
The Impact of World War I on the Law Governing the Treatment of Prisoners of War and the Making of a Humanitarian Subject

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Abstract

This article evaluates the impact of World War I on the development of international humanitarian law (IHL) regarding the treatment of the 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 World War I 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 World War I 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

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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 (1932–1934) being the most obvious examples – revealed both the dangers implicit in such endeavours and their ultimate futility. Only the 1925 Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods and the two Geneva Conventions signed on 27 July 1929 – the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and the Convention Relative to the Treatment of Prisoners of War (POW Convention) – 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 World War II 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 article challenges the orthodox view that the developments in *jus in bello* arising from World War I are of little consequence or simply reflected traditional 19th-century norms.³ Focusing on the law relating to the treatment of prisoners of war (POWs) – ‘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 a 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 World War I not only transformed the position of POWs, 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 article contributes to our broader understanding of how international law shaped, and was in turn shaped by, the experience of war

¹ See Roberts, ‘Land Warfare: from Hague to Nuremberg’, in M. Howard, G.J. Andreopoulos and M.R. Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (1994) 124. Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare 1925, 94 LNTS 65; Convention for the Amelioration of the Condition of Wounded and Sick in Armies in the Field 1929, 118 LNTS 303; Convention Relative to the Treatment of Prisoners of War 1929, 118 LNTS 343 (POW Convention). Texts of these conventions are found at <https://ihl.databases.icrc.org/ihl>.

² See R. Kolb, *Advanced Introduction to International Humanitarian Law* (2014), at 1–14. Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (Geneva Convention I) 1949, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II) 1949, 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War (Geneva Convention III) 1949, 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) 1949, 75 UNTS 287; all four Conventions entered into force 21 October 1950.

³ See G. 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 article begins by sketching the key features of the pre-1914 ‘POW legal regime’ and then turns to examine three aspects of captivity during World War I – 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 World War I’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’ world, 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 18 ‘POW’ articles in the regulations annexed to 1907 Hague Convention (IV) faithfully reflected current European practice, but did not prescribe how these 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

⁴ I. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2014), at 2; Deprechin, ‘The Laws of War’, in J. Winter (ed.), *The Cambridge History of the First World War*, 3 vols (2014), vol. 1, 615; Jones, ‘International Law and Western Front Prisoners in the First World War’, in A.-M. Pathé and E. Théofilakis (eds), *Wartime Captivity in the Twentieth Century* (2016) 30.

⁵ G. Best, *Law and War since 1945* (1994), at 8–9ff.

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; Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land 1899, 32 Stat. 1803; Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (Hague Convention IV) 1907, 36 Stat. 2277. Text available at <https://ihl-databases.icrc.org/ihl>.

⁷ Although we do not deal with this issue here, it is worth noting that attitudes towards the selective application of prisoner of war (POW) law changed over this period. See, *inter alia*, Hull, ‘Prisoners in Colonial Warfare: The Imperial German Example’, in Scheipers, *supra* note 6, 157; 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; Schroer, ‘The Emergence and Early Demise of Codified Racial Segregation of Prisoners of War under the Geneva Conventions of 1929 and 1949’, 15(1) *Journal of the History of International Law* (2013) 54; 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.

⁸ Hague Convention IV and its Annex, *supra* note 6. See A. Rachamimov, *POWs and the Great War: Captivity on the Eastern Front* (2002), at 67–86.

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 and 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 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 POWs. 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 World War I, states not only looked to make the standards more effective to protect POWs 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. Thus, although attitudes and detention practices after 1914 frequently followed traditional norms, the duration of the war and 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 of 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, which 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 POWs.¹¹ The fate and treatment of POWs thus quickly established itself as a matter of 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

⁹ See Davis, 'Prisoners of War in Twentieth Century War Economies', 12(4) *Journal of Contemporary History (JCH)* (1977) 623, at 623–634.

¹⁰ Kramer, 'Prisoners in the First World War', in Scheipers, *supra* note 6, 75, 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 radicalization of warfare. U. Hinz, *Gefangen im Großen Krieg: Kriegsgefangenschaft in Deutschland 1914–1921* (2006); Oltmer, 'Unentbehrliche Arbeitskräfte Kriegsgefangenen in Deutschland 1914–1918', in J. Oltmer (ed.), *Kriegsgefangenenenschaft im Europa des Ersten Weltkrieges* (2006) 67; H. Jones, *Violence against Prisoners of War, Britain, France and Germany 1914–1920* (2011).

¹² See, e.g., British Foreign Office, *The Treatment of Prisoners of War in England and Germany during the First Eight Months of the War* (London: Her Majesty's Stationery Office [HMSO], 1915).

¹³ Hull, *supra* note 4, at 278. G. 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.

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, of course, was not ubiquitous. Boer commandos 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 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 concepts of chivalry and military honour.¹⁷ 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’.¹⁸

Detention practices during World War I amply confirm the veracity of Neff’s observations. The increasingly ‘attritional’ mindset 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.¹⁹ Governments often allowed doubts over their prisoners’ loyalty or fighting spirit to justify withholding the dispatch of relief parcels and denying them the right to parole. Rome’s refusal to attend to its prisoners’ welfare contributed to the very high death rates – upwards of 14 per cent – amongst Italian 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.²⁰ 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.²¹ In this sense, World War I was a harbinger for the kind of politicized

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. Andreopoulos and M.R. Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (1994) 86, at 86–97.

¹⁶ S. Carvin, *Prisoners of America’s Wars* (2010), at 63–66.

¹⁷ Hague Convention IV and its Annex, *supra* note 6.

¹⁸ Lord Lyons (British ambassador to Paris) to the Earl of Derby (Foreign Secretary), 13 July 1874, file FO83/481, The National Archives (TNA), United Kingdom.

¹⁹ 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 and Present* (2013) 161.

²⁰ See Rachamimov, *supra* note 8, at 133–159, 191–220; Y. Yanikdağ, *Healing the Nation Prisoners of War, Medicine and Nationalism in Turkey, 1914–1939* (2013); G. Procacci, *Soldati e prigionieri italiani nella Grande Guerra* (2000).

²¹ See H. 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 dissertation on file at École des hautes études en sciences sociales).

treatment of prisoners that 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 that became a central feature of modern state formations for the remainder of the 20th century and beyond.²²

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 been featured in the Geneva Conventions of 1864 and 1906 and the 1899/1907 Hague Regulations.²³ The belligerents of World War I 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.

Hospitalizing 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.²⁴ The first operation to hospitalize sick and wounded prisoners nevertheless took place in January 1916, when a party of tuberculosis patients was 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.²⁵

Practice during World War I also departed from the written codes in conferring repatriation on 'long-term' prisoners; men who had been held for over 18 months and

²² See Minca, 'Geographies of the camp', 49 *Political Geography* (2015) 74; S. Audoin-Rouzeau and A. Becker, 14–18: *Understanding the Great War* (2002), at 70–93. Jones, 'A Technological Revolution? The Great War and the Radicalization of the Prisoner of War Camp', in A. Kramer and B. Greiner (eds), *Welt der Lager: Zur 'Erfolgsgeschichte' einer Institution* (2013) 110, at 110.

²³ Art. 6 of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864 Geneva Convention), 22 August 1864, proposed various options; Art. 2 of the Convention for the Amelioration of the Condition of Wounded and Sick in Armies in the Field (1906 Geneva Convention) 1906, 11 LNTS 440, provided for special agreements for it; Hague Regulations 1907, *supra* note 6: Art. 21 incorporates the 1864 Geneva Convention by reference.

²⁴ Draft Additional Articles Relating to the Condition of the Wounded in War 1868, 18 Martens Nouveau Recueil (Series 1) 612, Art. 5; 1906 Geneva Convention, *supra* note 23, Art. 2, called upon belligerents to enter into special agreements.

²⁵ S. Wolf, *Neutrality: Diplomacy and Internment in the Netherlands during the First World War* (2013), at 147–163; G. Wurzer, *Die Kriegsgefangenen der Mittelmächte in Russland im Ersten Weltkrieg* (2008), at 387–397.

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.²⁶

It would be wrong to assume that these exchanges were unproblematic. Although aided by neutral governments and national Red Cross societies, negotiations were rarely free from the pressure of external events.²⁷ 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.²⁸ Officials clearly feared being distracted by ‘sentimental rubbish’; had public interest in the matter not been so intense, 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.²⁹

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.³⁰ The arrangements were transferred to other theatres, building a momentum that 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

²⁶ See A. 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 *Twentieth Century British History* (2010) 163.

²⁷ See Hinz, ‘Humanität im Krieg? Internationales Rotes Kreuz und Kriegsgefangenenhilfe im Ersten Weltkrieg’, in J. Oltmer (ed.), *Kriegsgefangene in Europa des Ersten Weltkriegs* (2006) 216, at 226; Davis, ‘National Red Cross Societies and Prisoner of War in Russia, 1914–1918’, 28 *JCH* (1993) 31.

²⁸ Jones, *supra* note 11, at 161.

²⁹ Diary of Lt. Gen. Sir Herbert Belfield, 29 June 1917, 91/44/1 HEB 1/1, Imperial War Museum, London, United Kingdom. See *The Horrors of Wittenburg: Official Report to the British Government* (London: HMSO, 1916); Nachtigal, ‘Seuchen unter militärischer Aufsicht in Rußland: Das Lager Tockoe also Beispiel für die Behandlung der Kriegsgefangenen 1915/1916’, 48 *Jahrbücher für Geschichte Osteuropas* (2000) 363. The belligerents also took a restrictive attitude towards their obligations under the Geneva Convention to return ‘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 (IRRC)* (2015) 1099.

³⁰ 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.

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.'³¹ Governments, of course, did flout agreements when it suited their book, but they seemed powerless to prevent the gradual liberalization of the exchange regime, extending its provisions from severely invalidated prisoners to more lightly wounded and, later, to long-term or old captives or those suffering from mental or psychological conditions. Arrangements governing the repatriation and neutral internment operations were likewise progressively relaxed. Medical criteria were loosened, selection was based on the category of illness rather than on strict numerical parity and permission was granted for family members to visit internees in Switzerland and the Netherlands. This process was in sharp distinction to the radicalization 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 being indicative of the way in which World War I echoed earlier customary or chivalric conventions.³² 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, rather, 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 his or her enemies should be categorized as a prisoner first and only then receive special humanitarian dispensation on account of his or her wounds.³³ 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 (POW Convention).³⁴ While the 1906 Geneva Convention merely encouraged belligerents to repatriate sick and wounded prisoners 'by way of exception or favour', the POW Convention was much more

³¹ Diary of Sir Herbert Belfield, 29 June 1917, *supra* note 29.

³² Nachtigal estimates the number of men released before October 1918 at about 1.2 million. Nachtigal, 'The Repatriation and Reception of Returning POWs, 1918–1922', 26 *Immigrants and 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. Hatley-Broad (eds), *Prisoners of War, Prisoners of Peace: Captivity, Homecoming and Memory in World War II* (2005) 11, at 11.

³³ Diplomatic Conference for the Revision of the Geneva Convention of 1864, Geneva, Minutes of 1st committee, 4th Meeting, 19 June 1906, reprinted in Davis, 'The Geneva Convention of 1906', 1 *American Journal of International Law (AJIL)* (1907) 409, at 414.

³⁴ POW Convention, *supra* note 1.

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 organizing repatriation operations.³⁵ 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 repatriation to take place ‘as soon as possible after the conclusion of peace’ (Article 75).³⁶ They did seek, though, 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 POW Convention. It was only reinstated in the 1949 Geneva Convention III (Article 21) after states had repeatedly reverted to the practice during World War II as a means to facilitate a more humanitarian treatment of individual POWs in specific cases.³⁷

That most humanitarian of gestures – releasing men from captivity into the care of their families and loved ones – was thus granted in the 1929 POW 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.³⁸ At the same time, the principle was strengthened in the 1949 Geneva Convention III by an obligation to allow seriously 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.³⁹

3 Reprisals

During World War I, prisoners of war suffered greatly from the consequences of measures purportedly taken in reprisal for unlawful acts allegedly committed by their

³⁵ Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, 11 November 1918, reprinted in *Foreign Relations of the United States, 1918, Supplement 2: The World War* (1933), Doc. 148. See R. Stone ‘The American-German Conference on Prisoners of War, 1906’, 13(3) *AJIL* (1919) 406, 406–449.

³⁶ Hague Regulations 1907, *supra* note 6, Art. 20.

³⁷ J. Pictet (ed.), *Commentary on Geneva Convention III* (1960), at 178–180; Report of the Commission of Government Experts (1947), at 133–134. Parole was considered ‘particularly valuable to disabled prisoner of war awaiting repatriation’. Geneva Convention III, *supra* note 2.

³⁸ Zillman, ‘Political Uses of Prisoners of War’, 6(2) *Arizona State Law Journal* (1975) 237.

³⁹ Geneva Convention III, *supra* note 2, Art. 109; see also the updated commentary on Art. 7 of Geneva Convention I, in ICRC, *Commentary on the First Geneva Convention* (2016), paras 999–1001, and the commentary on Art. 118 of Geneva Convention III in Pictet, *supra* note 37, at 541–549.

respective states. Reprisals against POWs were not prohibited under international law, and states entered 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'.⁴⁰ 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.⁴¹ As Isabel Hull observes, World War I was to be 'disfigured by wave after wave of violent reprisals exercised with lethal stubbornness'.⁴² Germany, and arguably France too, opened 'reprisal camps' where prisoners were subjected to deliberately harsh or humiliating treatment in reprisal for the alleged wrongdoing of their adversaries.⁴³ 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 in war-related tasks, often within range of their own guns, and denied access to relief parcels or inspection visits by neutral diplomats.⁴⁴ Those parties finally agreed to move the prisoners 30 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.⁴⁵

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 towards POWs as the war progressed,⁴⁶ while others point to the fact that the term 'reprisal' was used to justify unlawful behaviour, not necessarily connected with an intent to redress or deter unlawful behaviour on behalf of their enemies.⁴⁷ A reprisal is an act that would normally be unlawful, taken in response to a prior unlawful

⁴⁰ 'French Yellow Book', *Journal Officiel*, 6 August 1914, at 7133, reprinted in *International Law Studies Series: US Naval War College* (1917), at 86–87. Today, it is prohibited to carry out reprisals against a broad range of persons and objects under international humanitarian law (IHL). See J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 2 vols (2005), vol. I, Rules 145, 146, 147; see the commentary on Art. 46 of Geneva Convention I, in ICRC, *Commentary on the First Geneva Convention* (2016), p. 973.

⁴¹ Jones, 'A Missing Paradigm? Military Captivity and the Prisoner of War, 1914–18' 26 *Immigrants and Minorities* (2008) 19, at 27.

⁴² Hull, *supra* note 4, at 278.

⁴³ For details, see Jones, *supra* note 11, at 127–161.

⁴⁴ Art. 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 World War I, see Cameron, *supra* note 29.

⁴⁵ *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 January 1917–31 May 1918, file CG1 A 35-08, ICRC Archives, Geneva, Switzerland. See especially Jones, 'The German Spring Reprisals of 1917: Prisoners of War and the Violence of the Western Front', 26 *German History* (2008) 335.

⁴⁶ Jones, *supra* note 11, at 127–161. Becker, *supra* note 26, at 279–292.

⁴⁷ 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'. International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts and Their Commentaries (ILC Draft Articles), UN Doc. A/56/10 (2001), Part III, ch. 2, draft Arts 49–54.

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.⁴⁸ 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.⁴⁹

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. Although delegates clearly viewed reprisals as an essential deterrent against violations of the law of war, they were reluctant to encourage, entrench or legitimize practices that were so obviously distasteful.⁵⁰ The resulting ‘arbitrariness’ of the pre-war reprisals regime clearly worried contemporaries and led Lassa Oppenheim, amongst others, to insist on the ‘imperative necessity’ of regulating state practice.⁵¹ The issue was all the more pressing given the relative fragility of rules governing the treatment 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.⁵² In case of mistake, reprisals may lead to irreparable harm and are always at risk of abuse. In World War I, 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

⁴⁸ Special Arbitral Tribunal, *Naulilaa Case (Portugal v. Germany)*, reprinted in (1928) 2 UNRIAA 1011, 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, especially at 66.

⁴⁹ Hull, *supra* note 4, at 278. This aspect was stressed in the draft codes developed by the International Law Association (ILA) following the war. See note 64 below.

⁵⁰ F. Kalshoven, *Belligerent Reprisals* (2005 [1971]), at 45–68. The matter had, by contrast, been addressed at the Brussels Conference in 1874; S. Darcy, *Collective Responsibility and Accountability under International Law* (2007), at 134–138.

⁵¹ L. Oppenheim, *International Law: A Treatise*, 2 vols (1905), vol. 2, at 259–263.

⁵² This point is also made by Hampson, ‘Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949’, 37 *International and Comparative Law Quarterly* (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. *Naulilaa* case, *supra* note 48.

reprisals after 1914 revealed a number of elements that 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.⁵³ 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, also, partly to London's conviction that the employment of German prisoners in French ports did not violate its obligations under the Hague Regulations.⁵⁴ The episode again underlined 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.⁵⁵ 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 maximizing 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.⁵⁶

Linked to this is the perception of the existence of a violation justifying the resort to reprisals. 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'.⁵⁷ 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

⁵³ Jones, *supra* note 11 at 165.

⁵⁴ *Ibid.*, at 140–141; some 30,000 French POWs were detained in the reprisal camps, against 2,000 British.

⁵⁵ See especially correspondence of 8 and 12 November 1915 between Gustav Ador (ICRC President) and the French Ministry of Foreign Affairs, Prisoner of War Service, file CG1A 35-04, ICRC Archives.

⁵⁶ Lord Phillimore characterized reprisals as 'of no use unless you are the stronger side'. Quoted in 'The League of Nations and the Laws of War', 1 *British Yearbook of International Law* (1920–1921) 109, at 115 (unsigned).

⁵⁷ Hull, *supra* note 4, at 286, 280.

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.⁵⁸

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 Hague Regulations. As we have seen, this was certainly the view taken in London.⁵⁹ 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 it may not have been fully motivated by a concern for respect of the law. Indeed, there is evidence to suggest that the 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 well-being of its men, that steered German attitudes on the issue.

Various steps and confidence-building measures were taken to halt the relentless recourse to reprisals or to prevent them, once enacted, from escalating out of control into a spiral of increasingly brutal measures and countermeasures. 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.⁶⁰ 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.⁶¹ 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 working to eliminate the use of reprisals, the USA soon resorted to them on entering the war as a belligerent in April 1917.⁶²

⁵⁸ A similar argument can be made regarding the military's influence in Russia's treatment of POWs.

⁵⁹ See correspondence between Horace Rumbold and Edouard Naville and the Frankfurt branch of the German Red Cross, July 1916–June 1917, file CG1 A 35-06, ICRC Archives.

⁶⁰ A. Durand, *The History of the International Committee of the Red Cross: From Sarajevo to Hiroshima* (1984), vol. 2, at 80–81.

⁶¹ 'Reprisals against Combatant and Civilian Prisoners of War', 5 *Grotius Annuaire International* (1917), ch. IX, 165, at 179, para. 20.

⁶² Payments to German officer POWs were suspended in December 1917 after Berlin refused to base payments on the German army pay scale.

The efforts taken to diminish, regulate and, finally, eliminate reprisals against POWs 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.⁶³ 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 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.⁶⁴ But the ILA 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'.⁶⁵ 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'.⁶⁶

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 wrongdoings of their compatriots flew in the face of the committee's apparent determination to entrench prisoners' position as 'humanitarian' subjects. Thus, the last paragraph of Article 2 of the POW Convention stated unequivocally, 'measures of reprisals against [POWs] are forbidden'.

⁶³ 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.

⁶⁴ ILA, *Prisoners of War: Suggested Regulations*, reprinted in *Report of the 29th Conference (Portsmouth, England)* (1920) 275, at 290–294, 303.

⁶⁵ The last sentence of Art. 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.'

⁶⁶ Proposed International Regulations for the Treatment of Prisoners of War, reprinted in *Final Report of the Treatment of Prisoners of War Committee* (1921) 236. *Reichsvereinigung ehemaliger Kriegsgefangener held similar views: Vorschläge für ein neues Kriegsgefangenenrecht*, April 1929, file CR177-1, at 25–26, ICRC Archives.

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 1929.⁶⁷ 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 POW Convention, though, naturally covered 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 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.⁶⁸ In the words of the US delegate, the ban on reprisals represented nothing less than a 'new humanitarian rule of international law'.⁶⁹ 'Were [the convention] to contain but this one principle', the conference rapporteur triumphantly proclaimed to those present, 'you would not have met in vain'.⁷⁰

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 Frits Kalshoven suggests, the negotiators of the POW 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.⁷¹ 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'.⁷² The American delegation was apparently flattered into supporting the motion by the (erroneous) claim that its inspiration lay in the US Lieber Code of 1863.⁷³ Only three delegations spoke in favour of retaining

⁶⁷ J. Pictet, *Commentary on the First Geneva Convention* (1952), at 344.

⁶⁸ Kalshoven, *supra* note 50, at 71–72.

⁶⁹ E. Wadsworth (US delegate, Geneva) to Secretary of State (Washington), 1 August 1929, RG59 1910–1929 CDF, file 514.2A12, box 5447, National Archives and Records Administration (NARA), College Park, MD, USA.

⁷⁰ Report by M. George Werner on the work of the 2nd Commission (POW), RG59 1910–1929 CDF, file 514.2A12/137, box 5445, NARA.

⁷¹ Kalshoven, *supra* note 50, at 106–108. For an argument that reprisals and diplomatic protection have the same roots in international law, see Haggemacher, 'L'ancêtre de la protection diplomatique: les représailles de l'ancien droit (XIIe–XVIIIe siècles)', 143 *Relations internationales* (2010) 7.

⁷² Sir Horace Rumbold (UK delegate, Geneva) to Sir A. Henderson (Foreign Office), 31 July 1929, file FO372/2551 T9202, TNA. For British attitudes, see N. Wylie, *Barbed Wire Diplomacy: Britain, Germany and the Politics of Prisoners of War, 1939–1945* (2010), at 50.

⁷³ Lieber had in fact left 'all prisoners ... liable to the infliction of retaliatory measures'. General Orders no. 100: Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Art. 59.

reprisals, but the weight of opinion behind an absolute ban was so overwhelming that the objections were withdrawn and the vote carried unanimously.⁷⁴ Following this initial ban, the potential targets for belligerent reprisals during armed conflicts have been progressively restricted.⁷⁵

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 violations 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.⁷⁶ 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 1872.⁷⁷ 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.⁷⁸ 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 Young Men's Christian Association to neutral Red Cross societies, mixed medical commissions (responsible for selecting prisoners for repatriation) and the ICRC.⁷⁹ What

⁷⁴ The British amendment found support from only the Turkish and Japanese delegations.

⁷⁵ Geneva Convention I, *supra* note 2, Art. 46; Geneva Convention II, *supra* note 2, Art. 47; Geneva Convention III, *supra* note 2, Art. 13; Geneva Convention IV, *supra* note 2, Art. 33; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3, Arts 20, 51–56; Hague Convention for the Protection of Cultural Property in Time of Armed Conflict 1954, 249 UNTS 240, Art. 4(4); 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 47; Henckaerts and Doswald-Beck, *supra* note 40, Rules 145–148; see also the updated commentary on Art. 46 of Geneva Convention I, *supra* note 40; Darcy, 'The Evolution of the Law of Belligerent Reprisals', 175 *Military Law and the Law of War Review* (2003) 184; Hampson, *supra* note 52.

⁷⁶ J. Fabian Witt, *Lincoln's Code: The Laws of War in American History* (2012), at 285–304.

⁷⁷ Hall, 'Première proposition de création d'une cour criminelle internationale permanente', 80 *IRRC* (1998) 59.

⁷⁸ Hague Regulations of 1899 and 1907, *supra* note 6, Art. 15.

⁷⁹ Jones, 'International or Transnational? Humanitarian Action during the First World War', 16 *European Review of History* (2009) 697. Becker, *supra* note 26, at 179–228.

distinguished these organizations from the protecting powers was that the former based their 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.⁸⁰ 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 1904–1905 saw protecting power diplomats visit places of detention and submit formal reports on their findings. This practice, however, had not 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, swiftly extended to other theatres and grew to become an ‘openly recognized and accepted definite system’.⁸¹ 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 to 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 the protecting power’s representatives, even when granted to other neutral agencies.⁸² By 1918, Spanish diplomats in Germany had become so frustrated by the way they were treated that Madrid considered withdrawing its services altogether.⁸³

Yet, while belligerents were ready to make life difficult for neutral diplomats, they evidently found it difficult to dispense with their services entirely or to 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 earshot of the camp authorities – attested to the significance that 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

⁸⁰ See the commentary on Art. 8 (Protecting Powers), in ICRC, *Commentary on the First Geneva Convention* (2016), paras 1016–1019.

⁸¹ Stone, ‘American-German Conference on Prisoners of War’, 13 *AJIL* (1919) 406, at 433–434.

⁸² ICRC memo, ‘Les Visites’, (n.d., pre-April 1917), file C G1 A 21-01, ICRC Archives.

⁸³ 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.

emerge out of the war.⁸⁴ 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.⁸⁵ Even hard-bitten observers like the ICRC’s veteran 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.⁸⁶

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 had wider ramifications for the nascent corpus of IHL. For the first time, a system 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 a 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 World War I, 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 (PCIJ), founded in 1922, were both explicitly rejected, despite being featured 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, and it revealed, in the words of the chairman of the British Red Cross, the ‘impossibility of securing adequate punishment for those guilty’ of violating the conventions.⁸⁷ Finally, a US proposal that protecting powers be specifically tasked with investigating infractions and publicizing their results, was voted down at the conference. The POW Convention merely encouraged the belligerents to follow the example set in World War I and to resolve any problems through dialogue, facilitated where necessary through the good offices of their protecting powers.⁸⁸

⁸⁴ C.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922), vol. 2, at 340.

⁸⁵ *Actes de la Conférence diplomatique de Genève de 1929* (1930), at 512.

⁸⁶ Mme. R.M. Frick-Cramer to Gustav Ador (ICRC), 30 November 1929, file CR177-1, ICRC Archives.

⁸⁷ Sir Arthur Stanley (British Red Cross) to Gustav Ador (ICRC), 11 June 1921, RG200, Group 2 1917–1935, box 77, NARA. See Segesser, ‘The Punishment of War Crimes Committed against Prisoners of War, Deportees and Refugees during and after the First World War’, 26 *Immigrants and Minorities* (2008) 134; Kramer, ‘The First Wave of International War Crimes Trials: Istanbul and Leipzig’, 14 *European Review* (2006) 441.

⁸⁸ *Actes de la Conférence diplomatique, supra* note 85, at 518. See the commentary on Art. 49 of Geneva Convention I, in ICRC, *Commentary on the First Geneva Convention* (2016), paras 2823–2827.

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-20th-century states to accede to external interference in their military affairs, on the other. What compromised the record of protecting powers during World War II was not the failure of the supervisory regime invested in the POW Convention but, rather, the calculated denial by some governments of any legal or normative restraints on the conduct of war fighting and the treatment of enemy 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 principle of external supervision to allow a semblance of humanitarian oversight to emerge in its stead.⁸⁹

Finally, in resisting the temptation to leave oversight of the implementation of the POW Convention to either judicial bodies, such as the PCIJ, or political institutions, such as the League of Nations Council, the drafters of the POW 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 International Red Cross and Red Crescent Movement.⁹⁰ In this light, IHL's 'legitimacy' can partly be explained by the lessons learned 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 criminalization of wrongdoers or the support of political institutions founded on the shifting sands of great power consensus.

⁸⁹ Wylie and Crossland, 'The Korean War and the Post-War Prisoners of War (POW) Regime, 1945–1956', 23(4) *War in History* (2016) 439. Since the Korean War, the ICRC has distinguished between oversight functions derived from its role as a humanitarian organization, which it accepts, and formal supervisory functions for 'substitute protecting powers' enshrined in Geneva Convention III, *supra* note 2, Art. 10. See ICRC, *Commentary on the First Geneva Convention* (2016), section J, available at <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

⁹⁰ Resolution II on Strengthening Compliance with International Humanitarian Law, Doc. 32IC/15/R2, 8–10 December 2015.

5 Concluding Remarks

Recent research has revised our assumptions about the place of World War I in the broader history of the 20th century.⁹¹ 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.⁹² 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 World War I and the legal developments that 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.⁹³ But, while many of the POW 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.⁹⁴ 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 Ausfluß 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'.⁹⁵ It was 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.⁹⁶

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

⁹¹ D. Reynolds, *The Long Shadow: The Great War and the Twentieth Century* (2013).

⁹² 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.

⁹³ The Russian delegate to the 1864 Geneva Conference suggested including POWs in their remit, but he 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.

⁹⁴ For ICRC thinking in the 1920s, see 'Projet de Code des prisonniers de guerre, déportés, évacués et réfugiés', 5/56 *Revue internationale de la Croix-Rouge* (1923), 771 at 771–814.

⁹⁵ E. Wolle, *Grundsätzliches und Kritisches zur Reform des Rechtes der Kriegsgefangenen* (1929), at 3.

⁹⁶ J.M. Spaight, *War Rights on Land* (1911), at 58.

World War I 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 as well as 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'.⁹⁷ Under the POW 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 invalidated, 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).⁹⁸ 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. Thus, there was a clear substantive and conceptual distinction between the two 'humanitarian' conventions signed in Geneva in 1929 and the earlier Hague Regulations of 1899/1907 governing the conduct of armed conflicts.⁹⁹

The rights, and the principles that underpinned them, sat alongside a detailed list of specific provisions, covering all aspects of custody.¹⁰⁰ 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'.¹⁰¹ 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 that 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 have claimed, is open to debate, though there is little doubt that the British, mindful of their experiences in World War I, shared Washington's

⁹⁷ B. Cabanes, *The Great War and the Origins of Humanitarianism* (2014), at 301.

⁹⁸ POW veterans associations used similar rights-based terminology. See Reichsvereinigung ehemaliger Kriegsgefangener, *Vorschläge für ein neues Kriegsgefangenenrecht*, April 1929, at 17.

⁹⁹ 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) 52, at 52–68.

¹⁰⁰ The conditions of employment, for instance, were outlined in seven articles (660 words), as against a single article in the 1907 regulations.

¹⁰¹ Paul des Gouttes, cited in Durand, *supra* note 60, at 255.

preference for a convention that distilled key principles rather than sought to legislate for every possible contingency.¹⁰²

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.¹⁰³ This was not without its dangers. The more detailed the treaty, the greater the possibility of triggering reprisals for alleged non-compliance.¹⁰⁴ This was a quandary well known to neutral diplomats, who often found their camp visit reports used by the belligerents to justify the very 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.¹⁰⁵ Although events in the late 1930s and 1940s soon exposed its limitations, the POW Convention, on balance, ultimately represented a triumph of precision over broad-brush principles.¹⁰⁶ This not only marked another departure from the pre-war treaties, but it 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, rather, 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.¹⁰⁷ The 20th century has witnessed an unmistakable trend towards 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 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 victimization and brutality, such that

¹⁰² A.P. Higgins, *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 (BYBIL)* (1931) 31. Foxton, ‘International Law in Domestic Courts: Some Lessons from the Prize Court in the Great War’, 73 *BYBIL* (2002) 261.

¹⁰³ See Note de M. Huber sur la conférence diplomatique: Confidentiel, 26 June 1929, file CR177-1, ICRC Archives; 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, file CR177-1, ICRC Archives.

¹⁰⁴ des Gouttes, ‘Les Conventions de la Haye de 1899 et 1907’, 2 *IRRC* (1919) 22, at 25.

¹⁰⁵ Hull, *supra* note 4, at 279.

¹⁰⁶ 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.

¹⁰⁷ S.G. Reymond (New Zealand delegate) to Sir James Parr (High Commissioner for New Zealand, London), 6 August 1929, file R22435985, 4, Archives New Zealand.

their fate became a *cause célèbre* at home and across the neutral world.¹⁰⁸ To humanitarian observers, the importance of legislating in favour of civilians was self-evident, and, throughout the interwar era, various attempts were made in this direction. The ICRC's first draft comprising 103 articles and tabled at the 1923 International Red 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.¹⁰⁹ The ICRC, however, also championed other mechanisms to protect civilians caught up in the maelstrom of war, including 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 of these initiatives were built directly on the practical and conceptual innovations found in the 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 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 and 24). Draft Article 17 even went so far as to make the POW Convention 'by analogy applicable to civilian internees' and pledged a level of 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 World War I. The excesses of World War II did not obliterate the advances made in the preceding two decades nor did they 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 World War I as much as it did from the dust clouds and death camps of World War II.

¹⁰⁸ The most egregious instances of ill-treatment involved minority populations – Ottoman Armenians, Jewish or German communities in Russia and so on – rather than civilians under enemy occupation. See T.M. Proctor, *Civilians in a World at War, 1914–1918* (2010). For changing attitudes towards civilians, see H.M. Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (2011).

¹⁰⁹ See Frick-Cramer, 'A propos des projets des conventions internationales réglant le sort des prisonniers', 7(74) *Revue internationale de la Croix-Rouge* (1925) 73.