Understanding the Geneva Conventions

Peter Berkowitz on *Geneva Conventions* by Gary D. Solis and Fred L. Borch.

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Gary D. Solis and Fred L. Borch. Geneva Conventions. Kaplan Publishing. 316 pages. $20.95.

In law schools — as well as in public discourse and at the highest levels of government — international law, particularly the law of armed conflict, has become a hot topic. In the era of transnational terrorism, it's likely that its prominence will continue to grow. Yet where it comes from, when it applies, and who or what has responsibility for authoritatively interpreting and enforcing it remain poorly understood by, if not a mystery to, most people.

In the 1970s and 1980s, the vast majority of scholars interested in international law focused on commercial transactions, trade, and finance. A few hardy professors who dealt with arms control or military affairs taught the laws of war. Back then, though, the action at the law schools was in constitutional law.

The stars were professors whose sensibility had been molded by the Warren Court. They came of age revering Chief Justice Earl Warren's unanimous 1954 decision in Brown v. Board of Education, which in straightforward terms declared the doctrine of separate but equal in education unconstitutional and paved the way for the elimination of state-backed discrimination in other spheres as well. They thrilled to Warren Court activism in criminal procedure, voting rights, and individual privacy, and devoted their scholarship to vindicating it. Progressive law students in the 1970s and 80s, keen to hear their star professors' enticing message that the Constitution, rightly interpreted, authorized the use of law as an instrument to transform politics and achieve social justice, flocked to their classes.

But the elevation in 1986 of then Associate Justice William Rehnquist to the position of chief justice and the arrival of Associate Justice Antonin Scalia ushered in a new era. The Rehnquist Court curbed the use of constitutional law to achieve progressive goals otherwise unobtainable through the democratic process. And it sought to establish limits grounded in constitutional text, history, and structure on the exercise of federal power. Still, it left much Warren Court law in place. This, however, did not stop progressive professors of constitutional law — by far the majority — from scorning the Rehnquist Court as a bastion of reaction. Nor did it prevent the study of constitutional law from losing something of its glamour and allure for ambitious and idealistic law students eager to use the law to build a more progressive world.

Meanwhile, progressives were beginning to grasp the potential presented by international law. Thanks to improvements in transportation and telecommunications, the world had become smaller and more interconnected. One result was that human rights abuses from around the globe were increasingly reported in real time and broadcast in living color on the nation's tv screens. Both Presidents Jimmy Carter and Ronald Reagan made advocacy of human rights central to their foreign policy agendas (with very different results to show for their efforts). But the turn of progressive law professors to international law more or less converged with, and was in part inspired by, the International Court of Justice's 1986 decision in The Republic of Nicaragua v. The United States of America, which held that the U.S. acted unlawfully by supporting the Contras and by mining Nicaragua's harbors, and with the formation in the 1990s of international tribunals to prosecute war crimes in the former Yugoslavia and Rwanda.

Before, human rights campaigns concentrated on bringing political pressure to bear on dictatorial regimes. Since the late 1980s, the international human rights movement has been increasingly led by lawyers seeking — under the authority of international law and supervised by international bodies — investigations, prosecutions, and punishments of war crimes and crimes against humanity. In some cases this represents a turn away from politics to law, in others it reflects the pursuit of political ends through legal means, and in still others it involves the rank politicization of law.

Al qaeda's September 11, 2001, attacks brought to the fore an array of novel and difficult legal questions. Those that have generated the greatest interest thus far among professors and practitioners of international human rights law have concerned the protections provided by the laws of war to combatants who themselves violate the most fundamental requirements of the laws of war. While the U.S. has long had a rich and extensive criminal law code and a deep commitment to the international law of armed conflict, before September 11 it had little experience dealing with transnational terrorists equipped, or seeking to equip themselves, with unconventional weapons, including weapons of mass destruction, to use against civilian populations and civilian infrastructure.

Many jihadists could be considered lawbreakers subject to the criminal law, since it is unlawful to kill civilians and destroy civilian property, or classified as enemy combatants since they had declared themselves at war with the United States and had committed or sought to commit acts of violence and destruction on a scale associated with war. To further complicate matters, the jihadists could also be seen as unlawful enemy combatants. By violating the duty that the law of armed conflict imposes on combatants to wear uniforms, carry their arms openly, and refrain from attacks on civilians and civilian objects, an unlawful enemy combatant loses the prisoner-of-war protections reserved for lawful enemy combatants. These privileges and protections are rooted in the 1949 Geneva Conventions, perhaps the best known and most widely respected of the international treaties that constitute the law of armed conflict.

But what about the applicability of the rest of the Geneva Conventions to unlawful enemy combatants? Did the struggle against transnational terrorism expose a gap in the laws of war, a category of combatant that the Geneva Conventions left unmentioned and unprotected? In Hamdan v. Rumsfeld (2006), the Supreme Court touched on these questions. It ruled that the Bush administration's military commissions were unlawful but could be corrected by congressional authorization. In the process, it also controversially held that even unlawful enemy combatants detained by the United States are entitled to the minimum protections laid out in the Geneva Conventions' Common Article 3.

This hitherto obscure but fundamental and far-reaching provision is found, as its name suggests, in all four Geneva Conventions — dealing with the wounded and sick on land, the wounded and sick at sea, prisoners of war, and the protection of civilians. Common Article 3's meaning, along with other critical issues, is illuminated by Gary D. Solis, professor of law at the U.S. Military Academy (ret.) and adjunct professor of law at the Georgetown University Law Center, in his introduction to the first book available to the general public containing, in their entirety, the four 1949 Geneva Conventions and the 1977 Additional Protocols I and II. Fred L. Borch, regimental historian and archivist for the Army Judge Advocate General's Corps, provides further expert illumination in running annotations of the Conventions' provisions.

Those who wish to acquaint themselves with the fundamentals of the law of armed conflict will be well served by this volume. "The 1949 Geneva Conventions," Solis emphasizes, "are the cornerstone of the law of war. They are the most adhered to treaties in history. Every nation in the world has ratified them." And he argues that they deserve to maintain their preeminence:

The 1949 conventions have stood the test of more than 60 years of armed conflicts, revolutions, civil wars, rebellions, and insurgencies. Yes, there are some odd provisions contained in the 429 Articles of the four 1949 conventions. The Conventions nevertheless remain the most significant brake on the horrors of warfare, and the most significant protection of victims of war that a compassionate world can devise.

Solis acknowledges that "the 1949 Conventions do not seamlessly fit the current version of international terrorism." But by examining their history and the concerns out of which their provisions emerged, he also shows that the Conventions provide sturdy foundations on which refinements of old law or new laws can be crafted.

The Geneva Conventions are the products of large moral and political forces at work in the Western world for centuries — including both the Christian just war tradition and the formation of modern nation-states — that impelled European powers, then North America, and finally nations around the globe to recognize their interest in subjecting matters of war and peace to universal legal principles. They also owe their existence to the exertions of

extraordinary individuals, perhaps in no case more critical, as Solis recounts, than those of Swiss banker and businessman Henry J. Dunant who, on June 24, 1859, witnessed the bloody battle of Solferino, in which French-led forces defeated Austrian troops.

In 1862, in A Memory of Solferino, Dunant offered a searing account of the battle's butchery, the ghastly spectacle after the guns fell silent of thousands of abandoned soldiers lying wounded and dying, and the atrocious medical care provided to the lucky few who had been evacuated. He closed his book, which attracted the attention of royalty, parliaments, and intellectuals across Europe, with a proposal "to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted, and thoroughly qualified volunteers."

The proposal bore fruit in 1864. At the invitation of Dunant's International Committee for the Relief to the Wounded, representatives of 15 governments — including those of Europe and the Ottoman Empire, the United States, Brazil and Mexico — met in Geneva to draft the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. All 15 nations eventually signed the first, brief, two-page Geneva Convention. It provided that

during wars and military occupations, ambulances, hospitals, and their personnel would be considered neutrals; a distinctive uniform and flag would be adopted for such neutrals; the wounded and sick, of whatever nation, would be collected and cared for; and, independent of the convention, societies in each subscribing country would organize groups of medical volunteers to bring aid to the wounded, regardless of their nationality.

Within a few years, 57 more nations would ratify the Geneva Convention. And Dunant's International Committee would undergo transformation into the International Committee of the Red Cross (icrc), a neutral international organization assuming responsibility for overseeing the work of neutral national organizations dedicated to the relief of the wounded.

In the coming decades, ratifying states revised the 1864 Convention and the icrc's mandate. In 1868, 23 articles were added to the 1864 Convention, and the 1906 meeting in Geneva produced substantial revisions. In 1912, the icrc went beyond caring for the wounded and sick by assuming responsibility for providing relief for able-bodied pows. The unprecedented carnage of World War I imposed unprecedented demands, spurring the icrc to hire regular paid employees to carry out its responsibilities. In July 1929, a second Geneva Convention was adopted formalizing protections for pows. Within three decades of World War I, World War II set new records for slaughter, leaving more than 55 million dead, of whom almost two-thirds were civilians. In response, the nations met again in Geneva in 1949 to revise the conventions. The four conventions that emerged were ratified by all the world's nations; their principles have become well-accepted and widely adhered to.

Several substantial innovations were introduced. First, the Conventions went beyond protecting combatants to incorporate into the law of armed conflict obligations to protect civilians and civilian objects. Second, they established the notion of “grave breaches” — the most serious violations of the laws of war — and required states to enact legislation for the investigation, prosecution, and punishment of those who committed them. The duty imposed on nation-states themselves to enforce the laws of war represented a novel and certainly imperfect solution to an enduring challenge for the laws of war, which was how to hold those who violated them accountable. And third, by means of Common Article 3, they broadened the domain of the conflicts that the laws of war covered. Common Article 3 requires that “in the case of armed conflict not of an international character” — traditionally understood to mean, as Borch points out in the annotations, “conflicts within a State’s borders, such as insurrections, revolutions, or civil wars” — all combatants who are out of the fight must be treated humanely.

Solis suggests that Common Article 3 may be “the most significant innovation of the 1949 Conventions.” Before 1948 the Conventions dealt exclusively with international conflicts, or war between two or more states. Even after 1949, every provision other than Common Article 3 dealt with international conflicts. By imposing obligations that apply to conflicts that take place within a state, Common Article 3 represented a profound alteration to the international law norm, dating at least as far back as the 1648 treaties that formed the Peace of Westphalia, according to which sovereign states dealing with domestic matters within their own borders were not subject to legal oversight by other sovereign states or international bodies.

On this understanding, one might conclude that the Supreme Court was wrong to hold in Hamdan that Common Article 3 applied to al Qaeda fighters captured on the battlefield in Afghanistan, since the U.S.’s military operations took place outside U.S. territory and therefore did not qualify as an “armed conflict not of an international character.” But the conflict with nonstate actor al Qaeda did not seem to be of an international character either, at least according to the Geneva Conventions definition, which involves two or more states. On a straightforward reading of the conventions, a state conducting military operations against transnational terrorists halfway around the world is involved in a conflict that is of neither an international nor a noninternational character. And therefore, one might reason, as did some Bush administration lawyers, that in the case of America’s struggle against al Qaeda, the Geneva Conventions are not applicable.

According to Solis, however, there is less of a puzzle here than meets the eye. Over the years, he observes, the straightforward reading of Common Article 3 has been revised: “Today Common Article 3’s humanitarian norms are considered so basic that, despite the Article’s plain wording, its application extends to international armed conflicts as well, and its requirements are folded in to the humanitarian norms of any armed conflict” (emphasis in original). If the international consensus is to be relied on, Hamdan brought the United States

in line with the dominant understanding of international law. That raises more hard questions about the practices and procedures through which the international law of arm conflict authoritatively changes.

The 1977 Additional Protocols I and II supplement Geneva Convention restrictions and protections. Controversially, Additional Protocol I expands the definition of international armed conflict to include groups “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights of self-determination.” More controversial still, it grants to combatants who conceal their weapons and don’t wear uniforms prisoner-of-war protections. Additional Protocol II applies to noninternational conflicts, elaborating Common Article 3 protections. While the U.S. has declined to ratify either Protocol, finding in them unwarranted restrictions on its ability to defend its rights and interests, and perverse incentives legitimating asymmetric warfare, it has come to accept large parts of them as customary international law. Moreover, the rest of the world has increasingly come to accept them in their entirety as binding parts of the Geneva Conventions. This gap between the world’s lone superpower and much of the rest of the world raises additional hard questions about how the international law of armed conflict authoritatively changes.

While it has been progressives — at law schools, through nongovernmental organizations, at the un, and as activist human rights lawyers — who have most aggressively demanded that the United States honor the rights of all detainees, the laws of war are hardly a matter of exclusively progressive concern. Conservatives, too, have an abiding interest in limiting and civilizing war.

But to what extent can war be limited and civilized? How are the rules to be elaborated? And who is authorized to be the final judge in controversies over whether the laws of war have been honored?

Differences of opinion between progressives and conservatives about the law of armed conflict often revolve around the role of international institutions. Distrustful of sovereign states and confident in disinterested transnational and cosmopolitan elites, progressives aim to increase the authority of international institutions to make decisions about war and peace, and investigate, prosecute, and punish war crimes. Meanwhile, suspicious of the interests that transnational and cosmopolitan elites bring to international institutions, conservatives insist that liberal democracies are best equipped to protect freedom and so wish to safeguard the rights and responsibilities of states while encouraging the promotion of liberty and the spread of democracy. This difference of opinion deserves a vigorous public debate, and our law schools should undertake or redouble their efforts to foster it.

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