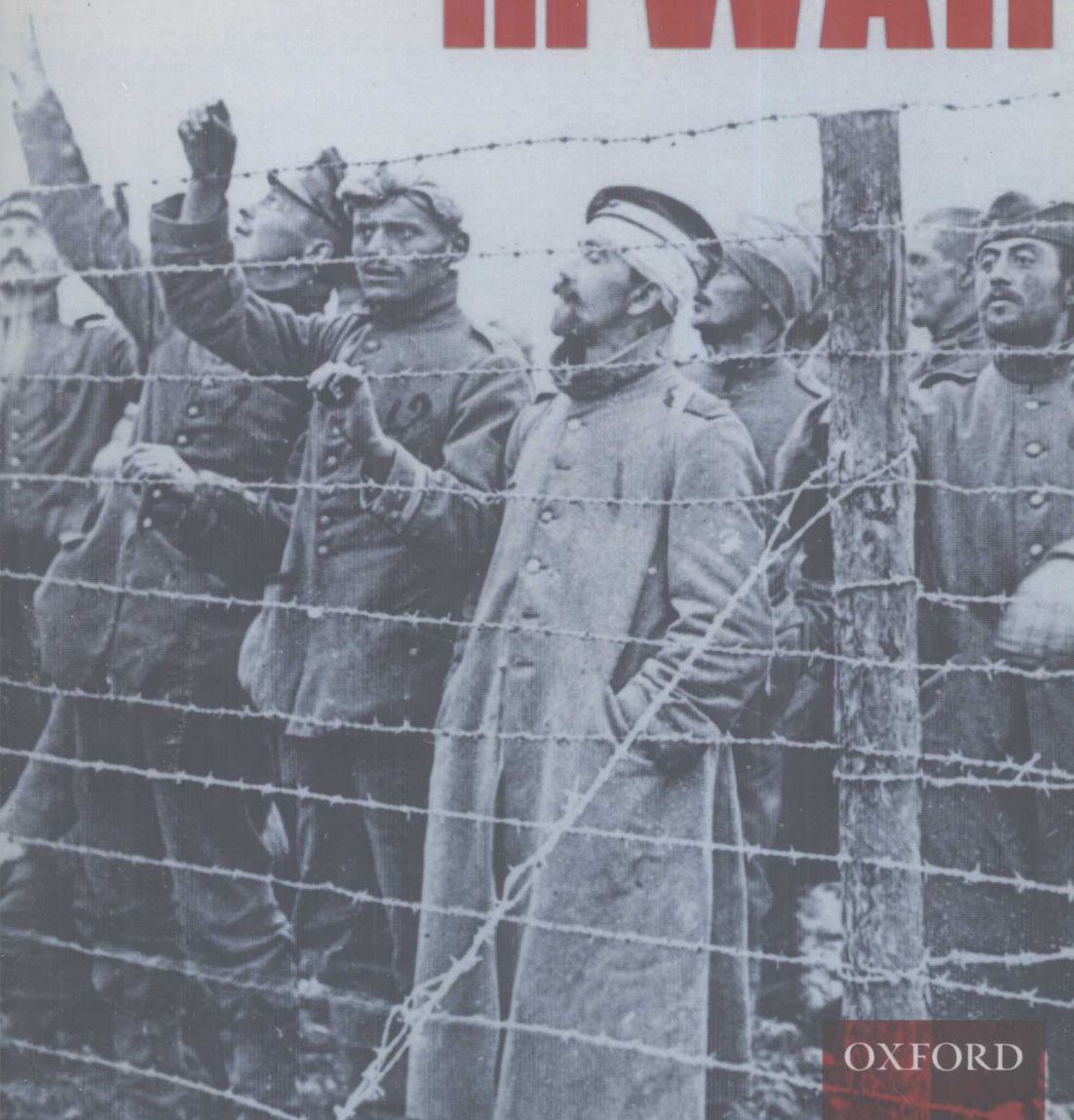edited by SIBYLLE SCHEIPERS

PRISONERS in WAR

OXFORD

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
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Oxford New York

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Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece
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Published in the United States
by Oxford University Press Inc., New York

Acknowledgements

List of Abbreviations

ALN	National Libération Army
ARBs	Administrative Review Boards
CDR	Centre for re-education
CMI	Centres Militaires d'Internés
CPT	Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
CRRB	Combined Review and Release Board
CTT	Centres de tri et de transit
DPW	Directorate of Prisoners of War
FARRA	Foreign Affairs Reform and Restructuring Act of 1998
FFI	French Forces of the Interior
FLN	Front de Libération Nationale
FSS	Federal Security Service
GC	Geneva Convention
GC III	Third Geneva Convention
GOC	General Officer Commanding
GPRA	Provisional Government for the Algerian Republic
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IDP	internally displaced persons
IHL	International Humanitarian Law
ILA	International Law Association
IPOWC	Imperial Prisoner of War Committee
IRA	Irish Republican Army
ISAF	International Security Assistance Force
JIC	Joint Intelligence Committee
JSIW	Joint Services Interrogation Wing
LRCS	League of Red Cross Societies
MCA	Military Commissions Act
NCO	non-commissioned officers
NGO	non-governmental organization
OKW	*Oberkommado der Wehrmacht*
OSCE	Organization for Security and Co-operation in Europe
PAMs	Pris les armes à la main

PCIJ	Permanent Court of International Justice
PMC	private military companies
POW	prisoner of war
PWD	Prisoners of War Department
RSFSR	Russian Soviet Federated Socialist Republic
RUC	Royal Ulster Constabulary
SEP	surrendered enemy personnel
SO	Special Organization
TVPA	Torture Victim Protection Act
UAV	unmanned aerial vehicle
VCGS	Vice-Chief of the General Staff

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Introduction: Prisoners in War

Sibylle Scheipers

At first glance, prisoners and detainees may appear as a mere by-product of war. Arguably captivity was for a long time a state of transition for a surrendering soldier (or, for that matter, a civilian unfortunate enough to be in the vicinity of the battlefield or inside a besieged town), followed by execution, enslavement, or release for ransom, on parole, or in exchange for prisoners taken by the opponent. However, the number of prisoners taken on the battlefield and the length of captivity increased substantially with the emergence of mass armies and the nationalization of war following the French Revolution. This development culminated in the Second World War, in which the average soldier spent more time in captivity than on the battlefield.[1] In addition to this quantitative increase, the twentieth century also witnessed a qualitative shift towards greater political relevance and even politicization of prisoners and detainees. According to Geoffrey Best, 'POWs [prisoners of war] have been at the centre of a series of IHL [international humanitarian law] rows since 1950.... Parties to armed conflicts have repeatedly exploited the weaknesses of the POW regime and the vulnerability of its objects in order to serve their own political interests.'[2] The current debates surrounding the issue of detention in the so-called war on terror indicate that this trend will most likely continue into the twenty-first century.

Apart from its increased relevance in quantitative as well as qualitative terms, the issue of prisoners and detainees is in many ways a prism through which more general research problems related to war become visible. First, the treatment of prisoners and detainees seems to be a litmus test for compliance with cultural, legal, and moral norms aimed at mitigating the effects of war. According to a statistical survey on compliance with the law of armed conflict, the treatment of POWs has one of the lowest compliance rates compared to other issue areas.[3] This is partly attributable to the large scope for individual non-compliance in the treatment of prisoners and detainees as opposed to issues such as the use of biological or chemical weapons, where the state or the military leadership has a greater degree of direct control.[4] Individual non-compliance with legal rules pertaining to POWs and detainees can serve as an indicator for training, discipline, and the success of enforcement measures within the armed forces or armed groups more generally. Non-compliance emanating from the state or leadership level, in contrast, often reflects the specific characteristics of the military culture

of a state or armed group. If violations of the law occur as a response to previous non-compliance on the part of the opponent, the treatment of prisoners and detainees can become the focus of efforts to adjust reciprocity between the adversaries. The fact that POWs were frequently the main object of reprisals is a case in point.

Secondly, the issue of prisoners in war tells us something about the success and progress of the humanitarian project as such. It is one of the issue areas that saw the greatest efforts at legal codification and regulation over the last one-and-a-half centuries. After both world wars the legal provisions in this field were revised. Yet the treatment of detainees is far from being a sweeping success story. True, with the 1949 Geneva Conventions (hereafter GCs) it seemed as if POWs had become 'the most favoured war victim',[5] and the Third Geneva Convention (hereafter GC III) is the most comprehensive and detailed of all four conventions. But it only offers detailed protections for those individuals that clearly fall within the boundaries of its applicability; that is, first and foremost members of regular armed forces. A large array of other individuals involved in armed conflict either sit uneasily 'between the Conventions', most notably between the prisoner convention and the civilian convention (GCs III and IV), or can only claim minimum protections under Common Article 3 of the GCs and customary international law. Arguably, the 1977 Additional Protocol I to the GCs attempted to widen the group of individuals qualifying for the protections of POW status, but it has not been as widely ratified as the GCs, and the provisions on national liberation movements remain one of its most contested parts.[6] According to Stefan Oeter, 'the real problem are those situations and groups of individuals that were deliberately excluded from the protections provided by the traditional law of armed conflict pertaining to POWs'.[7] The trajectory of the legal protections pertaining to prisoners in war is thus indicative of a more general problem: the codification of the law of armed conflict often comes at the expense of exclusionary measures towards certain groups and practices. It offers protections, but at the same time it tends to exclude those who do not fit a certain template of warfare.

Thirdly, while it is commonly assumed that the treatment of prisoners depends on the nature of the war in question, this equation sometimes also works the other way round. In wars of decolonization and insurgencies the question of whether captured insurgents or members of the national liberation movement qualify for POW status is frequently the centrepiece of the broader debate over the political legitimacy of the parties to the conflict. In the Algerian war, for instance, the Front de Libération Nationale (FLN) demanded that the French treat captured FLN fighters as POWs, or at least apply Common Article 3 of the GCs. The FLN itself claimed to grant captured French soldiers POW status. The FLN's insistence on POW status for its captured members reflects only to a small degree its concerns about their well-being (although they had every reason to be worried given the widespread use of torture by the French armed forces). It is mainly an expression of the FLN's claim to belligerent status, and, by extension, to the political legitimacy of its cause and its recognition as an international

actor.[8] The French government, in contrast, aiming at denying the Algerian liberation movement, precisely this recognition, 'resolutely refused to consider the conflict as anything other than an internal one, in which domestic law and order provisions were applicable'.[9] The issue of prisoners and detainees thus frequently forms the focal point of much broader conflicts at the interface of politics, law, and strategy.

HISTORICAL OVERVIEW

For a long time in the history of war, captivity was merely a transitory period between the moment of surrender or capture and the prisoner's final fate: execution, enslavement, or release. Wars in archaic and early classical Greece were constrained by a set of cultural rules that also regulated the treatment of prisoners: prisoners had to be offered for ransom to the opponent after the battle.[10] However, it is difficult to say to what extent this rule was observed. Enslavement was a common alternative fate of prisoners.[11] Massacres of prisoners did happen, but there is some debate on the circumstances in which they took place. Josiah Ober argues that massacres were typical for wars between Greeks and barbarians such as the Persian Wars (490–478 BC) and for the period of the breakdown of the early classical system of cultural constraints on warfare during the Peloponnesian War (431–404 BC).[12] In contrast, Raoul Lonis holds that the pattern of atrocities was less clear-cut and often depended on the specific political purposes of the victorious party.[13] Ancient Roman warfare offered a similar picture, although the significance of enslavement was possibly greater. From the Roman perspective, prisoners were sometimes the main purpose of war rather than a mere by-product.[14] Often the inhabitants of whole towns and settlements were captured and enslaved. Mass enslavement was the result of a convergence of strategic and economic objectives. Strategically, it facilitated enforcing claims to conquered territory. Economically, enslavement was a source of additional income for the armed forces, in particular for the ordinary soldier.[15] Mass enslavement made no distinction between combatants and civilians.

War in medieval Europe was characterized by an evolving quasi-legal code of conduct restraining violence in warfare. This development was tied to the emergence of a warrior elite. Ransoming and executing prisoners continued to be common practices, whereas religious norms prohibiting the enslavement of Christian adversaries had emerged. Ordinary soldiers had thus largely lost their economic value, since ransom could only be expected for members of the nobility.[16] The inequality in the economic value of prisoners and the confinement of the chivalric code of conduct to the nobility were mutually reinforcing. For common men fighting in war, chances of surviving capture were low: 'Armed peasants and townsmen ... could be massacred at will.'[17] Inhabitants of a besieged town refusing to surrender would often meet the same fate if the besieger succeeded in taking it.[18] Apart from war fought within the constraints of the

chivalric code of conduct (*bellum hostile*) and siege warfare,[19] however, there was a third category of war in the Middle Ages called *bellum Romanum* or *guerre mortelle*, which covered first and foremost (though not exclusively) armed conflicts between Christians and non-Christians, such as the Crusades. While *bellum Romanum* is often depicted as the lawless and unrestrained antithesis of the rule-bound *bellum hostile* supposedly resembling a fair and honourable contest among equals, such dichotomies should be treated with caution. As Frédéric Mégret outlines in Chapter 2, although indiscriminate massacres, torture, and enslavement of prisoners were common practices, there were also examples of restraint and even generosity towards captured opponents. Moreover, the treatment of non-Christian prisoners in the Crusades bore many similarities to the treatment of peasants and townsmen in *bellum hostile*, except for enslavement, which did not occur in medieval wars among Christians.

The end of the Middle Ages saw the decline of the warrior elite and, by extension, a decrease in the economic value of prisoners belonging to this elite. Whilst in medieval wars ransoming was confined to the nobility, ordinary soldiers largely belonging to mercenary armies were now integrated into the ransoming system.[20] The role and the fate of prisoners in war in early modern Europe slowly changed. According to Geoffrey Parker, the sixteenth and seventeenth centuries mark the beginning of a development that led to greater restraint in warfare and to increased efforts to enforce the laws of war.[21] The gradual emergence of a states system in Europe, in which the armed forces became a regulated part of the state apparatus, and the deconfessionalization of war created the conditions for a transition towards greater restraint, although its trajectory was non-linear and characterized by numerous setbacks. As Peter Wilson outlines in Chapter 3, this transition saw a variety of practices including execution, exchange, imprisonment, enslavement, release, and pressment into the captor's forces. The practice of pressing soldiers was often attractive to both captors and captives, since it provided the former with additional manpower and gave the latter access to food and shelter. However, as Wilson argues, whilst early modern European armies consisted largely of mercenaries, they were not necessarily indifferent as to what side they fought on. Therefore, pressment often substantially increased the chances of desertion.

The prevalence of siege warfare in the sixteenth and seventeenth centuries also meant that massacres were a widespread fate of prisoners.[22] Yet from the beginning of the seventeenth century exchanging prisoners with the opponent slowly became a common practice that considerably enhanced the captives' chances of survival.[23]

The system of prisoner exchange through bilaterally negotiated cartels continued throughout the seventeenth and eighteenth centuries. Prisoner exchange was a rational solution, since soldiers held captive were of no use to either side. Prisoners were either exchanged man-for-man or for ransom. Although this worked in favour of the rank-and-file soldiers, their value was still far lower than that of officers. Considerable efforts were made to specify accurate 'exchange rates' for different military ranks.[24] An alternative to exchange was release on

parole. Officers were allowed to return to their home country or to reside on their own in certain designated 'parole towns' under the condition that they gave their word of honour to refrain from returning to the ongoing conflict.[25] Ordinary soldiers were more likely to be induced to switch sides and join the adversary's armed forces.[26] The unequal treatment of officers and rank-and-file prisoners in all three practices—exchange, parole, and pressment into the opponent's armed forces—reflected and reproduced the inequality in their status that had already emerged in medieval warfare, albeit with less deadly consequences for the lower ranks.

The Revolutionary and Napoleonic Wars of 1792–1815 marked once again the beginning of a period of transition in the treatment of prisoners characterized by the typically muddled picture of the partial persistence of old practices, the emergence of new ones, and the occasional breakdown of all constraints. Exchange cartels continued to exist, although the prisoner cartel between Britain and France broke down repeatedly. This was not due to nationalistic fervour among the armed forces commonly associated with these wars. According to Gunther Rothenberg, despite some revolutionary rhetoric, the French army had maintained a high degree of professionalism and aimed at upholding established norms on the treatment of detainees. The breakdown of the cartel was based on a political decision on the part of the French and the British leadership rather than on the military's desire to do away with constraints.[27] The military, on the contrary, often attempted to negotiate better treatment for their prisoners bilaterally.[28] Atrocities towards prisoners occurred as well, depending on the circumstances of their capture, most notably in siege warfare, in campaigns against guerrilla forces and resistance movements, during the invasion of Russia, and in situations in which prisoners became a burden for their captors.[29]

The need for new regulations on the treatment of prisoners became once again evident during American Civil War of 1861–5. Exchange cartels broke down again, this time over the question of whether black troops qualified as exchangeable POWs.[30] As a result, prisoners had to be held in large numbers. As Stephen Neff argues in Chapter 4, this led to increased efforts to codify legal standards for their treatment. The Lieber Code of 1863 contained provisions to this effect. While the Lieber Code and the 1874 Brussels *projet* were the work of legal experts (although the former was promulgated by the US government), the Hague Conferences in 1899 and 1907 marked the beginning of a process of the codification of legal constraints on the treatment of prisoners in war as a state-led endeavour. However, these early efforts partly adopted a conservative perspective, inasmuch as they drew upon traditional customs and practices in the treatment of prisoners, despite the fact that some of them were already about to be abandoned. For instance, the Lieber Code regulated the exchange of prisoners in cartels, and Articles 10–12 of the Hague Convention IV (Annex) contained rules on the release of prisoners on parole.[31] In other parts, however, the Hague Conventions ventured into new terrain, for instance in setting out standards for prisoner labour (Article 6).

These regulations proved to be crucial during the First World War, although they also quickly turned out to be insufficient. The unprecedented level of

socio-economic mobilization during the First World War soon led to the 'discovery' of prisoners as an exploitable workforce (see Chapter 5). The 1907 Hague Rules on the Laws and Customs of War on Land contained no provisions on the specific conditions of prisoner labour other than 'the task shall not be excessive and shall have no connection with the operations of the war'.[32] The second provision was frequently violated, as a large number of Allied prisoners held by Germany were forced to work in the operations zone. Prisoners inside Germany often suffered from harsh working conditions and poor provision of food and shelter. This started a downward spiral of Allied reprisals against prisoners from the Central Powers. Although extensive prisoner labour was a new aspect, there were continuities in the treatment of prisoners during the First World War. According to Kramer, regarding the conditions of captivity 'the most significant distinction was not that between nationalities, but between officers and ranks'—a clear continuity from previous centuries. A second continuity was that the protection of civilians from the consequences of war—which had been a concern for a long time, first of the Church in the Middle Ages[33] and later of the Enlightenment legal thinkers,[34] but had frequently not been achieved—was once again ignored with respect to captivity: large numbers of enemy civilians were deported or interned due to suspicion and security fears.

The exploitation of prisoner workforce continued to be a defining feature of captivity during the Second World War. The 1929 Geneva Prisoners Convention was an attempt at regulating the treatment of prisoners in more detail; specifically, it contained extended provisions on prisoner labour and aimed at strengthening supervision of the application of the legal rules. Yet many prisoners in the Second World War faced a worse fate than during the First World War. As Neville Wylie explains in Chapter 6, this was not due to the weakness of the Convention. Rather, it was due to the unwillingness of certain states to apply the Convention unambiguously. The Convention was generally followed on the Western front, where prisoners were, by and large, treated well (see Chapter 7). Here it was the mutual threat of retribution that largely ensured the lawful treatment of POWs. The treatment of prisoners on the Eastern front and in the Pacific theatre was rather different. Two factors account for this: (*a*) racial and ethnic stereotyping and (*b*) military culture. Racial and ethnic stereotyping played a certain role on the Western front as well, where, according to Moore, non-white troops from the French and British colonies were subject to maltreatment by the Germans; but it was more important on the Eastern front. Rüdiger Overmans shows in Chapter 8 how the stereotypical ascription of 'Asian cruelty' to Soviet soldiers tied in with certain features of military culture on both sides: from the German perspective, surrender was seen as an irrational act of self-abandonment into the hands of an exceptionally cruel opponent, whereas Stalin branded surrender as a traitorous act of cowardice. In the Pacific theatre, it was arguably certain features of Japanese military culture that led to widespread maltreatment of POWs. First, notwithstanding the fact that Japan had signed the 1929 GC, it regarded this GC as an example of 'the alien Western system of values which [it] hoped would disappear

from Asia' (Philip Towle, Chapter 9, this volume). Secondly, imperial Japanese military culture was at odds with the idea of restraint in warfare in general and viewed surrender as an unheroic and thus inconceivable act in particular. Both in the Pacific theatre and on the Eastern front prisoner labour still served economic purposes, but there was only a fine line between the ruthless overexploitation of POWs on the one hand (such as the construction of the Burma railway and the work of German prisoners in Soviet coal mines) and the deliberate annihilation of prisoners in work camps on the other—a line that the German treatment of Soviet prisoners had crossed.

Despite the importance of the economic use and value of prisoner labour in both world wars, the political aspects of POWs in the first half of the twentieth century should not be underestimated. In the aftermath of both world wars, the legal conventions on prisoners were revised and updated. According to Geoffrey Best, this was not owing to the fact that POWs had suffered more atrocities than other protected groups. Rather, it reflected the extent to which POWs had become the focus of popular national sentiment and emotion—a smokescreen onto which both claims about one's own humanity and *ressentiments* towards the enemy could be projected.[35] Although it briefly looked as if prisoners were to become the best-protected category of the law of armed conflict after 1949, the detailed rules on their treatment never resulted in a vast improvement of their actual protection. Two trends were particularly important in this respect: first, in later conflicts, states such as Korea and Vietnam refused to apply the legal protections to US and British prisoners, arguing instead that they were war criminals who were to be tried before Korean and North Vietnamese domestic courts.[36] This argument essentially breaks down the separation between *ius ad bellum* and *ius in bello* that had allowed for a more humane treatment of prisoners in war in the first place: the idea that individual soldiers were not to be held accountable for their governments' decision to go to war.[37] It is an indicator for the continuing, or even increased, politicization of the issue of prisoners in war in the second half of the twentieth century. The second trend is the contested limits of applicability of the law of armed conflict pertaining to prisoners. This trend towards politicizing the law also has its roots in the late nineteenth and early twentieth centuries. As Isabel Hull shows in Chapter 10, the legal reasoning at that time was that the law of armed conflict did not apply in colonial warfare. The question of the applicability of the law became even more important in the wars of decolonization in the second half of the twentieth century, since, as mentioned above, granting POW status to prisoners in those wars was often perceived as acknowledging the political legitimacy of their cause.

USES OF PRISONERS IN WAR

Taking prisoners has a number of military advantages, the most obvious of which is the tactical benefit gained by depriving the opponent of manpower and