Prisoner of War or Unlawful Combatant

An Evolution of International Humanitarian Law

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“Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others.”

- John Rawls
Abstract

The construction of International Humanitarian Law and the norms regarding protection of prisoners of war have evolved as a reaction to the horrors of war. After September 11 and the following war on terrorism the notion of POWs has been widely debated. The USA holds prisoners at the navy base at Guantánamo Bay, Cuba without granting them status as POWs; this thesis is placing the treatment of these detainees within a historical context. The norm concerning rights of POWs is today both internationalized and institutionalized, but that has not always been the case. This thesis illuminates how the norms have evolved during World War I, World War II and Vietnam War; finally the war against terrorism and the treatment of the prisoners at Guantánamo Bay is analyzed. The intention of the thesis is to use a historical overview of the evolution of IHL, and the rights of POWs in particular, to formulate a wider assumption about the implication of IHL in the war against terrorism and the future.

The thesis adopts a theory which combines constructivism and John Rawls’ theory of justice and uses constructivist ideas about the nature of the international system applied to Rawls’ notion of justice. The constructivist theory and ontology are the basis of the theoretical framework of this thesis and Rawls’ definition of justice as the base of social institutions are viewed from a constructivist perspective. IHL and the norms regarding protection of POWs are thus considered as social facts, constructed and upheld through social interaction between states.

Keywords: Prisoners of War, Unlawful Combatant, International Humanitarian Law, Guantánamo Bay, War on Terrorism, History, John Rawls, Constructivism
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1. Introduction

After the terrorist attacks on the USA on September 11th 2001 and the following war in Afghanistan, the notion of Prisoners of War (POWs) has become widely debated. In their search for the responsible terrorist group al-Qaeda under Osama Bin Laden which was protected by the Taliban regime in Afghanistan the Americans detained a number of suspected al-Qaeda sympathizers. The prisoners were sent to the US navy base at Guantanamo Bay, Cuba. There is a debate about if the USA has acted according to International Humanitarian Law (IHL) in the treatment of these prisoners who have not been granted status as prisoners of war.\(^1\) This fact has led to a debate regarding the notion of POWs and different human rights organizations, such as Amnesty International and the International Committee of the Red Cross have reacted to the prisoner’s situation at Guantanamo Bay and have commanded a change.\(^2\)

The legal framework of IHL has evolved as a reaction to the horrors of war. The very first Geneva Convention of 1864 was a direct reaction to Henri Dunant’s experiences at the battlefield of Solferino and it laid down the foundations of contemporary humanitarian law. The major wars of the twenties century have led to reformation of the laws and the framework has extended into the current laws consisting of the four Geneva Conventions of 1949 and the Additional Protocols of 1977.\(^3\)

This thesis focuses on the evolution of the rights of POWs and concludes with the current situation of the prisoners held at Guantanamo Bay. The study of the treatment of the prisoners at Guantanamo Bay is wider than those of other wars; the U.S. argues that IHL in its current form is not fully applicable on the declared war on terrorism.\(^4\) The objective of the thesis is to investigate, from a historical perspective, whether they are right and the Geneva Conventions are in need of further reformations or if the current legal framework is applicable in all armed conflicts, including the nature of war against terrorism.

1.1 Aim of the thesis and research questions

The intention of the thesis is to use a historical overview of the evolution of International Humanitarian Law, and the rights of prisoners of war in particular, to formulate a wider assumption about the implication of IHL in the war against terrorism and the future.

- How has the norm concerning rights of prisoners of war been internationalized and institutionalized into the current legal framework?
- Considering the historical background, does the war against terrorism require a reformation of International Humanitarian Law?

\(^2\) www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/0F32B7E3BB38DD26C1256E8A0055F83E, The International Committee of the Red Cross, questions about International Humanitarian Law, 2005-12-01
\(^3\) http://web.amnesty.org/library/Index/ENGAMR510032005, Amnesty International, press release, 2005-12-01
\(^4\) www.icrc.org/Web/Eng/siteeng0.nsf/iwpList104/E71D51EB05EF6FB1C1256CF5003F72EA, The International Committee of the Red Cross, questions about International Humanitarian Law, 2005-12-01
1.2 Delimitations

This thesis has a westernized approach (although it will bring up the general tendencies of the treatment of POWs) the focus is on the western powers in a number of wars. General patterns in the treatment of POWs will be presented, but the examples will be gathered with a focus on the Western world, namely Western Europe and the United States. The obvious exception is the Vietnam War, where the treatment of American prisoners will be mentioned; however the focus will be on the American treatment of Vietnamese prisoners.

International Humanitarian Law and Human Rights Law are complementary and they both have the purpose of protecting the individual human being. The two legal frameworks sometimes overlap each other and it can thus sometimes be hard to decide which legal framework that is best applicable in a particular situation. However, this thesis will exclusively use the Conventions which form IHL and which deal with POWs in particular, International Human Rights Law is not considered as unimportant, but since this thesis concerns armed conflict and POWs which is the objective of IHL it is this legal framework that will be used.

The thesis has a historical perspective, not a legal one, and it will therefore not concentrate on the legal nuances of IHL but rather place the evolution of IHL within a historical context. The thesis will define a historical perspective as one that focuses on human relations in the past with the method of text analysis. The thesis puts a number of events in focus and analyzes them and the impact they had on the surrounding society.

The historical perspective will make it possible to analyze how the treatment of POWs has been portrayed and how it has evolved over time as opposed to analyzing the legal details of IHL. The thesis analyzes a chain of events that had an impact on the evolution of IHL in general and the regulations applying to the treatment of POWs in particular. The thesis will argue that the chosen events and the treatment of POW’s in the selected wars are part of a process towards restricting the treatment of POW’s, and will thus place them in a wider context.

The wars that will be examined to create this historical chain of events are the two World Wars and the Vietnam War; finally concluding with a study of the prisoners held at Guantánamo Bay captured during the war in Afghanistan. The thesis will focus on the fact that they were not granted status as prisoners of war when they were captured and determine what effects this had on the treatment of these prisoners (however later events such as the recent trials of these detainees will not be explored). The chosen wars have in common that they symbolize a nature of war that was not known before in history, i.e. they were fundamentally new in their nature.

The thesis uses constructivism and John Rawls’ theory of justice to create a theoretical framework; however his later work “The Law of Peoples” is not utilized even if it was written to be applied on an international level.

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7 Ibid., p. 34
In “A Theory of Justice” John Rawls creates a strong definition of justice as the basis of just institutions of the society. In “The Law of Peoples” however, Rawls has changed his definition of justice applied at an international level towards a more relativistic notion. Rights and liberties are no longer the basis of institutions, but rather a product of history and international human rights are therefore considered a liberal ideal difficult to apply internationally. Therefore the thesis adopts Rawls´ definitions from his first book where his statement of that every human being is born free and equal and their inherited dignity corresponds with the United Nations Universal Declaration of Human Rights.8

1.3 Structure of the paper

CHAPTER 1. INTRODUCTION
This chapter introduces the aim of the study, research questions and delimitations, stressing the historical perspective; a presentation of the theory which combines constructivism and a theory of justice as well as an overview of the state of the art is also part of this chapter.

CHAPTER 2. METHODOLOGY AND METHOD
This chapter outlines the methodology and method of the thesis, a qualitative, interpretivist, constructivist approach, and discusses its advantages and drawbacks. This chapter also highlights that the thesis is a literature based research.

CHAPTER 3. THEORETICAL FRAMEWORK
This chapter presents constructivism as the ontological standpoint and broad theoretical framework of the study, the constructivist approach to international law as constructed through social interaction is also illuminated. The constructivist ontology is here combined with John Rawls´ normative theory of justice after a general presentation of this theory and its importance for human rights.

CHAPTER 4. THE CONCEPT OF INTERNATIONAL HUMANITARIAN LAW
To be able to place the rights of POWs within a framework this chapter lay down a definition of IHL, presents how it has evolved over time as a reaction to the horrors of war and how IHL differs from International Human Rights Law. Finally the debate of Asian values is approached when Europe’s relation to the rest of the world is viewed through the evolution of International Law.

CHAPTER 5. THE EVOLUTION OF RIGHTS OF PRISONERS OF WAR
After a definition of POWs and which criteria’s a combatant has to fulfill to be granted this status the evolution of the rights of POWs is presented through a study of how POWs have been treated during World War I, World War II, Vietnam War and finally the current War on Terror and the prisoners held at Guantánamo Bay and the implications on IHL. Each war is followed by theoretical reflections where the empirical facts brought up are analyzed from a theoretical perspective. Different ways of legitimatizing breakages of IHL is also analyzed and a short presentation of Taliban treatment of prisoners.

CHAPTER 6. ANALYSIS

This chapter is analyzing the findings of the thesis from a theoretical perspective and summarizes the implications on IHL. International law is viewed as constructed through social interaction between states and the evolution of norms regarding a just treatment of POWs is analyzed from a historical perspective. The historical overview is here used to analyze the current situation at Guantánamo Bay and to make assumptions about the future.

CHAPTER 7. CONCLUSIONS

This chapter presents the final conclusions of the thesis. It addresses the research questions and attempts to give them short and clear answers.

1.4 A constructivist theory of justice

The thesis will adopt a theory which combines constructivism and John Rawls´ theory of justice and uses constructivist ideas about the nature of the international system applied to Rawls´ notion of justice. The constructivist theory and ontology are the basis of the theoretical framework of this thesis and Rawls´ definition of justice as the base of social institutions will be viewed from a constructivist perspective.

John Rawls´ theory of justice is a variant of rational choice theory, which often has normative objectives. Constructivism and rational choice theory are often seen as each others opposite, but it has been demonstrated that a combination of the two different theoretical approaches enriches the analysis because they capture different features of reality. Therefore a combination of the two theories is seen as both possible and useful.

A combination of constructivism and a theory of justice are very applicable to a study of IHL. According to Shestack, the role of justice is crucial in order to understand human rights both on a domestic and an international level. He also states that John Rawls´ theory of justice always has to be taken into consideration when studying human rights. The fact that constructivism is regarded as the most useful theory when studying international law is one of the reasons why it has been chosen for this thesis.

The combination of the normative theory of justice and constructivism makes it possible to reveal that states have collaborated to create IHL and the protection of POWs not only out of self interest, but also out of humanitarian concern as a reaction to a number of horrible wars. Self interest is relevant in the sense that states use the system in order to create and promote their humanitarian identity. The ideal of justice will be considered as the base of the rights of POWs. Constructivist theory focus on social interaction and the system of norms and ideals while justice is clearly one of the norms of the international society and is thus in the field of constructivism. Using constructivist theory makes it possible to reveal that norm creation and evolution play a central role in the system of IHL.

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The theory is operationalized so that there will be a discussion at the end of the chapters where the problems which have been explored are viewed from a theoretical perspective.

1.5 State of the art

1.5.1 Empirical literature

Analytical studies of prisoners of war from a historical perspective are a rather unexplored area. The reason for this may be due to the nature of these studies who considers the losers of war and previous studies also fall between the different branches of the discipline of history. Writers of military history have rarely touched the subject of POWs and social historians have tended to focus on the relationship between the prisoner and his capturer on a day-to-day basis. Little attention has thus been given to the wider governmental policy issues. Since the primary focus has been on personal experiences and relationships inside the prisoner-of-war camps there has been a lack in analysis of the governmental policies which influenced the daily life in the camps.¹³

Due to the lack of books written on the subject this thesis has primarily used articles from scientific journals such as “The American Journal of International Law” or “Journal of Contemporary History” in the creation of a historical chain of the evolution of rights of POWs. The articles have predominately an American (or at least Westernized) perspective, but are considered as relevant and relatively objective. Many of the articles were written during the era they analyze and reflect current debates of the period which have been very useful for the thesis. Hyde highlighted for instance the importance of inspections of POW camps made my neutral powers in his article “Concerning Prisoners of War” published in “The American Journal of International Law” during World War I. The thesis has thus considered contemporary debates as well as articles prepared with a historical perspective.

After September 11 and the proceeding war on terror resulting in detainees at Guantánamo Bay, the profile of IHL and POWs increased. A number of publications and reports have been prepared about the legal challenges of the post-September 11 world and about the impact on the subject international relations. The focus of these books, however, looks at the change in power relations or pure legal implications in the war on terror. There are also plenty of publications debating the notion of terrorism such as Hayden, Lansford and Watson’s book “America’s War on Terror”,¹⁵ which do apply a historical perspective, but do not explore the treatment of captured suspected terrorists.

There are publications which focus exclusively on the situation at Guantánamo Bay. However, some of them such as Rose’s book “Guantánamo: America’s War on Human Rights”¹⁶ and Ratner and Ray’s “Guantánamo: What the World Should Know”,¹⁷ together with a number of biographies written by former Guantánamo detainees, are written in a rather moral, arguing or pragmatic style.

¹³ Moore, B. “Turning Liabilities into Assets: British Policy towards German and Italian POWs” in Journal of Contemporary History (Vol. 32, No. 1, Jan., 1997), pp. 117-118
These books focus on the experiences of the individual prisoner and relate them to the American policy in the war on terror, even if they do not place the situation at Guantánamo in a historical context. The use of these books in an academic thesis is a bit problematic since they have a rather subjective approach and often lack proper references. This thesis is using them carefully and the facts presented from them are recurrent in several, independent sources.

The publication which has been most useful in the study of the prisoners at Guantánamo Bay is a report by the International Bar Association’s Task Force on International Terrorism called “International Terrorism: Legal Challenges and Responses”\(^{18}\). The report explores the legal challenges of the war against international terrorism in preventing terrorism and the lawfulness of the responses that have been taken, both domestically and international. The report places the treatment of the detainees at Guantánamo Bay within a legal context and investigates how the U.S. officials have legitimized this treatment, however, historical analyzes of the situation are not included.

1.5.2 Theoretical literature

The literature this thesis is using in the formation of a theoretical framework is primarily written by recognized scholars in the field such as Reus-Smit\(^{19}\) and Barnett\(^{20}\) who both elaborate the field of constructivism. Their publications were used to outline the foundations of constructivism and its core assumptions about the nature of the social world. Barnett’s explanation of human rights and IHL as social facts was of essential importance as well as the overview of the internationalization and institutionalization of norms. The relationship between international law and constructivism is analyzed in Barker’s publication “International law and international relations”\(^{21}\) which have been very helpful to understand constructivist approach to the construction of international law.

The other part of the theoretical framework, Rawls’ theory of Justice has primarily been constructed through a study of his publication “A theory of Justice”\(^{22}\) but also through other scholars analyzes of his work. Glaser highlights for instance in his article “Normative Theory”\(^{23}\) within which field Rawls’ theory are situated and how it is a normative theory. He also clarifies what he considers as the key concepts of the theory.


Shestacks analyze of the connection between the theory of justice and human rights as well as the connection with international law in the publication ”The Philosophical Foundations of Human Rights”\textsuperscript{24} has been of crucial importance for the thesis. Shestack also stress the importance of Rawls´ theory when approaching human rights issues and shows how the notion of justice is related to the pillars of human rights.

2. Methodology and Method

2.1 Methodology

This thesis will use a qualitative research methodology. A qualitative methodology will lead to a research of words, not numbers; neither the collection of data nor the analysis will be quantified. A qualitative methodology is preferred when the aim is to explore people’s subjective experiences and the meanings they attach to them. The qualitative methods are applicable to the political attitudes and behaviors both on people and interest groups within and outside the political arena. When choosing between qualitative or quantitative methods it also raises the question of different ontology, epistemology and the view on theory.

Social ontology deals with the nature of the social world. The essence of the ontological question is whether social entities should be considered as having objective existence independent of the actors (objectivism) or if they are constructed through the perceptions and interaction of social actors (constructivism). The ontology of this thesis is constructivism in the sense that social phenomena such as IHL are considered as a product of social interaction. IHL in general and the rights of POWs in particular is considered both produced and upheld because of the meaning the actors give the phenomenon.

Linked to the ontological position are the epistemological considerations. Epistemology concerns the question of knowledge and what can be regarded as acceptable knowledge in a discipline. The main debate here is whether the principles and procedures used in natural sciences are applicable to social science with the goal to explain human behavior. According to positivism the principles of natural sciences are the correct approach for social science. Acceptable knowledge is phenomena that can be confirmed by our senses and science and the scientist have to stay objective and avoid normative statements.

Interpretivism on the contrary considers social science as something fundamentally different from natural science and thus requires other research methods. The object of natural science (objective phenomena) and social science (people and their institutions) differs completely in that human beings gives their actions meaning and interpret the actions of others. The essence of social science is seen as the understanding of human behavior. Understanding the subjective meaning the actors are giving their actions is the mission of a social scientist. When adopting the interpretative epistemology one can also admit to the double interpretation. The researcher interprets the interpretations of others and places them within a scientific framework of ontology, theory and literature of a discipline.

The epistemology that corresponds best with the qualitative methodology is interpretivism and that is the epistemology chosen for this thesis. It is aiming at understanding the interpretation and meaning of IHL in general and the rights of prisoners of war in particular and how historical events has changed these interpretations.

27 Bryman, A. (2001), p. 21
28 Ibid., pp. 16-18
29 Ibid., pp. 11-18
2.2 Deductive and inductive methods

Another factor that has to be taken under consideration when forming a research strategy is the choice between deductive or inductive method. The choice has to do with the relationship between theory and social research. The deductive method involves theory testing where the researcher forms a hypothesis through theoretical considerations that is tested against empirical data. It is the theory and the hypothesis deduced from it that drives the collection of data. The deductive method is usually associated with a quantitative research method. With an inductive method theory is the outcome of the research instead of the starting point. Observations generate theory in stead of the other way around. The inductive approach is usually associated with a qualitative method. There is, however not a clear-cut line between the two strategies, they are rather tendencies than absolute distinct methods.  

When conducting a research in social science it is very hard to use a clear-cut inductive or deductive method, this is because the collected facts are not perfectly objective. The facts arise from human interpretation in relation to something else. However, this thesis will basically have an inductive approach in the meaning that it is using empirical material in order to create a general assumption.

2.3 Weaknesses of qualitative methods

Qualitative methods have been criticized, mainly by quantitative researchers, as producing soft, unscientific results. The methods are considered hard to evaluate and therefore unreliable. The criticism focus around that the qualitative research is too subjective and relies too much on the interpretations of the researcher. It is the researcher that decides what is important and meaningful to include in the research. This is even a bigger problem since the subjectivity and unstructured methods of a qualitative research makes it difficult to replicate the study and thus makes the results of the research questioned. Qualitative researchers have also been accused of lack of transparency. It can sometimes be difficult to establish what the researcher actually did, why the researcher focused on certain issues, how the data was selected and how the analysis was conducted.

A qualitative research is often conducted with a small number of participants. Quantitative researchers have questioned how representative the results can be. Generalizations are considered impossible. The answer to this criticism is that instead of statistical data it is the quality of the theoretical inferences that are made out of qualitative data that is crucial to the assessment of generalization.

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30 Bryman, A. (2001), pp. 9-11
32 Ibid.
2.4 Method

2.4.1 Literature based research

The thesis is based on literature studies. When conducting a literature based research there are predominant four criteria’s taken under consideration.

- Authenticity, is the origin of the source genuine
- Credibility, are there any errors or manipulations
- Representativeness, is the source typical of its kind
- Meaning, is the source clear and comprehensible

Sources which can not be considered as fulfilling these criteria’s can also be valuable, precisely because of their faults. For instance this can occur when contrasting facts that derive from official documents produced by the state with those that derive from private sources and/or media. The documents that are used in this thesis are mainly official documents that derive from NGOs such as the International Committee of the Red Cross or Amnesty International. Documents which are available on the internet will also be used, after necessary critical considerations.\(^{35}\)

The thesis will entail secondary analysis in that it includes data which has been collected by other researchers for purposes that were not the same as for this thesis. The secondary analysis makes it possible to spend more time with the analysis; it also allows for new interpretations of the data which are used.\(^{36}\)

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\(^{36}\) Ibid., pp. 370-371, pp. 196-199
3. Theoretical framework

3.1 Constructivism

Constructivism is a social theory of international relations. The theory focuses on how to conceptualize the relationship between agents and structures on the international arena. The scientist has to illuminate who the actors are, their interests and normative structures in order to make substantive claims.37

“Constructivism is about human consciousness and its role in international life.”38 Constructivists see the international arena as socially constructed. The main actors in the international system are states, the states are unitary actors and the structure of the international system is anarchic. The basic elements of the socially constructed world are:

1. Shared understandings, expectations or knowledge
2. Material resources
3. Practices

Through practice countries forms norms of behavior (shared expectations), these norms are just as essential to the structure as material resources such as military strength or economic resources. The normative structure is thus socially constructed.39 The constructivists take it even further when they claim that material structure is subordinate to norms in importance.

“Material resources only acquire meaning for human action through the structure of shared knowledge in which they are imbedded.”40

The structure of ideas, values and beliefs are seen as shaping the social identities of political actors and thus have a direct influence on their actions. Understanding how actors develop their interests is essential to explaining international political phenomenon and that understanding can be reached through a focus on the social identities of states. Shortly, it is the identities that form interests.

Concerning the structure-agent debate the constructivists state that agents and structures are mutually constituted. The structure of norms and ideas forms the identity and interest of the actors and makes them act in certain ways, but these structures would not exist if it were not for the practices of the actors. The actors reproduce the structure itself they maintain and transform the structure through their actions. Thus the actors both form and are formed by the normative structures of society.41

Neither individuals nor reality exists “out there” waiting to be discovered, rather it is historically produced and culturally upheld knowledge which makes it possible for individuals to construct and give meaning to reality. At the same time the cultural surroundings which the actors uphold produce the individuals within and thus are the individuals created by their cultural environment.

38 Ibid., p. 258
39 Barker, C. (2000), pp. 82-83
41 Ibid., pp. 196-197
The structure-agent debate is closely related to the notion of social facts. Social facts are dependent on human agreements and exist only as long as the agreements exist, however, they are treated as objective facts. Money, refugees, terrorism, human rights and sovereignty, for instance, are social facts. They are treated as objective facts and therefore constrain action.42

The normative and ideational structures shape the actors identities and interests through three mechanisms: imagination, communication and constraint. Imagination because the institutionalized norms and ideas set the frames for what the actors consider necessary and possible in both practical and ethical terms. The structures also influence the actors through communication. Actors try to justify their actions with established norms of legitimate conduct, such as human rights norms. Norms and ideas are also seen as constraining the actors, the fact that the actors feel that they have to explain themselves as acting according to legitimate norms is a constrain by itself.43

Constructivists do not ignore the notion of power; they acknowledge the importance of power. However, instead of defining power simply as a states ability to compel another state to do what it otherwise would not through military might or economic statecraft constructivists introduce the variable of ideational forces. One example of this is how human rights organizations “name and shame” governments that break the laws of human rights. This is done to embarrass the government and persuade them to change their behavior by demonstrating how they adhere to existing legal norms. Other forms of power are linked to knowledge, the fixing of meanings and formation of identities. Human rights organizations are using the notion of identity when they try to influence states to include human rights norms in their national identity.44

Norms evolve through a political process called the life cycle of norms. Key concepts are internationalization and institutionalization of norms. The first step is norm emergence, the introduction of the norm, usually by NGO’s to the broad mass. The norm is seen as a new way of viewing an issue and is highly debated. To reach the next step it has to become institutionalized through international rules and organizations. The second stage is called the norm cascade and is characterized by the spreading of the norm to other states. The progress can be seen as a form of socialization where states are pressured to learn and concur to the new norm. The third and last stage is norm internalization where the norm is taken for granted and is not an issue for debate any longer. Examples of norms that have reached this stage are women’s right to vote and abandonment of slavery.

Another norm that has become internationally accepted is the rights of POWs. Today most states concur that these rights exists and the prisoners can not be subjected to summary executions on the battlefield, but this has not always been the case. IHL emerged from a debate about how to minimize the horrors of war during the nineteenth century. The rights may not be fully observed, but they are largely accepted. Many states adopt institutionalized norms because they accept the symbolic legitimacy given to them without having the intention of following the norm. However, the norm is still internationally accepted and legitimate.45

45 Ibid., p. 260, pp. 265-266
3.1.1 Constructivism and International Law

Constructivists such as Hedley Bull and Hurrell view the construction of international law as the base of, or even as the construction of the international society itself. An international society exists when a number of states consciously decide to form a set of rules for their interaction that they feel obligated to follow. International law is seen as interesting since it is part of the international system and it also forms state identity and interest.\footnote{Barker, C. (2000), pp. 83-84}

The constructivist view of international law, which they see as constructed, is very clear in Hurrell’s statement: “Being a political system, states will seek to interpret obligations to their own advantage. But being a legal system that is built on the consent of other parties they will be constrained by the necessity of justifying their actions in legal terms.”\footnote{Ibid., pp. 83-84}

3.2 A theory of Justice

John Rawls’ theory of justice is a theory of social contracts and his object is social justice as the fundament of the society and he thus sees the original contract as a contract about justice. The principles of justice stated in the contract are the fundament that other agreements of society such as social cooperation and constitution can be built on. Rawls chooses to use a definition of justice where it is the function the principles of justice have when it comes to the distribution of liberties and duties as well as social advantages that decides the definition. In other words: Justice is used as the principles of distribution in the main structure of a society.\footnote{Rawls, J. (1996) \textit{En teori om rättvisa}, Uddevalla: Bokförlaget Daidalos AB, pp. 28-33}

Rawls forms his theory around a created original position where the social contract of justice is to be signed. This original position takes place in an imagined group of people with the task to select the principles of justice that will govern the distribution of primary social goods such as liberty and well being. Human beings are considered as rational actors capable of deciding what goals they want to achieve among a number of choices. The members of the group do not have any knowledge of their talents or social ranking in the new society and are thus completely equal. This veil of ignorance will lead to that they agree on principles that grants them a certain amount of security if they would end up as the least advantaged.

Rawls clarify that this original position with its social contract obviously is a construction; every human being is born into a society in a certain position that will form his or her life. However, the original position as a hypothearetical situation is a useful tool in the formation of fundamental principles of justice.\footnote{Ibid., pp. 33-35}

From the original position Rawls forms two principles of justice that the group would choose and that would be acceptable to all rational human beings. Rawls definition of rationality is, according to him, by necessity rather narrow. He claims that the notion of rationality applied in his theory has to be kept close to the interpretation within economic theory and thus mean that the actors will chose the most efficient means to achieve a certain goal.\footnote{Ibid., p. 35}
“First principle
Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second principle
Social and economic inequalities are to be arranged so they are both
   a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
   b) attached to offices and positions open to all under conditions of fair equality of opportunity."

The first principle has priority over the second one and the basic liberties can only be restricted in the case of liberty. There are two cases where that can appear. The first is that liberties can be limited if that leads to strengthening of the total system of liberty shared by all. The second case is that an unequal liberty has to be acceptable to those who have the lesser liberty. This is what Rawls calls the priority of liberty.

Concerning the second principle which deals with the distribution of justice Rawls states that an unequal distribution of opportunities are only acceptable if it leads to increased opportunities to the least advantaged. The second exception is that an excessive rate of saving must lessen the burden for those who are bearing this hardship. He thus states that justice has priority over efficiency and welfare.

Rawls indicates that the basic liberties of the first principle includes political liberty, freedom of speech and assembly, liberty of conscience and thought, freedom of the person and personal property and freedom from arbitrary arrest and seizure. These are the basic liberties equal to all.

Rawls has outlined how it is possible to apply the theory of justice on international law. Again there is a created original position. The members of the group in the original position are familiar with the principles of justice on a domestic level. The members are representatives of different states and their task is to lay down the fundamental principles of solving international conflicts. They do know that they are representing states, but they do not know what country, the balance of power or constitution of the different states and are thus equals. International justice will be visible through the principles the representatives of the states chose in this original position. The principles will be political in that they form the public policy towards other nations.

Rawls states that the principles that would be accepted by all corresponds with the international law of today. International law is based on the principle of equality of sovereign peoples formed as states. Those principles are, according to Rawls, compatible with the one of equality of citizens. Other principles that would be chosen as consequents of the first two are the principle of right to defense and the formation of defense alliances and the principle of those treaties are to be followed. The treaties must correspond with other principles of international relations. This means the treaties of defense alliances are legally binding, but those concerning cooperation in unjustified attacks are not.

52 Ibid., pp. 302-303
Rawls also outlines principles that regulate war, “jus in bello”. Whether the war is just or not, there are rules as to what can be done and what can not and there are forms of violence that are strictly forbidden. The goal of a war is to reach a fair peace and the means of war that destroys those opportunities and leads to contempt for human life can therefore not be allowed. The acts of war have to be conducted according to this purpose. The representatives in the original position would realize that their national interests are best fulfilled if they agree on the limits of war. Rawls states that this is possible since the national interests are defined through the principles of justice on a domestic level and the state is thus fair and do not strive for world dominance. The goal of these nations is to keep their just institutions and the bases of their society. The nations are driven by the principles of justice and the representatives will therefore sign international treaties that protect human lives.

### 3.2.1 The theory of justice, a normative theory

The thesis will create a theoretical framework which partly falls under the umbrella of normative theory in that it is concerned with the basic moral questions which society needs to adhere to. In other words: questions about what ought to be instead of what is.

The theory formed by John Rawls is considered as deontological liberal in the way that he focuses on the ethics of right or duty instead of the ethics of ends. The deontological liberals states that sacrificing some for the greater good of many is always wrong, individuals are considered ends, not means and as such they are inviolable. The deontological liberals also claim that certain constraints can be placed on human behavior. “*Individuals are free and autonomous beings, but they should not be free to violate the freedom and autonomy of others. (...) collective social action too must respect individual rights.*” The goal is not anarchy, there is a need for a public body that guarantees rights and makes them effective.

### 3.2.2 The theory of justice and human rights

“*Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others.*” This statement can, according to Shestack, be seen as the essence of Rawls’ theory of justice. Furthermore, he argues that the theory formed by Rawls is fundamental when analyzing human rights. Rawls states that justice is the first virtue of social institutions and Shestack sees human rights as an obvious end of justice, thus, he states that the theory of justice is crucial in the study of human rights.

The objection against Rawls’s theory when applied to the international arena is that the representatives in the original position would only choose moral principles with further human rights if they themselves represent just states. Another criticism is that the theory is predominately formed for and best applied on a domestic level.

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57 Ibid., p. 26
58 Ibid., pp. 25-26
59 Rawls, J. (1978), pp. 3-4
However, Shestack states: “If Rawls’s moral principles produce justice for individuals in a domestic state, that is a long step towards gaining the domestic state’s endorsement of and adherence to international human rights principles.”

Shestack states that the theory of justice supports both the forming of constitutional democracy as well as the universality of human rights. Rawls’ moral structure of how the values of liberty and equality can be realized in open institutional forms are considered very comforting and shows the advantages of a just and equal social distribution.

3.3 Combining Constructivism and a Theory of Justice

The ontology of the thesis is constructivist as the international arena is viewed as socially constructed just as human rights and international humanitarian law are considered social facts. Those social facts are considered historically produced and culturally upheld by states in the international arena.

IHL is viewed through Rawls’ clarification of the rules of war. Whether the war is just or not, there are rules of what can be done and what can not and there are forms of violence that are strictly forbidden. The goal of a war is to reach a fair peace and the means of war that destroys those opportunities and leads to contempt for human life can therefore not be allowed. The acts of war have to be conducted according to this purpose. As mentioned above are the rules of war considered constructed through social interaction of states and upheld as social facts. The ideal of a just war is considered as formed through internationalized norms regarding protection against the horrors of war.

The notion of power is viewed through the eyes of constructivism. Military and economic might are important, but not the only source of power. The construction of rules of war is seen as constraining states by the necessity of justifying their actions in legal terms. The power of norms is thus of essential importance.

Rawls’ notion of the original position where the social contract of IHL is signed is considered a construction. Both constructivism and Rawls theory are very clear on the fact that such an original position is not real; every human being is born into a society in a certain position that will form his or her life. The original position is only used as an analytical tool as a contrast to existing IHL and the treatment of POWs in particular. It will not be used as the basis of this thesis; however it is a useful contrast in the analysis. The basis of this thesis is constructivism and the study of the international system of norms.

The constructivist approach connects the social identities of states with their attitudes towards and adhering to IHL and the way they treat POWs. The rights of POWs are treated as a norm which has become internationally accepted through the cycle of norms and today is included in several states national identity. The thesis’ objective is therefore how the rights of POWs have evolved and how it has gone through the steps of the cycle of norms.

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62 Ibid.
4. The concept of International Humanitarian Law

International Humanitarian Law is the law on armed conflict. These armed conflicts consist of both international and internal conflicts. IHL regulates the conduct of military action, the means and methods of force and the protection of the victims of war (namely for instance wounded, sick, prisoners and civilians and people who do not take part in the fighting such as medics, chaplains and aid workers). The thesis examines the section of IHL which is concerned with the latter area of protection, namely the protection of the victims of war.

The objective of IHL is to protect the individual and it is the responsibility of the states to ensure their combatants adhere to IHL. The main body of IHL was created when states where the only subjects of international law and has thus focused on international conflicts, however the framework of IHL has expanded to include non-international conflicts as well as international. Furthermore, the UN Security Council has stated that individuals will be held responsible for committing or ordering grave breaches of IHL.

The framework of IHL has grown over years and contemporary IHL which stipulated a minimum standard of protection for individuals in war is based on the four Geneva Conventions of 1949 and the Additional Protocols of 1977.

The Geneva Conventions and the Additional Protocols consist of:
1st Convention: wounded soldiers on the battlefield
2nd Convention: wounded and shipwrecked at sea
3rd Convention: prisoners of war
4th Convention: civilians under enemy control
1st Protocol: international conflicts
2nd Protocol: non-international conflicts

In summary the most important rules of IHL are, according to the International Committee of the Red Cross that the parties to a conflict must at all times distinguish between the civilian population and combatants. Only military objectives are legitimate targets of an attack and people who do not or can no longer take part in the hostilities must be protected and treated with humanity and it is forbidden to kill those who have surrender or become wounded. Wounded combatants shall be given equal medical treatment whether they belong to the enemy or their own forces. Medical personnel and medical establishments, transports and equipment must be spared just as personnel belonging to the Red Cross or the Red Crescent.

64 Beckman, O. (2005), pp. 83-84
66 www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions, The International Committee of the Red Cross, the Geneva Conventions, 2005-12-01
Weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering are strictly forbidden. Captured combatants must enjoy basic judicial guarantees and are to be treated with respect for their lives, their dignity, their personal rights and their political and religious convictions. They must be protected against all acts of violence or reprisal.  

One can reveal three factors that encourage states to act according to the laws of war.

1. States have a mutual interest in following IHL. Violating IHL usually leads to reprisals or violations of the same kind made by the opponent side.
2. A state which does not prevent war crimes exposes itself for international condemnation. In an era of multimedia that is an efficient weapon against war crimes.
3. War criminals know that there is a risk of being captured and convicted by the enemy tribunals or being convicted in the courts in their own state if the violation is to repulsive for the public opinion.

These factors might seem of marginal importance but in reality the norms of IHL are institutionalized and even if the paragraphs of IHL may not be fully observed they are largely accepted. Many states adopt institutionalized norms because they like the symbolic legitimacy given to them without having the intention of following the norm. However, the norm is still internationally accepted and legitimate and it does restrain states from the gravest violations.

4.1 The evolution of International Humanitarian Law, a historical overview

The laws of war, namely IHL, have never been an isolated phenomenon. The laws have been shaped by societal factors such as political, economic and military development and have grown within the framework of international law.

Ever since the ancient times wars have been regulated through rules and rituals, and during this time moral arguments already influenced international relations. However, modern IHL dates back to the formation of centralized states with standing armies and most scholars agree about a starting point at the Peace of Westphalia. The evolution of IHL has been influenced not only by humanitarian concerns but also by state interest.

The evolution of IHL is closely linked to religion and culture. It was mostly among peoples sharing the same values such as religion, history and race that rules of humanitarian treatment in war evolved. For instance, both Christian and Islamic values had a big impact on the formation of norms in the Middle Ages. However, both religions regulated these humanitarian rules of war as applicable strictly to believers of the same religion.

The origin of the current IHL can be found in Hugo Grotius book “De Juri Bellis ac Pacis” where he makes a basic distinction between combatants and civilians. He also condemned military actions against the civilian population and pleaded for human treatment of POWs.

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67 www.icrc.org/Web/Eng/siteeng0.nsf/html/5ZMEEM, The International Committee of the Red Cross, the Geneva Conventions, 2005-12-01
71 Rosas, A., Stenbäck , P.( Sep., 1987), p. 219
The Enlightenment led to a period in favor of the ideal of human rights and humanitarian treatment where the nature of war started to change. After the French Revolution humans created conflicts for the cause of ideas instead of only material interests, as a result the wars became crueler and the industrialization of arms made them more lethal. However, it was this evolution that triggered a change and as a reaction to the horrors of war the legal framework of IHL started to evolve.\textsuperscript{72}

The very first Geneva Convention of 1864 was a direct reaction to Henri Dunant’s experiences at the battlefield of Solferino. Dunant was horrified by the scenes he witnessed and as a result emphasized the principle of protecting the wounded and sick on the battlefield.\textsuperscript{73}

At the beginning of the 20th century it became obvious that these principles did not apply to the jurisdiction of the ocean concerning naval battles and thus a Convention was adopted in 1906 extending IHL to include the wounded, sick and shipwrecked members of the armed forces at sea. After the First World War further amendments to the legal framework of IHL were required as the war demonstrated how the protection of POWs was unsatisfactory. The question of the treatment of POWs had already been raised during the 1860s by Henri Dunant, but a special convention regarding the treatment of POWs was signed belatedly 1929.

The Second World War revealed that the existing humanitarian law concerning protection of victims of conflict where insufficient, in particular regarding the protection of civilians. Therefore articles of the law concerning armed conflicts intending to protect the victims of conflicts were developed and the four Geneva Conventions were adopted in 1949. These are still today the main body of IHL.\textsuperscript{74}

The Geneva Conventions of 1949 were soon revealed to be to narrow as they only applied to international conflicts. However, the nature of conflicts showed a change of character both by decolonization and guerilla warfare. Thus in 1977 there were two Additional Protocols added to the body of IHL. The First Protocol did not only strengthen the protection of civilians in an armed conflict but also extended the notion of international conflict, including for instance wars of liberation. It also extended the definition of lawful combatants, now including guerilla combatants in the status of POWs. The Second Protocol of 1977 clarified that non-combatants in an armed conflict of non-international character was to be granted the same protection as those of an international conflict.\textsuperscript{75}

IHL was thus formed through extreme situations with the purpose of protecting victims of war against states which used all means possible to win a battle during a conflict. The structure has been developed through the interaction between states. Obedience of IHL is dependent on interaction between states as there is not an international police force to uphold IHL, as in domestic law, but instead it is other states that publicize and condemn war crimes. All states which have signed the Geneva Conventions are obligated to follow them irrespective of whether the opponents violate the laws or not.

\begin{itemize}
\item \textsuperscript{73} www.icrc.org/Web/Eng/siteeng0.nsf/iwpList104/E71D51EB05EF6FB1C1256CF5003F72EA, The International Committee of the Red Cross, questions about International Humanitarian Law, 2005-12-01
\item \textsuperscript{74} Meurant, J. (Sep. 1987), p. 242
\item \textsuperscript{75} Ibid., pp. 243-244
\end{itemize}
4.2 International Humanitarian Law and Human Rights Law

IHL and Human Rights Law are complementary and they both have the purpose of protecting the individual human being and even though they have developed through parallel lines historically they have a lot of similarities. The essential purpose of IHL can indeed be considered as protecting certain human rights in extreme situations of armed conflicts. The most distinctive difference is, however, that while human rights are universal rights that are applicable in all situations, IHL is exclusively concerned with armed conflicts. Human rights law does not cease to be in practice in an armed conflict and thus do the two different bodies of law overlap each other in a conflict. Individuals can in a conflict consider themselves protected by both sets of legal standards when it can be difficult to determine if violations are committed against IHL or human rights law.

One of the fundamental differences between the two legal systems is that some human rights treaties permit governments to make exceptions from certain rights in situations of public emergency. When it comes to IHL no derogations are permitted, it was designed exclusively for emergency situations, namely armed conflict.

There are also differences regarding supervision of the implementation of the two legal systems. Regarding the implementation of IHL there are several specific mechanisms, for instance, where states are required to ensure respect also by other states. IHL also specifies an investigating procedure, a Protecting Power mechanism, and the International Fact-Finding Commission. Further, the International Committee of the Red Cross (ICRC) is given a key role in ensuring respect for the humanitarian rules. Contrary to IHL mechanisms the human rights law includes regional systems for implementing respect for its rules. Supervisory bodies, such as the UN Commission on Human Rights, are either based on the UN Charter or provided for in specific treaties. The mechanisms are very complex.

4.3 International Law and Europe’s relation to the world

The evolution of International Law has usually been approached with a Eurocentric perspective emphasizing the legal framework as formed during a few hundred years in Europe between the existing Christian states. However, scholars have stated that in each civilization the populations formed some kind of political entities (a family of nations) and the relation between those were regulated by customary rules and practices. Throughout history several families of nations have existed or coexisted in areas such as the Near East, Greece and Rome, or China, Islam and Western Christendom. Each one of these families constructed regulations and rules of interaction to control the relations in peace and war.

The relationship between Europe and non-European states has since the age of European colonization been tense. Legally all members of the international community were equals and the European states recognized a number of other powers, but in reality the international system was dominated by the Great Powers in Europe and the rising power of USA.

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77 Beckman, O. (2005), pp. 83-84
78 www.icrc.org/Web/Eng/siteeng0.nsf/iwpList314/F403C245E308981BC1256CF5005C3530, The International Committee of the Red Cross: "International humanitarian law: answers to your questions", 2005-12-01
However, China preferred isolation to contact with foreigners and stressed the difference in culture and codes of law as a reason to avoid trading with Europe. Similarly Japan closed its borders to foreigners and the European powers did not re-establish trade with China and Japan until the nineteenth century after threats and the use of force. Furthermore the Ottoman Empire was the first non-Christian nation to be formally included in the concert of Europe; however the Turks found it difficult to see the Christian states at their European borders as equals and insisted on their superiority.

By the nineteenth century the international community had virtually become a European club on the basis of either domination or conquest. In Europe the defeat of nearly all non-European countries was seen as a proof of the white man’s inherent superiority since nations selected for colonization only rarely managed to offer effective resistance. The myth of the invincibility of the European colonial masters was not destroyed until Japan’s aggression and initial victories during the Second World War.79

In recent years a debate concerning human rights contra so called Asian values has flourished among scholars. Some states in Asia have declared that human rights is based on Western values and that it is just another form of imperialism trying to force these values upon states with a different culture and sets of norms. Asian values are built on Confucianism and in stead of individual rights focus lies at the welfare of the group. Confucianism is claimed to teach the individual that welfare of the family and community suffers if one focus on selfish interests. Natural rights, such as human rights, are therefore considered as alien and unnatural to Asians who do not focus on the individual.

The notion of Asian values has been used by political leaders in Asia. Drawing on the legacy of Confucianism the Chinese government has for instance stressed the difference of the Chinese people compared to Europeans in the way they have a different historical background, social systems and cultural traditions as well as a different tradition of human rights.80

Asian values are in fact both a Western construction and a debate within Asia itself. Some scholars stress the similarities between Asian values and the Islamic world. In both these cultures primacy lies on the family and the collective of the community rather than at the individual rights. Another factor these two cultures have in common is that they have been considered as the Christian Western states significant Other. In other words, mainly Muslims, but also Asians have through history been considered as the contrast of “Us” in the West, i.e. everything that we are not, or do not want to be (such as barbaric and simple).81

The debate concerning Asian values, or rather about the way Western democracies impose their liberal values on the rest of the world flourish, not only in Asia but also in Eastern Europe and South America. The power of norms and values are visible in these debates as well as the connection between economic interest and the clash of norms of political rights.82

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82 Hood, S. J. (Sep., 1998), p. 859, p. 863
5. The evolution of rights of prisoners of war

5.1 Prisoners of war, a definition

The definition of prisoners of war (hereafter POWs) and what makes a prisoner granted this status is found in article 4 in the Geneva Convention III relative to the Treatment of Prisoners of War from 1949 and is here presented in a summary.83

Members of the armed forces of a party to the conflict are the obvious POWs, they are to be granted this status whether the capturing power recognize the government or authority to whom these forces pay allegiance or not. This also includes personnel that follow the forces without being members of them such as civilian members of military aircraft crews and war correspondents. Members or pre-members of the armed forces of an occupied country that tries to rejoin the armed forces, or by other means, makes it necessary to intern them shall also be granted status as POWs.

However, there are other groups that have to be granted status as POWs as well. These are members of other militias and members of volunteer groups, such as organized resistance movements, that are commanded by a person responsible for the subordinates of the group. These groups have to carry some kind of a fixed distinctive sign recognizable at a distance and carry their arms openly. However, the criteria of a visible sign and commander in charge can be avoid if the group consists of people that take up arms to resist invading forces without time to organize themselves or if the nature of the hostilities requires secrecy. What they do need to fulfill are the demand of carrying their arms openly during engagement in the hostilities and at all time act according to the laws and customs of war themselves.

The status of POWs shall also be granted persons belonging to one of the categories above who have been received by neutral powers on their territory and whom these powers are required to intern under international law.84

5.2 World War I

The First World War erupted in the summer of 1914 after the murder of Francis Ferdinand, heir to the throne of the Empire of Austria-Hungary and his wife in Sarajevo. The War was welcomed both by the peoples and the governments. The Great War followed a period of nationalist emotion and wars in Europe with Germany as the rising power in the middle of Europe. The war led to the falling of the four great Empires, Russia, Austria-Hungary, the Ottomans and Germany, and accelerated the growth of nationalism in Asia and made the United States a global power.85

83 For Article 4 of the Geneva Convention III in full text see Appendix 1
84 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. In full text at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6ef854a3517b75ac125641e004a9e68, 2005-12-01
However, the biggest impact was on Europe and since only a few thousand POWs were held in USA\(^\text{86}\) the focus of this chapter is on the general tendencies of treatment of POWs in Europe, namely in German and British custody.

Two major blocks were made up at the outbreak of the war with the Triple Entente consisted of Russia, France and Great Britain on one side and the Triple Alliance of Germany, Austria-Hungary and Italy on the other. However, Italy declared its neutrality in 1914 on the ground that Austria had launched a war of aggression and instead joined the Triple Entente in 1915. Instead the Ottoman Empire joined the Triple Alliance and the war soon stretched over the entire world. The last Great Power to join the war was the United States which entered the war in April 1917.

The optimism from the outbreak of the war was however soon changed into horror as the war required an increasing amount of lives. The situation in the trenches at the west front has been called a slaughter.\(^\text{87}\) More than 65 million soldiers were mobilized, around 8.5 million lost their lives and more than 21 million were wounded. The civilian populations were also mobilized in a different way, producing enormous quantities of guns, munitions, and other supplies. Because civilians played such an important role, World War I was the first conflict to be called a total war. The war finally ended in November 1918 with the victory of the Triple Entente; however Russia signed a separate peace treaty with Germany in early 1918 after the Russian revolution of 1917.\(^\text{88}\)

During the First World War it was the Haag Convention on the Laws of War on Land from 1907 that formed the framework of IHL, including rights of POWs. A definition of combatants existed and so did regulations of the treatment of POWs. However, during World War I the Haag Convention on the Laws of War on Land proved itself inadequate and had to be complemented by special agreements between the warring governments.\(^\text{89}\)

During the war the avalanche-like increasing in numbers of POWs led to some governments of the warring states establishing special departments with the assignment to seek information about captured POWs. The special departments also tried to arrange exchanges for severely injured prisoners and protest against ill-treatment. During the war the POW camps placed far behind the frontline was organized so that the ICRC observed the treatment of prisoners.\(^\text{90}\)

The governments in both Germany and Great Britain also agreed to use neutral powers to inspect the treatment of POWs and to supervise the relief of the same. This led to a high number of inspections of POW camps and the conditions within where reported on. The neutral powers was seen as the most appropriate inspectors, reports about ill-treatment in the camps would be taken more serious if it came from a neutral observer than if it came from the internees themselves. The agreement was made on an inter-governmental level since there was a lack of satisfying international laws in the issue.\(^\text{91}\)

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\(^{91}\) Hyde, C.C. (Jul. 1916), p. 602
The importance of laying down proper international laws guaranteeing inspections of POW camps made by neutral powers in the future was repeatedly debated and is clearly shown in the quotation from a article written in 1916: “The proven value, if not the necessity, of inspection and relief, through neutral agencies, emphasizes the importance of general international agreement contemplating their use in the event of war, and establishing the right of a belligerent to avail itself thereof. By no other process can inhumane treatment on the part of a captor in any form be so readily detected, or so fairly estimated.”

At the outbreak of the First World War the articles concerning POWs in the Haag Conventions of 1907 were not of a sufficient standard and were therefore interpreted differently in different states. Even within states there where problems with the interpretation of the proper treatment of POWs, at least when analyzing the situation of Great Britain. The British problem with a single policy was obviously originated in the fact that the British Empire at that time was stretched all over the world. However they tried to impose general guidelines of policy and proper treatment of POWs.

Mainly members of the regular forces were considered legal combatants. This was agreed to by the major powers as they saw this as a guarantee of better protection for their armed forces against armed resistance movements while the smaller states wanted to include partisans, paramilitary units and militia in the concept. During the war some territory occupied by Germany saw the rise of organized resistance movements against the occupants. However, the Germans did not consider the members of the resistance as lawful combatants, but as civilians who had unrighteous taken up arms. Captured members where in many cases therefore severely punished.

Concerning the POWs, i.e. members of the regular forces, the treatment was rather poor. The prisoners were dependent of food parcels from home, the food offered to them in the camp were not sufficient. There where little fuel to heat the barracks and the prisoners had to share mattresses. At Christmas 1914 the first Russian POWs died in a German camp in Wittenberg. The combination of hunger, cold and physical weakness led to an outbreak of typhus in the camp. The sick prisoners were not given medical treatment; a German doctor arrived, but only for the sake of taking bacteriological specimens for his research. A number of British captured medical officers tried to help the sick Russians, three of those caught the decease and died.

By August the same year the typhus epidemic had grown so severe the German camp administration decided to abandon the camp, leaving the 15 000 Russian, French and British POWs to their fate. The fences were surrounded with dogs and men with machine guns, the massive protests by neutral powers finally made the German staff return to the camp and improve the conditions there.

The treatment of the POWs was often dependent on nationality. In Germany, for instance, British and French POWs were treated more humane than the Russians. There were reports about ill-treatment of British prisoners and fear of that the hatred against Great Britain would lead to violence against the POWs.

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92 Hyde, C.C. (Jul. 1916), p. 602
95 Gilbert, M. (1994), pp. 119-120, p. 186
The prisoners also wished for increasing communication with their relatives. But most of the complaints seem to include frustration over the monotony of captivity. However, the question of religion among the POWs was in many cases taken into consideration. A number of the German POW camps had separate sections for Muslims and colored prisoners containing a mosque. The Russian prisoners were treated differently. There were reports about how they were forced to work seventeen hours a day at hard labor without enough food. Those who objected to the treatment and refused to work were severely punished.\(^\text{96}\)

Severely punished and humiliated were also prisoners who tried to escape from the POW camps in order to return to the allied forces to continue the fight. No mercy was shown to civilians that assisted the prisoners and a number of reports about executions of these were written.\(^\text{97}\) The Haag Convention states in article 8 that POWs who attempt escape but are recaptured before they have managed to rejoin their own forces are liable to punishment by the captors. However, escaped prisoners that manage to join their forces but are later recaptured are not to be punished. The debate in the aftermath of the war showed that a number of writers considered an escape to be no crime, but rather as the duty of a POW just as it is the duty of the captor to prevent the escape.\(^\text{98}\)

During the war it became obvious that there was a need for further international legislation for protection of POWs. The Hague Convention of 1907 was seen as a progress when it declared that POWs were prisoners of the government, not the private war loot of the soldier or unit that captured him. It also states that the POWs must be humanely treated. However, during the First World War it became known that during the period between capture and installation in a POW camp the prisoners where likely to be brutally treated. The POWs were completely in the hands of their capturers and reports showed that they were often subject to personal violence and even torture during the transport. The loathsome prisoners were also shown to the civil population during the transportation.\(^\text{99}\)

Both sides of the war used POWs as labor in order to improve their infrastructure and thus be able to use it during the war. E.g. the British used Turkish prisoners to build a railway on the Salonica front. The Russians used German and Austrian prisoners of war together with Chinese workers to build a railway between the port in Murmansk and Petrograd. The railway was meant to be used for the transport of war materials to the front.\(^\text{100}\)

This was done even if the contemporary IHL (article 6 in the Haag Conventions of 1907) directly forbade states to employ POWs in any work that had any connection with the efforts of war. The article was considered vague and impossible to follow since every POW employed directly released a domestic worker as potential soldier and thus strengthened the capture states possibilities in the conflict. The warring states decided that no POW was to be employed within thirty kilometers from the frontline and not do a job that was directly connected with the efforts of war.

\(^{97}\) Ibid., p. 202, p. 320  
\(^{99}\) Hyde, C.C. (Jul., 1916), pp. 600-601  
According to studies made during the war POWs that were put into labor suffered less from
the internment than officers who were not put into work and the compulsory work that may be
considered a punishment was instead seen as relief from idleness. This is evidently under the
right circumstances and with a correct treatment of the prisoners.\footnote{Belfield, H. E. (1923), pp. 136-137}

The biggest problem with the existing international legal framework showed to be a lacking
of supervision of the respect of humanitarian norms during military operations. There was no
third party or special institution given the supervisory function. All sanctions such as reprisals
or penal punishment were conducted in unilateral manner. There was also a clause stating that
all belligerents had to be contracting parties to the Conventions otherwise the Convention
would not be applied equally to all parties of the conflict.

World War I thus revealed the weaknesses in the Haag Convention, especially regarding a
lack of protection to the situation for POWs. Thus in 1929 the Geneva Convention Relating to
the Treatment of Prisoners of War was signed.\footnote{Meurant, J. (Sep. 1987), pp. 241-242} The treaty stated that all kind of reprisals
against POWs was strictly forbidden, i.e. the action taken by a state to answer to another
states breakage of international law by the same means. Later there were suggestions of
including civilians of an occupied territory in the protection against reprisals, but unity could
not be reached and thus POWs were the only protected group at the outbreak of the Second

5.2.1 A theoretical reflection

It is obvious that the norms concerning wars were dramatically changed during World War I.
At the outbreak of the war the ideal of a just war was strong, but war was still seen as
legitimate and something that would bring glory to the people. The fundamentally new nature
of conflicts revealed during the First World War proved the horrors of war and changed the
norms of war for most states in the international society.

During the war the norm concerning protection of POWs proved itself stronger than existing
international law. It was the Haag Convention on the Laws of War on Land that formed the
framework of IHL, including rights of POWs. That framework was constructed with another
nature of war in mind. In the new, modern war, a new agreement had to be formed since there
was a gap between existing legislation and the strong norms formed by principles of justice
acceptable to all rational human beings. This agreement was made on an inter-governmental
level since there was a lack of satisfying international laws in the issue. International actors,
i.e. representatives of the warring governments thus came together to construct constraining
measures in order to live up to the international norms of a just treatment of POWs.

The fact that the Haag Conventions of 1907 were interpreted differently in different states
comes rather naturally since the international arena is socially constructed and reality is
always interpreted on the base of historically produced and culturally upheld knowledge that
makes it possible for individuals to construct and give meaning to reality. Furthermore the
articles of the Convention were considered written open and imprecise.
The debate regarding a just treatment of POWs and the lack of protection was striking and the international society thus organized ways of granting a certain level of protection on an inter-governmental level during the war. The formation and institutionalization of norms of a just treatment of POWs thus took place through social interaction between states and in the aftermath of the war a upgrading of existing legislation were constructed.

The goal of the war was, after all, reaching a fair peace. The means of war that destroys those opportunities and leads to contempt for human life could therefore not be allowed. When studying World War I and the following strengthening of IHL the rules of war reveal themselves as constructed through social interaction of states and upheld as social facts. At the end of the War the norm of a just treatment of POWs had become an institutionalized and internationally accepted norm even if World War II would reveal shortages in the new legislation. These shortages could depend on how the representatives of the states did not realize that their national interests are best fulfilled if they agree on the limits of war, instead the representatives stressed national interests and the new Geneva Convention strengthened IHL as a whole, but was not capable of granting a complete protection of the victims of war.

5.3 World War II

In September 1939 Germany attacked Poland which was the beginning of what became the Second World War. The outbreak of World War II followed almost a decade of German aggression and British appeasement policy. Ever since Adolf Hitler and his National Socialist German Worker’s party, i.e. “the Nazis”, came into power in Germany they were repeatedly breaking the restrictions laid down in the peace treaty of Versailles. By doing so Germany was pushing the Great Powers in Europe towards a war. However, the war tired nations, with Great Britain as the policy setting power, wanted to avoid repeating the Great War to any cost and thus imposed an appeasement policy towards Germany.

In 1939 the appeasement policy had shown itself as useless. Hitler and the Nazis would not be satisfied until they achieved hegemony in Europe and thus the Second World War erupted between the warmongering Axis powers of the militaristic dictatorship of Nazi Germany, the Fascist Italy and the Empire of Japan on one side and the Allies, the war tired and reluctant Great Britain and France on the other. After Germany’s attack on the Soviet Union in June 1941 they joined the Allies and so did the USA after Japan attacked the U.S. naval base in Pearl Harbor, Hawaii in December 1941.104

The war began in Europe in 1939, but by its end in 1945 it had involved nearly every part of the world and became an even larger and bloodier conflict then the First World War. The estimation of the number of casualties vary widely, depending on that many nations could not accurately count their losses, therefore the estimation end up with somewhere between 35 million to 60 million deaths and millions more wounded or left homeless. The civilian population was suffering terribly during the war through air bombardings, starvation, and epidemics. Campaigns of genocide in Europe and Asia were also responsible for millions of deaths.105

105 http://search.eb.com/ebi/article-9277798 , "World War II." Britannica Student Encyclopedia from Encyclopædia Britannica Online, 2005-12-01
Just as the First World War, World War II had a huge historical impact: two atomic bombs had been dropped, the industrial slaughter of human beings in concentration camps and the terror bombings of cities showed new dimensions to the horrors of war. The war can also be seen as the starting point of the Cold War since it resulted in the Soviet Union's dominance of the states of Eastern Europe, brought up the communist revolution in China and marked a shift of power away from the countries of Western Europe and toward the United States and the Soviet Union.\(^{106}\)

The Geneva Convention Relating to the Treatment of Prisoners of War was signed in 1929, by 1939 and the outbreak of World War II 40 nations had ratified the Conventions and they were thus put into action for the first time.\(^{107}\) The treaty was considered binding and the states had the intention of meeting their obligation, but the nations soon discovered that the international treaty left many matters open for interpretation. One of the main problems discovered was how to combine the Geneva Convention with military necessary and the demands on the home front.\(^{108}\)

The definition of POW in the Geneva Convention refers to the Regulations annexed to the Hague Convention of 1907. The regulations states that the laws, rights and duties of war do not only apply to armies but also to militia and volunteer corps that are commanded by a person responsible for the subordinates of the group, carry some kind of a fixed distinctive sign recognizable at a distance and carry their arms openly. They also have to conduct their operations in correspondence with IHL. Those who spontaneous take up arms to resist the invading troops without any time to organize themselves are also considered as POWs if captured as well as the non-combatants traveling with an army.\(^{109}\)

Nevertheless the Germans did not recognize resistance movements as providing lawful combatants during World War II. The German authorities gave an order in 1943 that all captured members of the Free French Forces were to be executed without any legal conviction. All captured Yugoslavian partisans were also to be executed without delay at the internment.\(^{110}\)

The fear of reprisals directed at the POWs were very much alive during World War II, even if POWs had legal protection against this, as both sides in World War II used POWs as means of reprisals. Japan passed for instance a law after the American air strikes on Tokyo in 1942 contenting that captured American pilots was to be executed or detained for at least ten years.\(^{111}\) During the summer of 1940 when the British government felt it necessary to move German and Italian POWs from Great Britain to Canada, two questions came up: how moving prisoners would correspond with the new Geneva Convention and would it lead to reprisals by Germany and Italy against the British prisoners in their custody. The fear was that the Germans would move the British POWs to camps in Poland and Italian reprisals was seen as both inevitable and unpredictable.

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\(^{106}\) http://search.eb.com/ebi/article-9277798 , "World War II." Britannica Student Encyclopedia from Encyclopædia Britannica Online, 2005-12-01

\(^{107}\) Krammer, A.P. “German Prisoners of War in the United States” in Military Affairs (Vol. 40, No. 2, Apr., 1976), pp. 68

\(^{108}\) Moore, B. (Jan., 1997), p. 117


\(^{111}\) Ibid., pp. 65-66
The Geneva Convention stated that POWs should not be moved from the theatre of war where they were captured, but also that they must not be exposed to danger in a war zone. The British public and the prisoners held in Germany and Italy had to be convinced about that the British government acted in accordance with the Geneva Convention and the justification of the move thus referred to the threat of air-strikes. The truth was that the British government was afraid of invasion and rebellion among the prisoners and thus wanted to remove dangerous elements from the country as this was seen as of higher importance than the possibility of reprisals on British POWs.\(^{112}\)

Reprisals are meant to correct a state that do not act according to international law, however the result is usually, as became visible during World War II, increased violence where the reprisals are followed by other reprisals. A Canadian force brought with them German POWs when they returned to England after the raid on Dieppe in 1942. To avoid revolts among the prisoners they where handcuffed, which is a violation of Geneva Convention. The German reprisal was to handcuff a high number of British POWs held in German camps. The British government’s reaction was to order the same treatment of German POWs held in British camps as a reprisal. The situation was promptly getting out of control when the ICRC managed to resolve it.\(^{113}\)

During the war the rules of the Geneva Convention and complying to them was seen as, if not a guarantee of, at least a safeguard that the POWs taken by hostile forces would receive treatment which corresponded with the Convention as well. Compliance with the Geneva Convention in fact became both parts of the American self-image as well as part of the war propaganda. According to this image the U.S. was the nation of freedom of speech and religion, a moral state that treated their POWs fair and according to International Humanitarian Law. The policy of treatment of POWs was seen as a factor that helped breaking down the moral of German troops making them willing to surrender. Thus a humane treatment of German POWs was helping the American war effort and saving American lives.\(^{114}\)

The U.S. compliance with the articles of the Geneva Convention could be explained by a lack of experience. The last time the US held a high number of foreign prisoners was over 100 years before World War II and thus experiences did not provide useful guidance. Therefore the Americans considered their only remaining alternative was to turn to the relatively new Geneva Conventions of 1929. The Americans simplified the Conventions into two fundamental, however general, principles that became the pillars of the treatment of POWs throughout the war.

1. The Geneva Convention is a humanitarian document meant to prevent indignities against enemy soldiers simply because they had the misfortune of been taken prisoners.
2. The enemy powers held American soldiers as prisoners who where protected by the US by a decent treatment of the enemy prisoners.

The second principle shows that the Americans considered correspondence with IHL as a safeguard against unjust treatment of American POWs early in the war.\(^{115}\)

\(^{112}\) Moore, B. (Jan., 1997), pp. 120-121
\(^{114}\) Krammer, A.P. (Apr., 1976), pp. 68-72
\(^{115}\) Ibid., p. 68
However, the Geneva Convention on POWs was followed by the Americans in the war in Europe. The war in the Pacific was extremely brutal, a leading American scholar referred to it as a war without mercy where both sides committed atrocities. The violence was spiraling, leading to mutual hatred and dehumanizing racial stereotypes on both sides. As reprisals to Japanese action in China and the Philippines, the American marines and army troops rarely took any prisoners after the Battle of Guadalcanal. Braking one of the oldest Articles of IHL the Americans killed even the few Japanese soldiers who offered to surrender.\textsuperscript{116}

There can be several reasons to the cruel war in the Pacific, one reason can be the feeling of humiliation the Japanese attack of Pearl Harbor led to among Americans who considered themselves as superior to the Japanese. These feelings had long historical roots from the immigration of Asians during the late nineteenth and early twenties century that led to racism where Asians were considered inferior to native Americans. After the First World War Japanese immigrants were not even permitted to enter the U.S. mainly because of labor reasons where the workers feared the impact of cheap Asian labor. The unexpected attack on the U.S. brought Americans together in a spirit of anger and revenge.

The Japanese claimed that they were freeing Asia from Western imperialism, pleading to the nationalistic feelings in Asia which initially led to support for Japan. However, the Japanese considered themselves superior to the populations in the areas they occupied and when it became known that the Japanese treated civilians and POWs cruel their support declined. The Chinese were particularly treated badly, after the fall of Hong Kong, for instance, wounded prisoners were murdered and burned and there was a mass rape of nurses.\textsuperscript{117}

The anti-Japanese feelings were strong in the U.S. and many Japanese Americans and scholars witnessed about how many Americans did not see any difference between Japanese Americans and residents of Japan. More than 110 000 Americans of Japanese descent were evacuated and put in concentration camps. In early 1943 resolutions including deportation of all Japanese Americans was ratified. The Japanese were described as brutal apes, a people who were considered as fanatical in their faith that they were destined to conquer the world; it was thus the duty of the U.S. to stop them. Everyone with a Japanese descent was considered a potential spy. These feelings were still very strong when the detainees returned to their homes after being released from the camps and many faced violence.\textsuperscript{118}

The legal system had failed in preventing the outbreak of the Second World War and to prevent the aggression of Hitler with the following genocide. Therefore the victorious states decided to establish an international organization with the purpose of out-ruling wars, preventing the horrors of the Second World War to repeat itself, in that purpose the United Nations was formed. The organization soon had almost a global membership.\textsuperscript{119}

\textsuperscript{117}Ibid., p. 906, pp. 1033-1034
\textsuperscript{118}Leonard, K. A. ““Is That What We Fought for?” Japanese Americans and Racism in California, The Impact of World War II” in \textit{The Western Historical Quarterly} (Vol. 21, No. 4 Nov., 1990), pp. 463-466
\textsuperscript{119}Malanczuk, P. (1997), pp. 26-27
After World War II the main concern of states was how to upgrade exiting IHL to a more efficient system of protection of victims of armed conflicts in general and civilians in particular. The articles of the laws of armed conflict intended to protect victims of war were thus developed by the international community into the four Geneva Conventions of 1949. The Conventions were applicable on all forms of armed conflict between one or more contracting parties, even if one of them does not recognize the state of war. Before that only declared wars was considered in IHL. The Conventions are also applicable in conflicts where the invading forces meet no armed resistance or where one of the parties is not a contracting party to the Conventions. The contracting parties are bound by the Conventions in all international conflicts.\(^{120}\)

Regarding the treatment of POWs a direct reaction to the interrogation camps in Germany by the Geneva Conventions of 1949 was to outlaw these kinds of camps as not sufficient for the treatment of POWs. The norm regarding the proper treatment of POWs did not correspond with the purpose of these camps.\(^{121}\)

### 5.3.1 A theoretical reflection

The fact that states considered the Geneva Convention as a binding fact was the condition of making the legal framework an existing agreement, it became a social fact. The Convention was treated as an objective fact and therefore constrained action. The World War II was the first war since the new Convention was signed, the lack of experiences and practice led to that the countries did not yet have shared expectations on what the treaty meant which lead to different interpretations. The international arena is socially constructed and reality is always interpreted on the base of historically produced and culturally upheld knowledge, however practice makes it possible for the actors to have shared expectations and thus similar interpretations.

The treatment of POWs and IHL had become even stronger international norms as the Second World War escalated. Obedience of the Geneva Convention III was considered as a safeguard against cruel treatment of captured combatants from the own forces. When Japan ignored IHL it was considered as legitimizing a cruel treatment of captured Japanese soldiers and the feelings of revenging Pearl Harbor were obvious. The example of the United States also shows how an internationalized norm is part of both nation building and the structure of power on the international arena. Obedience of the Geneva Convention in fact became part of the American self-image as well as part of the war propaganda. The US presented itself as the nation of freedom of speech and religion, a moral state that treated their POWs fair and according to International Humanitarian Law, a nation other should follow.

World War II shows the impact ideologies and norms have on state behavior, not only in the cruelties by Nazi Germany committed against what they considered as lower races such as Jews and Slavic POWs, but also in the behavior of the Americans. In the war in Europe they obeyed the Geneva Convention; however, in the war in the Pacific they treated the Japanese quite different, including racism and executions.

\(^{120}\) Meurant, J. (Sep. 1987), p. 242

The ideal of a just war was proved as an unrealistic utopia during the Second World War. The international norms regarding preventing the horrors of World War II to repeat itself were very strong, leading not only to a strengthening of IHL, but also International Human Rights Law and the formation of the United Nations. In the aftermath of the First World War the goal of a fair peace was forgotten in a public request of revenge. However, after the Second World War the ideal was remembered, a just peace was considered part of the prevention of World War III.

Viewed from the perspective of a created original position the strong international reaction on the cruelties of the Second World War corresponds with the principles of justice formed by the members of the group. The principles of justice do not allow a treatment of prisoners which depends on nationality or race, the principles guarantees a just treatment equal to all and acceptable to all rational human beings. There was also a gap where the international society recognized members of resistance movements as legal combatants while some states chose to consider them as unlawful combatants without the status as POWs. Limitations of the rights can only be legitimate if it leads to a strengthening of the system of IHL shared by all and are acceptable to those exposed to the lesser liberty. Obviously the treatment of some captured combatants did not strengthen the total system of IHL and were not acceptable to killed or tortured prisoners.

5.4 The Vietnam War

In the conflicts after World War II it became increasingly obvious that the Geneva Conventions of 1949 were incomplete and in need of a completion. The Conventions applied to conventional wars, such as World War II, not for internal conflicts with guerilla warfare. The main principle was that only traditional soldiers were entitled of status as POWs, guerilla soldiers were not. Members of armed resistance movements could be convicted as common criminals and did not have the protection of POW standards in prisons observed by the ICRC. Their relatives did not have to be contacted; they were not allowed receive mail or choose men to represent them to their counterpart.122

After the end of World War II France attempted to reclaim its colonies in Southeast Asia, however the communist and nationalist guerilla leader Ho Chi Minh declared an independent republic of Vietnam and refused to the pre-war colonial rule. A war broke loose that finally ended in the French defeat in the Battle of Dien Bien Phu in 1954 leading to France abandoning French Indochina which developed into independent states. Vietnam was temporarily divided into two sections with the plan of having democratic elections within two years which would unite the state under a single government. The elections were, however, never held since the president of South Vietnam was convinced Ho Chi Minh and the communist would win, and a bloody civil war soon developed between the communist government in North Vietnam and the anti-communists in the South.123

The United States government increased its involvement in South Vietnam, sending military advisers to the area with the justification of preventing the spread of Communism in Southeast Asia. These advisers became increasingly militarily active in Vietnam and when two American destroyers were supposedly attacked by North Vietnamese forces in the Gulf of Tonkin in August 1964, the US went to war, officially beginning the Vietnam War.\textsuperscript{124}

A guerilla force formed by South Vietnamese called the Vietcong fought for the cause of a united Vietnam under Ho Chi Minh. The American troops were used not only to increase the war on the ground but also to strangle the efforts of Vietcong. Villages suspected of collaborating with the guerilla force were paid visits where men of military age were killed, the homes and food was burned, and the surviving villagers were ordered to refugee camps. About 20,000 South Vietnamese who were suspected of collaborating with the Vietcong were executed without trials and as the war progressed the troops adopted harsh methods such as routine torture and beatings of Vietnamese POWs.\textsuperscript{125}

The cruel war in Vietnam led to massive protests all over the Western World, but most dramatically in the US, especially after the increasing number of American casualties. The reason why the U.S. was involved in Vietnam was questioned. The Americans legitimized their attendance in the war through the Truman Doctrine, and the fear that the entire area would fall under communism in a domino effect. The Truman doctrine was built on a Cold War logic stating that “it must be the policy of the United States to support free people who are resisting attempted subjugation by armed minorities or by outside pressure.”\textsuperscript{126} However, the question of the Vietnam War divided the U.S. in two, the anti-war demonstrations were massive, but the majority of the country was in favor of the war.

The massive bombings of Northern Vietnam was not able to decide the war and the American government were reluctant to invade Northern Vietnam fearing that could trigger war with the entire Communist block. A peace agreement was finally reached in 1973 and the U.S. withdrew its forces from Vietnam. In 1975 Vietnam was united under Ho Chi Minh and the communists of the North.\textsuperscript{127}

The Geneva Convention III of 1949 lacked a satisfactory framework of protection regarding guerilla warfare. However, Article 3 of the same Convention states that captured guerilla soldiers always have at least a minimum of protection against reprisals.\textsuperscript{128}

“(…) To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

\textsuperscript{125} Ibid.
\textsuperscript{127} Ibid., pp. 1064-1065
\textsuperscript{128} Bring, O. (1974), p. 165
The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.”

The capture of a number of Americans in Northern Vietnam led the US to announce that the war was an international conflict and thus the Geneva Convention III applicable. This was meant to bring a certain international protection to the prisoners since they would be granted status as POWs. In addition the Americans stated that they would follow the Convention and expected their enemies to do so as well. However, the US and their allies South Vietnam did not recognize the Vietcong as a legal power and the application of the Geneva Conventions were thus ambiguous. In the beginning of the conflict there were strict distinctions between captured North Vietnamese and captured Vietcong guerillas where the former were granted status of POWs and the latter were considered bandits. However, during the war the situation changed somewhat and Vietcong guerillas received treatment, if not status, as POWs with the option to attend South Vietnam’s rehabilitation program.

The government of Northern Vietnam on the contrary considered the conflict as a war of aggression led by the US and thus declared that captured American pilots were to be considered as war criminals that should not benefit from the provisions of the Third Geneva Convention. As a result American soldiers were refused permission to correspond with their relatives, there were no lists of prisoners presented and the ICRC was not allowed to perform any inspection of the prisoner’s camps.

The Geneva Conventions had thus been interpreted in different ways in the conflict and this is in fact the nature of the legal framework. The North-Vietnamese refusal to apply the Convention of POWs is built on their interpretations and is very difficult to change. North Vietnam used the words of the Convention in order to prove why it could not be applied in the case of American pilots. Achieving an international consensus stating that North Vietnam were violating international law was the only situation where the government could have changed their interpretation, but that was not likely to happen.

All states have a long range interest in maintaining their own powers to recognize or not recognize situations where the articles of the Geneva Convention are applicable. Therefore an international consensus condemning the North Vietnam was highly unlikely. In order to maintain their own right to interpretations states were willing to recognize North Vietnam’s unilateral interpretation of the Convention, even if they did not agree to it.

Even if the US stated that the Geneva Convention III was applicable to the Vietnam War, and that they acted according to the Convention, the war still saw a high number of violations of IHL from both sides of the conflict. American soldiers have, after their return to the US, testified about grave violations of Geneva Convention III.

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129 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. In full text at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6feb854a3517b75ac125641e004a9e68, 2005-12-01
131 Meurant, J. (Sep. 1987), p. 245
133 Rubin, A. P. (Jul., 1972), p. 489
For instance was there an incident where the soldiers brought with them five captured Vietnamese soldiers in a helicopter in order to interrogate them. Those who refused to answer their questions were thrown out of the helicopter; four out of five were thrown out, the fifth prisoner spoke and was taken to a camp. There were also reportedly incidents where Vietnamese prisoners were humiliated, tortured and killed by American soldiers.\(^{134}\)

The Geneva Convention III requires that guerilla soldiers are to carry either a uniform or a sign recognizable from distance in order to be considered prisoners of war when captured. The conflicts after World War II, such as the Vietnam War, demonstrated that this requirement was hardly realistic. The nature of guerilla warfare built on the possibility to hide among the civilian population and strike from there, especially in conflicts where the guerillas was convinced of a broad support among the civilians. Reprisals where civilians were injured were used as propaganda in order to increase that support.\(^{135}\) Many of the war crimes against Vietnamese civilians conducted by American soldiers were in fact explained by the lack of recognizable signs on the guerilla soldiers leading to the conclusion that every Vietnamese became considered as a potential enemy.\(^{136}\)

The internationalized norm concerning POWs and the institutionalization of the same into IHL and the U.S. military code at the time of the Vietnam War made it possible to convict an American soldier who shot dead an enemy soldier after he had surrendered for murder. Some American officers were in fact sent to prison for violating such laws during the Vietnam War.\(^{137}\)

In order to develop IHL so the framework would be applicable to all armed conflicts the ICRC organized the Diplomatic Conference on the Reaffirmation and the Development of International Humanitarian Law Applicable in Armed Conflict in Geneva from 1974 to 1977. In 1977 the Conference signed two Additional Protocols to the four Geneva Conventions of 1949 which meant a further development of the rules of war and increased protection for the victims of war.

The First Protocol extended the notion of international conflict, including for instance wars of liberation. Concerning prisoners of war the Protocol also extended the definition of lawful combatants, now including guerilla combatants in the status of POWs as long as they distinguished themselves from non-combatants. The Second Protocol of 1977 clarified that non-combatants in an armed conflict of non-international character was to be granted the same protection as those of an international conflict.\(^{138}\)

One of the significant changes the Additional Protocols of 1977 brought with them was that a exception regarding the demand of that combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.

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\(^{134}\) Bring, O. (1974), p. 165
\(^{135}\) Rubin, A. P. (Jul., 1972), p. 481
\(^{137}\) Nye, J. S. (2003), p. 25
\(^{138}\) Meurant, J. (Sep. 1987), pp. 243-244
The third paragraph in Article 44 of the First Additional Protocol states that “there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
(a) during each military engagement, and
(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”

5.4.1 A theoretical reflection

By the time of the Vietnam War the Geneva Conventions were considered binding facts, for instance tried the US to use the Convention III in order to guarantee basic protection of captured Americans in Northern Vietnam. By calling the war an international conflict the US stated that the Geneva Convention III was applicable and the prisoners would be granted status as POWs and thus international protection.

The weakness of the Conventions were also revealed during the Vietnam War since the government of Northern Vietnam considered the conflict as a war of aggression led by the US and considered captured American pilots as war criminals who should not benefit from the provisions of the Third Geneva Convention. The interpretations made by one state are very difficult to change as states in the international society prefer to stress the possibility of interpreting the Articles of the Convention individually. The US was not an exception and did not recognize Vietcong as fulfilling the requirements to be granted status as POWs, thus only captured North Vietnamese were granted status of POWs while captured Vietcong guerillas were considered bandits.

In other words, the Geneva Conventions are social facts, depending on the interpretations of the international actors. As long as states consider the Articles of the Conventions binding they will be binding in their consequences, constraining the action of states during armed conflict. However, the Vietnam War clearly demonstrated that when the states do not acknowledge the Conventions as facts they are weakened and there is little the international society can do about it. It is, however, important to bear in mind that neither the US nor North Vietnam stated that the Convention was useless or that it did not exist. Instead they used the words of the Convention to prove why it was not applicable in the conflict.

The cruelty of the war had a big impact in the U.S. and the American self image as a leading moral nation of freedom of speech and obeying IHL did not correspond with the testimonies of cruelties in the war. The question of the Vietnam War divided the U.S. in two, the anti-war demonstrations were massive, but the majority of the country was in favor of the war. The state was thus ambivalent in choosing which set of norms they was to follow as the norm of anti-communism was strong in the country, but so was the anti-war norm.

The international norms had yet again proved themselves stronger than existing legislation. The international society saw members of guerillas as combatants even if they did not fulfill the requirements in existing legislation.

139 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 available online in full text at www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9feee14a77fdce125641e0052b079, 2005-12-01
Conflicts had obviously changed character and in order to make them just and abiding to international law that regulated them in accordance with an international set of norms, the Geneva Conventions were in need of a complement. Representatives of the states on the international arena thus came together to construct this complementary legislation.

In a created original position the members of the group would reach the same conclusions regarding the treatment of detained enemies in a conflict as the international society did. The treatment of Vietcong members were not just and did thus not live up to the strong principles of justice, which has to be acceptable to all rational human beings, the members of the group agreed on.

5.5 The war on terror and the prisoners at Guantánamo Bay

September 11th 2001 is a historical date as it was on this day terrorists attacked the most powerful country in the world, USA. It soon became understood that it was the terrorist group al-Qaeda under Osama Bin Laden that was responsible for the attack. The network had its base in Afghanistan and was protected by the Taliban regime in the country which refused to turn over leading al-Qaeda members. The president of the United States, George W Bush, with the support of the Congress thus decided to attack Afghanistan and arrest those responsible for the terrorist attack.\textsuperscript{140}

Osama Bin Laden was not found or arrested during the war in Afghanistan, however there were other suspected Taliban and al-Qaeda members who were arrested and sent to the U.S. navy base at Guantánamo Bay, Cuba. The treatment of these prisoners has been highly debated since they have not been granted status as POWs.\textsuperscript{141} The U.S. justified their refusal of granting the prisoners status as POWs by explaining they did not consider them combatants or soldiers, but as terrorists. The U.S. has also stated that the Third Geneva Convention is not applicable since al-Qaeda is a network of terrorists and not a state bound by the Conventions.\textsuperscript{142} Instead of prisoners of war, the al-Qaeda detainees are called “unlawful combatants” or simply “battlefield detainees”.\textsuperscript{143}

In a fact sheet from February 2002 the White House stated that:

“i) the Geneva Convention Relative to the Treatment of Prisoners of War (the ‘Third Geneva Convention’) applies to the Taliban detainees, but not to the al-Qaeda detainees; ii) neither the Taliban nor the al-Qaeda detainees are entitled to prisoner of war (POW) status; iii) nevertheless, all Taliban and al-Qaeda detainees in Guantánamo Bay are to be treated humanely and consistent with the principles of the Third Geneva Convention.”\textsuperscript{144}

There has been confusion as to how the US can apply the Third Geneva Convention to the Taliban detainees without granting them status as POWs since that Convention deals exclusively with prisoners of war. Another issue that has been brought up is whether the U.S. is entitled to deny the Taliban prisoners status as POWs.\textsuperscript{145}

\textsuperscript{141} The International Bar Association’s Task Force on International Terrorism, 2003, pp. 99-101
\textsuperscript{144} The International Bar Association’s Task Force on International Terrorism, (2003), p. 96
\textsuperscript{145} Ibid., pp. 96-97
The Americans stated that the Taliban-controlled Afghanistan was a failed state and the territory had been overrun and ruled by violence by a militia or fraction, not a real government. Thus were the Taliban soldiers not representatives of the regular army of Afghanistan. However, the Taliban government did in fact control most of Afghanistan and thus was the Taliban soldier’s representatives of the armed forces of Afghanistan in an international conflict between states that had signed the Geneva Conventions.

The Americans claimed that the Taliban soldiers had not distinguished themselves from the civilians or followed the laws and customs of war and since they did not fulfill the conditions of Article 4 of Geneva Convention III the Taliban soldiers were not entitled to status as POWs. However, those conditions were written for guerilla soldiers or other volunteer groups, not for members of the armed forces and the ICRC has stated that the conditions are not applicable on regular armed forces. Furthermore, even if the Taliban soldiers did not wear western-style uniforms, they were in fact distinguished from the civilians by wearing black turbans.

The situation of the al-Qaeda fighters is different. They probably did not fulfill the criteria’s of POWs since they did not belong to regular armed forces, but instead to militias or volunteer corps belonging to the Taliban side. That would have been enough if those fighters had acted according to the laws of war, which it is highly unlikely, thus they probably did not qualify for status as POWs. However, the ICRC has stated that all persons in enemy hand must have a status under international law, it may be as POW, civilian or medical personnel, but nobody in enemy hands can be outside the law.

Furthermore, in a case of doubt, the First Additional Protocol concludes that all persons taking part in hostilities and captured shall be presumed to be and treated as a POW until a competent tribunal can decide the correct status of the prisoner. A person who later is reviled as not fulfilling the criteria’s of status as POW shall benefit not only from the provisions of the Fourth Convention applicable in his case but also from the fundamental guarantees laid down in Article 75 of the First Protocol. In other words, all prisoners are protected by the Geneva Conventions and the Additional Protocols independent of whether they are considered POWs or not. The U.S. has in previous wars used these tribunals, for instance after the first Iraqi war, but has refused to do so in the case of the prisoners detained during the war in Afghanistan.

Article 75 of the First Protocol states that persons who are in the power of an enemy power and who do not benefit from more favorable treatment shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction. The Article protects the prisoners against all kind of violence and disrespectful treatment and grants them freedom of religion.

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147 The International Bar Association’s Task Force on International Terrorism, (2003), pp. 96-97
149 The International Bar Association’s Task Force on International Terrorism, (2003), p. 97
150 www.icrc.org/Web/Eng/siteeng0.nsf/0/46E2225AA0CE99DC1256B6600595193, Basic rules of the Geneva Conventions and their Additional Protocols, 2005-12-01
152 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 in full text at www.icrc.org/ihl.nsf?7c4d08d9b287a42141256739003e636b/f6c8b9f8e14a717fde125641e0052b079, 2005-11-22
However, several former detainees that have been released from Guantánamo Bay have witnessed about inhumane standards with continuous interrogations, disrespectful treatment and even torture at the camp.\textsuperscript{153}

When the U.S. stated that the Taliban soldiers and al-Qaeda members did not fit under the Geneva Conventions or by any other laws, those detained by the United States became lawless. The treatment of the prisoners became dependent on the government officials in a lawless situation where the United States has made up a new legal system built on selected parts of existing international law. The laws of war apply to international conflict between one or more states or to a civil war, thus applicable to the Taliban’s. The laws of war have never previously been applied to terrorism, neither in the case of Northern Ireland nor in Germany were these laws applied; instead the terrorists were convicted under criminal law. The situation with al-Qaeda is thus completely new.\textsuperscript{154}

The detainees held at Guantánamo Bay are thus not considered as POWs, the base at Guantánamo Bay is, in fact not a prisoner-of-war camp or even a prison, it has been classified as an interrogation camp and the U.S. government has admitted that the classification is correct. However, after World War II interrogation camps were outlawed in the Geneva Conventions of 1949. The purpose of the camp at Guantánamo Bay is similar to that of the German camps of the Second World War which were the reason interrogation camps were outlawed.\textsuperscript{155}

Concerning the prosecution and trial of persons accused of war crimes or crimes against humanity the Article declares minimum standards of treatment. Persons who are accused of such crimes shall be prosecuted according to the applicable rules of international law. Whether or not the crimes they are accused of include grave breaches of the rules of war these persons are to be treated, as a minimum, according to Article 75.\textsuperscript{156}

The right of a fair trial thus includes all prisoners detained during a conflict, independent of whether they are entitled of status as POWs or not, even if they are accused of grave war crimes. However, the US principal argument was that “no alien held by the United States outside the United States has the right to litigate his detention in a U.S. court.”\textsuperscript{157} The U.S. does not claim sovereignty over the Guantánamo base and thus do the prisoners held there, according to that statement, not have the right to bring their case to an American court. The leasing treaty from 1903 however gives the US complete jurisdiction and control over the territory of Guantánamo.\textsuperscript{158}

The confusion between the statement in the war on terror and the text from 1903 over whether the U.S. courts have jurisdiction in the case of the Guantánamo prisoners led to that the legal situation was brought up in the U.S. Supreme Court in order to determine if the Guantánamo base is under the jurisdiction of the USA.

\textsuperscript{153}http://web.amnesty.org/library/Index/ENGAMR510632005, USA Guantánamo and beyond: The continuing pursuit of unchecked executive power, Amnesty International Index: AMR 51/063/2005, 2005-12-05
\textsuperscript{155}Ibid., pp. 3-4
\textsuperscript{156}Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 in full text at www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9feced125641e0052b079, 2005-11-22
\textsuperscript{158}Ibid., p. 2, p. 8
In late June 2004 the Supreme Court announced that the prisoners at Guantánamo Bay have the right to have their detention tried in American courts. However, almost one year later, in May 2005 Amnesty International reported that there still had not been a single case where a detainee had the lawfulness of the detention tried at an American court of justice.

One of the reasons why the naval base at Guantánamo Bay was chosen as the site of a detention camp for the al-Qaeda and Taliban prisoners was that American lawyers initially saw a possibility to avoid that the detainees brought their case to American courts. However, that was not the only reason, the Americans chose between Guantánamo Bay, a foreign country, in the U.S. or at another American territory. Establishing the camp on American soil was ruled out for two reasons: the legal complications mentioned above and the danger of attracting terrorist attacks. Establishing the camp in a foreign country could have made it difficult for the intelligence officers to get access to the prisoners and on another American territory would bring them under American jurisdiction. Guantánamo Bay was seen as a unique opportunity and was chosen as the perfect location for a detention camp.

The Geneva Convention III states that POWs shall be released at the cessation of hostilities. Prisoners engaged in criminal proceedings may be held until the end of those proceedings and possible punishment. The same goes for protected persons under Geneva Convention IV. The prisoners held at Guantánamo Bay are not considered as captured in the war against Afghanistan, but in the war against terrorism. The US Secretary of Defense has declared that “I think that the way I would characterize the end of the conflict is when we feel that there are not effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities.”

Furthermore, the memory of September 11 is kept very much alive at Guantánamo, legitimizing the treatment of the detainees. New prison-guards are reminded never to forget that event and to further impose this there are posters on the walls of the prison emphasizing the importance by asking the guards: “Are you in a New York state of mind?”

The U.S. states that the Geneva Conventions are not applicable in their current form on the war on terror. This war is something fundamentally new and thus the articles of the Geneva Conventions not only dated and in need of rewriting, but they are not appropriate in the war on terror. The detainees are seen as highly dangerous individuals who do not deserve treatment according to the restraints of the Conventions. The U.S. also emphasizes that the Taliban regime and al-Qaeda ignores IHL and uses this as an argument to why they do not deserve the treatment granted in the Conventions.

In a press briefing from January 2002, the press spokesman of President George W. Bush declared that the state was not only dealing with a new type of war but also with a new type of detention system, Guantánamo Bay. He saw the situation as more complicated than what interpreted in the Geneva Convention.

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162 The International Bar Association’s Task Force on International Terrorism, (2003), p. 100
163 Hultén, G. (2005), p.54
164 Ibid., p. 92
He therefore welcomed a debate about the applicability of the Convention on the war on terror since the Convention was written in the aftermath of the Second World War with those kinds of conflicts in mind. He further presented the war on terrorism as a war where “people don’t wear uniforms, they are unlawful combatants and they come from 30 different nations, not any one recognized nation with whom the United States is fighting a war.”\textsuperscript{165}

However, even if the US states that the Geneva Conventions of 1949 are not fully applicable in the current war against terrorism, they do not admit that the U.S. is ignoring them or is acting contrary to any of the Articles in the Conventions. In a public letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate in September 20, 2002, George W. Bush declared: “We currently hold approximately 550 enemy combatants at Guantánamo. All are being treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949.”\textsuperscript{166}

The treatment of the detainees at Guantánamo Bay has indeed cost the U.S. and its allies international support in the war on terror. Several representatives from the European Union and European statesmen have criticized the U.S. treatment of the prisoners, stressing that we are supposed to be more principled than the terrorists. Even their closest allies, Canada and Great Britain have criticized the US for their refusal grant the detainee’s status as POWs. The Canadians stated that they were reluctant to turn over prisoners to the US, dreading the treatment the prisoners would receive. The British Foreign Minister demanded that all British citizens held under conditions that did not correspond with the Geneva Convention should be returned to British custody for a fair trial.\textsuperscript{167}

\subsection*{5.5.1 The treatment of prisoners in Taliban detention}

Afghanistan has a violent history where IHL and human rights often have been neglected. During the Taliban era in Afghanistan, from 1996 to 2001, many political prisoners were arrested simply because they opposed the Taliban system. Several reports to Amnesty International state that political prisoners or military combatants were held in prison containing several thousand prisoners. These reports also contain witness account concerning forced labor and of prisoners who died of exhaustion or from beatings by prison guards. The situation in the prison was reportedly poor with starvation, torture and executions as a rule. But the harsh conditions for prisoners did not only appear in Taliban custody (the Taliban’s controlled most of the country) but there were also reports about terribly cruel treatment in prisons run by armed groups within the anti-Taliban alliance.\textsuperscript{168}

\textsuperscript{165} The International Bar Association’s Task Force on International Terrorism, (2003), p. 92
\textsuperscript{166} www.whitehouse.gov/news/releases/2002/09/20020920-4.html, Text form a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate in September 20, 2002, 2005-12-05
Other human rights organizations, such as Human Rights Watch repeatedly reported on how the Taliban neglected IHL and human rights. There were reports about spiraling violence against civilians and prisoners where reprisals for previous killings were used to legitimize treatment reported as massacres.\textsuperscript{169}

During the Taliban era the ICRC worked to familiarize the Talibans with IHL and managed to get access to a number of prisons. Prior to September 11 2001, the ICRC visited over 4000 detainees held by the Taliban. Most of these prisoners were released when the Taliban lost power. ICRC also visited 500 detainees held by the United Front. At the outbreak of the war the ICRC was forced to leave Afghanistan and thus there was a gap in the inspections of prisons. The main concern was the survival of prisoners in an area with a history of massacres and reprisals. ICRC considered the threat of reprisals against captured Taliban combatants as high. Reports witnessed of horrific conditions in the detention camps at the return of ICRC and hundreds of detainees died. Meanwhile, the ICRC tried to negotiate access to them.\textsuperscript{170}

\subsection*{5.5.2 A theoretical reflection}

The importance of norm regarding the treatment of POWs can be seen in the strong international reactions to the situation at Guantánamo Bay. However, the legal framework of IHL has again been proven as insufficient in providing the prisoners with what the international community would call a “just treatment”. The definition of the Geneva Conventions and the Additional Protocols as social facts which depend on the interpretations by international actors is more obvious than ever. The entire situation at Guantánamo Bay is built on interpretations. The U.S. has decided that the Articles of the Conventions are not applicable in the war on terror and thus as a consequence the detainees do not have any legal protection. Again it is evident that when states do not acknowledge the Conventions as facts they are weakened and there is not much the international society can do about it.

The power of norms is also visible in the example of the prisoners at Guantánamo Bay. As mentioned above, the U.S. does not claim that they do not follow IHL or that the construction of the Geneva Conventions is irrelevant. Instead they claim that they are acting according to existing laws and treat prisoners humanely, that they are following international norms regarding the treatment of prisoners, even if they are not entitled to status as POWs under international law. The words of Geneva Convention III are used to legitimize why the detainees are not POWs but unlawful combatant and the U.S. government thus tries to keep the image of a moral state who obey international norms.

Furthermore, the September 11 is used as a motivator, both for the prison guards who are reminded of how it is the detainees who were guilty of the event and for the American and international public who are obligated to support the inevitable means taken to protect Americans from further attacks. Leading Americans are thus playing on the strong feelings of revenge and anger domestically and internationally to justify the treatment of the detainees at Guantánamo Bay.

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In a created original position where the members of the group do not know which country they represent or how the balance of power looks like strong principals of justice would be formed. The members do know about the strong norms of just treatment of prisoners and are appointed to lay down principles controlling the treatment of detained enemies. The members of the group would not allow the treatment the Guantánamo Bay detainees have faced. The rights of POWs can, according to the principles of justice, only be restricted if it leads to a strengthening of IHL shared by all and is acceptable to those with the lesser liberties. The treatment of the detainees at Guantánamo Bay can in this perspective not be considered just. Several statements of former detainees show that the limitations of liberties at Guantánamo Bay are not considered as acceptable to those exposed to it. Furthermore the possibility of that the citizens of the countries the member represent will be exposed to the same treatment are too high.
6. Analysis

The norms of war have changed dramatically during the conflicts brought up in this thesis. At the outbreak of World War I the ideal of a just war was strong, but war was still seen as legitimate and something that would bring glory to the people. The new nature of a total war changed this image and the international society tried to outlaw wars. New agreements had to be formed since there was a gap between existing legislation and the strong norms formed by principles of justice acceptable to all rational human beings. The international society stated that the goal of the war was to reach a fair peace and thus was the means of war that destroys those opportunities and leads to contempt for human life unacceptable. World War I reviled a lack of protection of POWs which was required by the international society. At the end of the War the norm of a just treatment of POWs had become an institutionalized and internationally accepted norm even if the Second World War would reveal how all states were not willing to observe it.

The armed conflicts described in this thesis had in common that they symbolized a new nature of war, proving existing legislation as unable to cover the new nature of war and how international norms required further protection of the victims of war in general and POWs in particular. In the aftermath of these conflicts the international society has thus united with the purpose of upgrading IHL so it corresponded with the demands raised through existing norms. The demands were based on a combination of state interest but also on humanitarian concern. In a historical perspective it is apparent how the set of norms regarding IHL has evolved through social interaction on the international arena forming the legal framework of today. The historical framework of the treatment of POWs built up in this thesis shows that the world probably stands before a new reformation of IHL since the nature of the war on terror is fundamentally new in its character and the international society requires that the treatment of the detainees at Guantánamo Bay corresponds with existing norms.

This thesis clearly reveals the Geneva Conventions as social facts; even if the norms regarding IHL are internationally accepted and have grown into being used as part of the national identity in several nations they are still dependent on the interpretations of the international actors. As long as states consider the Articles of the Conventions binding they will be binding in their consequences, constraining the action of states during armed conflict. However, when the states do not acknowledge the Conventions as facts they are weakened and there is little the international society can do about it.

The social facts of IHL and the rights of POWs are in other words open for interpretations. The interpretations may be done consciously or unintentionally but they are inevitable since the entire social world is built on interpretations formed by culture and history. The regulations and treatment of POWs are dependent on previous situations since it is through practice countries form norms of behavior and shared expectations of how a just treatment of detained enemies can be conducted. The Geneva Convention of 1929 regarding the treatment of POWs were written as a direct reaction to the First World War where it became evident that the treatment of POWs did not correspond with existing norms, the interpretations of the Haag Convention of 1907 allowed a treatment which the international society condemned. The international society also saw the value of having neutral observers to guarantee obedience of the Convention.
The Second World War was the first war after the new Convention was signed and POWs were supposed to be protected through the new legislation guaranteeing a just treatment. The states considered the Convention as a binding fact but the nature of the social world dependent on interpretations combined with a lack of experiences and practice led to that the states did not yet have shared expectations on what the treaty meant which lead to different interpretations. The war covered the entire world and the diverse cultures and histories of people from various parts of the world obviously led to different understandings of the Articles in the Convention. The norms of equal and just treatment of POWs and protection of other victims of armed conflicts thus required further legislation and a new legal framework was formed through interaction during the aftermath of the war. IHL was thus seen as a legitimate and genuine solution to the problematic protection of these groups.

The importance of the norms regarding IHL, Human Rights and the rights of POWs are obvious in this thesis. As mentioned above the Geneva Conventions were considered binding facts, providing genuine protection of POWs. States have used this fact trying to force other states to act according to the Articles there. For instance the US tried to use the Convention III in order to guarantee basic protection of captured Americans in the Vietnam War. By calling the war an international conflict the U.S. stated that the Geneva Convention III was applicable and the prisoners would be granted status as POWs and thus international protection.

The power of norms has also been highlighted in the thesis: even if a state do not wish to apply the Geneva Conventions, or prefers unilateral interpretations of how and when to apply them there has not been a single case brought up in this thesis where a state declares that it does not follow international norms or that they are irrelevant. Even if some Asian states argue that IHL is built on Western values forced upon the rest of the world they still declare their obedience of the articles, interpreted according to Confucianism. The closest situation of a state claiming that IHL is irrelevant is the current war on terrorism where the U.S. has stated that the Geneva Convention III is not fully applicable and the entire framework of the Geneva Conventions is old and in need of rewriting. They legitimize this statement by using the articles in the Convention and through unilateral interpretation they show why the detainees are not entitled to status as POWs.

However, the situation at Guantánamo Bay is not unique in a historical perspective; states have previously used the articles of existing IHL to justify their actions, using the language of the Conventions as a reason why they are not applicable in the specific situation. It was done during World War II, for instance by the Nazis who did not grant members of organized resistance movements status as POWs. North Vietnam used the language of Geneva Convention III to justify why American pilots were not legal combatants, just as the Americans refused to recognize Vietcong soldiers and now the detainees at Guantánamo Bay as entitled of status as POWs.

The debate regarding Asian values has been brought up in this thesis as a contrast to human rights. Some consider the ideals of natural, human rights and humanitarian law as Western ideals built on liberal thoughts about the individual as the base of the society forced upon the rest of the world through imperialistic and post-colonial pressure. Others considers human rights as international norms acceptable to all rational human beings human rights are social facts that influence international social interaction.
As a matter of fact the vibrant debate regarding human rights as a Western ideal unnatural to Asians who are formed by Confucianism are a part of the cycle of norms. The second stage of the cycle, called the norm cascade, is characterized by the spreading of the norm to other states. The progress can be seen as a form of socialization where states are pressured to learn and concur to the new norm. The debate regarding human rights can thus be seen as a proof of how the norm still at second stage, on its way to the third and last stage where the norm is taken for granted. The debate of Asian values can therefore be considered as correct, there is a chance the Western democracies are forcing their values upon the rest of the world; it is a part of the cycle of norms.

The strong international norms regarding a just treatment of POWs and the international demand for granting the detainees at Guantánamo Bay this status can be viewed through Rawls’ principles of justice. The rights of POWs can, according to these principles, only be restricted if it leads to a strengthening of IHL shared by all and is acceptable to those with the lesser liberties. The treatment of the detainees at Guantánamo Bay can in this perspective not be considered just. Several statements of former detainees show that the limitations of liberties at Guantánamo Bay are not considered as acceptable to those exposed to it. In a created original position it is doubtful if the individuals would agree on principles which allowed the treatment the detainees are facing. As a matter of fact the international actors, i.e. the states have not agreed to the treatment of the detainees. The international norms concerning the treatment of prisoners have the purpose of protecting those who are detained by the enemies against reprisals or unjust treatment.

The threat of reprisals against prisoners is clear in the historical perspective of the thesis. In a war the feelings of revenge grows strong and those available for revenging are the prisoners from the enemy forces. The treatment of Japanese prisoners during the Second World War has some similarities to the current situation at Guantánamo. In both situations there was a dramatic event (the attack of Pearl Harbor and the terrorist attack of September 11) which gave birth to strong feelings of revenge and racism with demonizing of the enemy. Those available for the revenge were obviously the detained enemies. The thesis highlights how predominantly Muslims, but also Asians have been considered as the significant Other as a contrast to the Western world and racist images has flourished from historical roots. The combination of historically produced racism and the humiliating attacks on the U.S., made by these inferior people, clearly contributed to the treatment of these groups.

The usage of September 11 for legitimizing the treatment of the detainees at Guantánamo Bay is not a secret. Spokesmen for the U.S. government repeatedly refers to the event in speeches to the people and the guards at Guantánamo Bay are, reportedly, reminded never to forget what happened during that day. The strong norms of a just treatment of prisoners are thus neglected and revenging the attacks takes priority under the device they do not deserve the treatment required by the Geneva Convention III.

The contrast between the American treatment of Japanese and German prisoners during World War II illuminates the impact of cultural and historical ideas on the treatment of prisoners. The Geneva Convention was considered a binding fact and therefore constrained action when applied to the detained Europeans (Caucasian and Christian). These POWs were generally treated according to international law which was used as part of the war propaganda and included in the American self-image.
However, as mentioned previously, captured Japanese were treated rather differently including racism and executions, even if those facts were hidden. As a reflection to this a notice about how it is the victorious that writes the history and chooses how it is supposed to be presented is appropriate.

The image of USA as a leading nation of freedom of speech and religion, a moral state that treated their POWs fair and according to IHL became very strong within the U.S. The impact of the Vietnam War were therefore devastating for the American self-image, dividing the nation in two. Two major sets of norms were in conflict, the norms regarding IHL and a just treatment of POWs and the strong anti-communist norms. Furthermore, historically produced racism against Asians surfaced again. After the Vietnam War the U.S. has tried to reclaim their position as a morally leading state, however it is tempting to stress the similarities of the treatment of Japanese, Vietnamese and Muslim (at Guantánamo Bay) prisoners brought up in this thesis. Racist feelings against these groups of people have flourished and been part of the demonization of the enemies and thereby a legitimization of the treatment of detained enemies.
7. Conclusions

The intention of the thesis is to use a historical overview of the evolution of IHL, and the rights of POWs in particular, to formulate a wider assumption about the implication of IHL in the war against terrorism and the future.

How has the norm concerning rights of prisoners of war been internationalized and institutionalized into the current legal framework?

The norm has grown as a reaction to the horrors of war and has through international interaction between states been introduced and reinforced in international law. There have always been some regulations of how to conduct a just war, but these regulations were long based on religion and applicable only to those with the same faith. The first Geneva Convention of 1864 changed the laws on wars which became based on treaties; it was, however, not until World War I the lack of protection of POWs was illuminated. In particular a shortage of control mechanisms was reviled and the international society agreed on the importance of laying down sufficient standards in international law. During the war this was achieved on an intergovernmental level since there was a lack in the legislation, in the aftermath of the war the international society gathered with the purpose of institutionalize the norms of just treatment of POWs in international law, formulating the Geneva Convention relating to the treatment of prisoners of war of 1929.

World War II reveled how the new Convention were insufficient to protect the victims of war and the states were again left to individual interpretations of the Articles. The international society demanded stronger protection of the victims of war, but also against war itself. Representatives of the states gathered again to reformulate existing legislation and founded the United Nations and stronger International Human Rights Law but also reformed IHL into the four Geneva Conventions of 1949.

The post World War II conflicts visualized how the reformed Geneva Convention was not fully applicable in a new nature of conflicts dominated by guerilla warfare and civil war. In this thesis the Vietnam War has symbolized this fundamentally different nature of war, even if it was an international conflict. The lack of sufficient protection of the combatants in the conflict where guerilla members were not granted status as POWs finally forced the international society to gather and form complementary legislation. Guerillas were considered as combatants according to international norms even if IHL had not been formed with them in mind, as they were signed in the aftermath of World War II. The additional protocols of 1977 were meant to guarantee a sufficient protection applicable to all victims of war, both in international conflicts, but also in non-international wars.

This thesis clearly reveals how the states in the international society considered IHL as a sufficient and legitimate guarantee of certain standards regarding a just treatment of POWs. Treaties were to be held and by laying down minimum standards of protection in IHL the horrors of war were supposed to be restricted. These norms have been both reinforced and strengthened over time, but state interest still influence the obedience of the Articles. Prisoners detained during armed conflict are, however, supposed to have a strong protection against reprisals and cruel treatment and that is a strong norm, acceptable to all rational human beings.
Considering the historical background, does the war against terrorism require a reformation of International Humanitarian Law?

After each one of the major wars of the twenties century the international society has united with the task to upgrade existing IHL since the wars all visualized a new nature of war which IHL could not cover. The war against terrorism is fundamentally new in its character and the Articles of the Convention relative to the treatment of POWs have been neglected as not applicable to the current situation. With a historical perspective which analyzes a chain of armed conflicts, namely World War I, World War II and the Vietnam War the logic in this negligence is nothing new. During the three conflicts in this thesis states have argued exactly what the U.S. is doing in the current war on terror, that some of the combatants are not lawful and therefore not granted status as POWs. The international society has, however, as a reaction to these statements agreed to reformulate IHL so that it corresponds with existing norms regarding the protection of victims of war, including the neglected combatants.

Considering the historical background with the massive international reactions against ignoring IHL and the strong internationalized norms regarding protection of the victims of war such as POWs this thesis clearly proves the probability of a reformation of IHL so it answers to the challenges of the war on terror. During the conflicts analyzed in this thesis states have chosen to use IHL in order to achieve goals set up unilateral, in some of the cases, such as American treatment of European POWs this has corresponded with IHL.

However, states have repeatedly ignored the intentions of the Geneva Conventions and instead interpreted them literally legitimizing unjust treatment of prisoners. The international society has so far reacted to these cases by strengthening the legal framework, trying to prevent historical injustices to repeat themselves. Therefore the answer to the research question is: yes IHL will be reformed and the current legal framework has not been capable of protecting the prisoners and is thus not fully applicable in the war against terrorism. The reformed Convention will probably guarantee suspected terrorists a certain level of protection, members of transnational organizations who do not pay allegiance to a state will probably be included in the Convention. The protection of victims of non-international conflicts will probably be strengthened as well.
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Appendix 1: Geneva Convention (III), Article 4

Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949

Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
   a. that of being commanded by a person responsible for his subordinates;
   b. that of having a fixed distinctive sign recognizable at a distance;
   c. that of carrying arms openly;
   d. that of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.
(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.