatant and unprivileged belligerent.[1]

The theoretical underpinning of warfare has shifted dramatically. Clausewitz's classic conception of war as "an act of violence intended to compel our opponent to fulfil our will" endures,[2]but the means to achieve such compulsion have diversified far beyond the battlefield. As Rupert Smith aptly observed, "*War no longer exists in the form it was once understood to be.*"[3] In the hybrid model, traditional kinetic engagements are supplemented, and at times supplanted, by legal, economic, cyber, and informational means of warfare. The Gerasimov Doctrine further articulated this reality, highlighting that the role of non-military means of achieving political and strategic goals has, in many cases, exceeded the use of force itself.[4]

Hybrid warfare is characterised by several distinctive features:[5]

- It fuses conventional and irregular capabilities within the same battlespace.
- It leverages the use of proxy groups and non-state actors to maintain plausible deniability.
- It encompasses cyber operations that can paralyse a state's critical infrastructure.
- It weaponises information to shape perceptions and destabilise societies.
- It often operates in the grey zone below the threshold of declared armed conflict, complicating legal classifications.

These characteristics fundamentally challenge the traditional assumptions embedded within international humanitarian law, particularly the Geneva Conventions of 1949.[6] The Geneva Conventions, and especially the Third Geneva Convention of 1949 (GC III) relating to the treatment of prisoners of war (POWs), were crafted in the aftermath of the Second World War with the paradigms of conventional, declared, interstate warfare firmly in mind.[7] The entire structure of POW

[1] Frank G. Hoffman, *Hybrid Warfare and Challenges*, 52 JOINT FORCE Q. 34, 36 (2009).
[2] CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1989) (1832).
[3] RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD 5 (2005).
[4] Valery Gerasimov, *The Value of Science Is in the Foresight*, MILITARY-INDUSTRIAL COURIER (Feb. 27, 2013).
[5] *See* FRANK G. HOFFMAN, CONFLICT IN THE 21ST CENTURY: THE RISE OF HYBRID WARS (Potomac Inst. for Pol'y Stud. 2007); Sascha-Dominik Bachmann & Håkan Gunneriusson, *Hybrid Wars: The 21st-Century's New Threats to Global Peace and Security*, 43 SCIENTIA MILITARIA 77 (2015).
[6] Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].
[7] *Id.*

protection presupposes a neat separation between combatants and civilians, between lawful and unlawful acts of war, and between the states party to an international armed conflict.

However, in the context of hybrid warfare, these assumptions are increasingly untenable. The protean nature of hybrid conflicts, wherein actors may shift between civilian and combatant roles, where affiliations may be deliberately obscured, and where conflict may not even be openly acknowledged, undermines the traditional criteria for determining POW status under GC III (1949). As a result, persons captured during such hostilities often find themselves in a legal limbo, neither accorded the full protections of POW status nor sufficiently safeguarded under alternative legal regimes.

The humanitarian spirit underlying the Geneva Conventions is the imperative to protect human dignity even amidst armed conflict and it must not be allowed to be eroded under the pressures of contemporary hybrid warfare. While the letter of the law may strain under new realities, its spirit endures and demands adaptation. There is, therefore, an urgent need to reimagine and reinterpret POW protections in a manner faithful to humanitarian principles, yet responsive to the complexities of modern conflict.

A new Additional Protocol, the fourth in the series after the protocols of 1977 and 2005,[8] would carry three definitions and one institution. The definitions cover the two sides of a hybrid conflict, the Offender State and the Victim State, and the person who fights in it, the Hybrid Combatant. The institution is a standing Hybrid Conflict Determination Tribunal that declares whether a conflict is hybrid and, if it is, when it began. Hybrid warfare is described but never defined, the combatant is defined only through Article 4 of GC III (Part III.A), and nothing in the paper says who the offender or the victim is or who may decide any of it.

## II. EVOLUTION OF POW PROTECTIONS: FROM CONVENTIONAL TO HYBRID WARFARE

The protection of prisoners of war occupies a central place in the development of international humanitarian law. From ancient times to the contemporary era, the treatment of captured combatants has evolved from brutal exploitation towards codified humanitarian obligations. However, the emerging nature of hybrid warfare presents profound challenges to this well-established legal architecture.

[8] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, 2404 U.N.T.S. 261. Protocols I and II date from 1977. *See infra* note 56.

Historically, captives in warfare were often subjected to enslavement, ransom, or execution. The brutal practices of antiquity gradually gave way to rudimentary norms of restraint, often rooted more in custom and honour than in binding law. The codification of humanitarian principles governing the treatment of POWs can be traced back to the Lieber Code of 1863,[9] issued during the American Civil War. The Lieber Code set forth detailed rules for the humane treatment of captured soldiers, recognising their continuing rights even in captivity.

Responding to these grim realities, the international community convened in Geneva in 1949 and adopted four Conventions, among which the Third Geneva Convention of 1949 (GC III) was devoted entirely to the treatment of prisoners of war.[10] GC III (1949) was predicated upon the recognition of POWs as victims of war deserving of dignity, humane treatment, and legal protections, rather than as mere instruments of state policy. It codified comprehensive rules concerning their capture, detention, and repatriation, aiming to balance military necessity with humanitarian considerations.

At its core, GC III (1949) applies to international armed conflicts (IACs), that is, conflicts between two or more High Contracting Parties.[11] The Convention defines the categories of persons entitled to POW status under Article 4, including members of the armed forces, militias and volunteer corps fulfilling certain conditions, and inhabitants of a non-occupied territory who spontaneously take up arms.

However, the framework established by GC III (1949) reflects the assumptions of its time: that warfare would primarily occur between states, through formal declarations of war, fought by regular armed forces distinguishable from the civilian population. The clear categorisations of combatants, civilians, and non-combatants formed the foundational bedrock upon which the entire POW protection regime rested.

The nature of contemporary warfare, particularly hybrid warfare, has profoundly unsettled these assumptions. Hybrid warfare represents a strategic blending of multiple modes of conflict, combining conventional military force with irregular tactics, cyber operations, information warfare, and the deployment of proxy forces.[12] This amalgamated approach deliberately seeks to exploit the legal, political, and operational seams within existing frameworks.

Hybrid warfare is characterised by several distinct features:[13]

[9] Instructions for the Government of Armies of the United States in the Field (Lieber Code), Gen. Orders No. 100, Apr. 24, 1863.
[10] GC III, *supra* note 6.
[11] *Id.*
[12] Hoffman, *Hybrid Warfare and Challenges*, *supra* note 1, at 37.
[13] *See* sources cited *supra* note 5.

**a)** The fusion of conventional and irregular capabilities within the same battlespace.

**b)** The deployment of proxy groups, militias, and non-state actors to maintain plausible deniability.

**c)** The integration of cyber-attacks targeting critical infrastructure.

**d)** The weaponisation of information, propaganda, and disinformation campaigns to shape public perceptions and undermine enemy morale.

**e)** The use of economic coercion, lawfare, and political subversion alongside kinetic operations.

As per Major Brian P. Fleming hybrid threat actors seek to master unrestricted operational art through bypassing the cognitive and moral boundaries and laws of warfare. "A hybrid threat is defined as an adversary, state or non-state that adaptively and rapidly incorporates diverse and dynamic combinations of conventional, irregular, terrorist, and criminal capabilities, as well as non-military means, simultaneously across the spectrum of conflict as a unified force to obtain its objectives."[14] Dr. Russell W. Glenn defines a hybrid threat as an adversary that simultaneously and adaptively employs a combination of political, military, economic, social, and information means alongside conventional, irregular, catastrophic, terrorism, and disruptive or criminal methods.[15]

The European Union describes hybrid threats as a mixture of coercive and subversive activity, conventional and unconventional, that State or non-State actors coordinate to reach their objectives while staying below the threshold of formally declared warfare.[16] NATO speaks of a wide range of overt and covert military, paramilitary and civilian measures employed in a highly integrated design.[17] Both are built around ambiguity, and neither says who may declare that the ambiguity has ended.

That omission matters because the Geneva Conventions do not wait for a declaration. Common Article 2 applies them to any armed conflict between States, even if one of them does not recognise a state of war,[18] and the standard commentary treats the intervention of one State's armed forces

[14] Brian P. Fleming, The Hybrid Threat Concept: Contemporary War, Military Planning and the Advent of Unrestricted Operational Art 2–3 (School of Advanced Military Studies, U.S. Army Command & General Staff College 2011).
[15] Russell W. Glenn, Thoughts on "Hybrid" Conflict, Small Wars J., Mar. 2, 2009, at 3, https://smallwarsjournal.com/jrnl/art/thoughts-on-hybrid-conflict.
[16] Joint Communication to the European Parliament and the Council, Joint Framework on Countering Hybrid Threats: A European Union Response, at 2, JOIN (2016) 18 final (Apr. 6, 2016).
[17] N. Atl. Treaty Org. [NATO], Wales Summit Declaration ¶ 13 (Sept. 5, 2014), https://www.nato.int/cps/en/natohq/official_texts_112964.htm [hereinafter Wales Declaration].
[18] GC III, *supra* note 6, art. 2.

against another as enough, however long it lasts.[19] The Tadić jurisdiction decision gives the same test: an armed conflict exists whenever there is resort to armed force between States.[20]

Notably, hybrid warfare often operates in the "grey zone" which is a space between peace and full-scale war where the existence of an armed conflict itself may be contested. This blurring of traditional boundaries creates significant challenges for the application of IHL.[21]

In this environment, the traditional criteria for POW status under GC III (1949), including the requirements for combatants to bear arms openly, operate under responsible command, and distinguish themselves from civilians becomes increasingly difficult to apply. Fighters may move fluidly between civilian and combatant roles; affiliations may be deliberately obscured; and the very existence of an armed conflict may be denied or concealed by involved parties.

Moreover, hybrid warfare has facilitated the manipulation of conflict classification. States engaged in hybrid operations often deliberately obscure their role, portraying conflicts as internal disturbances, law enforcement operations, or counter-terrorism efforts rather than acknowledging them as armed conflicts.[22] This strategic ambiguity allows states to argue that the Geneva Conventions, and by extension POW protections, do not apply. Captured fighters may thus be treated as criminals, insurgents, or terrorists rather than as lawful combatants, subjected to prosecution rather than detention under GC III (1949) standards.

## III. STRUCTURAL LIMITS OF GC III (1949) IN HYBRID WARFARE

The Third Geneva Convention of 1949 (GC III) stands as one of the principal instruments safeguarding the rights of prisoners of war. Built upon the experiences of previous conflicts, it endeavours to establish a comprehensive framework governing the capture, detention, treatment, and repatriation of combatants. However, the doctrinal foundations of GC III (1949), formulated in the milieu of conventional interstate warfare, exhibit significant limitations when applied to the complex realities of hybrid conflicts.

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[19] JEAN S. PICTET, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (1952).

[20] *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[21] *See* MICHAEL J. MAZARR, MASTERING THE GRAY ZONE: UNDERSTANDING A CHANGING ERA OF CONFLICT (Strategic Stud. Inst., U.S. Army War Coll. 2015).

[22] INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (2015) [hereinafter ICRC, CHALLENGES].

### *a. The Combatant-POW Nexus under the Third Geneva Convention of 1949*

The Third Geneva Convention of 1949 establishes the entitlement to prisoner of war status upon a close nexus with lawful combatancy.[23] Article 4 of GC III (1949) lists the categories of persons who will qualify as prisoners of war upon capture.

These include:

**i.** Members of the armed forces of a Party to the conflict.

**ii.** Members of militias or volunteer corps forming part of such armed forces.

**iii.** Members of other militias and volunteer corps, including organised resistance movements, provided they fulfil four conditions:[24]

- ❖ Being commanded by a person responsible for subordinates,
- ❖ Having a fixed distinctive sign recognisable at a distance,
- ❖ Carrying arms openly, and
- ❖ Conducting operations in accordance with the laws and customs of war.

**iv.** Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power.

**v.** Persons accompanying the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, and supply contractors.

**vi.** Members of crews of merchant marine vessels and civil aircraft of Parties to the conflict.

**vii.** Inhabitants of non-occupied territories who spontaneously take up arms on the approach of the enemy, provided they carry arms openly and respect the laws and customs of war.

The structure of Article 4 reflects the classical assumption that combatants would belong to organised, identifiable forces operating under a clear chain of command and adhering to the laws of war. The Convention sought to distinguish lawful combatants who are entitled to POW protections and combatant immunity from civilians and unlawful fighters, who could be prosecuted for their acts of violence.

### *b. Rigid Categorisation and Exclusionary Consequences*

The rigid categorisation inherent in Article 4 gives rise to serious challenges in hybrid conflicts. The doctrinal insistence on formal characteristics, such as a fixed distinctive sign, open carrying of arms and adherence to the laws of war, automatically assumes a level of organisation and transparency often absent in contemporary hybrid warfare.

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[23] GC III, *supra* note 6, art. 4.
[24] *Id.*

Hybrid actors including non-state armed groups, irregular militias, and proxy forces, may deliberately eschew visible insignia or formal affiliation to maximise operational effectiveness and plausible deniability. Consequently, when captured, such fighters often fail to meet the strict conditions laid down in Article 4. As a result, they are denied POW status and combatant immunity, exposing them to prosecution under domestic criminal law.[25]

This exclusion has grave humanitarian consequences. Fighters operating in hybrid contexts are often treated as common criminals or terrorists, subjected to prolonged detention without the procedural safeguards afforded to POWs. The absence of POW status not only deprives them of specific protections but also increases their vulnerability to mistreatment, torture, and denial of fundamental rights.

Moreover, the doctrinal framework fails to account for the fluidity of roles in hybrid warfare. Fighters may shift between civilian and combatant functions, further complicating status determinations. The binary distinction between combatants and civilians, central to GC III (1949), thus proves ill-suited to the realities of modern conflicts where identity and allegiance are deliberately obfuscated.

### *i. Manipulation of Conflict Classification and Denial of POW Rights*

Hybrid warfare has created fertile ground for the manipulation of conflict classification. States engaging in hybrid operations often avoid acknowledging the existence of an armed conflict, characterising hostilities as internal disturbances, counterterrorism operations, or law enforcement actions. This deliberate framing seeks to prevent the application of the Geneva Conventions and, by extension, the obligation to accord POW status to captured fighters.[26]

The consequences of such manipulation are profound. By denying the existence of an armed conflict, states can classify captured fighters as criminals or unlawful combatants, subjecting them to domestic prosecution and denying them the protections of GC III (1949). The strategic ambiguity of hybrid warfare thus enables states to sidestep international obligations, undermining the humanitarian purpose of the law.

The experiences in Ukraine, Syria, and Afghanistan illustrate the operationalisation of this strategy. In eastern Ukraine, the conflict was framed as an "anti-terrorist operation" rather than an armed conflict, allowing captured individuals to be treated as terrorists rather than POWs. Similarly, in Syria, the Assad regime consistently portrayed its fight against opposition forces as a struggle against

[25] INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR art. 4 (2020) [hereinafter ICRC, GC III COMMENTARY].
[26] *Id.*

terrorists, refusing to apply POW protections to captured fighters.[27] In Afghanistan, the post-9/11 detention practices of the United States, including the designation of captured individuals as "unlawful enemy combatants," reflected a deliberate effort to circumvent Geneva protections.[28]

Such practices erode the normative force of IHL and jeopardise the rights and dignity of individuals caught up in conflicts. They also create dangerous precedents that other states may emulate, further weakening the protective regime envisioned by the Geneva Conventions.

There is a common cause behind the three case studies that is easy to miss. States can deny a conflict because nobody holds the power to say it exists. The Article 5 tribunal looks at one detainee at a time and only after capture.[29] It asks whether this person is entitled to POW status. It cannot ask whether the Convention governs the hostilities as a whole, so that question returns to the detaining State, which has every reason to answer it in its own favour. The Security Council can find a threat to the peace, a breach of the peace or an act of aggression,[30] but it is a political body with a veto, and a finding under Article 39 does not tell a detaining State whether GC III applies. The question that matters here is whether a given conflict is hybrid and whether the Convention therefore applies from a stated date. At present nobody is asked it. Part V.F proposes one whose only task is to answer it.

### *ii. Status Determination and the Neglect of Article 5 Safeguards*

Recognising that battlefield realities may complicate immediate status determinations, GC III (1949) includes an important procedural safeguard in Article 5.[31] It provides that should any doubt arise as to whether a person enjoys POW status, such a person shall be treated as a POW until their status has been determined by a competent tribunal.

The spirit of Article 5 is to ensure that individuals are not wrongfully denied protections based on hasty or unilateral determinations. However, in hybrid conflicts, the consistent neglect of Article 5 safeguards has become a recurring phenomenon. Detaining authorities often presume irregular fighters to be unlawful combatants without convening competent tribunals to assess their status objectively.[32]

The failure to apply Article 5 processes not only contravenes the letter of GC III (1949) but also exacerbates the humanitarian risks faced by detainees. Without impartial status determination, individuals may languish indefinitely without clarity regarding their rights or protections. Moreover,

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[27] *Syria: Counterterrorism Court Used to Stifle Dissent*, HUM. RTS. WATCH (June 25, 2013), https://www.hrw.org/news/2013/06/25/syria-counterterrorism-court-used-stifle-dissent.
[28] ICRC, CHALLENGES, *supra* note 22.
[29] GC III, *supra* note 6, art. 5, ¶ 2.
[30] U.N. Charter art. 39.
[31] GC III, *supra* note 6, art. 5.
[32] *Id.*

the denial of access to a neutral review undermines the credibility of the detaining power's treatment of captured individuals and invites allegations of abuse and arbitrary detention.

The consistent application of Article 5 safeguards could serve as a crucial mitigating mechanism in hybrid warfare settings. It would ensure that captured individuals are not summarily excluded from POW protections and would reinforce the normative expectation that humanitarian obligations must be observed even amidst the fog and ambiguity of modern conflict.

### *iii. Combatant Immunity and the Unprivileged Fighter*

Another critical structural issue is the relationship between POW status and combatant immunity. Under classical IHL, lawful combatants are immune from prosecution for acts of war that comply with the laws and customs of war.[33] POWs, by virtue of their status, enjoy this immunity; they cannot be tried simply for having fought against the detaining power.

However, hybrid warfare complicates this principle. Fighters who fail to qualify for POW status under Article 4, whether because of non-affiliation with a State, failure to wear a distinctive sign or lack of formal organisation, are deemed "unprivileged belligerents."[34] They are liable to prosecution under domestic criminal law for acts that, if committed by lawful combatants, would have been immunised.

This creates an inequitable situation where individuals who may have conducted hostilities in accordance with humanitarian principles are nonetheless subjected to criminal sanctions solely due to their technical failure to meet rigid status requirements. It also creates disincentives for compliance with IHL among non-state actors, who may perceive that adherence to the laws of war offers them no legal advantage.

The humanitarian logic underpinning GC III (1949), to mitigate suffering and humanise the treatment of those engaged in hostilities, is thus undermined. The structural rigidity of the combatant/POW nexus fails to accommodate the complexities of hybrid conflicts and leaves many fighters without meaningful legal protections.

## IV. POW PROTECTIONS IN RECENT HYBRID CONFLICTS

The operational realities of hybrid warfare present formidable challenges to the application of the Geneva Conventions, particularly the Third Geneva Convention of 1949 relating to prisoners of war. The following case studies, Ukraine, Syria and Afghanistan, vividly illustrate how the traditional

[33] *Id.* art. 4.

[34] Michael N. Schmitt, *The Status of Unprivileged Belligerents in the Modern Battlespace*, 5 PRZEGLĄD STRATEGICZNY 35, 38 (2012).

POW protection framework has been strained, manipulated, or circumvented in hybrid conflict settings. These examples underscore the urgent need for doctrinal and practical adaptations to uphold humanitarian principles amidst evolving forms of warfare.

### *a. Ukraine (2014–present): Denial of IAC Status and Selective Application of POW Protections*

The conflict in Ukraine, which erupted in 2014 following the annexation of Crimea and the insurgency in Donbas, represents a paradigmatic example of hybrid warfare. Russian intervention through unmarked forces colloquially known as the "little green men" and the mobilisation of local proxy groups blurred the lines between internal unrest and international armed conflict.[35]

Despite substantial evidence of Russian state involvement, the Kremlin consistently denied direct participation, framing the situation as a domestic Ukrainian matter. Ukraine, for its part, initially characterised its military response as an "Anti-Terrorist Operation" (ATO), thereby avoiding the formal designation of an international armed conflict.[36] This deliberate ambiguity served to complicate the application of the Geneva Conventions, particularly the provisions relating to the treatment of captured personnel.

Captured fighters on both sides were frequently denied POW status. Ukrainian servicemembers apprehended by separatist forces or transferred to Russia faced criminal prosecution rather than being treated as POWs. The case of Nadiya Savchenko, a Ukrainian military pilot captured by pro-Russian forces and subsequently tried in Russia for murder and illegal border crossing, exemplifies this practice.[37] Despite being a member of Ukraine's armed forces, Savchenko was treated as a common criminal rather than a POW, reflecting a blatant disregard for GC III (1949) protections.

Conversely, captured Russian personnel, such as Aleksandr Alexandrov and Yevgeny Yerofeyev, were prosecuted in Ukrainian courts for terrorism and waging aggressive war.[38] Although Ukrainian authorities acknowledged their Russian military affiliation, the official characterisation of the conflict as an anti-terrorist operation facilitated their treatment as unlawful combatants rather than as POWs entitled to the protections of GC III (1949).

These practices highlight the strategic manipulation of conflict classification to evade humanitarian obligations. The denial of IAC status allowed both parties to selectively apply or ignore POW protections, resulting in significant humanitarian consequences for captured individuals.[39]

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[35] THOMAS D. GRANT, AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW 110–12 (Palgrave Macmillan 2015).
[36] *Id.* at 113–14.
[37] Andrew Roth, *Russian Court Sentences Nadiya Savchenko to 22 Years*, GUARDIAN (Mar. 22, 2016).
[38] *Two Russians Handed 14-Year Sentences for Terrorism in Ukraine*, MOSCOW TIMES (Apr. 18, 2016), https://themoscowtimes.com/2016/04/18/two-russians-handed-14-year-sentences-for-terrorism-in-ukraine-a52577.
[39] GC III, *supra* note 6, art. 5.

Furthermore, the ad hoc nature of prisoner exchanges, often brokered informally rather than under the structured repatriation processes envisaged by GC III (1949), further underscores the erosion of established norms in hybrid conflicts.

The full-scale invasion of February 2022 changed the facts but not the underlying problem. In August 2022 Russia's Supreme Court designated the Azov Regiment a terrorist organisation, which could allow captured Azov fighters to be prosecuted as terrorists, and Kyiv says that would breach the Geneva Conventions.[40] In October 2022 the ICRC said that it had been barred from visiting thousands of Ukrainian prisoners of war held by Russia, which it considers a breach of the Geneva Convention.[41] Exchanges continue. In March 2026 each side released 200 prisoners of war in the first part of a planned exchange of 500 each.[42]

### *b. Syria (2011–2024): Fragmented Conflict and Systemic Collapse of POW Protections*

The Syrian conflict, which began as a domestic uprising in 2011 and evolved into a complex multi-party war involving state and non-state actors, offers a stark illustration of the collapse of POW protections in a hybrid warfare environment. The Syrian government's fight against a patchwork of opposition groups, the intervention of foreign actors, and the rise of extremist factions such as ISIS created an operational landscape marked by fragmentation, fluid allegiances, and pervasive legal ambiguity.

The Assad regime consistently framed its military campaign as a counter-terrorism effort, thereby eschewing any recognition of opposition fighters as lawful combatants entitled to POW protections.[43] Captured fighters were typically treated as criminals and subjected to harsh detention practices, including torture, summary executions, and incommunicado detention, in flagrant violation of even the minimal standards of Common Article 3 of the Geneva Conventions.[44]

The conduct of non-state armed groups further compounded the humanitarian crisis. ISIS, in particular, demonstrated utter contempt for IHL norms, engaging in mass executions of captured soldiers, beheadings, and public displays of brutality designed to terrorise both enemies and civilian populations. The fall of Tabqa airbase in August 2014, after which ISIS executed at least 160 Syrian

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[40] *Russia Brands Azov Regiment 'Terrorists,' Paving Way for Captured Fighters' Imprisonment*, MOSCOW TIMES (Aug. 2, 2022), https://themoscowtimes.com/2022/08/02/russia-brands-azov-regiment-terrorists-paving-way-for-captured-fighters-imprisonment-a78483.

[41] *ICRC Condemns Lack of Access to POWs During Russia's War*, KYIV INDEP. (Oct. 14, 2022), https://kyivindependent.com/icrc-condemns-lack-of-access-to-po-ws-during-russias-war.

[42] *Russia and Ukraine Exchange Prisoners but Peace Talks Appear Stalled*, AFRICANEWS (Mar. 6, 2026), https://www.africanews.com/amp/2026/03/06/russia-and-ukraine-exchange-prisoners-but-peace-talks-appear-stalled.

[43] *Syria: Counterterrorism Court Used to Stifle Dissent*, supra note 27.

[44] Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, U.N. Doc. A/HRC/31/CRP.1 (Feb. 3, 2016).

soldiers according to the Syrian Observatory for Human Rights, epitomises the complete collapse of POW protections in the Syrian conflict.[45]

Opposition groups aligned against the Assad regime exhibited varying degrees of compliance with humanitarian norms. Some factions endeavoured to treat captives humanely and sought to leverage prisoner exchanges as political tools. Others, however, engaged in summary executions and other abuses, particularly against regime forces and suspected collaborators.

The multiplicity of actors, combined with the absence of clear battle lines and the state's refusal to acknowledge the existence of an armed conflict under IHL, rendered the structured application of POW protections practically impossible.[46] The Syrian case demonstrates how hybrid and fragmented conflicts can create environments where the normative force of the Geneva Conventions is not merely ignored but systematically obliterated. The Assad government fell on 8 December 2024, when armed opposition forces overthrew it, and about 2,000 prisoners were released from Sednaya prison, long known for torture and executions.[47]

### *iii. Afghanistan (post-9/11): Unlawful Combatants and Erosion of POW Norms*

The post-9/11 conflict in Afghanistan presents a different, though equally instructive, manifestation of the erosion of POW protections in a hybrid warfare setting. Following the terrorist attacks of 11 September 2001, the United States launched military operations against Al-Qaeda and the Taliban regime that had harboured it.[48] Although the initial stages of the conflict bore the hallmarks of an international armed conflict, the ensuing "War on Terror" introduced a novel legal categorisation: the "unlawful enemy combatant."[49]

The United States asserted that members of Al-Qaeda were not entitled to POW status under GC III (1949), as they did not satisfy the conditions for lawful combatancy including the existence of a responsible command structure, wearing a fixed distinctive sign, and conducting operations in

[45] Agence France-Presse, *IS Militants Execute 160 Syria Troops*, DAILY STAR (Bangl.) (Aug. 28, 2014), https://www.thedailystar.net/is-militants-execute-160-syria-troops-39195 (reporting the Syrian Observatory for Human Rights' count of at least 160 soldiers executed).

[46] Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/27/60 (Aug. 13, 2014).

[47] Int'l Inst. for Democracy & Electoral Assistance, *Syrian Arab Republic: December 2024*, Democracy Tracker, https://www.idea.int/democracytracker/report/syrian-arab-republic/december-2024 (reporting that armed opposition forces overthrew the Assad government on 8 December 2024 and that about 2,000 prisoners were released from Sednaya prison).

[48] GC III, *supra* note 6, art. 4.

[49] *Id.*

accordance with the laws and customs of war. Taliban fighters were similarly denied POW status on the grounds that they did not consistently adhere to the requirements set out in Article 4(A)(2).[50] This legal position facilitated a system of detention that operated outside the full framework of GC III (1949) protections. Detainees captured in Afghanistan and elsewhere were transferred to facilities such as Guantanamo Bay, where they were held in legal limbo and were classified as unlawful combatants without access to the procedural guarantees afforded to POWs.[51]

*The U.S. Supreme Court's decision in* Hamdan v. Rumsfeld marked a significant, albeit partial, check on this practice. The Court held that Common Article 3 of the Geneva Conventions applied to the conflict with Al-Qaeda, thereby imposing baseline obligations concerning the treatment of detainees.[52] However, the denial of full POW protections persisted, reflecting a broader trend wherein hybrid conflict dynamics were used to justify deviations from established humanitarian norms.

The Afghanistan case illustrates how the evolution of the concept of the combatant and the creation of new legal categories outside the traditional framework of GC III (1949) can undermine the protective purposes of the Geneva Conventions. It also demonstrates how powerful states can reshape the normative landscape of detention practices in ways that ripple across subsequent conflicts

## V. REIMAGINING POW PROTECTIONS IN HYBRID WARFARE

The preceding analysis reveals that the traditional architecture of the Third Geneva Convention of 1949 (GC III) struggles to fully accommodate the complex realities of hybrid conflicts. As warfare evolves beyond conventional paradigms, it becomes imperative to explore ways to reinterpret, adapt, and strengthen the legal protections afforded to persons captured during hostilities. While the core humanitarian ethos of international humanitarian law remains resilient, doctrinal rigidity and structural limitations call for a principled yet pragmatic reimagining of prisoner of war protections in the modern era.

### *a. Structural and Doctrinal Limits of GC III (1949) in Hybrid Contexts*

The structural underpinnings of GC III (1949) reflect a state-centric vision of warfare rooted in mid-20th century experiences. The Convention presupposes clearly identifiable parties to a conflict,

[50] Memorandum from President George W. Bush to the Vice President et al., *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002).
[51] *Boumediene v. Bush*, 553 U.S. 723 (2008).
[52] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

formal armed forces adhering to hierarchical command structures, and combatants distinguishable from civilians through fixed signs and uniforms.[53]

Hybrid warfare unsettles these assumptions by introducing blurred affiliations, decentralised fighting units, and deliberate strategies of plausible deniability. Non-state actors, proxy forces, and cyber operatives often operate outside the formal bounds envisaged by GC III (1949). Consequently, many individuals who actively participate in hostilities may not satisfy the rigid Article 4 requirements necessary to claim POW status.[54]

The binary categorisation between lawful combatants and civilians, fundamental to GC III (1949), proves increasingly inadequate in contemporary battlefields. Fighters frequently shift between civilian and combatant roles, affiliations are obfuscated, and conflicts are masked as law enforcement or counter-terrorism operations to evade the formal application of IHL. These dynamics expose captured fighters to vulnerability, stripping them of protections originally designed to safeguard dignity and humane treatment amidst armed conflict.

Thus, the need arises to rethink the interpretive and institutional frameworks governing POW protections, ensuring that the humanitarian objectives of GC III (1949) are preserved without compromising legal coherence or state security imperatives.

### *b. Rethinking Legal Categories: Beyond the Combatant–Civilian Binary*

One of the most pressing challenges posed by hybrid warfare is the inadequacy of the traditional dichotomy between combatants and civilians. In modern conflicts, many individuals engaged in hostilities do not fit neatly into either category, operating in a grey zone that the existing legal framework struggles to address.

A broader, more purposive interpretation of Article 4 of GC III (1949) could serve as a meaningful step towards adapting POW protections to hybrid realities. Rather than adhering rigidly to formalistic criteria, the focus should shift towards substantive affiliation and conduct. For instance, where non-state armed groups exhibit sufficient organisation, responsible command structures, and a general commitment to humanitarian norms, their fighters could reasonably be accorded POW-like protections,[55] notwithstanding the absence of formal state affiliation or distinctive signs.

This approach finds support in the evolution of IHL itself. The Additional Protocols to the Geneva Conventions, particularly Additional Protocol I, expanded the definition of combatants in wars of national liberation, recognising that irregular fighters might not always meet the classic criteria yet

[53] GC III, *supra* note 6, art. 4.
[54] *Id.*
[55] ICRC, GC III COMMENTARY, *supra* note 25, art. 4.

still merit protection under humanitarian law.[56] Drawing upon such interpretive evolutions, a flexible understanding of combatant status could be promoted in hybrid conflicts to safeguard the spirit of GC III (1949).

It must be noted, however, that expanding protections should not inadvertently legitimise violations of IHL or reward perfidious conduct.[57] The extension of POW status or analogous protections must be contingent upon compliance with core humanitarian principles, ensuring that the integrity of the law is preserved while adapting to contemporary operational realities.

Article 4 asks a fighter to show four things: responsible command, a fixed distinctive sign, open carriage of arms, and respect for the laws of war. Two of them cannot be shown in cyberspace. A programmer in a State's signals unit wears no sign recognisable at a distance, and arms carried openly do not describe a keyboard. A rule that makes the impossible a condition of status hands the detaining State a ready reason to refuse it. Additional Protocol I already moves some way from the Article 4 model. Article 43 defines the armed forces of a Party by command responsibility and discipline, with no mention of uniform. Article 44(3) lets a combatant who cannot distinguish themselves keep combatant status if they carry arms openly during each engagement and while visible to the adversary before an attack. Article 45 presumes POW status for a person who takes part in hostilities, falls into enemy hands and claims the status or appears entitled to it, until a competent tribunal decides.[58]

The definition in draft Article 1(d) keeps those three moves and adapts them to the digital case. Identification shifts from the person to the Party. A cyber operator is identified by the acknowledgement of the Party they act for, or by the Tribunal's attribution of their unit to that Party, and no sign is needed. Membership of an organised group, whether a cyber unit or a proxy militia, follows the continuous combat function test, which asks whether a person's lasting function is to take a direct part in hostilities. It keeps the occasional volunteer from being counted as a fighter.[59] Direct participation then follows the definition of attack. The Tallinn Manual 2.0 defines a cyber-attack by the injury, death, damage or destruction it is reasonably expected to cause.[60] The ICRC reads the idea more widely and treats an operation designed to disable a computer or network as an

[56] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 43–44, June 8, 1977, 1125 U.N.T.S. 3.
[57] *Id.*
[58] Protocol I, *supra* note 56, arts. 43(1)–(2), 44(3), 45(1).
[59] NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27, 31–34 (Int'l Comm. of the Red Cross 2009).
[60] TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS r. 92 (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL 2.0].

attack, whether the network is disabled by kinetic or cyber means.[61] Draft Article 1(a)(i) takes the wider reading, since a narrow one would let an Offender State argue that disabling hospital records or a power grid is not hostilities. A person who meets neither limb of the definition is not left in a gap. They keep the protection of Article 45 and the fundamental guarantees of Article 75 until the Tribunal or an Article 5 tribunal rules on status,[62] and domestic prosecution can follow only after that ruling. The limit stated earlier in this Part stays in place. Status does not reward deception, and a person who feigns civilian status to carry out an attack gains no combatant immunity by doing so.

### *c. Voluntary Extension of POW Protections: A Humanitarian Imperative*

In the absence of formal legal obligations under GC III (1949), states engaged in hybrid conflicts could voluntarily extend POW-like protections to captured fighters as a matter of policy and humanitarian commitment. Such an approach would align with the underlying ethos of IHL, which seeks to humanise warfare regardless of the status of the adversary.[63]

Voluntary extensions could include:

- Ensuring humane treatment consistent with GC III (1949) standards.
- Allowing access to the International Committee of the Red Cross (ICRC) for monitoring detention conditions.
- Affording basic judicial guarantees, including the right to challenge detention and protection against torture or cruel treatment.
- Facilitating repatriation or release at the cessation of hostilities.

Adopting such practices would not necessarily entail conferring full combatant immunity or political legitimacy upon non-state actors. Rather, it would embody the principle that respect for human dignity should not be contingent upon formal status alone. By leading through example, states could also encourage reciprocal adherence to humanitarian norms by non-state groups and reinforce the normative power of IHL.

Such voluntary humanitarian practices have historical precedents. Several conflicts, including civil wars and non-international armed conflicts, have witnessed parties agreeing to special arrangements inspired by Geneva standards, even in the absence of binding treaty obligations.[64] In hybrid conflicts, similar special agreements could play a crucial role in maintaining humanitarian space amidst legal and political uncertainties.

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[61] INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND CYBER OPERATIONS DURING ARMED CONFLICTS: ICRC POSITION PAPER 8 (2019).
[62] Protocol I, *supra* note 56, arts. 45, 75.
[63] GC III, *supra* note 6, art. 3 (common to all four Geneva Conventions).
[64] ICRC, SPECIAL AGREEMENTS IN NON-INTERNATIONAL ARMED CONFLICTS, ADVISORY SERVICE FACT SHEET (Feb. 2013).

### *d. Strengthening Institutional Mechanisms: Safeguarding Protections in Practice*

The reimagining of POW protections must also focus on strengthening institutional mechanisms capable of enforcing and monitoring humanitarian standards in hybrid conflicts.

Firstly, the consistent and rigorous application of Article 5 tribunals must be emphasised.[65] In cases of doubt regarding an individual's status, a competent tribunal should be convened promptly to determine eligibility for POW protections. This procedural safeguard, often neglected in hybrid contexts, serves as a crucial bulwark against arbitrary deprivation of protections and reinforces the principle of humane treatment.

Secondly, the role of the International Committee of the Red Cross remains paramount. The ICRC, through its confidential dialogue, monitoring, and reporting mechanisms, provides an essential channel for upholding humanitarian standards even where formal recognition of conflict status is contested.[66] States should ensure that the ICRC is granted full and unimpeded access to detainees captured in hybrid conflicts.

Thirdly, the international community could explore the creation of independent detention monitoring panels for hybrid conflicts. Such panels, composed of legal experts and humanitarian practitioners, could investigate allegations of mistreatment, recommend corrective measures, and promote transparency in detention practices.[67] While enforcement challenges remain, the moral and political weight of such panels could exert meaningful pressure on parties to comply with humanitarian norms.

Finally, regional organisations and human rights courts have an important supplementary role to play. Through jurisprudence and soft law instruments, they can reinforce the application of humanitarian standards to persons detained in the context of hybrid conflicts, even where formal IHL applicability is disputed.

The detention panels and Article 5 tribunals described here work downstream of a more basic decision. Neither can say whether a conflict is hybrid or from what date the Convention applies to it. That decision belongs to the Hybrid Conflict Determination Tribunal proposed in Part V.F (draft Articles 4 to 5). The status tribunals and the panels would then act inside its declaration, with a fixed starting date and a named Offender State, instead of arguing about both.

[65] GC III, *supra* note 6, art. 5.
[66] *Id.*
[67] *Id.*

### *e. Prospects for Future Reforms: Towards a Responsive Legal Framework*

In the longer term, consideration may be given to formal legal reforms addressing the protection of persons captured in hybrid conflicts. Potential avenues include:

- A New Protocol to the Geneva Conventions: Negotiating an Additional Protocol specifically tailored to the realities of hybrid warfare could provide greater legal clarity regarding the status and treatment of fighters in ambiguous conflicts. Such a protocol could incorporate flexible combatant definitions, reaffirm core humanitarian protections, and establish procedural safeguards for status determinations.[68]
- Codification of Customary Norms: The progressive development of customary IHL, particularly concerning humane treatment, judicial guarantees, and the prohibition of torture and inhumane treatment, should be encouraged. By affirming that certain fundamental protections apply to all detainees, regardless of classification, customary law can serve as a bridge across legal gaps.[69]
- Promotion of Special Agreements: Parties to hybrid conflicts should be encouraged to conclude special agreements under Common Article 3 of the Geneva Conventions, voluntarily extending Geneva protections to all persons hors de combat, irrespective of formal status.
- Strengthening Accountability Mechanisms: International and regional mechanisms should be empowered to investigate and respond to violations of POW protections, particularly in conflicts involving non-state actors and hybrid tactics.
- Establishing a Hybrid Conflict Determination Tribunal: A standing body created by the new Protocol would declare whether a conflict is hybrid, between which States, and from what date, so that the question no longer rests with the State that gains by denying it. The design is set out in Part V.F, draft Articles 4 to 5.

Such reforms would require political will, diplomatic engagement, and sensitivity to concerns regarding sovereignty and security. Nevertheless, they represent necessary steps towards ensuring that the core humanitarian promises of the Geneva Conventions endure in an era of evolving conflict. The evolution of warfare compels a corresponding evolution of humanitarian law. Hybrid conflicts, with their blurred lines and strategic ambiguities, threaten to erode the hard-won protections afforded to prisoners of war under international law. While the Third Geneva Convention of 1949 remains a cornerstone of humanitarian law, its rigid doctrinal structures must be interpreted and, where necessary, adapted to meet the challenges of contemporary conflicts.

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[68] *Id.*

[69] ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE (Rules 128, 129, 131).

By rethinking legal categories, promoting voluntary humanitarian practices, strengthening institutional mechanisms, and pursuing thoughtful reforms, the international community can reaffirm the enduring principle that even in the chaos of modern warfare, human dignity must be protected. In doing so, the spirit of the Geneva Conventions can be preserved, even as the character of war continues to change.

### *f. Proposed Additional Protocol IV: Definitions and a Hybrid Conflict Determination Tribunal*

This Part gathers the paper's proposals into draft treaty text so that each term has one place where it is defined. It helps to say first where the paper stood. Hybrid warfare was described by its features in Part I and Part II (items a to e) and by the Fleming and Glenn definitions in Part II, and none of those is a legal definition. The combatant was defined only through Article 4 of GC III in Part III.A and criticised in Part V.B. The paper defined neither an offender nor a victim of hybrid warfare, and it named no body with power to say when a war is hybrid. Table 1 shows where each of those gaps is now filled.

*Table 1. Where each term is defined*

| Term | Where defined | Source of the idea |
|---|---|---|
| Hybrid Conflict | Draft Art. 1(a); findings in Art. 5(4) | Common Art. 2 of the Geneva Conventions; UN Definition of Aggression; EU and NATO descriptions |
| Offender State (State Actor and State Sponsor) | Draft Art. 1(b); attribution in Art. 2 | Clausewitz's aggressor; UN Definition of Aggression, art. 3(g); Tadić overall control |
| Victim State | Draft Art. 1(c) | Clausewitz's defender |
| Hybrid Combatant | Draft Art. 1(d); reasoning in Part V.B | Protocol I, arts. 43, 44(3), 45; ICRC continuous combat function |
| Continuing Hybrid Conduct | Draft Art. 1(e); rule in Art. 3 | ILC Articles on State Responsibility, arts. 14(2) and 15(2) |
| Hybrid Conflict Determination Tribunal | Draft Arts. 4 to 5 | See Table 2 |

The terms Offender State and Victim State come from the oldest pairing in strategic thought, which is Clausewitz's aggressor and defender. His aggressor wants something, whether territory or a change in the existing order, and so has to act. His defender wants only to keep what it has. The aggressor would prefer to enter unopposed, which is why war in a real sense begins when the defender resists.[70] Hybrid warfare turns this around in practice. The aggressor hides behind deniable

[70] CLAUSEWITZ, *supra* note 2, bk. 6, ch. 5.

means, so the first visible act of force may be the defender's response, and the defender is then described as the one who started it. The Protocol is meant to stop that inversion by having the Tribunal fix who acted first and how. Article 1(c) adds that responding by force does not change a Victim State's label.

Two adjustments to Clausewitz are needed. He sorts the parties by political motive, and motive is a poor legal test because it is hard to prove and easy to disguise, so Article 1 looks at conduct and effects. Aggressor is also a loaded word in the law on the use of force, tied to Articles 2(4) and 39 of the United Nations Charter and to the Definition of Aggression.[71] The Protocol says Offender and Victim and leaves the lawfulness of any use of force to the bodies that already decide it.

Strategic writing also separates the State Actor, which fights through its own forces, from the State Sponsor, which trains, equips, finances or employs proxies and keeps its own forces out of sight. Article 1(b) treats both as Offender States, because the purpose of sponsorship is to be treated differently. The legal bridge already exists. The Definition of Aggression lists the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, or the State's substantial involvement in that sending, among acts of aggression.[72] The ICJ accepted the listing as customary law in Nicaragua, but it required effective control before the proxies' individual acts could be attributed to the sponsor.[73] Article 2 sets a lower bar for one narrow purpose. A sponsor that organises, coordinates or plans a group's operations, in addition to equipping it, is treated as exercising overall control, the standard the ICTY Appeals Chamber used to decide whether a conflict is international.[74] The ICJ rejected that standard as a test of State responsibility. It added that the test may well suit the classification of a conflict and took no position on that use.[75] The Protocol uses it only there.

Cyber operations are the part of a hybrid campaign most likely to be treated as a string of separate incidents, and that treatment suits the Offender State. An intrusion made in one year can sit unused in a grid controller until someone triggers it years later. If the law counts only the day of visible effect, the Offender State can call the earlier access espionage and say that hostilities ended with the

[71] U.N. Charter art. 2, ¶ 4, art. 39; G.A. Res. 3314 (XXIX), annex, arts. 1, 3(g) (Dec. 14, 1974) [hereinafter Definition of Aggression].
[72] Definition of Aggression, *supra* note 71, annex, art. 3(g).
[73] *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, ¶¶ 115, 195 (June 27).
[74] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).
[75] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 404–406 (Feb. 26).

last outage. Article 3 takes the other view and treats the whole campaign as one continuing wrongful act.

The model comes from the law of State responsibility. A breach with a continuing character extends over the whole period during which the act continues and stays out of line with the obligation, and a breach made up of a series of acts runs from the first of them for as long as they are repeated.[76] The duty of due diligence points the same way, since a State may not knowingly let its territory be used for acts that harm other States.[77] The Tallinn experts apply that duty to cyber operations.[78] On the humanitarian side, the ICTY said that IHL applies from the start of an armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace.[79]

The risk runs the other way too. If a dormant implant keeps a conflict alive, the Victim State could hold prisoners of war indefinitely, and Article 118 of the Third Convention requires release and repatriation without delay after the cessation of active hostilities.[80] Article 3(3) therefore separates two questions. The conflict and the Offender State's responsibility continue while the access and the capacity to use it persist. The duty to release prisoners turns on a different test, the end of active hostilities, which the Tribunal declares under Article 5(5) and which does not wait for the implant to be found and removed.

### *Draft Additional Protocol IV*

#### Article 1. Definitions

For the purposes of this Protocol:

(a) **Hybrid Conflict** means a campaign directed by one State against another that combines two or more of the following: armed force, cyber operations, operations by Proxy Actors, and coercive economic or informational operations. The campaign is a Hybrid Conflict where (i) at least one of its operations causes, or is reasonably expected to cause, death, injury, or damage to or loss of functionality of objects; and (ii) the operations share a common direction and objective, whether or not the Offender State acknowledges them. A Hybrid Conflict is an international armed conflict for the purposes of the Geneva Conventions of 1949 and Protocol I.

(b) **Offender State** means a State that conducts or directs a Hybrid Conflict against another State, either through its own organs (State Actor) or through Proxy Actors it trains, equips,

[76] Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, annex, arts. 14(2), 15(2) (Dec. 12, 2001).
[77] *Corfu Channel* (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 22 (Apr. 9).
[78] TALLINN MANUAL 2.0, *supra* note 60, r. 6.
[79] *Tadić*, Decision on Jurisdiction, *supra* note 20, ¶ 70.
[80] GC III, *supra* note 6, art. 118.

finances, directs or employs (State Sponsor). A State that merely fails to prevent the use of its territory is not an Offender State, but remains answerable under the law of State responsibility.

(c) **Victim State** means a State against which a Hybrid Conflict is directed and, on whose territory, forces or critical infrastructure the effects described in paragraph (a)(i) have occurred or are reasonably expected to occur. A State does not cease to be a Victim State because it responds with force. A State may be an Offender State and a Victim State in the same conflict.

(d) **Hybrid Combatant** means a person who takes a direct part in hostilities in a Hybrid Conflict and who is (i) a member of the armed forces of a Party within the meaning of Article 43 of Protocol I, including a member of a cyber unit; or (ii) a member of an organised group, including a Proxy Actor, whose conduct the Tribunal has attributed to a Party under Article 2 and whose lasting function is to take a direct part in hostilities. A Hybrid Combatant is identified by the acknowledgement of the Party concerned or by the Tribunal's attribution, and for operations conducted by cyber means that identification satisfies the requirements of a fixed distinctive sign and of carrying arms openly. A person who takes a direct part in hostilities and meets neither limb is presumed to be a prisoner of war under Article 45 of Protocol I until a competent tribunal decides. A person who feigns civilian status to carry out an attack does not benefit from this paragraph.

(e) **Continuing Hybrid Conduct** means conduct that persists beyond the first operation forming part of the Hybrid Conflict. It includes persistent unauthorised access to the networks, systems or infrastructure of the Victim State, the retention of the capacity to disrupt them, and the continuing direction, supply or financing of a Proxy Actor.

(f) **Proxy Actor** means a person or group, organised or not, that acts on the instructions, under the direction or under the overall control of a State, or whose conduct a State acknowledges and adopts as its own.

### *Article 2. Attribution*

1. For the purposes of this Protocol, the conduct of a Proxy Actor is attributed to a State that has overall control over it, that is, a State that has a role in organising, coordinating or planning its operations in addition to financing, equipping, training or supporting it.

2. A State's denial of its role does not prevent attribution. Attribution under this Article is made only to classify a conflict and to apply the Geneva Conventions and Protocol I. It does not alter the rules of State responsibility.

### *Article 3. Continuing offence*

1. Cyber operations that form part of a Hybrid Conflict constitute a continuing wrongful act. The conduct of the Offender State begins with the first unauthorised access forming part of the campaign and lasts for as long as Continuing Hybrid Conduct persists.

2. Where the date of first access is unknown, the Tribunal shall fix it at the earliest date supported by reasonable grounds. No limitation period runs against a request to the Tribunal while Continuing Hybrid Conduct persists.

3. The Hybrid Conflict and the Offender State's responsibility under this Protocol continue until the Tribunal declares under Article 5(5) that Continuing Hybrid Conduct has ended. Cessation of active hostilities for the purposes of Article 118 of the Third Convention is declared separately under that paragraph, and dormant access that is not being used to produce the effects in Article 1(a)(i) does not by itself prevent that declaration.

### *Article 4. Establishment and composition of the Tribunal*

1. A Hybrid Conflict Determination Tribunal (the Tribunal) is established, with its seat at Geneva.

2. The Tribunal consists of fifteen members of high moral standing, recognised competence in international humanitarian law and acknowledged impartiality, elected by secret ballot by the Meeting of States Parties for a single term of nine years. At least four members shall have expertise in military operations and at least four in cyber operations and digital forensics.

3. The Tribunal is served by a Technical Panel of forensic and military experts, which gathers and evaluates evidence and reports to the Tribunal.

### *Article 5. Requests and determinations*

1. A request for determination may be made by any State Party, by a State not party that accepts the Tribunal's competence by declaration for the situation concerned, or by the Security Council. The Tribunal does not need a determination by the Security Council, and no such determination binds it.

2. The ICRC may transmit information to the Tribunal at its own discretion but shall not be a party to the proceedings, so that its confidential working method and neutrality are preserved.

3. The Tribunal shall invite the State alleged to be the Offender State to submit evidence and to be heard. Its failure to appear does not prevent a determination.

4. On a request, the Tribunal shall decide whether a Hybrid Conflict exists, identify the Offender State and the Victim State, and fix the date on which the conflict began. It may make

a provisional finding on the standard of reasonable grounds to believe and a final finding on the standard of clear and convincing evidence.

5. The Tribunal shall declare when Continuing Hybrid Conduct has ended. It shall declare separately when active hostilities have ceased for the purposes of Article 118 of the Third Convention. The second declaration does not wait for the first.

6. A final finding binds States Parties for the application of the Geneva Conventions and this Protocol. It does not decide whether any use of force was lawful.

7. The Tribunal shall report each final finding to the Security Council and the General Assembly of the United Nations.

The Tribunal in Articles 4 to 5 borrows from several existing bodies, and Table 2 sets out what is taken from each. In structure it is closest to the International Humanitarian Fact-Finding Commission, a standing body of fifteen impartial experts serving in a personal capacity.[81] In function it is closest to the Article 5 tribunal, lifted from the single detainee to the conflict as a whole. Its gatekeeping owes something to the Rome Statute's rules on aggression, under which the Prosecutor may proceed without a Security Council determination if the Pre-Trial Division authorises it, unless the Security Council acts under article 16.[82] The Technical Panel follows the OPCW's Investigation and Identification Team, which identifies who used chemical weapons before anyone draws a legal consequence.[83] The reporting line follows the IAEA, where the Board of Governors finds non-compliance and reports it to the Security Council and the General Assembly.[84] The nearest counterpart in the hybrid field is a political one. NATO's Allies have said that the North Atlantic Council decides case by case when a cyber-attack triggers collective defence.[85] The Tribunal addresses the same problem for the law of armed conflict, with a body that is independent and hears the accused State.

[81] Protocol I, *supra* note 56, art. 90(1)–(2).
[82] Rome Statute of the International Criminal Court arts. 15*bis*(6)–(9), 16, 36(9)(a), July 17, 1998, 2187 U.N.T.S. 3, *as amended by* Review Conference of the Rome Statute, Res. RC/Res.6, annex I (June 11, 2010).
[83] Org. for the Prohibition of Chem. Weapons [OPCW], Conference of the States Parties, Decision: Addressing the Threat from Chemical Weapons Use, ¶ 10, OPCW Doc. C-SS-4/DEC.3 (June 27, 2018).
[84] Statute of the International Atomic Energy Agency art. XII(C), Oct. 26, 1956, 276 U.N.T.S. 3.
[85] Wales Declaration, *supra* note 17, ¶ 72.

*Table 2. Which existing body each feature of the Tribunal resembles*

| Feature of the Tribunal | Closest existing body | What is borrowed | Where it differs |
|---|---|---|---|
| Fifteen independent members elected by States Parties (Art. 4(2)) | International Humanitarian Fact-Finding Commission, Protocol I, art. 90 | Standing panel, personal capacity, impartial expertise | The Commission acts only where States have accepted its competence by declaration or on ad hoc consent, and it reports facts. The Tribunal's determination fixes the legal regime. |
| Ruling on the conflict as a whole rather than on one detainee (Art. 5(4)) | Article 5 tribunal, GC III art. 5 | A competent tribunal decides a doubtful status, and protection applies until it does | The Article 5 tribunal decides one person's status. The Tribunal decides what kind of conflict it is and who the Offender State is. |
| Who may start the process, and what follows if political bodies stay silent (Art. 5) | Rome Statute, art. 15bis(6) to (9) | State and Security Council routes; a judicial route open when the Council makes no determination within six months, unless the Council acts under art. 16; an outside determination does not bind the court | The Tribunal has no criminal jurisdiction and cannot find individual guilt. |
| Technical Panel (Art. 4(3)) | OPCW Investigation and Identification Team | A technical body that identifies perpetrators before legal consequences are drawn | The Panel works inside a judicial process, and the accused State is heard before the Tribunal decides. |
| Reporting final findings to the Security Council and the General Assembly (Art. 5(7)) | IAEA Board of Governors, Statute art. XII(C) | A finding of non-compliance is reported to the Security Council and the General Assembly | The Board is a political body of States. The Tribunal is independent and its findings are legal determinations. |
| Deciding case by case whether a cyber operation reaches the level of armed conflict (Art. 5(4)) | NATO North Atlantic Council, Wales Declaration ¶ 72 | A case-by-case decision on whether a cyber attack triggers collective defence | The Council is a political body and does not hear the accused State. The Tribunal is independent and hears it (Art. 5(3)). |

## VI. CONCLUSION AND WAY FORWARD

Beyond interpretation, voluntary extension of POW-like protections by states in hybrid conflict situations can play a transformative role. Humane treatment need not and should not be contingent

solely on formal legal entitlement. States can, and in several historical instances have, opted to provide Geneva-standard treatment to detainees as a matter of policy and principle. Such practices not only reinforce the universality of humanitarian norms but also reduce incentives for reciprocal mistreatment. The practice of entering into special agreements, even in non-international armed conflicts, to emulate GC III (1949) standards has long been encouraged under Common Article 3 and should be proactively pursued wherever possible.

In parallel, institutional mechanisms require strengthening. The International Committee of the Red Cross, as the guardian of the Geneva Conventions, must be granted unobstructed access to all detainees, regardless of classification. States should be transparent in their detention practices and allow independent humanitarian monitoring, both as a matter of legal compliance and normative leadership. Regional and international judicial bodies, too, must continue to affirm that rights under IHL and human rights law are not mutually exclusive but rather complementary, particularly in contexts where the application of one is contested. The role of jurisprudence in clarifying minimum guarantees for all persons deprived of liberty cannot be overstated.

Looking ahead, it is necessary that the international community engages in a deeper reflection on whether the current treaty framework is adequate for the age of hybrid warfare. There may come a time, perhaps already upon us, when a new protocol to the Geneva Conventions is needed, one that explicitly recognises and addresses the peculiarities of hybrid conflict. At the very least, coordinated interpretive declarations or soft-law instruments could harmonise emerging state practice and reduce ambiguity. The development of customary norms around humane treatment and procedural fairness in detention must also be supported, especially in relation to non-state armed groups and transnational conflicts. The full regime of GC III is not peremptory, but the floor beneath it is. The core of what every detainee is owed rests on rules the International Court of Justice has called intransgressible principles of customary law, which bind States whatever the status of the captive,[86] and the ban on torture within that core is peremptory.[87] A State cannot contract out of that floor by calling its prisoners terrorists or by denying that a conflict exists. Meanwhile, legal education and doctrinal training must evolve to reflect the complexity of modern combat. Integrating hybrid warfare realities into IHL instruction is no longer optional but essential.

[86] *Nicaragua*, *supra* note 73, ¶ 218; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8).

[87] *Questions Relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, ¶ 99 (July 20); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

One proposal is more specific than the rest, and it carries the argument. If a new protocol is written, it should define the Offender State, the Victim State and the Hybrid Combatant, treat sustained cyber operations as a continuing wrongful act, and give a standing Tribunal the power to declare when a conflict is hybrid (Part V.F, draft Articles 1 to 5). The last element does the most work. Definitions alone leave the denial strategy in place, because the State that denies a conflict would still be the one deciding whether it exists.

In essence, the future of POW protection lies not in abandoning the Geneva tradition, but in ensuring its continued vitality through principled adaptation. The hybrid battlespace may defy easy classification, but the imperative to treat all captives humanely is neither novel nor negotiable. It is a reaffirmation of the fundamental idea that even amidst conflict, there remain lines that must not be crossed. If international humanitarian law is to retain its moral and legal authority, it must rise to meet the changing character of war without compromising the dignity of those it seeks to protect.

The emergence of hybrid warfare should not be allowed to erode the humanitarian foundations upon which the Geneva Conventions rest. The complexity of modern conflict, while undeniable, must not become an excuse for the denial of basic human dignity to those who fall into enemy hands. Legal frameworks must evolve, but they must do so in fidelity to the principles of restraint, reciprocity, and humanity.

The protection of prisoners of war is not a mere procedural formality; it is a moral and legal imperative. In an age where the character of war has changed, but its consequences remain devastating, the international community bears a solemn responsibility to ensure that those captured in battle are not abandoned to legal ambiguity and humanitarian neglect. Only through principled adaptation, institutional vigilance, and a collective reaffirmation of humanitarian norms can the law of war remain relevant and just in the battles of the present and the future.