INTERNATIONAL HUMANITARIAN LAW IN 21ST CENTURY CONFLICT: A HISTORICAL EXAMINATION OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (1949), AND ITS APPLICABILITY IN FUTURE WAR

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by

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This study examines the Third Geneva Convention Relative to the Treatment of Prisoners of War of 1949 as the benchmark of international humanitarian law governing the treatment of prisoners during armed conflict. The history of humanitarian law during conflict dates back to the mid-nineteenth century. Since that time, the international community has incrementally codified provisions governing the detainment of enemy captives. However, the character of war has changed significantly since the drafting of the most recent update to the Geneva Conventions in 1949. Asymmetric conflict against non-state actors challenges many of the assumptions of war predicated upon by the Third Geneva Convention. A revision of the Convention must address current issues not captured within the provisions of the existing document. Examples of such matters of concern include: conflict without a formal declaration of war; the qualifications for enemy combatants to receive prisoner-of-war protections; repatriation; rendition operations; consideration for failed states; and international organizations or coalitions at war. As long as humans endeavor to wage war, the international community must maintain the applicability of international law to the current and future character of war in order to meet mankind's moral obligation to the humane treatment of prisoners during armed conflict.

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

ABSTRACT

INTERNATIONAL HUMANITARIAN LAW IN 21st CENTURY CONFLICT: A HISTORICAL EXAMINATION OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (1949), AND ITS APPLICABILITY IN FUTURE WAR, by LT Stephen P. Huffman, 123 pages.

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ACKNOWLEDGMENTS

This work is first and foremost dedicated to the plight of prisoners of war, past, present, and future. It is with their burden in mind, and the hopeful prevention of future atrocities, that international humanitarian law in armed conflict exists. Though the analysis presented in this treatise may be controversial to some readers, it is meant to generate discussion and inspire debate. It is to that end that I humbly submit this thesis.

I would first like to thank my committee chairman, Dr. John Kuehn, for his wisdom and guidance throughout this process. I would also like to thank Dr. Mark Hull for his expertise in the field of international law, and Dr. Phillip Pattee for his invaluable historical insights. The committee brought a wealth of knowledge and perspectives to the subject at hand, and their feedback was vital to creating a contributory piece of scholarly writing. I am sincerely grateful for the committee's devotion of time and resources to this project.

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ACRONYMS

Acronyms

DOJ	Department of Justice
EPW	Enemy Prisoner of War
ICRC	International Committee of the Red Cross
IO	International Organization
MACV	Military Assistance Command, Vietnam
POW	Prisoner of War
UN	United Nations
UNC	United Nations Command
US	United States

CHAPTER 1

INTRODUCTION

Background

Since war is a human endeavor, it is inherently a struggle of passion, fog, and friction. In the words of Prussian theorist Carl von Clausewitz, war is "a paradoxical trinity–composed of primordial violence, hatred, and enmity, which are to be regarded as a blind natural force; of the play of chance and probability within which the creative spirit is free to roam; and of its element of subordination, as an instrument of policy which makes it subject to reason alone."[1] The battlefield of war is not merely a contested piece of ground. For many captured combatants who find themselves prisoners in the enemy's hands, a detention facility can be a more violent and trying place than the front lines of combat. It is understandable why this can be true. The vulnerability of a person in captivity cannot be understated. Completely powerless and devoid of physical protection, the atmosphere in a detention facility is ripe for captors to physically and psychologically exploit their captives. Considering the preponderance of these prevailing attitudes during conflict, is it reasonable to assume that a bastion of safety can exist where persons of opposing powers at war can act in a way that is lawful? Customary international law states; that this is not only possible, but rather the expectation.

The first half of the twentieth century bore witness to two world wars, and following each one, the international community set out to create law that would prevent future human rights violations during armed conflict. The Third Geneva Convention on

[1] Carl von Clausewitz, *On War,* ed. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 89.

the Treatment of Prisoners of War of 1949 updated the existing conventions from 1929 and added two more. Ironically, some of the most horrific treatment of prisoners occurred after 1949. For the (United States) US, the second half of the twentieth century was consumed by the Cold War, and armed conflict consisting of proxy wars attempting to contain the spread of communism. Both the conflicts in Korea and Vietnam had a significant impact on international law due to the treatment of US and Communist prisoners of war. After 1975 when US involvement in the Vietnam War ended, the Geneva Conventions were modified with Additional Protocols I and II in 1977. The Protocols addressed issues pertaining to the differences and similarities between international and non-international armed conflict. Years later, in 2005, Protocol III was added. These amendments address a variety of topics within the Conventions, but they do not directly provide new guidance with respect to the treatment of prisoners of war.

The character of war has changed significantly since 1949. If the ways and means by which war is waged have undisputedly changed, do the laws that govern warfare need to change as well? That question informs this thesis question: Does the Third Geneva Convention Relative to the Treatment of Prisoners of War (1949) require revision to account for a future of asymmetric warfare with non-state actors? To answer that, one must determine if the Third Geneva Convention on the Treatment of Prisoners of War (1949) is applicable to war as we know it now and expect it to be in the future. Law is an evolutionary entity that must be constantly revisited to ensure applicability and compliance, and international humanitarian law related to prisoners of war is no exception.

This thesis first examines the evolution of international humanitarian law since its inception in the mid-nineteenth century, up through the creation of the Geneva Conventions of 1949. Next, it assesses the applicability of the Conventions to prisoner operations in conflict up to the present day. Finally, it examines specific shortcomings of the Third Geneva Convention with advisable revisions to ensure applicability in future conflict, most especially by state actors against non-state adversaries.

Conflict Today

The current conflict against global terrorism has called into question the nature of prisoner detainment in modern war. In the US, it has been a social and judicial challenge for over a decade, and is a by-product of ill-defined political objectives, a non-existent timeline for hostilities, and questionable legal interpretation. When guidance from the strategic level of leadership promotes policy that is misaligned with the intent of the Geneva Conventions, US efforts to achieve theater end states are delegitimized.

Issues arise when the character of war changes so much that the specifics of international law as currently written are not always clearly applicable. As a result, enforcing international law becomes challenging since the law's applicability seems to decline as a result of the changing nature of armed conflict. Because of this increasing lack of clarity, the result is that states that are signatory to the law resolve ambiguity through their domestic legal system and its interpretation of international law. For example, starting in 2001, the US Department of Justice (DOJ) led the effort to interpret the Third Geneva Convention's definition of enemy combatant status as it pertained to the conflict in Afghanistan. The purpose was to determine if certain non-state actors were entitled to Prisoner of War (POW) classification and the legal protections afforded

therewith. Other signatory states face this same issue within their domestic legal systems as well; to ensure their respective nation abides by the intent of international law. It has been a struggle since the inception of the Conventions. However, the provisions of the Conventions were drafted based on many assumptions about the character of war as it existed prior to 1949. The current and projected character of war presents a type of conflict that does not conform to the assumptions of the 1949 Conventions, which will only continue to make compliance with international law more and more challenging.

Research Questions

This study examines international humanitarian law, history, and policy to answer the following question: Does the Third Geneva Convention Relative to the Treatment of Prisoners of War (1949) require revision to account for a future of asymmetric warfare with non-state actors? Before looking to the future to see if and how the Convention would apply in armed conflict against non-state actors, it is important to review its historical applicability to state actors. Thus, secondary questions include: has the Third Geneva Convention on the Treatment of Prisoners of War (1949) been adhered to by signatory nations since its inception? What have been the most significant and common breaches of the Convention, and why did they happen? Answering these questions provides a thorough historical analysis of where the law fell short with respect to armed conflict between belligerent states. The next step is to examine some of the difficulties with applying the law to non-state actors. What defines a "prisoner of war," and is that definition sufficient to meet the intent of the Convention? What changes, if any, should be made to the Convention to ensure its adherence in future conflict? Finally, to understand the roles of state and non-state actors in war, it is necessary to understand the

context in which the war will be fought. This will require answering tertiary questions pertaining to international law in the future. Will conventional declared war between nation states exist in the future without some prevalence of non-state or partisan involvement? Does the Third Geneva convention need to address issues of rendition and preventative detention? How do new domains (space and cyber) that did not exist in 1949, affect prisoners of war? If war, like the so-called "global war on terrorism," exists without a defined beginning or end, how can prisoners be released at the termination of hostilities if no such conclusion occurs?

Limitations and Delimitations

Limitations for this study include primary source material that requires travel outside Leavenworth, Kansas, although the internet is used to access some collections and sources. Delimitations for this thesis will be the examination of international law (conventions, treaties, agreements, etc.) to only the portions of those laws that apply to the treatment of prisoners of war, and only to laws in which the US was, or is now, complicit. Though many laws, agreements, treaties, and other legally binding documents have been drafted subordinate to and in compliance with the Third Geneva Convention, the focus will be on the convention itself as the over-arching document upon which other guidance from signatory nations is based. The examination of POW treatment will be general, only examining those aspects that pertain directly to requirements of international law. Temporally, this study focuses on twentieth century conflict since 1949 through the present day, and makes recommendations for the future. The scope is through the examination of American involvement in wars with state and non-state actors. Non-state actors will be defined as Violent Extremist Organizations, and this study will not

address transnational criminal organizations or pirates. The thesis will conclude with a final assessment of the Third Geneva Convention's applicability to future conflict based on available government guidance on the expected characteristics of war.

It is important to note that the dichotomy between state and non-state actors can be quite ambiguous. History has shown that the categorization of combatants can in fact be relatively complex, as the connections between partisan groups and state governments is not necessarily all or nothing. Add to that; liberation movements that claim independent sovereignty or the status of failed state governments, and the generic categorization of fighters as state or non-state actors appears overly simplified. Though this thesis will refer to combatants using these two structures, but it is important to note the inherent challenges associated with using this convention. The reason to continue to define combatants using this framework is that it most accurately conforms to the provisions of the Geneva Conventions.

Significance

Adherence to customary international law is of vital strategic importance in maintaining the legitimacy of a government and military force during war. This is especially true in an asymmetric warfare environment against actors who use information in ways that exploit opportunities to delegitimize the efforts of a more powerful belligerent. Actions in accordance with, or in violation of, international law at the strategic, operational, and tactical levels of war all have significant strategic-level impacts. Therefore, the understanding of, and adherence to, customary international law is a requirement to meet strategic end states in conflict.

Deviations from customary international humanitarian law are rampant throughout history. Nowhere has this been truer than in the captivity of prisoners of war during major twentieth century conflicts. The question of how international law applies to prisoners continues into the twenty-first century. Therefore, as leaders in the profession of arms, it is important to understand why enemy prisoner of war operations remain so difficult to get right. Everyone shares this burden of responsibility-from the highest levels of civilian and military leadership down to every soldier, sailor, airman, and marine on the battlefield. As part of this effort, American military officers must educate themselves, their peers, and their subordinates in matters of international humanitarian law, in order to ensure their military remains the most professional and honorable warfighting force in the world.

Terms

Accession. The act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states.[2]

Belligerents. Parties engaged in conflict, hostilities, or war.[3]

Detaining Power. The belligerent Power (state, country, government) in whose possession a prisoner resides.[4]

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[2] United Nations Treaty Collection, "Glossary of terms relating to Treaty actions," United Nations, accessed February 25, 2018, https://treaties.un.org/Pages/ Overview.aspx?path=overview/ glossary/page1_en.xml#ratification.

[3] Ibid.

[4] Ibid.

High Contracting Party. A State bound in contract to the Conventions (signatory member).[5]

Levée en masse. An organized resistance movement. A situation where, upon the approach of an invading/occupying army, the civilians of the threatened territory spontaneously take up arms in order to resist the invasion.[6]

Power on Which They Depend. The Power for whom a prisoner fought prior to capture.[7]

Protecting Power. The neutral State or party agreed upon by the High Contracting Parties to oversee the well-being of prisoners of war in accordance with the Conventions.[8]

Ratification. The international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act.[9]

Repatriation. To send, bring, or return a person to their country or land of origin or citizenship.[10]

Signatory (Power/State). A state that creates an obligation to refrain, in good faith, from acts that would defeat the object and purpose of the treaty. The signature is

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[5] United Nations Treaty Collection, "Glossary of terms relating to Treaty actions."

[6] Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (New York: Oxford University Press, 2010), 19-20.

[7] United Nations Treaty Collection, "Glossary of terms relating to Treaty actions."

[8] Ibid.

[9] Ibid.

[10] Ibid.

usually subject to ratification, acceptance, or approval, and indicates the willingness of the signatory state to continue the treaty-making process. It does not establish the consent to be bound.[11]

Research Design

The primary document at the heart of this thesis is The Third Geneva Convention on the Treatment of Prisoners of War of 1949. It is one of four Conventions from 1949. The other three speak to different aspects of humanitarian law in war, but it is the Third Geneva Convention that specifically addresses prisoner of war operations. In 143 Articles, the Convention generally discusses the responsibilities of belligerents before and during conflict, while discussing in detail the rights and privileges afforded prisoners of war from the moment of capture until repatriation. In addition to the Convention, several secondary sources explain and clarify the articles of the Convention for better comprehension for the lay reader. Other primary sources for this project include memoirs, books, reports, and memoranda.

Due to the high number of available primary sources, there exists a plethora of secondary sources that provide insight, analysis, and application of the Convention to the history of prisoner of war operations. These sources include theses, transcripts from speeches, journal articles, and books, to name a few. To scope the research, sources used spoke to the connection between the Geneva Conventions and prisoner of war practices. Much of the published literature focuses on the treatment of prisoners during conflict, especially torture and other forms of abuse. Some of these sources were used for

[11] United Nations Treaty Collection, "Glossary of terms relating to Treaty actions."

contextual purposes to understand overall treatment, but the focus of the research with respect to secondary sources is the adherence or violation of articles of the Geneva Conventions.

This thesis asks the question of the Geneva Convention's applicability to future conflict against non-state actors. The preponderance of available information on twentieth century conflict involving the US pertains to state actors. However, this information is valuable to the analysis of non-state actors as well. Starting in the twenty-first century after the terrorist attacks on September 11, 2001, one begins to observe detainee operations against Violent Extremist Organizations non-state actors in large numbers. It is this so-called global war on terrorism that has significantly impacted understanding what it means to conduct prisoner of war operations. As a result, multitudes of people have published information on the US and its detainee policy. This recent history, in the form of international law literature, US case law, as well as US foreign policy, is critical to making assumptions about the applicability of the Conventions in future conflict.

This thesis consists of six chapters. Chapter 2 contains a literature review in the form of a historiography. Chapter 3 provides a brief history of the genesis of the Third Geneva Convention on the Treatment of Prisoners of War of 1949. Chapter 4 provides a summary analysis of significant twentieth century conflicts since 1949, and their associated prisoner of war operations. Chapter 5 discusses the current status of US detainee operations and the debate surrounding its adherence to the Geneva Conventions. Chapter 6 will analyze the nature of future conflict, and determine whether or not the Third Geneva Convention will be relevant based on its applicability throughout history.

This chapter focuses on challenges pertaining to non-state actors, and how the Convention can address future issues such as rendition operations, and defining enemy combatants. Chapter 6 will also contain a conclusion and suggest items that require further study.

CHAPTER 2

HISTORIOGRAPHY AND LITERATURE REVIEW

Unlike some subjects of history, international humanitarian law in armed conflict invites a wide breadth of authorship–historians and academics, lawyers, journalists, politicians, and members of the armed forces, to name a few. Therefore, it is challenging to categorize perspectives of these authors of history temporally or otherwise, as is common in other historiographical subjects. The most reasonable approach is to examine the literature with respect to certain conflicts and subject areas, while evaluating authorship within these areas as orthodox or reformist. The orthodox view conforms to the law as it is established, generally accepting it as true and correct. The reformist view advocates reform of the law by arguing that it is not sufficient as currently written. However, it must be noted that orthodox and reformist views are merely informed opinions on specific issues, and do not necessarily categorize the author on all matters of subjective analysis.

Creation of the Law

The Third Geneva Convention on the Treatment of Prisoners of War of 1949 is the foundational document for this thesis. Born out of the aftermath of World War II, as a result of the human rights violations experienced by prisoners of war, the four Geneva Conventions of 1949 sought to update the existing Geneva Conventions of 1929. In general, authors collectively express a revisionist view towards the Geneva Conventions of 1929, and agree that the need for amendment to the law based on atrocities committed during World War II was urgent and undeniable. Gregory Urwin, in his book *Victory in*

Defeat: The Wake Island Defenders in Captivity (2010), shares this view in his explanation of loopholes in the Geneva Conventions of 1929.

> Although not legally compelled to do so, Japan pledged to observe the Geneva Convention and apply its guidelines to the treatment of Allied POWs. The Japanese slyly added, however, that they would interpret these provisions mutatis mutandis–a legal nicety meaning 'necessary changes having been made.' That seemingly innocent disclaimer gave the Japanese a loophole to ignore any part of the agreement they found inconvenient. In actual practice, the Japanese ran their POW camps as if the Geneva Convention had never been written.[12]

In 1949, the US State Department led the effort to negotiate new Conventions.[13] Plenipotentiaries from around the world gathered in Geneva to pen a needed revision to international law. The primary change, specifically to the Third Geneva Convention on the Treatment of Prisoners of War (1949) was to ensure that the Convention's articles adequately captured the intent of the law–to assuage human suffering and promote the safety and well-being of prisoners before, during, and after captivity.[14] Law professor Emily Crawford wrote, "The Conventions updated and, to some extent, revolutionized the traditional law of armed conflict, considerably expanding the scope and range of the laws of war."[15] The plethora of literature on this subject, and the unanimity with which authors express the need for new Conventions, illustrates how dire the need was to revisit the law during this time period.

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[12] Gregory J.W. Urwin, *Victory in Defeat: The Wake Island Defenders in Captivity* (Annapolis, MD: Naval Institute Press, 2010), 46.

[13] Paul J. Springer, *America's Captives: Treatment of POWs from the Revolutionary War to the War on Terror* (Lawrence, KS: University Press of Kansas, 2010), 164.

[14] Ibid., 165.

[15] Crawford, 18.

Because of the interest in the Geneva Conventions by scholars without legal experience many publications provide an examination of the articles of the Convention in detail with commentary appropriate to the lay reader. These objective sources are necessary in order to acquire a deeper understanding of the Third Geneva Convention through their descriptive commentary. Some of these publications include: Keiichiro Okimoto's article "The Protection of Detainees in International Humanitarian Law" (2010), G. I. A. D. Draper's *The Red Cross Conventions* (1958), and Jean de Preux's *The Geneva Conventions of 12 August 1949: Commentary* (1960).[16]

Conflicts of the Cold War

During the drafting of the Geneva Conventions of 1949, the Cold War had already begun. Over the next several decades, armed conflict for the US consisted primarily of engaging communist forces in East Asia in an attempt to avoid a hot war with the Soviet Union while attempting to contain the spread of communist ideology. In examining the literature published during this time, it is important to understand the societal context in which authors were writing. Historian Michael Howard describes this Cold War environment in *War and the Liberal Conscience* (1994). He states, "Soviet power must therefore be contained, by firm declarations of interest and where necessary by displays

[16] Keiichiro Okimoto, "The Protection of Detainees in International Humanitarian Law," in *Geneva Conventions Under Assault*, eds. Sarah Perrigo and Jim Whitman (London: Pluto Press, 2010), 99-135, accessed October 29, 2017, ProQuest Ebook Central; G.I.A.D. Draper, *The Red Cross Conventions* (New York: Frederick A. Praeger, 1958); Jean S. Pictet, ed., contributions by Frédéric Siordet, C. Pilloud, R. Wilhelm, O. Uhler, J. P. Schoenholzer, and Henri Coursier, *The Geneva Conventions of 12 August 1949: Commentary. Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva, Switzerland: International Committee of the Red Cross, 1960).

of strength; by operating in fact the traditional mechanism of the balance of power."[17] The prevailing attitude at the time was that US democratic principles were just, while communist ideology was attempting to undermine the sanctity of American democracy. These beliefs perpetuated fear and skepticism among the populace that were at times reflected in writing of the day.

The evaluation of the adherence to international law during the Korean War reflected these societal sentiments. While orthodox authors wrote on the atrocities committed by the communists against allied POWs in violation of international law, there was a politically-charged element that viewed American prisoners as the ones responsible for their poor treatment. US Air Force Colonel William Norris wrote, "The theme of this propaganda was that there had been wholesale collaboration by American POW's by their communist captors."[18] While these claims were likely unfounded, authorship during the Cold War on matters such as prisoner detention could be very divisive in nature, and one could reasonably cite society's fear of communism as the culprit. It is worth noting that during this time it was not so much international law that was the brunt of the attack, but rather the politics surrounding military action. However, post-Cold War literature pertaining to the Korean War is devoid of these Cold War societal attitudes and creates a more unbiased historical account. Assessment of both Communist and Allied prison camps are objectively compared to the standards prescribed by the Geneva Conventions,

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[17] Michael Howard, *War and the Liberal Conscience* (New Brunswick, NJ: Rutgers University Press, 1994), 121.

[18] William C. Norris, "The Plight of American POW's in Korea and Vietnam" (Air War College Research Report Summary No. 4211, Air War College, Air University, Maxwell AFB, AL, 1970), 9.

as shown in William C. Latham's recent study *Cold Days in Hell: American POWs in Korea* (2013)*:* "Conditions in the UN prison camps never descended to the depths of depravity found in most of the communist camps during the first year of the war, but neither did they meet the requirements specified in the Geneva Conventions, much less the idealized rhetoric of US officials."[19]

Literature pertaining to international law during the Vietnam War is also prolific. The scale and duration of the Vietnam War inspired historians to comprehensively examine the characteristics of that conflict that so confounded the US. Part of the examination was to evaluate one of the most infamous travesties of the war–prisoner treatment and detention operations. To try and analyze the historical scholarship, it is best to understand how the focus on legal issues has changed over time. Immediately after the war, legal analysis was focused on torture and treatment of US prisoners by the North Vietnamese Army, and the reciprocal treatment of North Vietnamese Army and Viet Cong prisoners in South Vietnamese camps. One significant orthodox work from 1975 is by Major General George S. Prugh, the Staff Judge Advocate at Headquarters, US Military Assistance Command, Vietnam (MACV). His monograph, *Law at War: Vietnam* (1975), illustrates the difficulty in applying international law in the presence of claimed sovereignty (international) and civil war (non-international). This complex warfare dynamic is characteristic of present conflict, and Major General Prugh's insights speak to the challenges of adhering to international law in such a legally complicated

[19] William C. Latham, *Cold Days in Hell: American POWs in Korea* (College Station, TX: Texas A&M University Press, 2013), 215.

environment.[20] Other writings since the 1970s, to include biographies and memoirs such as John McCain's *Faith of My Fathers* (1999), provide historical context into prisoner operations during the Vietnam War. However, modern day historians writing about Vietnam are more focused on comparing communist and allied prisoner detention policies together to arrive at a more holistic view of compliance with international law relative to both sides of the conflict. An example of differing views between historians of the 1970s and today is the subject of non-state actors. Though Prugh discusses the legal quagmire surrounding insurgent forces, like the Viet Cong, contemporary historians understand the impact of such fighters from the viewpoint of the modern so-called global War on Terrorism. Prugh and General William C. Westmoreland agreed that treating state and non-state actor prisoners as POWs in accordance with the Geneva Conventions could result in better treatment of US prisoners in Hanoi.[21] Meanwhile, modern historians see this issue of reciprocal treatment as more of a fantasy than a reality in war. There is a burden of legitimacy for a state to comply with customary international law that does not exist among non-state or would-be state actors. Thus, an adversary of both state and other actors is far less likely to abide by the law as compared to a first-world power like the US. That proved to be true in Vietnam, but it has also proven to be true today.

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[20] Major General George S. Prugh, *Law at War: Vietnam* (Washington, DC: US Department of the Army, 1975).

[21] Robert C. Doyle, *The Enemy in Our Hands: America's Treatment of Prisoners of War from the Revolution to the War on Terrorism* (Lexington, KY: The University Press of Kentucky, 2010), 271.

United States-Iraq Gulf War (1991)

Historians tend to agree that the conduct of prisoner operations during the US-Iraq 1991 Gulf War was in keeping with international humanitarian law. This conclusion is derived from military reports, assessments from the International Committee of the Red Cross (ICRC), and other secondary sources. The primary reasons why the literature is in agreement are, first, the fact that Operation Desert Storm was a quick and decisive military effort against a state actor (Iraq), and second, the strong US alliance with Saudi Arabia created a unity of effort in handling prisoners of war. Historian Paul Springer wrote, "The US POW effort succeeded in the First Gulf War, despite inadequate planning, a shortage of trained personnel, and a lack of facilities, because it had ample assistance from the Saudi government in the form of supplies and transportation."[22] Although there are certainly some lessons to be learned from prisoner operations in the Gulf War, it is not a focus of discussion in the field of international humanitarian law. Prisoner detention met the intent of international law, and was devoid of any egregious violations.[23]

Current Conflict

Since the night of October 7, 2001, in response to the terrorist attacks of September 11, 2001, the US has been at war. Throughout the last sixteen plus years, countless American and foreign authors have written about every facet of the so-called global War on Terror. One subject that has garnered a great deal of world attention has

[22] Springer, 195.

[23] Ibid., 194.

been the legality of detention and treatment of foreign fighters held by the US. Fundamental to this discussion is the applicability of the Third Geneva Convention on Prisoners of War of 1949. Depending on the specific issue, some historians have taken an orthodox view of US compliance with international law; arguing that policy may or may not have been in line with the intent of the law, but the law itself was sufficient to provide guidance on the issue at hand. Meanwhile, others write about the same issue from the reformist viewpoint; arguing that no matter how the law is interpreted, the fact that interpretation is required to such an extent speaks to the need for the law to be revised.

The most significant debate among historians and the legal community about US prisoner operations is the definition in international law of an enemy combatant, and a prisoner of war. International law experts, Professor David Crane and Daniel Reisner, wrote, "The common view is that, barring very specific exceptions, combatant status means (1) the right to participate in hostilities, (2) being a legitimate target during hostilities, and (3) the right to POW status if caught by the adversary."[24] Under this guidance, one could consider captured terrorists as legitimate combatants, though the Third Geneva Convention maintains that POW status can only apply to combatants that conform to the rules of war. Yet in January of 2002 at a Pentagon briefing from the Office of Public Affairs, the government released a message to the world saying that the US considered captured fighters to be "detainees" rather than prisoners of war, and

[24] David M. Crane and Daniel Reisner, "Jousting at Windmills: The Laws of Armed Conflict in an Age of Terror-State Actors and Nonstate Elements," in *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare*, ed. William C. Banks (New York: Harper Collins Publishers, 1999), 74.

further professed that the Geneva Conventions did not apply to the war in Afghanistan.[25] This assertion generated debate among both orthodox and reformist authors.

Orthodox writers maintain that the law is precise in its definition. Yet there is still debate on what that definition is; an indication that this legal clarity may in fact be opaquer than many authors would make it appear. Alberto Gonzales, former White House Counsel from 2001 to 2005 and later US Attorney General, agreed with the recommendations of the US DOJ that the Conventions did not apply. According to Gonzalez, it was a matter of strict adherence to the letter of the law. "Considering whether Geneva should apply to members of al-Qaeda, the logical and legal answer was no. Al-Qaeda was not a nation-state; they were not signers of the Geneva Conventions and could not have been, even if they desired to do so, since only nations could ratify treaties, not individuals or rebel groups with allegiance to no particular country."[26] However, as previously mentioned, not all orthodox academics share the same view on this controversial issue. Professor of Law at the Free University of Brussels, Eric David, argues that if a state is a Contracting Power, then the government and the people of that state are responsible to comply with international humanitarian law. "The legal answer is straightforward: the State is bound by the rule and the State includes not only the government but also the entire population that is made up of individuals and groups. Whether these groups are rebels or insurgents is irrelevant."[27] And because Afghanistan

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[25] Doyle, 309.

[26] Alberto Gonzales, *Faith and Allegiance: A Story of Service and Sacrifice in War and Peace* (Nashville, TN: Harper Collins Christian Publishing, 2016), 153.

[27] Eric David, "IHL and Non-State Actors: Synopsis of the Issue," *Collegium*, no. 27 (Special Edition, Spring 2003): 35.

is a Contracting Party to the Third Geneva Convention of 1949,[28] the Conventions would therefore be in effect during armed conflict.

In contrast to the strict interpretation of the orthodox perspective, the reformist view states that one cannot use different terminology to avoid adherence to the intent of international law. The plenipotentiaries that assembled in 1949 to draft the Conventions did not expect to address every possible scenario in war, but rather, provide a framework of intent to which signatory states are expected to comply. This view was perhaps best summarized by the United Nations (UN) Security Council in its description of the broader purpose of the Geneva Conventions from a report published in 1993: "The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope."[29] Therefore, if presented with a decision to apply the Conventions in the detention of enemy fighters on the battlefield, the answer should be found in the intent of international humanitarian law.

The reason this debate over combatant status definition exists today speaks to a larger issue of applying the Geneva Conventions in general to non-state actors. Using Professor David's classification of non-state actors, there are five different types: private citizens, armed or rebel groups, national liberation movements, international

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[28] US Department of State, *Geneva Conventions of August 12, 1949 For the Protection of War Victims* (Department of State Publication 3938, General Foreign Policy Series 34, August 1950), 139.

[29] United Nations Security Council, *Report Pursuant To Paragraph 5 Of Security Council Resolution 837 (1993) On The Investigation Into The 5 June 1993 Attack On United Nations Forces In Somalia Conducted On Behalf Of The Secretary-General*, UN Doc S/26351, 24 August 1993, Annex §9, accessed December 30, 2017, http://repository.un.org/bitstream/handle/11176/51901/S_26351-EN.pdf?sequence=3&isAllowed=y.

organizations, and non-recognized states. All of these entities face similar challenges under the application of international law.[30] Authors David M. Crane and Daniel Reisner epitomize the reformist perspective by advocating for revision of international law to meet the demands of complex battlefields with state and non-state actors alike. Simply put, they argue "modern conflicts between states and nonstate entities are not easily addressed within the structural framework of humanitarian law."[31] Therefore, the prudent measure is to revise the law to avoid controversial interpretations by Contracting Powers to the Geneva Conventions. Crane and Reisner continue to say, "we argue for a new framework describing the status and rights of participants in modern conflict."[32] In contrast to this reformist view, orthodox Canadian law professor Marco Sassoli believes that the law's descriptive rather than prescriptive nature allows for interpretation and achieves the effect its authors intended. "The world today is much more a traditional world of inter-State wars to which the law of international armed conflicts and the Geneva Conventions are quite well adapted. For the time being international humanitarian law must be kept in its current form rather than be transformed or abolished altogether before the social phenomenon it governs disappears."[33] Academics and lawyers from both the orthodox and reformist camps have differing opinions on the

[30] David, 34.

[31] Crane and Reisner, 79.

[32] Ibid., 80.

[33] Marco Sassoli, "Collective Security Operations and International Humanitarian Law," *Collegium*, no. 27 (Special Edition, Spring 2003): 91.

relevance of international law to the current and future warfare environment, but all agree that some standard of international law must be maintained.

Conclusion

The Third Geneva Convention of 1949 is as relevant to warfare today as it was over sixty years ago. In the last six decades, American conflict has kept humanitarian law in the forefront of international scholarship. Whether orthodox or reformist; there is a preponderance of opinions on a variety of subjects related to the Third Geneva Convention. As the character of war changes and new types of conflicts and adversaries emerge, it is necessary for academics to continue the deliberation on the relevance of the law. With the debate as passionate and impactful as it is today, and the future of warfare looking very different than it did in the 1940s, it begs the question of whether or not another conference in Geneva is due.

CHAPTER 3

FROM THE HAGUE CONVENTIONS OF 1899 AND 1907

TO THE GENEVA CONVENTIONS OF 1949

Prior to the nineteenth century, and specifically the Lieber Code of 1863, prisoners of war engendered no protections under the law. Captors punished, enslaved, or even murdered their prisoners, if so desired. However, the nineteenth century brought about two evolutions in thought that challenged the historical paradigm. The first was the compulsion to treat prisoners humanely based on moral and religious obligations to one's fellow man. The second was the idea that states are truly the entities at war, and combatants are merely the lawful representatives of their state. Thus, the idea of captivity became a means of preventing combatants from participating in conflict, rather than a punitive act.[34]

This chapter analyzes the evolution of international humanitarian law throughout the first half of the twentieth century. The purpose is not to focus on the details of POW treatment by belligerents during conflict, but rather show how general treatment and conditions inspired changes to the Geneva Conventions. It is also important to note how the legal revisions impacted the next conflict. The trend indicates that law is reactionary. Plenipotentiaries draft law in response to conflicts of the past in order to prevent those atrocities from reoccurring again in the future, with the hope that the new law "fits" the character of the next war.

[34] Crawford, 61-62.

The Genesis of International Humanitarian Law

The Hague Conventions of 1899 and 1907 were the primary pieces of international humanitarian law pertaining to armed conflict at the turn of the twentieth century. They were the foundational legal body preceding the later Geneva Conventions of 1929 and 1949. Several events during the last half of the nineteenth century were instrumental in the creation of international humanitarian law pertaining to prisoners of war. First, the US War Department issued General Orders No. 100 "Instructions for the Government of Armies of the United States in the Field," better known as The Lieber Code of 1863.[35] Though it was an American document intended for domestic application, the international community embraced it. Military historian and current chairman of the Department of Research at the Air Command and Staff College, Paul Springer, states, "The code also served as the basis for international attempts to codify the laws of war at the Brussels Conference of 1874; the Institute for International Law's manual of the laws of land warfare; and at The Hague Conventions of 1899 and 1907."[36] The second event was the creation of the International Committee of the Red Cross in 1864. Though the mission of this organization evolved throughout the decades to follow, aiding prisoners of war as a protecting entity became a prescribed responsibility in international humanitarian law.[37] Thirdly, the creation of the 1864 Geneva Convention and 1868 Declaration of St. Petersburg established rules of war pertaining to the treatment of the

[35] US War Department, *General Orders No. 100*, 24 April 1863.

[36] Springer, 94.

[37] Ibid., 121.

sick and wounded, as well as restrictions on the use of certain weapons of war.[38] These three significant accomplishments during the nineteenth century established the legal framework for The Hague Conventions.

Tsar Nicholas II of Russia called for The Hague Conference in 1899. The purpose of this meeting was to discuss disarmament, the laws of warfare on land and sea, and the establishment of a legal body that could hear international disputes as a means to prevent armed conflict.[39] Twenty-four nations adopted the four Conventions, and eight years later, in 1907, a second conference at The Hague established "a uniform code of conduct for military forces during war."[40] The conference established The Hague Conventions of 1907, comprised of fourteen individual conventions, which superseded the previous Hague Conventions of 1899 for signatories of the 1907 Conventions.[41] The Fourth Hague Convention of 1907, entitled "Laws and Customs of War on Land," contained seventeen articles devoted to prisoners of war. These seventeen articles created a rudimentary precedence regarding the nature of capture, detention, pay, punishment, and repatriation for prisoners of war. Notably, the Convention did not provide a clear and explicit definition for prisoner of war, a necessary element of later Conventions. However, the first article on prisoners of war does clarify a critical idea: that prisoners of war must

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[38] Crawford, 17.

[39] Doyle, 168.

[40] Springer, 121.

[41] Laws and Customs of War on Land, 1907, *United States Statutes at Large*, 36:2277, Treaty Ser., No. 539, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, Section I, Chapter II, Article 4. The Hague Conventions are also referred to as The Hague Regulations.

receive humane treatment, and that this responsibility belongs to the state that captured them, not the individuals that facilitated the capture. Article 4 of the Convention states: "Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated."[42] The significant flaw to the Convention was Article 2, which stated that the Convention applied only during conflict between signatory belligerents: "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."[43] In legal terms, this is known as a *clausula si omnes*.[44] This critical weakness rendered The Hague Conventions of 1907 ineffective during World War I because Italy, Bulgaria, Serbia, Montenegro, and the Ottoman Empire were all not signatory powers.[45] The US ratified the Fourth Hague Convention on December 3, 1909, but because all belligerent powers in the Great War had not signed and ratified the Convention, adherence by all parties was voluntary.[46]

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[42] Laws and Customs of War on Land, 1907.

[43] Ibid., Article 2.

[44] This clause provides that legal obligations are binding on a belligerent power only when an enemy belligerent (and all of its allies) is also bound by that same obligation. Pictet et al., 21.

[45] Springer, 122.

[46] Doyle, 168. In addition to the US, France, the United Kingdom, Germany, Austria-Hungary, and Russia all ratified the Fourth Hague Convention prior to the outbreak of World War I. These same Hague and Geneva provisions represented the gravamen of Count II (waging aggressive war) charges against the German defendants at Nuremberg in 1945-1946. The Hague and Geneva Conventions were held to be customary international law for signatories and non-signatories alike.

Though not legally binding, most World War I belligerents agreed to comply with The Hague Conventions of 1907. The war began in August of 1914, and within months, hundreds of thousands of prisoners surrendered and were subsequently detained by belligerent powers. There existed limited communication between belligerents on the status of their prisoners, and this lack of information bred skepticism about whether or not belligerents were upholding their voluntary compliance with The Hague Conventions of 1907. Springer writes,

> Disagreements soon arose over the interpretation of virtually every aspect of the convention. Each government felt obliged to protect its own prisoners held by the enemy, but no government had a means to assess the conditions of its own soldiers held prisoners. Each side soon fell prey to rumors about the mistreatment of prisoners by the enemy, and threats of retaliation soon followed.[47]

Prior to US Military involvement in 1917, when the country was still a neutral party, belligerents from both the Allied and Central Powers requested that the US serve as a protecting power to monitor the well-being of prisoners of war. The US obliged, and conducted hundreds of inspections of prisoner camps, while providing written reports in the hopes of easing relations with respect to prisoner operations by belligerent powers. The reports were objective in their assessment of the camps, and carefully worded to avoid inflammatory commentary that strained the already tense relationships of the belligerents. Once the US entered the war in April 1917, Switzerland became the protecting power, and remained so for the duration of the conflict.[48]

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[47] Springer, 133-134.

[48] Ibid., 134.

As a result of the major belligerent powers volunteering to follow the Fourth Hague Convention, prisoner treatment by both sides during the Great War was relatively decent. It was apparent that efforts made at the strategic level to comply with international law contributed to the generally humane treatment of prisoners. Starvation, torture, or other forms of abuse were minimal, and exchanges of sick and wounded prisoners occurred regularly throughout the war.[49] There were, however, exceptions. Robert Doyle, professor of history at the Franciscan University of Steubenville, writes that US soldiers on the western front sometimes "killed the enemy wounded, declared an unofficial 'no prisoner' policy before a battle, or shot EPWs on the way to the rear. But once the German soldiers arrived safely behind the lines and were put into the hands of military police, the Hague rules forced the detaining army to obey international law."[50] It is not surprising that these shameful actions occurred. The horrors of prolonged trench warfare affected soldiers at the front. When given an opportunity to take advantage of a prisoner, it is only reasonable to assume a few did so, even if they knew it was wrong. Reasons for exploiting prisoners in violation of the law could include a lack of training on behalf of the Detaining Power, desire for retribution, desire to inflict punishment, or a lack of recognition of surrender. Hence the challenge of adherence to law in war and the inherent difficulty in enforcing international humanitarian law at the tactical level. This is

[49] Doyle, 169.

[50] Ibid., 176.

especially true when a governing piece of international law isn't technically applicable due to requirement that all belligerents to be signatories before the law is in effect.[51]

Although World War I demonstrated that the Fourth Hague Convention of 1907 was sufficient in its intent, there was a need for further detail and revision within the law. The lack of specificity pertaining to prisoner policy and treatment bred skepticism between belligerents regarding the treatment of their own prisoners in enemy captivity. This led to rumors, reprisals, and a lack of coherent communication between powers. It was clear that the law required specific criteria governing the treatment of prisoners, which in turn allowed belligerents to trust that the opposing power treated their prisoners appropriately. Additional items for revision included: the broadening of the term prisoners of war, more specific requirements pertaining to the nature of captivity, the empowerment of neutral protecting powers, and emphasis on repatriation at the cessation of hostilities.[52] Most importantly, the law needed to apply to armed conflict, regardless of the signatory status of all of its belligerents.[53] The Convention established rudimentary principles of conduct with respect to prisoner of war operations. However, the First World War proved that these principles often required clarification in their execution. In

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[51] FM 27-10, Rules of Land Warfare (1914) contained 56 articles in its chapter 4 pertaining to prisoners of war, and was the guidance available to military officers during World War I. The reference cited most frequently in chapter 4 is General Orders 100 of 1863, the Lieber Code. The manual also references The Hague and Geneva Conventions. Although *clausula si omnes* negated mandatory compliance with The Hague Conventions, FM 27-10 (1914) shows that the US War Department intended for members of the US military to conform to existing humanitarian law, regardless of the obligations from other belligerents.

[52] Pictet, 6.

[53] Springer, 141.

response, after World War I concluded, the ICRC suggested a revision to The Hague Conventions.[54]

The Geneva Conventions of 1929

The conference in Geneva in 1929 sought to amend the shortcomings of international law as evidenced by the events of World War I. Attendees of the conference needed to create a replacement for The Hague Conventions of 1899 and 1907, and the Geneva Convention of 1906 for the Amelioration of the Condition of the Wounded and Sick Armies in the Field.[55] Among the most important items for consideration by the conference were: acceptable forms of prisoner labor, improved communication requirements through prisoner information bureaus, and the humane treatment of prisoners through rations and accommodations comparable to those provided to the detaining power's own military forces.[56] The Hague Convention of 1907 only provided seventeen articles on the treatment of prisoners of war, enough to provide guidance and intent, but not specifics on treatment and conduct. Therefore, The Geneva Convention

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[54] Pictet, 94.

[55] In 1906, thirty-five countries attended a conference convened by the Swiss government to revise the Geneva Convention of 1864. From this conference came the Geneva Convention of 1906 for the Amelioration of the Condition of the Wounded and Sick Armies in the Field. The contents of this convention did not pertain specifically to the keeping of prisoners of war, but it is notably the first time where volunteer aid societies were explicitly identified. The Geneva Convention of 1906 is also important because its revision and combination with the contents of The Hague Conventions created the Geneva Conventions of 1929; International Committee of the Red Cross, "Convention for the Amelioration of the Condition of the Wounded and Sick Armies in the Field, Geneva, 6 July 1906," Treaties, States Parties, and Commentaries, accessed January 14, 2018, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/180?OpenDocument.

[56] Springer, 145.

Relative to the Treatment of Prisoners of War of 1929 contained ninety-seven articles, broken into four parts addressing the chronology of prisoner of war operations: general provisions, capture, captivity, and the end of captivity. Among its provisions, it also specified that captured soldiers need only provide their true name, and rank or service number. Interrogators could not pressure or coerce prisoners to provide any further information.

Most importantly, however, the Geneva Conventions of 1929 abolished *clausula si omnes,* as specified in Article 82: "In time of war if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto."[57] This also meant that signatory powers had to uphold the law in their treatment of enemy prisoners, regardless of the treatment of their soldiers held prisoner by the enemy. It was significant progress in the attempt to minimize retributory practices, and encourage states to always pursue the moral high ground.

Thirty-seven countries, including the US, signed the Conventions on July 27th, 1929, and all ratified them. This piece of international humanitarian law was the applicable legal document on the treatment of prisoners a decade later when World War II began. Unfortunately, the Soviet Union and Japan were ominously absent signatories to the Conventions. The Soviet government intended to adhere to The Hague Conventions of 1907, of which the Tsarist government was a signatory power, but not The Geneva Conventions of 1929; a regrettable decision when the Germans during World War II

[57] Convention Relative to the Treatment of Prisoners of War of 27 July 1929, 118 *League of Nations Treaty Series* 343, Article 82.

ended up detaining millions of Russian POWs.[58] Japan, who ratified The Hague Conventions of 1907, signed but did not ratify The Geneva Conventions of 1929. The Japanese Field Service Regulations (*Senjin kun*) forbade surrender, and did not expect Japanese soldiers to be captured and held as prisoners of war.[59] Therefore, ratification would force Japan to comply with the provisions of the Conventions without any reciprocal benefits to its own soldiers.[60] The absence of compliance to the Geneva Conventions by the Soviets and Japanese played a significant role in the poor treatment of prisoners during World War II.

The shameful management of large numbers of prisoners of war during World War II had a profound impact on international humanitarian law. The Geneva Conventions Relative to the Treatment of Prisoners of War of 1929 fell short of providing the protection of basic humanitarian rights during armed conflict. Though not all belligerents were guilty of grave violations to the Conventions, illegal acts such as reprisals, torture, harsh labor practices, and overall inhumane treatment were common place. Setting the example, the US was judicious in its loyalty to the Conventions.

> There is little doubt that American policies toward EPWs brought to the United States were fair, human, and even generous. Properly housed and fed, German and Italian EPWs left in much better condition than they arrived, and the 1942-

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[58] Doyle, 181.

[59] The *Senjin kun,* or Code of Battlefield Conduct (1941), implied that it is better for a soldier to die than to become a prisoner while alive–a true act of shame. Because of this philosophical belief, Japanese guards viewed allied prisoners as shameful cowards. Karl F. Friday, "Bushido or Bull? A Medieval Historian's Perspective on the Imperial Army and the Japanese Warrior Tradition," *The History Teacher* 27, no. 3 (1994): 346-348, accessed May 2, 2018, http://www.jstor.org/stable/494774.

[60] Urwin, 46.

> 1946 era marked perhaps America's finest hour. By strict adherence to the Geneva Convention, the moral high ground was most certainly achieved.[61]

To maintain international legitimacy and good legal standing, the US did not partake in acts of reprisal, regardless of the treatment of its prisoners by enemy powers. This was especially true in the Pacific theater. When US forces took Enemy Prisoners of War (EPWs), they generally treated their few Japanese prisoners humanely.[62] In contrast, Japanese treatment of American POWs was harsh, and one in four died while in captivity.[63]

In stark contrast, Japan showed little regard for the humane treatment of its captives during World War II. As mentioned previously, Japan signed the Geneva Conventions of 1929, but never ratified them. Japan treated Russian prisoners well during the Russo-Japanese War in 1904 and 1905, as well as German prisoners in 1914, but a subsequent cultural shift changed the dynamics of Japanese society. Historian Robert Doyle states, "The radical change in Japanese military attitudes and behavior toward prisoners of war in World War II and their collective decision against surrender were formed in part as a result of cultural retribution for European double-dealing in the early part of the twentieth century and the development of militant Bushido."[64] Japan's distrust

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[61] Urwin, 200.

[62] In general, US treatment of prisoners of war was compliant with the Conventions. There were undoubtedly isolated incidents where this wasn't the case. However, in agreement with the cited authors, this thesis will characterize prisoner treatment in generalities for the purposes of examining large scale compliance with the Geneva Conventions.

[63] Springer, 161-162.

[64] Doyle, 202; Friday, 345-348. Of note, Friday modifies the traditional interpretation of Bushido often transferred to the Showa era from that of the Tokugawa.

and distain for the West, and adherence to *Senjin kun*, pre-disposed its military members to exploit captured Western military members. Gregory Urwin, professor of history at Temple University, asserts, "This ambivalence toward the Geneva Convention is why so many of the POW camps Japan opened during World War II degenerated into death camps."[65] Knowing the preponderance and severity of these disparaging attitudes, it is a wonder that Japan signed the Geneva Conventions of 1929 at all. The atrocities committed by the Japanese against American prisoners is infamous, and included torture, harsh labor, and overall maltreatment and abuse. The brutality characteristic of Japanese prison camps during World War II were a driving force in the US State Department's initiation of a revision to the Geneva Conventions in 1949.

The Geneva Convention Relative to the Treatment of Prisoners of War of 1949

In 1949, the US State Department polled government agencies and the international community for recommendations on updating the content of The Geneva Conventions of 1929. Using the provided information, the US State Department drafted a model for a new set of Conventions.[66] The diplomatic conference in Geneva accepted, without significant issue, the US proposal of four conventions to replace the two from 1929. The Geneva Conventions of 1949 are:

> I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
>
> II. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea;

[65] Urwin, 46.

[66] Springer, 164.

III. Geneva Convention Relative to the Treatment of Prisoners of War; and

IV. Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[67]

The purpose of revising the Geneva Conventions of 1929 was to clarify apparent ambiguities in order to ensure that belligerents better adhere to the intent of international humanitarian law. This required the expansion of existing articles, creation of new articles, and even the generalizing of articles into broader terminology. Examples of such modifications, and their associated articles in the revised Convention of 1949, include: the addition of gender terminology to consider female-specific requirements (Articles 3, 14, 16, 29, 49, 88, 97, 108), details on appropriate forms of prisoner punishment (Article 89), clarification of responsibilities of neutral protecting powers (Article 11), expanded guidance on the nature of prisoner labor (Articles 50, 51), and the requirements for a prisoner's physical well-being at work, during transfer, and while in captivity (Articles 2, 13, 46, 47, 51, 55, 87).[68] While the aforementioned subjects constituted significant revisions, the list is by no means comprehensive. However, it does speak to the variety of issues that the events of World War II identified as being weak points within the Geneva Conventions of 1929.

Though the changes to the Geneva Convention Relative to the Treatment of Prisoners of War of 1929 are numerous, three of the most significant revised subject matters are: the definition of enemy combatant status, the clarification of authority of protective powers and parties, and the standards for safety, health, and well-being of

[67] US Department of State.

[68] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 *United Nations Treaty Series* 135.

prisoners. These revisions, while significant in the post-World War II era, provided an important foundation for POW operations that persisted throughout the 20th century. They provided clearer guidance to leaders during the Korean and Vietnam wars than the Geneva Conventions of 1929. In fact, the issues of combatant status, protective powers, and standards for prisoner well-being continue to be fundamental to the debate on applicability of the Conventions to asymmetric warfare against non-state actors today.

World War II demonstrated that that The Geneva Conventions of 1929 did not adequately address the legal status of combatants who are not members of a nation's uniformed armed services. In drafting the Third Geneva Convention of 1949, the principle definition of an enemy combatant, stated in Article 4, remained very similar to the definition provided in Article 1 of The Hague Convention of 1907 and carried through in Article 1 of the Geneva Convention Relative to the Treatment of Prisoners of War of 1929. Four basic requirements defined an enemy combatant: "to be commanded by a person responsible for his subordinates; to have a fixed distinctive emblem recognizable at a distance; to carry arms openly; and to conduct their operations in accordance with the laws and customs of war."[69] Militia and volunteer corps were included as well. But this definition did not account for partisans such as resistance fighters, like those of the French Resistance fighting in support of Allied forces during World War II, and members of a *levée en masse*. How could international law characterize combatants who, though not uniformed soldiers, act with hostile intent that negates civilian status? Members of the Diplomatic Conference of 1949 debated this very subject. World War II Nazi-occupied states wanted partisans to receive full protection of

[69] Laws and Customs of War on Land, 1907, Article 1.

the Conventions as enemy combatants under POW status, while states that had formerly been occupiers tended to disagree.[70] Eventually the members of the conference granted enemy combatant status to partisans, resistance fighters and members of a *levée en masse*.[71]

Although the Geneva Convention now protected these groups, protection was only guaranteed if these non-state actors complied with the four basic requirements of enemy combatant status as required of regular military members in Article 4.[72] Partisan groups could reasonably possess a rudimentary command structure, as well as abide by the open carry of arms. However, the standardizing of fixed emblems and adherence to the laws and customs of war are not as likely for unprofessional soldiers. Without uniforms or education in the laws of war, compliance with these last two requirements, though not impossible, could be difficult. Article 4 expanded the definition of an enemy combatant, but accordingly placed a burden on non-state groups to adhere to potentially unreasonable requirements in order to receive protection under the law. It also opened the door for more subjective interpretation of enemy combatant status. Upon capture of partisan fighters, a detaining power could determine the degree of adherence to Article 4, and then decide whether or not to grant prisoners protections as intended by the Third Geneva Convention.

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[70] During World War II, Nazi forces often denied partisans the protections of international humanitarian law, and subsequently executed them or sent them to concentration camps.

[71] Crawford, 20.

[72] Ibid., 20-21.

The second most significant revision to the Geneva Convention Relative to the Treatment of Prisoners of War of 1929 was the increase in authority of neutral states and parties acting as Protecting Powers. Under Article 11 of the Third Geneva Convention of 1949, Protecting Powers have the ability to initiate a meeting between representatives of the parties in conflict in order to resolve disputes pertaining to the "application or interpretation of the provisions of the present Convention."[73] Under the Convention of 1929, Protecting Powers were only able to intervene in the settlement of disputes if requested to do so by the parties in conflict. Through this empowerment, Protecting Powers became more likely to take action, which in turn increased their burden of responsibility.[74] Jean de Preux, a Doctor of Laws and former member of the Legal Department of the International Committee of the Red Cross, described the impact of Article 11 in his commentary on the Geneva Conventions:

> During the Second World War there were several cases of disagreement between belligerents concerning the way in which the provisions of the 1929 Conventions should be applied. The Protecting Powers however, were inclined more often than not to regard themselves as agents acting only on the instructions of the Power whose interests they safeguarded. The new wording invites them to take a more positive attitude. The general tendency of the 1949 Conventions is indeed to entrust Protecting Powers with rights and duties considerably more extensive than those which would devolve upon them as mere agents, and with a certain power of initiative.[75]

[73] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 11.

[74] Pictet, 125.

[75] Ibid., 124.

Along with Article 10, which also describes the qualification and criteria for Protecting Powers, the Convention adequately captured the employment of Protecting Powers in conflict.

However, there is no guarantee that a Protecting Power can provide services at the required levels of "impartiality" and "efficacy" as required by the Conventions throughout the entirety of a conflict. If a belligerent power is defeated to the point where it is no longer able to function as a state, then the contract between belligerents, under which the Protecting Power acts, terminates. This enables the remaining power to appoint a new Protecting Power without a mutual agreement of neutrality, potentially threatening the welfare of prisoners of war belonging to the defeated power still in captivity. This occurred during World War II multiple times, and by the end of the war, Sweden and Switzerland were Protecting Powers for almost every belligerent state.[76] To help provide unbiased intervention on behalf of prisoners in such an event, the remaining powers must still select a neutral party to serve as the Protecting Power, or utilize the services of such humanitarian organizations as the International Committee of the Red Cross.[77]

Articles 10 and 11 describe Protecting Powers acting in support of, and coordination with, belligerent powers that are state actors. The Convention does not describe protective measures pertaining to the situation of states combatting non-state actors.[78] The assumption is that the belligerent power that is signatory to the Conventions

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[76] Pictet, 111.

[77] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 10.

[78] A group of non-state actors engaged in hostilities are not necessarily representative of any specific state, nor are they citizens of the same state. Therefore,

requests a neutral party to serve as a Protecting Power, since the requirements of the Geneva Conventions apply to any High Contracting Party, regardless of the signatory status of the adversary. However, it is unlikely that the non-state belligerent could enter into diplomatic relations to provide agreement or disagreement to the proposed Protecting Power, nor would they have the legal obligation to do so.

All 143 articles of the Third Geneva Convention of 1949 capture the third significant revision to the Convention Relative to the Treatment of Prisoners of War of 1929, and that is the improvement of the standards for safety, health, and well-being of prisoners. General improvements in this area pertain to the physical safety of prisoners during transfer between camps or from the front lines to the camps, physical suitability for labor and working conditions, appropriate forms of punishment, and accountability of treatment. [79]Most of the revisions in these areas provided more detailed requirements than the Convention of 1929. Some revisions spoke in general terms, and others addressed specific issues not specified in the Convention of 1929. For example, as a result of medical experiments conducted on prisoners of war during World War II, Article 13 of the Third Geneva Convention of 1949 expressly forbids the subjugation of prisoners to "physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest."[80] Not only did the Convention of 1949 better

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expecting a single state to act on behalf of non-state actors to act in matters of diplomacy is not likely. Especially in the case of violent extremist organizations.

[79] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Articles 20, 30, 46, 47, 50, 51, 55, 78, 89.

[80] Ibid., Article 13.

clarify standards for health and safety, it also allocated greater power to prisoners to report violations of their safety, as provided under the Convention, to the Protecting Power. The report of any grave breaches of the Convention from prisoners to the Protecting Power could not be restricted in any way, and "may not give rise to any punishment."[81]

Conclusion

The Third Geneva Convention of 1949 was a great leap forward in international humanitarian law. It proved that the legal system could learn from the atrocities of conflict. It also showed that representatives from nations around the world cared for the well-being of prisoners of war. Government representatives from nations around the world readily attended diplomatic conferences to draft law that allocated protection to prisoners of war in future conflict. The true test of the protections guaranteed by this Convention occurred during three subsequent twentieth century conflicts: the Korean War, the Vietnam War, and the US-Iraq Gulf War of 1991. How were prisoners treated during these wars, and did the Third Geneva Convention of 1949 uphold the drafters' intent?

[81] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 78.

CHAPTER 4

THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (1949) AT WAR IN THE TWENTIETH CENTURY

The creation of the Third Geneva Convention on the Relative Treatment of Prisoners of War of 1949; expanded the breadth and depth of international humanitarian law during armed conflict. The Third Geneva Convention of 1949 was very much a product of the post-World War II environment in which it was drafted. The world has not seen a conflict of that scope and intensity since. The presence of limited proxy wars during the Cold War era challenged the character of war as assumed by the drafters of the Third Geneva Convention. Throughout the 1900s, large international conventional war between states evolved to include international and non-international war between states, coalitions, and non-state actors. Law professor Emily Crawford wrote about this changing landscape of conflict:

> As a result of these changes in means and methods of conducting armed conflict, the traditional distinctions that once seemed so fixed when dealing with war were becoming increasingly blurred. Where once wars were fought by regular armies, in geographically limited battlefields, with short-range weapons, now wars were likely to spread to include civilian areas, to include persons who did not dress or act like regular soldiers, and who employed weapons that could affect larger areas. The rigid distinction between civilian and military was dissolving. In response, the laws of war were changed to adapt to these developments; in doing so, the law itself contributed to this on-going blurring of the dichotomy between civilian and military, between international and non-international.[82]

The Conventions at War: Korea (1950 to 1953)

Some of the most horrific treatment of prisoners of war occurred after 1949 during the Cold War era. As the first significant conflict since World War II, the Korean

[82] Crawford, 16.

War signaled the beginning of a new type of twentieth century conflict, war centered on political ideology more than military strategy. Political captivity was starting to supplant captivity for primarily military purposes, and prisoners were more apt to be used as a means of propaganda rather than physical labor.[83] This struggle of political ideology was quite evident in prisoner of war operations throughout the conflict.

When North Korea invaded South Korea in 1950, the US Government sent military forces as an instrument of national power to prevent the spread of Communism through the policy of containment as prescribed in National Security Council (NSC)-68. The US had not yet ratified the Geneva Conventions of 1949.[84] However, as a signatory member, the US indicated its intent to adhere to the provisions of the Conventions. Conversely, the Democratic Republic of South Korea was not a signatory member to the Conventions.[85] Therefore there was a legal discrepancy pertaining to prisoner of war treatment obligations between the two leading states in the UN coalition on the Korean peninsula. To unify prisoner of war operations, two months into the conflict US Army General Douglas MacArthur made it clear that all United Nations Command (UNC) forces would abide by the Geneva Conventions of 1949, regardless of the enemy's policy towards UN prisoners.[86] Although South Korea was the official Detaining Power[87], in

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[83] Doyle, 247.

[84] The United States of America ratified the Geneva Conventions of 1949 on August 2, 1955.

[85] The Democratic Republic of South Korea declared its adherence to the Conventions through accession on August 27, 1957.

[86] Springer, 168.

[87] Doyle, 254.

September of 1950, the US assumed responsibility of POWs to prevent mistreatment by Republic of Korea forces.[88]

Despite the start of the Korean War fewer than five years after the end of the Second World War, the US and its UNC partners did not approach prisoner of war operations with any new understanding of lessons learned from the previous war. Initially, UNC treatment of communist prisoners was appropriate. However, after China entered the war, the numbers of prisoners soared, resulting in the UNC transferring over 130,000 prisoners to an island south of Pusan called Koje-Do.[89] Overcrowding, failed labor programs, illness, lack of food, lack of trained and reliable guards, as well as prisoner riots and unrest plagued Koje-Do.[90] Prisoner factions were commonplace, dispensing discipline and punishment against their fellow prisoners with no intervention from camp authorities. Fueling the unrest was the lack of separation for Communists and anti-Communists.[91] Additionally, the identification of enemy combatants was initially ineffective and disorganized. The North Korean Army forced South Koreans into service, and even these South Koreans who became prisoners in UNC camps were not separated from North Korean prisoners. South Korean President Syngman Rhee insisted on South Korean authorities implementing a screening system to identify South Korean nationals

[88] ROK tendencies were known to be similar to their Communist counterparts which is why the US insisted on maintaining overall responsibility; Latham, 215.

[89] Latham, 215.

[90] Latham, 215; Springer, 168-173.

[91] In World War II, Americans separated German Nazis from anti-Nazis for the sake of prisoner safety and good order and discipline. That practice was not replicated in Korea.

serving against their will in North Korean units. US Army General Matthew B. Ridgway abided by Rhee's request and changed the classification of South Korean prisoners to "civilian internees," subjecting them to release once identified during the screening process.[92] In total, tensions between South Korean and US officials resulted in a lack of unified leadership in the UNC's treatment of enemy prisoners.

Although the UNC intended to follow the Third Geneva Convention of 1949, this did not end up being the case. Violations of many of the articles of the Convention took place during the war. These violations pertained to matters of prisoner discipline, safety, and health. Such grave breaches to the Convention included violations of Articles 3, 22, 25, 26, 29, 30, 39, 42, and 89, just to name a few. A year and a half after MacArthur's declaration of UNC adherence to the Conventions, over 6,000 prisoners had died in UNC camps.[93] Despite the UNC's woeful lack of preparedness and execution of prisoner of war operations, the treatment of Communist prisoners by UNC forces was far better than the treatment of UNC prisoners by the Communists.

North Korea had not ratified the Geneva Conventions of 1949 prior to the outbreak of hostilities, and its treatment of UNC prisoners was characteristic of its blatant apathy towards the requirements of international humanitarian law.[94] Historian William C. Latham describes North Korea's treatment of American POWs in 1950:

> Evidence of North Korean atrocities had been mounting throughout the bitter fighting in July and August. Some Americans were burned, others castrated, and others had their tongues cut out before a North Korean bullet put them out of their

[92] Springer, 169.

[93] Latham, 215.

[94] North Korea ratified the Geneva Conventions on August 27, 1957.

> misery. The Eighth Army's judge advocate general later reported several thousand cases of suspected North Korean and Chinese atrocities but found no substantive evidence that senior North Korean commanders had directed the summary execution of prisoners.[95]

North Korean treatment of prisoners was barbaric, and nothing shy of aggressive torture. It is important to note, that a state does not need to ratify the Geneva Conventions to treat prisoners in accordance with the intent of international law. There is a minimum measure of respect for the sanctity of human life expected by the international community in accordance with customary international law. North Korea's treatment of prisoners stood in grim contradiction to international expectations.

Both the North Koreans and UNC forces were guilty of prisoner mistreatment, and therefore, one could argue that the Third Geneva Convention of 1949 did not adequately protect prisoners on either side. However, it is absolutely vital to note that the difference was that North Korea never intended to conform to international law, while in contrast, UNC leadership made a concerted effort. This divergent approach to prisoner operations was evident in the differing treatment of prisoners by the respective parties. However, one of the most significant prisoner issues of the Korean War had nothing to do with the treatment of captives. It was the issue of repatriation.

Prisoners of war had never been a more important topic in armistice negotiations than it was in ending the Korean War. While the convention to conclude hostilities began in July of 1951, it would be two years until delegates signed the armistice in July of 1953.[96] Though several camps had resisted repatriation screenings, the UNC's screening

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[95] Latham, 30.

[96] Springer, 173.

efforts revealed that many Communist prisoners did not want to be repatriated. Initially, the UNC told its Communist counterparts to expect around 116,000 prisoners for repatriation. However, upon further questioning, the actual number was far fewer. Of the first 105,000 prisoners questioned, 74,000 resisted repatriation.[97] In the largest compound of Chinese prisoners, roughly 85 percent chose to move to Taiwan.[98] However, the prisoner camps had been infiltrated by Communist and anti-Communist agents who greatly influenced prisoner repatriation screenings. Some anti-Communist prisoners conducted their own screenings and threatened or even killed those who desired repatriation.[99] Conversely, communist agent Colonel Pak Sang-hyon used an alias of Private Joen Moon Il to control the compounds in Koje, sentencing to death prisoners that defied the Communist Party.[100] This ideological war inside the wire made objective assessment of prisoner desires near impossible. However, it was clear that many of the prisoners were against repatriation. This infuriated the Communists who demanded immediate repatriation of all prisoners and accused the UN of malevolent influence. US President Harry S. Truman, much to the support of Congress and the press, refused to repatriate prisoners against their will.[101] This decision, however, complicated the armistice process.

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[97] Latham, 216.

[98] Doyle, 256.

[99] Latham, 216.

[100] Doyle, 256-557.

[101] Latham, 216.

Under Article 118 of the Third Geneva Convention of 1949, prisoners "shall be released and repatriated without delay after the cessation of active hostilities."[102] Communists used Article 118 to further their case for immediate repatriation. However, the UN delegates argued the intent of the Convention superseded the wording of any one specific article. They insisted that the Convention was designed to protect and benefit individual prisoners, not to benefit the desires of a belligerent power. Therefore, it would be wrong to forcibly repatriate, especially when there is a likelihood that the repatriated prisoner would face reprisal by their own government.[103] The debate ended in June of 1953. Under the terms of the agreement, prisoners refusing repatriation were turned over to a Neutral Nations Repatriation Commission led by delegates from India. In the end, 15,000 Chinese prisoners refused repatriation and were subsequently transported to Taiwan. The 8,000 North Korean prisoners that refused repatriation were allowed to settle in South Korea.[104]

This cumbersome repatriation process identified several critical problems. First, the weak control and oversight of UN and South Korean prison camp leadership allowed for agents and infiltrators from both the Communist and anti-Communist parties to influence prisoners under threat and execution of punishment or death. The effects of political manipulation would have been significantly less had prisoner discipline and accountability been better maintained. However, many communist prisoners likely

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[102] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 118.

[103] Springer, 174.

[104] Ibid., 176-177.

desired relocation elsewhere besides their country of origin, regardless of the prevalence of political agents inside the camps. Stricter oversight alone would not have resolved the issue. Secondly, the issue of repatriation can be so divisive that it can actually prolong conflict by prohibiting an agreeable armistice; thus, leading to increased casualties due to a lack of cessation of hostilities. A plan for repatriation, as specified in the Convention, should be addressed at the outbreak of conflict by the belligerent powers so that an agreement can be reached prior to the conclusion of the conflict. Finally, belligerents interpreted the Geneva Conventions in any way that supported their argument. Drafters wrote the articles to alleviate ambiguity, knowing that it cannot be eliminated entirely. This is expected, as law is often constructed to allow for some interpretation. Also, there exists a potential conflict inherent to the Conventions with respect to strict wording versus general intent. This specific concern of language versus intent would continue to influence interpretation of the Conventions throughout the Cold War and into the twenty-first century.

The Korean War identified many issues with employing the newly drafted Third Geneva Convention of 1949. The Convention could work, but belligerents had to strictly adhere to the articles contained therein. It is one thing to say that a state would comply, and it is another to actually do so, just as the Japanese did with respect to the Geneva Conventions of 1929 in World War II. Military leaders also needed to ensure that soldiers down at the lowest levels understood their responsibilities under the Conventions. Additionally, prisoner of war operations had to be planned and coordinated as early as possible. They could not simply be an afterthought once combat commenced. And finally, the Third Geneva Convention of 1949 was interpretable. The provisions were a

legal construct designed to protect prisoners of war. The intent of the Convention is paramount to any specific wording or phraseology. From heads of state, to legal advisors, and down to tactical practitioners, everyone involved in POW operations had to know and understand the intent of the Convention. The Korean War showed that the Third Geneva Convention of 1949 did not protect prisoners as designed, and Vietnam would challenge the Convention even further.

The Conventions at War: Vietnam (1964 to 1973)

Vietnam was the most significant conflict of the twentieth century to test the applicability of the Third Geneva Convention of 1949 in a highly complex warfare environment. Similar to Korea, the war was international and civil at the same time, and there had not been a formal declaration of war between sovereign states. Fighting units on both sides varied in type. Regular divisions of the North Vietnamese Army, US, South Vietnamese Army, Koreans, and Australians, intermixed with Viet Cong Main Force battalions, Local Force battalions, militias, and self-defense groups. Additionally, the enemy was amorphous, and, in the case of certain Viet Cong elements, hiding among the civilian populace making them hard to identify. There were no definable front lines on the battlefield. The provisions of the Third Geneva Convention of 1949 were predicated upon a litany of assumptions, yet almost all of the conditions upon which those assumptions were based did not exist.[105]

Major General George S. Prugh was the judge advocate on staff at US Military Assistance Command, Vietnam from 1964 to 1966. His insights, recorded in his

[105] Prugh, 61-62.

monograph *Law at War: Vietnam* (1975) serve as the fulcrum for the study of international law, and the applicability of the Geneva Conventions of 1949, throughout the Vietnam War. The preface of his monograph vividly expresses his overall thoughts on the legal challenges of the Vietnam War:

> There were aspects of a civil war within South Vietnam and equally valid aspects of invasion by regular troops from North Vietnam; Free World forces were present at the invitation of the government, asserting the sovereignty of South Vietnam. Attacks on these Free World forces were made by 'indigenous' Viet Cong and 'foreign' North Vietnamese troops; the line between civilian terrorists and the military insurgents was so blurred as to be indistinguishable; and almost all of the traditional measures-uniform, organization, carrying of arms openly-failed to identify the combatants.[106]

All involved parties agreed to comply with the Geneva Conventions of 1949. The US did not diplomatically recognize North Vietnam as it had South Vietnam, but it did recognize North Vietnam's agreement to adhere to the Geneva Conventions.[107] The Republic of Vietnam (South) and the Democratic Republic of Vietnam (North) were both accessions to the Conventions in the years 1953 and 1957 respectively. The US had ratified the Conventions in 1955, and all allied Free World Force nations had ratified or accessioned to the Conventions prior to 1960. The US understood that the detention of enemy combatants would ultimately be a task for the South Vietnamese, but the US had to maintain responsibility for its captives upon transfer into South Vietnamese custody, as required by Article 12 of the Third Geneva Convention.[108] Though all parties were bound

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[106] Prugh, vi-vii. Of note, the "Free World Forces," in support of South Vietnam and the US, included South Korea, Thailand, Philippines, Australia, New Zealand, and Spain.

[107] Doyle, 269.

[108] Prugh, 62.

to comply with the Third Geneva Convention, the difficulty was in applying it to a complex conflict that was in essence beyond the scope of the document's legal framework.

Correctly categorizing combatant status was one of the central problems for MACV legal advisors, as well as getting the South Vietnamese to concur with their recommendations. The South Vietnamese considered the Viet Cong to be criminals who were subject to the legal process of the state; therefore they should not receive the protections guaranteed under "POW" status. To lend credence to the South Vietnamese argument, many Viet Cong did not qualify as enemy combatants under the four criteria required by Article 4 of the Convention. By using the intent of the article rather than its verbiage alone, MACV legal advisors decided that Viet Cong Main Force and Local Force combatants, as well as regular North Vietnamese Army troops, would all be considered POWs and sent to an appropriate detainment facility. This categorization simplified tactical-level operations by affording POW status to any enemy combatant, regardless of their unit. Explicitly excluded from this policy were any terrorists, spies, and saboteurs. MACV codified the combatant status policy in MACV Directive 381-11 in March 1966. The ICRC praised the policy and its interpretation of the Third Geneva Convention of 1949.[109]

Of paramount concern to MACV was the treatment of American POWs by the North Vietnamese. MACV believed that if North Vietnamese captives were given the protection of POW status, then perhaps the action would be reciprocated. MACV had already seen retributory behavior from the North Vietnamese. The government of South

[109] Prugh, 66.

Vietnam executed several Viet Cong agents, and North Vietnam responded with retributory executions of Americans. Complicating matters, the North Vietnamese decided that captured American aviators were "pirates." North Vietnam considered the actions of American aviators to be unlawful, and thus the pilots were not afforded POW status. Prugh explains, "It was expected that efforts by the United States to ensure humane treatment for Viet Cong and North Vietnamese Army captives would bring reciprocal benefits for American captives."[110] Therefore, the US position from 1965 on, was that "North Vietnam was a belligerent, that the Viet Cong were agents of the government of North Vietnam, and that the Geneva Conventions applied in full."[111] The South Vietnamese reluctantly conceded to the US position.

Adherence to the Conventions by the US and South Vietnamese was challenging, yet their efforts to comply with the provisions of the Conventions was recognized by the ICRC, and in stark contrast to the blatant lack of adherence by the North Vietnamese. South Vietnam was not ready to process and detain such a high volume of prisoners, nor differentiate between Viet Cong fighters, prisoners of war, and common criminals. There were insufficient numbers of administrative personnel and security officers.[112] Though breaches to policy occurred, the effort with which the US led the South Vietnamese in adherence to the Geneva Conventions was commendable.[113] Conversely, the North

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[110] Prugh, 66.

[111] Ibid.

[112] Ibid., 64.

[113] The generally accepted understanding of South Vietnamese treatment of prisoners is that it did not conform to international law, as exemplified by the image of Col. Nguyen Loan executing a Viet Cong prisoner during the Tet Offensive in Saigon on

Vietnam, in similar fashion to Japan during World War II, did not show any attempt to conform to international humanitarian law despite its legal obligation to do so.[114] North Vietnam did not give POW status to legal combatants, refused to allow the ICRC to access their prisons, refused to accept repatriated POWs, failed to repatriate the sick and wounded, committed inhumane acts of torture and abuse, employed corporal punishment, did not provide adequate health services, and overall disregarded the well-being of its captives. These actions constituted grave breaches of the Third Geneva Convention of 1949 and violated Articles: 3, 4, 5, 9, 11, 13-15, 17, 18, 21, 22, 25-30, 40, 42, 71-73, 78, 88-90, 97, 98, 100, and 101, to name several.[115] The details of the atrocities are too numerous for this study and outside its purview. US Senator John McCain wrote of his experiences as a prisoner of the North Vietnamese in his memoir, *Faith of My Fathers*. He states, "They never seemed to mind hurting us, but they usually took care not to let

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February 1, 1968. There were breaches to MACV policy by Americans and South Vietnamese alike, and images, like the one of Col. Nguyen Loan, perpetuated the misunderstanding that these violations were commonplace. However, as confirmed by the ICRC, the efforts made at the strategic and operational levels of war to comply with the intent of the Third Geneva Convention were commendable.

[114] The military doctrine of the North Vietnamese and Viet Cong, as employed by People's Army of Vietnam (PAVN) General Vo Nguyen Giap, was called *dau tranh* (struggle). The two types of *dau tranh* are: *dau tranh vu trang* (armed struggle through military action and violence, and *dau tranh chinh tri* (political struggle using weapons). This dualistic doctrine characterized their "people's war" against the enemy. *Dau tranh* sanctioned violence and torture, and it was often directed towards enemy prisoners of war; Douglas Pike, "Conduct of the Vietnam War: Strategic Factors, 1965-1968," in *The Second Indochina War: Proceedings of a Symposium Held at Airlie, Virginia, 7–9 November 1984*, ed. John Schlight, (Washington, DC: US Army Center of Military History, 1986), 108-117, accessed April 11, 2018, https://history.army.mil/html/books/103/103-1/cmhPub_103-1.pdf.

[115] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.

things get so out of hand that our lives were put in danger. We strongly believed some POWs were tortured to death, and most were seriously mistreated."[116]

The war in Vietnam was fraught with as many legal complexities as it was tactical challenges. MACV's attempts to conduct a war in compliance with international law were praiseworthy. The legal advisors at MACV quickly realized that the Third Geneva Convention of 1949 "fit" a very specific type of conventional war, like World War II with the partisan threat characteristic of the time. However, the law became unclear when the character of conflict no longer met the assumptions of the Convention. Was it time again to revise the Geneva Conventions, or could the current framework provide a basis of interpretation that could therefore apply to conflicts of differing types? Prugh's assessment was quite simple:

> It was evident that international law was inadequate to protect victims in wars of insurgency and counterinsurgency, civil war, and undeclared war. The efforts of the international community to codify the humanitarian law of war in 1949 drew upon examples from World War II which simply did not fit in Vietnam. The law left much room for expediency, political manipulation, and propaganda. The hazy line between civilian and combatant became even vaguer in Vietnam.[117]

The Conventions at War: US-Iraq Gulf War (1991)

In support of UN Security Council Resolution 668, as a response to the Iraqi invasion of Kuwait in 1991, the US sent military forces to the Arabian Peninsula. Operation Desert Shield and Operation Desert Storm consisted of a US-led coalition set to fight a state enemy, Iraq. In preparation for combat operations, the coalition made a concerted effort to prepare for the capture of Iraqi soldiers, and gave considerable

[116] John McCain and Mark Salter, *Faith of My Fathers* (New York: Harper Collins Publishers, 1999), 225-226.

[117] Prugh, 78.

attention to POW operations. The plan involved the capture and holding of prisoners for no more than one week before transporting and detaining them in Saudi Arabia.[118] The US, French, British, and Arab allies agreed to turn over prisoners to Saudi Arabia, the Detaining Power. By putting prisoners in Saudi custody, the coalition ensured that Iraqi captives would be detained with an awareness to Arab culture, and in accordance with their religious and dietary habits.[119] It is also important to note that the US, Saudi Arabia, France, Great Britain, and Iraq had all ratified the Geneva Conventions of 1949 prior to 1991. All belligerent parties were obligated to comply with the Conventions.

To further discourage fighting and encourage Iraqi troops to surrender, coalition aircraft released over 32 million surrender leaflets. Iraq's government and military leadership conducted an aggressive propaganda campaign to counter the US leaflet drop, and discourage surrender or desertion of Iraqi military forces. They attempted to convince their soldiers that capture would result in mistreatment, torture, or even death. However, this propaganda campaign largely fell on deaf ears as evidenced by the high numbers of Iraqis who abandoned the fight and surrendered to coalition soldiers. The robust air campaign prior to the advance of ground combat forces had severely weakened Iraqi combat power, and psychologically impacted their resolve to fight. Additionally, Iraqi soldiers faced food and water shortages, and many were afraid of being killed or

[118] Springer, 193.

[119] Doyle, 297.

wounded.[120] The coalition expected high numbers of prisoners, but despite the planners' best approximations, actual numbers far surpassed expectations.[121]

In total, coalition forces captured 86,743 enemy prisoners in four days of ground combat.[122] There was insufficient transportation available to move that volume of prisoners from the front lines to the camps in Saudi Arabia. Many prisoners traveled from the front lines to coalition rear areas without escort. Once prisoners were transported to the Saudi Arabian camps, detainers could only process 100 prisoners per day, though that number grew to 1500 per day by the end of the conflict.[123] An infrastructure of holding areas, theater camps, and two very large facilities in Saudi Arabia permitted an echeloned movement of prisoners out of the combat zone and into the custody of the Detaining Power.[124] This no doubt took foresight and deliberate planning to implement. Additionally, the quality of life at the POW camps in Saudi Arabia was very good. Iraqi prisoners reported that their treatment in Saudi Arabia was far better than the treatment they received while serving in Iraq's army, to include better shelter, clothing, food, and

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[120] US Department of Defense, *Final Report to Congress on the Conduct of the Persian Gulf War* (Washington DC: Government Printing Office, 1992), 210, accessed November, 18, 2017, http://www.ssi.army.mil/!Library/Desert%20Shield-Desert%20Storm%20Battle%20Analysis/Conduct%20 of%20the%20Persian%20Gulf %20War%20-% 20Final%20Rpt%20to%20Congress.pdf.

[121] Springer, 193.

[122] US Department of Defense, *Final Report to Congress on the Conduct of the Persian Gulf War,* 662.

[123] Springer, 193.

[124] Doyle, 298.

medical services.[125] As a final measure of the success of the coalition's EPW operations, only eight Iraqi prisoners died while in custody, and all of them from "injuries or sickness contracted prior to capture."[126]

Although military action during the Gulf War of 1991 was brief, the treatment of prisoners of war by US military and coalition forces was admirable. There were minor issues including limited coalition manpower to handle prisoners and limited resources to move tens of thousands of POWs in only a few days of combat. However, coalition prisoner operations were successful and in keeping with the intent of the Third Geneva Convention of 1949. Conversely, Iraq's treatment of coalition POWs was abusive and wrought with mistreatment in clear violation of the Third Geneva Convention. However, this never affected coalition treatment of Iraqis.[127]

Coalition POW operational success was due to several factors. First, there was a good relationship between the coalition leadership and Saudi Government. Unlike the South Vietnamese during the Vietnam War, the Saudi Government fully cooperated with the American POW effort.[128] All parties had an aligned vision for how EPW operations would be conducted in compliance with the provisions of the Geneva Conventions of 1949. Secondly, US leaders provided clear guidance. They took the time to develop a plan and made it clear to subordinate units that the coalition expected to conduct EPW

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[125] Springer, 194.

[126] US Department of Defense, *Final Report to Congress on the Conduct of the Persian Gulf War,* 662.

[127] Doyle, 298.

[128] Ibid., 297-298.

operations in an ethical and legally complicit manner. Coalition operations were so commendable that a member of the ICRC in Riyadh, Saudi Arabia, remarked "The treatment of Iraqi prisoners of war by US forces was the best compliance with the Geneva Convention by any nation in any conflict in history."[129]

In 1991, the US demonstrated that with the appropriate effort and attention to detail, a coalition of nations, never mind individual states, could conduct large scale combat operations in compliance with the Third Geneva Convention of 1949. While successful POW operations were a direct result of substantial resources and a large logistical capacity, compliance does not have to be unique to a superpower like the US. Smaller countries can still provide assistance and resources with whatever means are available to them. Coalition POW operations were successful due to several important factors: the conflict was short in duration, geographically small, and coalition overmatch resulted an exceptionally low casualty rate. Additionally, it consisted of nation states in conflict without serious concern for non-state actors such as violent extremist organizations. There was no civil war, and the circumstances were straight forward in comparison to the war in Vietnam. The US went to war again almost eleven years after the end of the Gulf War of 1991 against a very different enemy and the waters of international humanitarian law would be muddier than ever.

The Additional Protocols of 1977

The Cold War, and especially the war in Vietnam, proved that the Geneva Convention of 1949 suited a type of war that was already obsolete. Law professor Emily

[129] US Department of Defense, *Final Report to Congress on the Conduct of the Persian Gulf War,* 662.

Crawford states, “By the late 1960s, the change in the means, methods, and typology of armed conflicts made it clear that another reassessment of the law of armed conflict was necessary.”[130] Nationalist movements throughout the time period concerned the UN, and identified a weakness in the Geneva Conventions of 1949. The Conventions did not provide an adequate legal characterization for participants in these wars of “national liberation.” In response to this deficiency, Additional Protocols I and II to the Geneva Conventions were drafted. Protocol I expanded protections of the Conventions to participants in international conflict, while Protocol II expanded protections for participants in non-international conflict.[131]

Protocol I gave recognition of combatant status to participants in national liberation wars, effectively altering the definition of an enemy combatant as outlined in Article 4 of the Third Geneva Convention of 1949. Knowing the participants in nationalist movements were primarily guerillas, Protocol I legitimized fighters who likely did not wear uniforms or carry arms openly; two requirements for enemy combatant status under Article 4. This assertion fundamentally changed the concept of distinction, making it even more challenging to identify an enemy on the battlefield who was now considered an enemy combatant under international law.[132] However, Article 44 of Protocol I required that these newly established enemy combatants still comply with international law applicable in armed conflict. The article states that fighters must “promote the protection of the civilian population,” and “are obliged to distinguish

[130] Crawford, 23.

[131] Ibid., 24.

[132] Ibid., 24-25.

themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."[133] According to Article 44, if a fighter fails to comply with these requirements, "he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol."[134]

The US never ratified Additional Protocol I or Additional Protocol II. In the view of US President Ronald Reagan, Protocol I began to blur the line between lawful and unlawful combatants. Bestowing POW status on guerrilla fighters opened the door to other partisan groups not already covered under the conventions, and started to erode the understanding of distinction between combatants and non-combatants. In 1987 Reagan stated in his Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions:

> It would give special status to 'wars of national liberation,' an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form,

[133] International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, 1125 UNTS 3, Article 44(2), accessed December 10, 2017, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=524284F49042D4C8C12563CD0051DBAF.

[134] Ibid., Article 44(4).

> and I would invite an expression of the sense of the Senate that it shares this view.[135]

Though this statement seems noble in its intent, the reality is that it established the framework for a legal gap in which certain combatants could not qualify as POWs, protected under the Third Geneva Convention, or civilians, protected under the Fourth Geneva Convention. Additionally, these fighters would likely not be considered criminals, which would entitle them to criminal proceedings. In the words of journalist and Senior Fellow at the Brookings Institution, Benjamin Wittes, "the United States had specifically guarded its right to maintain a distinct category of unprivileged belligerent for whom prosecution is an option but not a requirement."[136]

The US decision to abstain from the Additional Protocols to the Geneva Conventions of 1949 may not have seemed significant in the 1980s, but it would become much more so in the twenty-first century after the terrorist attacks on September 11, 2001. Most countries have not only ratified the Geneva Conventions of 1949, but also Additional Protocols I and II, including world powers like China and Russia. The US is one of the only countries that has not ratified either of these amendments to international law, including nations like Iran, Pakistan, Somalia, and India.[137]

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[135] Ronald Reagan, "Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions," The American Presidency Project, January 29, 1987, accessed March 10, 2018, http://www.presidency.ucsb.edu/ws/?pid=34530.

[136] Benjamin Wittes, *Law and The Long War: The Future of Justice in the Age of Terror* (New York, Penguin Books, 2008), 40.

[137] International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, accessed March, 22, 2018, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470; International Committee of the Red Cross, *Protocol*

Conclusion

Although the first half of the twentieth century was a time of great development in international humanitarian law, the second half of the century challenged the validity and applicability of the provisions of the Convention in the context of limited war. Evolution in the character of war challenged the assumptions of conflict as understood by the drafters of the Convention in the post-World War II era. Despite these truths, there has been no initiative to amend the law in the decades since 1949. Might we conclude from this fact that international humanitarian law is an idyllic creation that states agree to merely as a matter of public perception, and that the intent to follow the law is only a product of circumstance and convenience? Can war be waged in accordance with international law? Clausewitz presented his opinion on this matter when he stated:

> In the conduct of war, perception cannot be governed by laws: the complex phenomena of war are not so uniform, nor the uniform phenomena so complex, as to make laws more useful than the simple truth. Where a simple point of view and plain language are sufficient, it would be pedantic and affected to make them complex and involved. Nor can the theory of war apply the concept of law to action, since no prescriptive formulation universal enough to deserve the name of law can be applied to the constant change and diversity of the phenomena of war.[138]

Would the US be able to maintain its glowing reputation of ethical EPW practices in accordance with international humanitarian law from 1991? How would the Third Geneva Convention of 1949 fare in the twenty-first century?

Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, accessed March, 22, 2018, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475.

[138] Clausewitz, 152.

CHAPTER 5

THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (1949) IN THE BEGINNING OF THE TWENTY-FIRST CENTURY

Armed conflict during the second half of the twentieth century proved that the character of war changed since the drafting of the Third Geneva Convention in 1949. There was clearly a need for a body of international humanitarian law to regulate the treatment of prisoners of war, but there was a difficulty in applying the law to conflicts that did not exhibit the necessary conditions upon which the assumptions of the Third Geneva Convention were based. Proof of this point came at the dawn of the twenty-first century, after the terrorist attacks of September 11, 2001. US President George W. Bush and his cabinet formulated a military response against the terrorist organization responsible for the devastating attack on American soil, Al-Qaeda, and the radical government of Afghanistan, the Taliban. Military operations began in October of 2001. Concurrently, legal experts within the government reviewed the legal obligations of the US with respect to its operations in Afghanistan, a nation that ratified the Geneva Conventions in November of 1956.

The US Department of Justice's summary finding was that the Third Geneva Convention did not apply to captives from Al-Qaeda or the Taliban Government of Afghanistan in the undeclared so-called "War on Terror."[139] With the character of war so vastly different from that of the World War II era that inspired the Third Geneva

[139] Springer, 196.

Convention of 1949, the Justice Department did not see how the Convention applied to this new type of conflict. The effects of this interpretation cascaded into future military operations in Iraq in 2003, debatably contributing to the grave breaches to the Third Geneva Convention that occurred in the Iraqi Abu Ghraib prison outside of Baghdad in 2004. The decision to abstain from adherence to the Third Geneva Convention invited a wealth of criticism and discussion challenging the interpretations of the US Government. However, it is important to note that even if the government determined that the Third Geneva Convention did apply, there were a number of legal considerations applicable to the War on Terror that fell barely inside of, or entirely outside of, the scope of the Third Convention. The most important of these issues included: combatant status definition in general, the applicability of the Conventions to the government of a failed state, and the issue of war between state and non-state actors.

Since 1949, the World War II era of large scale combat between nations states evolved to include asymmetric warfare between states and non-state actors. In determining whether or not the Third Geneva Convention is now too antiquated to address the needs of combatants in current conflict, it is important to analyze the events and decisions of legal experts during the years immediately following 2001. Only after understanding the interpretation of the provisions of the Convention within the context of modern warfare, can one speculate whether or not this body of law will meet the needs of future war.

The US Department of Justice: Applying the Third Geneva Convention to the War on Terror

Combat operations to seek and destroy members of Osama Bin Laden's terrorist organization, Al-Qaeda, and the Taliban Government of Afghanistan that harbored them, forced government officials to consider prisoner detention on a large scale for the first time since the Gulf War of 1991. However, the circumstances surrounding the conflict in Afghanistan were vastly different from that of the previous war a decade earlier. The US was now facing a primary adversary of non-state actors, terrorists. The secondary adversary was the Taliban Government of Afghanistan. The Third Geneva Convention's lack of explicit guidance in a conflict against the government of a failed state and associated violent extremist non-state actors opened the door for consideration by US officials that the Convention was not applicable at all. The crux of this argument was the definition of an enemy combatant, which in turn determined the right of a captive to obtain POW status. If members of Al-Qaeda and the Taliban were not enemy combatants under the definition of Article 4 of the Third Geneva Convention, then the US was not legally bound to afford those captives POW protections under the Convention. However, if terrorists were not enemy combatants, were they civilians, criminals, or something else? The debate was reminiscent of the challenge faced by MACV legal analysts during the Vietnam War decades earlier in deciding whether to afford Viet Cong fighters POW status. In 1966, MACV determined that combatants acting as agents of the enemy government should be considered POWs, and that decision was codified in MACV Directive 381-11. However, MACV explicitly deprived POW protection to terrorists.[140]

[140] Prugh, 66.

In 2001, however, the Justice Department determined that Al-Qaeda and Taliban fighters were unlawful enemy combatants, a classification that did not exist in MACV's legal determinations during the Vietnam War.[141]

Prior to examining the decisions made in 2001, it is important to understand how terrorists were categorized in the late 1990s under President Bill Clinton. Terrorism was not a new threat to US national security discovered on September 11, 2001. The US was involved militarily in fighting terrorists abroad years prior. After the US embassy bombings in Nairobi and Dar es Salaam in 1998, President Clinton ordered cruise missile strikes on Al Qaeda targets in both Afghanistan and the Sudan. These actions by US military forces were consistent with war-time action against enemy combatants. In the words of historian Benjamin Wittes, "We don't, after all, attack mere criminal suspects with Tomahawk missiles."[142] The significance of this action is that the US Government set the precedent that terrorists, though criminals, were also considered valid military targets. More than a law enforcement operation alone, combatting terrorism was a joint effort utilizing intelligence and military resources as well.[143]

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[141] Wittes, 39; The term "unlawful combatant" originated in WWII as determined by the US Supreme Court in the case *Ex parte Quirin* 317 US 1 (1942) pertaining to German soldiers conducting covert acts of sabotage out of uniform. The Court's decision prescribed the legal status of unlawful combatants. Unlawful combatants are not afforded POW status since they do not conform to the rules of war, but they are subject to trial and punishment by military tribunals for their unlawful acts. Additionally, combatants may be held without trial. Though detention of combatants without trial may be permitted under international law, human rights law, and specifically Article 75 of Additional Protocol I, challenges this assertion. However, the US did not ratify Additional Protocol I. Crawford, 54-55.

[142] Wittes, 23.

[143] Ibid., 24.

Beginning in 2001, President Bush relied on two primary sources of legal advice in determining the applicability of the Geneva Conventions to the war in Afghanistan: the US DOJ led by Attorney General John Ashcroft, and White House Counsel Alberto Gonzales. In response to a request from the executive branch, the DOJ conducted a review of treaties and laws to formulate a recommendation to the White House on how Al-Qaeda and Taliban detainees fit within the purview of international law. Assistant Attorney General for the Justice Department's Office of Legal Counsel Jay Bybee wrote a 37-page memorandum with the DOJ's findings to the White House on January 22, 2002. The memorandum's summary is clear within its very first paragraph: "We conclude that these treaties do not protect members of the Al-Qaeda organization, which as a non-state actor cannot be a party to the international agreements governing war. We further conclude that the President has sufficient grounds to find that these treaties do not protect members of the Taliban militia."[144]

The DOJ described the reasons for arriving at this conclusion as consisting of three parts:

> First, al Qaeda is not a State and thus cannot receive the benefits of a State party to the Conventions. Second, al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under Geneva Convention III. Third, the nature of the conflict precludes application of common article 3 of the Geneva Conventions.[145]

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[144] Jay Bybee, Assistant Attorney General, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Washington, DC: Department of Justice, January 22, 2002), 1, accessed March 29, 2018, https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf.

[145] Ibid., 9.

Keeping these three points in mind, it is necessary to examine each on its own to better understand the merits of the government's argument.

The DOJ's first argument in support of its recommendation is that the Third Geneva Convention does not apply to non-state actors: "Al-Qaeda is merely a violent political movement or organization and not a nation-State. As a result, it cannot be a state party to any treaty."[146] This statement is slightly misleading. It is true that a non-state entity cannot be a "state party to any treaty." However, that does not mean that a non-state entity cannot be protected by the provisions of a treaty. This transitions into the Justice Department's second argument pertaining to members of Al Qaeda failing to meet the provisions that qualify POW status. The Third Geneva Convention specifically confers POW status on certain non-state combatants, separate from members of a nation's armed forces, under Article 4(b). Such protected partisans include resistance fighters and members of a *levée en masse*, as previously discussed in chapter 2.[147] Therefore, members of an organization do not have to be a state party or signatory to any treaty in order to be considered enemy combatants, and thus receive POW protections upon capture by an adversarial force. Article 4(b) does, however, require that partisans conduct themselves in accordance with the laws of war if they are to receive protection under the Convention. This requirement pertains to both partisans and members of conventional armed forces. Therefore, to determine that a partisan captive is not protected under the Convention, one must determine that their conduct was in violation of the laws

[146] Bybee, 1.

[147] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 4(b).

of war. Until such a determination is made, or if there is any doubt, Article 5 requires that "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[148]

The issue of tribunals warrants a brief overall explanation without addressing the details of implementation under the Bush administration of Combatant Status Review Tribunals. The purpose of tribunals, as established by the Third Geneva Convention, is to determine combatant status. Thus, the drafters intended that the Convention apply in general to a conflict, with specific assessments completed by competent tribunals to determine the combatant status of individual captives as necessary. Under Article 4 of the Third Geneva Convention, uniformed members of a nation's military can be denied POW status if they have not conformed to the laws of war, just as partisans and non-state actors can be denied those protections. Therefore, in cases of ambiguous combatant status, tribunals serve to make the appropriate determination for all captives, regardless of state or non-state actor status. To make the argument prior to, or at the onset of hostilities, that the Convention is not applicable due to the issue of combatant status is flawed. According to Wittes, the fundamental problem "lay, rather, in dispensing with the requirement of the Third Geneva Convention, to allow 'competent tribunals' to make these judgments individually for each detainee."[149]

The third reason for the Justice Department's conclusion was that the conflict in Afghanistan did not meet the requirements of common Article 3. Article 3 pertains to

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[148] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 5.

[149] Wittes, 40.

conflict of a non-international nature. Being that the US was a foreign power that would be executing combat operations within Afghanistan's sovereign territory, the DOJ assessed the conflict to be of an international nature, and thus Article 3 correctly does not apply.[150] However, even if that were true, that does not mean that the Convention as a whole does not apply.

One of the key underlying assumptions by the DOJ was that the Conventions do not apply to Afghanistan because of its status as a failed state:

> The President has the constitutional authority to temporarily suspend our treaty obligations to Afghanistan under the Geneva Conventions. Although he may exercise this aspect of the treaty power at his discretion, we outline several grounds upon which he could justify that action here. In particular, he may determine that Afghanistan was not a functioning State, and therefore that the Taliban militia was not a government, during the period in which the Taliban was engaged in hostilities against the United States and its allies. Afghanistan's status as a failed State is sufficient ground alone for the President to suspend Geneva III, and thus deprive members of the Taliban militia of POW status.[151]

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[150] In the 2006 case of *Hamdan v. Rumsfeld*, the US Supreme Court ruled that common Article 3 applied to the conflict against al-Qaeda forces in Afghanistan, in contrast to the assessment by the DOJ in 2002: "Common Article 2 provides that 'the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.' 6 U. S. T., at 3318 (Art. 2, ¶1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-À-vis one another even if one party to the conflict is a nonsignatory 'Power,' and must so abide vis-À-vis the nonsignatory if 'the latter accepts and applies' those terms. *Ibid.* (Art. 2, ¶3). Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase 'not of an international character' bears its literal meaning." See part VI-D-ii of the Opinion of the Court by Justice John Paul Stevens in *Hamdan v. Rumsfeld* 548 US 557 (2006).

[151] Bybee, 2.

Afghanistan is a state party to the Geneva Conventions, and therefore a conflict between the US and Afghanistan requires conformation to the provisions of the Conventions. Article 2 explains that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[152] Therefore, a formal declaration of war is not required for the Conventions to be invoked. If under normal pretenses the Conventions applied to conflict between the states, then what about the DOJ's assessment of Afghanistan's status as a failed state? Article 2 does not specifically discuss considerations for a failed state, but it does assert, "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations."[153] Therefore, the US is required to adhere to the Convention regardless of the ratification status of the Convention by any other belligerent powers involved in the conflict. A "Power" that is not party to the Convention refers to a state that is able to enter into negotiations, and thus it would be a stretch to interpret "power" to mean a non-state actor like Al Qaeda. However, what about a governing body like the Taliban? What criteria must be met for a country to declare Afghanistan a failed state? Does this mean that a contracting power can simply declare any other state that has ratified the Geneva Conventions as a failed state in order to avoid adherence to the Conventions? Though professing adherence to international humanitarian law was likely not high on the Taliban's to-do list, what if an

[152] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 2.

[153] Ibid.

illegitimate government, like the Taliban, made a concerted effort to conform to the Convention as ratified? These are interesting questions, whose answers are not explicitly found in the common articles of the Geneva Conventions.

The drafters of the Geneva Conventions assumed that conflict existed in two forms: of an international nature, or belligerency, between two sovereign states; or of a non-international nature, or insurgency, between a State and one or more factions within its own territory. Prior to 1949, the laws of war only applied to international conflicts, as internal conflict was assumed to fall under the realm of national criminal law. Since 1949, drafters of international law consciously included large-scale civil wars within the purview of international law to prevent governments from utilizing inhumane methods to quell civil unrest.[154] In the DOJ's view, the war at hand was an international conflict between a sovereign state, and a failed-state's government and associated non-state actors. Therefore, it met neither of the categories of conflict specified by the Geneva Conventions. Because of this, the DOJ argued that the Geneva Conventions could not apply.

> If the state parties had intended the Conventions to apply to <u>all</u> forms of armed conflict, they could have used broader, clearer language. To interpret common article 3 by expanding its scope well beyond the meaning borne by its text is effectively to amend the Geneva Conventions without the approval of the State parties to the agreements.[155]

This is a very bold assertion, and is evidence to the broader observation that the DOJ specifically referenced the wording of the Geneva Conventions' articles with little concern for subtext or intent. Did the plenipotentiaries convening at the Geneva

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[154] Bybee, 7.

[155] Ibid., 8.

Conference anticipate a conflict like the so-called global "war on terror" when drafting the Conventions over fifty years ago? Likely not, and appropriately, the DOJ did casually acknowledge this important fact:

> Giving due weight to the state practice and doctrinal understanding of the time, the idea of an armed conflict between a nation-State and a transnational terrorist organization (or between a nation-State and a failed State harboring and supporting a transnational terrorist organization) could not have been within the contemplation of the drafters of common article 3.[156]

After months of analysis of the Third Geneva Convention, the DOJ presented their findings to the White House. Although the DOJ's conclusions and recommendations were quite clear, it was very evident that the supporting evidence for these conclusions was based on a litany of assumptions not specified clearly within the provisions of the Convention. The law certainly leaves room for interpretation, but there is still a limit to its scope of intent, and interpretation of the law must remain within these bounds. The DOJ made their recommendations, and advisors at the White House weighed in, but it was ultimately the President who had to decide how to proceed. How did President George W. Bush understand the legality of the war on terror, and how would this shape military operations going forward?

The White House: Applying the Third Geneva Convention to the War on Terror

The US DOJ sent their recommendations to the Department of Defense and the White House, and it was ultimately up to President Bush to decide how to proceed. White House Counsel Alberto Gonzalez held the President's ear on legal matters. Due to Gonzalez's background as a corporate lawyer, he relied heavily on the DOJ for their

[156] Bybee, 8.

understanding of international law, and sought guidance as well from the Central Intelligence Agency (CIA) and Departments of State and Defense.[157] Understanding whether or not the Third Geneva Convention applied to the conflict in Afghanistan was important for many reasons. According to Gonzalez, one of the primary reasons was the need to extract information from captured enemy fighters.

> If Geneva applied to the people we were capturing, captives could be asked only for their name, rank, and serial number. We could not induce the prisoners to talk, a restriction that was not going to help us in thwarting the next attack by al-Qaeda, something we all worried could happen at any time. Many of our lawyers felt that it was important that we not hamstring our intelligence gathering, including any information we might gain by lawfully interrogating captured al-Qaeda and Taliban.[158]

Gonzalez explains that lawyers intentionally did not want to restrict the ability of authorized personnel to "induce the prisoners to talk," or "hamstring" intelligence gathering. Simply put, the legal analysts who were tasked to determine the applicability of the Geneva Conventions had to find a way to legally interrogate prisoners for the means of acquiring intelligence. If the law did not permit such an action, then perhaps the law did not apply at all. In that case, the US was free to exercise its own judgment in the handling of enemy captives without the handcuffs of the Third Geneva Convention.[159]

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[157] Gonzales, 151.

[158] Ibid., 152.

[159] In 1988, the US signed the United Nations Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, known simply as CAT. While the Third Geneva Convention of 1949 generally addresses the treatment of prisoners, CAT is a far more specific document of international humanitarian law. Rightly or wrongly, even if the US chose not to comply with the Third Geneva Convention, it still had obligations under international law to abide by humane practices with respect to treatment of captives. Article 2 of CAT states, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture;"

Gonzalez indirectly brings up another reason for questioning whether or not the Geneva Conventions would apply, and that is due to Al-Qaeda's lack of compliance with the rules of war. To even hint that the US should not comply with international law because the adversary it opposes does not, is worrisome and in stark contrast to the intent of international humanitarian law, specifically the Geneva Conventions. Gonzalez stated: "Al-Qaeda flagrantly violated every one of Geneva's conditions on 9/11 and afterward. Al-Qaeda does not obey the rules of war, does not wear identifiable uniforms, does not limit fighting to combatants, and has no qualms about killing innocents. As a corollary, al-Qaeda does not keep prisoners."[160] Though Gonzalez intended to prove a point, it is a well-established fact that terrorists do not conform to the rules of war. Hence the name terrorism. The question is whether or not terrorists can and should be considered enemy combatants in a conflict between a nation-state and a non-state actor. Evidence to support the answer to that question was never provided in Gonzalez's account of the White House's deliberation.

Gonzalez's final considerations about the applicability of the Third Geneva Convention are that of Afghanistan's status as a failed state, and the concept of reciprocal treatment. Gonzalez believed, in agreement with the Justice Department, that the Taliban was not representative of the state government of Afghanistan. Therefore, they were non-state actors and not legitimate agents of the government. The second issue, however, was how the Taliban or Al-Qaeda would treat members of the US Military if captured,

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Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, December 10, 1984, 1465 *U.N.T.S.* 85, Article 2.

[160] Gonzalez, 153.

especially if the US Government did not conform to the Third Geneva Convention. This issue deeply concerned President Bush, the National Security Council, and legal advisors.[161] Reciprocal treatment of prisoners by warring parties has been an issue as far back as World War I. President Bush knew that if the US took the stance that Taliban and Al-Qaeda prisoners would not be afforded POW status; there could be even less of an incentive for either organization to treat American military members with any measure of decency.

One cannot be so naive to think that governments do not do what they need to in order to protect their citizens against existential threats, even if it means the use of questionably legal practices. The pressure of preventing another massive attack on American soil no doubt plagued the minds of government officials in 2001 and 2002. However, there had to be a limit in how far the country deviated from its legal obligations. In the type of conflict that the US embarked upon in Afghanistan, the ability for the nation to preserve the appearance of innocence in the face of terrorist evil was paramount to maintaining international legitimacy. Waging a war in a way that contradicted the conventional sense of morality that characterized America would only further Al-Qaeda's cause to make the country appear to be a nation of hedonistic hypocrites. According to Gonzalez, Secretary of State Colin Powell was keenly aware of this situation.

> On the other hand, Secretary Colin Powell argued that we had always applied Geneva's provisions in previous wars and conflicts, even when the international law did not require that we do so. We were a country intent on taking the high road. Relying no doubt on his experiences as a soldier, Powell was concerned that by not applying the convention rules, we could be undermining our own

[161] Gonzalez, 154.

> military's culture that emphasized maintaining the highest standards of conduct, even in combat.[162]

Powell understood that Taliban and al-Qaeda fighters may not warrant POW status as defined by Article 4, but that should not be a reason to say that the entirety of the Third Geneva Convention does not apply. In addition to undermining domestic and international support, one of Powell's principal arguments against the Justice Department's recommendation was that "it will reverse over a century of US policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general."[163] Similarly to MACV's decisions in Vietnam, the Bush Administration had to decide whether or not to conform to international law when the law did not exactly fit the scenario at hand. Either decision had significant implications, and part of the decision-making process included the consideration of short-term tactical gains versus long-term strategic gains. Choosing not to conform to the law could increase acquisition of intelligence and the likelihood of near-term tactical success, but could delegitimize the US in the international court of opinion. On the other hand, conforming to the law could preserve legitimacy, but also jeopardize the safety of the American people.

The whole of Washington put forth a variety of opinions on the issue. On February 7, 2002, President Bush announced that the US would treat its prisoners humanely, but that the Third Geneva Convention did not apply to Al-Qaeda. On the

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[162] Gonzalez, 152.

[163] Colin Powell, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan* (Washington, DC: US Department of State, January 25, 2002), 2, accessed April 2, 2018, https://nsarchive2.gwu.edu//NSAEBB/NSAEBB127/02.01.26.pdf.

contrary, the Convention did apply to the conflict against the Taliban. However, Taliban detainees were "unlawful combatants" incapable of receiving POW status.[164] Following this pronouncement, US military forces operated under nebulous guidance concerning the legality of the war in Afghanistan. The Third Geneva Convention both did and did not apply to the conflict with the Taliban and al-Qaeda respectively. At the same time, all captured enemy fighters were considered unlawful enemy combatants, and not POWs in accordance with the Third Geneva Convention. Yet, all prisoners still had to be treated in accordance with the principles of the Convention.[165]

When coalition troops captured Al-Qaeda's number three leader, Abu Zubaydah, in March of 2002, the legal waters muddied even further. Intelligence officials suspected that Zubaydah possessed important information, but they knew he was unlikely to speak to interrogators employing traditional interrogation tactics. The DOJ and CIA embarked on a four-month process of expanding current methods of interrogation that still conformed to domestic and international law. Finally, the Justice Department's Office of Legal Counsel produced a list of approved interrogation techniques for the Central Intelligence Agency that became commonly known as "enhanced" interrogation methods. These authorized acts included: facial holds, facial slaps, cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and waterboarding. Additional techniques included diet manipulation, nudity, abdominal

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[164] Office of the Press Secretary, "The White House Fact Sheet: Status of Detainees at Guantanamo," February 7, 2002, accessed April 16, 2018, https://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020207-13.html; Gonzalez, 154.

[165] Doyle, 313.

slapping, and water dousing.[166] These techniques were assessed to be completely legal by the DOJ, CIA, and the White House. Since the Third Geneva Convention was no longer in effect, then interrogators would not have to worry about utilizing these techniques in grave breach of the Convention. And since Taliban and al-Qaeda detainees did not have the protection of prisoner of war status under the Convention, these methods could be used without violating Articles 3, 13, 14, and 17, amongst others. However, many of the approved actions listed above appeared in later POW operations in Iraq in 2003 when the Third Geneva Convention was in effect, and such actions were in violation of international law.

The decisions made by the US Government with respect to applying the Third Geneva Convention to the conflict in Afghanistan continue to be highly debated. Though international humanitarian law states that no matter of national security can justify breaching the law, it is difficult to recount the events of September 11, 2001 and not understand the need to do anything and everything to prevent a similar attack from happening again. Yet despite the temptation to deviate from the law, US legitimacy as a global power is reliant upon the ability to maintain the moral high ground. As much as the law exists to protect the adversary, it also exists to restrain friendly forces from committing immoral or unjust acts. By deciding to conform to international humanitarian law, Americans choose to govern their actions by a code of ethics. It is this regard for the sanctity of human life that separates Americans from the likes of terrorists. The turn of the twenty-first century ushered in a new era of international law with the advent of the globalized prosecution of terrorism. In the words of historian Robert Doyle, “For

[166] Gonzalez, 183-196.

Afghanistan and soon Iraq, a wholly new paradigm emerged. Gone was the era of reciprocity, the Golden Rule, and strict adherence to both the rules of war and the Geneva Conventions. Gone were advantageous legal restraints on both sides."[167]

The Third Geneva Convention in Iraq (2003 to 2011)

In March of 2003, the US commenced military operations in Iraq to remove Iraqi President Saddam Hussein from power. Though the beginning of military action in Iraq occurred within a couple years of operations in Afghanistan, and both countries are within relatively close global proximity to one another, the conflicts were quite different in their strategic objectives and legal status. Unlike the conflict in Afghanistan, Iraq was a conventional fight against a state actor, and one that met the assumed conditions of war under the Geneva Conventions. As mentioned earlier in chapter 4, both the US and Iraq had ratified the Geneva Conventions. Thus, the Third Geneva Convention applied to the conflict.[168] Iraqi soldiers were considered lawful enemy combatants, and therefore prisoners of war upon capture.

The US was not adequately prepared to execute POW operations in accordance with the standards specified in international humanitarian law at the outset of hostilities in Iraq. Issues arose immediately. US forces captured Iraqi soldiers in addition to foreign fighters and other non-uniformed combatants, and therefore, not every fighter was legally a prisoner of war. Captured partisans and other non-conventional Iraqi soldiers were considered detainees according to Department of Defense Directive 2310.1, and not

[167] Doyle, 309.

[168] Springer, 198.

afforded POW protections.[169] Classifying prisoner status, and subsequently where and how to keep these captives, was a challenge, but an expected challenge as explained in the Third Geneva Convention. In addition, the US had to find locations to appropriately detain prisoners. This was easier said than done due to the presence of an insurgency that resulted in relatively few safe areas within Iraq that did not threaten the well-being of US prisoners.[170]

Initially, roughly 8,000 captured EPWs were transferred to Camp Bucca in southern Iraq. Weeks later, American forces secured the Abu Ghraib prison, which also known as the Abu Ghraib Confinement Facility or the Baghdad Detention Center.[171] American commanders settled on Abu Ghraib because the quantity of prisoners required another detainment facility in addition to Camp Bucca. Although the decision was made out of a necessity for more prisoner housing, it was evidence of a lack of preparation. The decision also demonstrated a lack of understanding of the significance of the prison to the Iraqi people. In the words of historian Paul Springer, "the prison deserved its reputation as a hated symbol of the regime: it held thousands of political prisoners who were subjected to unspeakable tortures."[172] The choice to house prisoners at Abu Ghraib was not only a bad decision due to its association with torture by Saddam's regime, but it is also in violation of Article 22 of the Third Geneva Convention. Article 22 states, "Except in particular cases which are justified by the interest of the prisoners themselves, they

[169] Doyle, 314.

[170] Springer, 198.

[171] Doyle, 314.

[172] Springer, 198.

shall not be interned in penitentiaries."[173] The presence of few safe areas within Iraq was the primary impetus for choosing the prison. However, Article 22 specifically intends for prisoners to be held in camps outside of combat zones, rather than in prisons inside of combat zones. Article 22 later states, "Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favorable climate."[174] Abu Ghraib was under continuous attack and was by no means a safe area to hold prisoners. In fact, four soldiers died due to mortar attacks on Abu Ghraib.[175]

In May of 2003, four soldiers of the 320th Military Police Battalion abused prisoners at Camp Bucca, and in the fall of 2003, photographic evidenced showed that US Army soldiers abused prisoners at Abu Ghraib as well. In January of 2004, Specialist Joseph M. Darby of the US Army's 800th Military Police Brigade reported detainee abuse at Abu Ghraib. The Army launched an AR 15-6 investigation into the allegations a month later. The ICRC produced a confidential report by the end of February to coalition authorities on their independent investigation of detainee abuse.[176] The ICRC's report cited widespread abuse by coalition forces and Iraqi police officers in holding facilities throughout Iraq. The frequency and breadth of abuse indicated that it was not unique to a

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[173] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 22.

[174] Ibid.

[175] Independent Panel to Review DoD Detention Operations, *Final Report of the Independent Panel to Review DoD Detention Operations* (Arlington, VA: Independent Panel to Review DoD Detention Operations, 2004), 11, accessed April 4, 2018, http://news.findlaw.com/wsj/docs/dod/abughraibrpt.pdf.

[176] Doyle, 314-315.

few perpetrators, but indicative of systemic issues. The ICRC cited incidents of "harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture, in order to force cooperation with their interrogators."[177] The abuse was definitely biased towards detainees that were suspected of withholding valuable information. "In the case of 'High Value Detainees' held in Baghdad International Airport, their continued internment, several months after their arrest, in strict solitary confinement in cells devoid of sunlight for nearly 23 hours a day constituted a serious violation of the Third and Fourth Geneva Conventions."[178] The report also referenced "the excessive and disproportionate use of force by some detaining authorities,"[179] and urged coalition leaders to abide by "their humanitarian obligations under all four Geneva Conventions, in particular the Third and Fourth Geneva Conventions as far as the treatment of persons deprived of their liberty is concerned."[180]

In March of the same year, the Army released the preliminary results of its AR 15-6 investigation into the Abu Ghraib incident. Known as the "Taguba" report, named after the Army's investigating officer Major General Antonio M. Taguba, the results of the investigation showed "incontrovertible evidence that such abuse did

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[177] International Committee of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation,* February 2004, 3-4, accessed April 3, 2018, http://www.informationclearinghouse.info/pdf/icrc_iraq.pdf.

[178] Ibid., 4.

[179] Ibid.

[180] Ibid., 6.

occur."[181] The report revealed a variety of problems within the detention facilities, to include a lack of adequate facilities, inadequate training for members of the 800th Military Police Brigade, nonstandard policies and procedures, and confusion about the "handling, processing, and treatment" between the various categories of detainees housed in the same facility.[182] It also stated "that between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees."[183] Specified acts included: punching, slapping, and kicking detainees; videotaping and photographing naked male and female detainees, arranging detainees in explicit positions, using military working dogs to intimidate and frighten detainees, and rape.[184]

These acts constitute grave breaches of the Third Geneva Convention, and directly violate the provisions of Articles 3, 13, 14, and 17. Article 17 states: "No physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."[185] However, some of the actions sited in the report are enhanced interrogation

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[181] Major General Antonio M. Taguba, Investigating Officer, *AR 15-6 Investigation of the 800th Military Police Brigade*, March 2004, accessed April 3, 2018, https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DODDOA000248.pdf.

[182] Ibid., 9-10.

[183] Ibid., 16.

[184] Ibid., 16-17.

[185] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 17.

methods previously approved by the Justice Department in 2002 to be used against detainees in Afghanistan. Slapping, water dousing, and forced nudity are just some of the actions approved for use against non-POW detainees in Afghanistan that surfaced in the Abu Ghraib investigation.

In response to the findings, the Army pressed charges against several soldiers responsible for committing unlawful acts against detainees. These soldiers ranged from senior officers to junior enlisted soldiers, most of whom were members of the 800th Military Police Brigade.[186] However, the government maintained that the atrocities at Abu Ghraib were committed by a handful of miscreants, and not characteristic of widespread abuse. The findings of the Red Cross's report and to a lesser extent the Taguba Report as well, challenged that assertion.

The important question is whether or not the breaches to the Geneva Convention that occurred in Iraq in 2003 were at all influenced by the US government's decisions in 2002 concerning action in Afghanistan. It is reasonable to assume that the government did not directly order members of the military to abuse prisoners at Abu Ghraib. There was nothing to be gained from it, and the fallout from the scandal was devastating to the US's international legitimacy. On the other hand, it seems unlikely that there is no connection at all. Gonzalez asserted that the government's decisions did not contribute to the incidents at Abu Ghraib:

> Critics immediately blamed the president's decision on the application of the Geneva Conventions as a contributing factor to the lessening of our values, asserting that this in turn resulted in the atrocities at Abu Ghraib. Nothing could

[186] CNN Library, "Iraq Prison Abuse Scandal Fast Facts," *CNN*, March 18, 2018, accessed April 3, 2018, https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html.

> be further from the truth. What happened at Abu Ghraib had nothing to do with interrogations or gathering information from detainees. The soldiers abusing those prisoners were not acting according to orders; they had no authority to conduct interrogations; they were not in charge of getting information out of prisoners.[187]

While Gonzalez may not be wrong in his assessment, a classic leadership quagmire is presented. What was the "command climate" like within the military during this period? The ICRC's report from February 2004 indicated that there was a pervasive problem of mistreatment, not unique to several soldiers in Abu Ghraib. Though specific soldiers at Abu Ghraib were punished for their treatment of detainees, the abuse would likely not have been addressed had photographs never emerged in 2003. According to an independent commission led by former Secretary of Defense James Schlesinger published in August 2004, "the abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels."[188] The report goes on to say that, "interrogators and lists of techniques circulated from Guantanamo and Afghanistan to Iraq."[189] If Schlesinger's assessments are correct, then the issues at Abu Ghraib were attributable in part to the decisions made by senior leaders with respect to Afghanistan.

Conclusion

The legal waters were very muddy in the few years after September 11, 2001. Various entities within the US Government scrambled to create the legal framework for a

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[187] Gonzalez, 203.

[188] Independent Panel to Review DoD Detention Operations, 5.

[189] Ibid., 9.

new kind of war, a global war on terrorism. The Justice Department argued that Third Geneva Convention did not address the character of armed conflict between a state actor and a "failed state." Additionally, they argued that the Taliban and al-Qaeda fighters were non-state actors not protected under the Third Geneva Convention, for a variety of reasons. Yet, as hostile forces opposing the nation's military, these combatants were also not civilians protected under the Fourth Geneva Convention. Neither were they treated as criminals and subjected engagement by law enforcement and prosecuted in accordance with international criminal law. In effect, the US created a new category of adversary, an "unlawful enemy combatant." This new enemy was not protected under existing law. Benjamin Wittes states:

> Prevailing international sentiment has also treated the prosecution of those not granted prisoner-of-war status as all but obligatory. In other words, under this view, any detainee must be a prisoner of war protected by the Third Convention, be put on trial for war crimes, or be treated as a civilian protected by the Fourth Convention, which deals with civilian protections in circumstances of conflict or military occupation.[190]

In the years following the commencement of military operations in Afghanistan, the legal quagmire continued to intensify. Domestic and international criticism regarding US legal policy delegitimized US military efforts. The establishment of new law and the decisions from several US Supreme Court cases in 2004 to 2008 challenged the US policy of detainment at the Naval Base at Guantanamo Bay, Cuba, in addition to the US policy pertaining to detention of US citizens serving abroad as enemy combatants. The questionable legal practices in place and high-profile nature of dissent against them resulted in President Barack Obama announcing in 2009 that he would close the facility

[190] Wittes, 39.

at Guantanamo Bay. His goal was to "restore the standards of due process and the core constitutional values that have made this country great even in the midst of war, even in dealing with terrorism."[191] Obama also ended the Bush administration's Central Intelligence Agency program of enhanced interrogation methods.[192] However, the detention facility at Guantanamo Bay remains open as of 2018, with no forecasted closure date from President Trump's administration.[193] Additionally, the precedent establishing unlawful enemy combatants remains a part of American legal doctrine.

The Third Geneva Convention's applicability throughout its history is informative in determining whether or not it is a viable piece of international humanitarian law for the future of warfare as we know it. In a world of unconventional warfare and asymmetric conflict against non-state actors, it is time to assess whether or not the Third Geneva Convention still serves its purpose as intended by the drafters at the Geneva Conference in 1949. If the character of war has changed so significantly that the Convention of 1949 is no longer sufficient, should the US lead or encourage an international effort to draft a new Convention that is suitable to current and future war? If so, what might be some of the considerations that international humanitarian law should address?

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[191] Ed Henry, Barbara Starr, and Deidre Walsh, "Obama Signs Order to Close Guantanamo Bay Facility," *CNN*, January 22, 2009, accessed April 3, 2018, http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/.

[192] Ibid.

[193] Ryan Browne, Elise, Labott, and Barbara Starr, "Trump Signs Order to Keep Guantanamo Open," *CNN*, January 31, 2018, accessed April 3, 2018, https://www.cnn.com/2018/01/30/politics/trump-guantanamo-bay-reverse-obama/index.html.

CHAPTER 6

THE FUTURE OF THE THIRD GENEVA CONVENTION

The history of conflict since 1949 makes the case for a need to update and revise the Third Geneva Convention. Its importance as an instructive piece of international humanitarian law is timeless, but it loses its noble intent in the details. From The Hague Conventions of 1899 and 1907 to the Third Geneva Convention of 1949, the nature of the provisions therein continued to become more and more prescriptive. Yet the drafters understood that an increased amount of specificity and regulation might lead to greater compliance, but would also make the individual articles more limiting. Commentary by the ICRC in 1960 on Article 3 of the Third Geneva Convention identified the difficulty with striking a balance between broad and explicit terminology, specifically in reference to torture:

> However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible, and at the same time precise.[194]

This is a perpetual dilemma for drafters of international law–requisite specificity to address particular requirements balanced with broader language to provide comprehensive coverage. However, the passage of time is the litmus test of whether or not the law suffices as written. Through comprehensive historical analysis, experts in the field must identify shortcomings, and seek to update the law to fit the current

[194] Pictet, 39.

environment. Although the purpose and intent of the Third Geneva Convention is without expiration, the details of its provisions are due for reconsideration.

A primary impetus for the necessity to revise the Third Geneva Convention is the increase in military action against violent extremist organizations in asymmetric conflict. The Geneva Conventions of 1949 do not adequately address this new type of conflict. Law professor Gregory Rose describes the future non-state actor threat environment as "a mode of conflict (and crime) at societal levels, involving measures short of traditional war, in which the protagonists use network forms of organization and related doctrines, strategies, and technologies attuned to the information age."[195] Recent history has shown that non-state actors will use the media and other information outlets to aggressively promote their narrative while simultaneously denigrating their adversary as a way of delegitimizing their opponent. This results in even more pressure by state belligerents to deny these extremist organizations the figurative ammunition to use in their informational campaigns. In this environment, conformation to international humanitarian law is fundamental to maintaining international legitimacy and keeping the moral high ground. If states conduct themselves in a manner that violates their obligation to international law against asymmetric threats, the enemy will exploit that transgression. Non-state actors will frame the adversarial state to be a hypocritical power that will do whatever it takes to win. The fallout can be irreparable, or at the very least detrimental to achieving strategic objectives.

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[195] Gregory Rose, "Preventive Detention of Individuals Engaged in Transnational Hostilities: Do We Need a Fourth Protocol Additional to the 1949 Geneva Conventions?" in *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare*, ed. William C. Banks (New York: Harper Collins Publishers, 1999), 46.

Thus, it is vital that the framework of international law fits the character of conflict as it exists in the present, and as it is expected to be in the future. To that end, High Contracting Parties to the Third Geneva Convention must devote the utmost care and consideration to their legal obligations. Civilian and military operational planners must incorporate the provisions of the Convention into their war plans. The potential consequences of not doing so are ruinous.

Most of the following recommendations are not exclusive to asymmetric warfare against non-state actors, but rather recommendations to fit various sorts of conflict including asymmetric warfare against non-state actors. Regardless of the types of armed conflicts that come to fruition in the future, broad assumptions and specific criteria alike require revision. The following analysis will first address the basic general assumptions of the Conventions that need to change, and then subsequently consider more specific review of individual articles.

General Revisions for Better Applicability in Future Conflict

Firstly, all of the Geneva Conventions must be flexible and adaptable in order to apply to various forms of armed conflict. The common articles currently strive to achieve compliance across a broad spectrum of conflict, but in their detailed discussion of "international" and "non-international" conflict, they become overly specific. Despite the intent of Article 2 to cover "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting parties,"[196] by referencing

[196] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 2. One must read Article 2 in its entirety to avoid misunderstanding that the Convention only applies to "conflict which may arise between two or more of the

international and non-international conflict, the Convention implies that its applicability must conform to one of these categories. Thus, there is room for certain types of conflict to fall between, or outside of, these descriptions of Convention applicability.[197] The common articles of the Conventions must therefore be broad in their definition of armed conflict. Conflict should not be defined by a prescriptive set of pre-existing circumstances, but rather by the intent of the desired action and the type of force being applied. The Conventions must define armed conflict more in keeping with the Clausewitzian definition of war, "an act of force to compel our enemy to do our will," and less by a checklist of criteria.[198] Though this will allow for more subjective interpretation of what constitutes armed conflict, it also broadens the definition to potentially leave no type of conflict entirely exempt from the protections of the Conventions.

Additional Protocols I and II of 1977 specifically addressed some of these common article deficiencies. They attempted to close the applicability gaps in the common articles of the conventions, and provide comprehensive coverage for signatory parties across the spectrum of conflict. However, the US chose to abstain from complying

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High Contracting parties." Article 2 later states that the Convention is binding to any Party thereto, regardless if the other power is party to the Convention.

[197] An example of this interpretation of conflict being outside the scope of the common articles was the US Department of Justice's (DOJ) assessment of the conflict in Afghanistan being unique and not readily addressed by the Conventions. The DOJ specifically referenced the fact that the Convention did not "apply to all forms of armed conflict" in its Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense*, Application of Treaties and Laws to al Qaeda and Taliban Detainees*.

[198] Clausewitz, 75.

with these protocols, thereby intentionally leaving those gaps open. Most of America's European allies, Canada, Australia, New Zealand, and half of Central and South America are all party to Protocols I and II. Meanwhile, countries like Malaysia, Indonesia, Thailand, India, Pakistan, Iran, Turkey, and Somalia are not party to any of the Additional Protocols.[199] The US has an opportunity to stand with its closest allies in conforming to these additions to the Geneva Conventions, and in turn set the example for other nations to follow. If the international community updated the Geneva Conventions as recommended, the new legal documents would incorporate the provisions of the Additional Protocols. Therefore, High Contracting Parties to the new Geneva Conventions would conform to much of the contents of the Additional Protocols. Though the US could circumvent some of these provisions by declaring reservations to certain articles and still sign and ratify the new conventions, it would be wise to ensure that reservations are only noteworthy exceptions. It would be imprudent to contradict the generally accepted norms of customary international law.[200]

Secondly, the common articles must not presuppose a declared state of war between powers. The title prisoner of war assumes that a state of war exists between some number and type of belligerents. Some articles also reference obligatory action by High Contracting Parties "upon the outbreak of hostilities" or "upon the outbreak of a

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[199] International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977;* International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977*.

[200] The term "customary international law" refers to the generally accepted legal obligation of the common and consistent practice of states.

conflict."[201] These terms and phrases all imply a declaration of war, or at least some definitive beginning to armed conflict. The assumption at the time of the Conventions' inception in 1949 was that powers declared war on one another prior to the outbreak of hostilities. As evidenced by America's lack of a formal declaration of war in multiple conflicts since World War II, that is no longer a pertinent assumption. In the words of Law professor Emily Crawford, "The intent behind the expansive application of the 1949 Geneva Conventions was to ensure that no State Party to the Conventions could deny their obligations by claiming that a state of 'war' did not exist."[202] Therefore, revision of the common articles, in addition to phraseology in subsequent articles, must be revised to better reflect this understanding. If the Conventions apply to a conflict, then a formal declaration of war by belligerent parties is irrelevant. Additionally, the commencement and cessation of hostilities is not always as temporally definitive as the common articles imply. For example, modern conflict often involves shaping or stability actions prior to and after conventional military operations, and this approach to warfighting is likely to continue in the future. Therefore, conflict is more continuous and at the same time amorphous in its beginning and end than it was in 1949. As a result, contracting powers must execute their responsibilities at all times when the use of force is applied in accordance with the Convention's characterization of war.

Thirdly, the frequent use of international organizations (IOs) in conflict warrants consideration; of whether or not belligerent powers can or should be considered as groups

[201] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Articles 112 and 122.

[202] Crawford, 19.

of states rather than individual nations. Currently, an international organization cannot ratify a treaty like the Geneva Conventions. Professor Eric David, as mentioned previously in chapter 2, explains that IOs face many of the same legal challenges as non-state actors in the application of international law. Hence why he considers them to be a category of non-state actor.[203] But David adds that customary international law does apply to IOs. Therefore, if the provisions contained within the Geneva Conventions are accepted as customary international law, then IOs are bound to those provisions. David states, "it is easier to follow the conclusion of the International Court of Justice, according to which 'an international organization is a subject of international law and, as such, is bound by all the obligations deriving from the general rules of international law.'"[204] The debate of how to incorporate IOs into international law is not new or unique to the Geneva Conventions. However, any revision to the Conventions should consider the legal status and obligations of IOs. As long as IOs are expected to play a role in perpetual low-scale conflict involving military forces, such as counter-terrorism operations, the Geneva Conventions will continue to be a consideration.

Finally, one of the primary difficulties with ensuring that states uphold their commitment to the Geneva Conventions is the matter of enforcement. According to ICRC commentary on Part IV, Section 1, of the Third Geneva Convention, "complete and loyal respect for the Conventions must be based on the application of effective penalties."[205] The international legal experts that convened in Geneva in 1948

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[203] David, 34.

[204] Ibid., 36.

[205] Pictet, 618.

acknowledged that each contracting state must enact domestic legislation to provide legal action against those individuals guilty of grave breaches to the Conventions. However, to prevent states from circumventing punishment of its own citizens guilty of such crimes, the Conventions recognized the principle of universality of jurisdiction. This meant that any Contracting Party could prosecute citizens of any nationality, not just their own, for breaches of the Convention considered to be war crimes.[206] The details of Articles 129 through 132 mostly pertain to the enforcement of penal sanctions by states against individuals that commit grave breaches to the Third Geneva Convention. However, Article 131 addresses liabilities of states with respect to breaches of the Convention: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article."[207] Therefore, states must hold themselves accountable as the Detaining Power ultimately responsible for the welfare of prisoners. After all, as the ICRC commentary states, "It would seem unjust for individuals to be punished while the State in whose name or on whose instructions they acted was released from all liability."[208]

However, the Convention does not clearly specify the means by which High Contracting Parties are held accountable. Individual states voluntarily ratify the Geneva Conventions, though much of the Conventions' provisions have since become customary

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[206] Pictet, 619-620.

[207] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 131.

[208] Pictet, 630.

international law. Thus, it seems counter-intuitive that High Contracting Parties would desire to shirk their obligation to the law in which they voluntarily professed agreement. But the nature of modern conflict has shown that this could be the case.[209] Therefore, the Convention should provide greater empowerment to the neutral Protecting Power to act as a supervisory body. Article 10 dictates much of the Protecting Power's obligations, but these responsibilities are directed primarily towards the well-being of prisoners, and not the behavior of the state itself. Should the Protecting Power be able to supervise and advise state leadership with respect to conformation with the principles of the Convention, state-level accountability would increase. This should also have a trickle-down effect that would improve adherence to the Conventions at the prisoner level.

Specific Revisions to Articles Pertaining to Combatant Status

The largest source of debate surrounding the Third Geneva Convention today is the definition of prisoner of war as prescribed by Article 4, and the associated applicability to non-state actors also nested within Article 3. The issues with the current terminology have been explained in detail throughout the preceding chapters. The concern now is how to move forward in an attempt to quell the debate. The current definition is sufficient as written in reference to conventional conflict between state belligerents. On the contrary, further clarification is needed in reference to non-state actors. Though Article 3 pertains to conflicts "not of an international nature" occurring within the territory of one of the High Contracting Parties, decisions by legal organs, such as the US Supreme Court, have extended the coverage of Article 3 to include conflict

[209] As evidenced by the debate within the US government pertaining to military action in Afghanistan immediately following the terrorist attacks of September 11, 2001.

between parties of differing nations.[210] Thus, the modern legal system has already attempted to broaden the scope of these articles to address non-state actors.

The definitions and explanations in Additional Protocols I and II are a good starting point in broadening the Geneva Conventions' terminology in international and non-international conflict respectively. Article 45 of Additional Protocol I states that, "a person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war."[211] This definition is broad and inclusive without requiring that combatants meet certain specific appearance or behavioral criteria for incurring POW status. Its generic language allows for a wide range of conduct that can be deemed contributory to hostilities. Similarly, Article 44 of Additional Protocol I expands upon the definition of combatants and prisoners of war in Article 4 of the Third Geneva Convention. The current POW requirements in Article 4 include the open carry of arms and wearing of a "fixed distinctive sign recognizable at a distance," both of which are antiquated in the context of modern war. In reference to the aforementioned characteristics of prisoner of war status from Article 4, Article 44 of Additional Protocol I states:

> In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of hostilities an armed combatant cannot so

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[210] *Hamdan v. Rumsfeld* 548 US 557 (2006).

[211] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, Article 45.

> distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries arms openly.[212]

In reference to appearance and the open carry of arms, the contrast between the Third Geneva Convention and Additional Protocol I is quite apparent. Additional Protocol I provides far greater context and reasoning in its discussion. This broadened contextual approach to clarifying the articles must be continued in further revisions.

But broadening is just the starting point. One of the fundamental requirements in establishing combatant status must be the intent to commit harm, rather than merely meeting a checklist of pre-existing conditions. The revised articles must establish that intent to participate in hostilities through action or function during war constitutes status as an enemy combatant. The modern battlefield is a mix of regular conventional forces, special operators, intelligence officials, non-state actor groups, contractors, and civilians. How is a soldier supposed to know and identify each category of individual at a moment's notice during the fog of war to know who is an enemy combatant and who is not? Though the Convention currently addresses some of the various types of military and civilian individuals present on the field of battle, the numbers and types of these individuals has grown significantly. What about the role that cyber warfare operators play in modern conflict? If a special operations force raids a warehouse full of civilians at computer terminals hacking and sabotaging military computer systems, would these individuals not be considered prisoners of war? International law experts, Professor David Crane and Daniel Reisner, note "The common view is that, barring very specific

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[212] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,* Article 44.

exceptions, combatant status means (1) the right to participate in hostilities, (2) being a legitimate target during hostilities, and (3) the right to POW status if caught by the adversary."[213] Since Article 44 of Additional Protocol I states that combatants shall be prisoners of war, then many of the types of military members, contractors, or civilians previously mentioned could qualify as POWs upon capture, if their actions or functions meet the combatant definition. This synthesis of Article 4 of the Third Geneva Convention of 1949, Articles 44 and 45 of Additional Protocol I of 1977, and the understanding of current and future conflict illustrates an overly simplified form of the thought process required to address the combatant status issue today. Law makers must understand that the complexities of war will only continue to increase, and the issue of combatant status will inflame further debate if not addressed sooner rather than later.

Elimination or Reduction to Articles

In order to focus the Third Geneva Convention on the primary concerns of future war, most specifically asymmetric conflict against non-state actors, revisions to the Convention should eliminate or consolidate certain sections and articles. Instead of simply adding more and more articles in hopes of rectifying ambiguities, the Convention must become more efficient and eliminate articles that are not critical to the well-being of prisoners. One such example is the financial support Detaining Powers are required to provide to prisoners.

The idyllic organization of detention for prisoners of war conceived in 1949 has never fully been realized. Part III Section IV, entitled "Financial Resources of Prisoners

[213] Crane and Reisner, 74.

of War," is an example of a detailed system prescribed by the Convention that is unlikely to ever come to fruition. Articles 58 through 68 require Detaining Powers to establish and maintain prisoner accounts, provide prisoners with monthly stipends and fair pay for labor, and furnish transaction and account information at the prisoner's request.[214] The provisions of these articles demand legitimate financial resources, a requirement that could be unlikely in conflict due to such constraints as the duration of hostilities or lack of robust economic and logistical infrastructure. This is especially true of third world nations that have ratified the Geneva Conventions. Though a banking system for prisoners may be ideal, deficiencies in the financial system would not constitute inhumane treatment. Throughout the history of the Third Geneva Convention, the lack of financial resources for prisoners is rarely noted. One can infer from historical first-hand accounts by former POWs that sufficient food, water, shelter, and recreation, combined with a lack of torturous or inhumane treatment, would satisfy most prisoners in captivity. By simplifying these extraneous requirements like prisoner financials, the Convention can focus more specifically on issues that directly affect prisoner health and safety.

Additions to Articles

The first item of concern unsatisfactorily addressed in the Third Geneva Convention is that of prisoner repatriation. Though the Conventions were not in effect during the Korean War, both sides agreed to respect the principles contained therein. The conflict highlighted that the Third Geneva Convention's two articles on repatriation at the close of hostilities lack clarity. At the end of the Korean War, many communist prisoners

[214] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Articles 58-68.

did not wish to return to their country of origin, but chose instead to settle elsewhere. The Convention does not specify what a Detaining Power must do in a situation in which prisoners refuse repatriation. In the end, the communist prisoners that did not wish to return were not forced to repatriate, as the UNC argued that forced repatriation would be against the spirit of the Convention.[215]

Refusal to voluntarily repatriate to a country of origin is just one example of a potential problem of repatriation. What if a prisoner's country of origin is so destroyed and ravaged by war, that a prisoner does not feel able to safely return and resume a normal life? What if a prisoner's country of origin is indeterminable? This is an especially pertinent question when considering the capture of non-state actors, such as violent extremists, who travel from around the world, forfeit their passports, and then participate in hostilities as enemy combatants. What if a country of origin refuses to accept a prisoner being repatriated by a Detaining Power, and no other country is willing to accept them either? This scenario is also especially applicable to the discussion of non-state actors. Articles 118 and 119 of the Third Geneva Convention assume prisoners want to be repatriated to their country of origin, and assume that those countries want them back. Are these relevant assumptions based on the character of present and future conflict? Arguably not.

The solution lies in revising the guidance contained within the existing articles, and through the addition of at least one additional article. The additional article should dictate the establishment of a neutral party whose purpose is to negotiate repatriation concerns in the event that they arise. The Protecting Power should facilitate the creation

[215] Pictet, 543-546.

of this party. Prisoners would be granted direct access to the repatriation party in order to avoid influence from any belligerents involved in the conflict. These additional provisions will mitigate the amount of time and effort required to facilitate repatriation.

The second issue not covered by the Third Geneva Convention is rendition, or the practice of sending captives for interrogation and detention to foreign countries with lower standards for humane treatment of prisoners. Though by no means exclusive to the US, this practice has been in use by the US Government for decades, and is a critical item of consideration for international humanitarian law. According to investigative journalist Stephen Grey in 2006, "The United States has obtained assurances, [Bush] implied, that countries like Egypt would not torture a suspect who was rendered into their custody."[216] Additionally, Grey states that for "more than a decade, under both presidents Clinton and Bush, the rendition program had sent prisoners to foreign jails in the full knowledge that these prisoners would be tortured."[217] There is no doubt that rendition starkly contrasts with the intent of the Convention to protect the dignity of human life, but the Convention only applies to combatants declared to be POWs.

Article 12 of the Convention requires that "prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention."[218] Being that this article applies only to

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[216] Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program* (New York: St. Martin's Press, 2006), 215.

[217] Ibid.

[218] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 12.

prisoners of war certain non-state actors are exempt from the protection of this article if they are not classified as POWs. If the definition of POW expanded to cover such individuals, then the practice of rendition becomes a violation of Article 12 of the Convention. However, depending on how the criteria for combatant status changes under Article 4, Article 12 may still not be sufficient to address rendition operations. Therefore, the revision to the Convention should include the expressed prohibition of rendition operations by any High Contracting Party with respect to any detained person, POW or otherwise.

The previous examples of issues not fully addressed by the Convention are by no means comprehensive. Examples of other matters devoid of sufficient attention within the Convention include temporal limitations on preventative detention and the classification and associated responsibilities of "failed states." These two topics both have significant applicability in conflicts with non-state actors and the ever-changing global geopolitical landscape. Therefore, these concerns, amongst many others, also warrant due consideration.

Conclusion

As long as humans endeavor to wage war, the international community must maintain the applicability of international law to the current and future character of war in order to meet mankind's moral obligation to the humane treatment of prisoners during armed conflict. As the character of war evolves, so too must the legal framework by which mankind dictates its behavior. The globalization of economic and informational infrastructure, a resurgence in nationalist movements, creation of space and cyber space as new warfare domains, as well as the rise of violent extremist organizations and trans-

national criminal organizations have all combined to create a new modern battlefield. The international community drafted multiple iterations of the Geneva Conventions and other documents of international law between the inception of humanitarian law in the mid-nineteenth century, and the creation of the Geneva Conventions in 1949. Yet, despite all of the evolutionary changes previously mentioned, no revisions to the Conventions have been made in the almost seven decades since 1949, save the drafting of the Additional Protocols.

Twentieth and twenty-first century history show that prisoners of war are not sufficiently protected under the existing Third Geneva Convention of 1949. Whether behind the trenches of the Western front in 1917, in Japanese prison camps in the Philippines, on the island of Koje-Do south of Pusan, in the jungles of Vietnam, the desert of Iraq, or Guantanamo Bay, combatants held prisoner during armed conflict have repeatedly faced unethical treatment while in captivity. And Detaining Powers have similarly struggled to comply with the standards of international law. Due to humanity's innate fallibility, which is only magnified during times of war, no legal construct will ever completely eliminate the inhumane treatment of prisoners in armed conflict. History has revealed this truth over and over again, and it is no longer possible to ignore.

The answers are not simple, and the effort to implement change will be herculean. Historian Benjamin Wittes summarizes the challenge ahead: "To make law for our current conflict, contemporary America will need to apply its own values, its own instincts, and its own evaluations of risk. And it will need to undertake this project in the institution of its government which exists in order to write new rules for new

circumstances."[219] America has an opportunity to lead the effort to bring international humanitarian law into the present day, just as it did seventy years ago. In doing so, America will honor and reaffirm its own commitment to the protection of human life, and pay homage to the thousands of prisoners of war mistreated throughout history.

Items for Further Research

Two items for further research surfaced throughout the course of this study, but were beyond the scope of this thesis. Further analysis of the following topics will build a more holistic view of the difficulties faced by international law moving forward through the twenty-first century.

This study focused exclusively on the Third Geneva Convention of 1949, but a very similar study into the Fourth Geneva Convention of 1949 would provide an even more comprehensive analysis of the asymmetric conflict against non-state actors. The non-state actor dilemma is a gray area between the laws of war pertaining to combatants, and international law protecting civilians from the damages of war. A similar study would focus on the evolution civilians in conflict through the lens of international law, and examine its applicability to current and future conflict. As the front lines of battle continue to blend into residential areas, with the distinction between militants and civilians continuing to degrade, how will the role of civilians in war change?

Another item of consideration is how international humanitarian law addresses conflict in the evolving domains of warfare, specifically cyber space. As mentioned earlier in this chapter, cyber warfare is an integral aspect of the battlefield. One could

[219] Wittes, 17.

consider individuals that wage war in this new domain as enemy combatants. How does this affect our understanding of prisoners of war? What are the ethical considerations involved in cyber domain warfare, and how should international law account for these concerns?

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