

# Contemporary Challenges to the Implementation of International Humanitarian Law

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## Introduction

The problem of how to deal with prisoners of war is not a new one; even the Old Testament calls for humane treatment of those captured in the course of armed conflict.<sup>1</sup> The issue has assumed significant contemporary relevance as a result of developments in Iraq and Afghanistan. Rights of prisoners/detainees during armed conflict is governed by the Law of Armed Conflict (formerly referred to as the Laws of War), or what is probably better known today as International Humanitarian Law. There is an obligation on all states and armed forces to ensure that international humanitarian law is upheld. This involves a responsibility to disseminate information and educate populations, but especially members of armed forces, regarding the principles of international humanitarian law. This branch of international law has always come under pressure during armed conflict, and the current conflicts taking place in Iraq and Afghanistan are no exception.

In ancient times the concept of prisoners of war was unknown. Captives were regarded as part of the spoils of victory, and they were frequently killed, enslaved, or held for ransom. Not surprisingly, prisoners of war have traditionally been among the most vulnerable groups in situations of armed conflict. Their treatment is a question with which the laws of war have been particularly concerned. Their detention is a form of permissible internment, and it should come as no surprise to learn that the laws governing armed conflict lay down detailed rules for their protection. This article examines the origins of the laws of war and their relationship to international human rights law, with particular reference to the protection provided to prisoners of war.

A serious obstacle confronting those charged with ensuring compliance with the norms of humanitarian law is to make the rules establishing such norms accessible and relevant to those most responsible for their implementation, *i.e.*, the soldiers on the ground. The language of the international instruments in question is often obtuse and unintelligible. The principles enshrined in these instruments, when combined with a “dumb down” approach for classroom instruction, are often presented in a half-hearted and “touchy-feely” way that makes the instructors and principles involved appear out of touch with reality. Best has described the situation as follows:

It cannot be said that books in this field are lacking. The international law of war ... has become something of a boom industry in the legal realm and raises a regiment of professional experts. The way in which those experts write about it and debate it

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<sup>1</sup> See 2 Kings, 6:21–22.

among themselves, however, is not often directly communicable to all the others who also have pressing interests of their own in the subject and who, some of them, also write and confer increasingly about it, conscious that, beyond the legal experts they may happily have contact, are many from whom they are cut off.<sup>2</sup>

## What are the Laws of War or International Humanitarian Law?

International humanitarian law constitutes one of the oldest branches of public international law. Its two main branches are referred to as the law of the Hague and the law of Geneva. The law of the Hague regulates the means and methods of warfare. It is codified primarily in the Regulations Respecting the Laws and Customs of War on Land (“the Hague Regulations”) annexed to the 1907 Hague Convention IV (“the Hague Convention”). These govern the actual conduct of hostilities during armed conflict, such as the selection of targets and permissible weapons for use against the enemy.

The law of Geneva is codified primarily in four conventions adopted in 1949, and these are known collectively as the Geneva Conventions for the Protection of War Victims.<sup>3</sup> Their aim is to protect certain categories of persons, which include civilians, the wounded, and prisoners of war. Significant aspects of the law of the Hague and the law of Geneva were merged in a common treaty regime in the 1977 Protocols Additional to the Geneva Conventions: one relating to the victims of international armed conflict (“Protocol I”), and the other to the victims of non-international armed conflicts (“Protocol II”).<sup>4</sup>

Among the equivalent and interchangeable expressions—the “Laws of War,” the “Law of Armed Conflict,” and “International Humanitarian Law”—the first is the oldest. The expression “laws of war” dates back to when it was customary to make a formal declaration of war before initiating an armed attack on another state. Nowadays the term “armed conflict” is used in place of war, and while the military tend to prefer the term “law of armed conflict,” the International Committee of the Red Cross (“ICRC”) and other commentators use the expression “international humanitarian law” to cover the broad range of international treaties and principles applicable to situations of armed conflict. It also includes a number of rules of customary international law. The fundamental aim of international humanitarian law is to establish limits to the means and

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<sup>2</sup> Geoffrey Best, *War and Law since 1945* (Oxford: Clarendon Press, 1994), 10. An example of a more accessible read is A.P.V. Rogers, *Law on the battlefield*, 2nd ed. (Manchester: Manchester University Press, 2004) (1999).

<sup>3</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 (Geneva II); Geneva Convention Relative to the Treatment of Prisoners of War 1949 (Geneva III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (Geneva IV).

<sup>4</sup> See generally *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1946* (Geneva: International Committee of the Red Cross; M. Nijhoff, publishers, 1987).

methods of armed conflict, and to protect non-combatants—whether they are the wounded, sick, or captured soldiers—and civilians.<sup>5</sup>

### **International Humanitarian Law: Background**

The norms regulating the conduct of combatants in times of conflict are not only of ancient origin, but they are also found in diverse cultures on many continents.<sup>6</sup> Up until the end of the nineteenth century, the treatment of prisoners of war varied a great deal depending on the nature of a conflict, the parties involved, and its geographical location. The killing or enslavement of prisoners was often linked to the failure to distinguish between combatants and non-combatants, and the obligation to distinguish themselves from civilians remains one of the fundamental rules that combatants must adhere to in order to be treated as prisoners of war.

The 1785 treaty of friendship between Prussia and the United States was one of the first international treaties to contain the obligation of the contracting parties to protect prisoners of war. Later, during the American Civil War, President Lincoln adopted the Lieber Code.<sup>7</sup> This contained detailed rules for the protection of, *inter alia*, prisoners of war.<sup>8</sup> What was really remarkable about this code is that it was introduced unilaterally in the course of a protracted and bitter civil war when the Union government was intent upon defeating the Confederacy and ensuring that no foreign state would recognize it as legitimate. Despite the threat to the Union, Lincoln still had the foresight to introduce a comprehensive set of humanitarian rules governing the conduct of hostilities. Even today the rules of international humanitarian law applicable in internal armed conflict are not as extensive as those applied by the Union Army at the time. Not surprisingly, the Code had a significant impact on later attempts by European states to formulate similar rules.

<sup>5</sup> See C. Greenwood, “The Relationship of *Ius ad Bellum* and *Ius in Bello*,” *Review of International Studies* 9 (1983); Hans-Peter Gasser, *International Humanitarian Law - An Introduction*, trans. from German by S. Fitzgerald and S. Mutti (Haupt: Henri Dunant Centre, 1993); S. Nahlik, “A Brief Outline of International Humanitarian Law,” *International Review of the Red Cross* (July-August 1984); and F. Kalshoven, *Constraints on the Waging of War* (Geneva: ICRC, 1987).

<sup>6</sup> *Ibid.* Greenwood, “The Relationship of *Ius ad Bellum* and *Ius in Bello*”; Hans-Peter Gasser, *International Humanitarian Law - An Introduction*; Nahlik, “A Brief Outline of International Humanitarian Law”; Kalshoven, *Constraints on the Waging of War*; and J. Simpson Study, *Law Applicable to Canadian Forces in Somalia 1992/93* (Ottawa: Public Works and Government Services Canada, 1997), 13.

<sup>7</sup> In 1861, Francis Lieber, a professor of political science and jurisprudence at Columbia University in New York, prepared a manual based on international law (the Lieber Code), which governed the Union Army during the American Civil War (1861-65). See D. Schindler and J. Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents*, 3<sup>rd</sup> ed. (Dordrecht: Nijhoff, 1988), 3.

<sup>8</sup> The Lieber Code, Articles 49–59, in Schindler and Toman, *Laws of Armed Conflict*.

After the piecemeal development of humanitarian law at the end of the nineteenth century and the start of the twentieth century,<sup>9</sup> the experience of World War II made the shortcomings in the legal regulation of this field all too apparent. This realization led to the adoption in 1949 of the four Geneva Conventions for the Protection of War Victims.<sup>10</sup> The adoption of the Conventions, coupled with the earlier well-developed body of Hague law governing the conduct of hostilities by armed forces, meant that traditional inter-state wars—or “armed conflicts,” to use the language of the Conventions—were now well regulated, at least in theory.<sup>11</sup> The phrase “armed conflict” was employed to make it clear that the Conventions applied once a conflict between states employing the use of arms had begun, whether or not there had been a formal declaration of war.<sup>12</sup>

The actual codification and promotion of international humanitarian law has been undertaken primarily by the ICRC in Geneva. It can be argued that the UN should have played a more significant role in this regard, but the UN system was carefully designed to make war illegal and unnecessary.<sup>13</sup> Nowhere in the UN Charter is the concept of war mentioned. Having rendered the concept of the classical “war” redundant, it might have seemed unduly pessimistic for the UN to set about regulating that which it had legislated out of existence. It was not surprising, then, that the International Law Commission of the UN (a body of experts named by the General Assembly and charged with the codification and progressive development of international law), declined the task when it came to considering the codification of humanitarian law in 1949. It was believed that if the Commission at the very beginning of its work were to undertake this study, public opinion might interpret its action as showing a lack of confidence in the efficiency of the means at the disposal of the UN for maintaining

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<sup>9</sup> 1899 saw the adoption of a treaty that made the principles of the 1864 treaty applicable to the wounded and shipwrecked at sea. In 1906, the 1864 treaty was revised, and in the following year the 1899 treaty was amended along the same lines. In 1926, a convention on the treatment of prisoners of war was adopted. See Kalshoven, *Constraints on the Waging of War*, 9–10.

<sup>10</sup> See note 2 above.

<sup>11</sup> Art. 2 common to all four Geneva Conventions of 1949; see *The Geneva Conventions of 12 August 1949 - Commentary: III Geneva Convention* (Geneva: ICRC, 1960), 20–23.

<sup>12</sup> See C. Greenwood, “Scope of Application of Humanitarian Law,” 42–43. It should be noted that common Article 3 of the Conventions did outline minimum provisions that must be applied in situations of non-international armed conflict or internal conflict within a state.

<sup>13</sup> T. Franck and F. Patel, “Agora: The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War: ‘The Old Order Changeth,’” *American Journal of International Law* 85, 63. See also C. Greenwood, “The Concept of War in Modern International Law,” *International and Comparative Law Quarterly* 36 (1987). For general background on the UN and humanitarian law, see C. Bourloyannis, “The Security Council of the United Nations and the Implementation of International Humanitarian Law,” *Denver Journal of International Law and Policy* 20:2 (1992): 335–55; and G. Abi-Saab, “The United Nations and International Humanitarian Law - Conclusions,” *Actes du Colloque International de l’Universite de Geneve* (1996).

peace.<sup>14</sup> In this way, the responsibility to codify and improve the principles fell upon the ICRC.

As the majority of armed conflicts in the Cold War period did not approximate to inter-state wars of the kind envisaged by traditional humanitarian law, certain obvious gaps in the legal regulations governing armed conflicts remained.<sup>15</sup> The adoption of the Conventions marked a break with the past in that Article 3, which was common to all four Conventions, sought to establish certain minimum standards of behavior “in the case of armed conflict not of an international character” which reached a certain (undefined) level of intensity. While of modest scope, this was a radical development.<sup>16</sup> Unfortunately, limitations to its application remain, as states often deny that internal problems have risen to the required level of “armed conflict” (a term that Article 3 does not attempt to define), or that the conflict in question is in some other way not governed by the Conventions.<sup>17</sup> In an attempt to address these and other issues, Additional Protocols I and II were adopted in 1977.<sup>18</sup>

Protocol 1 applies to international armed conflict, and brought what was often referred to as “wars of national liberation” within the definition of international conflicts.<sup>19</sup> Protocol II, on the other hand, did not apply to all non-international armed conflicts, but only to those that met a new and relatively high threshold test.<sup>20</sup> Despite the time and effort that was involved in drafting and ratifying the Protocols, the result was less than satisfactory, especially from the point of view of classifying armed conflicts to determine which Protocol, if any, would apply in a given case. The applicabil-

<sup>14</sup> S.D. Bailey, *Prohibitions and Restraints on War* (Oxford: Oxford University Press, 1972), 92.

<sup>15</sup> The 1999 Report of the Secretary-General on the Protection of Civilians in Armed Conflict makes depressing reading; see UN Secretary-General’s Report on the Protection of Civilians in Armed Conflict, S/1999/957, 8 September 1999.

<sup>16</sup> G. Aldrich, “The Laws of War on Land,” *American Journal of International Law* 94 (2000): 42–59, at 59.

<sup>17</sup> See G. Aldrich, “Human Rights in Armed Conflict: Conflicting Views,” *ASIL Proc.* 67 (1973): 141–42; and R. Baxter, “Some Existing Problems of Humanitarian Law,” in *The Concept of International Armed Conflict: Further Outlook*, Proceedings of the International Symposium on Humanitarian Law (Brussels, 1974).

<sup>18</sup> See generally *Commentary on the Additional Protocols*, 33 and 1319.

<sup>19</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol 1), Art. 1(4). This saved captured guerrilla fighters who met certain conditions from trial and potential execution for actions committed in the course of liberation wars, by granting such captives prisoner-of-war status. See C. Greenwood, “Terrorism and Protocol I,” *Israel Yearbook of Human Rights* 19 (1989).

<sup>20</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 1(1). See B. De Schutter and C. Van De Wyngaert, “Coping with Non-International Armed Conflicts: The Borderline Between National and International Law,” *Georgia Journal of International & Comparative Law* 13 (1983): 285.

ity of Protocol II is quite narrow, and this helps explain in part why so many states are party to it.

If the broader picture of the development of humanitarian law over the last two decades is examined, it is evident that, in addition to their contribution to the regulation of non-conventional warfare, the 1977 Protocols are significant in two other respects. First, Protocol I represents the fusion of Hague law and Geneva law in that it not only includes provisions designed to protect the civilian population and those *hors de combat*,<sup>21</sup> but also sets out new rules on the conduct of hostilities based on the principle of proportionality.<sup>22</sup> Secondly, both protocols represent a merger to a certain degree of humanitarian law with its younger cousin, international human rights law, in that they incorporate detailed and explicit human rights guarantees, drawn directly in some instances from the International Covenant on Civil and Political Rights.<sup>23</sup> As a result, the Additional Protocols have blurred the distinction between what was traditionally seen as international humanitarian law, which emphasized generic rights determined according to the status of certain participants or other groups caught up in an armed conflict, and the more individual-based rights, which form the core of international human rights law.

## Human Rights and Humanitarian Law

Human rights and humanitarian law have different historical and doctrinal origins.<sup>24</sup> Previously, scholars assumed that one or the other regimes was applicable in a given conflict situation, depending on the categorization.<sup>25</sup> However, Meron has pointed to a dangerous lacuna that may exist if and when the applicability of both regimes is denied.<sup>26</sup> Although humanitarian law was originally intended to govern situations of

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<sup>21</sup> See, for instance, Articles 52–56.

<sup>22</sup> See especially Articles 57–58.

<sup>23</sup> For instance, the fair trial guarantees in Protocol I, Art. 75 and Protocol II, Art. 6 are clearly based upon, though are not identical to, those in Art. 14 of the ICCPR. For a discussion of this point see S. Stavros, “The Right to a Fair Trial in Emergency Situations,” *International and Comparative Law Quarterly* 41 (1992): 343.

<sup>24</sup> See T. Meron, “The protection of the human person under human rights and humanitarian law,” *UN Bulletin of Human Rights* 91/1 (1992): 33–45. See also L. Doswald-Beck and S. Vite, “International Humanitarian Law and Human Rights Law,” *International Review of the Red Cross* 293 (1993); and *Minimum Humanitarian Standards, Report of the Secretary-General*, Doc. E/CN.4/1998/8, 5 January 1998.

<sup>25</sup> See T. Meron, “On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument,” *American Journal of International Law* 77:3 (1983): 580–606, at 602.

<sup>26</sup> *Ibid.*; see also T. Meron, *Human Rights in Internal Strife: Their International Protection*, (Cambridge: Grotius, 1987), 3–49; T. Meron and A. Rosas, “A Declaration of Minimum Humanitarian Standards,” *American Journal of International Law* 85 (1991): 375–81; and Commission on Human Rights, “Minimum humanitarian standards - Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,” UN Doc. E/CN.4/1998/87, 5 January 1998.

armed conflict between states, it has become increasingly important in the regulation of internal armed conflict.<sup>27</sup> Human rights, on the other hand, originated in the intra-state relationship between the government and the governed, and are intended to protect the latter against the former, regardless of nationality.<sup>28</sup> But humanitarian law is also concerned with protecting basic human rights during armed conflict and other situations of violence. Humanitarian law does not just bind armed groups operating with the imprimatur of a state—other armed groups (and the individuals belonging to them) are also bound by its provisions.<sup>29</sup> The application of such principles in non-international armed conflicts is not linked to the legitimacy of armed groups.<sup>30</sup> The ICRC position is that humanitarian law principles, recognized as part of customary international law, are binding upon all states and all armed forces present in situations of armed conflicts.<sup>31</sup> In recent years, various Security Council resolutions have called upon “all the parties to the conflict” to respect international humanitarian law.<sup>32</sup>

The International Court of Justice, in its *Advisory Opinion on Nuclear Weapons*, looked at the relationship between international humanitarian law and human rights law.<sup>33</sup> The Court affirmed that they are two distinct bodies of law, and that human rights law continues to apply in time of war unless a party has lawfully derogated from

<sup>27</sup> See also C. Greenwood, “Scope of Application of Humanitarian Law,” 39–49; and D. Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols,” *Recueil des cours* 163 (Hague Academy, 1979): 153–56.

<sup>28</sup> T. Meron, *Human Rights in Internal Strife*, 29.

<sup>29</sup> See “Armed conflicts linked to the disintegration of State structures,” *Preparatory document for the first periodical meeting on international humanitarian law*, 19–23 January 1998 (Geneva: ICRC, 1998), 8. See also C. Greenwood, “International Humanitarian Law and United Nations Military Operations,” *Yearbook of International Humanitarian Law* 1 (Dordrecht: Kluwer, 1998), 3–34, esp. 7–9.

<sup>30</sup> It is the identification of the relevant legal prescription in the given context that is of central concern; see H. McCoubrey and N. White, *International Organizations and Civil Wars* (Aldershot: Dartmouth, 1995), 67.

<sup>31</sup> D. Shagra and R. Zacklin, “The Applicability of International Humanitarian Law to United Nations Peacekeeping Operations: Conceptual, Legal, and Practical Issues,” in Palwankar (ed.), *Symposium on Humanitarian Action and Peace Support Operations – Report* (Geneva: ICRC, 1994), 39 at 40. *Symposium*, 40. See also F. Kalshoven, “The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit,” *Yearbook of International Humanitarian Law* 2 (Dordrecht: Kluwer, 1999), 3–66, esp. 38 onwards; and ICRC Resolution XXXVII of the 20th International Red Cross Conference, Vienna, 1965, in Schindler and Toman, *The Laws of Armed Conflicts*, 259.

<sup>32</sup> For example, see Resolution 814, 26 March 1993, para. 13 (Somalia); and Resolution 788, 19 November 1992, para. 5 (Liberia).

<sup>33</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 226 (1996). See generally L. Boisson de Chazournes and P. Sands, eds., *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999); and a number of articles in *International Review of the Red Cross* 316 (1997), esp. C. Greenwood, “The Advisory Opinion on nuclear weapons and the contribution of the International Court of Justice to international humanitarian law,” 65–75.

them. The effect of this is that international humanitarian law is to be used to interpret a human rights rule and, conversely, in the context of the conduct of hostilities, human rights law may not be interpreted differently from humanitarian law.<sup>34</sup> In this way there has been significant overlap and convergence of humanitarian and human rights law, and the strict separation of the two is not always conducive to providing the maximum protection to victims.

### **Prisoners of War and the Geneva Conventions**

Common Article 2 of the Conventions states that the Conventions apply “to all cases of declared war or any other armed conflict which may arise between one or more High Contracting Parties.”<sup>35</sup> This was intended to cover as broad a range of armed conflict as possible.

The Third Geneva Convention of 1949 governs the treatment of prisoners of war. This applies to situations of international armed conflict such as occurred in Afghanistan with the commencement of military operations by the United States against the Taliban and Al-Qaeda organization, or the situation in Iraq after the commencement of hostilities by Coalition forces. During World War II, the treatment of Allied forces captured by the Japanese was appalling, and so too was the treatment by German forces of captured Russians on the Eastern Front. These and similar atrocities led to the adoption in 1949 of the Third Geneva Convention Relative to the Treatment of Prisoners of War.

This Third Geneva Convention contains 143 articles and a number of annexes. It attempts to provide legislation to cover every facet of the prisoner of war regime, and to provide for all the situations and contingencies that arose for prisoners of war during World War II. While essential to provide for the proper treatment and safety of such prisoners, some administrative measures in the Third Convention could be dispensed with without seriously impacting the life and well being of prisoners of war.<sup>36</sup> However, other provisions are absolutely essential, but the fundamental question is how to determine entitlement to prisoner-of-war status in the first place.

The key to this Convention is Article 4, since it defines the people who are entitled to prisoner-of-war status. It is this provision that is at the heart of the controversy regarding the status of the captured Taliban and Al-Qaeda fighters currently detained at the prison camp in Guantanamo Bay by the United States. Article 4 was discussed at length during the diplomatic conference in 1949 that led to the adoption of the Geneva Conventions. It was considered essential that the text be explicit and easy to understand, so as to avoid the problems that arose with regard to partisan fighters during

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<sup>34</sup> L. Doswald-Beck, “International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons,” *International Review of the Red Cross* 316 (1997): 35–55 esp. 45.

<sup>35</sup> See *Commentary, III Geneva Convention*, 22–23. Both the U.S. and Afghanistan are parties to the Geneva Conventions.

<sup>36</sup> For example, Articles 70, 71, 76, and 77 relating to correspondence.



World War II, and that it leave no doubt as to the categories of combatants covered by the Third Convention.

The category of combatants entitled to claim the privilege of prisoner-of-war status was expanded upon in the 1977 Additional Protocol I to the Geneva Conventions. This supplemented the Third Convention, mainly by its elaboration of who is (and who is not) entitled to the status of combatant and prisoner of war, and by providing further fundamental guarantees under Article 75 that lay down several minimum rules of protection for the benefit of all those who find themselves in the power of a party to an armed conflict.<sup>37</sup> It reiterated the general rule that although combatants are obliged to comply with international humanitarian law, violations of those laws shall not deprive combatants of their status as combatants or of their right to be prisoners of war.

This was a provision the United States was most anxious to ensure was included in the Additional Protocol, owing to its own experiences in Korea and Vietnam, where U.S. military personnel captured by the enemy were deprived of prisoner-of-war status on the grounds that they had committed war crimes.<sup>38</sup> Under the Third Geneva Convention and the Additional Protocol, prisoners of war may still be tried by a competent court or tribunal for crimes. However, this is not a reason to deny them prisoner-of-war status in the first place. In fact, the Conventions are specifically intended to protect prisoners and detainees from mistreatment under those circumstances. Although the United States has not ratified Additional Protocol I, many of its provisions are considered to be part of customary international law, and are therefore binding on all states.

### **Prisoners of War: Rights and Obligations under the Geneva Convention**

A 1980 United States Department of Defense publication—*Prisoners of War: Rights and Obligations under the Geneva Convention*—intended for the use of military personnel refers to the leading role the United States has played among the world's nations in developing and expanding the rights and responsibilities of prisoners of war and their captors.<sup>39</sup> Fear of mistreatment is the greatest single deterrent to surrender. Furthermore, atrocities embitter and strengthen the will of the enemy, encouraging prolonged resistance. The publication appeals to the self-interest of military personnel, under the possibility that they too may be prisoners of war seeking humane treatment some day.

However, it is the paragraph dealing with the “Enemy in Your Hands” that is most enlightening. It states that the United States requires its military forces to obey the Geneva Conventions, and that this has been the policy even when the enemy has blatantly violated the Conventions and has refused prisoner-of-war status to captured Ameri-

<sup>37</sup> See *Commentary on Additional Protocols*, 861.

<sup>38</sup> See G. Aldrich, “Prospects for the United States Ratification of Additional Protocol 1 to the 1949 Geneva Convention,” *American Journal of International Law* 85 (1991): 1–12, at 8.

<sup>39</sup> *Prisoners of War: Rights and Obligations under the Geneva Convention* (DoD GEN-35A) (Washington: Department of Defense, 1 March 1980).

cans. Even in such circumstances, it says that the United States has found it better to continue to apply the Geneva Conventions rather than to descend to the enemy's level. It calls on all U.S. personnel to "treat anyone you capture humanely and in accordance with the Conventions."<sup>40</sup> Later, under the heading "Making the Convention Work," the document acknowledges that full compliance with the Third Geneva Convention is not always easy, especially in the heat of battle. Nevertheless, the United States expects compliance by all its military service personnel as its national reputation and soldiers' well being are at stake.

This statement was issued by the United States Secretary of Defense some twenty years ago; one can only speculate as to what the current secretary, Donald Rumsfeld, would make of his predecessor's instructions. Under Common Article 1 of the Third Conventions, the United States has agreed to "respect and ensure respect for the Convention in all circumstances."<sup>41</sup>

Adherence to the Geneva Convention will not preclude charges of war crimes or other serious offences being brought against individuals detained, if sufficient evidence is available to support such charges. The Conventions do not require placing detainees in luxury cells or ignoring the security threat that such prisoners may continue to pose even in captivity; they merely require according them the basic human rights that the bitter experience of past conflicts has led the majority of states to conclude is appropriate. However, Article 5 of the Convention is absolutely clear in one respect: prisoners are to be accorded the protection of the Convention until their status has been determined by a "competent tribunal."<sup>42</sup> Only such a tribunal of the capturing state (detaining power) may determine whether a person is entitled to be a prisoner of war or not. The U.S. Department of Defense document reiterates that everyone who is captured or detained during an armed conflict should therefore be treated as the Third Convention requires, until a proper tribunal can try his or her case.<sup>43</sup>

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<sup>40</sup> Ibid.

<sup>41</sup> *Commentary, III Geneva Convention*, 17–18.

<sup>42</sup> Ibid., 73–78. In Canada, for example, the Minister of National Defense, pursuant to Section 8 of the Geneva Conventions Act, adopted specific regulations in 1991 respecting the determination of the entitlement of persons detained by the Canadian Forces to prisoner-of-war status. Section 4 of the regulations stipulates that a competent tribunal shall consist of one office of the Legal Branch of the Canadian Forces.

<sup>43</sup> *Prisoners of War: Rights and Obligations*, 4.

*Right to Humane Treatment*

It is prohibited to treat prisoners of war inhumanely or dishonorably.<sup>44</sup> Although there is no definition of what constitutes inhumane treatment, this is a basic theme of the Geneva Conventions.<sup>45</sup> Furthermore, what are regarded as the principle elements of humane treatment are listed in Article 13, and further guidance can be found in the relevant international human rights instruments. The detaining power must protect the prisoners at all times, and reprisals or discrimination against prisoners are expressly prohibited.<sup>46</sup>

The question of whether the measures taken in transporting the detainees constitute inhumane or dishonorable treatment is worthy of proper investigation, but the relevant articles of the Convention are only applicable to prisoners of war. Amnesty International has noted that keeping prisoners “incommunicado, sensory deprivation, and the use of unnecessary restraint and the humiliation of people through tactics such as shaving them” are all classic techniques employed to break the spirit of individuals ahead of interrogation.<sup>47</sup> Even if the detainees are found by a competent tribunal not to be prisoners of war under the Third Convention, then they will at least be entitled to the protections afforded by the Fourth Geneva Convention for the Protection of Civilians.<sup>48</sup> Furthermore, international human rights law will apply to all categories of prisoners.<sup>49</sup>

There is a requirement to provide prisoners of war with “living conditions” of a comparable standard to those of the forces of the detaining power who are accommodated in the same area.<sup>50</sup> This is clearly not the case in Guantanamo Bay, and it would present the United States with obvious practical and security dilemmas. Nevertheless,

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<sup>44</sup> Articles 13 and 14, Third Geneva Convention. On the treatment of POW’s during the Iran/Iraq war, see Memorandum from the ICRC to the States Party to the Geneva Conventions of August 12, 1949, concerning the conflict between Islamic Republic of Iran and the Republic of Iraq, Geneva, 7 May 1983; and second Memorandum of 10 February 1984. On the rights of prisoners in general, see N. Rodley, *The Treatment of Prisoners Under International Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1999), 277–308.

<sup>45</sup> Article 12, First and Second Convention; and Article 27, Fourth Convention. The term is taken from the Hague Regulations and the two 1929 Geneva Conventions.

<sup>46</sup> Articles 13 and 16, Third Geneva Convention.

<sup>47</sup> Amnesty International, Press Statement, 22 January 2002.

<sup>48</sup> See *Prosecutor v. Delalic and Others*, Case No. IT-96-21-A, Trial Chamber, 16 November 1998, paras. 236–277. This confirmed the view that there is no intermediate status; nobody in the hands of the enemy can be outside the law, and must fall under the purview of one of the Conventions (para. 271).

<sup>49</sup> The relevant provisions include the International Covenant on Civil and Political Rights, Article 75 of Additional Protocol 1; and the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (which the U.S. has ratified).

<sup>50</sup> Article 25, Third Convention. See also *United States of America, Plaintiff v. Manuel Antonio Noriega, Defendant*, United States Court for Southern District of Florida. Opinion by William M. Hoveler, 8 December 1992 (808 F. Supp. 791, 1992).

the requirement constitutes the minimum acceptable standard.<sup>51</sup> Interestingly, photographs of the detainees that caused such an outcry in Europe and highlighted the issue of the prisoners may have been in breach of the prohibition on making prisoners of war objects of curiosity.<sup>52</sup>

### *Right to Interrogate Prisoners of War*

It is a common misconception that the only information that you can obtain from a prisoner of war is his or her serial number, date of birth, rank, and name. In fact, this is the only information a prisoner of war is obliged to give to the detaining power under the Third Convention, but there is nothing that prohibits interrogating prisoners to learn more.<sup>53</sup> It is acceptable under such circumstances to offer inducements, and even to trick prisoners into supplying information. Any form of torture, whether physical or psychological, is prohibited, and the overall duty to treat all prisoners of war humanely continues throughout the period of internment or detention. This reflects the practical application of the Convention to armed conflict, and prisoners of war are often a source of valuable intelligence on enemy morale and deployment—for example, Iraqi prisoners of war during the Gulf War were a useful source of information. The need to interrogate detainees is therefore not a reason for not granting them prisoner-of-war status.

### *Release and Repatriation*

Since detaining prisoners of war amounts to a form of permissible internment, it is appropriate that the Third Convention should deal specifically with what happens to the prisoners after hostilities have ceased. Article 118 provides that all prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. Somewhat surprisingly, there is no express commentary on the direct repatriation of able-bodied prisoners while hostilities continue. Nevertheless, during the Vietnam War, American servicemen were released to “anti-war groups” in the United States, and during the Falklands/Malvinas conflict a number of repatriations took place before hostilities ceased. Article 117 provides that no repatriated person may be employed on active military service, and this seems to have been respected by both sides in the Falklands conflict.<sup>54</sup>

The question of involuntary repatriation has been an issue in a number of recent conflicts. After the Korean, Vietnam, Iran-Iraq, and Second Gulf Wars, a number of prisoners refused repatriation. Some prisoners faced the very real prospect of persecu-

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<sup>51</sup> This principle of assimilation is to be found in a number of articles of the Convention; see *Commentary, III Geneva Convention*, 192 and *passim*.

<sup>52</sup> Article 13, Third Convention.

<sup>53</sup> See Article 17, Third Geneva Convention; and H. Levie, *Prisoners of War in International Armed Conflict* (Newport: U.S Naval War College, 1978), 108. On the rights of prisoners in general, see N. Rodley, *Treatment of Prisoners Under International Law*, 46–106.

<sup>54</sup> H. McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (Aldershot: Dartmouth, 1990), 107–9.

tion upon arrival in their homeland, and this did happen to many Ukrainian prisoners of war who fought with the German army and were repatriated at the end of World War II. In such situations, the ICRC has a crucial role to play to ensure that the detaining power is not imposing repatriation on unwilling prisoners, nor using the excuse that prisoners do not want to be repatriated in order to circumvent its obligations under the Convention. This issue must be decided on an individual basis by an independent body such as the ICRC. The official position of the United States is that prisoners have a right to decide about their own repatriation, and each prisoner must consent to repatriation rather than being forced to return.<sup>55</sup>

A crucial question in the context of the campaign in Afghanistan and the hostilities in Iraq is when can hostilities be said to have ceased, thus triggering the general duty to release prisoners of war. The phrase “without delay” in the first paragraph of Article 118 indicates that the obligation to release prisoners arises immediately after the cessation of actual hostilities, and is not dependent upon the corresponding conduct of the enemy. President Bush has declared war on terrorism, and he has warned the American public to expect a long campaign. The Convention does not provide any guidance on how it can be determined that the hostilities have actually ended. One preferred formula is if neither side expects a resumption of hostilities.<sup>56</sup> There is no requirement for a formal armistice or peace treaty; what matters is the actual or *de facto* cessation of hostilities, provided they are unlikely to resume within a reasonable period. This has the effect of permitting the belligerent parties to make a subjective assessment of the intention of the enemy, but, since hostilities cannot be ruled out completely in the future, the mere fact that they *could* be resumed is not sufficient to prevent or delay repatriation. Given the ideological dimension of the current conflict, the question of the cessation of hostilities will be especially problematic. However, with the establishment of a new government in Kabul, and the end of bombing and conventional military operations by the United States and its allies, it will be difficult to argue that active hostilities against the Taliban have not ceased. Similarly, the formation of the Interim Iraqi Government, and the adoption of UN Security Council Resolution 1546 (2004), has changed the situation in Iraq.<sup>57</sup> However, the level of violence in Iraq suggests that there is an ongoing armed conflict taking place there.

The duty to repatriate does not prevent prisoners of war against whom criminal charges—including charges of war crimes or crimes against humanity—are pending from being detained beyond the cessation of active hostilities.<sup>58</sup> This provision refers to specific individuals who have been indicted, and it does not justify the denial of the

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<sup>55</sup> U.S. Department of Defense, *Conduct of the Persian Gulf War - Final Report to Congress*, Appendix 0-20, April 1992.

<sup>56</sup> G. Schwarzenberger, *International Law* (London: Stevens, 1968), 723; and *A Manual of International Law*, 5<sup>th</sup> ed. (London: Stevens, 1967), 215–6.

<sup>57</sup> Adopted 8 June 2004.

<sup>58</sup> Article 119, para. 5, Third Convention. Article 82 provides that prisoner-of-war status does not protect detainees from criminal offences that are applicable to the detaining powers' soldiers.

right of repatriation on the basis that some among the prisoners may have been involved in war crimes. Prisoners of war cannot be held on mere suspicion, in the hope or expectation that evidence may be found in the future that will allow the initiation of legal proceedings. If the United States has evidence against any of those detained in Cuba, then it may begin proceedings to hold them accountable for their alleged crimes. In the meantime, such prisoners need not be repatriated at the end of hostilities.<sup>59</sup>

## Conclusion

There is an issue of self-interest for all states and military forces in ensuring the proper treatment of all prisoners. Even the Irish Defense Forces have experienced ill treatment as prisoners in the former Congo, and others have been captured and brutally killed in southern Lebanon. At the end of the first Gulf War, the United States claimed that the treatment of enemy prisoners of war in United States custody constituted the best compliance with the Third Geneva Convention in any conflict in history. This was a fitting tribute to the United States and coalition forces. The Department of Defense Report concluded that measures to comply with the Conventions had no significant impact on planning and executing military operations. In fact, encouraging the surrender of Iraqi military personnel may have speeded and eased operations.<sup>60</sup>

While the principles and basic rules of international humanitarian law may be considered to represent fundamental values that have met with almost universal acceptance, peacetime efforts to implement them at the national level are nonetheless insufficient.<sup>61</sup> In fact, it is often a marginal item in military training programs.<sup>62</sup> Consequently, these rules of law are not as well known or understood as they should be by those who must apply them, especially the members of the armed forces.

In order to be able to count upon being treated according to humanitarian principles in a conflict, all parties must be prepared to demonstrate a willingness to respect those principles. Reciprocity, while not a legal requirement, is a practical necessity. A primary consideration in developing the principles of humanitarian law was the self-interest of the most protected class of person under the original rules: the combatant. Adherence to the principles of international humanitarian law is not a threat to the security or national interests of the United States. The detaining power can still interrogate and prosecute prisoners of war without infringing upon the Third Convention. On 26 January 2002,

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<sup>59</sup> Cf. Articles 115 and 119; see *Commentary: Third Convention*, 534–37 and 553–57.

<sup>60</sup> *Conduct of the Persian Gulf War - Final Report to Congress*, L-17.

<sup>61</sup> Louis Geiger, “Armed forces and respect for international humanitarian law: Major issues,” Symposium on Humanitarian Action and Peacekeeping Operations Report, (Geneva: ICRC 1994), 60.

<sup>62</sup> See generally David Lloyd-Roberts, “Training the armed forces to respect international humanitarian law: The perspective of the ICRC Delegate to the Armed and Security Forces of South Asia,” *International Review of the Red Cross* 319 (1997): 433; and Yves Sandoz, “Respect for the Law of Armed Conflict: The ICRC’s Observations and Experiences,” International Seminar on International Humanitarian Law in a New Strategic Environment: Training of Armed Forces, Stockholm, 17–18 June 1996.

the United States Secretary of State broke rank and called on the Bush Administration to apply the Geneva Conventions to all prisoners. It later agreed to apply the Conventions, but not to grant all detainees prisoner-of-war status.<sup>63</sup> However, the Geneva Conventions do not provide for discretionary benevolence. They recognize two basic categories of persons in the context of armed conflict: the civilian and the combatant. They also establish a rule that it is not for the military forces that capture prisoners to determine their status under the Conventions; this must be done by a “competent tribunal.” In particular, it is not for a Secretary of Defense or his/her equivalent to make this determination unilaterally.

There is a certain appeal in the simplistic argument that, since “terrorists” do not play by the rules, then why should U.S. or other forces do so? The answer is straightforward: you abide by the principles because they are the law, and because it is the right thing to do. Furthermore, two wrongs never make a right. It is certain that United States soldiers will at some point in the future need the protection provided by international humanitarian law. If the U.S. decides to ignore the law, then it can expect its enemies to do likewise. It will also add to the pervading lawlessness in places like Iraq and Afghanistan. Since the adoption of the Lieber code, over the years the United States has done more than many other states to ensure that humanitarian principles are respected during armed conflicts. In the long term, it has the most to lose if it is not seen to uphold the highest standards.

Humanitarian law represents fundamental principles of humanity, and applies to all those involved in armed conflict. It must be respected in all circumstances, regardless of the existence or nature of the armed conflict. After one hundred years of law making, the primary objective must not be a new law, but ensuring compliance with and effective implementation of the laws already in existence.<sup>64</sup> It is the responsibility of all states and parties to armed conflicts to ensure that all personnel undergo systematic training in humanitarian law, and that standing operating procedures be drawn up to deal with violations when they occur.

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<sup>63</sup> *The Irish Times*, 8 February 2002.

<sup>64</sup> Christopher Greenwood, *International Humanitarian Law and the Laws of War*, Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899 (May 1999), 3 (para. 1.6), quoting Sir Franklin Berman.