Treaty Interpretation in the Fog of War

Ellen Policinski
Legal Adviser, ICRC Geneva
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IHL in the international legal order
Jus ad bellum vs. jus in bello

Law on the use of force

• War is prohibited

• Exceptions:
  • Self-defence (Art. 51)
  • Authorisation of the UN Security Council

Laws of war

• War is a reality

• IHL is applicable independent of (il)legality of war

• Does not affect legal status of parties to the conflict
Sources of IHL

- The Geneva Conventions of 12 August 1949
- Protocols Additional to the Geneva Conventions of 12 August 1949
- Customary International Humanitarian Law

Other treaties
Initial ICRC Commentaries

1952
1959
1960
1986
1956
Commentaries Update Project

In 2011, the International Committee of the Red Cross (ICRC) and a team of renowned experts embarked on a major project to update the Commentaries on the Geneva Conventions of 1949 and their Additional Protocols of 1977.

The updated Commentaries take into account developments in law and practice over the past six decades gleaned from State practice, case law, legal writings and the ICRC archives.

They have undergone an extensive peer review by practitioners and academics from around the world.
Interpretive Method

VCLT Articles 31-33

Good Faith

Ordinary Meaning in its context and in light of the object and purpose

Subsequent Practice & Int'l Law

Preparatory Work, case law, literature
Commentary on The Third Geneva Convention
Prisoners of War

Article 4 identifies the persons who, if they fall into the power of the enemy, are entitled to protection of the Third Convention, including:

• members of the armed forces
• members of ‘irregular’ armed forces that belong to a party to the conflict
• persons who take up arms in response to an invading army, and
• certain categories of civilians authorized to accompany the armed forces.
Humane Treatment

Prisoners of war must at all times be humanely treated.

Protected Against

Acts of Violence or Intimidation
Insults and Public Curiosity
Humiliation
Reprisals
Medical or Scientific Experiments
GC III Commentary

Interpreting GCIII in today’s conflicts
Who is the Detaining Power?

- Assumes control over (and responsibility for) the individual
- Responsibility rests on the State, not individuals, units, etc.
- Always in the hands of a single Detaining Power
- Multilateral operations must not render determination of the DP impossible

Can an international organization detain?

**Party to the conflict?**
- Westphalian logic of the GCs
- Bound by CIL

**Transfer?**
- Not envisaged by the drafters
- Subsequent legal developments
- Object and purpose of GCIII
- No loss of protection
Linguistic evolution

Article 14(1)

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

The meanings of ‘honour’ in GCIII:

• Sufficient and appropriate clothing (Art. 27)
• Wearing badges of rank and nationality (Arts. 40 and 87)
• Treatment in accordance with rank and age (Arts. 44 and 45)
• Prohibition of humiliating labour (Art. 52)
• The right to be honourably interred (Art. 120)
New technologies

A 1949 treaty regulating social media, electronic monitoring bracelets, CCTV, video games, e-banking, etc.

• Prisoners of war must be protected from insults and exposure to public curiosity (Art. 13)
• Surveillance and personal dignity (Art. 14)
• Currency and other valuable property (Art. 18)
• Educational and recreational materials, including (Arts. 38 and 72)
Changes in medical understandings

- Tobacco use (Art. 26)
  - But! Premises affording every guarantee of hygiene and healthfulness (Art. 22)
- ‘Serious hysteria’ as a medical condition (Art. 110, Annex I)
Persons with distinct needs

- Persons with Disabilities
- Older People
- Women
- Children
Gender

The Convention prohibits adverse distinction based on sex or any other similar criteria.

The rules relating to women seek to acknowledge the specific needs and address the particular risks, be they psychological or physiological, women may face during armed conflict.

The present Commentary thus analyses the specific needs of women and other vulnerable groups detained as POWs from the perspective of contemporary practice and legal requirements.
Questions?