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Detention and Occupation in International Humanitarian Law

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Series Preface

Over half a century ago, Sir Hersch Lauterpacht, then Whewell Professor of International Law at the University of Cambridge, observed that 'if international law is the vanishing point of law, the law of war is at the vanishing point of international law'. He was wrong. While it is true that the law of war, or international humanitarian law as it has become known, is particularly vulnerable to the vagaries of political, social and economic influences, it has nevertheless proven itself a robust normative regime that positively shapes man's most destructive undertaking – warfare. No other body of law can be credited with saving more lives or alleviating as much suffering.

These six volumes comprise a collection of particularly significant works on humanitarian law. They are intended for use by scholars, practitioners and students who seek to better understand the topics addressed herein, together with their lineage. Just as importantly, they allow users to begin to separate the wheat from the chaff. The proliferation of publications in the field, in part a sad reflection of the fact that armed conflict remains so horribly pervasive, as well as the digitization that facilitates access to journals that would not otherwise be readily available, often results in information overload. A Ministry of Defence legal adviser looking for background material to address a situation involving belligerent occupation will, for instance, uncover scores of articles. The student writing a dissertation on the law of targeting or a scholar penning an article on detention will find him- or herself buried in material. Unfortunately, some of what they unearth will prove misguided, out of context or simply wrong. This collection will not break down these obstacles in their entirety. But it does afford a useful starting-point by offering topically arranged humanitarian law journal essays that have been thoroughly vetted by many of the top experts in the field.

In this regard, a few words on the process used to choose the essays are helpful. It began with the selection of those subjects that we believed comprised the *sine qua non* of international humanitarian law – development, principles, scope, application, conduct of hostilities, detention, occupation, implementation and enforcement. We then contacted over 60 recognized humanitarian law experts, both academics and seasoned legal advisers. They were provided the topics and asked in a very open-ended fashion to identify pieces they considered 'classics', believed to be 'essential' in a compilation of this nature, have found to be especially influential, used regularly in their work or deserved greater attention on the basis of their quality and insights. The experts were asked to pay particular attention to those essays that may have been 'forgotten' over time, but merited 'rediscovery'. Many of them responded in depth. We also benefited from the work of a five-member team from Emory Law School's International Humanitarian Law Clinic which conducted an exhaustive literature review to locate essays relied on regularly by writers – the 'usual suspects', if you will. Finally, as editors we took the liberty of adding a few pieces to the pool *sua sponte*.

Armed with a daunting inventory of candidates for inclusion, we began the difficult task of whittling it down. Many essays proved to be consensus choices among the experts; often the Emory team had also identified them. These provided the skeleton for the project. We then fleshed out the collection based on two key factors: quality assessments by the experts and topic coverage. The latter criterion proved particularly central to the process, for our objective was to produce a collection that not only contained thoughtful and influential works, but also addressed most key humanitarian law topics.

Beyond esteem factors and topical relevance, some essays were selected on account of their temporal significance, that is, having been written at key junctures in the development of international humanitarian law. As an example, the collection includes pieces written in the immediate aftermath of the First and Second World Wars and the attacks of 11 September 2001. Others were published soon after adoption of the 1949 Geneva Conventions or the 1977 Additional Protocols. We hope they both afford insight into the perspectives at play as humanitarian law was evolving and provide a context for understanding the genesis of contemporary norms.

In the end, we were unable to include many insightful and influential works. Exclusion was frequently a mere matter of being cursed with too many good choices on a particular topic. Although no reader is likely to be entirely satisfied with the essays included, or comfortable with the omission of others, we hope the rigorous selection process has resulted in a collection that is both useful and enlightening.

This project would not have been possible without the help of many supporters. We are, of course, deeply indebted to the many international experts who took time from their busy schedules to offer recommendations and comments over the course of the three-year effort. Although we cannot possibly name them all, particular appreciation is due to Ken Anderson, Yutaka Arai, Louise Arimatsu, Laurie Blank, Gabriella Blum, Bill Boothby, Ove Bring, Claude Bruderlein, Knut Dörmann, Alison Duxbury, William Fenrick, Dieter Fleck, Steven Haines, Agnieszka Jachec-Neale, Dick Jackson, Marie Jacobsson, Claus Kress, William Lietzau, Noam Lubell, Lindsay Moir, John Murphy, Sean Murphy, Mary Ellen O'Connell, Bruce Oswald, Hays Parks, Stephen Pomper, Jean-Francois Queguiner, Noelle Quenivet, Adam Roberts, A.P.V. Rogers, Peter Rowe, Joseph Rutigliano, Robert Sloane, Dale Stephens, Ken Watkin and Sean Watts.

We are equally indebted to the brilliant group of young scholars at Emory Law School, whom we dubbed our 'IHL Detectives' – Flora Manship, Carmel Mushin, Jeannine Privat, Nandini Rao and, in particular, Benjamin Farley. Their ability to identify and locate 'lost treasures' of humanitarian law was awe-inspiring. All have since graduated, and we wish them the very best in their professional careers.

Three people deserve special mention and gratitude. Laurie Blank, Director of the Emory's International Humanitarian Law Clinic, ably and tirelessly supervised her team. Beyond supervision, she also devoted an enormous amount of her own time to the substance and administration of the project. At European University Viadrina, Kaya Kowalski took on the task of collating materials and later working with us as we made the final selections for the collection. She was unflappable in the face of our long and sometimes contentious deliberations and always exceptionally good-natured and professional. Finally, we thank our editor at Ashgate, Valerie Saunders, who showed the patience of Job throughout.

We hope this collection proves valuable in the years to come. For our part, it was a fascinating endeavour.

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Introduction

This volume addresses two subjects that have re-emerged in the twenty-first century as flashpoints of international humanitarian law: detention and belligerent occupation.

Detention

Detention is one of the oldest and most heavily codified topics in this body of law. After all, it must be recalled that humanitarian law began not as an effort to protect the civilian population, but was instead intended to mitigate the suffering of combatants. This was natural because it was not until the twentieth century that conflict among ordinary people became prevalent. Indeed, only in the Second World War did the number of civilian casualties in a conflict finally exceed military deaths.

The issue of prisoners of war (POWs) was addressed in the 1874 non-bonding Brussels Declaration. Its codified lineage can be traced back to the 1899 and 1907 Hague Conventions (II and IV respectively), which contained 17 provisions related to prisoners of war. During the inter-war years, the 1929 Geneva Convention on prisoners further developed the norms regarding prisoners. In light of the suffering of prisoners during the Second World War, the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War was adopted. Also noteworthy was the inclusion of protections for civilian detainees in the 1949 Fourth Geneva Convention. In 1977 these conventions were supplemented by a number of articles on prisoners of war in Additional Protocol I.

Despite this extensive record of codification, unresolved issues remain. For instance, the Korean and Vietnam conflicts raised questions as to non-consensual repatriation of prisoners. Twenty-first-century conflicts such as Afghanistan, Iraq and the so-called 'global war on terror' have also infused the topic of detention with controversy. The issues range from the status of fighters captured on and off the battlefield to their treatment. Part I of this volume explores these and related matters. The five essays should be read in conjunction with those in *The Conduct of Hostilities in International Humanitarian Law*, Volume I, which deals with the status of individuals involved in an armed conflict.

In 'The Declining Significance of POW Status' (Chapter 1), Derek Jinks, of the University of Texas, examines the effects of denial of prisoner-of-war status. Traditionally, such a denial was deemed to have 'drastic protective and policy consequences' (p. 4). Jinks argues to the contrary, asserting that 'the gap in protection for those classified as POWs and those not so classified (e.g., those designated "unlawful combatants") is closing' (ibid.). In particular, he suggests that '[t]he only gaps that persist are: (1) that POWs are "assimilated" into the legal regime governing the armed forces of the detaining state; and (2) that POWs enjoy "combatant immunity"' (ibid.).

Jinks's analysis focuses on the war in Afghanistan. Early on in that conflict, the United States determined that captured detainees were unlawful combatants who did not qualify as

prisoners of war. Specifically, it asserted that neither captured Taliban nor al Qaeda fighters met the requirements for status under the Third Geneva Convention. In a position that has since moderated, the United States therefore concluded that it had 'the right to treat the detainees in any way it deems appropriate – unencumbered by international legal obligation' (p. 6). Many disagreed with the US position, arguing not only that it was wrong as a matter of law, but also that, in any event, the procedure for resolving doubt set forth in the Convention (an 'Article 5 Tribunal') should have been employed.

For Jinks, the distinction was less than momentous from both a protective and a policy perspective. He observes that all persons in enemy hands are entitled to Common Article 3 and Article 75 of Additional Protocol I protections and that under Articles 4 and 5 of the Fourth Geneva Conventions enemy aliens are entitled to humane treatment and fair trial rights. He also takes the position that unlawful combatants are 'presumptively covered by the full protections of the Geneva Conventions – even if some of these protections may be suspended when (and so long as) necessary to protect state security' (p. 59), a level of protection that he characterizes as closely approximating that accorded to POWs. It must be noted that, as pointed out in *The Conduct of Hostilities in International Humanitarian Law*, Volume II, the issue of whether unlawful combatants fall under the protection of the Fourth Geneva Convention is as yet unsettled.

There are, of course, certain differences. For instance, the Third Geneva Convention is highly detailed, with violation of certain of its provisions constituting grave breaches. By contrast, violations of Common Article 3, which sets forth protections in abstract terms, and those in Article 75 of Additional Protocol I are not grave breaches. In addition, numerous key states are not party to Protocol I, although the United States now considers its protections to be of customary character.

Jinks suggests that two major developments have narrowed the apparent gap between the protective regimes. First, 'abstract provisions have acquired a more concrete meaning through the elaboration of general humanitarian principles such as "humane treatment," "torture," and "essential judicial guarantees"'. Second, 'the conditions under which the identified alternative schemes apply have been broadened' (p. 60).

He cites the example of the Fourth Geneva Convention's nationality criterion, tracing its relaxation through the case law of the International Criminal Tribunal for the Former Yugoslavia. Human rights law also serves to imbue the provisions with substance – for example, through the 'elaboration and concretization of non-derogable rights' (pp. 62–63) and the clarification of fair trial rights. Moreover, '[a]lthough the lower threshold of applicability for Common Article 3 remains poorly defined, there is now an emerging consensus on the upper threshold: Common Article 3 applies in both non-international and international armed conflict' (pp. 64–65).

The key remaining differences derive from 'a curious feature of the POW Convention – that POWs must be "assimilated" into the armed forces of the detaining state' (p. 69). According to Article 102 of the Convention, prisoners of war 'can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power'. This means, *inter alia*, that they may not be tried in special civilian or military courts, such as military commissions.

More importantly, prisoners of war enjoy combatant immunity – that is, they may not be punished for their acts of participation in the conflict so long as those acts do not constitute

war crimes. This distinction is controversial. Some commentators argue that those who do not enjoy prisoner-of-war status 'may be prosecuted upon capture for their very act of participation in the hostilities (even if they otherwise scrupulously observed the rules of war)' (p. 70). Jinks disagrees, arguing that there are sound policy reasons 'to accord all captured combatants immunity for their otherwise lawful warlike acts' (ibid.). He contends that '[i]f all captured combatants failing to satisfy the requirements for POW status are subject to prosecution for any warlike acts, the law provides irregular fighters with no incentive to comply with its dictates' (ibid.). One's position on this issue determines in part whether Jinks's conclusion that 'POW status carries *no significant, unique protective consequences*' holds water (p. 78, emphasis in original).

Howard Levie, then Legal Adviser at the US European Command and later Professor Emeritus at Saint Louis University, examines a 'significant, but inadequately recognized' aspect of prisoner-of-war detention in 'Prisoners of War and the Protecting Power' (Chapter 2). A protecting power is 'a state which has accepted the responsibility of protecting the interests of another state in the territory of a third, with which, for some reason, such as war, the second state does not maintain diplomatic relations' (p. 79).

The notion is an ancient one, first appearing in the Capitulations of the Ottoman Empire in the sixteenth century. In the nineteenth century the practice was widely employed during the 1870–71 Franco-Prussian War, the first conflict in which protecting powers represented all the belligerents. Protecting powers were active in most subsequent conflicts through the First World War. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War was the first international instrument negotiated during peacetime to formally recognize the institution. It applied during the Second World War, but neither the USSR nor Japan was party to it. The fact that there were few neutral powers of significance during the conflict also weakened its application, especially since the same neutral nation sometimes represented opposing belligerents. The lessons of the Second World War influenced further development of the institution in the 1949 Third Geneva Convention, as well as inclusion of the practice in the other three conventions. For instance, the Third Geneva Convention makes designation of protecting powers 'at least a moral obligation' (p. 87), whereas the comparable 1929 Convention provision simply raised the possibility of designation.

Protecting powers must be neutral states that enjoy diplomatic relations with both the 'Power of Origin' (of the prisoners) and the detaining power. A neutral becomes a protecting power upon request of the power of origin and approval of the detaining power; more than one state may be so designated for a belligerent, and a neutral may serve as a protecting power for multiple states, as in the case of Switzerland in the Second World War. Either diplomats or other nationals may serve as representatives.

The Third Geneva Convention does not delineate powers and duties with great specificity. The keystone duty, set out in Article 8, is to 'safeguard the interests of the Parties to the conflict'. It was generally agreed at the Diplomatic Conference which drafted the 1949 Convention that this entitled protecting powers to 'verify whether the convention was being properly applied and, if necessary, to suggest measures on behalf of prisoners of war' (p. 94). Accordingly, the convention permitted them, *inter alia*, to visit places of detention, have access to prisoners, visit locations of prisoner transport, interview prisoners and prisoner representatives without witnesses, assist in the settling of disputes, inspect financial records, inspect disciplinary punishment records and find counsel for prisoners facing judicial proceedings. Protecting

powers are also a conduit for communication between the power of origin and the detaining power. As stated in Article 8, in performing their duties, the protecting powers must 'take account of the imperative necessities of security of the State wherein they carry out their duties'.

According to the Third Geneva Convention, the International Committee of the Red Cross (ICRC) also shoulders certain powers and duties vis-à-vis prisoners of war. In the event that a protecting power is no longer able to serve (for instance, because it becomes a belligerent) and no substitute can be found, the detaining power may request or accept the services of the organization, although, since it is not a state, it acts in its humanitarian capacity rather than a protecting power as such. Even beyond this specific circumstance, the ICRC, or 'any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake [humanitarian activities] for the protection of prisoners of war and for their relief'. Indeed, the ICRC and the protecting power may act in parallel.

In 'International Law Aspects of Repatriation of Prisoners during Hostilities' (Chapter 3) Richard Falk, of Princeton University, considers the return of prisoners during an ongoing conflict. He wrote this essay following the release of three US prisoners of war in 1972 to mark North Vietnam's National Day. Soon after their release, the US Department of Defense announced that none of the men would be reassigned to duties that related to the continuing conflict.

A threshold issue is the applicability of the Third Geneva Convention. North Vietnam claimed that it was not bound by the treaty because it had issued a reservation to Article 85: 'Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention'. The United States objected to the reservation. Falk also questions whether the Third Geneva Convention applied beyond Common Article 3 because 'it remains unclear whether North Vietnam would be bound to treat the armed conflict as one of international character bringing the whole of the Convention into play' (p. 107).

In any event, the Third Convention did not deal with repatriation to a belligerent state during hostilities. Rather, it addressed repatriation of the sick and wounded, repatriation to a neutral country, repatriation at the close of hostilities (also governed by the 1907 Hague Regulations) and return of dead prisoners of war. Falk looks to these provisions for guidance. He reasons that if repatriated wounded and sick personnel may not 'be employed on active military service' pursuant to Article 117, neither may repatriated able-bodied prisoners. As to whether the article extends to using repatriated prisoners 'to engage in official or semiofficial pro-war propaganda' (p. 108), Falk argues that such a prohibition is a reasonable interpretation, and one that was accepted by the US government in the form of an assurance by President Nixon that 'the men shall do nothing further to promote the American war effort in Indochina' (ibid.).

The incident also raised the issue of the role played by humanitarian organizations in repatriation. During the conflict, anti-war activists formed the Committee of Liaison with Families of Servicemen Detained in North Vietnam to facilitate acquiring information about prisoners of war and to deliver mail to and from them. Until the 1973 Paris Peace Accords, the North Vietnamese would deal only with this group, and not US government officials, on prisoner matters; it was accordingly designated by the North Vietnamese to serve as 'the social organization' responsible for escorting the released prisoners back to the United States.

Falk queries whether the protections afforded by the Third Geneva Convention encompass the activities of such a group. Article 9 contemplates, subject to the consent of the parties,

impartial humanitarian organizations which undertake humanitarian activities for the benefit of prisoners. Article 10 sets forth the circumstances in which a detaining power may allow a humanitarian organization to assume protecting power functions (impartially). Falk argues that the Committee qualified as a humanitarian organization encompassed by these provisions. Although not formally appointed by North Vietnam and anti-war by design, it *de facto* acted as such, and its performance of humanitarian activities was by nature non-partisan. As to the absence of US consent (Article 9), the United States did nothing to actively frustrate the group's activities. Thus, use of the Committee was, for Falk, consistent with the Third Convention.

Falk offers five observations drawn from his analysis of the incident:

> (1) The humanitarian objectives of the Convention may have to be realized in a flexible manner that is responsive to the characteristics of a particular armed conflict;
>
> (2) A private organization of nationals of the 'enemy' state may be more acceptable to the Detaining Power in certain situations than either the International Committee of the Red Cross or a neutral or even a friendly third power government;
>
> (3) The Geneva system is comprehensive enough to provide general guidelines of relevance even in relation to a form of repatriation not specifically covered by the existing treaty;
>
> (4) Treaty revision efforts should take explicit account of the possibility of repatriation of healthy prisoners to the enemy belligerent during the period of active hostilities;
>
> (5) Repatriated prisoners should also be entitled to humanitarian protection once returned to their country of nationality and should be removed from any further relationship, direct or indirect, to an armed conflict in progress. (p. 115)

He concludes that the incident amounted to a 'precedent with international law relevance', for in the absence of treaty law directly on point it 'provides guidelines and experience as to repatriation during hostilities to a belligerent power, and affirms the capacity of a nongovernmental organization of private citizens to play a direct role in this process' (p. 116).

Although the treatment of prisoners of war was the foundation upon which the international humanitarian law of detention was built, in modern conflict the law governing the status and treatment of civilian detainees has loomed large. This is especially so in light of those involving occupation and insurgencies. In 'Procedural Principles and Safeguards for Internment/ Administrative Detention' (Chapter 4), Jelena Pejic, Legal Adviser at the International Committee of the Red Cross, examines deprivation of liberty for security reasons in armed conflicts and other situations of violence.

Pejic defines internment or administrative detention (terms she uses interchangeably) as 'the deprivation of liberty of a person that has been initiated/ordered by the executive branch – not the judiciary – without criminal charges being brought against the internee/administrative detainee' (pp. 117–18). It is an aspect of conflict situations that is highly problematic. She points out that '[t]here is often no mechanism in place to review, initially and periodically, the lawfulness of internment/administrative detention or, if there is one, its lack of independence prevents it from effectively examining cases' (p. 118). Other problem areas include the relative

absence of legal assistance in challenging detentions and the difficulty of securing access to one's family.

The law on internment is set forth in Article 3 Common to the 1949 Geneva Conventions, the Fourth Geneva Convention, Article 75 of Additional Protocol I (for parties thereto), Additional Protocol II and customary law. Pejic also draws on human rights law, both in its binding sense and as a source of 'soft law'. She supports her position in this regard by noting that the International Court of Justice has deemed the rights of persons interned for security reasons to be a matter of both international humanitarian law and human rights law. In addition, the Additional Protocols acknowledge the applicability of human rights law in certain circumstances.

Pejic's essay is especially useful in setting forth the principles and practices that govern such detention. Various general principles can be identified from the applicable law. Internment/administrative detention is an exceptional measure that can only be ordered on a non-discriminatory case-by-case basis and it must cease as soon as the reasons for it no longer exist. It must also conform to the principle of legality. Those subject to internment/administrative detention are entitled to an array of procedural safeguards. They include the rights to: information about the basis for their predicament; be held in a recognized place of internment/detention; challenge the detention/internment; have the detention/internment reviewed by an independent and impartial body (including subsequent periodic review) and have legal representation; have contact with family; receive medical care; and have ICRC access.

In Chapter 5, 'Evolving Geneva Convention Paradigms in the "War on Terrorism"', Sean Murphy, of George Washington University, considers the controversies that erupted in light of US detention practices following the 11 September 2001 terrorist attacks. He perceptively notes that although

> ... the Geneva Conventions and the laws of war more generally comprise a sophisticated regulatory regime, ...like all law, the inevitable imprecision in the rules presents opportunities for governments to exploit gray areas so as to augment governmental authority and to avoid sensible interpretations that will protect individuals from overreaching governmental power. (p. 135)

Murphy cautions that '[s]uch exploitation ... severs the rules from their ethical foundation and loses sight of their underlying object and purpose' (p. 135).

In reaching his conclusion, Murphy recounts the historical development of the issue, noting that the problem of dealing with 'guerrilla' forces has 'bedeviled' international humanitarian law from at least the time of Francis Lieber (p. 136). Two paradigms emerged – one for international armed conflict, the other for non-international hostilities – which eventually found expression in the 1949 Geneva Conventions and their 1977 Additional Protocols.

Events subsequent to the attacks of 9/11 deviated from this neat binary scheme. For the sake of analysis, Murphy addresses three contemporaneous conflicts: (1) the Northern Alliance against the Taliban; (2) the United States-led coalition against Afghanistan; and (3) the United States against al Qaeda. As he notes:

> By considering each of these conflicts ... it becomes apparent why many roads in contemporary armed conflict can lead to application of the minimum standards of Common Article 3, rather than the full range of protections contained in the 1949 Geneva Conventions as a whole. (p. 148)

The first conflict was clearly non-international prior to the launch of Coalition operations in October 2001. At that point, two possible characterizations of the conflict present themselves: an international armed conflict involving all parties and a continuing non-international armed conflict coexistent with an international armed conflict between the Coalition states and the Taliban. Murphy finds the first option less than compelling because 'the 1949 Geneva Conventions were not designed to impose obligations (other than those contained in Common Article 3) on nonstate actors' (p. 152). The second is also problematic because 'it envisages two completely separate sets of rules governing allied armed forces that may be fighting side-by-side, perhaps even inviting the more-regulated forces to shift certain responsibilities to the less-regulated force so as to avoid significant laws-of-war obligations' (p. 153). Once the Taliban were ousted from power, the international armed conflict ended, and Coalition forces were present in support of the non-international armed conflict between the remnants of the Taliban and the new Afghan transitional government. As Murphy notes, this seems an odd result given that 20,000 US combat troops remained in the country.

At least until the Taliban lost control of the government and most of the country, the second conflict was clearly international. The United States took the position that members of the Taliban's armed forces lacked prisoner-of-war status because they did not meet the Third Geneva Convention criteria (see the discussions in *The Conduct of Hostilities in International Humanitarian Law*, Volume II). Murphy highlights the debates in the international humanitarian law community over whether the criteria apply to members of the armed forces, taking the view that they do. He supports the United States' controversial blanket determination that all members of the Taliban armed forces failed to meet the criteria, but argues that it erred 'in making sure that the persons in its custody *were in fact part of the Taliban (or al Qaeda)*, rather than a wayward tourist or relief worker' (p. 161, Murphy's emphasis).

If the Third Geneva Convention did not reach the Taliban, did they enjoy the benefits of the Fourth? In other words, are the Third and Fourth Conventions seamless, as claimed by the ICRC? Ultimately, Murphy concludes, they are not. However, he accepts the International Court of Justice's claim in *Nicaragua* that Common Article 3 rules constitutes a 'minimum yardstick' applicable in all conflicts. Thus, captured Taliban fighters were entitled to the limited protections it affords.

The most significant normative quandaries arose with regard to the third conflict. Since al Qaeda is not a state, the international armed conflict paradigm is ill-fitting. In that the conflict is transnational, it equally does not accord well with characterization as a non-international armed conflict. This paradox has led some – for instance, the ICRC – to conclude that the situation does not qualify as an 'armed conflict' at all in the way in which that term is used in international humanitarian law, but is instead mere international criminality.

Arguments that international humanitarian law governs hostilities between the United States and al Qaeda rely on a number of observations and propositions. First, Article 3 is not limited to 'internal' armed conflicts. Instead, it refers to conflicts 'not of an international character', which can be interpreted as conflicts with entities other than a state. Second, the phrase 'in the territory of one of the High Contracting Parties' in the article can be broadly interpreted as referring to hostilities in the territory of any party. Third, the extension of the protections of Additional Protocol I to conflicts with certain non-state actors, such as those involving colonial domination, illustrates a trend towards a broad reach of international humanitarian law. This approach underpinned the US Supreme Court's position in *Hamdan* v.

Rumsfeld, although that case involved an individual detained on the battlefield in Afghanistan during the US conflict with the Taliban. Murphy concludes that the debate will continue, with some arguing for fuller application of the protections of the Geneva Conventions and others opposing even the application of Common Article 3.

Despite concluding that treaty law offers little protection to irregular forces, Murphy nevertheless observes that 'the historical trend is one that has favored development of certain core protections for all persons engaged in armed conflict' (p. 170), particularly in customary law. He singles out Article 75 of Additional Protocol I as 'an appropriate touchstone for determining the rights of non-state actors' (p. 175) and argues that there is 'strong evidence' that its terms now reflect customary law (p. 176). Since the publication of Murphy's essay, the United States has adopted exactly this position.

Also problematic in the conflict is the duration of captivity issue. Combatants may normally be held for the 'duration of hostilities', a position apparently adopted by the US Supreme Court in *Hamdi* v. *Rumsfeld*. But Murphy notes that Article 75(3) provides that 'such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist'. Of course, if the detainees have committed criminal offences, they may be tried and subsequently held to serve their sentence. The mechanism for making the determination is, by reference to Article 75, the periodic review process for decisions on internment set forth in the Fourth Geneva Convention. The United States has set up just such a system.

Murphy concludes that '[w]ith respect to the Taliban detainees, the United States, its allies, and the government of Afghanistan should be permitted to continue the detentions so long as the individuals remain a threat' (p. 191), which may be until conclusion of the hostilities. As to the al Qaeda detainees, 'the United States must continue to engage in periodic reviews of the threat posed by each individual detainee' (p. 192). Factors to consider include the passage of time, age, health, psychological condition and relationship to al Qaeda.

Occupation

Part II of this volume turns to belligerent occupation, a subject of particular contemporary relevance. Following the occupations that occurred during and after the Second World War, the Israeli occupation of Egyptian, Jordanian and Syrian territory in the aftermath of the 1967 Six-Day War continued to draw attention to the topic. Those occupations were, and remain, unique in that certain of the territories remain occupied, the Golan Heights and parts of the Israeli capital of Jerusalem have been annexed, sections of the occupied territory are no longer claimed by the original state in possession, and Israel has unilaterally withdrawn from Gaza. Recent conflicts have also served to focus attention on occupation law issues. For instance, questions arose not only on whether all states maintaining forces in Iraq qualified as occupying powers, but also about the Security Council's authority to end an occupation as a matter of law when it appeared to be ongoing as a matter of fact.

Eyal Benvenisti, of Tel Aviv University, examines occupation law's lineage in 'The Origins of the Concept of Belligerent Occupation' (Chapter 6). The modern law of occupation can be traced back to the late nineteenth century. Benvenisti identifies two theoretical approaches underpinning its development. The first emphasizes the principle of humanity (the distinction between combatants and civilians). Maturing from the writings of Vattel, Grotius and others

into the Rousseau–Portalis doctrine, this approach held that non-combatants should not be harmed unless involved in the conflict. It led to such occupation rules as the prohibition on taking private property.

National self-determination, a by-product of the French Revolution, serves as the basis for the second approach. According to this concept, a state's territory belongs to the citizenry and thus cannot be transferred by 'the prince'. This premise eventually resulted in replacement of the notion of transfer by conquest with that of temporary control through occupation, followed by return of sovereignty.

Drawing on these ideas, the law of occupation began to take shape. The Lieber Code, for instance, permitted occupation authorities to only make new law 'as far as military necessity requires' and to 'acknowledge and protect ... religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations'. The Code ignored the sovereignty issue, for it was intended for application in a civil war.

In Europe, the Franco-Prussian War focused attention on the issue, with Prussian demands for the annexation of Alsace and Lorraine evoking much debate. Articles 2 and 3 of the Brussels Declaration of 1874 delicately addressed the subject by providing that an occupier 'shall take all the measures in his power to restore and ensure, as far as possible, public order and safety' and 'shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary'.

The issue of occupation was taken up again at the 1899 Hague Peace Conference, with discussions marked by a sharp division between would-be occupiers and those likely to be occupied. Ultimately, the 1907 Hague Regulations strengthened the Brussels Declaration's approach in favour of occupied states by providing, in Article 43, that the occupant 'shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'. Thus, by the dawn of the twentieth century, occupation was understood as a temporary condition designed to maintain order and civil well-being pending a return of responsibility and authority to the occupied state.

Benvenisti notes that the Hague provisions 'represented a delicate balance that both provided for a civilian population brought under the control of an occupant and safeguarded the interests of the ousted government for the duration of the occupation' (p. 197). Of particular significance in the context of recent occupations is that occupation law traditionally sought to safeguard the interests of the ousted state pending conclusion of a peace treaty. This aim has been subjected to increasing pressure, for such interests are often exercised to the detriment of the population, as in the case of Saddam Hussein's Iraq. It clearly conflicts with contemporary notions of promoting governance and human rights.

In his two-part essay, 'Occupation under the Laws of War' (Chapters 7 and 8), Elbridge Colby, a US army officer and early twentieth-century law of war scholar, addresses the occupation of territory *flagrante bello*, as well as that which occurs after a cessation of hostilities, but before peace is concluded. Such situations amount to 'belligerent occupation' – 'conditions of war exist, ... the occupation is founded on force, [and] the laws are laws of war' (p. 227). Part I of the essay provides a valuable insight into perspectives on occupation pre-dating the Second World War and on the resulting Fourth Geneva Convention of 1949.

Colby emphasizes that the commencement of occupation is determined *de facto*, not *de jure*. According to Article 42 of the 1907 Hague Regulations, '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army'. While mere raids into enemy territory do not suffice because there is no attempt to establish administration, the 'actual size and distribution of the occupying forces are immaterial' (p. 229). The issue is instead one of 'effectiveness', with the extent of occupation determined by an occupying force's 'effectiveness in permanently eliminating the authority of the original government and continuously maintaining the authority of the occupant' (ibid.). Since the test is factual, an occupation proclamation need not be issued.

In the same way in which an occupation commences upon the occasion of a particular factual situation, so it ends. If the occupation forces are expelled, the occupation ceases, although the simple fact of some degree of armed opposition to the occupant's forces does not suffice. But '[o]ccupation does cease definitely when a military reverse or a strategic withdrawal permits the original officials to return and institute again the functions and processes of their administration' (p. 231). It also ends with a peace treaty, whatever the fate of the occupied territory by operation of the treaty. In that regard, Colby distinguishes a peace treaty from an armistice, which, as that term was used at the time, signifies an agreed temporary cessation of hostilities pending conclusion of a final peace treaty. As it is also temporary in nature, a ceasefire would likewise fail to terminate an occupation, absent any provision for withdrawal of the forces maintaining the occupation.

Historically, territorial occupation was a form of 'conquest'. Since conquest transferred sovereignty, an occupant acquired title to the territory. Over time, 'occupation became more and more merely a means of war instead of an end of war. It was in purpose as well as fact belligerent, an act of war, without necessarily any prospects of permanence' (p. 233). Colby attributes this shift to the influence of Rousseau and Locke, as well as practices during the French Revolution. A technical legal debate ensued over whether sovereignty actually passed to the hands of the occupant, if only temporarily. Colby concludes that, whatever the answer, 'for the time being it is enemy territory, so far as the ousted nation is concerned' (p. 236).

The essay is replete with scepticism regarding limits placed on the occupant's actions. The 1907 Hague Regulations, for instance, require the occupant to respect the laws in force in the occupied country, 'unless absolutely prevented' (Article 43). But Colby suggests that this and other limitations of the Regulations 'can be avoided on a just plea of military necessity, of reprisals, or of superior orders and national policy' (p. 237). Labelling the Hague Convention and its annexed Regulations 'scant' and 'superficial', he concludes that:

> ... such things are left in vague and general terms – and therefore meaningless since they can be interpreted in various ways and always in view of that elastic doctrine of military necessity – to 'the principles of the laws of nations, the usages among civilized peoples, the laws of humanity, and the dictates of public conscience.' (p. 238)

These are fascinating comments in light of the fact that, decades later, the Nuremberg Tribunal and International Court of Justice would find the Hague Regulations reflective of customary international law. His comments are likewise interesting in view of the extensive refashioning of the Iraqi government following the 2003 conflict, which Adam Roberts has labelled, in his essay (Chapter 9), 'transformative occupation'.