After Guantanamo

The War Over the Geneva Convention

Jeremy Rabkin

BRITISH TABLOIDS blasted the story around the world: The Americans had removed Al-Qaeda and Taliban prisoners to a secret torture camp in Cuba! Photographs showed prisoners gagged and shackled, and crammed into cells exposed to the elements. Amnesty International demanded immediate access to the scene of these abuses. Mary Robinson, the UN Commissioner for Human Rights, chimed in, along with other prominent human rights advocates and a supporting chorus of left-wing politicians in Europe. Unwilling to be left behind, the International Committee of the Red Cross (ICRC), self-declared "guardian" of the Geneva Convention on the treatment of war prisoners, weighed in with its own expressions of outrage.

The furor died down in less than a week as the facts became known. The prisoners, some of whom had been involved in a violent prison revolt in Afghanistan, had been restrained in transit but not within their prison cells in Guantanamo. Officials from the ICRC who visited the site soon confirmed that prisoners were receiving adequate food and medical attention, and that their makeshift prison offered no less protection from the elements than the hastily constructed facilities set up for their American guards.

It was left only to wrangle about legal details. The ICRC, along with Amnesty International and Human Rights Watch, insisted that the prisoners deserved the full protections accorded prisoners of war under the Geneva Conventions. After some initial verbal clutter, the Bush Administration maintained that terrorists were not technically prisoners of war, but that they would nevertheless be treated by the standards set down in the Geneva Conventions whenever possible. This did not satisfy the ICRC. "There are divergent views between the United States and the ICRC", officials in Geneva reported, vowing to "pursue dialogue" on the legal issues even as they acknowledged that there was no humanitarian crisis at Guantanamo.

The whole episode could be chalked up to typical European carping at American "unilateralism", enabled, if not created, by irresponsible slash-and-burn journalism. But the fracas says something important about the changing character of international law. This episode should warn the wise that ambitious new versions of international law are likely to become a continuing source of mischief in the world, and much trouble to the United States.

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Whence the Laws of War?

THE IMMEDIATE source of law in the Guantanamo dispute is the third Geneva Convention of 1949, which concerns the treatment of war prisoners. Three other conventions were launched at the same time (on the treatment of wounded and sick combatants in the field; on the treatment of wounded, sick and shipwrecked combatants captured in naval war; and on the protection of civilians in occupied territory). The provisions in these four treaties were for the most part clarifications and elaborations of the Geneva Conventions of 1929, which in turn sought to elaborate and clarify standards agreed at The Hague Peace Conferences of 1906 and 1899. The underlying impulse for all of this is usually traced to the Geneva Convention of 1864, the first treaty to recognize a specially protected role for Red Cross medical services in wartime. (The International Red Cross had been established in Geneva only shortly beforehand and was instrumental in convening the 1864 conference.)

The dispute over the Guantanamo prisoners, then, is a dispute about treaty law—but treaty law with a history. It is worth our while to briefly review that history, for only in its light can we see how inventive the ICRC's current interpretation of the law really is.

That history indeed goes back further than the 19th-century conferences that gave formal recognition to restraints in the conduct of war. Yet restraint had not always been accepted practice. In medieval Europe, the sacking of towns and fortresses was regarded as a necessary reward for soldiers after the rigors of a siege, and a useful warning to the next target to surrender short of a siege. As late as the 16th century, Spanish theologians claimed to be applying the principles of St. Thomas Aquinas in justifying massacre and rape as an acceptable form of punishment for those who took the wrong side in a just war.

But unrestrained war of this kind seemed safely in the past by the mid-19th century. Wars had long since come to be the undertakings of professional armies, funded and directed by well-organized states that were generally eager to minimize injury to private property and ongoing commerce. It was widely accepted that states should respect certain limits and proprieties in war, especially in their treatment of captive enemy soldiers and civilians, well before the treaty conferences in Geneva and at The Hague. The prevailing conception of war was so gentlemanly that both Hague Conventions acknowledged the customary practice of releasing enemy officers on "parole"—that is, their word as gentlemen not to escape or return to fighting, but be neutralized by their capture.

Indeed, by the 19th century, neutrality itself had achieved a considerable degree of moral prestige, as neutral powers were conceived by most European statesmen and jurists as standing aloof from the political intrigues and calculations of petty marginal advantage in the foreign ministries of warring states. The neutral power could thus be identified with the higher claims of humanity at large. Geneva and The Hague were thus thought to be especially appropriate sites for conferences on the laws of war precisely because Switzerland and Holland were neutral states.

The same conferences that polished up humanitarian standards for captives also sought to lay down broader limitations on the conduct of war—for example, against the use of submarines to sink merchant ships even of the enemy power. Restrictions were also negotiated on the size of artillery shells and the types of rifle bullets permissible in war. Admiral Alfred Thayer Mahan, one of the American del-

egates to the 1899 Hague conference, cautioned (regarding a ban on dropping bombs from aerial balloons) that improved weapons, by "localizing at important points the destruction of life", might well "diminish the [overall] evils of war and [so] support the humanitarian considerations we have in view."[1] But he was ignored by Europeans eager to experiment with what we would now call arms control.

Most of these experiments in mutual restraint were promptly abandoned amid the pressures of the First World War. The Germans ignored restrictions on submarine warfare in their determination to starve Britain of aid and supplies. The Allies imposed their own naval blockade to starve Germany and Austria of supplies—including food for civilians. World War II was still worse. Disregarding interwar agreements that sought to revive limits on submarine warfare, the American and British navies adopted a policy of unrestricted submarine warfare against Japanese merchant shipping. Disregarding agreements on the protection of civilians, British and American bombers devastated the cities of Germany and Japan from the air, with little pretense of focusing on "military" as opposed to "civilian" targets. Hundreds of thousands of civilians died, even before the culmination of these efforts at Hiroshima and Nagasaki. Such ferocity could be defended as lawful reprisal for enemy aggression or for treaty violations by the enemy, releasing the Allies from their own commitments. But the truth is that Western governments were not much concerned about legal niceties in the midst of all-out war.

The hallowed idea of neutrality just barely survived World War II. In a struggle that was seen so clearly as a battle of good against evil, nobody on the winning side expressed admiration for states that had remained neutral. For several years the Soviets objected to admitting Ireland to the United Nations; members were required to be "peace-loving" and the Irish refusal to join the war against Hitler showed, said the Soviets, that Ireland was not reliably in favor of peace. Traditionally neutral states that had been overrun without serious resistance—Holland, Norway and Denmark—were chastened by the experience and readily joined the Atlantic Alliance after the war. Even Switzerland was condemned for trading with the Nazis rather than admired for holding itself aloof.

And yet some laws of war did survive, notably those covering the treatment of prisoners. Neither Stalin's Soviet Union nor the Japanese warlords professed to be bound by the 1929 Geneva Convention and neither expected any mercy from their enemies. But Germany remained a signatory and did honor its obligations toward fellow signatories—though not out of any sense of reverence for international legality. American and British (including British Commonwealth) prisoners were, with some exceptions, reasonably well treated by the Germans, even as their non-"Anglo" prisoners—and all prisoners of the Japanese—were horribly abused (or simply murdered). The reason for the restraint in the case of the Anglo-American war with Germany was a sense of reciprocal obligation and thus mutual deterrence. General Alfred Jodl testified at Nuremberg that Hitler had demanded the

[1]The State Department cautioned American delegates in these terms: "The expediency of restraining the inventive genius of our people in the direction of devising means of defense is by no means clear and considering the temptations to which men and nations may be exposed in a time of conflict, it is doubtful if an international agreement to this end would prove effective." See Calvin DeArmond Davis, *The United States and the First Hague Peace Conference* (Ithaca, NY: Cornell University Press, 1962).

execution of captured Allied airmen in 1943 in retaliation for the devastating incendiary bombing of German cities. But Hitler's military staff evaded and finally buried this directive, fearing that it would trigger retaliation in kind against German prisoners in Allied hands.

Thanks to this history, it did not seem altogether hopeless to restore the Geneva Conventions after World War II. Indeed, it seemed only prudent—and so, by 1949, it was done. The 1949 conventions were not honored by the North Koreans or the Chinese in the Korean War, nor by the Hanoi government in the Vietnam conflict. But even in these wars, communist authorities did not massacre American prisoners *en masse*. If they held them as bargaining chips, rather than as vessels of sacred humanity, communist governments still saw mutual restraint as being in their interest, much as the Nazis had recognized during World War II.

The same logic of reciprocity and restraint pertains today, but do circumstances allow that logic to function? It is certainly in America's interest to adhere to these conventions when others also do so. But where does that leave us in a war with terrorist organizations and states that nurture them? Can humanitarian laws of war function with enemies who disdain the very idea of humanitarian restraint?

Practical Matters

THE OFFICIAL position of the U.S. government is that prisoners at Guantanamo are not "prisoners of war" in the sense of the Geneva Convention, and they are not therefore entitled to claim the protection of every provision in the convention. The International Committee of the Red Cross and leading human rights groups, however—and, as of April 28, the British government, as well—insist that they are prisoners of war or should at least have the presumption of such status, with denials of such status to be determined on the basis of individual trials.[2] Since the U.S. government insists that it will treat the prisoners humanely—and the ICRC has confirmed that it is doing so—this dispute may seem a pointless quibble.

But it is not pointless, and it is more than a quibble. The designation of being a prisoner of war carries a certain sense of respectability. A prisoner of war is not a criminal, because soldiering is not inherently criminal. We may not want to say the same about terrorist forces, and there is clear precedent for this attitude. The Western Allies treated soldiers of the Wehrmacht as men who were simply doing their duty, while SS troops were treated as members of what was designated a "criminal organization"—and thousands were sentenced to postwar imprisonment on that basis or detained much longer than ordinary German POWs.

Clearly, then, apart from moral and symbolic issues, serious practical matters are at stake in the current war. Among the most important are the implications for the interrogation of prisoners.

As everyone recalls from old war

[2]Even those who advocate broader protections still want to make certain moral distinctions. In 1977, many governments agreed to an additional protocol to the Geneva Conventions (Protocol I) extending protections to fighters in national liberation struggles, even when not connected to a recognized state. At the insistence of Castro's Cuba, then assisting such struggles in Africa, "mercenary" troops were excluded from coverage. The Cubans wanted soldiers of fortune hired by the South African government excluded from protection, and they got their way. The United States has never ratified this protocol and, despite arguments advanced by some human rights advocates, cannot plausibly be bound by it—so it has no relevance to American policy toward "volunteers" in international terror campaigns.

movies, prisoners of war are required only to give "name, rank and serial number"—or, as the 1949 Convention adds (as an alternate means of identification), "date of birth." Human Rights Watch insists that this limitation does not prevent prisoners from volunteering more information, nor prohibit prison officials from seeking more. But the convention expressly stipulates that prisoners of war may not be "threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind." The convention goes into considerable detail in trying to exclude unnecessarily "unpleasant or disadvantageous treatment." Prisoners of war, for example, are to have access to "canteens" where they "may procure foodstuffs, soap and tobacco and ordinary articles in daily use." They must be allowed to retain or receive money to buy such things, even if the money has to be provided by the detaining power as an advance on regular pay. Prisoners must also be allowed their own cooking facilities to make use of little extras they may acquire.

As it happens, no such facilities exist in Guantanamo, and this is objectively helpful. It makes the job of interrogators easier if such comforts are not provided as of right but can instead be used as bargaining chips to induce cooperation.

Similarly, the convention envisions that prisoners will be housed together and be allowed to participate as a group in recreational, cultural and religious activities. Prisoners who want to lead prayer services with fellow prisoners are guaranteed the right to do so. At Guantanamo, prisoners have been isolated in individual cells and the U.S. Army supplies its own Muslim chaplains for individual prayer sessions.

The problem is that when a prisoner is being questioned, it is useful for interrogators to suggest that others have already talked. It may make a big difference (both for psychological and practical reasons) for the prisoner to know whether this is so; there is a good reason that social scientists often invoke the "prisoner's dilemma" as a model for decision-making under conditions of uncertainty. As a matter of security, too, it is much harder to plot an uprising or a mass escape if you cannot communicate easily with fellow prisoners. In the makeshift cells at Guantanamo, it has not been possible to keep prisoners from communicating with each other by calling out from their open-air enclosures. But more permanent facilities may make fuller isolation feasible. It thus remains a serious issue whether respect for the Geneva Convention should be understood as a legal obstacle to such practices on the part of the prison administration.

Perhaps most importantly, the Geneva Convention requires that prisoners be "released and repatriated without delay after the cessation of active hostilities." It will not be easy to say when "active hostilities" have ceased where the opposing "power" is a non-state terrorist organization. Nor will it be a simple matter to say when it may be safe to return members of an international terrorist network to roam free again. The convention does allow for individual prisoners to be tried and punished for war crimes they may have committed prior to capture, such as direct participation in terror attacks on civilians. But it is very hard to assemble information about the past activities of individual prisoners captured with a terrorist force. It will be especially hard if, as the ICRC and human rights groups insist, prisoners are presumptively "lawful combatants" until individually proven otherwise, so that each may retreat to name, rank and serial number.

All such practical considerations are dismissed by the ICRC and most human rights groups, however. They argue that if the United States says it is making "war", then the prisoners it takes should be con-

sidered, at least presumptively, prisoners of war until an individual can be shown by a competent judicial tribunal to be a terrorist. It should not matter, they say, whether Al-Qaeda or Taliban forces adhere to all or even any of the requirements of the Geneva Conventions so long as they are organized participants in what the United States itself regards as a war. To pick and choose among the protections we offer will "provide cover to other governments to ignore human rights standards", as Amnesty International argues, and, as Human Rights Watch warns, "put soldiers around the world at risk."

From Contract to Folly

THE UNDERLYING premise of such arguments is that the "humanitarian laws of war" are now part of general human rights law. In the mid-1990s, the United Nations published the Geneva Conventions in the same volume with the Covenant on Civil and Political Rights, the Convention Against Torture, and some ninety other general human rights treaties adopted since World War II. No one says that these other protections can be suspended just because some signatories fail to uphold them. The ICRC insists, therefore, that the requirements of the Geneva Convention are "unilaterally binding."

This sounds sensible enough, but it makes the text and history of the conventions unintelligible. Each of the four conventions is proclaimed in the name of "the High Contracting Parties"—that is, the states that subscribe—and the provisions are expressly limited to "parties" on the understanding that the conventions are "contracts." So if "one of the Powers" engaged in a war is not a party to the convention, others in the war who are "parties" to the convention "remain bound by it in their mutual relations"—but not bound to it in relation to the non-party unless "the latter accepts and applies the provisions thereof." This is the original idea of a treaty. A treaty, as *The Federalist* (No. 64) explained in 1788, "is only another name for a bargain." At the heart of the Geneva Conventions is this bargain: fight according to these professional rules and we will treat you with professional respect.

The main rules for defining combatant status go back to The Hague Convention of 1899. They are not based on ancient ideas of rank and courtesy. Rather, the rules were drawn up at conferences at which military officers were not merely present as observers, but constantly at the elbow of the diplomats and lawyers as full participants for what they could provide by way of practical advice. The rules thus rest pre-eminently on practical considerations. The rules allow even "militias" or "other volunteer corps" to qualify for POW status—if they belong to a "party to the conflict"—even if not part of regular armies. But to qualify as a lawful combatant, an individual fighter must be "commanded by a person responsible for his subordinates." One obvious reason for this is that the opposing army, if it is going to treat a captive with all the courtesies of a prisoner of war, must be sure that the captive will behave like a prisoner rather than an infiltrator ready to attack his guards the moment they turn their backs. Surrender is reliable only when those claiming to give up actually answer to the command of a superior who has ordered them to lay down their arms.

So, too, a "lawful combatant" must "carry arms openly" and also carry a "fixed distinctive sign recognizable at a distance" (that is, a uniform or insignia). An opposing army cannot respect the claims of non-combatants if it cannot discern who they are. The other criteria are encompassed in the final requirement that all lawful combatants must "fulfill the conditions" of "conducting their

operations in accordance with the laws and customs of war." Armies are not required to respect the "laws and customs of war" against enemies seeking special advantage by exempting themselves from those laws.

Historically, the most common categories denied the protections of POW status (apart from pirates and robber bands) were spies and saboteurs operating out of uniform. The U.S. Supreme Court hastily approved the conviction of German saboteurs by secret military commission in 1942. Death sentences were imposed, even though the half-hearted efforts of these saboteurs, landed by submarine on Long Island, did no damage in the United States. No one thought it strange that the two Germans who cooperated with investigators were spared execution as a reward for their cooperation. By the same token, postwar American war crimes tribunals dismissed charges against German officers who had executed Yugoslav partisans for sabotage efforts. It was held that because the partisans did not have clearly marked insignia, indicating their status as lawful combatants, killing them was not a war crime. Military courts were not willing to endorse the notion that saboteurs and secret partisans had the same status as lawful combatants.

The underlying bargain here rests most of all on the assumption that an organized army can be neutralized by its surrender. Valuable information might be gained by closely questioning surrendered troops, but armies have been willing to forego the right to pressure POWs into talking in order to assure respectful treatment when their own troops are taken prisoner. The calculus always looked different for bands of spies, saboteurs or secret agents operating behind enemy lines, where pressing for information seemed absolutely crucial because secrecy, more than massed formation, was the essential precondition for the success of such enemy activity.

If the protections of the Geneva Convention are regarded as reciprocal concessions by the "contracting parties"—the states sponsoring the forces in conflict—then systematic violations by one side release the other side from its obligations. The opposing side can rightly claim to be *strengthening* international standards by denying legitimacy to forces that systematically violate the laws of war. If the convention is seen as a statement of universal human rights standards, however, then every individual prisoner has some claim to these protections unless it can be shown that he was personally operating in violation of the rules.

The idea of universal human rights norms was certainly known to the diplomats and generals who gathered in Geneva in 1949. The year before, the United Nations General Assembly had, with much fanfare, proclaimed a "Universal Declaration of Human Rights" premised on the idea that the world recognized basic rights for all human beings. Most of the governments negotiating the 1949 Geneva Conventions no doubt regarded universal human rights as a fine idea, and wished well to the machinery established in the UN Charter to "save succeeding generations from the scourge of war." But they did not regard these new projects as sufficient reason to sacrifice the more tangible benefits of the traditional rules of war. To this day, UN human rights norms have no means of enforcement. But the laws of war always had some means of enforcement through the natural and logical operation of reciprocity.

If the obligations are entirely binding, regardless of what the other side does, the whole scheme looks quite different. A reprisal or response then becomes as bad as the initial violation that provoked it. By that sort of reasoning, it would always be wrong to use terrible weapons or even threaten their use. So much, then, for

deterrence. It is a view that makes sense, if at all, only to those who see themselves as standing entirely above or apart from the conflict, or as answering to some authority positioned above the actual forces in conflict. In other words, it demands the return of the old idea of neutrality.

That is, of course, precisely where the ICRC and human rights groups position themselves. As an official ICRC publication puts it, "the basic principles underlying [international humanitarian] law—humanity, impartiality and neutrality—are as valid as ever and certainly still of the utmost relevance."[3] That brings us to the deepest issues in the war on terrorism.

The Lightness of Neutrals

CONTEMPORARY human rights groups demand a neutral forum for adjudicating abuses, an international criminal court where the decision to press charges will be left entirely to an independent international prosecutor. Actually, it will not be left entirely to the prosecutor, for new procedural rules allow "victims" to appeal the decision of the prosecutor not to seek an indictment. This means that advocacy groups like the ICRC, mobilizing on behalf of victims, will have legal as well as political forums to press their views. As it happens, violations of the laws of war, including mistreatment of prisoners, are very much in the jurisdiction of the new court, so disputes like the one over the Guantanamo detainees may one day be pursued by a prosecutor at The Hague. The court would also have jurisdiction over crimes of "aggression" and broadly defined "war crimes", so American decisions to strike at terrorist bases or the countries harboring them could also trigger indictments.

Nobody imagined such a thing in the late 1940s when the current Geneva Conventions were negotiated. Certainly, nobody imagined that the ICRC would play a prominent role in arraigning offenders against the laws of war. The ICRC had never done that sort of thing before, and its wartime record did not suggest that it had either the inclination or the capacity to do so. During the war, the ICRC performed with reasonable efficiency in its traditional role, discreetly conveying inspectors' reports from prison camps to the opposing European powers. To win the trust of both sides, it reported abuses of prisoners to home states, but it did not trumpet its findings to the world. And it said precisely nothing about the Nazi extermination camps, though it had considerable information about them. Much has been made in recent years about the failure of the Vatican to protest the Nazi Holocaust. But the ICRC's conduct was no better and in some ways worse. Whatever may be said about Pope Pius XII, at least he did not voice public praise for the SS. From its headquarters in Geneva—a much safer place than Rome—the International Red Cross published commendations of the German Red Cross, even when the German chapter was directed by an SS doctor who conducted ghoulish experiments on concentration camp victims.

No doubt, the ICRC had its reasons. It did not want to compromise its role as a discreet go-between in the monitoring of prisoner-of-war camps. The Swiss government, with which the ICRC had always been closely associated, was itself eager to maintain good relations with Germany, and was fearful of being "swamped" by a "flood" of Jewish refugees. But whatever the reasons, the ICRC did not emerge from the war as an inspiring example of humanitarian achievement.[4] The Geneva

[3]Yves Sandoz, *The International Committee of the Red Cross as guardian of international humanitarian law* (Geneva: ICRC, 1998), p. 12.

[4]The record of the ICRC in World War II is reviewed in Caroline Moorehead, *Dunant's*

Conventions acknowledge in passing the ICRC's role as a monitor, but they do not make cooperation with it mandatory and they certainly do not establish the ICRC as the definitive arbiter of compliance with the conventions.

Partly because the ICRC remained cautious about its own role until relatively recently, a new set of conflict monitors arose in the 1970s and 1980s and quickly achieved much more prominence. Amnesty International, Human Rights Watch, and Médecins sans Frontières were much louder and more insistent in their denunciations of abuses because they were willing to provoke the hostility of governments. The ICRC has tried to reclaim leadership with public denunciations of its own in recent years, as in its very public and premature condemnation of American practices at Guantanamo.

But the prestige of Amnesty International and Human Rights Watch owes much to the period in which they arose. During the late 1960s and early 1970s, much Western opinion inclined to the view that the United States was acting the role of a bully in Southeast Asia. During the 1980s, much Western opinion inclined to the same view regarding American involvement in the nasty guerrilla wars of Central America. In the 1990s, the collapse of communism in Europe seemed to leave much scope for reform and improvement, but no enemy deeply threatened the United States or the West as a whole. In such a world it was easy for human rights groups to maintain a lofty detachment and retain their prestige as neutral moral arbiters.

For most Americans, September 11 changed all that. President Bush speaks of terrorist networks and the regimes that sponsor or harbor them as "evil." Countries that are not "with us" are to be regarded as "against us." There is not much patience for neutrality in these formulations. But that is almost beside the point. In truth, those who planned the attacks on the World Trade Center and those who nurtured them have no interest in "humanitarian law." Islamist radicals do not think of war as a conflict between states from which ordinary humanity should, as much as possible, be spared. They think of war as an all-out contest between peoples, so that American civilians (or, in the counterpart struggle in the Middle East, Israeli civilians) are no less legitimate targets than uniformed soldiers. Neither age nor sex nor disability makes any difference. The aim is simply to punish a whole society for its sins. The preconditions for reciprocal restraint are wholly absent.

The United States must not sink to the level of its adversaries, of course. Regardless of whether our restraint is reciprocated, the United States will need to observe some restraints for the sake of its own self-respect. Nobody, for example, suggests that the prisoners at Guantanamo should simply be executed without trial. But in a war against barbarism, it is hard to operate at all times within the gentlemanly code of the Victorian peace conferences that codified the modern law of war. In World War II, when the United States conceived itself at war with total barbarism, American bombers reigned merciless destruction on the cities of Germany and Japan. Michael Walzer argued decades later that this tactic was morally indefensible, and a serious case can be made for his claim—though a strong case can also be made for the answering claim that, in the final analysis, American bombing (including the use of atomic bombs on Japan) hastened the enemy's surrender and so saved lives overall.[5] There is room for legitimate debate about the restraints that

Dream: War, Switzerland and the History of the Red Cross (London: HarperCollins, 1998).

[5]Walzer's views appear in *Just and Unjust Wars* (New York: Basic Books, 1977), which argues

should be observed even in a war with a very dangerous and unrestrained enemy. But imagine how Americans would have reacted during World War II if "neutral" advocates of humanitarian restraint had set themselves up as official arbiters of American war policy. In fact, during the Battle of Britain, the ICRC did offer to monitor civilian damage inflicted by British and German bombers. Churchill rejected any such neutral monitoring role:

> It would simply result in a Committee under German influence or fear, reporting at the very best that it was six of one and half-a-dozen of the other. It is even very likely they would report that we had committed the major breaches. Anyhow, we do not want these people thrusting themselves in, as even if Germany offered to stop the bombing now, we should not consent to it. Bombing of military objectives, increasingly widely interpreted, seems at present our main road home.[6]

Today's ICRC would deny that it is neutral in quite the way it was during the war against Nazi Germany. The ICRC and other advocacy groups were certainly quick to denounce the bombing of the World Trade Center last fall. But they are also eager to maintain credibility with Islamic opinion and with the larger trend of leftist opinion that instinctively sides with "oppressed people" and assumes Western wrongdoing in every conflict with non-Western peoples. So, for example, both Amnesty International and Human Rights Watch insist that "international law" requires that all Palestinians be assured the right to return to the places where their grandparents or great-grandparents may have lived in what is now Israel—a demand that even governments in Europe, which are very sympathetic to Palestinian claims, do not make. The ICRC has for decades allowed Islamic medical services to affiliate as "Red Crescent" rather than "Red Cross" services but refuses to acknowledge Israel's "Red Star of David" service because it lacks an authorized insignia. Meanwhile, during the recent fighting on the West Bank, the ICRC repeatedly condemned Israel for interfering with Palestinian Red Crescent ambulances—before finally warning the Palestinians not to use these vehicles to sneak weapons and fighters past Israeli checkpoints as they have continually done. Indeed, the ICRC is so receptive to Islamist opinion that last fall a staff officer in Geneva circulated within the organization a report that the attack on the World Trade Center had probably been organized by Israeli intelligence because Jews working at the WTC had stayed home from work on that day.

But the political inclination of individuals in these organizations is not the point. In a war on shadowy terror networks, human rights advocates simply cannot provide even-handed monitoring on both sides. One of the attractions of terror as a strategic weapon is that actual attacks involve very small groups whose support structure can be disguised: states that sponsor or cooperate with these networks can deny their involvement. Human rights groups do not have intelligence services that allow them to shed light on these connections. But they can publicize what they regard as American abuses, because the United States is much more open about most of its operations. Similarly, advocacy groups can hope to affect American opinion, while their influence on dictatorial states like Iraq is effectively nil.

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that the bombing of German civilians might have been justified, if at all, only in the early stages of the war to stave off Allied defeat, but not after 1942. For a defense of the strategic value of Allied bombing, see Richard Overy, *Why the Allies Won* (New York: W.W. Norton, 1995).

[6]Churchill quoted in Martin Gilbert, *Winston Churchill, Vol. VI: Finest Hour, 1939–1941* (New York: Henry Holt, 1992), p. 832.

What is true for the monitoring activities of such groups is even more true for the International Criminal Court. Having received strong support from European governments, the 1998 treaty for the Court has now received sufficient ratifications to take effect. It will start operations in July. The Court will not be able to apprehend any terrorist or anyone else on its own, and terrorists will obviously find it much easier to hide than travelling American (or Israeli) officials. Moreover, the moral onus of an indictment will surely have more political weight—to say the least—against democratic states. After all, would Saddam Hussein be more dismayed by an ICC indictment than by a Security Council condemnation? Would Al-Qaeda leaders care in the least?

Another problem is that the Court can only deal with those proven guilty of precise crimes. What if a leader of a terrorist operation is acquitted of the precise charges before the court because concrete evidence is insufficient for legal standards of proof? Will the terrorist then be released? Will his comrades and followers also be released on the same ground? It will not be easy to disarm terror networks if the detention of their operatives can only be continued when a judge in The Hague finds them guilty of precise crimes. But, like it or not, the ICC is now a fact, and it is likely to reinforce trends in European opinion that complicate American policy. Among other things, the existence of the ICC will strengthen the notion that there really is a higher law of humanity, binding on everyone, and that supposedly unbiased, neutral judges have the moral authority to enforce this law.

Meanwhile, the active role of advocacy groups is also a fact. In western Europe in particular, criticism of American policy from Amnesty International and the ICRC immediately won an attentive hearing. The United States must expect to be criticized. It has reason to cooperate with the ICRC, as it has in Guantanamo, to dispel slanders against actual American policy.

But the United States also needs to remind Europeans that wars cannot always be fought by gentlemanly rules—not when the enemy disdains all civilized restraint. Europeans may need reminding on this point because, the British excepted, most of them did not do much fighting in the last great war against barbarism—or did their fighting on the side of barbarism—and now regard actual war as something done only by other, less ennobled people. Contemporary Europe has reverted in many ways to the moral complacency characteristic of neutral Holland before each of the world wars.

APART FROM Britain and Turkey, European states are unlikely to be serious military allies for the United States. But to retain a place in the community of civilized states, European nations still need to remember those very important security obligations that they still can satisfy. Most of those directly involved in the September 11 attacks spent much time planning, consulting and training for their missions in European cities. And European governments remain reluctant to undertake arrests and investigations on the scale required to stop future terrorists from refitting and regrouping in Europe. Their devotion to unilateral and decontextualized standards of human rights has made Europe a haven for those who care least of all for such rights.[7]

Yes, constitutional states must respect certain limits. But as Justice Robert Jackson famously put it, a "constitutional bill of rights" cannot be interpreted as "a

[7]See Michael Radu, "The Problem of 'Londonistan': Europe, Human Rights and Terrorists", Foreign Policy Research Institute, April 12, 2002.

suicide pact."[8] He wrote that only a few years after his return from service as chief U.S. prosecutor at the Nuremberg war crimes trials, which perhaps helped to clarify his perspective on what a constitutional state cannot do and what it must do. Yes, the United States owes "a decent respect to the opinions of mankind", as the American Declaration of Independence puts it. But the U.S. government remains responsible to its own people when deciding how to defend them. That is also in the Declaration of Independence.

We should do everything we can to encourage European cooperation in the struggle against terrorism. But we cannot delegate our own decisions about national defense to prosecutors in The Hague or moral monitors in Geneva any more than we would give final word on these matters to the spiritual admonitions of the Pope in Rome. The dispute about our detention policies in Guantanamo is a harbinger of serious emerging differences with our European friends. It is important to clarify the moral and legal grounds of the American position in that dispute. It is unlikely to be the last time in this war when we will have to assert our right to an independent policy. □

[8] *Terminiello v. Chicago*, 337 U.S. 1 (1949) at 37.

Talk Club

At the U.S. Army's interrogation school [in Fort Huachuca, Arizona] Staff Sgt. Giersdorf, a veteran intelligence-operative who speaks Arabic, Czech and Russian, is teaching new recruits to extract information from al Qaeda and other captive foes. The job, he tells his students, 'is just a hair's-breadth away from being an illegal specialty under the Geneva Convention.'. . . Soldiers study 30 techniques to make prisoners crack. One is the simple 'incentive approach.' Around the world, 'everyone smokes', Sgt. Giersdorf tells students. 'If you've ever talked to a captured Arab who hasn't smoked for two hours, a pack of smokes can get you a long way.'. . .

The students get a day's training in the Geneva Conventions of 1949, which govern the treatment of prisoners during wartime, and are cautioned that violating the treaty could bring prosecution. That means there are some lines they can't cross—no truth serum, or physical or mental coercion, according to Army lawyers.

On the other hand, even the International Committee of the Red Cross, which monitors compliance with the treaty, says there's room for interpretation. . . . Thus, Sgt. Giersdorf tells students, 'You can put a source in any position you want. You can chain his legs to the chair, you can handcuff his hands behind him', force him to stand at attention or have military police thrust him to the ground. 'If [a prisoner] says it hurts, is it torture?' he asks.

'Yes', say several students.

'No, it's not', the sergeant corrects. America's allies, he says, go farther, placing prisoners into what he calls 'stress positions' until they talk. Those aren't taught here, he is quick to add, but 'if you work with the Brits or the Dutch or the Germans, they can show you all about it.'

—Jess Bravin, *Wall Street Journal*, April 29, 2002