Pre-published copy.

European Journal of International Law

Journal:	**European Journal of International Law** (ISSN: 0938-5428, ESSN: 1464-3596)
RoMEO:	This is a RoMEO **yellow** journal
Paid OA:	This journal is not in the list for the paid open access option.

Date of acceptance: 28 June 2017

The impact of the First World War on the law governing the treatment of prisoners of war, and the making of a humanitarian subject

Neville Wylie* and Lindsey Cameron**

Abstract

This paper evaluates the impact of the First World War on the development of international humanitarian law (IHL) regarding the treatment of prisoner of war (POW). In contrast to traditional scholarship, which overlooks the war's significance on the jus in bello, we argue that in the area of POW law, the changes brought about by the war were significant and long lasting, and led to the creation of a POW convention in 1929 that set IHL onto a markedly different path from that followed before 1914. Although the process was only completed with the signing of the four Geneva Conventions in 1949, many of the distinguishing features of modern POW law had their roots in the experience of captivity during the First World War and the legal developments that followed in its wake. In particular, the scale, duration and intensity of wartime captivity after 1914 gave rise to a conceptual shift in the way POWs were perceived, transforming their status from 'disarmed combatants', whose special privileges were derived from their position as members of the armed forces, to 'humanitarian subjects', whose treatment was based on an understanding of their humanitarian needs and rights.

The legal significance of the First World War is generally judged to lie in the impact it exercised on the *jus ad bellum* and in crystallizing ideas around such concepts as collective security and the protection of minority populations. By contrast, its imprint on the *jus in bello* is considered to have been comparatively slight. Having just concluded the 'war to end all wars' and embarked on an era that sought to outlaw force from the conduct of international affairs, statesmen and lawyers alike were understandably wary after 1918 of devoting their energies towards legislating on how future wars might be fought. No attempt was made to resuscitate The Hague 'peace' conferences and such steps that were taken to codify the conduct of hostilities – the draft Hague Rules on Air Warfare (1923), and the League of Nations' World Disarmament Conference (1932-34) being the most obvious examples – revealed both the dangers implicit in such

endeavours and their ultimate futility. Only the 1925 Geneva Protocol, prohibiting the use of poisonous gas, and the two Geneva conventions of 1929, dealing with the battlefield sick and wounded and prisoners of war, proved capable of withstanding the test of time.[1] This meagre record is in stark contrast to the wave of codification that followed in the wake of the 1939-1945 war. It is the post-1945 paradigm, hewn from the experiences of the Second World War and embedded in the four Geneva Conventions of 1949, that is typically held to provide the template for today's 'law of armed conflict', or international humanitarian law (IHL).[2]

This paper challenges the orthodox view that the developments in *jus in bello* arising from the First World War are of little consequence or simply reflected traditional 19th century norms.[3] Focusing on the law relating to the treatment of prisoners of war – 'POW law' – we argue that the war's impact on the *jus in bello* was both significant and long lasting. We do so by drawing on our respective methodological approaches, as an historian and a lawyer; offering a revised account of the changes wrought by the war in the treatment of POWs, and then identifying how these changes shaped the direction of legal thinking after the war. Far from generating ideas that merely echoed customary practice, we argue that the First World War not only transformed the position of prisoners of war, by conferring on them the status of 'humanitarian subjects', but also exercised a profound influence on this area of international law, the effects of which are still with us today. In the process, the paper contributes to our broader understanding of how international law shaped, and was in turn shaped by, the experience of war

* Professor, School of Politics & International Relations, University of Nottingham, UK. Email: neville.wylie@nottingham.ac.uk.

** Legal Division, International Committee of the Red Cross, Geneva, Switzerland. Email: lcameron@icrc.org.

The authors are grateful for the advice of the journal's anonymous reviewers and for the opportunity to explore the themes in this paper at the workshop on 'International Law and the 1st World War' (Jesus College Oxford, September 2015), conference on 'Law as an Ideal? The Protection of Military and Civilian Victims to the Test of the 1st World War' (ICRC, September 2014), and the research seminar at the New Zealand Centre for Human Rights Law (March 2014). They also thank Fabrizio Bensi for his invaluable help in the ICRC Archives. This article was written in a personal capacity and does not necessarily reflect the views of the ICRC or its legal division.

[1] See Roberts, 'Land Warfare: from Hague to Nuremburg', in M. Howard, G.J. Andrepoulos and M.R. Shulman (eds), *The Laws of War: Constraints on warfare in the western world* (1994) 124-128.
[2] See Robert Kolb, *Advanced Introduction to International Humanitarian Law* (2014) at 1-14.
[3] See Geoffrey Best, *Humanity in Warfare* (1983), at 220.

between 1914 and 1918.[4] It also prompts us to question the traditional prominence attached to the events of the 1940s as a watershed in the history of IHL.[5] The paper begins by sketching the key features of the pre-1914 'POW legal regime', and then turns to examine three aspects of captivity during the First World War – prisoner repatriation, the use of reprisals, and the introduction of 'organizations of control' – that collectively symbolized and in large measure inspired the transformation in POW law once the war came to an end.

1. Legal Foundations

The starting point for any evaluation of the First World War's impact on the law governing the treatment of POWs is the Hague Convention (II) of 1899, revised in 1907 as the Hague Convention (IV) on the law and customs of war on land.[6] Although states had their own 'field regulations' to guide them in times of war, and had periodically addressed the matter at international congresses since the 1870s, it was only in 1899 that the international community agreed on a set of legally binding rules. These rules were applicable to warfare with the so-called 'civilized' word, but not always considered applicable for colonial conflicts against non-white opponents.[7] Updated in the light of the 2nd South African (Boer) and Russo-Japanese wars at the turn of the century, the eighteen 'POW' articles in the regulations annexed to 1907 Hague Convention (IV) faithfully reflected current European practice, but did not prescribe how these

[4] Isabel Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2014), at 2. Deprechin, 'The Laws of War', in Jay Winter (ed.), *The Cambridge History of the First World War* 3 Vols (2014) 615-638. Jones, 'International Law and Western Front Prisoners in the First World War', in A-M Pathé and F Théofilakis (eds), *Wartime Captivity in the Twentieth Century* (2016), 30-44.
[5] Best, *Law and War since 1945* (1994), at 8-9 and *passim*.
[6] In general, see Neff, 'Prisoners of War in International Law: The Nineteenth Century' in S. Scheipers (ed.), *Prisoners in War: Norms, military cultures and reciprocity in armed conflict* (2009) 57-73.
[7] Although we do not deal with this issue here, it is worth noting that attitudes towards the selective application of POW law changed over this period. See *inter alia*., Hull, 'Prisoners in Colonial Warfare: The Imperial German Example', in Scheipers, *supra* note 6, 157-172. Jones, 'Imperial Captivities: Colonial Prisoners of War in Germany and the Ottoman Empire, 1914-1918', in S. Das (ed.), *Race, Empire and First World War Writing* (2011), 175-193, Schroer, 'The Emergence and Early Demise of Codified Racial Segregation of Prisoners of War under the Geneva Conventions of 1929 and 1949', *Journal of the History of International Law* 15/1 (2013) 54-76 and Mégret, 'From 'savages' to 'unlawful combatants': a postcolonial look at international humanitarian law's 'other'', in A. Orford (ed.), *International Law and its Others* (2006), 265-317.

principles were to be applied.[8] Thus, ultimate responsibility for the treatment of prisoners lay with the captor state, not the individual who captured them or the state to which the prisoner owed his allegiance. The detaining power was to ensure that prisoners were treated 'humanely' at all times, to restrict their movement only as required for their personal security or as 'indispensable measure(s) of safety', and to adequately compensate 'other rank' POWs for work performed, in or outside the place of detention. Such work was not to be of a military nature. In return, prisoners were subject to the detaining power's laws and regulations, could be punished for acts of insubordination and disciplined for attempting to escape. The detaining power was responsible for meeting the prisoners' basic needs; their upkeep, lodgings and victuals and, in the case of officer-prisoners, their payment too. Prisoners were free to follow their religious beliefs, communicate with their families at home and benefit from the 'charitable zeal' of societies established for their relief, whether from their own countries, their enemies or from the neutrals. Living conditions were set at a level commensurate to that of the detaining power's own servicemen. The only area where the prisoner's own government retained some authority was on the issue of parole, whereby prisoners would be granted freedoms, or permitted to return home, on the understanding that they would not escape or take up arms against their one-time captor. Governments could refuse their men the right to offer or accept parole, but once offered and accepted, the government could neither renounce the agreement nor force any repatriated prisoner to return to active service. Prisoners who broke parole forfeited their rights as POWs and laid themselves open to criminal prosecution. While three articles were devoted to the system of parole, the regulations took no position on the wartime release or exchange of prisoners, and limited itself to noting that post-war repatriation should take place 'as quickly as possible' after the cessation of hostilities.

Many of these core principles have remained the same over the past century and may appear to have been simply tweaked or set out in greater detail in the 1929 and 1949 Geneva Conventions relating to prisoners of war. However, the constancy of these essential principles may have obscured the significance of other changes regarding the POW regime. In our view, the post-war developments are better seen as a picture of continuity and change. The aspect of change is important to recognize because it underlines that, following the First World War, states

[8] Text available at: https://ihl-databases.icrc.org/ihl. See Alon Rachamimov, *POWs and the Great War: Captivity on the Eastern Front* (2002) 67-86.

looked to make the standards more effective to protect prisoners of war, but also sought new ways to enhance the implementation of international law. In other words, the negotiators of the 1929 Geneva Conventions understood that more words on paper, without the tools to make sure they would not easily be cast aside or trampled, were not sufficient.

Although attitudes and detention practices after 1914 thus frequently followed traditional norms, the duration of the war, its scale and intensity, exposed important gaps and weaknesses in the pre-war legislative framework. The sheer number of prisoners – estimated at between 6.6 and 9 million men, or about a quarter of the population of France – dwarfed earlier conflicts. The majority of these men were taken on the eastern front, where one in three Austro-Hungarian soldiers and one in five Russian soldiers fell into enemy hands. But by the war's end, captivity had become a genuinely global phenomenon, with an archipelago of camps and work detachments stretching into every corner of the world.

The economic importance of POW labour also assumed a magnitude unforeseen by pre-war legislators. All the major belligerents extracted economic benefit from their enemy captives but it was the Central Powers, with no colonial workforce to draw on, that became particularly addicted to POW labour. By 1918, Germany's 1.1 million Russian prisoners were deemed so critical to Germany's economic output that Berlin refused to agree to their repatriation as part of the Brest-Litovsk peace talks.[9]

Finally, although conditions of captivity varied widely, recent research has uncovered evidence of prisoner abuse, through neglect, coercive control or physical violence that overturns previous assumptions about the relatively benign nature of military imprisonment during the war.[10] Opinions vary as to why this occurred, but few pre-war norms were not flouted during the war; prisoners were employed in war-related tasks, often within range of their own guns, and subjected to a variety of reprisals, either in retaliation for the perceived ill-treatment of their own men or for alleged infractions of other treaty or customary norms, unconnected with the status of prisoners of war.[11] The fate and treatment of POWs thus quickly established itself as a matter of

[9] See Davis, 'Prisoners of War in Twentieth Century War Economies', XII *Journal of Contemporary History* (1977), at 623-634.
[10] Kramer, 'Prisoners in the First World War', in Scheipers, *supra* note 6, 75-90, at 76-77.
[11] Hinz and Oltmer explain it in terms of the war's waxing economic demands and the need to maximize output; Jones depicts it as part of the broader radicalisation of warfare. Uta Hinz, *Gefangen im Großen Krieg: Kriegsgefangenschaft in Deutschland 1914-1921* (2006); Oltmer, 'Unentbehrliche Arbeitskräfte Kriegsgefangegen in Deutschland 1914-1918', in Jochen Oltmer (ed.), *Kriegsgefangenenschaft im*

debate, and a central motif in wartime propaganda campaigns and public discourse.[12] Its significance to post-war attitudes is apparent in French and British attempts to try those accused of prisoner abuse for war crimes in the early 1920s.[13]

Writing shortly after the cessation of hostilities, the lawyer J. W. Garner commented that 'hardly one of The Hague conventions [could not] be greatly improved in the light of the experience of the recent war'. Many of the pre-war rules, he concluded, were 'inadequate, illogical or inapplicable' to modern warfare.[14] It is our contention that in revising the *jus in bello* after 1918, the international community went beyond making it merely 'adequate, logical and applicable', but initiated a fundamental transformation in the position POWs occupied in international law. We begin by assessing the war's impact on the question of prisoner repatriation and exchange.

2. Repatriation

The repatriation of POWs was an area that had undergone a profound change over the course of the preceding century. As Stephen Neff observes, the 19th century saw practice shift from one in which prisoners were routinely released *before* the end of hostilities – by conscripting them into their captors' armies, offering them parole, or exchanging them across the battle-lines – to one that increasingly saw enemy captives detained for the entire duration of the war.[15] In short, norms relating to captivity and imprisonment came to eclipse those governing methods of release and exchange. This tendency was not, of course, ubiquitous. Boer commandoes regularly freed or paroled prisoners they were unable to detain. But the experience of the Franco-Prussian war and the American Civil war, where attempts to arrange exchange cartels all ultimately

Europa des Ersten Weltkrieges (2006), 67-96. Heather Jones, *Violence Against Prisoners of War, Britain, France and Germany 1914-1920* (2011).

[12] See for example, British Foreign Office, *The Treatment of Prisoners of War in England and Germany during the first eight months of the war* (London: HMSO, 1915).

[13] Hull, *supra* note 4, at 278. Gerd Hankel, *The Leipzig Trials: German War Crimes and Their Legal Consequences after World War I* (2014).

[14] J. W. Garner, *International Law and the World War*, 2 Vols (1920), Vol 2, at 452, 463.

[15] Neff, *supra* note 6, at 57-73. Ransoming had already declined by the turn of the 19th century: see Rothenburg, 'The Age of Napoleon' in M. Howard, G.J. Andrepoulos and M.R. Shulman (eds), *The Laws of War: Constraints on warfare in the western world* (1994), at 86-97.

floundered, was symptomatic of the general trend.[16] This process spoke to a definition of prisoners as essentially 'disarmed warriors' rather than 'non-combatants' or innocent 'victims of war'. The 1907 Hague Regulations reflected this trend, framing the conditions of captivity and treatment on the basis of prisoners remaining members of their armed forces, whose behaviour would be governed by martial values and a warriors' code, rooted in western concepts of chivalry and military honour. This was particularly evident in the articles dealing with parole, but was also heard in the criticisms of those who felt that the pampering of prisoners sat ill with their status as servicemen and might, in the words of the Austrian emperor, 'be an inducement to cowardly or effeminate soldiers to escape the dangers and hardships of war...'.[17]

Detention practices during the First World War amply confirm the veracity of Neff's observations. The increasingly 'attritional' mind-set that took hold in strategic thinking from late 1914 naturally stifled any thought of exchanging able-bodied military prisoners. With a single exception, discussed below, all able-bodied POWs had to wait until the end of the war for their liberation.[18] Governments often allowed doubts over their prisoners' loyalty or fighting spirit to justify withholding the dispatch of relief parcels and deny them the right to offer their parole. Rome's refusal to attend to its prisoners' welfare contributed to the very high death rates – upwards of fourteen percent – amongst Italians prisoners captured at the battle of Caporetto. At the war's close, fear of political or biological 'contamination' frequently coloured official and popular attitudes towards returning prisoners.[19] The prisoners' desire to return home at the end of hostilities was thus repeatedly subordinated to the political, military or economic ambitions of their governments or captors, many of which reflected ethnic or national goals that bore little resemblance to the political realities the prisoners had known before their captivity.[20] In this sense, the First World War was a harbinger for the kind of politicized treatment of prisoners that

[16] Stephanie Carvin, *Prisoners of America's Wars* (2010), at 63-66.
[17] Lord Lyons (British ambassador to Paris) to the Earl of Derby (Foreign Secretary), 13 July 1874. National Archive, UK (TNA) FO83/481.
[18] There was no code governing the treatment of civilians. For earlier conflicts, see Caglioti, 'Waging War on Civilians: The Expulsion of Aliens in the Franco-Prussian War', 221 *Past & Present* (2013) 161.
[19] See Rachamimov, *supra* note 8, at 133-159, 191-220; Yücel Yanikdağ, *Healing the Nation Prisoners of War, Medicine and Nationalism in Turkey, 1914-1939* (2013); Giovanna Procacci, *Soldati e prigionieri italiani nelli Grande Guerra* (2000).
[20] See Hazuki Tate, 'Rapatrier les prisonniers de guerre: la politique des Alliés et l'action humanitarire du Comité international de la Croix-Rouge (1918-1929)' (2015) (PhD thesis on file at École des hautes études en sciences sociales).

occasioned the end of fighting in 1945 and the armistice negotiations following the Korean War. It placed 'the camp' and its associated 'regime of exception' at the epicentre of the national 'warfare-state', accelerating a process that had emerged in the Boer and Spanish-American wars at the turn of the century, but which became a central feature of modern state formations for the remainder of the twentieth century and beyond.[21]

For our purposes, it is the release and repatriation *during* the course of hostilities that repay closest scrutiny, for it is in these practices that we see the emergence of a distinctively new status for POWs at the war's close. The release of sick and wounded prisoners had a long pedigree, and had featured in the Geneva Conventions of 1864 and 1906 and the 1899/1907 Hague Regulations.[22] The belligerents of the First World War settled on two categories of wounded prisoner for release and repatriation. The first category – severely wounded or 'invalids' – were offered direct repatriation home. Operations commenced across Switzerland in March 1915, and were extended to the Netherlands and Sweden later that year. While there were numerous precedents for the exchange of 'invalids', the privileges accorded to the second category of prisoners – those suffering from non-life-threatening wounds or tuberculosis – was altogether new, and arose out of a proposal from the International Committee of the Red Cross (ICRC), that prisoners whose injuries were insufficiently grave to qualify them for direct repatriation be considered for internment in neutral countries instead.

Hospitalising prisoners in neutral sanatoriums was advocated in the revised Geneva Convention of 1906 – having first appeared in a draft code on maritime warfare in 1868 – but, as with direct repatriation, belligerents were under no direct obligation to do so.[23] The first operation to hospitalize sick and wounded prisoners nevertheless took place in January 1916,

---

[21] See Minca, 'Geographies of the camp', 49 *Political Geography* (2015) 74-83; Stéphane Audoin-Rouzeau and Annette Becker, *14-18: Understanding the Great War* (2002) 70-93. Jones, 'A Technological Revolution? The Great War and the Radicalization of the Prisoner of War Camp', in Alan Kramer and Bettina Greiner (eds), *Welt der Lager. Zur 'Erfolgsgeschichte' einer Institution* (2013), at 110.

[22] Article 6 of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field 1864 proposed various options, Article 2 of the 1906 Geneva Convention provided for special agreements for it, and Article 21 of the Regulations of Convention No. II with Respect to the Laws and Customs of War on Land, with annex of Regulations, 29 July 1899, 32 *Stat.* 1803, 1 *Bevans.* 247, incorporates the 1864 Geneva Convention by reference.

[23] Article 5 of the Draft Additional Articles relating to the condition of the Wounded in War 1868, 18 *Martens Nouveau Recueil* (ser. 1) 612; Article 2, Convention for the Amelioration of the Condition of Wounded and Sick in Armies in the Field 1906, 11 *LNTS* 440, called upon belligerents to enter into special agreements.

when a party of tuberculosis patients were received in Switzerland. The Dutch, Norwegians and Danes opened their doors over the course of 1916 and 1917, and agreements were reached clarifying the selection criteria and processing arrangements. By the time the war came to an end nearly 80,000 men of all nationalities had profited from early release and internment in neutral hospitals.[24]

Practice during the First World War also departed from the written codes in conferring repatriation on 'long-term' prisoners; men who had been held for over eighteen months and were either fathers of large households (with three or more living children) or over a certain age. Needless to say, negotiations on the issue proved difficult, and despite intense public pressure, the first agreement, between France and Germany, was not finalized until April 1918. Thereafter, however, the idea quickly took hold, and was applied in various forms to German agreements with Belgium, Britain and America. Significantly, the rationale for bestowing special privileges on able-bodied prisoners went beyond merely the 'humanitarian' desire to release those held for long periods of time. It was, rather, based on medical grounds, in particular the accumulating evidence that pointed to the prevalence of 'barbed-wire' disease amongst men subjected to prolonged periods of captivity.[25]

It would be wrong to assume that these exchanges were unproblematic. Though aided by neutral governments and national Red Cross societies, negotiations were rarely free from the pressure of external events.[26] Russia unilaterally suspended exchanges in reprisal against the torpedoing of one of its hospital ships in March 1916. The following year the German High Command began excluding prisoners employed in front-line labour companies from repatriation for fear that they would reveal information on German installations.[27] Officials clearly feared being distracted by 'sentimental rubbish'; had public interest in the matter not been so intense,

---

[24] Susanne Wolf, *Neutrality: Diplomacy and Internment in the Netherlands during the First World War*, (2013) 147-163; Georg Wurzer, *Die Kriegsgefangenen der Mittelmächte in Russland im Ersten Weltkrieg* (2008), at 387-397.

[25] See Annette Becker, *Oubliés de la Grande Guerre. Humanitaire et culture de guerre* (1998), at 213-228. For evolving attitudes towards 'barbed wire disease', see Jones and Wessely, 'British prisoners-of-war: from resilience to psychological vulnerability: reality or perception', 21 *20th Century British History* (2010) 163-183.

[26] See Hinz, 'Humanität im Krieg? Internationales Rotes Kreuz und Kriegsgefangenenhilfe im Ersten Weltkrieg', in Jochen Oltmer (ed.), *Kriegsgefangene im Europa des Ersten Weltkriegs*, (2006) 216, at 226. Davis, 'National Red Cross Societies and Prisoner of War in Russia, 1914-1918', 28 *Journal of Contemporary History* (1993) 31-52.

[27] Jones, *supra* note 11, at 161.

especially after the outbreak of typhus in German and Russian camps over 1915 and 1916, it is unlikely that the negotiations would have led to such fruitful results.[28]

At the same time, however, it is clear that there were strong currents propelling the exchange and repatriation operations. The complicated procedures and criteria for selecting prisoners for repatriation were agreed with comparative ease. On the western front negotiations were conducted through government channels, but in the east, responsibility was devolved to the Red Cross societies, who were naturally sympathetic to the prisoners' humanitarian needs and less constrained by overtly political or military considerations.[29] The arrangements were transferred to other theatres, building a momentum officials found difficult to resist. British efforts to negotiate the return of long-term prisoners in 1917 were, for instance, 'a good deal hampered' by the existence of an earlier Franco-German agreement on the same subject, the terms of which they disliked. 'We have steadfastly refused to consider some of the worst features …', admitted the British negotiator, '[but] the Germans are constantly referring to [it] and we cannot ignore it entirely'.[30] Governments did, of course, flout agreements when it suited their book, but they seemed powerless to prevent the gradual liberalisation of the exchange regime; extending its provisions from severely invalided prisoners to more lightly-wounded and later to long-term or old captives or those suffering from mental or psychological infirmities. Arrangements governing the repatriation and neutral internment operations were likewise progressively relaxed. Medical criteria were loosened, selection based on the category of illness rather than strict numerical parity and permission granted for family members to visit internees in Switzerland and the Netherlands. This process was in sharp distinction to the radicalisation of policy and attitudes that marked other areas of POW treatment during the war.

The impressive scale of the repatriation and exchange operations could be taken as indicative of the way in which the First World War echoed earlier customary or chivalric

[28] Diary of Lt. Gen. Sir Herbert Belfield, Diary, 29 June 1917. Imperial War Museum 91/44/1 HEB 1/1. See *The Horrors of Wittenburg. Official Report to the British Government* (London: HMSO, 1916); Nachtigal, 'Seuchen under militärischer Aufsicht in Rußland: Das Lager Tockoe also Beispiel für die Behandlung der Kriegsgefangenen 1915/1916', 48 *Jahrbücher für Geschichte Osteuropas* (2000) 363-387. The belligerents also took a restrictive attitude towards their obligations under the Geneva Convention to return of 'protected' medical personnel. Cameron, 'The ICRC in the First World War: Unwavering belief in the power of law?', 97 *International Review of the Red Cross* (2015), 1099-1120.
[29] See Streeruwitz, 'Die Stockholmer Konferenz 1915', in H. Weiland and L. Kern (eds), *In Feindeshand: Die Gefangenschaft im Weltkriege in Einzeldarstellungen* 2 Vols (1920) Vol 2, 331.
[30] Sir Herbert Belfield, Diary, *supra* note 28, 29 June 1917.

conventions.[31] But the nature of the exchange regime after 1914 hints at the existence of attitudes that were distinctively new. In widening the scope of the repatriation operations, the belligerents implicitly assimilated prisoners to the 'protected' status that had previously been reserved for those made *hors de combat* by their wounds or ill health. This was most evident in the case of the 'long-term' POWs, whose treatment was based on their psychological, rather than physical, 'wounds'; ailments derived not from the battlefield but from the strain of prolonged detention. The emphasis on the prisoners' humanitarian needs represented an advance on the views held as recently as 1906, when the Geneva Conference agreed that any sick and wounded combatant who fell into the hands of their enemies should be categorized as prisoners first, and only then receive special humanitarian dispensation on account of their wounds.[32] By 1918, 'barbed wire disease' had transformed thinking on captivity, fostering an environment in which whole categories of prisoners could be released on the basis of their humanitarian and medical conditions. In a war of attrition, the fact that concern for the mental health of POWs superseded arguments for the need to continue detaining them is no small matter.

This conceptual shift is immediately apparent in the discussions leading to the signing of the 1929 Geneva Convention on POWs. While the 1906 Geneva Convention merely encouraged belligerents to repatriate sick and wounded prisoners 'by way of exception or favour', the 1929 POW convention was much more insistent. Belligerents were 'required' to repatriate seriously wounded men 'without regard to rank or numbers' (Article 68). The Convention also followed the wartime agreements – notably the US-German agreement of November 1918 – in laying out detailed selection criteria and procedures for organising repatriation operations. Only the prospect of accommodating long-term prisoners 'in good health' in neutral countries was left optional (Article 72), on the grounds that it was unwise to legislate on the actions of states not party to the conflict. As for the thorny issue of repatriating prisoners at the end of hostilities, the drafters in 1929 could find no way of improving on the 1907 Hague Regulation's rule for

[31] Nachtigal estimates the number of men released before October 1918 at about 1.2 million. 'The repatriation and reception of returning POWs, 1918-1922', 26 *Immigrants & Minorities* (2008) 157. For repatriations after 1939, see Overmans, 'The Repatriation of Prisoners of War once Hostilities are Over: A Matter of Course?', in B. Moore and B. Hately-Broad (eds), *Prisoners of War, Prisoners of Peace: Captivity, Homecoming and Memory in World War II* (2005), at 11.

[32] Diplomatic Conference for the Revision of the Geneva Convention of 1864, Geneva, Minutes of 1st committee, 4th Meeting, 19 June 1906. Davis, 'The Geneva Convention of 1906', 1 *AJIL* 409 at 414.

repatriation to take place 'as soon as possible after the conclusion of peace' (Article 75).[33] They did, though, seek to close one loophole by preventing any denunciation of the convention from taking effect before the repatriation of prisoners was complete (Article 96). Parole was entirely absent from the 1929 POW convention. It was only reinstated in the 1949 Geneva Convention (III) (Article 21) after states had repeatedly reverted to the practice during the Second World War as a means to facilitate a more humanitarian treatment of individual prisoners of war in specific cases.[34]

That most humanitarian of gestures – releasing men from captivity into the care of their families and loved-ones – was thus granted in the 1929 Convention as a set of discrete rights, not as favours based on the strength of a man's word or by allegiance to some traditional martial code. Though largely accepted today, this important conceptual shift has come under pressure, such as when states have refused to release or repatriate prisoners deemed guilty of violating the laws of war. While not entirely new – after 1914 both London and Washington sought, unsuccessfully, to exclude U-Boat crews from release arrangements – the Cold War conflicts frequently saw prisoners branded as war criminals and refused release.[35] At the same time, the principle was strengthened in the 1949 Convention by an obligation to allow wounded and sick POWs to make an individual decision as to whether they wish to be repatriated, in keeping with the principle of non-refoulement.[36]

3. Reprisals

During the First World War, prisoners of war suffered greatly from the consequences of measures purportedly taken in reprisal for unlawful acts allegedly committed by their respective states. Reprisals against POWs were not prohibited under international law, and states entered

[33] Article 20 of the 1907 Hague Regulations.
[34] J. Pictet (ed.), *Commentary on Geneva Convention III* (1960), at 178-180; *Report of the Commission of Government Experts*, 1947, pp. 133-134. Parole was considered 'particularly valuable to disabled prisoner of war awaiting repatriation'.
[35] Zillman, 'Political uses of prisoners of war', 6/2 *Arizona State Law Journal* (1975), 237-74.
[36] Article 109, Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949, 75 UNTS 135. See also the updated commentary on Article 7, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31, in ICRC, *Commentary on the First Geneva Convention* (2016), at paras 999-1001, and the commentary on Article 118 of the Third Convention, Pictet, *supra* note 34, at 541-549.

the war in 1914 determined, as the French government put it, to exercise their 'full right of reprisals which they might find themselves brought to exercise against an enemy so little regardful of its plighted word'.[37] Some of the reprisal measures, such as suspending communication rights, might appear prosaic, but all reprisals, however 'petty', undermined the authority of the POW regime.[38] As Isabel Hull observes, the First World War was to be 'disfigured by wave after wave of violent reprisals exercised with lethal stubbornness'.[39] Germany, and arguably France too, opened 'reprisal camps' where prisoners were subjected to deliberately harsh or humiliating treatment in reprisal for the alleged wrong-doing of their adversaries.[40] By 1917, the French, Germans and British were holding prisoners in front line labour companies, where, in apparent contravention of Article 6 of the 1907 Hague Regulations, the men were employed on war-related tasks, often within range of their own guns, and denied access to relief parcels or inspection visits by neutral diplomats.[41] Those parties finally agreed to move the prisoners thirty kilometres behind the front lines, but even then, they continued to threaten retaliation for alleged infringements on the letter or spirit of their agreements and to use POWs in war-related work.[42]

The cycle of reprisals taken against POWs between 1914 and 1918 has been construed in different ways: some historians see it as a vector for the increasing violence toward POWs as the war progressed,[43] while others point to the fact that the term 'reprisal' was used to justify

[37] French Yellow Book. *Journal Officiel*, 6 Aug. 1914, p. 7133, reprinted in *International Law Studies Series. US Naval War College* (1917) 86-87. Today it is prohibited to carry out reprisals against a broad range of persons and objects under IHL. See J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* 2 Vols, (2005), Rules 145, 146, 147; see the commentary on Article 46 of the First Geneva Convention in ICRC, *Commentary on the First Geneva Convention*, (2016).
[38] Jones 'A Missing Paradigm? Military Captivity and the Prisoner of War, 1914-18' 26 *Immigrants & Minorities* (2008) 19, at 27.
[39] Hull, *supra* note 4, at 278.
[40] See, for details, Jones *supra* note 11, at 127-161.
[41] Article 6 stipulated that the 'tasks shall not be excessive and shall have no connection with the operations of the war.' Unlike the later conventions, the Hague Regulations did not call for the removal of POWs from exposed areas. Paris defined war work narrowly as 'handling munitions'. *Bulletin International des Sociétés de la Croix-Rouge* (July 1917), at 287; Hull, *supra* note 4, at 292-293. On the *de jure* applicability of the Hague Conventions during the First World War, see Cameron, *supra* note 28.
[42] In the ICRC Archives, see file CG1 A 35-08, Transfert en 1917 de prisonniers français dans la zone des armées allemande en représailles du maintien de prisonniers allemande dans la zone des armées française 25/01/1917-31/05/1918. See especially Heather Jones, 'The German Spring Reprisals of 1917: Prisoners of War and the Violence of the Western Front', 26 *German History* (2008) 335-356.
[43] Jones, *supra* note 11, at 127-161. Becker supra note 25, at 279-292.

unlawful behaviour, not necessarily connected with an intent to redress or deter unlawful behaviour on behalf of their enemies.[44]

A reprisal is an act that would normally be unlawful, taken in response to a prior unlawful act, with the aim of getting the 'scofflaw' to return to compliance with the law. In 1914, while it was accepted that the taking of reprisals was permissible under international law, there was little clarity as to how reprisals could be applied in practice. In the *Naulilaa* case (1928), the arbiters, assessing a situation that occurred in 1914, held that for a reprisal to be lawful, there had to be a violation of an existing rule of international law, an announcement that measures of reprisal would be taken if the state did not comply with the law, and proportionality between the violation and the measures taken in response.[45] While there was no agreement over what office a person must occupy in order to institute legitimate reprisals, it was certainly not an individual form of vengeance. Likewise, reprisals at that time, as for countermeasures and reprisals now, could only be taken in response to a wrong attributable to a state.[46]

One reason for the lack of precision on the question of reprisals lay in the fact that the 1907 Hague Conventions had passed over the matter in silence. Though delegates clearly viewed reprisals as an essential deterrent against violations of the law of war, they were reluctant to encourage, entrench or legitimize practices which were so obviously distasteful.[47] The resulting 'arbitrariness' of the pre-war reprisals regime clearly worried contemporaries, and led Oppenheim, amongst others, to insist on the 'imperative necessity' of regulating state practice.[48] The issue was all the more pressing given the relative fragility of rules governing the treatment

[44] Hull, *supra* note 4, at 276-316. Scholars are inconsistent in their use of the similar but distinct terms of retaliation, reciprocity, and retorsion. Today peacetime reprisals are referred to as 'counter-measures'. ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts and their commentaries, UN Doc A/56/10 2001, (hereinafter ILC Draft Articles), Part III, Chapter II, Articles 49-54.
[45] Special Arbitral Tribunal, *Naulilaa case (Portugal v. Germany)*, UN Reports of International Arbitral Awards Vol. II, 1928, 1011–1077, at 1026-1027. The arbitrators acknowledged that international law was in a state of flux and that publicists disagreed on the requirement of proportionality. See Woolsey, 'Retaliation and Punishment', 9 *American Society of International Law Proceedings* (1915) 62–69, especially at 66.
[46] Hull, *supra* note 4, at 278. This aspect was stressed in the draft codes developed by the ILA following the war. See below, note 61.
[47] Frits Kalshoven, *Belligerent Reprisals* (1971, reprinted 2005), at 45-68. The matter had, by contrast, been addressed at the Brussels Conference in 1874; Shane Darcy, *Collective Responsibility and Accountability Under International Law* (2007), 134-138.
[48] L. Oppenheim, *International Law: A Treatise* 2 Vols (1905), Vol 2, at 259-263.

of POWs, and the concomitant danger that they would fall victim to states bent on enacting reprisal measures.

The inherent humanitarian concerns of belligerent reprisals are self-evident. They are a mechanism that relies on punishing persons who are not responsible for the initial violation and who may be powerless to stop it. Furthermore, the lawful recourse to reprisals hinges on the existence of a previous violation of an international rule, in circumstances in which it is extremely difficult to determine whether a violation has indeed occurred and where there is no independent body capable of rapidly adjudicating the matter. It is thus left up to the aggrieved state to draw its own conclusion and take the necessary or 'appropriate' action.[49] In case of mistake, reprisals may lead to irreparable harm and are always at risk of abuse. In the First World War, reprisals led to a vicious cycle of acts, each more barbaric than the last, and left the normally applicable law in tatters. Aside from the horrific consequences for their hapless victims, the use of reprisals after 1914 revealed a number of elements which cast doubt on their value as a means of enforcing international law.

In practice, reprisals are frequently orchestrated in such a way as to provoke a public backlash. They are state reactions to another state's behaviour, but in order to work, they often rely on public pressure to bring their government round to abandoning the allegedly unlawful behaviour out of concern for the welfare of their own loved ones.[50] It is a state-to-state mechanism, triangulated through making the population suffer. Thus in 1916 and 1917, Berlin deliberately allowed uncensored letters to reach the families of prisoners held in 'reprisal camps' in the hope of compelling the French government to end its detention of German POWs in camps in North Africa. The tactic had the desired result in this case, but it was less successful with the British; partly due to the smaller number of British POWs affected by the German reprisals, partly to London's reluctance to rescind the measure that had incited German ire in the first place, and partly too, to London's conviction that the employment of German prisoners in French ports did not violate its obligations under the Hague Regulations.[51] The episode again underlined

[49] This point is also made by Hampson, 'Belligerent reprisals and the 1977 Protocols to the Geneva Conventions of 1949', 37 *ICLQ* (1988) 818, at 822-823. The *Naulilaa* panel determined that as Portugal had not violated any legal rule, Germany's action could not be considered a reprisal.
[50] Jones, *supra* note 11 at 165.
[51] Jones, *supra* note 11 at 140-141; Some 30,000 French POWs were detained in the reprisal camps, against 2,000 British.

the dangers of reprisals, as London's obduracy prolonged the suffering of 2,000 British prisoners in German reprisal camps.

The public aspect of reprisals also affected the parties' ability to take effective reprisal measures. With Germany holding many more prisoners than France, the French authorities clearly felt constrained in their ability to play to the public gallery in Germany, and consequently were more restrained in their use of belligerent reprisals. Correspondence between the ICRC and the *Quai d'Orsay* in late 1915 shows the extent of French frustration at trying to match German actions, and their inventiveness in searching for alternative reprisal strategies.[52] Ironically, one of the suggestions aired at the time, directing reprisal measures against German aristocrats, echoed a policy that Germany had employed earlier in the year when attempting to stop London's segregation of U-Boat prisoners. In both cases, the ultimate objective lay in maximising the political impact of the reprisal measures in the target state. It is, though, difficult to avoid the conclusion that reprisals were likely to be a successful tool primarily in the hands of the more dominant, more powerful, or more ruthless state.[53]

Linked to this is the perception of the existence of a violation justifying the resort to reprisals. Isabel Hull argues that the French tended to take reprisals based on information supplied in neutral camp inspection reports, whereas their German counterparts tended to rely on 'the army's unverified suspicions about the enemy's behaviour.'[54] In an unregulated system, although good faith must play a role, there was no consensus on what kind of information could be used to either indicate whether a violation had occurred or justify recourse to reprisal actions. Moreover, the fact that German policy, particularly in the later war years, lay in the hands of the High Command rather than civilian ministries, meant that decisions over reprisals were less susceptible to the anxieties of the German public or concerns over the Reich's legal reputation than was the case in London and Paris.[55]

Moreover, in the case of the French and British POWs held in the reprisal camps, it was not entirely clear that the situation leading to the reprisal in fact constituted a violation of the

[52] See correspondence in ICRC Archives CG1A 35-04.
[53] Lord Phillimore characterized reprisals as 'of no use unless you are the stronger side'. Quoted in (Unsigned) 'The League of Nations and the Laws of War', 1 *British Yearbook of International Law* (1920-1921) 109-124, at 115.
[54] Hull, *supra* note 4, at 286 and 280.
[55] A similar argument can be made regarding the military's influence in Russia's treatment of POWs.

Hague Regulations. As we have seen, this was certainly the view taken in London.[56] It was also, intriguingly, reflected in the ICRC's internal discussions over whether to discredit German justification for its detention of French prisoners in 'reprisal camps' by disseminating its reports on the French camps in Morocco. The ICRC delegates apparently believed that the standards of treatment in Morocco did not amount to a violation of international law. In fact, the ICRC president even reminded his French interlocutors of the existence of these reports, in the belief that public knowledge of their contents might be sufficient to bring about a reversal in German policy. German 'reprisal' action might, then, have forced France into removing German prisoners from Morocco, but may not have been fully motivated by a concern for respect of the law. Indeed, there is evidence to suggest that German policy was based on a belief that in detaining German prisoners in Morocco France was deliberately seeking to undermine German prestige in the eyes of the local population; it was this political objective, and not concerns over the physical health or wellbeing of their men, that steeled German attitudes on the issue.

Various steps and confidence building measures were taken to halt the relentless recourse to reprisals, or prevent them, once enacted, from escalating out of control into a spiral of increasingly brutal measures and counter-measures. From early 1915 neutral diplomats were called upon to inspect prison camps and investigate allegations of ill-treatment. On 12 July 1916, the ICRC called on the parties to renounce the use of reprisals against prisoners.[57] That same year, the belligerents opened negotiations to improve the lot of prisoners, including agreements on the deployment of prisoners outside the battle zone, obligatory four-week notice periods prior to enacting reprisals, and arrangements to diffuse incipient tensions around the treatment of POWs, including pledging to attempt to negotiate.[58] The effectiveness of these measures was limited. Reprisal measures continued to impinge on the lives of POWs until the final days of the war. Even those governments that outwardly deprecated the use of reprisals rarely resisted the temptation to use them when circumstances required: having spent the best part of three years

[56] See correspondence between Horace Rumbold and Edouard Naville and the Frankfurt branch of the German Red Cross, July 1916 – June 1917, ICRC Archives CG1 A 35-06.
[57] André Durand, *The History of the International Committee of the Red Cross: From Sarajevo to Hiroshima* (1984), Vol 2, at 80-81.
[58] Chapter IX 'Reprisals against combatant and civilian prisoners of war', *Grotius Annuaire International* (1917) 165-192, at 179 (paragraph 20).

working to eliminate the use of reprisals, the United States soon resorted to them on entering the war as a belligerent in April 1917.[59]

The efforts taken to diminish, regulate, and finally eliminate reprisals against prisoners of war are indicative of the struggle to find effective and humane mechanisms to ensure the respect of the law of armed conflict. The question of reprisals goes to the heart of states' fear of finding themselves powerless in the face of violations of international law of which they are victim.[60] The problem rippled through the post-war debates on POW affairs. At the 1920 meeting of the International Law Association (ILA), statements like those of Mr. Wyndham Bewes, who described 'the infliction of reprisals upon innocent individuals for the crimes of their Government' as 'revolting and atrocious' were greeted with applause.[61] But the Association nevertheless found it difficult to countenance an outright ban on reprisals or any measure that effectively removed from 'the hands of the constituted authorities the only weapon [they] have against cruelty'.[62] The members of the ILA seem to have clung to the possibility of exercising reprisals specifically against POWs, even though it had long been understood that reprisals need not mirror the violations they were intended to stop. Curiously, in both the ILA meetings and the subsequent Diplomatic Conference in 1929, no one seems to have corrected this misconception. Draft conventions produced by the ILA and other agencies over the course of the 1920s thus sought to regulate the resort to reprisals and tasked protecting powers 'to endeavour to eliminate the reasons for the reprisals, either by arranging a personal discussion between delegates of the belligerent Powers…or in such other manner as may seem to it in the circumstances more appropriate'.[63]

---

[59] Payments to German officer POWs were suspended in December 1917 after Berlin refused to base payments on the German army pay-scale.

[60] This concern lies behind recent calls for recourse to belligerent reprisals against non-State actors. Newton, 'Reconsidering reprisals', 20 *Duke Journal of Comparative and International Law* (2010) 361-388.

[61] International Law Association, 'Prisoners of War: Suggested Regulations', *Report of the 29th Conference (Portsmouth, England)* (1920), 275 at 290-294 and 303.

[62] The last sentence of Article III (Protection) stated, 'Prisoners are not to be subjected to reprisals of any kind in retaliation for any act committed by their Government or fellow subjects.'

[63] Proposed International Regulations for the Treatment of Prisoners of War, Final Report of the Treatment of Prisoners of War Committee, 1921, pp. 236-246. Reichsvereinigung ehemaliger Kriegsgefangener held similar views: *Vorschläge für ein neues Kriegsgefangenenrecht* (Berlin: Reichsvereinigung ehemaliger Kriegsgefangener e. V., April 1929), 25-6. ICRC. CR177-1.

Against this, the ICRC insisted that there was no place for reprisals in POW law. Building on its 1916 appeal, but refined over the course of the 1921 and 1923 International Conferences of the Red Cross, the position was grounded on the belief that once reprisals were admitted in theory, states were unlikely to feel limited by any artful constraints imposed by international jurists. After all, most of the restrictions proposed by those in favour of reserving the right to resort to reprisals were drawn from the war time agreements, none of which had succeeded in either ending reprisals or fully containing their use. More significantly, though, the ICRC's position was derived from the new status of war victims being claimed for POWs. Admitting to states the right to penalize defenceless prisoners for the alleged wrong-doings of their compatriots flew in the face of the committee's determination to entrench prisoners' position as 'humanitarian' subjects. Thus, the last paragraph of Article 2 of the 1929 Convention stated unequivocally, 'measures of reprisals against [POWs] are forbidden'.

Admittedly, no injunction against reprisals had been included in the 1864 and 1906 Conventions on the wounded and sick, nor did it feature in the revised convention on them in 1929.[64] The reason for this lay partly in the general absence of incidents involving reprisals against sick and wounded soldiers, and partly in the reluctance of jurists to legislate over events that took place on the battlefield. The prohibition of reprisals in the 1929 POW Convention naturally covered, though, men who entered captivity as sick or wounded. The Convention also specifically included measures that met the needs of sick and wounded prisoners, such as injunctions against delays to their repatriation or obstacles to the provision of medical facilities. In this sense, Article 2's prohibition on reprisals went beyond merely elevating POWs to the status of privileged combatants; it set a new standard of protection and extended this privilege to the traditional category of sick and wounded soldiers. The article was critical, therefore, in cementing the conceptual shift that transformed POWs from 'disarmed enemies' into 'victims of war'. This was, moreover, widely acknowledged at the time.[65] In the words of the US delegate, the ban on reprisals represented nothing less than a 'new humanitarian rule of international

[64] J. Pictet, *Commentary on the First Geneva Convention* (1952), at 344.
[65] Kalshoven, *supra* note 47, at 71-2.

law'.[66] 'Were [the convention] to contain but this one principle', the conference *rapporteur* triumphantly proclaimed to those present, 'you would not have met in vain'.[67]

The terse minutes of the 1929 conference give little indication as to why the delegates accepted the ICRC's position on reprisals so willingly. The laconic record makes it difficult to know whether, as Kalshoven suggests, the negotiators of the 1929 Convention were willing to abandon the possibility of using reprisals against POWs because of their faith in the potential of the protecting power system to curb violations of IHL.[68] In the absence of evidence, it seems difficult to draw this conclusion. On the other hand, recognition of the broader significance of the ICRC's intentions for the article certainly seems to have played a role. A British report on the conference wrote of 'one delegation after another' speaking in favour of the ICRC's draft and condemning Britain's support for reprisals as 'a step backwards in civilization'.[69] The American delegation was apparently flattered into supporting the motion by the (erroneous) claim that its inspiration lay in the US Lieber code of 1863.[70] Only three delegations spoke in favour of retaining reprisals, but the weight of opinion behind an absolute ban was so overwhelming that the objections were withdrawn and the vote carried unanimously.[71] Following this initial ban, the potential targets for belligerent reprisals during armed conflicts have been progressively restricted.[72]

---

[66] E. Wadsworth (US delegate, Geneva) to Secretary of State (Washington), 1 August 1929. NARA. RG59 1910-1929 CDF. 514.2A12. Box 5447.

[67] Report by M. George Werner on the work of the 2nd commission (POW). NARA RG59 1910-1929 CDF. 514.2A12/137. Box 5445.

[68] Kalshoven, *supra* note 47, at 106-108. For an argument that reprisals and diplomatic protection have the same roots in international law, see Haggenmacher, 'L'ancêtre de la protection diplomatique: les représailles de l'ancien droit (XIIe-XVIIIe siècles)', 143 *Relations internationales* (2010) 7-12.

[69] Sir Horace Rumbold (UK delegate, Geneva) to Sir. A. Henderson (Foreign Office), 31 July 1929. TNA. FO372/2551 T9202. For British attitudes, see Neville Wylie, *Barbed Wire Diplomacy. Britain, Germany and the Politics of Prisoners of war, 1939-1945* (2010), at 50.

[70] Lieber had in fact left 'all prisoners … liable to the infliction of retaliatory measures' (Article 59).

[71] The British amendment found support from only the Turkish and Japanese delegations.

[72] Art. 46, Geneva Convention (I); Art. 47, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85; Art. 13, Geneva Convention (III); Art. 33, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287; Arts. 20, 51-56, Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3; Art. 4(4), Hague Convention for the Protection of Cultural Property in Time of Armed Conflict 1954, 249 UNTS 240; Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices 1980, 1342 UNTS 168; ILC Draft Articles, *supra* note 44; Henckaerts and Doswald-Beck, *supra* note 37, Rules 145-148. See also the updated commentary on Article 46 of the First

4. Supervision

The final area we consider is arguably the most important: the establishment of neutral oversight of the POW regime. This development was not merely decisive in strengthening the robustness of the POW regime and promoting state compliance, but it was also, as we shall see, important in setting POW law down a path that helped ensure its long term coherence and universality. The challenge of holding states to their humanitarian obligations had long frustrated international jurists. None of the proposals aired by the ICRC to tackle abuses of the Geneva Convention since the 1860s elicited much sympathy from the major powers. Nor was there any immediate enthusiasm shown for the example set by the Union government in trying and executing Confederate officers found guilty of ill-treating prisoners under their care.[73] Indeed, so reluctant were delegates at the first Hague conference to admit external interference into the conduct of war that no one saw fit to raise the possibility of extending the writ of the newly minted Permanent Court of Arbitration into this area of activity, despite the fact that a proposal along these lines had been in existence since 1872.[74] Before 1914 therefore, the laws of war occupied the frayed edges of international law, with state compliance ultimately resting on the strength of their own domestic legislation and military regulations and fear of reprisals.

This is not to say that external influences were entirely absent from the lives of POWs. The 1899 and 1907 Hague Regulations both acknowledged a role for neutral relief societies in this area, whether official or voluntary.[75] The list of agencies jostling to administer to prisoners' needs after 1914 was a long one, from aristocratic 'sisters of mercy' and representatives of the members of religious orders and the YMCA, to neutral Red Cross societies, mixed medical commissions (responsible for selecting prisoners for repatriation) and the ICRC.[76] What distinguished these organisations from the protecting powers was that the former based their

---

Geneva Convention, *supra* note 36; Darcy, 'The Evolution of the Law of Belligerent Reprisals' 175 *Military Law and the Law of War Review* (2003) 184; Hampson, *supra* note 49.

[73] John Fabian Witt, *Lincoln's Code. The laws of war in American History* (2012), at 285-304.

[74] Hall, 'Première proposition de creation d'une cour criminelle international permanente', 80 *International Review of the Red Cross* (1998) 59-78.

[75] Article 15 in the Regulations annexed to 1899 Hague Convention (II) and 1907 Hague Convention (IV).

[76] Jones, 'International or Transnational? Humanitarian Action during the First World War', 16 *European Review of History* (2009) 697-713. Becker, *supra* note 25, at 179-228.

right to act on humanitarian grounds, and on the recent stipulations covering the work of 'relief societies'. The *locus standi* of protecting powers, by contrast, flowed from the customary practice of neutral states offering their 'good offices' to promote amicable political relations between states in the absence, for whatever reason, of formal diplomatic relations.[77] The traditional functions of protecting powers had slowly expanded over the latter half of the 19th century. The Franco-Prussian war added the protection of enemy nationals to the protecting power's remit, while the Russo-Japanese War of 1904-05 saw protecting power diplomats visiting places of detention and submitting formal reports on their findings. This practice had not, though, received widespread recognition by the time war erupted in 1914. It was only in early 1915 that the US embassies in Berlin and London contrived to establish formal inspection programmes for British and German POWs and persuade their respective hosts to permit embassy staff to hold confidential meetings with prisoners' representatives or committees, assembled for the purpose.

Once established, however, this 'wedge of a tolerated practice', as one contemporary put it, was swiftly extended to other theatres and grew to become an 'openly recognized and accepted definite system'.[78] By the war's close, protecting powers were firmly inserted into the POW regime and accorded specific responsibilities in the belligerents' wartime agreements. Their operations were by no means entirely free from abuse. Far from easing relations between the belligerents, inspection reports were frequently used to justify the taking of reprisals or lend authority to government accusations of bad faith on the part of their enemies. Neutral delegates were generally barred from the zone of military operations, where upwards of a third of prisoners were routinely held, often in appallingly unhealthy and dangerous conditions. Camp visits were frequently obstructed by local military authorities, who resented foreign interference and often saw themselves as operating outside the political chain of command. In a number of cases, permission to visit camps was withheld from protecting power representatives, even when granted to other neutral agencies.[79] By 1918, Spanish diplomats in Germany had become so

[77] See the commentary on Article 8 (Protecting Powers) in ICRC, *Commentary on the First Geneva Convention* (2016), paras 1016-1019.
[78] Stone, 'American-German conference on prisoners of war', 13 *AJIL* (1919) 406 at 433-434.
[79] ICRC memo, 'Les Visites', (n.d. pre April 1917). ICRC. C G1 A 21-01

frustrated by the way they were treated, that Madrid considered withdrawing its services altogether.[80]

Yet while belligerents were ready to make life difficult for neutral diplomats, they evidently found it difficult to dispense with their services entirely, or forego the reciprocal advantages they brought. Even restrictions imposed on camp inspections by way of reprisal – for a period in 1918 the French and Germans withdrew the right to converse with detainees out of ear-shot of the camp authorities – attested to the significance both governments attached to this facility. By the end of the war, neutral inspection visits were widely accepted as the principal institutional innovation in POW affairs to emerge out of the war.[81] So while delegates at the 1929 Geneva conference struggled to agree on the extent of powers to be given to neutral diplomats, the principle of neutral involvement as 'an essential part of the convention' was agreed without demur.[82] Even hard-bitten observers like the ICRC veteran Mme Renée Marguerite Frick-Cramer saw the protecting power as the principal guarantor, to prevent the new POW convention succumbing to the problems that had bedevilled its predecessor after 1914, saying,

> It cannot be denied that, owing to the length of the hostilities, the prisoners have become a political instrument (propaganda camps, sending POWs to Morocco, continuing to detain POWs after the armistice), […] which is an infinitely regrettable fact. Let us hope that with the new Convention, thanks to the oversight/supervision of neutrals and the possibility of the belligerent powers to hear each other out, misunderstandings will be avoided and instructions given at the highest level will be carried out.[83]

The immediate importance of this innovation lay in the practical benefits it brought to the new POW regime; providing a level of external oversight where none had hitherto existed. It also, though, had wider ramifications for the nascent corpus of IHL. For the first time, a system

[80] See Delaunay, 'En toute discrétion. L'Espagne protectrice des intérêts français en Allemagne, 1914-1919', in Jean-Marc Delaunay (ed.), *Aux vents des puissances* (2008) 195-208.
[81] C.C. Hyde, *International law chiefly as interpreted and applied by the United States* (1922), Vol 2, at 340.
[82] *Actes de la Conférence diplomatique de Genève de 1929* (1930), at 512.
[83] Mme. R. M. Frick-Cramer to Gustav Ador (ICRC), 30 November 1929. ICRC. CR177-1.

was devised to hold states to their obligations towards a category of war victims that went beyond the 'threat' of moral censure or belligerent reprisal, or reliance on the good faith of military commanders. In this sense, it edged IHL away from the 'disappearing margins' of international law, and gave it a level of traction that had been singularly lacking since its initial inception in the 1860s.

Its significance also lay in its limitations; in what it was not. In establishing 'organizations of control' grounded on the harsh realities of neutral inspections during the First World War, the 1929 conference deliberately turned its back on other ways of promoting compliance with the POW regime. The possibility, for instance, of bringing violators before the League of Nations council or the Permanent Court of International Justice, founded in 1922, were both explicitly rejected, despite featuring in some of the draft codes drawn up over the 1920s. The experience of pressing criminal charges against those accused of ill-treating POWs in the post-war tribunals at Leipzig and Istanbul proved equally disappointing; revealing, in the words of the chairman of the British Red Cross, the 'impossibility of securing adequate punishment for those guilty' of violating the conventions.[84] Finally, a US proposal that protecting powers be specifically tasked with investigating infractions and publicising their results, was voted down at the conference. The 1929 POW Convention merely encouraged the belligerents to follow the example set in the First World War and resolve any problems through dialogue, facilitated where necessary through the good offices of their protecting powers.[85]

In bestowing a deliberately narrow remit on protecting powers, the delegates in 1929 accurately reflected the prevailing mood, and struck what would prove to be an astute balance between humanitarianism on the one side, and the willingness of mid-twentieth century states to accede to external interference in their military affairs on the other. What dented the record of protecting powers during the Second World War was not the failure of the supervisory regime invested in the 1929 POW Convention, but the calculated denial by some governments of any legal or normative restraints on the conduct of war fighting, and the treatment of enemy

[84] Sir Arthur Stanley (British Red Cross) to Gustav Ador (ICRC), 11 June 1921. NARA. RG200. Group 2 1917-1935 Box 77. See Segesser, 'The punishment of war crimes committed against prisoners of war, deportees and refugees during and after the First World War', 26 *Immigrants & Minorities* (2008) 134-156; Kramer, 'The First Wave of International War Crimes Trials: Istanbul and Leipzig', 14 *European Review* (2006), 441-455.

[85] *Actes de la Conférence diplomatique*, *supra* note 82, at 518. See the commentary on Article 49 of the First Geneva Convention, ICRC, *Commentary on the First Geneva Convention* (2016), paras 2823-2827.

nationals, whether military or civilian. Although the protecting power articles were strengthened in the 1949 Geneva Conventions, and extended to cover all categories of war victim (not just POWs), the fundamental characteristics of the protection regime remained unchanged. As a result, when states began retreating from the practice of state-based protection in the mid-1950s, questioning the validity of neutrality in the ideologically charged conditions of the Cold War, there was sufficient residual commitment to the principal of external supervision to allow a semblance of humanitarian oversight to emerge in its stead.[86]

Finally, in resisting the temptation to leave oversight of the implementation of the 1929 POW Convention to either judicial bodies, such as the Permanent Court of International Justice , or political institutions, such as the League Council, the drafters of the 1929 Convention may have unwittingly helped insulate the nascent POW regime from pressures that might in time have led to its undoing. Arguably, the choice to entrench an *in situ* supervisory mechanism reinforced the understanding of the law as purely *humanitarian*. While efforts to boost the potential of criminal law to ensure respect for IHL have recently increased massively, the focus on these internal mechanisms conveyed the clear message that what matters first and foremost is the ability to stop and correct non-compliant behaviour as soon as possible, before such behaviour leads to more victims. In fact, the imperative need to strengthen compliance with IHL has again been recognized by States and the components of the Red Cross and Red Crescent Movement.[87] In this light, IHL's 'legitimacy' can partly be explained by the lessons learnt after 1914 and the decision, in 1929, to inaugurate a system of oversight that was embedded in the POW convention and did not rely for its force on either the threat of post-war justice and the criminalisation of wrong-doers or the support of political institutions founded on the shifting sands of great power consensus.

5. Concluding remarks

[86] Wylie and Crossland, 'The Korean War and the post-war prisoners of war (POW) regime, 1945-1956', 23/4 *War in History* (2016) 439-456. Since the Korean War, the ICRC has distinguished between oversight functions derived from its role as a humanitarian organisation, which it accepts, and formal supervisory functions for 'substitute protecting powers' enshrined in the 1949 POW convention (Article 10). See ICRC, *Commentary on the First Geneva Convention* (2016), Section J, online: https://ihl-databases.icrc.org/ihl/full/GCI-commentary.

[87] Resolution II, 'Strengthening compliance with international humanitarian law', 32IC/15/R2, adopted at the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8-10 December 2015.

Recent research has revised our assumptions about the place of the First World War in the broader history of the twentieth century.[88] Although the cataclysmic destruction and new forms of violence remain the war's hallmark, historians have become increasingly conscious of those 'innovative humanitarian countermeasures' that helped save lives and rebuild societies.[89] This innovation is no more apparent than in the area of POW law, where the challenge of war prompted a fundamental reappraisal of the regulations and norms governing the treatment of POWs. If the full expression of this process had to wait until the signing of the four Geneva Conventions in 1949, it remains the case that many of the distinguishing features of modern IHL had their roots in the experience of captivity during the First World War and the legal developments which followed in its wake. The scale, duration and intensity of wartime captivity after 1914 gave rise to a conceptual shift in the way POWs were perceived in international law, transforming their status from 'disarmed combatants', whose special privileges were derived from their position as members of the armed forces, to 'humanitarian subjects', whose treatment was based on an understanding of their humanitarian needs. Humanitarians had advocated a separate convention for POWs, similar to that enjoyed by the battlefield sick and wounded, for over half a century.[90] But while many of the 1929 Convention's humanitarian features initially figured in the ICRC's draft text, the ICRC was not alone in advocating a 'humanitarian' approach to the new convention. [91] Indeed, by the late 1920s a broad consensus had formed around this issue. Representative of this view was the German jurist Friedrich Wolle, who argued in early 1929 that any new POW code had to be 'a product of humanity (ein Ausfluβ der Menschlichkeit)'. The 'principle of humanity', he wrote, should stand as the 'leitmotiv, rule and guideline for the entire POW law […] It must […] be placed at the forefront of POW law in order to clearly emphasize the spirit that prevails, and must prevail, over the new rules'.[92] It was

[88] David Reynolds, *The Long Shadow. The Great War and the Twentieth Century* (2013).
[89] Little, 'An explosion of new endeavours: global humanitarian responses to industrialized warfare in the First World War era', 5 *First World War Studies* (2014) 1, at 1.
[90] The Russian delegate to the 1864 Geneva conference suggested including POWs in their remit, but was outvoted. Henry Dunant spent the following decade promoting the idea of a POW code, without success, though his agitation led to the inclusion of POWs in the Brussels Conference in 1874.
[91] For ICRC thinking in the 1920s, see 'Rapport sur la réalisation du voeu No. XV de la Xème Conférence internationale de la Croix-Rouge, suivi d'un Avant-projet de Convention relatives au traitement des prisonniers de guerre'. ICRC. CR93a/37bis. Code des prisonniers de guerre, déportés, évacués et réfugiés.
[92] F. Wolle, *Grundsätzliches und Kritisches zur Reform des Rechtes der Kriegsfangenen* (1929), at 3.

this spirit that the British delegation encountered, rather to its surprise, when it tried to argue in favour of retaining the right to inflict reprisals against POWs. It can also be seen in the emphasis placed on repatriation in the new convention, and in the recognition that imprisonment itself could damage prisoners' health, and was not the 'inexpensive rest-cure after the wearisome turmoil of fighting' assumed by some pre-war critics.[93]

This new status was embedded in a convention that itself represented a major departure from the pre-war codes. The ill-treatment meted out to prisoners during the First World War lent weight to those who insisted that the new convention should go beyond defining the obligations and responsibilities of the detaining power, and instead articulate treatment in terms of prisoners' rights. Such thinking reflected a broader awareness of transnational issues, and the shift to a rights-based discourse for refugees, labour, minorities and children that was consciously 'developed, asserted, and defended in response to the chaos that Europe experienced in the aftermath of the Great War'.[94] Under the 1929 Convention, prisoners enjoyed rights as protected subjects under international law, not by dint of 'exception or favour', military honour, customary practice or even charity. They had the right to direct repatriation if invalided, the 'right to complain' about their conditions of internment and to communicate with neutral representatives (Article 42); the right to a qualified lawyer and interpreter if involved in judicial hearings and the right of appeal against their sentences (Article 62).[95] Moreover, for the first time, prisoners – and prisoners alone – could appeal to neutral diplomats to intercede on their behalf if their rights were withheld, or if their conditions of captivity amounted to inhumane or degrading treatment. There was then, a clear substantive and conceptual distinction between the two 'humanitarian' conventions signed at Geneva in 1929, and the earlier Hague Regulations of 1899/1907 governing the conduct of armed conflicts.[96]

---

[93] J. M. Spaight, *War Rights on Land* (1911), at 58.
[94] Bruno Cabanes, *The Great War and the Origins of Humanitarianism* (2014), at 301.
[95] POW veterans associations used similar rights-based terminology: see Reichsvereinigung ehemaliger Kriegsgefangener, *Vorschläge für ein neues Kriegsgefangenenrecht* (Berlin: Reichsvereinigung ehemaliger Kriegsgefangener e. V., April 1929), p. 17.
[96] For early efforts to distinguish 'humanitarian law' from the laws of war, see Wylie, 'Muddied Waters: The Influence of the First Hague Conference on the Evolution of the Geneva Conventions of 1864 and 1906', in M. Abbenhuis, A. Higgins and C. Barber (eds), *War, Peace and International Order? The Legacies of the Hague conferences of 1899 and 1907* (2017) at 52-68.

The rights, and the principles that underpinned them, sat alongside a detailed list of specific provisions, covering all aspects of custody.[97] This had obvious practical consequences: as the ICRC's legal expert, Paul des Gouttes, put it 'in the monotonous daily life of the prisoners of war, it is the details which matter'.[98] But it also reflected a profound shift in the way IHL was framed. In the months leading up to the 1929 conference – and even in its first sessions – protagonists wrestled with two different approaches to the codification process. One envisaged a convention based on customary practice and principles but shorn of cumbersome details that might prove impractical or embarrassing in practice. The approach was epitomized in the US draft convention brought to Geneva in 1929 which proposed a simple revision of the Hague Regulations, based on the US-German agreement of 1918 and a code drawn up by the ILA in 1921. Drafted by the War Department, the US project provided general lines and broad declarations, and reserved detailed provisions to special conventions drawn up by the belligerents. Whether this amounted to an Anglo-American approach, as some contemporaries claimed, is open to debate, though there is little doubt that the British, mindful of their experiences in the First World War, shared Washington's preference for a convention that distilled key principles rather than sought to legislate for every possible contingency.[99]

The alternative approach, associated at the time with a continental or Latin view of jurisprudence, placed more faith in the substance of codified laws, and saw the value of enveloping governments, their militaries and camp authorities, in a set of detailed provisions.[100] This was not without its dangers. The more detailed the treaty, the greater the possibility of triggering reprisals for alleged non-compliance.[101] This was a quandary well known to neutral diplomats, who often found their camp visit reports used by the belligerents to justify the very

[97] The conditions of employment, for instance, were outlined in seven articles (660 words), as against a single article in the 1907 regulations.
[98] Paul des Gouttes, cited in Durand, *supra* note 57, at 255.
[99] Higgins, 'Some Difficulties in International Relations', *Studies in International Law and Relations* (1928) at 30-31. Lauterpacht, 'The so-called Anglo-American and continental schools of thought in international law', 12 *British Year Book of International Law* (1931) 31-62. Foxton, 'International Law in Domestic Courts: some lessons from the Prize Court in the Great War', 73 *British Year Book of International Law* (2002) 261-291.
[100] See 'Note de M. Huber sur la conference diplomatique: Confidentiel', 26 June 1929. Paul des Gouttes (ICRC), 'Notes sur la délibérations du C.I.C.R. en vue des instructions à donner à sa délégation à la Conférence diplomatique', April 1929. ICRC. CR177-1.
[101] Paul des Gouttes, 'Les Conventions de la Haye de 1899 et 1907' 2 *International Review of the Red Cross* (1919) 22, at 25.

reprisals their inspections had meant to allay. And yet, the war had also shown that the belligerents were ready to seize upon 'every vagueness and loophole' to justify taking reprisals against prisoners in their care.[102] Although events in the late 1930s and 1940s soon exposed its limitations, on balance, the 1929 POW Convention ultimately represented a triumph of precision over broad-brush principles.[103] This marked another departure from the pre-war treaties, but also set IHL on a path that would become increasingly comprehensive and exacting, and insistent on the privileges it granted to the victims of armed conflict. Even those delegates at the 1929 conference who were initially in favour of the American draft found their views soften, as the cultural, historical and political differences between the various parties made themselves felt: the Mexican proposition that soldiers who had been gassed were not 'sick or wounded' but merely suffering from a 'depreciation of health', or the Italian insistence that any medical treatment given to injured prisoners be administered 'with humanity', lest amputations were conducted without anaesthetic.[104] The twentieth century has witnessed an unmistakable trend toward the adoption of more detailed rules, coupled with the development of a variety of enforcement mechanisms for IHL, all the while limiting the scope for reprisals. The prohibition on reprisals in the 1929 POW Convention is thus anything but anodyne.

Finally, changing attitudes towards POWs influenced the trajectory of IHL in other areas, most notably the position of civilians and enemy aliens living in occupied territory. At best, this category of individual shared the fate of POWs: their basic treatment and conditions of captivity frequently followed the regulations governing military prisoners. At worst, they were subjected to savage victimisation and brutality, such that their fate became a *cause célèbre* at home and across the neutral world.[105] To humanitarian observers, the importance of legislating in favour of civilians was self-evident and throughout the inter-war era various attempts were made in this direction. The ICRC's first draft comprising 103 articles and tabled at the 1923 International Red

[102] Hull, *supra* note 4, at 279.
[103] Here our views differ from those offered in Wylie, 'The 1929 Prisoner of War convention and the building of the inter-war Prisoner of War regime', in Scheipers, *supra* note 6, at 97.
[104] S. G. Reymond (New Zealand delegate) to Sir James Parr (High Commissioner for New Zealand, London), 6 August 1929, p. 4. ANZ R22435985
[105] The most egregious instances of ill-treatment involved minority populations – Ottoman Armenians, Jewish or German communities in Russia etc. – rather than civilians under enemy occupation. See Tammy M. Proctor, *Civilians in a World at War, 1914-1918* (2010). For changing attitudes towards civilians, see Helen M. Kinsella, *The Image before the Weapon. A Critical History of the Distinction between Combatant and Civilian* (2011).

Cross Conference, explicitly sought to assimilate the new legal categories of 'deportees, evacuees and refugees' to the traditional position occupied by 'military prisoners'. The logic behind extending the rights of POWs to civilian male detainees of military age was particularly strong.[106] The ICRC also, however, championed other mechanisms to protect civilians caught up in the maelstrom of war; inviolable 'sanitary zones', where medical aid could be dispensed to the local population, and 'zones of security', or 'lieu de Genève', which offered civilians safe refuge from the fighting.

All these initiatives built directly on the practical and conceptual innovations found in the 1929 POW convention. Although 'civilians' were ultimately excluded from discussion in 1929 – for fear of endangering the chances of securing agreement on the Conventions on POWs and the Wounded and Sick – the subject was addressed in the 'Tokyo draft' of 1934. This brief draft convention distilled the essence of the 1929 POW Convention, and adopted many of its key features, such as the prohibition against reprisals (draft article 10) and access to relief supplies (draft article 8), and replicated its oversight mechanisms and processes for settling disputes (draft articles 23, 24). Draft Article 17 even went so far as to make the POW Convention 'by analogy applicable to civilian internees', and pledged a level treatment that was 'in no case inferior' to that accorded to military prisoners. The viability of the ICRC's 'zones of security' and 'sanitary zones' were likewise dependent on the system of neutral supervision and oversight provided by the protecting powers.

These hesitant inroads into civilian protection did not long survive contact with war after September 1939. But to assume that they were of little consequence, or were representative of customary norms whose days had long past, is to overlook the broader legal and historical significance of the innovations that emerged out of the First World War. The excesses of the Second World War did not obliterate the advances made in the preceding two decades; nor did it give rise to ideas on international humanitarianism that were divorced from the experiences that went before. In a very real sense, the conceptual bedrock of modern IHL that took shape in the four Geneva Conventions of 1949, emerged out of the mud and rubble of the First World War, as much as the dust clouds and death-camps of the Second.

[106] See Frick-Cramer, 'A propos des projets des conventions internationals réglant le sort des prisonniers', 7 *Revue internationale de la Croix-Rouge* (1925) 73-84.