WAR IN HISTORY

**REVISING THE LAWS OF WAR ON PRISONERS OF WAR IN THE
TWENTIETH CENTURY**

INTRODUCTION

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Writing about the Armenian Genocide recently in the *London Review of Books*, Edward

Luttwak decried the inefficacy of international humanitarian law: 'As for the Geneva

Convention, I spit on it, given all the difference it has made to the fate of the

Cambodians, Rwandan Tutsis, Sarajevo Bosnians and indeed every beleaguered ex-

Yugoslav population.'[2] It is a depressingly familiar lament. Yet has international

humanitarian law – the modern term for law regulating international armed conflict

which encompasses both the laws of war and customary international law – proved so

inadequate?[3] What, in fact, has been its changing impact and relevance across the

twentieth century? This edition of *War in History* focuses in-depth on this question,

seeking to analyse specifically how one aspect of international humanitarian law has

evolved: how the laws of war have affected behaviour towards prisoners in a series of

[2] Edward Luttwak, 'Sins of the Three Pashas,' *London Review of Books*, 4 June 2015, p. 8.
[3] See on the subject of definitions: John Horne, ed., 'Focus: Crimes against Humanitarian Law: International Trials in Perspective,' special edition of *European Review*, 14, 4 (2006), pp. 415-419.

chronologically and geographically diverse twentieth century conflicts. Of course, such a thematic group of articles can never hope to conclusively address the functional or moral value of the laws of war: however, by focusing on one issue – prisoner treatment – across a series of case studies, ranging from the Japanese occupation in the Second World War to the Korean War and the decolonisation conflict in Aden – it becomes possible to glean a clearer understanding of how the international legal framework can have a cultural influence upon conflict mentalities. This introduction will first outline how the laws of war relating to prisoners of war developed and evolved as a result of specific historical contexts and why they came to hold such prominence and, second, will consider to what degree the articles in this special edition shed light on broad structural thematic developments regarding their cultural status and application.

As one of the earliest aspects of warfare to be legally codified in international law, during the period of its initial development in the late nineteenth century, the treatment of prisoners of war in many ways offers a litmus test of the influence and reach of legal cultural norms in conflict situations. The 1864 and 1906 Geneva Conventions offered significant new protection for enemy troops found wounded on the battlefield; the 1899 and 1907 Hague Conventions on Land Warfare set out a series of articles on how prisoners of war should be managed, in particular the stipulation which appears in

article 4 of both Conventions that prisoners of war should be treated 'humanely.'[4] These Conventions were intended to build on the groundwork of existing customary laws of war which had already established some basic shared European norms for capture and prisoner regimes, and also to work closely with national military law – the text of the Conventions was meant to be integrated by signatory states into their military law. However, the Hague Conventions in particular presented only largely broad brush stroke guidance to captivity treatment which was soon superseded by the challenges of the totalising mentalities of the 1914-1918 conflict. By 1916, the major belligerent states – Germany, France, Great Britain, Austria-Hungary and Russia – were all using prisoner of war labour on the battlefield, in many cases under shellfire, placing prisoners' health and safety at risk to a degree that significantly breached the spirit – and often the letter – of the contemporary Hague corpus of the laws of war.[5]

The initial pre-1914 codification of the laws of war, however, focused almost entirely upon one category - the combatant prisoner of war – with some additional protections offered for padres, medical staff and journalists taken prisoner on the field of battle: other kinds of conflict captives – civilian internees or guerrilla fighters, for example, which are the subject of two of the articles here by Felicia Yap and Huw Bennett – were

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[4] Article 4 of the 1907 Hague Convention Annex: Regulations respecting the Laws and Customs of War on Land, http://avalon.law.yale.edu/20th_century/hague04.asp#art5, accessed 12/10/15.
[5] Heather Jones, *Violence Against Prisoners of War in the First World War: Britain, France and Germany, 1914-1920* (Cambridge, Cambridge University Press, 2011).

excluded from any protection under international humanitarian law until much later in the twentieth century.[6] The articles in this special edition very effectively reveal the diversification of the category of conflict prisoner across this period, and its implications, a process only beginning in 1914: international law before the First World War struggled to envisage that conflicts would involve more complex prisoner-taking; the special cases of journalists, medics and padres set out in the pre-1914 laws of war would appear almost quaint in the 1939-45 context where entire populations were held captive, interned or deported, including those sent to Gulags or to the concentration camp system with its forced labour and death camps. Both the range of potential subjects for incarceration in wartime and the mass numbers involved increased exponentially from 1914 onwards.

Categorisation mattered because, as the nature of *who* was being taken prisoner in war diversified and expanded across the twentieth century, the applicability of the laws of war stipulations to protect prisoners was thrown into question. The decolonisation wars that followed the end of the Second World War further highlighted the problems of application of the laws of war as they existed at that time: it was relatively easy for states engaged in asymmetrical warfare against their own colonial subjects to claim that

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[6] For further discussion on guerrillas, rebels and other non-conventional fighter categories, see: Sibylle Scheiper's *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford: OUP, 2015).

international humanitarian law did not apply, often either because the term 'war' was deemed inadmissible to conflicts occurring within the borders of empires rather than between states, to domestic unrest or to civil war situations, or because those taken prisoner did not fall into the category of the traditional soldier combatant – the guerrilla or partisan remained outside the protection of the laws of war as they stood by the Second World War and, again during the early wars of decolonisation, despite Common article 3 of the 1949 Geneva Conventions, as its applicability to decolonisation contexts was contested. The laws of war are not considered to apply outside of international conflict - unlike Human Rights Law. More recently, the problem of categorisation has recurred, with the claim that international law regarding prisoner treatment does not apply to captives in the 'War on Terror': the 'terrorist,' as an unconventional fighter who eschews international humanitarian law in designing and carrying out unrestricted attacks – often without warning on civilian targets – is not entitled to the legal protections that international law offers to military personnel serving in national armies, so the argument goes. This argument creates a highly circumscribed understanding of the 'laws of war' – limited in terms of the conflicts it applies to and the category of prisoner – which in turn undermines its efficacy, leading sceptics to question its usefulness in the first place.

This debate as to the efficacy of laws of war is not new. In the interwar period, James Garner, a leading academic expert on international law, declared in a lecture that although the laws of war had been breached in the First World War that was not the essential point regarding their value. The purpose of law was to set out norms and demarcate boundaries. What was at stake, in other words, in laws of war was not that they were never broken – what law is never breached? Rather it was that they created a mentality that limitations on wartime behaviour existed and offered a means of gauging how far outside of acceptable practice a state had gone: Garner asked rhetorically 'what character the world war would have had had there been no binding norms upon any of the belligerents.'[7] It is this functional interpretation of international law – its value in setting boundaries and a framework of standards – that proved its main First World War usefulness. It is a very different understanding to that of Luttwak, quoted at the opening of this introduction, where efficacy lies in the degree to which the law is never broken.

As the twentieth century progressed, to this cultural function of international law was added another: the threat, and later effective implementation, of sanctions against states which broke those international laws of war to which they had previously signed up; this was intended to give international humanitarian law a strong deterrent function.

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[7] Bundesarchiv, Berlin-Lichterfelde, R 61 Akademie für Deutsches Recht: James Garner Vortrag, R 61/8, 9. Vollsitzung der Akademie für Deutsches Recht, Sonnabend den 30 November 1935, f.1; ff. 29-56.

With the establishment of the International Criminal Court, this process – previously trialled in an *ad hoc* way at the 1921 Leipzig war crimes trials and in 1946 at Nuremberg – became permanent.[8] Indeed, here history can be seen to have finally come full circle to solve an original 1914 problem: as Isabel Hull has argued, one of the reasons why the First World War broke out was because there was no effective legal way of sanctioning Germany for breaking international law by invading neutral Belgium in breach of the 1839 Treaty of London. The only option to chastise Germany's renegade behaviour was military action – with all its dreadful costs. The First World War, in Hull's interpretation, was thus as much about an absence of any other means than war to uphold international law, as it was about imperialism, strategic power or hegemony.[9] For the Allies, the war itself became a fight in 'defense of international law and justice.'[10] This helps to explain the interwar obsession with rebuilding international law and using it to prevent future conflict: the hopes enshrined in the Kellogg-Briand Pact of 1928 – in which signatories renounced aggressive war as a foreign policy practice – provide a stellar example of the degree of faith placed in the idea that more absolutist international law prohibitions on war itself could 'fix' the hole

[8] Gerd Hankel, *Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburg, 2003); J.F.Willis, *Prologue to Nuremburg. The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, Connecticut and London, 1982); Annette Wieviorka, (ed.), *Les Procès de Nuremberg et de Tokyo* (Caen, 1996).
[9] Isabel Hull, *A Scrap of Paper. Breaking and Making International Law during the Great War* (Ithaca, Cornell University Press, 2014).
[10] Sir Graham Bower cited in Hull, *A Scrap of Paper*, p. 1.

in the functioning of the international system revealed by 1914's lack of non-military alternatives. In many ways this was at the expense of revising the existing laws of war – focusing on outlawing war itself became the campaign aim of international law experts rather than updating the laws that applied during conflict. Hence the interwar period saw only two significant extensions of the existing laws of war – the Geneva Protocol on Chemical Weapons, signed in 1925 and entering into force in 1928, and the new 1929 Geneva Convention on Prisoners of War.[11] This, despite the glaring fact that both expert and public opinion largely concurred that during the 1914-1918 conflict the existing laws of war had proved outdated and inadequate and had been subjected to widespread breaches.

Of course, these interwar hopes proved a chimera and after another, even greater war, with the most extreme breaches of the laws of war, particularly on the Eastern Front, establishing sanctions and punishment to impose better adherence to the laws of war during conflict returned to prominence in public debate. Trying those responsible was emphasised as one way to deter breaches – perpetrators now risked being punished retrospectively. Enlarging the protections offered by international law was another, partly a belated recognition of the diversification of the category of conflict captive that

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[11] On the process of drafting the 1929 Geneva Convention see: Neville Wylie, *Barbed Wire Diplomacy. Britain, Germany and the Politics of Prisoners of War, 1939-45* (Oxford, OUP, 2010).

was occurring across the twentieth century: new groups – civilians in the 1949 Geneva Conventions, refugees in the 1951 UN Refugee Convention – now gained specific rights, including wartime captivity rights. Common Article 3 to the 1949 Geneva Conventions also gave very minimum protections to individuals in the case of 'non-international armed conflict' – a response to the fact that during the Second World War Germany had argued that resistance fighters in occupied Europe had no legal rights and could be legitimately eliminated. Common Article 3 was the first major extension of the laws of war into the realm of intra-state, unconventional conflict. Its application to later decolonisation conflicts, however, would be debated and resisted.

The laws of war thus coalesced during this period with a larger body of new international laws that had a humanitarian purpose –ultimately forming modern international humanitarian law. This process of coalescing was a long-term legacy of the atrocities of 1939-45 and, in particular, the difficulties in pursuing the perpetrators of the Holocaust, who in the war's immediate aftermath were tried under the new category of 'Crimes Against Humanity' - an extension of the laws of war tradition that ultimately paved the way for the later 1949-51 development of international laws explicitly protecting civilians in wartime. Although the term 'Crimes Against Humanity' drew upon the reference to humanity in the Martens Clause in the 1899 and 1907 Hague Conventions, the definition of Crimes Against Humanity is based upon

customary law, and is not set out in an international convention. Moreover, Crimes Against Humanity can occur in peace or war. All of this distinguishes them from the international laws of war and their definition of war crimes - which have been set out in Conventions and which are specific to international war situations.

Ultimately, the collapse of the ideals of Kellogg-Briand remained unresolved in the wake of the Second World War: the paradox that continues regarding international laws of war is that they remain virtually impossible to uphold or police without force – in other words, to enforce good behaviour in war, bystander states often have to intervene militarily. The alternatives – economic sanctions or prosecution of war criminals after the event – have become major aspects of our contemporary global international system. But they have a poor track record thus far in preventing war crimes occurring in the first place.

The three articles in this special edition each explore a key conjuncture in this historical process of evolution of international humanitarian law, with regard to the laws of war and captivity. Felicia Yap examines to what degree the knowledge of the international laws of war affected Japanese treatment of civilian internees in the Second World War, a group who lacked any international legal protection. She suggests that with regard to internees, Japan did look to the international laws on the treatment of combatant

prisoners for guidelines on norms, even though it had not signed the 1929 Geneva Convention on prisoners of war. Here chronology mattered – perhaps Yap's most important contribution is to show that Japanese captivity policy did not ignore international law completely when it came to designing its civilian internee policies, but at certain phases of the conflict was open to the idea of engaging with some of its stipulations when it came to setting treatment standards. There was confusion, however, as to the degree to which laws designed to protect combatant prisoners of war might apply to civilian internees in Japanese control and ultimately, the ruthless ideological war of imperial conquest that Japan was embarked upon stifled any engagement with international laws of war regarding captivity and led to harsh treatment of internees, particularly as material shortages increased. This issue not only arose in Japan: globally the Second World War was in many ways a key moment of tension as Geneva and Hague laws of war for prisoners of war were not considered applicable to civilian captives, leaving them vulnerable to mistreatment.

The article by Neville Wylie and James Crossland explores how international law influenced the treatment of prisoners of war in the Korean War – if Yap shows the strengths and weaknesses of the existing laws of war in the Second World War in the Pacific, Wylie and Crossland discuss the evolving new problems that emerged with applying international law with the advent of the Cold War. Cold War politics greatly

undermined the idea of a shared international sphere – a universal jurisdiction to which international law applied. This ideological fracturing impacted in the extent to which international law was able to protect combatant captives in the Korean conflict where political indoctrination of prisoners was but one of the war's breaches of the Geneva Conventions.

This case also flags another structural weakness of the laws of war, as they existed at the time, which was the civil war scenario. While the Korean War was internationalised due to the involvement of multiple nation states, it also encompassed a civil war. Throughout the twentieth century the internationally agreed laws of war remained applicable to interstate conflict only; they were subordinate to the overriding powers of national sovereignty in the case of civil war crisis. As the idea of 'universal jurisdiction' developed, such a dichotomous distinction between what was legally permissible in international and internal warfare became deeply problematic. This was a major problem for international humanitarian law after 1945: one thinks of Northern Ireland, Sudan, Yugoslavia, and other internal conflicts elsewhere where national regimes involved in military conflict could claim international laws of war did not apply to prisoner treatment; it also surfaced notably in decolonisation situations as Huw Bennett's article reveals. More generally, the wars of decolonisation after 1945 also highlighted that the concept of a modern universal jurisdiction was one which stemmed

from western origins, and it sometimes clashed with pre-existing national or religious laws of war, often ancient, for example in Chinese and Islamic traditions, that had developed over time and which, in contrast, frequently had a more limited remit, being applied specifically within particular cultures.

Finally, the article by Huw Bennett examines the use of torture during interrogation by the British authorities in Aden. Here the important role of international law in allowing neutral inspectors access to prisoners and providing captives with some possibilities of redress through the international media and Red Cross is emphasised. The difficulty faced by contemporaries as to whether international law could be applied to captives in this asymmetrical colonial conflict situation is examined – those arrested as suspected conspirators or terrorists were not traditional combatants and eschewed easy categorisation. Moreover the colonial context also opened the door to racialized hierarchies and a lack of transparency or legal process for these captives as Bennett shows. International protest and investigation – as well as domestic contestation – was thus key to forcing the colonial regime in Aden to improve its behaviour. A final key lesson that is clear from Bennett's work, however, is that despite the improvements made to detention conditions following such interventions, torture as a method of interrogation persisted. Aden thus highlights the growing interaction and resulting confusion for policymakers and interrogators between the laws of war and

human rights law. For the United Kingdom, Aden thus became the first major conflict where a public debate about human rights began to impact on security policy.

All three articles thus chart major historical moments where international humanitarian law played a significant role in regime debates as to how to define, standardise, manage – and in some cases even mitigate – conflict captivity: the Second World War; the Cold War; and decolonisation contexts. The articles show that law – like military doctrine – often fights the previous war. If there is a continuum visible here across all three articles it is that international law does influence the sense of boundaries in a given conflict – perhaps most especially among those states or historical actors who opt to treat captives in ways that fall far short of the international cultural expectations set out in the Conventions because it makes visible to them the extent to which they are breaking with international norms. In other words, the laws of war may not prevent breaches occurring but they provide the historical map upon which to chart them. Together the three articles also show the continual, and somewhat inevitable, historical pitfalls of the legal framework: revised after conflicts to take account of the lacunae that the last war has revealed in legal protections, international law cannot ever fully anticipate the new unexpected challenges that the next conflict context will throw up. In this sense, any laws of war are always going to have inadequacies as it is virtually impossible to

legislate in advance for unknown technological, political and military cultural changes that may unfold in the conflicts of the future.

Taken as a whole, these articles chart a twentieth century where war captivity was a widespread and expanding phenomenon: yet it is one that largely lacks an in-depth comparative historiography.[12] While international laws of war by the latter half of the twentieth century were based on the idea of a universal global jurisdiction, no such global approach has been applied to examining captivity comparatively across widely varying historical conflict contexts. This special edition aims to open such an approach to debate. Indeed a major trend, as illustrated in the attitudes to the laws of war in the conflicts covered here, has been their increasingly global reach, not unsurprisingly a trend that has grown during the second historical period of globalisation which began in the 1990s: from a largely European starting point in the Geneva and Hague Conventions, which before 1914 were not applied in colonial wars, the framework has increasingly been based on universalist cultural ideals. What these articles show as conclusions regarding the efficacy of international humanitarian law is that it needs to evolve to be relevant in each new historical context, inasmuch as warfare too is

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[12] One honourable exception to this is: Laleh Khalili, *Time in the Shadows: Confinement in Counterinsurgencies* (Stanford: Stanford UP, 2012)

constantly evolving.[13] They show that international humanitarian law also needs neutral

watchdogs to ensure its implementation: the role of the International Red Cross,

protecting powers and neutral observers all mattered in the conflicts examined here,

often thanks to their ability to publicise and shame states for not enforcing international

law. The power of social stigma in an increasingly interlinked and media savvy world

has some weight in encouraging nation states to abide by norms. For Japan, the United

States and North and South Korea, and Britain dealing with the Aden insurgency, their

state's international reputation mattered; as a result of the laws of war framework from

earlier in the twentieth century and the cultural prestige that it had successfully attached

to treating captives well as a demarcation of 'civilisation,' prisoner treatment was a

priority – or at least being *seen* to uphold good captive treatment publicly was. This

should not be viewed as a historical inevitability: the shock felt at the images from Abu

Ghraib, that the United States, which had built its national identity on the concept of

abiding by the rule of law, could mistreat prisoners, cannot be taken for granted in a

world where Islamic State has abandoned not only international legal prisoner treatment

norms, both based on Conventions and custom, but also many of those of Islamic law

tradition. Here one finds a final essential theme of all three articles: international laws of

war regarding prisoners interact and shape grassroots attitudes and work best where they

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[13] Felix Schwendimann, 'The Legal Framework of Humanitarian Access in Armed Conflict,'
International Review of the Red Cross; Humanitarian debate: Law, Policy, Action, themed edition: The
Future of Humanitarian Action, 93, 884 (2011), pp. 993-1008.

build upon a pre-existing local cultural ethos regarding captives. The twentieth century saw war prisoner treatment effectively raised through international law to become a powerful talisman of a belligerent's moral status; whether or not the twenty-first century will reverse this process remains to be seen.