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Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"

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I. INTRODUCTION

White House Counsel Alberto Gonzalez has noted his belief that in the context of the "War on Terror," the Geneva Conventions of 1949[1] have been made obsolete.[2] Victoria Clarke, a senior Pentagon spokeswoman, has taken a less political position, stating recently that in light of the events of September 11, 2001 and their aftermath, the Geneva Conventions "should be looked at with new eyes."[3] Though similar in that they suggest the United States should have greater flexibility in the administration of its military aims with respect to terrorism, these two comments implicate drastically different approaches to the relationship between international humanitarian law and military necessity. Did the Geneva Conventions become instantaneously obsolete with the impact of planes into the World Trade Center and Pentagon? This Recent Development argues against that very proposition. International humanitarian law, specifically the provisions of the Geneva Convention [No. III] Relative to the Treatment of Prisoners of War (the "Third Geneva Convention") that deal with the questioning of prisoners[4] and their repatriation at the end of hostilities,[5] is sufficiently flexible to accommodate tactics in the War on Terror, while still adequately protecting detainees at war. Both the text of the Third Geneva Convention and examples of state practice demonstrate that particular provisions of the Third Geneva Convention may be interpreted to address military considerations while still respecting the general principles of the Geneva Conventions.

II. RELEVANT BACKGROUND

In September 2001, terrorists associated with al-Qaeda and supported by the Taliban government in Afghanistan attacked the World Trade Center and Pentagon, prompting a military response from the United States in Afghanistan. Suspected al-Qaeda and Taliban fighters captured during the

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1. GENEVA CONVENTION [NO I] FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; GENEVA CONVENTION [NO II] FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; GENEVA CONVENTION [NO III] RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter THIRD GENEVA CONVENTION]; GENEVA CONVENTION [NO IV] RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Only the Third Geneva Convention will be dealt with in this Recent Development.

2. Stuart Taylor, Jr., *We Don't Need to be Scofflaws to Attack Terror*, NAT'L J., Feb. 2, 2002, at 294.

3. Duncan Campbell, *Washington Hints at Improving Legal Rights for Detainees in Guantanamo Bay*, GUARDIAN (United Kingdom), Jan. 29, 2002, at 12.

4. THIRD GENEVA CONVENTION, *supra* note 1, art. 17.

5. THIRD GENEVA CONVENTION, *supra* note 1, art. 118.

U.S.-led campaign were transported to a U.S. naval base in Guantanamo Bay, Cuba. There, the detainees were housed in Camp Delta (formerly Camp X-Ray), a detention facility originally intended for Cuban and Haitian boat people; some detainees have remained at Camp Delta since then.[6] From the outset, the U.S. administration denied the detainees Prisoner of War (POW) status under the Third Geneva Convention. However, in an official policy document, the Department of State concluded that while the Taliban was never recognized by the U.S. as the legitimate government of Afghanistan, its members were still covered by the Geneva Convention.[7] By contrast, al-Qaeda was "not a state party to the Geneva Convention; it is a foreign terrorist group . . . [and] as such its members are not entitled to POW status."[8]

III. The Indeterminacy of Humanitarian Law

The events at Camp Delta illustrate pressure by other states to apply international law. The initial U.S. position on the detainees was to deny the applicability of the Third Geneva Convention altogether. President Bush termed the detainees "killers" and "terrorists."[9] Reactions among states in the international community to the U.S. position and the detainment in Guantanamo were significant. International criticism came from a variety of sources, including the European Union, the Netherlands,[10] and the United Kingdom.[11] In response to these criticisms, the United States altered its approach. An official State Department policy brief, written shortly after such criticism began to surface, assured that detainees would be treated "in a manner consistent with the principles of the Third Geneva Convention of 1949."[12]

This change of policy showed that the United States was constrained in its actions. Arguably, it is an instance of the Geneva Convention treaty regime functioning as it was intended, with third states' reactions constituting fulfillment of their responsibility to take all steps necessary under the

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6. Julian Borger, *Human Rights Protest as POWs Arrive at U.S. Base*, Guardian (U.K.), Jan. 12, 2002, http://www.guardian.co.uk/international/story/0,3604,631519,00.html. The numbers at Camp Delta have swelled from 20 in January 2002, to 598 at the time of this writing; facilities are being constructed for an expected 2000 inmates. *See U.S. to Move Cuba Base Detainees if Storm Nears*, Guardian (U.K.), Sept. 25, 2002, http://www.guardian.co.uk/international/story/0,3604,798630,00. html.

7. U.S. Department of State Policy Document, *Status of Detainees at Guantanamo*, Feb. 7, 2002, http://www.state.gov/p/sa/rls/fs/7910pf.htm.

8. *Id.*

9. BBC News Online, *Bush Reconsiders Prisoners' Rights*, Jan. 29, 2002, http://news.bbc.co.uk/hi/english/world/americas/newsid_1788000/1788062.stm (stating that norms and values needed to be maintained in the "War on Terror").

10. BBC News Online, *E.U. Presses U.S. on Prisoner Rights*, Jan. 21, 2002, http://news.bbc.co.uk/hi/english/world/americas/newsid_1774000/1774237.stm.

11. Kamal Ahmed & Peter Beaumont, *Blair Warns Bush on Taliban Suspects*, The Observer (United Kingdom), Jan. 20, 2002, at 2 (warning the U.S. that treatment of those captured threatened to become "a political issue" causing international outcry).

12. *Status of Detainees at Guantanamo*, *supra* note 7. *See also* Third Geneva Convention, *supra* note 1, art. 1.

Third Geneva Convention.[13] It is also evidence of a dynamic application of compliance created by the treaty regime.[14] A unilateral interpretation of the Third Geneva Convention bears the same legal weight as interpretation by another state party to the Third Geneva Convention that is not involved in the conflict. For this reason criticisms by other states do not undermine the sovereignty of the state at which they are directed.[15] The pressure generated by other states' interpretations on a state to revise its opinion regarding the applicability of the Third Geneva Convention,[16] may act as an enforcement mechanism.

Criticism of U.S. policy died down following positive assurances that it would apply humanitarian law, if not grant actual POW status, to Guantanamo detainees. This Recent Development proposes that a state's freedom of interpretation within the Geneva Convention treaty regime is relatively broad, but is subject to general assent from the international community, which may hinge on considerations of both international law and politics. In short, the United States could have avoided international criticism and preserved political capital had it applied international humanitarian law from the outset in the current situation.

The indeterminacy of the threshold of application of international humanitarian law allowed the United States to take the position it ultimately did in the current conflict. Under one reading of the Third Geneva Convention, the captured combatants may be "POWs" under the Third Geneva Convention.[17] However, even if the detainees qualify as POWs, it is difficult for the international community to verify whether the requirements imposed by article 4 have been met, as the detaining agent will almost always be an active party to the conflict. In the absence of fact-finding by an objective body, any determination on an unclear point of law will necessarily be clouded by the prevailing interests of the detaining power. The fundamental principles of international humanitarian law ensure base level protections within loose rules. This Recent Development examines specific provisions of the Third Geneva Convention to show that POW status ultimately could

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13. Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS 345, 396 (1994). *See also* Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT'L REV. RED CROSS 67, 67–87 (2000). *See* THIRD GENEVA CONVENTION, *supra* note 1, art. 1.

14. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

15. René Provost, *Indeterminacy and Characterization in the Application of Humanitarian Law*, *in* THE NEW WORLD ORDER: SOVEREIGNTY, HUMAN RIGHTS AND SELF DETERMINATION OF PEOPLES 177, 197 (Mortimer Sellers ed., 1996).

16. *Id.* at 200; Asylum Case, (Colom. v. Peru), 1950 I.C.J. 274 (Nov. 20).

17. The broad scope of article 4 of the Third Geneva Convention, which deals with those who are entitled to POW status, could arguably encompass the detainees of the Afghanistan conflict. Though the armed opposition met by U.S. troops did not conform with strict conceptions of military organization, the detainees could have qualified for POW status as "members of the armed forces of a Party to the conflict *as well as members of militias or volunteer corps* forming part of such armed forces." *See* THIRD GENEVA CONVENTION, *supra* note 1, art. 4 (emphasis added).

have been given to detainees while still enabling the United States to collect information from the detainees for use in the War on Terror.

IV. Fundamental Principles of Humanitarian Law and Their Crucial Role in Interpretation

The indeterminacy and ambiguity of rules of humanitarian law are not confined to the rules on status of detainees. Substantive provisions of humanitarian law treaties often rely on fundamental guiding principles of humanitarian law in case of ambiguity as to the treaty's proper application. Furthermore, when ambiguity exists, typically the ambiguity is read to broaden, rather than limit, the scope of application of the rule. These elements display a base level of protection within the law for those placed *hors de combat*. The U.S. attempt to limit the scope of the Third Geneva Convention by denying POW status to the Camp Delta detainees was not in accordance with the principles of international humanitarian law.

Even without considering the interpretation of the Third Geneva Convention, the detainees would be covered by what are best termed "general principles" of humanitarian law,[18] such as those contained in the Martens Clause.[19] The Martens Clause was originally formulated within the Hague Regulations of 1899 as follows:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under *the protection and empire of the principles of international law*, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[20] (emphasis added)

The Martens Clause has since been incorporated in article 142 of the Third Geneva Convention and several other humanitarian law instruments.[21] The

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18. The Third Geneva Convention encapsulates humanitarian ideals. The "humanitarian and civilising object and purposes" of the Geneva Conventions have been used to argue that the rules contained therein are of a "higher" character. *See* Georges Abi-Saab, *The Specificities of Humanitarian Law*, *in* Studies and Essays of International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet 265, 272 (Charles Swinarski ed., 1984).

19. This notion was affirmed in *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16, Trial Chamber Judgment, ¶ 524 (Jan. 14, 2000). *See also Final Record of the Diplomatic Conference of Geneva of 1949*, *in* 2b Diplomatic Conference for the Establishment of International Conventions for Protection of Victims of War 71–72 (Berne 1949). In the drafting of the Geneva Conventions, the Special Committee supplemented article 129 of the draft text with the Martens Clause, despite concerns by the French, Finnish, British, and U.S. representatives as to its superfluous nature. *Id.*

20. Convention Respecting the Laws and Customs of War on Land, July 29, 1899, pmbl., 32 Stat. 1803, 1 Bevans 247 [hereinafter Hague Convention].

21. *Id.*; Protocol Additional I to the Geneva Conventions of 12 August 1949, June 8, 1977, pmbl., art.1, 1125 U.N.T.S. 25 [hereinafter Additional Protocol I]. Although the Martens Clause formulation in the Third Geneva Convention is laid down in relation to denunciation of the Con-

"requirements of public conscience" or "elementary considerations of humanity"[22] are not meant to be solid rules of governance but rather interpretative guides. It has been suggested that the reference to the laws of humanity refers to "those human rights standards that have been laid down in international instruments such as the Universal Declaration [of Human Rights]."[23] Such an approach affirms that there are general principles "of invaluable importance at the interpretative level"[24] to guide a state applying the laws of war.

The rule of proportionality is a classic example of an instance where a wide measure of discretion is left to the state. The rule requires that, in the course of military operations, attacks shall be prohibited if civilian loss of life or damage to civilian objects would be "excessive in relation to the concrete and direct military advantage anticipated."[25] The compromise here is between human suffering and military utility, and while the formulation in Protocol Additional I to the Geneva Conventions of 12 August 1949 ("Additional Protocol I") provides "quite detailed guidance" when compared with the *jus in bello* prior to the adoption of that instrument,[26] the requirements are still uncertain. Effective application of such a vague rule requires "complete good faith on the part of the belligerents, as well as the desire to conform with the general principle of respect for the civilian population."[27] The intent of the drafters of Additional Protocol I to rule out any excessive civilian losses,[28] fills out the rule's meaning. Protection of the civilian population must always be the overriding consideration.[29]

Indeterminacy has been deliberately employed in drafting rules of humanitarian law to broaden the potential scope of application of a provision.

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vention, it is still an indication that the humanitarian object and purpose resulting in the Convention are the codification of the "laws of humanity and the dictates of public conscience" which would serve to fill any gaps left by that treaty. Rudolf Bernhardt, *Martens Clause*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 326 (1994).

22. The Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9); Legality of a Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

23. Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUR. J. INT'L. L. 187, 207 (2000). *See also Law of Armed Conflict at the Operational and Tactical Level* (Can. Ministry of Defense) Office of the Judge Advocate General, Doc. B-GG-005-027/AF-020 (1999), http://www.forces.gc.ca/jag/operational_pubs_e.html.

24. Cassese, *supra* note 23.

25. ADDITIONAL PROTOCOL I, *supra* note 21, art. 51(5)(b).

26. GEOFFREY BEST, HUMANITY IN WARFARE 325 (Methuen 1983) (1980). The Geneva Conventions of 1949 made no explicit reference to the rule of proportionality.

27. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 625 (Claude Pilloud et al. eds., 1987) [hereinafter ADDITIONAL PROTOCOL COMMENTARIES].

28. *Id.* ¶ 1980. No military advantage, however large, would justify "excessive" collateral loss of civilians or civilian property, according to the drafters.

29. *See* EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 39 (1992). (describing the Third Geneva Convention as "particularly important as a principle of civilian protection"). *But see* Peter Rowe, *Kosovo 1999: The Air Campaign—Have the Provisions of Additional Protocol I Withstood the Test?*, 82 INT'L REV. RED CROSS 147, 147–64 (2000) (concerning the UK's position in relation to the NATO campaign in Kosovo).

For instance, in order to trigger the protections of Protocol Additional II to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II") to the Geneva Conventions, an armed force must be capable of carrying out "sustained" and "concerted" military operations.[30] These criteria were adopted in place of more stringent requirements that would have specified levels of "intensity" of the "duration" of operations.[31] Because such narrowing language was rejected, application of the provisions should be read broadly. This teleological interpretation of the Third Geneva Convention is very much at odds with the initial U.S. position on detainees at Camp Delta.

The Martens Clause demonstrates the continuing relevance of humanitarian law "regardless of subsequent developments of types of situation or technology."[32] The significance of September 11 and the War on Terror have undeniably affected the international community, but they have not rendered the Geneva Conventions obsolete. On the contrary, the guiding principles of international humanitarian law facilitate their continued application and interpretation.

V. Specific Provisions within the Third Geneva Convention

Application of humanitarian principles to concrete situations requires an understanding of the object and purpose of each principle. Debate on the efficacy and meaning of the Geneva Conventions has focused on the Third Geneva Convention. For foreign detainees being held by the United States under the auspices of the War on Terror, the resolution of the POW status question will significantly impact the responsibilities owed by the United States to the detainees in Guantanamo.

The United States used the perceived vagueness of the Third Geneva Convention in this area to read articles 4 and 5 to conclude that Geneva Convention protections do not apply to the detainees.[33] This position allows the United States to selectively apply Geneva Convention protections with-

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30. Protocol Additional II to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 1, 1125 U.N.T.S. 609, [hereinafter Additional Protocol II].

31. *See* Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law of Armed Conflicts, *Report of the Work of the Conference*, Geneva, Switzerland, 2d Sess., at 68 (1972). The more stringent requirements would have demanded specific levels of "intensity" or "duration."

32. Additional Protocol Commentaries, *supra* note 27, ¶ 55. From its origins, the clause has remained as protection against large military powers controlling the content of the laws of war. *See* Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 Int'l Rev. Red Cross 125, 134 (1997).

33. The United States claims that even though many detainees do not qualify for such protections, they are being given nearly all the protections that would be provided under the Third Geneva Convention. The United States is making a distinction between the protection granted to al-Qaeda and Taliban members, though neither the mechanics nor the effects of the distinction are clear. *See* Andrea Kannapell, *February 3–9; Front Lines*, N.Y. Times, Feb. 10, 2002, S4, at 2.

out hindering U.S. military aims. This selective application of the Third Geneva Convention is of questionable validity.

The United States' reluctance to grant POW status to the detainees is based on U.S. concerns about interference with interrogation and repatriation as well as a general concern about how application of the Third Geneva Convention would impact the War on Terror. However, an examination of articles 17 and 18 of the Third Geneva Convention shows that the goals of the United States can be met while still respecting the Third Geneva Convention.

A. Article 17: Limitations on Information Secured by Prisoners

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first name and rank, date of birth and army, regimental, personal or serial number, or failing this equivalent information.[34]

The United States consistently argued that article 17 specifications were unacceptable obstacles to its ability to thwart future terrorist attacks.[35] This Recent Development argues that under a proper interpretation of article 17, while a POW is not required to provide information beyond name, rank, and serial number, a detaining power is not *prevented* from asking questions beyond that scope. However, the humanitarian concerns underlying the creation of article 17 may direct recognition of certain interrogatory methods.

The interpretation that article 17 permits interrogation of POWs only as to the information specified therein is supported by the assertion of some international law scholars that Geneva Convention rights include a "right not to be interrogated or coerced into providing information."[36] However, article 17 does not prohibit interrogation but rather delineates information that the prisoner must provide at pains of the restriction of privileges that otherwise may accompany his rank or status.[37] By limiting the tactics available to elicit responses, the Geneva Convention implicitly acknowledges that interrogations of a prisoner are expected and inevitable.[38]

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34. THIRD GENEVA CONVENTION, *supra* note 1, art. 17.

35. Kenneth Roth, *Bush Policy Endangers American and Allied Troops*, INT'L HERALD TRIB., Mar. 5, 2002, at 7; Thom Shanker & Katherine Q. Seelye, *Behind the Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12 ("By denying captives the full Geneva protections, the administration said, it could more thoroughly interrogate them to uncover future terrorist plots . . .").

36. Marjorie Cohn, Editorial, *Having It Both Ways on Detainees*, SAN DIEGO UNION TRIB., Feb. 10, 2002, at G3. *See generally Weekend Edition Sunday* (National Public Radio broadcast, Jan. 27, 2002) (on file with the Harvard International Law Journal).

37. *See* THIRD GENEVA CONVENTION, *supra* note 1, art. 17.

38. *Id.* First, "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." *Id.* Second, "[p]risoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment

Furthermore, the traveaux préparatoires of article 17 support the view that detaining powers are not prohibited from interrogating prisoners. The notes of the Special Committee involved in the drafting describe that "[i]t was idle to harbor illusions. A state which had captured prisoners of war would always try to obtain military information from them."[39] Instead of banning interrogation, article 17 was designed to "inform [POWs] of the legal consequences of a refusal to answer."[40]

Given that interrogation is inevitable, the question becomes what limitations on interrogation must be applied to the current U.S. detainees. However, prohibition of interrogating tactics poses a dilemma. If a detaining power is allowed to question prisoners, but is not allowed to engage in "coercion" or utilize "unpleasant or disadvantageous treatment of any kind," what type of interrogation tactics may be used?[41] Deciphering this puzzle requires an examination of the article's history and commentary.

The framers of the Third Geneva Convention worked toward two objectives in drafting article 17: (1) eliminating torturous questioning; and (2) increasing efficiency and accuracy in keeping track of soldiers captured by the enemy.[42] The circumstances surrounding the Third Geneva Convention's enactment leave little room for doubt as to these objectives. During World War II, over 60,000 Soviet-held POWs died of hunger, torture, and neglect.[43] Similarly, thousands of Allied POWs were forced to do back-breaking labor that often led to death.[44] In Germany, many POWs were held in unofficial interrogation camps prior to being sent to the government sponsored POW camps.[45] In these unofficial camps, soldiers were beaten and intentionally placed outside of the influence and protection of the International Committee of the Red Cross.[46] Following the Nazi collapse and subsequent Allied occupation of Germany, British forces created "Direct Interrogation Centres" where torture tactics included naked solitary confinement in sub-freezing temperatures.[47]

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of any kind." *Id.*

39. *Preparatory Works of the Geneva Convention, 5th Meeting of Committee II, Friday 29 April 1949, in* DIPLOMATIC CONFERENCE FOR THE ESTABLISHMENT OF INTERNATIONAL CONVENTIONS, *supra* note 19, at 251.

40. *Id.*

41. *See* THIRD GENEVA CONVENTION, *supra* note 1, art. 17.

42. *See generally*, JEAN DE PREUX, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY, 155–64 (A.P. de Henry trans., 1960)

43. *See* Marjorie Miller, *Germany Takes New Look at Buchenwald's History*, L.A. TIMES, May 3, 1994, at 46.

44. *See A Bill to Preserve Certain Actions in Federal Court Brought by Members of the United States Armed Forces Held as Prisoners of War by Japan During World War II: Hearings Before Subcomm. on Immigration, Border Security, and Claims of the House Comm. on the Judiciary*, 107th Cong. (2002) (testimony of Robert D. McCallum, Jr.).

45. *See, e.g.*, DE PREUX, *supra* note 42, at 163.

46. *Id.*

47. Christopher Hudson, *Under the British Jackboot: Rape, Torture, Execution and the Horrors of Interrogation Camps*, DAILY MAIL (U.K.), Aug. 25, 2001, at 28.

In the Third Geneva Convention, the drafters responded to the events of World War II and noted in their commentary to article 17 that they "were not content to confirm the 1929 text."[48] Instead, they explicitly prohibited the kind of physical and mental torture that had occurred in the Soviet Union and Germany. They also broadened the scope of the prohibition on interrogative coercion from interrogation undertaken to reveal military information to that undertaken to reveal "information of any kind whatever."[49] The requirement that soldiers provide identifying information enables the detaining power to maintain accurate records of the number and identity of the prisoners detained. This purpose is reinforced by requirements that each captured soldier carry an identification card and that the detaining power report the identification of the prisoners detained to the prisoner's home country.[50] These identification requirements in part encourage more humane treatment. Furthermore, the requirements provide transparency designed to heighten accountability of each state for its treatment of enemy soldiers during and at the conclusion of hostilities.

The protection against coercion in article 17 of the Third Geneva Convention, broadly framed to prohibit torture, is the other potential obstacle to effective interrogation. POWs "may not be threatened, insulted," or "exposed to unpleasant or disadvantageous treatment" as a result of failure to answer interrogatory questions.[51] The impact of this broad provision is twofold. First, physical and mental abuse, or threats of such abuse, are clearly not allowed during an interrogation under the Third Geneva Convention, but also under customary international law and various human rights instruments.[52] Second, the requirement of equal treatment ensures that the detaining power does not engage in tactical favoritism, creating conflict among those detained.

State practice reinforces an interpretation of the Third Geneva Convention that allows for reasonable interrogation. There are numerous examples of state practice in this area that have been widely viewed as conforming to article 17 requirements. These examples of state practice bear prominent legal significance in the interpretation of treaties.[53] Examples of state practice that can inform the interpretation include the detention of Army Chief Warrant Officer Michael Durant by a Somali warlord in 1993 and the deten-

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48. DE PREUX, *supra* note 42, at 163. The framers noted that the 1929 text required only a regimental number and that such information was inadequate for effective identification and meaningful record-keeping.

49. *Id.* A reason listed for this change was that some states had coerced information from POWs relating to personal information of relatives.

50. *See* DE PREUX, *supra* note 42, at 163.

51. THIRD GENEVA CONVENTION, *supra* note 1, art. 17.

52. *See generally* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (arguing that the human rights regime, including torture prohibitions, is being adopted into humanitarian law).

53. *See* VIENNA CONVENTION ON THE LAW OF TREATIES, May 23, 1969, art. 31(3)(b), 1155 U.N.T.S. 331, 340.

tion of U.S. Army Chief Warrant Officer Bobby Hall by North Korea in 1994.

The capture and subsequent interrogation of Michael Durant during a failed U.S. operation in Somalia against warlord Mohamed Farah Aideed demonstrated the broad legal applicability of the Third Geneva Convention's protections despite vague language. Following Durant's capture, the United States demanded assurances that his treatment would be consistent with the broad protections afforded under the Third Geneva Convention. Under a strict interpretation of the Third Geneva Convention's applicability, Durant's captors would not be bound to follow the convention because they were not a "state."[54] Additionally, coverage under the Third Geneva Convention would allow Aideed to lawfully detain Durant until the end of hostilities. Nonetheless, the United States successfully argued that the captors were required to follow the Third Geneva Convention because breach of these protections would result in liability under customary law for Aideed.

Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, the Red Cross was allowed to visit him and observe his treatment, and he was subsequently released by Aideed as a "gesture of goodwill."[55] The treatment and subsequent release of Michael Durant show the impact of the Geneva Conventions even where actual detention may be unlawful.

Currently the situation is reversed: the United States is the captor of individuals associated with non-state parties that are not encompassed in the Third Geneva Convention. The U.S. response, and the opposition's acceptance of U.S. demands, to Durant's capture are instructive for determining the appropriate actions to be taken by the United States with respect to the Guantanamo detainees. The Durant case demonstrates that governments demand that the protections of the Geneva Convention be given to detainees, even if the actual detention is viewed as unlawful. The adherence to the Third Geneva Convention's protections absent its benefits for the detaining state (the right of capture and non-release until the end of hostilities) reveals that compliance with the Third Geneva Convention does not depend on reciprocity. If the Third Geneva Convention protections are binding on Somali warlords, non-state parties must be granted the same protection. More importantly, Durant's captors could not reject the Third Geneva Convention obligations because these obligations interfered with the captors' goals. Aideed did not possess significant intelligence-gathering operations or inside information of U.S. operations. Prior to Aideed's apparent capitulation to follow the Third Geneva Convention's protections, Aideed's men engaged in a thuggish interrogation of Durant, which culminated with two flesh

54. Indeed, encouraging treatment of Durant under the Third Geneva Convention would have implicitly implied that Aideed possessed a right to lawfully hold U.S. troops or U.N. peacekeepers. *See* Keith B. Richburg, *Somalia Battle Killed 12 Americans, Wounded 78*, WASH. POST, Oct. 5, 1993, at A1.

55. *Id.* Durant's release came on October 14, 1993, eleven days after his capture.

wounds inflicted by gunfire into Durant's arm.[56] However, Aideed's subsequent treatment of Durant and Durant's ultimate release demonstrate Aideed's adherence, albeit reluctant, to the protections of the Third Geneva Convention.

The capture and treatment of Bobby Hall is also illustrative of how the Third Geneva Convention has been applied in practice. Hall and another U.S. pilot, David Hilemon, inadvertently entered North Korean airspace due to navigational error and were subsequently shot down by North Korean forces.[57] Hilemon died in the crash, but Hall was quickly captured and detained for questioning.[58] During his detention, Hall was not tortured or maltreated in any way.[59] However, he was interrogated by North Korean authorities on both military and personal matters.[60] Under the circumstances of Hall's capture, it is uncertain whether he was a POW owed the protections under the Third Geneva Convention. The pivotal question was whether the United States and North Korea were engaged in "armed conflict."[61] Despite questionable applicability of the Third Geneva Convention, the North Koreans informed Hall that he would be treated as a POW.[62] According to a Pentagon briefing following Hall's release less than three weeks later, Hall "was well treated in North Korea. He was well fed, got some rest," and "was under no physical duress to sign the statement."[63]

Despite Hall's cooperation with North Korean interrogators, arguably in violation of the U.S. Military Code of Conduct,[64] no disciplinary proceedings were brought against him. Under a broad reading of "coercion" in the Third Geneva Convention, North Korea's questioning, which culminated in a statement labeled "confession," violated article 17. However, the United States did not claim that the questioning by North Korea constituted coercion, and instead noted that Hall's ultimate willingness to sign the statement was due to the "natural" stresses that accompany capture by a hostile power.[65] According to Hall himself, he was not subjected to any physical or

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56. *Id.*

57. Leanora Minai, *A Soldier's Story*, ST. PETERS. TIMES, Jan. 5, 1995, at 1A.

58. *Id.*

59. *Id.*

60. *Helicopter Pilot Says He Didn't Know He Was over North Korea*, AGENCE FR.-PRESS, Jan. 5, 1995.

61. Hall was found in a U.S. uniform emblazoned with symbols of the United States, possessed a knife, was found in a U.S. army helicopter, and engaged in no violation of the laws of war, generally meeting the requirements of article 4. Commentators observe that "as long as members of the regular armed forces are in uniform there should be no problem with respect to their entitlement to prisoner-of-war status." *See* Howard S. Levie, *Prisoners of War in International Armed Conflict*, 58 INT'L LEGAL STUD. 37 & n.145 (1978).

62. For a legal analysis concluding that Hall indeed was a POW, see Major Scott Morris, *America's Most Recent Prisoner of War: The Warrant Officer Bobby Hall Incident*, ARMY LAW. 3 (Sept. 1996).

63. Eric Schmitt, *Helicopter Pilot Unlikely To Be Punished for Statement*, N.Y. TIMES, Jan. 7, 1995, at A1.

64. It has not been definitively determined that Hall's agreement to the North Korean "confession" was against the U.S. Military Code of Conduct, a determination unnecessary here. *See* Exec. Order No. 10631, 20 Fed. Reg. 6057 (Aug. 17, 1955)

65. William E. Clayton, Jr., *Pentagon Says Chopper Likely Was Shot Down*, HOUS. CHRON., Dec. 31, 1994, at A1.

mental torture, and was held in a room with a bed, bathtub, and toilet.[66] If the United States does not consider interrogation of a captured soldier by the enemy state to violate the Third Geneva Convention then a similar interrogation of detainees by the United States should not be considered a violation of the Third Geneva Convention.

Insisting that article 17 prohibits all forms of interrogation ignores the purpose and spirit behind the Third Geneva Convention and renders its protections counterproductive. Prohibitions on mental and physical abuse contained in the Third Geneva Convention should be strictly followed. However, the inherent stress of being detained by a foreign power and asked for military information need not be eliminated, particularly when the detainee is asked for information relating to crimes for which other enemy actors could be lawfully tried. Such stress is a mild consequence compared to the advantages that may be gained in preventing and punishing international and domestic crime. An interpretation of the Third Geneva Convention that would forbid interrogation on those subjects also fails to deal with captors' incentives to obtain information from their detainees. If officially, interrogation is not allowed, then unofficial, more heavy-handed interrogation will likely take place. Thus, allowing some interrogation more accurately reflects the spirit and goals of the framers of the Third Convention. Instead of focusing on whether *any* questioning is allowed, the debate should concern permissible tactics of questioning under article 17.

B. Article 118: The Prospect of Repatriation

> Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.[67]

Article 118, providing for repatriation at the end of "active hostilities" creates confusion in the context of the War on Terror. The U.S. characterization of the conflict in Afghanistan as part of a larger war on global terrorism may be used to justify detention of suspected terrorists for years beyond the end of active hostilities. On the other hand, article 118's premise that released POWs will return to civilian life and will no longer present a threat to the detaining state may not be true in this conflict. This Part examines this tension, and concludes that ultimately, the object and purpose of the Third Geneva Convention demonstrates that such open-ended detainment is disallowed.

The U.S. government believes that continued detention of suspected terrorists disrupts potential attacks that may have been planned before their detainment.[68] Upon close scrutiny, article 118's repatriation responsibility

66. Hall was even given a television to watch North Korean movies. Minai, *supra* note 57.
67. THIRD GENEVA CONVENTION, *supra* note 1, art. 118.
68. *See* Risk Monitor Briefing, Department of Defense, *Special Briefing on the 2002 Unified Command*

does not present a real difficulty for this position. In reality, the two main issues for U.S. and international interests are: (1) how the Third Geneva Convention's requirement of repatriation at the conclusion of hostilities should be interpreted in the newly minted War on Terror, and (2) the corollary impact on U.S. ability to try these individuals. These issues should be resolved in accordance with the object and purpose interpretation of the Third Geneva Convention.

The repatriation of POWs is dependent on neither agreement between the parties,[69] nor reciprocal release of POWs by the other side, but should simply be undertaken once "active hostilities" have ceased.[70] The definition of "active hostilities," however, is the key to the understanding of the provision. According to the reasoning provided by article 17's commentary, the 1929 Convention was insufficient because it did not recognize that hostilities could cease in the absence of an armistice or peace treaty.[71] Unfortunately, the alternative chosen by the framers of the Third Geneva Convention in 1949 does not, on its face, properly account for the reverse situation, in which active hostilities continue indefinitely. The United States has repeatedly claimed, with justification, that continuing operations in Afghanistan will be necessary to extinguish the threat of remaining Taliban and al-Qaeda forces.[72] Furthermore, the detainees could be viewed not as prisoners of the conflict in Afghanistan, but rather as prisoners captured in the War on Terror. Under this view, detention could be justified under the Third Geneva Convention for potentially the rest of their lives.

Article 118's justification for requiring repatriation even if there is no formal agreement between the parties to end hostilities may suggest a long detention is legitimate in the context of terrorists.[73] Unlike the World War II context in which the Third Geneva Convention was framed, in the present situation, terrorist operatives being detained are likely to resume the fight against their captors. As one commentator notes, "the right to repatriation is based on the general assumption that for the prisoner of war, repatriation constitutes a return to a normal situation."[74] However, in the case of many detainees, peacetime living is not the norm. Many have instead chosen to be involved in continuous operations against the United States and its allies.

Plan, Apr. 21, 2002 [hereinafter Special Briefing UCP].

69. Meron, *supra* note 52, at 254. *See also* Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right To Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L. 721, 749 (2001).

70. Meron, *supra* note 52, at 254.

71. DE PREUX, *supra* note 42, at 541.

72. Jonathon Weisman & Vivienne Walt, *Anaconda Declared Over, but Work Remains There*, USA TODAY, Mar. 19, 2002, at 8A.

73. "In times of war, the internment of captives is justified by a legitimate concern—to prevent military personnel from taking up arms once more against the captor State. That reason no longer exists once the fighting is over." DE PREUX, *supra* note 42, at 546.

74. *Id.* at 547.

However, this unfortunate fact only complicates the question of repatriation and it does not fully answer it.

The tenor of the debate over the adoption of article 118 makes it clear that this provision was designed to minimize unnecessary detention.[75] A broad interpretation of "active hostilities," where U.S. detainees could conceivably spend their entire lives as POWs during an elusive and sporadic War on Terror, contravenes this aim. Many of the current detainees are at best loosely linked,[76] if at all, to the continuing hostilities on which the United States would assert its continuing right of detention.

Furthermore, the framers of the Third Geneva Convention envisioned the detention of prisoners as balancing military need and individual freedom. The benefit the state receives from continuing the detention decreases over time, especially once active hostilities have ended. A detainee possesses a limited amount of information, which becomes less relevant as time passes. As the military benefit of the detainees decreases and the burden imposed on the detainees increases, the balance of interests that justify their detainment becomes more difficult to accept under the Third Geneva Convention.

Contrary to popular belief, recognition of an obligation to repatriate does not preclude criminal prosecution. Detention not only for military but for eventual prosecutorial aims, which is part of U.S. policy with respect to the Guantanamo detainees, is permitted by the Third Geneva Convention. Prisoners of war suspected of common crimes before their detainment may be held for subsequent prosecution. Additionally, those detainees suspected of crimes committed in other nations, such as Afghanistan or Yemen, may be extradited to those jurisdictions for prosecution.[77] Similarly, POWs suspected of war crimes such as the intentional targeting of civilians may be prosecuted following the end of the hostilities.[78]

Pure preventive incarceration of POWs, however, is contrary to the Third Geneva Convention's protections, creating tension partially addressed by

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75. *Id.* at 546. The commentary to article 118 notes that the conference "recognized that captivity is a painful situation which must be ended as soon as possible and was anxious that repatriation should take place rapidly and that prisoners of war should not be retained in captivity on various pretexts." *Id.*

76. This loose linkage is an unavoidable result of the decentralized nature of many of the armed movements against the United States.

77. This possibility has been explicitly recognized, but not followed, by U.S. Secretary of Defense Donald Rumsfeld as a possible way to end some detainees' stay in U.S. camps. *See* Special Briefing UCP, *supra* note 68.

78. *See* Curtis Bradley & Jack Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 249, 256 (2001). Under this view, any detainee's participation, active or conspiratorial, with al-Qaeda operations relating to the September 11 attacks could be viewed as the initiation or confirmation of an ongoing armed conflict. The attacks were preceded by numerous other terrorist activities constituting a "conflict" rather than sporadic acts of violence. Many of these attacks, and undoubtedly the September 11 attacks, violate the laws of war by targeting civilians. By treating the detainees as covered under the Third Geneva Convention, the United States acknowledges an armed conflict with the Taliban and al-Qaeda, recognizes al-Qaeda as an unconventional state-type actor, and thus, actually bolsters its case to use military tribunals to try the offenders.

U.S. courts in *United States v. Noriega*.[79] General Manuel Noriega, the former dictator and leader of military forces in Panama, was captured by U.S. forces for drug crimes under U.S. law. After determining that Noriega was entitled to POW status, the court ruled that the United States could still prosecute Noriega for common crimes against the United States.[80] But, under U.S. domestic law, an official charge is required for incarceration beyond active hostilities for POWs.

The application of the Third Geneva Convention protections to detainees is evaluated in light of humanitarian goals shared by the framers in the face of the inevitable tragedy of war. As such, article 17 restrictions on coercion cannot appropriately be read to completely disallow interrogation. However, the United States, or any other nation, should not be allowed to pursue military aims through indefinite incarceration based on broad application of Third Geneva Convention language.

VI. Conclusion

This Recent Development has shown that the legal and political debate over detainees held by the United States can be resolved through consideration of international humanitarian law. A large part of humanitarian law is indeterminate in nature, but its application is still both legally and politically desirable. Fundamental principles of international humanitarian law ensure basic protections within the treaty regime, while specific provisions allow sufficient flexibility in their application to meet intelligence gathering requirements. This two-tier structure facilitates progressive interpretation, making the Geneva Conventions still relevant. A renewed commitment by the American public and other states to the rule of international law has been shown through their reactions to the events surrounding Camp Delta. However, the Geneva Conventions need to be looked at in a new light—they have never been applied to a situation like that facing the United States. The Geneva Conventions were originally framed to accommodate the greatest number of conceivable situations in armed conflict, and they can certainly apply to the War on Terror. For humanitarian law to function effectively in the face of these new threats, the focus should be on the protections afforded by the law, rather than the limitations it imposes upon states.

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79. United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992).

80. *Id.* at 793.

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