

The Applicability of the Geneva Convention to a War on Terror

Stephanie Carvin, MSc,

Research Officer, The Canadian Institute of Strategic Studies

Introduction

At the heart of any debate about the relevance of the laws of war is the idea that states are accountable for their actions and bound by the rules and norms of international society. While international relations may be anarchic, they are not chaotic. This view is also an underlying conviction found in the laws of war. Recently, however, arguments have been made that as the nature of warfare has changed from traditional interstate conflict to so called “new wars” and a “war on terror” the laws of war, specifically the Geneva Conventions, are no longer appropriate or applicable. The central thesis of this paper will argue that while the view of international society reflected in the laws of war may be challenged by the nature of modern conflicts, the norms embodied in the Geneva Conventions are both relevant, applicable and binding on actors in international society.

In discussing the importance of this conception to the Conventions, the paper will show the benefits of an approach that is not realist but realistic. Both the moral and practical relevance of the Geneva Conventions to the “war on terror” will be examined as will the argument that the degree of relevance one gives to the laws of war depends on whether one regards the Convention as a treaty or as a codification of higher principles.

Finally, as it would be impossible to undertake an examination of all aspects of the laws of war, or even the Geneva Conventions, this paper will pay special attention to issues surrounding the status and treatment of prisoners of war (POWs). This issue has recently been given significant attention with the controversy over the status of the prisoners taken in Afghanistan as a part of the war on terror. Therefore, this issue is useful in helping to understand the dilemmas that modern conflict presents for the laws of war.

Section One

The Conception of International Society in the Geneva Conventions

Embodied within the Geneva Conventions is a particular view of international society with five discernable characteristics can be found. These are

- 1) The importance of international law;
- 2) Universality –the idea that natural law as a set of rules affecting international relations applies to everyone equally;
- 3) That the members of international society are not only states, but include groups other than states and indeed individual human beings (though each group is entitled to its own set of rules and rights);
- 4) While trying to protect their sovereignty, states also seek to create a substitute for world government, by working in collaboration with other states and adherence to international laws to which they have given their assent;
- 5) That there is a role of for international institutions in international society;

Importantly, these characteristics hold that states are accountable to higher principles than merely *raison d'état*. Of all of these characteristics, the role of natural law is crucial for the argument being made here. While the Geneva Conventions outline the laws of war in a very positivist manner, they are the codification of natural and customary law that had developed over the centuries. The Geneva Conventions were not the starting point for international humanitarian law as we know it today. Rather, the original 1864 Geneva Convention codified and strengthened ancient, fragmentary and scattered rules of war protecting the wounded and those caring for them in the form of a multilateral treaty. Although such principles were not always adhered to (much like today) this does not diminish their status in natural law. The Geneva Convention can therefore be seen as the codification of these natural law principles for the purpose of making them stronger, clearer and easier to disseminate.

The importance of natural law in the Geneva Conventions is also made clear by the Marten's Clause, first articulated in the Hague Conventions of 1899 and incorporated into the law of armed conflict since, including the common articles of the Geneva Conventions. The clause was articulated by Fyodor Martens, the Russian delegate to the Hague Peace Conference, in order to overcome a dispute over whether resistance fighters were entitled to

POW status. The clause states:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

As of yet, there has been no attempt to codify what “the laws of humanity, and the dictates of public conscience” are. However, the Martens Clause today represents the idea that even if there are not concrete provisions regulating new situations and means of warfare in the Conventions, the assertion of the complete absence of law is not permitted. States are still accountable for their actions.

The universality of international society is another key component of the Geneva Conventions, and heavily emphasized by the ICRC. That the Conventions stipulate that they are only applicable between those who have signed the treaties is no longer as significant as it once was. The Geneva Conventions of 1949 have now achieved almost universal participation and virtually all states are parties to the four Conventions. In this respect, the 1949 Conventions can be considered customary international law and applicable to all international armed conflicts. However, there is controversy surrounding the status of the two Additional Protocols of 1977 (signed by 146 and 138 states respectively) which have not yet achieved the near-universal status of the 1949 Conventions (signed by 189 states). Yet, this does not mean that the Protocols are without significance – legal or otherwise. Many of its provisions are considered declaratory of customary international law and are therefore applicable in all international conflicts. For example, although several significant players in the Gulf War conflict were not parties to the Additional Protocols, the targeting policy announced by the coalition states reflected Articles 48-57 of the First Protocol. States, although they may not have signed onto the 1977 Protocols, often consider themselves and others bound by the rules contained by them. In this way, the entire Geneva Conventions can be seen as applying universally.

That there is a place for non-state actors and individuals is not as immediately clear as the two previous cases. Only states may become party to international treaties, including the Geneva Conventions and their Additional Protocols. International humanitarian law does not apply to situations of violence not amounting in intensity to an armed conflict. However, in reality, the situation is more complex. First, the Conventions are directed towards the protection of individuals in situations of armed conflicts, and in this way, acknowledge the place of individuals in international society. Second, in the event of a non-international conflict (such as a civil war or *levée en masse*) the rules in Article 3 common to the four Conventions and Protocol II are applicable. In such situations, humanitarian law is intended for the armed force, whether regular or not, taking part in the conflict and protects every category of individuals not or no longer actively involved in the hostilities. While not all states are party to

Protocol II, Common Article 3 requires that all armed groups, whether in rebellion or not, to respect those who have laid down their arms and those, such as civilians, who do not take part in the hostilities. Therefore, the documents acknowledge the place of individuals and non-state actors in international society and their rights and duties in times of armed conflict.

What, then, is the importance of noting this? Two important points should be made here that will play an important part in the remainder of this paper: First, that applying a realist view of international society to the laws of war is insufficient, and second, the importance of working with the international system and its components.

The Geneva Conventions demonstrate, and actually insist, that states have obligations above and beyond *raison d'état* or state interest. States are bound by international law and the commitments they have made internationally. It is clear, that for the most part, states try to adhere to these commitments and, even when they do not, often try to justify their actions. In the majority of cases, states do not want to be seen as openly violating the laws of war. Yet, a realist view of international relations maintains that international society should be viewed as a state of anarchy and "international politics is an arena in which there are no rules restricting states in their relations with one another." Where state interest is against the interest of international society, state interest will always prevail. Carl von Clausewitz can be seen adhering to this view in his famous On War when he states: "Attached to force are certain imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it"

However, the relative strength of the Geneva Conventions as international law seem to suggest that this is not so. States do consider themselves bound by the Conventions, not merely the obligations of *raison d'état*. This implies that in international society state interest is not seen as a justifiable excuse for violation of international law and expediency is not a legitimate reason to breach the Geneva Conventions.

Yet, while demonstrating the flaws of realist approach to international society, the foundation of the Geneva Conventions remains the idea that wars will happen, they will always happen. It is therefore better to work towards achieving a bare minimum of humanity in armed conflict than to pretend wars will never occur or that since war is immoral, that making rules of war is morally unacceptable. As Michael Ignatieff has argued, the genius behind the original Conventions lay in the acceptance of war as an essential ritual of human society, which can be tamed but never eradicated. Therefore, the Geneva Conventions both take this realistic (not realist) assumption and seek to regulate war for humanitarian purposes to uphold a basic international order.

These principles are crucial to the belief that international law and the Geneva Conventions are still relevant to new nature of international and even intra-state conflict. This idea will be examined in the remainder of the paper which will make the argument that the Conventions are also very relevant and applicable to the "war on terror" currently

underway in Afghanistan and around the world.

Section Two:

The Applicability of the Geneva Conventions to a War on Terror

Calling the events of September 11, 2001 unprecedented in scale for a non-state actor and in international law now sounds cliché, but it remains true. It is not surprising, then, that the ensuing “war on terror” beginning in Afghanistan on October 7, 2001, has led to controversial legal and moral issues for the international community. Centre stage in this legal jumble is the Geneva Conventions and what their appropriate role in this war might be. Although the vast majority of POWs taken in the conflict are being held by post-Taliban Afghan authorities, the United States has been the centre of the controversy with regards to the status of prisoners. On January 11, 2002 US Secretary of Defense Donald Rumsfeld announced that the detained prisoners were being considered “unlawful combatants” and that “unlawful combatants do not have any rights under the Geneva Convention.” This was met with immediate concern by several prominent international and non-governmental organizations and in the international community (including US allies in the conflict) who insisted that the Conventions remain applicable.

While the International Committee of the Red Cross has consistently argued that the Conventions must be followed, other arguments have emerged (including suggestions from US President George W. Bush) that the Conventions are not fully or completely relevant to a war on terror. To this end, moral and practical arguments have been offered suggesting that, at a bare minimum, the Conventions must be reconsidered.

Moral and practical arguments against the applying the Geneva Conventions:

One of the main moral arguments offered to support this position is that there is a certain degree of respectability surrounding prisoner of war status. Normally, although prisoners of war are detained, they are not considered criminals since soldiering is not an illegal act. However, many states have had difficulty in applying the laws of war to non-international conflicts, especially as the opponent tends to be viewed as a criminal and without the right to engage in combat operations. In the view of these states, applying the rules of international humanitarian law seems to imply a degree of moral acceptance of the right of any particular group to resort to acts of violence, at least against military targets. The United States in particular has held this position for at least 25 years, arguing that application of the rules of war might actually favour guerrilla fighters and terrorists, affording them a status that the US believes they do not deserve. On January 29, 1987, President Ronald Reagan argued that US repudiation of the Additional Protocols was an important move against “the intense efforts of

terrorist organizations and their supporters to promote the legitimacy of their aims and practices.”.

A second moral argument is offered by Jeremy Rabkin in the National Interest who claims that the method of fighting used by “Islamist radicals” eliminate any moral grounds for affording captured prisoners POW status. He argues:

Islamist radicals do not think of war as a conflict between states from which ordinary humanity should, as much as possible be spared... The aim is simply to punish a whole society for its sins. The preconditions for reciprocal restraint are wholly absent.

Therefore, this argument holds that by openly violating the laws of war and attacking civilians, the perpetrators of these acts have removed any basis for treatment along the lines of the Geneva Conventions.

However, there are also very practical reasons offered for not adhering to the Conventions in the war on terror. Most of these relate to the idea that certain steps are necessary in a war against a deadly foe. Rabkin writes: “in a war against barbarism, it is hard to operate all times within the gentlemanly code of the Victorian peace conferences that codified the modern law of war.” Therefore, provisions that would allow prisoners to freely communicate with one another, or prohibiting interrogation beyond name, rank and serial number, may hinder the ability for the anti-terror forces from gaining information that would enable them to fight more effectively and to better protect themselves or potential targets and perhaps end the war sooner. Another practical issue involves the rule of repatriation after hostilities have ceased. This rule was written on the assumption that a state has surrendered and that captured enemy soldiers could be neutralized. Yet, not only is it difficult to say when hostilities in a war on terror are over, there is also a significant security risk when letting prisoners of a terror war go free. While the anti-terror coalition troops are fighting a shadowy organization, there is not likely a chance for a full surrender. Therefore, there will always be a risk that these individuals will return to their terror cells, possibly with valuable information on coalition armies, their methods and bases.

Finally, it has also been suggested that due to the unprecedented nature of the attacks, and the unusual nature of the armed conflict, the situation has evolved to where it is different in important respects from what was originally envisioned in the existing laws of war. International humanitarian law has been principally designed for application in armed conflict between states – and only those states that are party to these international agreements, such as the Convention. Although there might be some minor allowances for intra-state clashes, it has been argued that the fighting between the United States and its allies against al-Qaeda do not fit any of the standard categories of conflict. Therefore, the attacks of September 11 and the war on terror can only be regarded as an entirely new phenomenon falling wholly outside

the framework of international law.

Arguments for the applicability of the Geneva Conventions to the war on terror

Given these arguments, it is fairly clear that the war against terror imposes some complex questions for the relevance of the Geneva Conventions to the conflict. Moral and practical issues, as well as the unparalleled nature and scale of the attacks has led to questioning about what role the Conventions should play. However, despite these points, it is possible and, indeed important, to argue for the relevance of the Conventions to the war on terror and similar conflicts.

It's true that there is not a perfect fit between the present laws of war and the current conflict in the war on terror. However, this is not grounds for an entire dismissal of the Geneva Conventions. It is true that there are problems in deciding how the various principles of the Conventions should be applied. However, as this paper has already argued, it is important to consider that the Conventions are to a large extent a codification of customary law. The Martens Clause, as it appears in the Conventions, stipulates that when in doubt, prisoners should be treated in accordance with *the principles of the laws of nations* as established by the *laws of humanity and the dictates of the public conscience*. That there are difficulties in measuring what the "laws of humanity" and the "dictates of the public conscience" are has been discussed. However, the humanitarian principles behind the Convention and the Additional Protocols are fairly clear. That they have been applied to cases where they do not fit (such as Somalia – where even Somali warlords, if not the population, abided by the Conventions) or where not every state has been a party to the Conventions (such as the Gulf War) is very significant. While a war against terror was not envisioned in the Geneva Conventions during its creation, it is more than probable that the authors of the documents believed that they were creating guidelines for future conflicts.

Additionally, recent statements of the United States military can be seen as advocating the importance of adhering to the values in international law, even when there is not a perfect fit between law and the characterization of the conflict. A recent document released by the Joint Chiefs of Staff (albeit before the attacks of September 11) stated:

US forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all other operations.

In this case, it is fairly clear that the issuers of the statement, the Joint Chiefs of Staff, felt that the US military was bound to comply with not only the law of war, but also its

underlying values.

Focusing on the prisoner of war issue, it is understandable (if only for emotional reasons) that the United States would hesitate in assigning the credibility associated with POW status to the perpetrators of the September 11 attacks and their associates. However, these strong moral convictions do not necessarily conflict with the Geneva Conventions. The terrorist attacks were certainly in violation of international law. In this regard, the al-Qaeda detainees, even if they are given prisoner of war status, may be held accountable for their actions before the fighting began in court. Yet, when the US and allied forces commenced operations in October 2001, they also became involved in fighting with the Taliban armed forces. The ICRC has taken the position that given the amount of Afghan territory under control of the Taliban at that time, the regular Taliban forces should be considered the armed forces of Afghanistan. As both countries are parties to the 1949 Geneva Conventions, the Conventions are equally binding on both sides. Because the “regular” Taliban fighters were not involved in the attacks of September 11, they deserve POW status under international humanitarian law.

Article 75 of Additional Protocol I describes a range of fundamental guarantees that are intended to provide minimum rules of protection for all those who do not benefit from more favourable treatment under any other rules. Even if the United States does prove that the prisoners do not deserve POW status, Article 75 should be as the minimum standard for treatment as these provisions are typically viewed as customary law. Any state with a claim to act legally or morally in international relations, even though it is not a party to the 1977 Protocols, should follow these established guidelines.

It is also important to consider that states have an incentive to apply the Conventions to the war on terror as a way of maintaining the “moral high ground” in the conflict. Where states have fought terrorists in the past, excesses by governments or by intervening forces may contribute to the growth of a terrorist campaign against it. States may also be seen as resorting to the same tactics as the terrorists themselves. For this reason it is clear to see why the US has heavily insisted that the prisoners will be treated humanely and in accordance with the Geneva Conventions, despite not being considered POWs. By openly treating the prisoners well, it ensures that the US maintains its moral image during the operation.

There is a relationship between these practical and moral issues in applying the Conventions. While states have an incentive to have the “moral high ground” in relation to their adversary, they also need to be seen as acting legally and morally for the sake of their allies. While the United States is fully capable of acting on its own, it desires to be seen as acting with the approval of its allies in the conflict. Therefore, it has the incentive to listen to the concerns of its allies regarding the status of the prisoners and adhering to the Convention. Eventually, the US did partially change its position when it was announced on February 7, 2002, that the Taliban forces would be treated in accordance with the Third Geneva Convention (relative to the Treatment of Prisoners of War), but that they would still not be considered

POWs as they did not meet the criteria to be considered as such laid down in the convention. Al-Qaeda prisoners would still not be regarded as falling within scope of the Conventions at all. While this position remains controversial, it is somewhat more defensible under international law, and more acceptable to America's allies.

Reciprocity, the Geneva Conventions and conceptions of international society

Another practical issue is the idea of reciprocity – that it is in the interest of a state or group to adhere to the Conventions to ensure that their own captured personnel are afforded humane treatment. However, the way one views the idea of reciprocity as part of the Geneva Conventions relates very much to the conception of international society that one applies to the convention.

With virtually no means to ensure compliance with international humanitarian laws, it has been argued that the only means to enforce the Conventions is reciprocity. Proponents of this view tend to see the Geneva Conventions as a bargain – if your side does not harm our soldiers that you have taken prisoner, we will not harm your soldiers that we have captured. This was the position taken by the German War Book at the beginning of the twentieth century:

If... in the following work the expression "the law of war" is used, it must be understood that by it is meant not a *lex scripta* introduced by international agreements; but only a reciprocity of mutual agreement; a limitation of arbitrary behaviour, which custom and conventionality, human friendliness and a calculating egotism have erected, but for the observance of which there exists no express sanction, but only "the fear of reprisals" decides..."

In questioning the relevancy of the Geneva Conventions to the war on terror, Rabkin argues along the similar lines. He asserts that although neither the Koreans, Chinese or the North Vietnamese honoured the 1949 Conventions in the Asian Cold War conflicts, communist authorities refrained from massacring American prisoners *en masse* because they held them as bargaining chips rather than "vessels of sacred humanity." Communist governments still saw mutual restraint as being in their interest. Rabkin maintains that the same logic of reciprocity and restraint pertains today, but the circumstances that allowed that logic to function does not exist in the war on terror where the US is fighting with enemies "who disdain the very ideas of humanitarian restraint."

Both the German War Book and Rabkin take the view that any constraints on the waging of war take the form of a treaty – and a treaty, argues Rabkin quoting The Federalist in 1788, "is only another word for a bargain." This view also maintains that the laws of war drawn up in the Geneva and Hague Conventions were not based on ancient ideas of rank and courtesy but were drawn up upon the advice of military

officials based on practical considerations.

This view reflects the realist thought that states comply with the law only because it is in their interest to do so. They are not obliged by any higher set of norms or rules than that. Parties to the Conventions only need to adhere to the principles stipulated as long as the restraint is mutual. Since al-Qaeda and the Taliban certainly don't play by the rules of the Conventions, the United States and its allies should not have any crisis of conscience for not following the rules.

However, as already argued, this view is not the one that is embodied in the Geneva Conventions as it is understood today and probably as it was being written in the first place. The rules set out by the delegates at the different conferences on the laws of war are the codification of customary laws that had been formed from centuries of tradition and the ideas of chivalry. By the time the first Conventions of 1860s had been signed, that which was forbidden was already largely considered things from which "civilized" nations should naturally refrain.

As international actors are accountable for their conduct in international society, this approach also tends to downplay the role of reciprocity in the Conventions. For example, during the US-led Gulf War, the Allies sought to observe the laws of war not because of any guarantee of reciprocity, but because such conduct was important to the maintenance of internal discipline, and for domestic and international support. He also points out that this could also be seen in the 1999 war in Kosovo. Therefore, reciprocity cannot be seen as the only basis for observing the laws of war.

There can be little doubt that the war on terror has posed significant challenges to international humanitarian law. Many of the key positions that the US has argued, especially that prisoners may not qualify for POW status, are understandable, if not actually defensible in international law. However, the handling of these issues by the United States, such as sweeping pronouncements that none of the detainees will be given POW status when such decisions can only be legally made on an individual basis, has left the perception internationally that they are treating the law in an cavalier manner. As many commentators have pointed out, this has posed a challenge to coalition unity. Yet the subsequent assurances that all prisoners will be treated humanely and in accordance with the Conventions demonstrate the importance of these norms in international society. The US has repeatedly offered justification for its actions and has been careful to argue that the norms are still largely valid: a good example of the way the Conventions still have in international society.

Conclusion

This purpose of this paper has been to argue that the Geneva Conventions are still applicable to modern conflict but whether or not one believes that this is so depends very much on the view of international society that one subscribes. Those who look at international society from a realist perspective will downplay the role of the laws of war, especially when they conflict with state interest. However, as this essay has argued, this

conception of international society is not sufficient. Although the nature of warfare has changed significantly from when the 1949 Conventions, or even the 1977 Additional Protocols came into force, the principles essential to the Conventions are not rules that can be easily broken, even when there is not a perfect fit between the characterization of conflict and the laws of war. Where international actors consider themselves as rightful, they are bound by the rules that

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Unless otherwise specified, Geneva Conventions imply the Geneva Conventions of 1949 and the Additional Protocols of 1977.

The expressions international humanitarian law, the law of armed conflict and the law(s) of war may be regarded as equivalent.

This conception of international society borrows heavily from Hedley Bull's description of the Grotian view of international society. See: Bull, Hedley, Benedict Kingsbury and Adam Roberts, ed. Hugo Grotius and International Relations. Oxford: Oxford University Press, 1990.

International Committee of the Red Cross (ICRC) International humanitarian law: Answers to your questions. ICRC document obtained at headquarters in Geneva. Further publication data unavailable.

Text obtained from Sheigeki Miyazaki, "The Martens Clause and international humanitarian law" in Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet/Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet. p. 434.

Ibid. p. 436.

Dieter Fleck, ed. The Handbook of Humanitarian Law in Armed Conflicts. p. 24.

Ibid. p. 26.

Ibid.

ICRC, Humanitarian Law. pp. 18-19.

Bull, Anarchical Society. p.135.

Text found in C. L. Green, Essays on the Modern Law of War. p. 1.

Michael Ignatieff, The Warrior's Honor: Ethnic War and the Modern Conscience. p. 156.

There seems to be a consensus in the relevant literature on this point. However, several authors used various terrorist incidents, their effects and investigations as precedents for handling the 9/11 fallout.

Human Rights Watch, "Background Paper on Geneva Conventions and Person Held by U.S. Forces" January 29, 2002.

Adam Roberts "Counter-terrorism, Armed Forces, and the Laws of War", Survival. pp. 10-12.

Ibid. p. 12.

Ibid. p. 13.

Jeremy Rabkin, "After Guantanamo: The War Over the Geneva Convention" The National Interest. Spring 2002.

Ibid.

Christopher Greenwood, "International law and the war against terrorism" International Affairs. p. 314.

Ibid. p. 301.

Roberts "Counter-terrorism". p. 14.

Greenwood, "International law". n. 46, p. 314.

Roberts, "Counter-terrorism". p. 23.

This included providing culturally appropriate meals and allowing for religious observances.

Greenwood, "International law". p. 315.

Text found in Green, Essays. pp. 27-28.

Rabkin, "After Guantanamo".

Ibid.

Ibid.

Ibid.

Roberts, “Counter-terrorism”. p. 14.

For example, it is very possible to argue that the Taliban forces do not meet the criteria specified under the Geneva Conventions for POW status. However, it is customary to relax these conditions in “new wars” conditions. See Roberts “Counter-terrorism”.

