Do the Geneva Conventions Matter?

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OXFORD
UNIVERSITY PRESS

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

Library of Congress Cataloging-in-Publication Data
[To come]
ISBN 978–0–19–937977–4 (hbk)
ISBN 978–0–19–937978–1 (pbk)

1 3 5 7 9 8 6 4 2
Paperback printed by WebCom, Inc., Canada
Hardback printed by Bridgeport National Bindery, Inc., United States of America

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How the Geneva Conventions Matter

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> Agreed limitations on warfare imply rational understandings with an enemy who, if he can be reasoned with, should not be an enemy.
> —Michael Howard, "Temperamenta Belli: *Can War Be Controlled?" (1979)*

> Some folks trust to reason, others trust to might
> Some folks look for answers, others look for fights
> —Robert Hunter, *"Playing in the Band" (1971)*

It is understandable to expect that socialization and internalization of the norms underpinning the Geneva Conventions should constitute the mechanisms by which states comply with their treaty obligations.[1] These are the means that the treaties themselves prescribe, as in this typical article from the Fourth Geneva Convention (1949) on protection of civilians:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include

[1] The skepticism expressed in the first epigraph is common. For further elaboration, see Michael Howard, "*Temperamenta Belli*: Can War be Controlled?," in *Restraints on War: Studies in the Limitation of Armed Conflict*, ed. Michael Howard (Oxford: Oxford University Press, 1979), p. 7. Nevertheless, among legal scholars especially, one finds more optimism about socialization and internalization of international legal rules. Among the main theoretical contributions to the literature are: Harold Hongju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106, no. 8 (1997); and Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal* 54, no. 3 (December 2004). Responding to Goodman and Jinks are José E. Alvarez, "Do States Socialize?" and Harold Hongju Koh, "Internalization through Socialization," with a reply by Goodman and Jinks, "International Law and State Socialization: Conceptual, Empirical, and Normative Challenges," all in *Duke Law Journal* 54, no. 4 (February 2005).

> the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.[2]

The implication is that through dissemination and instruction, civilian and military populations become socialized into the norms regulating warfare and come to internalize those norms. Eric Posner has associated this approach with what he calls the " 'legalist' camp [which] holds that states 'internalize' international law, comply with it as a matter of routine, and violate it only in extreme conditions, such as an emergency."[3] The approach is compatible with Louis Henkin's oft-cited generalization that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[4] The counterargument comes from "the 'realist' camp [which holds] that states follow their interests come what may: international law plays no role in states' policy choices."[5]

Posner and others seek to reconcile the legalist observation that states frequently adhere to international law with the realist claim that international law in effect does not exist as a factor in policymaking. Posner, for example, posits, "states comply with international law when doing so enhances their security and wealth, but not otherwise."[6] Such a generalization is compatible with the observation that *reciprocity* plays a key role in states' observance of the laws of war. If, for example, both sides in a battle "give no quarter"—that is, refuse to take surrendering combatants alive as prisoners, but kill them instead—neither side's security will benefit. If combatants on both sides expect to die if they surrender, the intensity and ferocity of the fighting will be greater than if the combatants adhere to a convention on prisoners of war (POWs). Thus, although the prohibition against giving no quarter has been codified in the Hague Conventions of 1907,[7] both legalists and realists would agree that it would be in states' interests to abide by such a convention even if there were no specific legal obligation.[8]

[2] Article 144, Convention IV, relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

[3] Eric Posner, "International Law and the Disaggregated State," *Florida State University Law Review* 32 (2005): 798.

[4] Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (New York: Columbia University Press, 1979), p. 47.

[5] Posner, "International Law and the Disaggregated State," p. 798.

[6] Posner, "International Law and the Disaggregated State," p. 803.

[7] Article 23 of the *IV Convention—The Laws and Customs of War on Land*.

[8] James D. Morrow, "When Do States Follow the Laws of War?" *American Political Science Review* 101, no. 3 (2007); Geoffrey P. R. Wallace, *Life and Death in Captivity: The Abuse of Prisoners during War* (Ithaca, NY: Cornell University Press, 2015).

The design of this project was intended to pose a difficult test for compliance, regardless of whether one is inclined toward the legalist perspective, the realist perspective, or Posner's interest-based approach (which, many would argue, is effectively a realist—or better, a "rationalist"—position). If legalists claim that states routinely comply with law, except, as Posner puts it, "in extreme conditions, such as an emergency," then a state whose security is imperiled by war—the ultimate emergency—should not be expected to comply. That is, as the opposing camp would claim, it should not be expected to comply unless there were some mechanism at work—such as reciprocity—that made compliance serve the state's interest. Most of the cases in this book were chosen specifically for the *absence* of such mechanisms. States facing terrorist attacks against civilians, or guerrilla insurgents whose strength stems from hiding their combatant status except when engaging in violence, are unlikely to benefit from reciprocal compliance by their enemies. Our expectation, then, was that compliance would be far from automatic or routine in cases such as the French in Algeria, the Russians in Chechnya, or the United States battling insurgents in Vietnam, Iraq, or Afghanistan, or waging a "global war on terror." It would be something worth explaining.

Given that we have focused on the hard cases—and have highlighted violations of the laws of war—one could argue that the study suffers from a "selection bias."[9] Indeed, following Henkin, it is likely that more states comply with more laws of war more often than this study suggests. Yet the study has shed considerable light on the factors that influence noncompliance as well as compliance—valuable information for understanding how norms and laws function in this domain. In this concluding chapter, I review the evidence from our case studies to highlight major issues that have emerged. The section that follows reviews the types of wars our authors have discussed—in particular, counterinsurgencies and antiterrorist operations—and notes a paradox: The body of law governing such conflicts, even in the wake of the 1949 Geneva Conventions, is relatively sparse, yet the belligerents exhibited some sensitivity to basic norms for treating prisoners and civilians (even while violating the law). The third section disaggregates the issue of compliance and noncompliance at different levels—from the top political and military authorities to the individual soldier—and draws out some occasionally counterintuitive findings from the case studies. Compliance is not simply a matter of training officers and soldiers in the laws of war and making sure they obey. Disciplined troops can carry out illegal orders—or sometimes blow the whistle on their criminal leaders.

[9] Alexander Downes, comments on project at Brown meeting.

It is widely held that the second half of the 20th century—the era following the adoption of the 1949 Geneva Conventions—has seen a growing international respect for law, human rights, and restraint on war. The fourth section assesses the impact of the international system as a constraint on war crimes, but also—when major powers and international institutions adopt double standards—as an occasional enabler. The fifth section focuses on courts as a likely vehicle for internalization of legal norms. Our case studies, however, provide widely divergent assessments. Israel and the United States are typically considered to resemble each other in their democratic political systems and the fact that they are frequently at war. Yet the Israeli Supreme Court issues sophisticated rulings on matters of international humanitarian law (IHL) (including treaties that Israel has not even signed), while US civilian courts—with a couple of notable exceptions—routinely defer to the government when it comes to national security. Given that Israeli and US legal practices regarding warfare do not seem so different, the comparison suggests the counterintuitive conclusion that perhaps courts are not so central to socialization and internalization of the laws of war. The final section revisits some of the methodological challenges facing a study of compliance with IHL and summarizes the creative ways our authors have sought to overcome them.

Wars and Laws

Counterinsurgency wars, where a conventional army confronts irregular guerrilla forces, provide fertile ground for war crimes. Our volume includes several such cases—the French effort to defeat armed Algerians seeking to liberate their country from colonial rule; the Korean War, which pitted United Nations (mainly US) and South Korean armed forces against North Korean regulars, sympathetic South Korean guerrillas, and Chinese "volunteers"; the US war in Vietnam, which entailed fighting both North Vietnamese soldiers and guerrilla forces of the Vietcong in the South; and Russia's war to suppress an armed separatist movement in Chechnya. The US wars in Afghanistan and Iraq turned into counterinsurgency campaigns after resistance emerged in the wake of the initial defeat of the Taliban and Saddam Hussein's army, respectively. Many conflicts degenerated into terrorism, with the female *porteuses de bombes* in the Battle of Algiers and suicide bombers and roadside improvised explosive devices in Afghanistan, Chechnya, and Iraq; or featured terrorist assaults against civilians as a prime modus operandi, as with al-Qaeda's attacks of 11 September 2001 or violent Palestinian opposition to Israeli occupation. Counterinsurgent and counterterrorist forces for their part engaged in torture and abuse of prisoners and indiscriminate bombing of civilians. The conflicts that attended the breakup

of Yugoslavia witnessed a mix of irregular and regular armed forces and shocking levels of terror and atrocity. Accusations of war crimes dogged the deployment of private security contractors working for the United States and even troops sent into conflict zones as peacekeepers. South Sudan—in 2011, the world's newest country—promptly acceded to the 1949 Geneva Conventions and the two Additional Protocols, and then plunged into civil war, with horrific levels of violence and atrocity against civilians.[10]

Gary Solis, in his chapter on the US war in Vietnam quotes General George S. Prugh on the extent to which the laws of war were drafted with very different conflicts than these in mind: "In the classic sense, the conventions presume a declared state of war between two or more sovereign states, each fielding a regular army fighting on a readily identifiable battlefront."[11] Few of the wars examined in this volume come close to fitting that model. The closest is probably the ten-year Iran-Iraq War, which nevertheless witnessed more than its share of atrocities and war crimes, including the use of chemical weapons by Saddam Hussein's Iraqi forces. Given the presence of potential mechanisms of reciprocity, rationalist accounts of the laws of war might indeed have expected more compliance. Anicée Van Engeland describes a report from the International Committee of the Red Cross (ICRC) that "claimed in 1987 that Iran had 49,285 Iraqi POWs in 15 camps while Iraq held 12,747 Iranian POWs in 10 camps." With such a structural symmetry, one wonders why reciprocity did not play more of role in fostering mutual restraint. The irony is the drafters of the Geneva Convention believed that by the mid-20th century reciprocity was no longer necessary to ensure compliance. Siobhán Wills, in her chapter, quotes one prominent commentary to the effect that the Convention was not "an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties."[12] Yet even peacekeeping forces (the topic of Wills's chapter), let alone insurgents or terrorists, are not contracting parties (even if their home states are) or formally parties to the conflict that they are trying to contain. Thus, in most of our cases, we should not expect the rationalist mechanism of reciprocity to operate.

AQ: CE does not find this quote in Wills's chapter. Please check. (p. 9)

When examining these cases through the lens of law and seeking explanations for compliance and noncompliance, the first thing one must acknowledge

[10] Human Rights Watch, "South Sudan: Killings, Rapes, Looting in Juba," 15 August 2016, https://www.hrw.org/news/2016/08/15/south-sudan-killings-rapes-looting-juba.

[11] George S. Prugh, *Law at War: Vietnam 1964–1973* (Washington, DC: Department of the Army, 1975), http://lawofwar.org/vietnam_pow_policy.htm.

[12] J. Pictet, ed., *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention* (Geneva: ICRC, 1958), Art. 1, quoted in Wills's chapter in this volume.

is that for some of these conflicts there was little relevant law in place at all, and in others the belligerents denied the relevance of existing law. Giovanni Mantilla's chapter traces the history of efforts to bring what became known as armed conflicts of a noninternational character under the international regime of the Geneva Conventions—starting with Common Article 3 of the 1949 Conventions through the 1977 Protocols and beyond. Some of the cases covered in this book—the Korean War and the French war in Algeria, for example—broke out only shortly after the drafting of the 1949 Geneva Conventions, before either side had incorporated their rules into their military law, let alone "internalized" them. As Raphaëlle Branche points out (and as Mantilla anticipated for many such cases), France denied the applicability of Geneva norms to the Algerian conflict, claiming it an internal affair, given Algeria's status as a French *département*, juridically equivalent to Brittany or Provence. By contrast, as Sahr Conway-Lanz describes, the United States sought to portray itself—sometimes unconvincingly—as compliant with Geneva norms during the Korean War, even though it would not ratify the treaty until 1955, well after the fighting had ended.

In both cases, nevertheless, the Geneva Conventions played a role. In the wake of scandals over torture and summary execution of Algerian prisoners, the French government committed itself to compliance with norms governing prisoners of war and allowed access to the ICRC. In April 1960 the provisional government formed by the Front de Libération Nationale (FLN) sought status as the legitimate representative of the Algerian people by claiming to endorse the Geneva Conventions. The FLN's ongoing terrorist activity belied any serious commitment to the laws of war. As Branche points out, the provisional government would not even make available to the ICRC lists of prisoners under its control. It was the defeat and retreat of the French forces that produced the Evian Accords and secured the FLN the legitimacy it desired. Branche concludes that the Algerian war hindered French acceptance of "any international framework regarding human rights." Even regarding the more narrowly defined laws of war, the experience of the Algerian war influenced France's resistance to ratifying the 1977 First Protocol to the Geneva Conventions because, as Mantilla describes, the document put anticolonial struggles in the same category as international armed conflict as far as the rights of combatants were concerned. France only ratified in 2001.

The experience of the Korean War shaped the way the United States adopted the Conventions into its military law and subsequent military practice. As Conway-Lanz explains, the 1956 US Army field manual on the laws of war embodied the legacy of the war and promoted the formal implementation of the Geneva Conventions. Reflecting the 1949 updating of the laws of war, the manual added a new chapter specifically devoted to the treatment of civilians. So, as with several of the cases covered here, US behavior during and after the Korean

War exhibits both violations of the norms and laws governing warfare, and a willingness to incorporate new rules into military practice. For that process to work, officers and troops must be trained to respect the rules and be disciplined if they fail to do so—the topic of the next section.

Training, Discipline, and Compliance in Hierarchical Systems

A state's general commitment to observing the laws of war is hardly sufficient to ensure compliance by its armed forces. Officers and troops must receive proper training and must be monitored to ensure that the training is reflected in their behavior. Given the hierarchical nature of military organizations, it makes sense to distinguish between levels of command at which compliance might vary. As Ben-Ari and Cohen suggest in their study of Israel, the top level consists of "policy decisions of the supreme command and the civilian masters of the military." Next are the "operational decisions of mid- to upper-level military commanders," followed by the "tactical decisions of specific soldiers or junior officers."

Even given a high-level commitment to comply, much depends on these lower levels. Soldiers' adherence to the laws of war (typically translated into rules of engagement for particular missions) is influenced by such factors as the orders of their immediate commanders and the culture of the specific unit within which they serve. Ben-Ari and Cohen refer to "rituals of rationality"—"a gamut of activities in and around safety and minimizing collateral damage that include briefings and debriefings, formulating and changing rules of engagement, creating 'review boards,' writing new training manuals, and elaborating new guidelines." Yet this type of training, while contributing to the objectives of IHL (especially regarding civilian protection), is not the same as specific education in the Geneva Conventions. Ben-Ari and Cohen make this point in their valuable discussion of DABLA, the Hebrew acronym for the International Law Division of the Military Advocate General (MAG) of the Israeli Defense Forces. Writing of midlevel officers, they claim, "a conscious decision was made not to provide these soldiers with instruction respecting the contents of the Geneva Conventions in the basic officer training." The practice instead is "to introduce IHL with its complex standards only to high level commanders." One consequence, "since DABLA representatives are not involved in the operational decisions of small units," is "that actions at such levels may contradict IHL or what DABLA representatives would have advised."

At the opposite extreme from the legalization of the 21st-century Israeli armed forces is the case of the French in Algeria in the middle of the previous century. There the French authorities denied any applicability of the Geneva

Conventions and treated torture—one of the most heinous of crimes—as "a weapon of war, violence employed by design, in order to win."[13] Torture was not a matter of "collateral damage, committed by some ill-disciplined soldiers," as Branche writes in her chapter. Rank-and-file torturers were trained and provided with equipment to carry out their crimes. Even in such a situation, the distinction between levels of command authority is still useful. As Branche points out, to the extent that civilians received decent treatment at all in Algeria (not from the trained torturers, obviously) it depended not on the laws of war but on the decisions of low-level officers and the instructions they gave their troops.[14]

The US conflict in Vietnam represented varying degrees of compliance at different levels. As Solis points out, some of the high-level decisions were of dubious legality. Establishing free-fire zones, where anyone remaining would be designated a combatant, illegally relieved the US authorities of the obligation to follow the principle of distinction and take care not to harm civilians who were not engaged in hostilities. Creating "strategic hamlets" violated the rules against mass population transfers.

At lower levels, the troops in Vietnam did receive training in their legal obligations, as Prugh's study reports and Solis's chapter summarizes. Yet in recounting the atrocities associated with My Lai, Solis poses the question, "Of what effect, then, were the training, the orders, and directives?" He summarizes the evaluation of General William Peers, who investigated the massacre, that "part of the problem was rooted in the lackadaisical manner in which the training was handled." In Solis's judgment, "My Lai also represents a failure of battlefield and higher command leadership," as well as "prosecutions of questionable effectiveness." Some of these shortcomings were remedied in the wake of the Vietnam War, when the Department of Defense instituted a program of training and education to prevent violations of the laws of war. Directive 5100.77, originally issued in November 1974, stated that all members of the Armed Forces must "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." The directive, reissued in 1979 and 1998, was superseded in 2006 by Directive 2301.01E, with much of same language intact.[15] The program increased the role of the judge advocates general (JAGs) in advising and promoting compliance with the Geneva Conventions.

In describing instances when "high level military and civilian political leadership give orders that violate" the laws of war, Ben-Ari and Cohen suggest,

[13] Raphaëlle Branche, *La torture et l'armée pendant la guerre d'Algérie, 1954–1962* (Paris: Gallimard, 2001), p. 14.

[14] Branche, *La torture et l'armée*, p. 243, and her chapter in this volume.

[15] Available at http://www.usslibertyveterans.org/files/231101p.pdf.

"Compliance or noncompliance at this level is not an issue of knowledge, but of politics." This observation would appear relevant to several of the topics covered by our authors, from torture in Algeria to free-fire zones in Vietnam. It also applies to later US cases, such as the torture of terrorist suspects and other detainees, as approved by President George W. Bush and his top advisors. Incidents such as the abuses at the Abu Ghraib prison in Iraq were initially dismissed as a "kind of Animal House on the night shift" (a reference to the 1978 film about the drunken antics of members of a college fraternity). This interpretation is as unconvincing as the claim that "ill-disciplined soldiers" were responsible for torture during the French war in Algeria. It is clear that the decision to violate US domestic and international legal commitments, including the Geneva Conventions, was taken at the highest level. Then Attorney General John Ashcroft, reacting to detailed discussion of torture techniques with the president and his advisors reportedly asked, "Why are we talking about this in the White House?"[16] The answer is that the White House—and the equivalent location for other countries—is where high-level political decisions that contravene the fundamental practices and training of lower-level officials must take place. It was the leaks of photos and documents by whistleblowers that exposed the illegality—suggesting that at lower levels, at least, norms against such vile practices had indeed been internalized by those who blew the whistles.

A more recent example of high-level politics at work would be the Obama administration's decision to create something that resembles free-fire zones in its use of drone attacks. As the *New York Times* reported, the White House avoided difficult (but legally required) questions of distinguishing between civilian and military targets by counting "all military-age males in a strike zone as combatants . . . unless there is explicit intelligence posthumously proving them innocent." As the article makes clear, aside from the obvious motivation to keep Americans secure from terrorist attacks, the president's policies—and the leak to the *Times* that helped reveal them—clearly had political motives as well: to forestall criticism from Republican opponents by adopting a suitably hawkish position.[17] Unlike during the Bush administration, the leaks evidently came from supporters rather than opponents of the practices. The Obama administration

[16] ABC News, "Bush Aware of Advisers' Interrogation Talks," 11 April 2008, http://abclocal.go.com/kfsn/story?section=news/national_world&id=6076727. For a thorough discussion of the political and legal dimensions of the Bush policies, see Thomas Michael McDonnell, *The United States, International Law, and the Struggle against Terrorism* (New York: Routledge, 2011), esp. chs. 3–5.

[17] Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *New York Times*, 29 May 2012. For a review of the Obama administration's counterterror policies, see Matthew Evangelista, "A 'War on Terror' by Any Other Name. . . . What Did Obama Change?" Publication 2012-02, Mario Einaudi Center for International Studies, Cornell University, February 2013, http://einaudi.cornell.edu/node/11529.

later denied that it pursued such an open-ended targeting policy, but the documents it issued in support of its contention failed to convince skeptics.[18]

Limits to the effectiveness of training in the laws of war depend on the degree of seriousness with which the lessons are imparted and received. Soldiers will not take the lessons seriously if their instructors signal a low priority or appear hypocritical. Craig Nation's interviews with veterans of the Yugoslav People's Army (JNA) revealed this pattern clearly: "When asked to describe some of the principles imparted in the instruction, former soldiers and officers often respond in a confused ('What is he asking?') or dismissive ('Oh yes, we had to learn all of that') manner." The Yugoslav case offered further impediments to internalizing the laws of war:

> Conversations with JNA veterans reveal a tendency to conflate training in the law of war with indoctrination in Yugoslav communist ideology. Yugoslav citizens and soldiers were taught that they enjoyed a superior form of political and social order and served a state that could not, by definition, wage aggressive war with illicit means. . . . As was the case elsewhere in the communist world, the contradictions inherent in Yugoslavia's official ideology encouraged cynicism.

As the country broke up, and armed militia units and gangs replaced the regular forces, training in communist ideology and the laws of war was supplanted by a very different kind of indoctrination—"often imbued with an aggressive cult of violence for its own sake, intolerant nationalist extremism, sadism, and racial prejudice." As the Serbian nationalist leadership fanned the flames of war in the former Yugoslav republics of Croatia and Bosnia-Herzegovina, they depended not only on undisciplined gangs but also on better-trained troops—from the Special Forces and Interior Ministry. Their training, in effect, consisted in how to contravene the laws of war, by engaging in atrocities intended to destroy diverse, mixed communities in favor of the nationalists' preferred vision of ethnic purity. Soldiers whose individual moral scruples might have inhibited their participation in such crimes faced an additional obstacle associated with their training. As Nation explains, "soldiers operate within hierarchical command structures that make obedience the most fundamental of obligations. They are subject to the normal human tendency to defer to authority figures even when required

[18] Charlie Savage and Scott Shane, "US Reveals Death Toll from Airstrikes outside War Zones," *New York Times*, 1 July 2016. The relevant document, "Summary of Information Regarding US Counterterrorism Strikes outside Areas of Active Hostilities," is available at http://www.nytimes.com/interactive/2016/07/01/world/document-airstrike-death-toll-executive-order.html. For an earlier assessment based on leaked documents, see Spencer Ackerman, "41 Men Targeted but 1,147 People Killed: US Drone Strikes—The Facts on the Ground," *The Guardian*, 24 November 2014.

to engage in actions that offend the conscience. To a significant extent then, the breakdown of respect for Geneva rules during the Yugoslav wars can be attributed to failures of leadership."

Thus, whereas training is essential for adherence to the laws of war, it is a double-edged sword. Given the importance of discipline to military success, soldiers internalize the requirement to obey orders at least as well as they internalize normative restraints on warfare. As Elisabeth Wood found in her pathbreaking work on sexual violence during war, undisciplined troops commit rapes, but so do well-trained troops ordered deliberately to destroy communities and carry out "ethnic cleansing" by sexual violence.[19] Branche's observation on French military training for much of the postwar period clearly applies more broadly: "Very little if any attention was devoted to circumstances within which soldiers would be obliged to listen to the dictates of personal conscience and contemplate the need to question or disobey orders to carry out illegal or unethical actions." Branche points out that "the French army was a conscript army" where military service was "compulsory and every French man had to enlist." The military leadership gave a higher priority to discipline than to individual choice in morally difficult situations. The professional army that was developed in France after 1996, Branche argues, took a different approach. She cites a 1999 document, "Foundations and Principles," to the effect that "ethics are not a question of disciplinary rules but rather a question of individual fulfillment."

Paradoxically, the pursuit of "individual fulfillment" can also contribute, indirectly, to war crimes. As in the French case, the Yugoslav People's Army was a conscript army—yet not everyone served. During the violent breakup of the country, tens of thousands of young men evaded the draft and many fled the country rather than fight.[20] Nation reports that some 300,000 young people left Yugoslavia between 1991 and 1999. As he points out, one possible factor in the high level of atrocities committed by the army during the wars of that era is that people of conscience, who might have resisted the descent into barbarity, rejected the violence altogether and left.

As Renée de Nevers describes in her chapter, private military and security corporations pose unusual problems for training and discipline in the service of compliance with the laws of war. She quotes the US Joint Forces Command manual on "armed private security contractors" to the effect that "the principle vehicle for the commander to exercise control" over the private troops is not a command structure but "the contract." Granted, as de Nevers points out, many

[19] Elisabeth Wood, "Variation in Sexual Violence during War," *Politics and Society* 34, no. 3 (September 2006).

[20] UN High Commissioner for Refugees, *Situation of Draft Evaders/Deserters from Former Yugoslavia*, 6 February 1995.

private security employees are former soldiers from Western militaries who should have received training in IHL during their military service. "It is less clear, however, whether 'third country nationals' hired from places such as Chile, Fiji, and Uganda have similar training." Moreover, "companies are hiring contractors with police and other domestic law enforcement backgrounds" who may never have encountered the laws of war.

Nevertheless, it would be incorrect to claim that private military contractors fall outside the law. As de Nevers explains, "legal frameworks cover their behavior at several levels." The high-profile cases of "Iraq and Afghanistan are anomalies in this regard." The US-led Coalition Provisional Authority deliberately sought immunity for the contractors under Iraqi law. Normally a Status of Forces Agreement between the United States and a host government determines under whose jurisdiction violations of the law should be handled. Since 2000, the US government could also prosecute civilian employees of the Department of Defense for crimes under the Military Extraterritorial Jurisdiction Act (MEJA). To supplement reliance on the MEJA, the US Congress revised the Uniform Code of Military Justice in late 2006 "to bring all contractors accompanying the armed forces under its purview."

Thus, as with regular armed forces, the extent to which private contractors abide by their legal obligations depends not only on training and discipline but also on high-level political decisions. The same is true, as Wills describes, for peacekeepers. Yet, in this case, the high-level decisions are not only taken by states but also shaped by international organizations, such as the United Nations. Given that peacekeeping missions emerged following the drafting of the UN Charter, and were not covered by the Geneva Conventions, the status, obligations, and rights of the soldiers participating in such missions have received little attention until recently. Regarding their own behavior—with examples of torture and murder by peacekeepers of civilians in Somalia and widespread sexual exploitation of the local population by peacekeepers throughout the world—it hardly represents the soldiers' internalization of the Geneva norms.

As the studies in this volume have indicated, it is not always easy to identify evidence of internalization of the laws of war. One means of detecting it is to examine the contrast between what soldiers at the middle and lower levels of the command hierarchy automatically consider the right thing to do and what their superiors order them to do. Perhaps one of the best examples of internalization of the Geneva Conventions is the US armed forces' approach to treatment of people captured on the battlefield whose status—soldier or civilian—is unclear. The Third Geneva Convention of 1949 provides rules for handling captives who may not enjoy the full rights of POWs. As Article 5 indicates, in case of doubt about their status, "such persons shall enjoy the protection of the present Convention until such time as their status has been

determined by a competent tribunal." Along with most provisions of IHL, these ones have been incorporated into US military law and practice. US military regulations defined a competent tribunal as a panel of three US commissioned officers familiar with the circumstances under which the person was taken prisoner. The use of such tribunals, and their provenance in the Geneva Conventions, had become so familiar to US military officers that they referred to them as "Article 5 tribunals." The 2002 edition of the US Army's Operational Law Handbook spells out the obligation in a paraphrase of the Convention (referring to "prisoner of war" as PW): "When doubt exists as to whether captured enemy personnel warrant continued PW status, Art. 5 Tribunals must be convened."[21] US armed forces made extensive use of Article 5 tribunals during the 1991 Gulf War, conducting 1,196 of them during Operation Desert Storm. The process resulted in 310 individuals receiving POW status. The others were determined to be civilians.[22]

Arguably having internalized the norm, the Pentagon was well prepared to carry out Article 5 Tribunals when the US-led coalition defeated the Taliban and disrupted the al-Qaeda network in Afghanistan in 2002. It took a high-level decision to undermine the standard operating procedures. As Elizabeth Grimm Arsenault describes in her chapter, the initial orders from Central Command to U.S. forces in Afghanistan in October 2001 specified the use of Article 5 Tribunals, as per standard practice. These orders were countermanded at the very top of the US political system, when, as she delicately puts it, "policymakers in Washington assessed that defeating al-Qaeda required new ways of thinking." Starting in January 2002, US authorities transported over five hundred prisoners to the Guantánamo base, never revealing the exact numbers or providing their names. The first public US commentary on the status accorded to the detainees came from then Secretary of Defense Donald Rumsfeld on 11 January. He declared that the detainees "do not have any rights under the Geneva Convention." Bypassing the Article 5 requirements, the Bush administration declared its detainees illegal "enemy combatants" and "international terrorists," not soldiers.[23] The legal basis for the policy was the Military Order

[21] US Army, Operational Law Handbook (2002), quoted in Adam Roberts, "The Laws of War in the War on Terror," in *International Law and the War on Terror*, ed. Fred L. Borch and Paul S. Wilson (Newport, RI: US Naval War College, 2003). My discussion owes much to Roberts's reconstruction and interpretation of the US developments.

[22] US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, April 1992, p. 663. The report was prepared under the auspices of then-Undersecretary of Defense for Policy Paul Wolfowitz, and directed by his deputy, I. Lewis Libby. The report is available at http://www.ndu.edu/library/epubs/cpgw.pdf.

[23] The discussion here draws on the analysis and some of the language in Matthew Evangelista, *Law, Ethics, and the War on Terror* (Cambridge, UK: Polity, 2008), pp. 62–64.

regarding the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, issued under the president's name on 13 November 2001. Although premised on the claim that al-Qaeda had carried out attacks against the United States "on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces," the military order made no reference to the Geneva Conventions or any aspect of the law of armed conflict.[24]

It was not always thus. As Gary Solis points out, US troops dealing with insurgents during the Vietnam War were highly attentive to the issue of status and treatment of prisoners. Solis notes that in the years following the war, a principle US argument against ratification of Additional Protocol I (1977) to the Geneva Conventions related to its Article 44.

> That provision requires ratifying states to give captured enemy fighters who do not meet all four of the traditional requirements for POW status to nevertheless provide captured enemy fighters "protections equivalent in all respects to those accorded to prisoners of war." Some ask, "But is that not what you did in the Vietnam war—treat captured North Vietnamese guerrillas as POWs?" Yes, we did.

The United States also treated South Vietnamese guerrillas, members of the Vietcong, as prisoners of war—a practice that earned US authorities praise from the ICRC.[25]

One can understand such a decision in terms of rational self-interest on a number of grounds. It was bureaucratically more efficient to put all captives in one category rather than spend time making fine distinctions (aside from a basic distinction between combatant and noncombatant). It also took off some of the pressure of international public opinion, much of which was harshly critical of US involvement in Vietnam. But other elements of the practice are harder to explain on rational grounds.[26] Solis points out, for example, that there was no hope of reciprocity from North Vietnam, whose judgment about the war blurred the categories of *jus ad bellum* and *jus in bello*: North Vietnam refused to treat US soldiers as POWs because they were involved in a war of aggression and committing crimes against humanity. By its practice regarding captured

[24] http://www.law.cornell.edu/background/warpower/fr1665.pdf.

[25] Michel Veuthey, *Guérilla et droit humanitaire* (Geneva: Comité International de la Croix-Rouge, 1983), pp. 231–232.

[26] For a recent study drawing on new archival materials, see Brian Cuddy, "Wider War: American Force in Vietnam, International Law, and the Transformation of Armed Conflict, 1961–1977," PhD dissertation, Department of History, Cornell University, 2016.

US troops, the North Vietnamese government itself committed war crimes. As Solis explains:

> Even if captured Americans were not considered by the North to be POWs, their unlawful treatment was prohibited by the fourth Geneva Convention regarding civilians. That is because, in the law of war, there are but two classifications of individuals on the battlefield: combatants and civilians. If US captives were viewed as lawful combatants they merited POW status and treatment in accord with the third Convention; if not viewed as combatants they were necessarily civilians protected by the fourth Convention, as well as common Article 3, which requires humane treatment of all who are *hors de combat*.

This is the same legal regime that governed US policy in the wake of the 9/11 attacks and the invasion of Afghanistan—even without US endorsement of the greater protections afforded by the First Additional Protocol. To evade it, the Bush administration established an alternative system of military commissions to supplant both the Article 5 tribunals, which the US armed forces were prepared to implement to determine the status of their captives, and the regular system of courts-martial to try suspected war criminals. In this case, we can get a sense of the degree of internalization by considering what was necessary to undermine the expected behavior.

As we have seen, violations in IHL—and failure to punish them—can stem from poor or inadequate training at low and middle levels or from high-level decisions taken on political or strategic grounds. They can also result from more prosaic considerations related to material shortcomings. In Vietnam numerous limitations hindered the optimal operation of the military judicial system, as Solis points out—lack of interpreters, electricity, and transport. Arsenault attributes some lapses in efforts to protect civilians in Iraq and Afghanistan to technical limitations—such as "reliance on close air support and the inability to effectively deploy critical weapons systems that would limit civilian casualties." Perhaps if the Obama administration had been able reliably to distinguish between terrorists and innocent people who happen to be near them—it would have been less likely to declare any male in a drone's target area a terrorist.[27]

[27] Defining everyone killed by a drone as an enemy is not a convincing way to demonstrate compliance with international law. Yet this is essentially the approach taken by defenders of the drone strikes, such as Michael Hayden, the retired US Air Force general and former CIA director. He acknowledged rare mistakes in killing innocent people and admitted attacking locations where the presence of the intended target was only suspected, and so others were killed instead. "We made no excuses about killing lower-ranking terrorists," he wrote, because "in warfare it is

Finally, it should not be assumed that military exigencies always influence states toward noncompliance with legal obligations. As Arsenault points out, the shift in US policy in Afghanistan and Iraq toward "a population-centric counter-insurgency mission" pushed in the opposite direction: Noncompliance with the Geneva Conventions—to the extent that it caused harm to civilians—"equated to mission failure."

The International System: Constraining and Enabling

The cases examined here display a range of ways that the international system—including what some have characterized as an emerging global regime governing human rights—has influenced compliance with the laws of war. During the French war in Algeria, General Raoul Salan established special camps for captured members of the Algerian National Liberation Army. Instead of referring to the detainees as prisoners of war (POW) he acknowledged their combatant status by calling them *PAM*: they were ***p**ris les **a**rmes à la **m**ain*, taken armed (with arms in hand).[28] As Branche describes, Salan "made it very clear: the inmates 'should not be considered prisoners of war. The Geneva conventions did not apply to them.'" Yet establishing the internment camps marked a step toward the international norm—especially if the alternative was summary execution.

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As countries came to adhere more consistently to the Geneva Conventions their behavior came to influence not only an international audience of their peers but also an internal, domestic audience. As Conway-Lanz assesses the impact of the Geneva Conventions on the Korean War, he also considers the war's impact on the conventions—for the United States and the world: "The Geneva Conventions," he argues, "underwent a process of legitimatization for Americans and a broader international community during the Korean War that laid a foundation for the future expansion of humanitarian protections. In 1955, the United States chose to ratify the conventions that had gained a new visibility during the war."

Another aspect of the international system that some of our authors consider is the growing worldwide process of legalization. Ben-Ari and Cohen find "the increasing intrusion of judicial considerations into various sectors of societies, including the military" to have influenced Israeli compliance with the Geneva

regrettably necessary to kill foot soldiers, too." Michael Hayden, "To Keep America Safe, Embrace Drone Warfare," New York Times, 19 February 2016.

[28] Veuthy, *Guérilla et droit humanitaire*, p. 228.

Conventions, for example. They also point to the role of international institutions, nongovernmental organizations, and a global media. They cite the views of Désirée Verweij, who "suggests that part of the restraint on military action results from an internalization by the military of the 'gaze' of other—the media, social movements, and NGOs, for instance. It is for this reason, that there is now widespread talk about how the armed forces of the industrial democracies operate 'under the shadow' of judicial proceedings." This formulation bears considerable similarity to Harold Hongju Koh's concept of *transnational legal process*: "the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."[29]

Building on Verweij's suggestions, and consistent with Koh's approach, Ben-Ari and Cohen propose "more than a simple model of external influences on soldiers' morality and action." They describe a three-phased process whereby the "'gaze' of (various) others is first internalized in the rhetoric" of the armed forces; second, the rhetoric comes to be "adopted into the organizational structures and practices" by which the military forces operate; and third, the rhetoric comes to reflect the "soldiers' and officers' self-image as military professionals and as human beings." This is an ideal model, one that cannot be expected to operate universally or consistently, but one that finds a solid basis in the research of psychologists and the popular aphorism that if you "talk the talk," you eventually come to "walk the walk."[30]

The case of Russia, and particularly its military actions in the secessionist republic of Chechnya and elsewhere in the North Caucasus region, poses a problem for this model, however, and in general for explanations that focus on the impact of international institutions. Although post-Soviet Russia is hardly the most open country in the world, the end of communist rule there brought a huge increase in engagement with the outside, and, in particular, an acceptance of a number of international obligations associated with human rights and war—along with integration into key institutions such as the Council of Europe. A small, but energetic and committed community of activists maintained pressure on the government and armed forces to adhere to its obligations in areas directly related to war and the human-rights abuses associated with it, such as torture, hostage-taking, "disappearances," collective punishment

[29] Harold Hongju Koh, "Transnational Legal Process" (1996), Faculty Scholarship Series, Paper 2096, http://digitalcommons.law.yale.edu/fss_papers/2096.

[30] For discussion of this point in relationship to compliance with international law, see Goodman and Jinks, "International Law and State Socialization," pp. 995–996.

(e.g., the Committee of Soldiers' Mothers, Demos, Memorial, Human Rights Watch). Yet Russia's military practices in Chechnya and its overall adherence to IHL appeared to show little effect from either international engagement or the efforts of human-rights activists at home.

The International Committee of the Red Cross represents a particularly strong example of the contrast between level of activity and impact. The ICRC stepped up its activities in Russia and the other former Soviet republics in the wake of the dissolution of the USSR in 1991. By 2008, it could boast of a number of achievements. As the article from the Fourth Geneva Convention I quoted at the outset showed, the ICRC has always aspired to disseminate its principles of respect for the laws of war more widely than just among military forces. It is striking, then, that Russia after the fall of the USSR was the only country in the world that had allowed the ICRC to establish a curriculum on "human values" for school children ages 11–17 (although Anicée Van Engeland describes something similar more recently in Iran). Those in the cohorts of 15–17 years old took a compulsory course in IHL and an exam on the topic. According to François Bellon, who served as the Moscow-based director of the ICRC for the former Soviet region (before heading the ICRC delegation to NATO and the European Union), the program reached 20 million children. The Russian government also allowed the ICRC to provide curricula for law schools, which require mandatory courses in humanitarian law, and for schools of journalism. Regarding the armed forces, starting in 1996 the Russian minister of defense had signed a "plan of action" with the ICRC on a yearly basis—something not done in other countries, and which, in the view of the ICRC director, reflected high-level interest. Yet, as Bellon admitted, the plans failed to match the reality in the field: "We lost that battle."[31]

Regarding Russia's war in Chechnya, the ICRC had informed the government of its obligations early on when a delegation met with officials of then-President Boris Yeltsin's administration at the end of December 1994. The delegation conveyed its assessment that the military action constituted an armed conflict "not of an international character," governed by Common Article 3 of the 1949 Geneva Conventions.[32] Although the ICRC continued to maintain

[31] Author's interview with François Bellon, ICRC headquarters, Moscow, 20 May 2008. For an example of the agreed program of activities: *Rossiiskaia Federatsiia: Kalendar' meropriiatii MKKK, Oktiabr'–dekabr' 2006* [Russian Federation: ICRC calendar of events, October–December 2006], in the author's possession.

[32] A collective memoir by Yeltsin's advisers acknowledges that one of them met with officials of the ICRC and accepted their assessment. See Iu. M. Baturin, A. L. Il'in, V. F. Kadatskii, V. V. Kostikov, M. A. Krasnov, A. Ia. Livshits, K. V. Nikiforov, L. G. Pikhoia, and G. A. Satarov, *Epokha El'tsina: Ocherki politicheskoi istorii* [The Yeltsin Epoch: Sketches of a political history] (Moscow: Vagrius, 2001), p. 625.

its assessment for many years thereafter, the Russian government only accepted it for the period from 1994 until Russian troops withdrew from Chechnya in 1996. From the time Russia reinvaded the republic in 1999, the government considered its subsequent actions as part of an "antiterrorist operation." Although the Russian forces violated many provisions of Common Article 3, as Kramer's chapter describes, they did allow the ICRC access to prisoners up until 2004 (the Chechen side allowed access to its captives only during the first war). Neither the Russian government nor the local Chechen regime under Ramzan Kadyrov allowed access to the "disappeared."[33]

In a certain sense, by rejecting the obligations of the Geneva Conventions, and failing to declare a state of emergency—which would allow for derogation of some of its human-rights obligations—Moscow has unintentionally invited scrutiny by human-rights observers and action by the European Court of Human Rights. The Court heard scores of cases related to Russian policy in the North Caucasus and ruled against Russia in the vast majority of them.[34] Moscow reacted by paying the modest compensation required by the court to victims or families of deceased victims. It barely investigated any of the cases even when the Court identified specific perpetrators of the crimes.[35] Frustrated by lack of progress, some activists picked up on a suggestion of the Parliamentary Assembly of the Council of Europe to advocate creating a special tribunal along the lines of the ones formed to deal with the conflicts in Rwanda and former Yugoslavia.[36] Others have continued to adopt the frame of human rights rather than the laws of war to address the widespread use of torture and "disappearances."[37] Indeed, the early 21st century has witnessed a blurring or overlap between international humanitarian law and human-rights law, with an extension of individual rights beyond the Geneva Conventions for those involved in armed conflict. It is significant already that a European Court of *Human Rights* would hear cases regarding a conflict that the ICRC considers to fall under Common Article 3 of the Geneva

[33] Bellon interview.

[34] Sergei L. Loiko, "In Russia, Some Seek Justice in European Court of Human Rights," *Los Angeles Times*, 22 March 2012.

[35] Author's interview with Tatiana Lokshina of the Demos human-rights groups, Moscow; "Chechen Cases at the ECtHR," European Center for Constitutional and Human Rights (n.d.).

[36] "Promoting the Proposal on Establishment the International Tribunal on Chechnya—The First Steps." The undated report (probably August 2007), in the author's possession, was prepared by Stanislav Dmitrevskii, the managing director of the Russian-Chechen Friendship Society, on behalf of a number of groups, including Memorial, and the Committee against Torture, in anticipation of a meeting in Nizhny Novgorod, planned for October 2007 to honor the journalist Anna Politkovskaia on the first anniversary of her murder.

[37] *Russian NGO Shadow Report on the Observance of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the Russian Federation for the period from 2001 to 2006* (Moscow, November 2006).

Conventions. Even more noteworthy is that the judges have ruled consistently against Russia, perhaps setting a precedent for applying the higher standards of human-rights law to an area heretofore considered the *lex specialis* of the laws of war.[38] Although cold comfort to the victims of Russian or Chechen violence, promoters of human rights and restrictions on warfare might view such developments as progress.

In assessing states' compliance with the laws of war, we typically think of the effect of the "international community"—represented, say, by the United Nations or the European Union—as a positive one. Europeans are often given credit, for example, for such initiatives as the Rome Statute for an International Criminal Court and the treaties banning antipersonnel landmines and cluster bombs.

Anicée Van Engeland's chapter on Iran provides a reminder, however, that the international community—by its inaction or double standards—can contribute to undermining respect for international law. She describes how the UN Security Council's refusal to denounce Iraq's poison-gas attacks against Iran and against its own Kurdish citizens during the Gulf War of 1991 undermined the credibility of international humanitarian law in the eyes of Islamist leaders who were already suspicious of international institutions dominated by the West. Undoubtedly Iran's leaders themselves revealed a degree of hypocrisy in denouncing violations of a body of international law that they claimed—in regard to their own behavior—was superseded by Shari'a law as they chose to interpret it. But for international bodies to accuse Iran of using chemical weapons, rather than identify Iraq as the real culprit, as Van Engeland reports, surely did little to bolster the Islamic Republic's respect for the law.

Iran's interest in international law revived in the wake of the Iran-Iraq War, following a pattern well established in the 20th century—with the 1925 Geneva Protocol limiting the use of poison gas signed in reaction to the widespread deployment of that weapon in World War I; the 1949 Geneva Conventions (particularly the new fourth convention intended to protect civilians) following the devastation and genocidal crimes of World War II; and the 1977 protocols inspired by the Vietnam War and wars of anticolonial struggle.[39] The attacks of 11 September 2001 and the subsequent US invasion of Iraq also provided an impetus for an Iranian reconsideration of the merits of international law: By

[38] William Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya," *European Journal of International Law* 16, no. 4 (2005): 741–767. See also the chapter by Charles Garraway in Matthew Evangelista and Henry Shue, eds., *The American Way of Bombing: Changing Ethical and Legal Norms, from Flying Fortresses to Drones* (Ithaca, NY: Cornell University Press, 2014).

[39] See David Wippman's discussion in David Wippman and Matthew Evangelista, *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsley, NY: Transnational, 2005), pp. 1–3.

endorsing the Geneva Conventions, Iran was seeking to distinguish itself from the lawless terrorists of al-Qaeda and was reacting to the fact that neoconservative officials in the Bush administration such as Paul Wolfowitz clearly had Iran in their gun sights (until the disastrous occupation of Iraq distracted their attention). However instrumental Iran's embrace of the Geneva Conventions, it has the potential, as Van Engeland claims, to become internalized.

Internalization and the Role of Courts

Scholars of international law who favor explanations for compliance that rely on mechanisms of socialization to dominant norms necessarily focus on the level of domestic politics and legislation. Koh, for example, describes "judicial internalization," which "occurs when litigation in domestic courts provokes judicial incorporation of international law norms into domestic law, statutes, or constitutional norms."[40] Yet, at the international level legalization of norms governing warfare is still relatively underdeveloped. The International Court of Justice in The Hague has weighed in on some issues related to the laws of war, most notably in a case brought by Nicaragua against the United States for the latter's support of the Contra forces seeking to overthrow the Sandinista government,[41] and regarding the legality of nuclear weapons.[42] More relevant is the Rome Statute that established the International Criminal Court, whose mandate includes prosecution of war crimes, genocide, aggression, and crimes against humanity. Yet some of the world's major military powers—for example, the United States, Russia, China, and India—are not parties to the treaty. Ad hoc courts have been established to administer justice in the face of war crimes during particular conflicts. The International Criminal Tribunal for the former Yugoslavia (discussed in Nation's chapter) and Rwanda are notable examples. And, although not mandated to deal with IHL, the European Court of Human Rights, as we have seen, has issued many judgments regarding Russia's war in Chechnya, and earlier on British conflict with the Irish Republican Army and Turkey's war against Kurdish separatism.

The Rome Statute, whose definition of war crimes tracks closely with the language of the Geneva Conventions, could have an indirect effect on states that do not formally participate in its institutions. Such states do not necessarily expect that their troops or commanders accused of war crimes will come before the

[40] Koh, "Why Do Nations Obey International Law?" p. 642.

[41] http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5.

[42] http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95.

International Criminal Court. Through the principle of "complementarity," the original Rome Statute provides that national legal authorities have the primary obligation to investigate war crimes. Only if national courts are unwilling or unable to do so does the international court come into play.[43]

So even with the establishment of the International Criminal Court, much of the action should still take place at the domestic level. Military courts-martial of course routinely handle violations of military law by members of the armed forces. As Solis points out in his discussion of the Vietnam War, the violations are not called war crimes or grave breaches of the Geneva Conventions but violations of the relevant national military law—in the US case, the Uniform Code of Military Justice.

Domestic civil courts are typically reluctant to intervene in the area of national security, granting the political authorities wide latitude. A notable exception is the Israeli Supreme Court, which has issued judgments regarding such controversial issues as targeted killings and harm to civilians during military operations. Ben-Ari and Cohen date the Israeli court's activism in matters related to international humanitarian law to the year 2000. "First, the court has expanded its jurisprudence to include application of the fourth Geneva Convention. In recent cases, the court even based some decisions on the First Additional Protocol to the Geneva Conventions (which Israel, like the United States, is not party to), justifying its action on the grounds that some of the norms in this protocol are considered Customary International Law." They point out, "the Israeli Supreme Court may be the only judicial body in the world that has demonstrated a willingness to enforce IHL on the army ex ante that is, before an action is taken, or even whilst a military operation is in progress." Although they stress "nonintervention is still the norm," they suggest that "the 'shadow' of possible judicial intervention lies over almost every military operation undertaken." The Israeli Defense Forces are thus obliged constantly to take the laws of war into consideration.

US courts rarely involve themselves in matters related to national security, and when they do so their actions do not always uphold the laws of war. Conway-Lanz writes, for example, of the US Supreme Court's overturning a court-martial conviction of a US airman charged with murdering a Korean prisoner on the grounds that the defendant had "been discharged from the Air Force when he was tried." In what he describes as "a collateral attack on the military conviction," Solis reports that a Georgia federal district court overturned the conviction of Lieutenant William Calley, the instigator of the My Lai massacre (a decision later reversed by the Federal Court of Appeals, by which time Calley was granted parole). There are many instances where neither military nor civilian judicial

[43] William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge, UK: Cambridge University Press, 2007).

authorities have pursued cases of documented war crimes because the perpetrators had left the armed forces and were difficult to locate.[44]

A notable exception to US civilian courts' deference on matters of national security occurred during the Bush administration's "global war against terror." In the cases of *Hamdan v. Rumsfeld* (2005)[45] and *Boudmediene v. Bush* (2008), for example, the Supreme Court rejected the administration's policies on detention of terrorist suspects. In the latter case, the majority wrote:

> In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, the courts must accord proper deference to the political branches. However, security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.[46]

During the Obama administration, the courts became arguably more compliant with the president's wishes. In a number of cases the White House intervened in defense of Bush administration officials. In December 2009, for example, Obama's Department of Justice successfully "asked an appeals court to dismiss a lawsuit accusing former Bush administration attorney John Yoo of authorizing the torture of a terrorism suspect, saying federal law does not allow damage claims against lawyers who advise the president on national security issues."[47] The previous month a federal appeals court had dismissed the case of Maher Arar, a Canadian citizen whom the United States arrested as part of its "extraordinary rendition" program and sent to Syria, where he was tortured. As one news report summarized, "the Second Circuit Court of Appeals ruled that victims of extraordinary rendition cannot sue Washington for torture suffered overseas, because Congress has not authorized such lawsuits." Although the Canadian government had declared Arar innocent of any connection to terrorism and apologized for providing the faulty intelligence that led to his arrest, the US government refused to apologize, but instead kept Arar's name on a "watch list" of suspected terrorists.[48] A common practice during the Obama

[44] Michael Sallah and Mitch Weiss, *Tiger Force: A True Story of Men and War* (New York: Little, Brown, 2006). This point was made by David Kaiser at our Brown workshop.

[45] David Cole, "Why the Court Said No," *New York Review of Books* 53, no. 13 (10 August 2006).

[46] http://www.law.cornell.edu/supct/html/06-1195.ZS.html.

[47] Bob Egelko, "White House Wants Suit against Yoo Dismissed," *San Francisco Chronicle*, 8 December 2009.

[48] "Appeals Court Rules in Maher Arar Case: Innocent Victims of Extraordinary Rendition Cannot Sue in US Courts," *Democracy Now* (radio program), 3 November 2009, http://www.democracynow.org/2009/11/3/appeals_court_rules_in_maher_arar.

administration, especially favored by the Central Intelligence Agency, was simply to declare the topic of a given law suit—say the targeted killing by drones of innocent civilians—secret on grounds of national security and render the judicial process impossible. As one critical evaluation put it, the policy served "not to protect legitimately classified information from disclosure, but to shield controversial decisions from public scrutiny and to spare officials from having to defend their policies in court."[49]

Assessing the Impact of the Geneva Conventions

Is the glass half full or half empty? Given the methodological hurdles confronting a study of the impact of the Geneva Conventions, or IHL more broadly, it seems unrealistic to pose a question any more ambitious than that one. Granted we have chosen "hard cases"—where one might expect minimal compliance by states fighting terrorists or insurgents who violate the laws of war by design. But that hardly means we can declare the violations we have encountered anomalies. For that reason we have sought to investigate the domestic and international institutions that should be in place and functioning if states are serious about their obligations.

Still, much of our evidence is subject to varying interpretations. Ben-Ari and Cohen found, for example, that between 2000 and 2007 the Israeli Defense Forces indicted just 10 percent of soldiers suspected of criminal offenses against Palestinians. That seems to them a low number. Renée de Nevers described a few high-profile crimes committed by private contractors, but points out that the "bulk of these contractors likely conduct their missions without incidents such as those highlighted here." At the same time, she observes, at the time of writing, "few private security contractors working in Iraq have been charged with committing crimes" and "only one has been prosecuted for actions in Afghanistan." In the infamous case of September 2007, where five employees of Blackwater were charged with manslaughter for killing seventeen civilians in Nisour Square in Baghdad, the charges were initially dismissed due to prosecutorial errors.

Gary Solis reveals the methodological challenges to accounting for war crimes in his close examination of the Vietnam War. How many US war crimes went undetected by military authorities is unknowable. Even the numbers

[49] Jameel Jaffer and Nathan Freed Wessler, "The C.I.A.'s Misuse of Secrecy," *New York Times*, 29 April 2012. Whether the Obama administration's actions represent a permanent "rollback" of rights or a temporary wartime expedient is addressed in Sidney Tarrow, "War, Rights, and Contention: Lasswell v. Tilly," in *Sovereignty, Citizenship, and Cosmopolitan Alternatives*, ed. Sigal Ben-Porath and Rogers Smith (Philadelphia: University of Pennsylvania Press, 2012).

of alleged crimes investigated cannot be known because of records missing or never kept. That said, Solis presents the evidence available and develops a clever technique for assessing the justice of the punishment meted out in those cases that were discovered and prosecuted. He compares them to the nearest equivalent in domestic law—cases of murder and manslaughter. His conclusion is that "court-martial sentences for Vietnam-era war crimes were substantial, even heavy, even when compared to sentences imposed in civilian courts. Nor were there discernible differences in court-martial sentences for the murder of Americans and those imposed for Vietnamese victims." His conclusion: "It is fair to say that Vietnam-era military courts fully executed their responsibilities in light of the 'effective sentencing' envisioned by the Geneva Conventions." Of course this assessment does not apply to other types of US military behavior in Indochina—such as aerial bombardment of civilian areas—that some would deem war crimes.[50] But it does offer a rather hopeful image of compliance with the laws of war.

Conway-Lanz's research into US treatment of civilians during the Korean War reveals heretofore little-known atrocities, such as a deliberate policy to fire on refugees on the suspicion that they might be harboring guerrilla fighters in disguise. Yet, even here he finds reason for hope. "Americans involved in the brutal refugee control policy did display a sensitivity to the norm against harming civilians even in the absence of a public spotlight." He cites as evidence the concern expressed in Ambassador John Muccio's 1950 letter to the secretary of state; a recommendation, contained in military orders to shoot at fleeing refugees, to "use discretion" in the case of women and children; and one captain's refusal to fire on refugees, despite his orders.

Yet if we observe progress, we also must recognize some substantial steps backward. The Bush administration's endorsement of torture, and its successors' unwillingness to investigate or prosecute the crimes, is one obvious example, but there are others. Conway-Lanz's chapter describes the sorry state of a hospital under US military authority, treating refugees in South Korea. "Staffed by five doctors and eighteen nurses with facilities for about 120 patients" at one point it "contained 817 patients with many lying on grass mats on the floor." One visitor wrote that the people "are forced to live worse than any animal kept by an American farmer." More than a half-century later, one might be tempted to say the same about US-held detainees at prisons such as Bagram in Afghanistan or Abu Ghraib in Iraq—and about patients in hospitals. At least that could be the reaction to headlines such as this one from August 2012: "Congressional

[50] For a multidisciplinary analysis of the morality and legality of aerial bombardment, see Evangelista and Shue, *The American Way of Bombing*, particularly Neta Crawford's discussion of the Vietnam War as a turning point.

Probe Reveals Cover-Up of 'Auschwitz-Like' Conditions at U.S.-Funded Afghan Hospital."[51]

These examples come from countries, such as Israel and the United States, commonly considered law-abiding democracies. The evidence in chapters by Craig Nation and Mark Kramer, on former Yugoslavia and Russia, respectively, paint an even bleaker picture of the state of the Geneva regime. From the standpoint of scholarship, however, Nation has done us a service by enumerating the factors that led to such widespread noncompliance in the Yugoslav case. And despite Russia's brutal practices in fighting Chechen separatism, the fact that human-rights activists have brought them worldwide attention—at great personal cost—inspires admiration. Their efforts have arguably contributed to a broadening of the scope of legal protections for civilians caught in armed conflict, as we saw with the rulings of the European Court of Human Rights.

One of our authors has described the US struggle with adherence to the Geneva Conventions as "part of a broader process of international consensus-building on minimizing the destructiveness and human costs of war."[52] Consensus was most easily achieved "in the relatively noncontroversial convention provisions that governments around the world agreed conformed to their military and political interests and their notions of military necessity, such as the immunity of doctors and hospitals from attack or the hundreds of mundane regulations for the humane operation of internment camps for prisoners of war and civilian detainees." These are areas where we would expect self-interest and the rationalist mechanism of reciprocity to operate. Perhaps the absence of reciprocity in the "unequal wars" that the United States has fought in Iraq and Afghanistan, for example, accounts for some of the serious lapses in adherence to even these noncontroversial provisions.[53] Conway-Lanz observes that "the protections for war victims that clashed the most with perceived military and political interests failed to even make it into the 1949 conventions, like noncombatant protections from bombing." Yet some of those provisions appeared in the 1977 Geneva Protocols, in treaties banning landmines and cluster munitions, and in the Rome Statute for the International Criminal Court—despite the opposition of the United States and some of the other major war-fighting powers. The study of the laws of war, as this volume has demonstrated, is full of such paradoxes. Despite the methodological difficulties it is a study well worth pursuing.

[51] *Democracy Now*, 1 August 2012, http://www.democracynow.org/2012/8/1/congressional_probe_reveals_cover_up_of.

[52] The quotations are from Sahr Conway-Lanz's chapter, in this volume.

[53] Alessandro Colombo, *La guerra ineguale: Pace e violenza nel tramonto della società internazionale* (Bologna: Il Mulino, 2006).