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**MAKING HUMANITARIAN LAW IN THE COLD:
THE COLD WAR, THE UNITED STATE AND
THE GENESIS OF THE GENEVA CONVENTIONS
OF 1949**

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MAKING HUMANITARIAN LAW IN THE COLD: THE COLD WAR, THE UNITED STATE AND THE GENESIS OF THE GENEVA CONVENTIONS OF 1949

Olivier Barsalou*

Abstract

Based on U.S. government archives, this paper argued that the most significant change that happened in the international society in the aftermath of the Second World War, at least, for the American government, was the rise of the Soviet Union as a global ideological power challenging the American liberal peace and democratic project for the post-World War Two world. This encounter with the Soviet “Other” triggered a process of revision and redefinition of the U.S. attitude toward international law but also, how the American government would make and deploy international legal arguments and vocabulary in the rising world of the Cold War. Taking the diplomatic negotiations over the Geneva Conventions on the Laws of War of 1949 as an historical example, this paper analyzes how the Cold War and the ideological confrontation between the United States and the Soviet Union became the intellectual environment in which the U.S. government legal advisors reformulated international humanitarian law in the post-1945 world. In the end, American diplomats shaped and used international legal vocabulary – in the present case, the one offered by international humanitarian law – to objectify the deployment of a global ideological vision for the preservation of Western values against the Communist threat.

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Future war may involve ideology
- U.S. Interdepartmental Committee on Prisoners of War¹

**If international law is, in some ways, at the vanishing point
of law, the law of war is, perhaps even more, conspicuously,
at the vanishing point of international law**
- Hersch Lauterpacht²

Introduction

America's so-called "War on Terror" has brought the issue of war and violence to the forefront of public opinion. The tragic events that preceded this global paradigmatic shift have called into question how we (de)regulate, (de)emphasize and (de)legitimize certain forms of violence at the expenses of other forms of violence³. International humanitarian law (IHL) or what we call *jus in bello* was caught up into this vortex, a sort of process aimed at redefining and developing new legal vocabulary to describe certain realities while excluding some others from the realm of the "War on Terror". This global war constitutes the overarching principle, the yardstick according to which we now reevaluate and reconceptualize our relationship with the concepts of war and violence. In that sense, the "War on Terror" constitutes the ideological lens through which we now differentiate between different types of killings⁴ – murder or war – and more importantly, the validity of the normative system establishing the benchmarks that will allow us to qualify a killing as a murder, a collateral damage, an accident, a death on the battlefield and/or a terrorist attack.

International legal vocabulary and arguments are thus dependent on the political/historical context and the ideological environment prevailing at a certain moment in time and space. In other words, they stem from a particular intellectual environment and are, to a certain extent, historically contingent. The "War on Terror" clearly exemplifies this situation. This expression had, in 2001, no legal meaning on his own. It was a pure politically aesthetic metaphor, a strategy of violence legitimization that substantially distorted

¹ *Prisoners of War Committee. Minutes. 10:30 A.M. to 12:00*, July 9 1947, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Subject Files Relating to the Preparation of the Geneva Convention, 1946-1949, Box 672.

² Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 382 (1952).

³ Catharine A. Mackinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47:1 HARV. INT'L L. J. 1 (2006) (Arguing that the "War on Terror" – male violence – overshadows systemic and structural forms of private violence which women are the main victims); Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43:1/2 OSGOODE HALL L.J. 171 (2005) (Arguing that the War on Terror is a rhetorical construction aimed at perpetuating relations of domination within the international society).

⁴ Geoffrey Best, "The Restraint of War in Historical and Philosophical Perspective" in J.M. Delissen & Gerard J. Tanja, eds., *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven*, Dordrecht, Martinus Nijhoff, 1991, 3, 6.

legal categories within the discipline of international law⁵. With the passage of time, the expression “War on Terror” took political, and legal, form. “Increasingly, defining the battlefield is not only a matter of deployed force, but also a rhetorical and legal claim”⁶. This is also the case with the individuals against whom the war is fought. The legal terminology used to describe the belligerents, as is the case with the “(un)lawful combatants”, has a massive impact on how the war will be politically, legally and militarily conducted⁷. So, the “War on Terror” is now a subcategory of a more global international legal vocabulary describing and qualifying the borders of the warfare between states and so-called private actors such as terrorists networks.

In the American context, the “War on Terror” does not necessarily constitute an exceptional historical moment for international law and international humanitarian law. If we take a broader perspective on the issue of the tumultuous historical relationship between international law and the American government, one can discover that the actual behaviour of the American government with regard to international law in the fight against terrorism is not purely contingent. Rather, it reflects a deep trend that began at the creation of the country at the end of the 18th century.

The U.S. government’s vision of international law has historically been defined not through the identification of its national self-interests and their subsequent translation in legal vocabulary, but through the encounter with America’s “Other”⁸. Here, the “Other” is loosely understood as a polity, a group of individuals, a State or a political project with global and universal aspirations conflicting or at least diverging from American ideals and visions for the world. In that sense, the actual “War on Terror” has put at the forefront of the political arena individuals and societies with conflicting views and aspirations about “how the world ought to be”. This encounter brutally materialized itself in September 2001. In reaction to these events, the American government has redefined its stance toward international law by developing and modernizing international legal doctrines such as the concepts of “preemptive strikes”, “unlawful combatants”, and “War on Terror”. This new legal vocabulary did not stem from an evaluation of American national interests carried out in a purely objective and scientific way, but rather, in the

⁵ Frédéric Mégret, “War”? *Legal Semantics and the Move to Violence*, 13:2 EUR. J. INT’L L. 361, 363-365 (2002). See also, Javid Rehman and Saptarshi Ghosh, *International Law, US Foreign Policy and Post-9/11 Islamic Fundamentalism: The Legal Status of the ‘War on Terror’*, 77 Nordic J. Int’l L. 87 (2008).

⁶ David Kennedy, *Modern War and Modern Law*, 12 INT’L LEGAL THEORY 55, 74 (2006).

⁷ Manooher Mofidi and Emy E. Eckert, “Unlawful Combatants” or “Prisoners of war”: *The Law and Politics of Labels*, 35 CORNELL INT’L L.J. 59 (2003). For the opposite argument, see Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025 (2003).

⁸ On this idea, see Peter Maguire, *Law and War: An American Story*, New York, Columbia University Press, 2000 at 6.

encounter with this terrorist “Other”. In the process, the American administration has redefined its relationship with international law and how it now construed international legal argument to justify a certain type of behaviour⁹.

As we said, the “War on Terror” does not constitute an exceptional moment if put in a broader historical perspective¹⁰. By looking into the recent history of the United States, especially the Cold War era, one can again identify important insights as to how the political, ethical as well as the juridical systems of the United States responded to the anxieties provoked by this destabilization process of national redefinition in the encounter with the “Other”¹¹. The American national identity and attitude toward international law is constituted by difference¹². The U.S. administration’s posture toward international law will be informed by this encounter with the “Other”. The construction and deployment of the international legal arguments by the American government will thus reflect this need to reaffirm and redefine U.S. identity. Encountering the “Other” triggers a moment of tension in the American posture toward international law between competing universalistic and particularist¹³ or nationalistic values¹⁴. Ideology alleviates these tensions by providing a clear and unified vision of what ought to be. This overarching principle resolves these contradictions by appealing to a superior ideal such as the fight against the communists, the defense of freedom and democracy or the “War on Terror”. In the encounter with the “Other”, the borderlands between universalistic and particularistic visions of international law are

⁹ The “Torture memos” are eloquent examples of this trend to redefine international law to answer “new” threats. Here, terrorism justifies, in the opinion of the American administration, the recourse to different types of interrogation techniques on prisoners, the avoidance of the application of the Geneva Conventions, and the expansion of the borders of pain. Jay S. Bybee, *Re: Standard of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President*, U.S. Department of Justice, Office of the Legal Counsel, August 1 2002; John C. Yoo, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States. Memorandum for William J. Haynes II, General Counsel for the Department of Defense*, U.S. Department of Justice, Office of the Legal Counsel, March 14 2003; John C. Yoo and Robert J. Delahunty, *Application of Treaties and Laws to al Qaeda and Taliban Detainees, Memorandum for William J. Haynes II, General Counsel, Department of Defense*, U.S. Department of Justice, Office of Legal Counsel, January 9 2002.

¹⁰ For example, Stephanie Carvin argues that the “source of the argument against applying the Geneva Conventions to the prisoners caught in Afghanistan emerged well before 9/11 and can be traced to the end of the Cold War. These doctrines emerged out of the work of the “new sovereigntists” and out of the frustrations guided by coalition warfare” in Stephanie Carvin, *Linking Purpose and Tactics: America and the Reconsideration of the Laws of War During the 1990s*, 9 INT’L STUD. PERSP. 128 (2008).

¹¹ Donald Bloxham, *Beyond “Realism” and Legalism: A Historical Perspective on the Limits of International Humanitarian Law*, 14:4 EUR. REV. 457, 463 (2006).

¹² Walter L. Hixson, *The Myth of American Diplomacy: National Identity and U.S. Foreign Policy*, New Haven, Yale University Press, 2008, 5.

¹³ Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?*, 18:3 EUR. J. INT’L L. 379 (2007) (Arguing that international law is the bearer of a paradox between universalism and imperialism – the domination of a particularistic vision – and that this divide is constitutive of the discipline of international law).

¹⁴ On the divide between universalistic and nationalistic values in the American international legal academia, see Alejandro Lorite Escorihuela, *Cultural Relativism the American Way: The Nationalist School of International Law in the United States*, 5:1 (art. 2) GLOBAL JURIST FRONTIERS 4 (2005).

blurred and disappear. International law becomes intermingled with American foreign policy goals. In this international legal no man's land, international law becomes associated with the defense of the U.S. national identity, and U.S. national identity becomes associated with international law. Consequently, the defense of the former also signifies the defense of the latter and vice-versa. The U.S. government's particularistic vision of the world becomes universalistic. There is, in the end, a perfect identity between international law and the U.S. administration in terms of the US practice of international law.

This is exactly what happened during the negotiations over the adoption of the Geneva Conventions of 1949 on the laws of war¹⁵. The encounter of the American administration with the Soviet "Other" in the aftermath of the Second World War provoked anxieties among U.S. officials as well as within the American population. The U.S. government was facing an alternative and competing universalistic and humanistic political project in stark opposition to the liberal and democratic proposal defended by Washington. In Geneva, American representatives discovered the revolutionary and anti-universalistic – as defined by U.S. legal advisors – Soviet attitude toward international law. U.S. diplomats quickly reached the conclusion that the Soviet project for international law constituted a threat for the world as well as for the American effort to institutionalize and legalize international relations in the wake of the Second World War¹⁶. Throughout the preparatory meetings leading up to the Geneva Conference of 1949, American representatives slowly developed a suspicious attitude toward the representatives of the Communist world. U.S. representatives linked their views on international humanitarian law to the global project of defense of Western democratic and liberal values against the Communist threat. In that sense, the Geneva Conventions of 1949 incorporated American anxieties created by its encounter with the Soviet "Other". International humanitarian law thus became part of a global political scheme aimed at defending and promoting a U.S. identity which the Western world was grounded. The war that broke out in the Korean peninsula in the months following the signature of the Geneva Conventions only contributed to strengthening this trypth formed by international law, U.S. anxieties and the defense and expansion of Western values. In 1949, American diplomats used international legal vocabulary to objectify and justify the deployment of a global ideological vision for the preservation of Western values against the Communist threat.

¹⁵ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12 1949, 75 U.N.T.S. 31; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12 1949, 75 U.N.T.S. 85.; *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, Aug. 12 1949, 75 U.N.T.S. 135 [*Third Convention*]; *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Aug. 12 1949, 75 U.N.T.S. 287.

¹⁶ On this project, see Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights*, Cambridge, Harvard University Press, 2005; G. John Ikenberry, *After Victory: Institutions, Strategic Restraints, and the Rebuilding of Order after Major Wars*, Princeton, Princeton University Press, 2001, chap. 6.

This paper is divided in 3 sections. The first section will briefly sketch the history of international humanitarian law and the key role played by the International Committee of the Red Cross in the process of revision of IHL in the aftermath of the Second World War. The second section will set the ideological stage on which the American government developed and deployed its vision of a renewed international legal system. In the third section, we will analyze, from the perspective of the American government, the making and unmaking of three set of norms during the Diplomatic Conference of 1949: the prohibition against the use of weapons of mass-destruction, the legal regime applicable to the repatriation of prisoners of war (PoW) repatriation and the problem encountered in ratifying the Geneva Conventions. This article ends with some discussions on the insights this historical examination of the drafting of the Geneva Conventions provides us with some insights into the idea of an American tradition of international law.

First, it is necessary to briefly clarify what is meant by the American tradition of international law. A distinction must be made between two American traditions of international law. The first one is academic. It is composed of the different theoretical and academic trends/movements that have influenced the reflection on the discipline of international law within the United States¹⁷. The second – the object of this study – focusses on how historically the foreign policy of the American government has influenced international law¹⁸. However, the border between the two traditions is not perfectly defined. Many individuals are involved in ongoing debates in both traditions¹⁹. This paper will focus on American

¹⁷ For a survey, see Jean-Pierre Cot, *Tableau de la pensée juridique américaine*, 110:3 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 537 (2006)(FR.); David Kennedy, “The Twentieth-Century Discipline of International Law in the United States” in Austin Sarat, Bryant Garth et Robert A. Kagan, eds., *Looking Back at Law’s Century*, Ithaca, Cornell University Press, 2002, 386; Iain Scobbie, *Jurisphilia/Jurisphobia: U.S. Approaches to International Law Theory* 100 AM. SOC’Y INT’L L. PROC. 166 (2006); Mark Weston Janis, *The American Tradition of International Law: Great Expectations, 1789-1914*, Oxford, Oxford University Press, 2004.

¹⁸ Carl Landauer, *The Ambivalence of Power: Launching the American Journal of International Law in an Era of Empire and Globalization*, 20 LEIDEN J. INT’L L. 325 (2007); Jonathan Zasloff, *More Realism about Realism: Dean Acheson and the Jurisprudence of the Cold War Diplomacy*, (2007) Public Law & Legal Theory Research Paper Series, Research Paper 07-01, University of California in Los Angeles (UCLA) School of Law, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955353>; Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years’ Crisis*, 77 S. CAL. L. REV. 583 (2004); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32:1 N.Y.U.J. INT’L L. & POL. 1 (1999); Jonathan Zasloff, *Abolishing Coercion: The Jurisprudence of American Foreign Policy in the 1920’s*, 102 YALE L.J. 1689 (1993); Francis A. Boyle, *American Foreign Policy toward International Law and Organization: 1898-1917*, 6:2 LOY. L.A. INT’L & COMP. L.J. 185 (1983); John M. Raymond and Barbara J. Frischholz, *Lawyers Who Established International Law in the United States, 1776-1914*, 76 A.J.I.L. 802 (1982).

¹⁹ John Yoo and Jack Goldsmith are two notorious cases. For a discussion on the blurred frontier between the academia and the governmental functions and how individuals play on both sides of the fence, see Alejandro Lorite Escorihuella, *supra* note 14 (Identifying the rise of a nationalist school of international law in the United States in the past two decades).

governmental institutions involved in the making of American foreign policy. In particular the role played by the legal advisors of the Department of State and to the advisors of the Judge Advocate General office in the process of translating the anxieties provoked by the encounter with the Soviet “Other” into international legal vocabulary and practice. The Geneva Conventions of 1949 are but one example of how U.S. anxieties became embedded in international legal vocabulary. The diplomatic process leading up to the Geneva Conference of 1949 did not escape Cold War anxieties.

1. En route to Geneva

A. A Short History of International Humanitarian Law

War has always occupied a paradoxical position in Western thought. On the one hand, war and violence have generally been considered, at least since the rise of liberalism, as an abnormal situation, an unnecessary aberration from what we call normality. On the other hand, we have accepted and internalized the idea that, notwithstanding their anomalous character, wars will be fought and sometimes, they will have to be fought²⁰.

The Geneva Conventions did not escape this liberal dilemma. On the contrary, they reproduce it. They aim at “humanizing” violence and at inculcating soldiers with an ethic of killing. In other words, the laws of armed conflict have always had to square military necessity and humanitarian ideals²¹. International humanitarian law provides the combatants with a juridical immunity against prosecution for certain kinds of large-scale violence, a “privilege to kill”²². International law has construed war as a separate sphere of human activities in which the normal rules of social life are suspended or do not operate. This “legal construction serves to channel violence”²³. In that sense, international humanitarian law does not humanize wars, but rather, it has been deliberately formulated so as to facilitate and legitimize violence in time of war²⁴.

²⁰ Michael Howard, *War and the Liberal Conscience*, New Brunswick, Rutgers University Press, 1986, 3-7 and 115-135

²¹ Sheng Hongsheng, *The Evolution of Law of War*, 1 CHINESE J. INT’L POL. 267, 269 (2006) (Arguing that international law originated in war).

²² Nathaniel Berman, *Privileging Combat? Contemporary Conflict and Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1, 3 (2004).

²³ *Ibid.*, 5.

²⁴ Chris Af Jochnik and Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, 50 (1994).

Usually, international humanitarian lawyers begin their narrative of the history of IHL with the advent of organized religions²⁵, in old civilizations²⁶ or in classical Western philosophy²⁷. An immemorial history seems to provide IHL with more depth when it comes to developing an argument or to simply justify the existence of restraints on the conduct of warfare. After making several stops in the Middle Ages and the Renaissance eras²⁸, the conventional narrative paradoxically marks the point of departure of the codification process of international humanitarian law in the United States²⁹. In 1863, the government of the United States adopted a formal set of rules for the conduct of war, *Instructions for the Government of Armies of the United States in the Field*³⁰ or “Lieber Code”. The code was primarily a response to the expansion of the U.S. army. It provided the young and inexperienced volunteer officers with a set of clear guidelines and rules to be applied on the battlefield³¹. In doing so, the U.S. government hoped to prevent, as much as possible, unnecessary and disproportionate acts of violence by its armies, which in turn that might prevent a possible reconciliation between the parties at the end of the war.

From the foundation of the Red Cross Movement in 1863 and the adoption of the first Geneva Convention of 1864³² to the Conference of Saint Peterburgh in 1868³³, the decades following the adoption of the Lieber code saw a phenomenal explosion in the number of projects aimed at codifying and developing international humanitarian law in Europe. These developments culminated in the Hague

²⁵ Gregory P. Noone, *The History and Evolution of the Law of War prior to World War II*, 47 NAVAL L. REV. 176 (2000); Jean Guillermand, *Les fondements historiques de la démarche humanitaire, I^{ère} partie. Le courant religieux*, 76:805 REVUE INTERNATIONALE DE LA CROIX-ROUGE 44 (1994) (Fr.).

²⁶ C.F. Amerasinghe, *History and Sources of the Law of War*, 16 SRI LANKA J. INT’L L. 263 (2004).

²⁷ Jean Guillermand, *Les fondements historiques de la démarche humanitaire, II^e partie. L’humanité et la pensée philosophique*, 76:806 REVUE INTERNATIONALE DE LA CROIX-ROUGE 216 (1994) (Fr.).

²⁸ Among a vast literature, see the contributions of Robert C. Stacey, Geoffrey Parker, Harold Selesky and Gunther Rothenberg in Michael Howard, George J. Andreopoulos and Mark R. Shulman, eds., *The Laws of War: Constraints on Warfare in the Western World*, New Haven, Yale University Press, 1994.

²⁹ Dietrich Schindler, *International Humanitarian Law: Its Remarkable Development and Its Persistent Violation*, 5:2 J. HIST. INT’L L. 165, 167 (2003) (Identifies five important periods in the modern history of IHL. The first era, qualified as a period of “remarkable development”, spans from 1860 to 1914. The second era, the interwar period, has seen IHL being neglected. The third era stretches out from 1945 to 1960. This period saw the adoption of the Geneva Conventions and afterwards, the stagnation of the development of IHL during the early Cold War. Between 1960 and 1980, there was a renewed interest in IHL. This fourth period has also seen the United Nations becoming more involved in questions relating to *jus in bello*. From this fourth period onward, international humanitarian law became a central concern of the international community).

³⁰ *General Orders N° 100 – Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, Apr. 24 1863, online: International Committee of the Red Cross <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>

³¹ Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92:2 AM. J. INT’L L. 213, 214 (1998).

³² *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, Aug. 22 1864, 129 C.T.S. 361.

³³ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight*, Nov. 29 – Dec. 11 1868, 138 C.T.S. 297.

Conferences of 1899³⁴ and 1907³⁵ where detailed conventions on the laws of war were adopted³⁶. Thereafter, only few conventions were adopted in the interwar era³⁷ and they did not provide chancelleries and armies with a comprehensive system of laws and regulations in warfare³⁸.

The tragic events of the Second World War confirmed the chronic incapacity of the positivist and voluntarist approaches to international law to regulate the use of violence within the international society³⁹. For some contemporary commentators like Josef L. Kunz, a collaborator of the American Journal of International Law, total war combined with the development in the techniques and technologies to wage war led to a disastrous decline of civilization in the conduct of war⁴⁰. The design of a comprehensive set of international norms was becoming absolutely crucial in order to ensure the “survival of our Western Christian civilization, if not of mankind”⁴¹. These circumstances favoured the emergence of what Professor Devin O. Pendas calls the legalist paradigm of war: the recognition that law and justice will play a key role in the prevention and termination of wars as well as in the design policies in the wake of the Second World War. In response to the anxieties identified by Kunz, the legalist paradigm was developed in response to the breakdown of the long-standing civilizational consensus among European powers and elites on how to wage war⁴². In 1945, the International Committee of the Red Cross took the lead in this process of legalizing warfare.

³⁴ *Final Act of the International Peace Conference*, The Hague, Jul. 29 1899, 187 C.T.S. 453, 187 C.T.S. 459, 187 C.T.S. 456., 187 C.T.S. 429.

³⁵ *Final Act of the Second Peace Conference*, The Hague, Oct. 18 1907, 205 C.T.S. 277, 205 C.T.S. 299, 205 C.T.S. 306, 205 C.T.S. 319, 205 C.T.S. 331, 205 C.T.S. 345, 205 C.T.S. 359, 205 C.T.S. 367, 205 C.T.S. 381, 205 C.T.S. 395.

³⁶ On the United States attitude and participation in these two conferences, see Francis A. Boyle, *Foundations of World Order: The Legalist Approach to International Relations, 1898-1922*, Durham, Duke University Press, 1999.

³⁷ The most important were the *Treaty relating to the Use of Submarines and Noxious Gases in Warfare*, Feb. 6 1922, 16 AM. J. INT'L L. SUPP. 57 (1922); *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, June 17 1925, 94 L.N.T.S. 65; *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Jul. 27 1929, 118 L.N.T.S. 303; *Convention relative to the Treatment of Prisoners of War*, Jul. 27 1929, 118 L.N.T.S. 343 [1929 Geneva Convention].

³⁸ Josef L. Kunz, “The Geneva Conventions of August 12, 1949” in George A. Lipsky ed., *Law and Politics in the World Community: Essays on Hans Kelsen’s Pure Theory and Related Problems in International Law*, Berkeley, University of California Press, 1953, 279, 279 [The Geneva Conventions].

³⁹ Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34:2 AM. J. INT'L L. 260 (1940).

⁴⁰ Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity of their Revision*, 45:1 AM. J. INT'L L. 37, 40-41 (1951) (Kunz didn't define what he meant by “civilization”).

⁴¹ *Ibid.*, 37.

⁴² Devin O. Pendas, “The Magical Scent of the Savage”: Colonial Violence, the Crisis of Civilization, and the Origins of the Legalist Paradigm of War, 30:1 B.C. INT'L & COMP. L. REV. 29, 38 (2007) (Arguing that “the two key pillars of the legalist paradigm – the disconnection of rights from sovereignty and the doctrine of mutual state and individual criminality – emerged as a response to the realization, driven home by the experience of mass-destruction and atrocity perpetrated in the course of global war, that sovereign nations-state were not simply insufficient guarantors of the basic rights associated with “civilization”, but that they could often be their worst

B. The ICRC and the Diplomatic Conference of 1949⁴³

Well before the end of the Second World War, during the winter of 1945, the International Committee of the Red Cross signaled to the Allies its intention of convoking an international conference to discuss the review and possible modernization of international humanitarian law⁴⁴. The ICRC was – and still remains an anomalous and unique actor in international politics⁴⁵. As a Swiss-based non-governmental organization (NGO), the ICRC plays quasi-political and diplomatic functions alongside sovereign states. While the United States seemed to be comfortable with the idea of having a NGO participating in the diplomatic process, there was a feeling of uneasiness in the British delegation. They felt that the ICRC, a private organization, was playing a role at odds with the normal and formal diplomatic and international legal processes.

The Red Cross Committee wanted to proceed speedily for the organization feared being considered soft on violence. In addition, the Committee was carrying the weight of its silence over the fate of Hitler's racial victims since 1933 as well as over the allies unrestricted bombings against German cities. These events had presented huge moral dilemmas for the ICRC during its wartime operations⁴⁶. The formalistic and legalistic outlook promoted by the President of the ICRC, Max Huber, during the interwar era seeped into the working of the committee. As a result, even before the outbreak of the Second World War, the ICRC adopted controversial stances on many international issues. For example, in the context of the Second Italo-Abyssinian war (1935-1936), Max Huber refused to disclose information on Italy's violation of the 1925 *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*⁴⁷. Huber wanted to preserve ICRC's privilege access to chancelleries. To do so, the organization had to remain neutral even in the face of grave and patent violations of international humanitarian law by a state. Given the consequences of its records, the ICRC had good reasons to speed up the negotiations over the revision of the laws of war in the aftermath of WWII. The reputation of the organization was at stake.

violators" (pp. 52-53)). Pendas borrowed the expression "legalist paradigm" from Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed., New York, Basic Books, 2006, 61-68.

⁴³ On the history of the Geneva Conference of 1949, see Geoffrey Best, *War and Law since 1945*, Oxford, Oxford University Press, 1994 [*War and Law*] and Catherine Rey-Schyrer, *Les conventions de Genève de 1949: Une percée décisive*, 2^{ième} partie, 81:835 REVUE INTERNATIONALE DE LA CROIX-ROUGE 499 (1999) (Fr.).

⁴⁴ Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, London, Weidenfeld and Nicolson, 1980, 289-290.

⁴⁵ Geoffrey Best, *War and Law*, *supra* note 43, 90.

⁴⁶ Neville Wylie, *The Sound of Silence: The History of the International Committee of the Red Cross as Past and Present*, 13:4 DIPLOMACY & STATECRAFT 186, 192 (2002).

⁴⁷ *Ibid.*, 196.

The task facing the ICRC was complex. On September 5 1945, Max Huber⁴⁸, the then Acting President of the International Committee of the Red Cross, requested the assistance of the states that were signatories of the 1929 Geneva Convention on the Treatment of Prisoners of War and of National Red Cross societies in collecting information on the problems faced by states, the solutions they developed and the loopholes they identified in the existing *corpus juris*. This request was part of an effort with to revise existing conventions on the laws of war and to develop new norms⁴⁹. However, there was a profound malaise within the ICRC and certain countries about the organization of diplomatic conferences for discussing the revision of IHL. This unease stemmed from the fact that the Second World War was still fresh in the memory of government officials and military as well the public. On the one hand, States were about to start negotiating the future rules of warfare while on the other hand, they were working toward the establishment of a world peace through the United Nations system⁵⁰. There was also another major problem. The technological development accomplished in the field of armament and military tactics during the war and the totalitarian nature of the Second World War questioned the foundations and effectivity of international humanitarian law in the future modern wars⁵¹.

Huber's letter was received and studied with extreme caution by the U.S. Department of State (DoS). Upon its reception, DoS officials decided to initiate a process of revision of international humanitarian conventions within the American government in collaboration with the War, Navy, Justice, and Interior Departments and the American Red Cross⁵². In the first months of the revision process, the American government showed little concern about Soviet participation in the diplomatic conference. The Second World War had just come to an end and tension between the two former allies had not yet erupted⁵³. In the DoS, the revision of the laws of war was seen as a purely technical and legal procedure free of political of domestic and international political debates. Some members of the Department of State saw "no reason for bothering the President to approve a technical commission [for] there was no statutory

⁴⁸ Yves Sandoz, *Max Huber and the Red Cross*, 18:1 EUR. J. INT'L L. 171 (2007) (Discussing the contribution of Max Huber to the International Committee of the Red Cross).

⁴⁹ *Max Huber, Acting President of the International Committee of the Red Cross, to James F. Byrnes, Secretary of State*, September 5 1945, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386.

⁵⁰ Catherine Rey-Schyr, *Les conventions de Genève de 1949: Une percée décisive*, 1^{ère} partie, 81:834 REVUE INTERNATIONALE DE LA CROIX-ROUGE 209, 214 (1999) (Fr.).

⁵¹ *Ibid.*, 215

⁵² *Albert Clattenburg Jr., Chairman of the American Delegation, to the Secretary of State*, August 26 1947, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386, 9 [*Albert Clattenburg Jr., Chairman of the American Delegation, to the Secretary of State, August 26 1947*]; *Donald Russel, Assistant Secretary of State, to James Forrestal, Secretary of the Navy*, November 6 1945, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386.

⁵³ Geoffrey Best, *War and Law*, *supra* note 43, 90.

requirement”⁵⁴. This view was shared by almost every state invited by the ICRC to participate in the revision of the laws of war in 1945. Early in the revision process, many participants genuinely thought that the violence of the war could be alleviated by simply revising, modernizing and expanding the scope of international humanitarian law. The rise of the Cold War in the following months will dramatically change the perception that DoS officials had of the whole diplomatic process and more broadly of IHL.

Although the American government was not preoccupied by the Soviet Union’s attitude toward the project of revision of the laws of war, Moscow nonetheless remained a key player in the mind of the legal advisors of the DoS. Indeed, Moscow was the only country – with the notable exception, but for different reasons, of the United Kingdom – whose behaviour was scrutinized and reported on by American officials throughout the diplomatic negotiations that began in 1946 and ended in 1949 with the adoption of the Geneva Conventions. How the Soviet Union would react to the invitation of the ICRC was the first question U.S. officials asked. In December 1945, Andreï Vychinski, the Soviet representative to the United Nations, explained Moscow’s attitude toward the ICRC’s project in a speech given at the United Nations.

In the opinion of the Soviet government an unfavorable impression would be made on world public opinion if already in the first days of peace the governments of the chief countries which participated in the war should concern themselves with the preparation of such an agreement concerning war prisoners⁵⁵.

The American administration was extremely interested – but not yet preoccupied – in the Soviet Union’s attitude toward the laws of war. Moscow’s participation in a formal conference charged with their revision. Likewise, for the new laws to be meaningful and truly “international”, it would be necessary that the Soviet Union ratifies the conventions resulting from these conferences. Military considerations were of course involved in these calculations: how could the armies of the world go to war if there were to apply dramatically different sets of rules in warfare? There was also some implicit concern about the unity/fragmentation of international humanitarian law on the U.S. side. In the wake of the Second World War and in the ongoing process of institutionalization and legalization of interstate relations, nations involved in revising the laws of war, as well as the ICRC, also had to show their commitment to

⁵⁴ *Unknown (with the concurrence of Hilldring, Fahy and Hickerson, legal advisors to the Department of State) to Dean Acheson*, March 20 1947, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386.

⁵⁵ *Averell Harriman, American Ambassador to the Soviet Union, to the Secretary of State*, December 12 1945, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386.

preventing future wars. As we will see, the unity of international humanitarian law became an important issue for the American government. With the advent of the Cold War, U.S. officials working in the DoS slowly came to the conclusion that the unity of international law should be read in conjunction with the preservation of Western values against the communist threat. The United States – as the sole power able to face Soviet Union – had thus inherited the responsibility to protect the unity of international law against anti-universalistic theories promoted by Moscow while at the same guaranteeing the adherence of Moscow to these conventions.

During the months following the reception of Huber’s letter, U.S. legal advisors had not yet reached this conclusion. On the contrary, they felt that the Soviets could hardly contribute to the revision process initiated by the ICRC, since they had no experience in applying the laws of war conventions. The U.S.S.R. had not ratified the 1929 Geneva Convention on the treatment of prisoners of war and had no official relations with the International Committee of the Red Cross. Therefore, their role in preliminary discussions was superfluous⁵⁶. However, U.S. officials nonetheless recognized that the preliminary discussions should develop more realistic and practicable propositions than the ones that had been put forward by some national societies of the Red Cross. According to U.S. officials, more “realism” would enhance the likelihood of Soviet ratification of the future conventions, something the U.S. government considered essential. DoS advisors were convinced that a pragmatic approach to the revision of the laws of war would enhance the chances of Moscow ratifying the treaties⁵⁷.

After six months of discussions, the American administration finally agreed to participate in preliminary discussions on the revision of the laws of war. In January 1946, the Truman administration, under the impulsion of Dean Acheson⁵⁸, then Under Secretary of State, the ICRC’s letter and the American Red Cross, created the Interdepartmental Prisoners of War Committee (POWC) bringing together representatives from the War, Navy, Justice, State and Interior departments to discuss the ongoing

⁵⁶ *Dean Acheson, Acting Secretary of State, to the American Embassy in Moscow*, January 25 1946, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386.

⁵⁷ *United States Participation in Preliminary Unofficial Discussions Concerning the Revision of Conventions Governing Treatment of Prisoners of War*, December 19 1945, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386.

⁵⁸ *Dean Acheson, Acting Secretary of State, to Harold L. Ickes, Secretary of the Interior*, January 25 1946, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386.

problem of how to treat the prisoners held by the Americans in Europe, in Asia and the United States⁵⁹. More specifically and as we will see, the experience acquired during the last World War had clearly showed the need to revise the Geneva Convention of 1929 applicable to prisoners of war⁶⁰. The inadequacy of certain norms combined with an uneven application of the convention convinced U.S. officials of the need to develop a workable and realist set of norms related to the treatment of PoW.

Prisoners of war were one of the major post-war problems the U.S. administration had to face on both domestically and internationally. U.S. officials were preoccupied by the treatment of ten of thousands of foreign prisoners of war captured during the Second World War and detained by the U.S. army in a vast network of camps spread across America as well as in Europe and Asia. In terms of the domestic situations, the U.S. Supreme Court had held in the *Yamashita* case⁶¹ that the article 60 of the 1929 Geneva Convention on the Treatment of Prisoners of War⁶² was applicable only to persons who were subjected to judicial proceedings for offenses committed while prisoners of war and not to acts committed before their capture. For the Department of State, this ruling “was inconsistent with the line the Department took in trying to protect Americans under sentence of death in Germany”⁶³. DoS officials were concerned about the protection of U.S. militaries detained abroad and facing criminal charges. The Supreme Court ruling reduced the protection offered to PoW detained by the American army. U.S. government’s officials feared that this decision could send bad signals to foreign armies and governments and had a negative impact on the fate of thousands of U.S. PoW detained abroad. There was thus an urgent need for the U.S. legal advisors of the State Department to reaffirm certain basic international legal principles regarding the treatment of prisoners of war and to modernize some other rules in order to better protect U.S. military captured abroad. The protection of U.S. military was at stake.

⁵⁹ *Untitled document (Interdepartmental Prisoners of War Fact Sheet)*, no date, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 4.

⁶⁰ *1929 Geneva Convention*, *supra* note 37.

⁶¹ *In Re Yamashita*, 327 U.S. 1 (1946).

⁶² *1929 Geneva Convention*, *supra* note 37. Article 60 reads as follow: “At the commencement of a judicial hearing against a prisoner of war, the detaining Power shall notify the representative of the protecting Power as soon as possible, and in any case before the date fixed for the opening of the hearing. The said notification shall contain the following particulars: (a) Civil status and rank of the prisoner; (b) Place of residence or detention; (c) Statement of the charge or charges, and of the legal provisions applicable. If it is not possible in this notification to indicate particulars of the court which will try the case, the date of the opening of the hearing and the place where it will take place, these particulars shall be furnished to the representative of the protecting Power at a later date, but as soon as possible and in any case at least three weeks before the opening of the hearing”.

⁶³ *Bailey to Kuppinger, Memorandum*, February 15 1946, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386.

It is important to note that the discussions leading up to the Geneva Conference of 1949 did not attract the attention of senior policymakers in the Truman administration, with the notable exception of Dean Acheson, then Undersecretary of State who would later become the Secretary of State in 1949. The delegations that represented the United States government from 1945 to 1949 in the negotiations over the Geneva Conventions were composed of military officials from the Department of Defense and legal and political advisors from the DoS. Most of the delegates occupied minor positions within their respective departments. Given the importance of IHL nowadays in U.S. politics, it is rather surprising that the U.S. delegation was devoid of high ranking officials. This was probably due to the technical aspects surrounding the laws of war. Revising international law in the wake of the Second World War was not a top-priority of American foreign policy, reflecting the lack of interest shown by the Truman administration between 1945 and 1949. However, for the growing community of international lawyers and for international law as a whole, the Geneva diplomatic conferences were part of a greater scheme aimed at rebuilding the discipline and the fundamental structures of international law.

In the interim, the ICRC was tirelessly pursuing its work. After the sending of Huber's letter in the fall of 1945, the Red Cross Committee organized a preliminary conference in Geneva in the summer of 1946. More than 140 delegates from national Red Cross societies – with the notable exception of the Soviet, Japanese and German national Red Cross and Red Crescent societies – and the League of Red Cross societies – a distinct organization from the ICRC that was engaged in a covert battle against the ICRC for the control of the international humanitarian movement – gathered to discuss ICRC proposals for a future diplomatic conference. Overall, the various proposals submitted by the ICRC were well received by the national delegations⁶⁴. Following this conference, the ICRC worked on new projects of humanitarian conventions and continued exchanging information with national governments. The ICRC, national delegations and national Red Cross societies will finally gather for another round of diplomatic negotiations at the Seventeenth International Red Cross Conference held in Stockholm at the end of August 1948.

Under the Presidency of Folke Bernadotte⁶⁵, President of the Swedish Red Cross society, the Swedish Conference brought together representatives from 52 national Red Cross societies and 50 governments⁶⁶. The Soviets refused to participate in the Conference because the ICRC had failed to denounce fascists war

⁶⁴ Catherine Rey-Schyr, *supra* note 50, 218.

⁶⁵ Bernadotte will later be assassinated in Jerusalem in September 1948 by a Zionist terrorist group while he was acting as a diplomatic envoy for the Security Council in the Arab-Israeli conflict of 1947-1948.

⁶⁶ Catherine Rey-Schyr, *supra* note 50, 229.

crimes, Nazi concentration camps and for its involvement in the Spanish civil war⁶⁷. Soviet dislike of the ICRC dated back from the Bolshevik Revolution when the ICRC helped people seeking asylum outside Russia to escape the country and protect others from summary execution or some other forms of reprisals by the Bolsheviks⁶⁸. Other communist satellites such as Bulgaria and Hungary followed the Soviet example and refused to participate in the Stockholm conference⁶⁹. The Conference nonetheless adopted projects for four conventions and asked the ICRC to submit them to governments in anticipation of a final conference that would adopt the definitive texts and submit them to states for ratification. Less than a year later, the ICRC held the Geneva Conference which began on April 21 1949.

The conventional narrative of the Geneva process tells us a story in which states were generally sharing a common vision for the humanization of warfare, despite the little difficulties and misunderstanding that arose during a diplomatic conference. This account gives the impression that the different national delegations worked together in an environment free of political and ideological tensions. To a certain extent, these assertions are valid⁷⁰, but the American archival documents consulted reveal a different story. One in which political, ideological and legal considerations were intertwined. For the American administration, the laws of war were integrated into a broader scheme aimed at defending Western values and international law against the spread of Communist ideology. The laws of war became an important tool for legitimizing in the public opinion Cold War military decisions and operations conducted by the U.S. government and for criticizing Communist military practices on the battlefield.

⁶⁷ *Embassy of the Union of Socialist Soviet Republics to Count Bernadotte, President of the Central Committee of the Swedish Red Cross*, August 17 1948, RG – 59, Bureau of Security and Consular Affairs. Records Relating to the Prisoners of War Conference of the International Red Cross Committee, Entry 1555, Lot 59D539, Box 5; François Bugnion, *The Geneva Conventions of 12 August 1949: From the 1949 Diplomatic Conference to the Dawn of the New Millennium*, 76:1 INT'L AFF. 41, 43 (2000).

⁶⁸ *Albert Clattenburg Jr., Chairman of the American Delegation, to the Secretary of State, August 26 1947*, *supra* note 52, 9.

⁶⁹ *Seventeenth International Red Cross Conference at Stockholm, Sweden, August 20-30, 1948. Report of the United States Delegation compiled by William McCahon, Division of Protective Services, Department of State*, December 15 1948, RG – 59, Bureau of Security and Consular Affairs. Records Relating to the Prisoners of War Conference of the International Red Cross Committee, Entry 1555, Lot 59D539, Box 5. [*Seventeenth International Red Cross Conference at Stockholm, Sweden, August 20-30, 1948. Report of the United States Delegation*].

⁷⁰ For instance, see the story told in Geoffrey Best, *War and Law*, *supra* note 43.

2. The U.S. Attitude at the Geneva Conference of 1949

A. A scientific Approach to the Laws of War?

The American delegation defended a fairly humanitarian and legalistic vision of the laws of war in the preparatory conferences leading to the Geneva conference of 1949. They, with many other national delegations and representatives, intended “to mitigate individual suffering in the event of future wars”⁷¹.

This legalistic *façade* however hid deeply entrenched fears within the American administration that the negotiations over the Geneva conventions would become politicized. For example, the Department of State urged the U.S. delegation representing the United States in Stockholm in August 1948 to focus on the traditional humanitarian work performed by the Red Cross and to strongly oppose any move to discuss what it deemed “political questions”⁷². However, what the DoS defined as “political questions” remains a mystery since the U.S. archives are silent on this point.

Equally mysterious is the fact that the final report of the U.S. delegation on the Geneva Conference did not discuss important question being raised by the arrival of the Cold War. The neutral tone of the report seemed to have followed the instruction given for the Conference of Stockholm held the previous year: not a single word in the report is dedicated to U.S. – Communist issues, despite the fact that Moscow had become a central preoccupation for the U.S. delegation’s legal advisors⁷³.

This seemingly apolitical approach makes for a stark contrasts with the eloquent report prepared by Albert H. Clattenburg, who was then the Chairman of the American delegation to the first Conference of Governmental Experts held in Geneva in 1947. In this secret and illuminating report, Clattenburg provided the Secretary of State with a detailed description of the various issues that could not be included in the official unclassified official report. According to Clattenburg, the American delegation had adopted a realist and pragmatic approach to the laws of war. Contrary to their Europeans counterparts coming from the liberated countries bearing a conventional wisdom on the history of the laws of war, the

⁷¹ *Seventeenth International Red Cross Conference at Stockholm, Sweden, August 20-30, 1948. Report of the United States Delegation*, *supra* note 69, Bureau of Security and Consular Affairs. Records Relating to the Prisoners of War Conference of the International Red Cross Committee, Entry 1555, Lot 59D539, Box 5.

⁷² *Annex C – Position Paper in Seventeenth International Red Cross Conference at Stockholm, Sweden, August 20-30, 1948. Report of the United States Delegation*, *supra* note 69.

⁷³ *Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims at Geneva, Switzerland, April 21 – August 12, 1949. Report of the United States delegation prepared by William McCahon*, October 3 1949, RG – 59, Bureau of Security and Consular Affairs. Records Relating to the Prisoners of War Conference of the International Red Cross Committee, Entry 1555, Lot 59D539, Box 5.

American delegation seemed to never have considered international humanitarian law as a panacea in times of conflict.

These [Europeans from liberated countries] delegates exhibited to a surprising degree reliance upon international legislation as a means of eliminating evil from the minds of man, and of confidence that precisely the correct formula would prevent a dishonorable enemy from warning [sic] the interpretation of such legislation to mean whatever might suit him⁷⁴.

For the American administration, the revision of the Geneva conventions was serving two purposes. Firstly, there was the traditional humanitarian commitment. U.S. officials shared the opinions of their foreign counterparts on the humanitarian purposes of the conventions under discussions. However, the American delegation's humanitarian "convictions" were imbued with a strong dose of realism. The purposes of such conventions were to effect some mitigation, "even if slight, in the suffering of individuals by setting up a standard of decency which no government will want to openly violate"⁷⁵. This official (but secret) position adopted by the American delegation at the Geneva conference of governmental experts in 1947 openly contradicts the conventional wisdom on the origins and purposes of the laws war. In fact, Clattenburg seems to recognize that violence in times of war remained taboo, and that there was nothing international law could do about it. At best, it was able to compel states and armies to hide their wartime violence from public scrutiny.

Secondly, the laws of war were also important in maintaining the morale of soldiers, prisoners of war and civilian populations in times of conflict. Clattenburg's thoughts are worth quoting at length:

To the weaker nations, to the members of the armed forces, to populations in areas likely to be overrun by hostile troops, the humanitarian conventions represent a sort of insurance policy. They hope not to collect on it but it helps allay fears. The negotiation of such agreements has become part of the normal pattern of behaviour of governments. To proclaim that it is futile to follow this standard or to attempt to renegotiate the insurance will not only heighten the impact of the fear [...] but might add to those of desperation. And certainly professed failure in the lesser field would impair confidence in the possibility of success of the United Nations in the larger field of trying to forestall entirely any war more serious than a local revolution or a tribal dispute⁷⁶.

Contrary to the official report on the 1949 Geneva Conference forwarded to the Secretary of State in the fall of the same year, the Soviet Union and its Eastern European satellites were already key players in the mind of the American representatives. From 1947 onward, the Communist bloc representatives

⁷⁴ Albert Clattenburg Jr., *Chairman of the American Delegation, to the Secretary of State, August 26 1947*, *supra* note 52, 7.

⁷⁵ Albert Clattenburg Jr., *Chairman of the American Delegation, to the Secretary of State, August 26 1947*, *supra* note 52, 15.

⁷⁶ *Ibid*, 15-16.

participating in the preparatory conferences tried to pass a resolution, the so-called “peace resolution”, aiming at prohibiting the use of war as a means of settling dispute and the use of weapons of mass-destruction. Even though this might be considered as a strategic move by the Communist bloc in 1947 – the Soviet Union exploded its first atomic bomb only in 1949 – discussions on these issues nonetheless created some important diplomatic problems for the U.S. government. The Communist argument underlying this resolution was relatively simple and straight-forward: why is it necessary to discuss prisoners of war and civilians’ protection since the United Nations organization was established to prevent war⁷⁷? The American delegation was facing a dilemma. On the one hand, a vote against the resolution would obviously be interpreted as a vote for the continuance of war as a political weapon. On the other hand, allowing such an important “political issue” to be dragged into the discussions over the revision of the laws of war might derail the negotiations and prevent states from reaching an agreement. “The basic, continuing problems involved in the humanitarian conventions are legal, military, administrative and, of course, humanitarian. In other words, they are intrinsically technical, not political”⁷⁸.

Clattenburg’s assertion reveals two important and closely related things on American attitude. Firstly, the U.S. representatives wanted to keep a positivistic, indeed scientific approach to the negotiations of the Geneva, since, it was the view of many American representatives, practical military problems required practical legalistic solutions. Secondly and consequently, the American delegation hoped to avoid any “political” interferences within the negotiations process. Communist ideology and anti-universalistic philosophies had to be kept away from the table of negotiations in order to preserve the “neutrality” and the objectivity of the whole diplomatic process.

U.S. officials seemed to have considered international law as a pure and abstract form of normativity, detached from social realities and that can be modelled according to certain needs and purposes. This technical – or positivistic – view of international law was precisely the idea of international humanitarian law that the U.S. legal advisors defended throughout the whole diplomatic negotiation leading up to the adoption of the Geneva Conventions. In arguing from an objective “technical” and even a “scientific” standpoint, the American government was conceptually placing its arguments outside the realm of the conference, i.e. outside the reach of political subjectivity. Rejections of Soviet arguments were based on

⁷⁷ For a similar reason, the International Law Commission of the United Nations refused to add the laws of war on its agenda the day before the opening of the Geneva Conference of 1949 in Hersch Lauterpacht, *supra* note 2, 360.

⁷⁸ Albert Clattenburg Jr., *Chairman of the American Delegation, to the Secretary of State, August 26 1947*, *supra* note 52, 9.

the idea that the U.S. government was arguing from a truly universal position free from subjectivity⁷⁹. It was defending a “true” international law against the Soviet vision of international humanitarian which was, according to U.S. officials, dogmatic, ideological and openly anti-universal. In that sense, technical and positivistic international humanitarian law was construed as a liberal and anti-ideological answer to a different and competing vision about the laws of war proposed by the Soviet Union. In other words, the “science” of international humanitarian law objectified U.S. ideological vision and Cold War anxieties during the Geneva Conference. To Soviet dogmatism, the U.S. government, in spite of itself, developed its own ideological – scientific and positivistic – vision of international humanitarian law. However, throughout the diplomatic process, the American government will discover its Soviet “Other”. In this process, it will refine and reinforce its ideological vision about the future international humanitarian law. This hardening of the American attitude toward the Soviet Union and *vice-versa* at the Geneva Conference evolved in parallel with the hardening of East-West relations on the global stage. In other words, the rise of the Cold War informed the conception of international humanitarian law of the American delegation. As a result, the Geneva Conventions incorporated U.S. Cold War anxieties.

The British delegation shared a common vision of IHL with the U.S. legal advisors despite the fact that the British government had its own, though unclear, agenda on the issue of IHL. The similarity of the views between the two allies contributed to the consolidation of America’s vision of the Soviet “Other” during the negotiations.

B. American Attitude toward the British Ally

During the preparatory meetings leading to the Geneva Conference of 1949, the U.S., British, and Canadian governments⁸⁰ shared their thoughts on several issues, in particular the questions of the treatment of prisoners of war. However, the three allies disagreed on many substantive issues⁸¹. They were far from acting as a uniform bloc. For example, the U.S. delegation didn’t share the view of their British colleagues on the responsibilities of a transferring power towards prisoners of war. The Americans

⁷⁹ Three contemporary commentators – Gutteridge, Kunz, and Pictet – shared this highly technical and even scientific vision of IHL in their early comments – which were consequently extremely descriptive – on the conventions. See Joyce A. Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. Y.B. INT’L L. 294 (1949); Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT’L L. 462 (1951); Josef L. Kunz, *The Geneva Conventions*, *supra* note 38.

⁸⁰ McCahon, *Department of State, to Hebert, Counselor at the Canadian Embassy, Memorandum of Conversation*, October 7 1946, RG – 59, Central Decimal File, 1945-1949, 514.2A12/1-145 to 514.2 Geneva/8-2347 (File 514.2A16 International Red Cross Diplomatic Conference, Geneva), Box 2386.

⁸¹ *Prisoners of War Committee, Informal Exchange of Views between POWC and British Experts*, May 17 1948, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Subject Files Relating to the Preparation of the Geneva Convention, 1946-1949, Box 678.

believed that in cases where PoWs were transferred by the captor to an associated belligerent, the captor state retained responsibility for the proper application of the Geneva Conventions towards those transferred. The British disagreed with that position, since U.S. proposal required some kind of international supervision to assess the legality of the transfer. From a technical standpoint, it was almost impossible for a state to monitor adequately the behaviour of an other state. From a more legalistic viewpoint, the British simply argued that this kind of monitoring also implied going against the sacrosanct principle of state sovereignty⁸².

Difference of opinion of specific legal issues were of no concern for the American governments compared to the behaviour of the British delegation during the whole diplomatic process. Whitehall adopted a damaging attitude for its diplomatic interests throughout the whole process of preparation of the Geneva Conventions. In the course of events, British delegates revealed themselves to be inelastic and to have adopted a “self-damaging legalism which was to persist, increasingly, almost to their end”⁸³. The meticulousness, inflexibility, and intransigence of British delegates was criticized by all the other delegations. The British were, in the opinion of U.S. delegates, the principal factor delaying the committees’ work. They were ignoring decisions reached at Stockholm in August 1948. In addition, during the conference, they submitted numerous amendments to almost every article. Amendments that often argued for extensive redrafting and major changes. Many delegations were irritated by this behaviour⁸⁴. The Americans were worried by the unilateralist position adopted by the British Foreign Office. “Their [British] efforts during [the] week which in effect was [an] attempt [to] substitute British position for [the] Stockholm draft met with complete setback. Apparent[ly], British [delegates are] losing votes, thus reducing the[ir] potential to help us on some major points we were relying on”⁸⁵. The matters were further complicated by the uneasiness of the British government to collaborate with the International Committee of the Red Cross. Whitehall believed that the laws of war were only matters of high politics. The ICRC action on the ground and growing diplomatic role was considered as an interference, moreover

⁸² *Gallman, American Embassy in London, to the Secretary of State, February 18 1948, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Subject Files Relating to the Preparation of the Geneva Convention, 1946-1949, Box 678.*

⁸³ Geoffrey Best, “Making the Geneva Conventions of 1949: The View from Whitehall” in Christophe Swinarski, ed., *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l’honneur de Jean Pictet*, The Hague, Martinus Nijhoff, 1984, 5, 6 [View from Whitehall].

⁸⁴ *U.S. Consulate in Geneva to the Secretary of State, May 2 1949, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Executive Division, 1920-1975, Box 3 [U.S. consul to the Secretary of State, May 2 1949].*

⁸⁵ *Ibid.*

by a non-British private entity, in the management of alien prisoners of war and national security matters⁸⁶.

However, notwithstanding these critics, the British government remained the most important ally of the United States throughout the negotiation process. They shared a similar attitude of suspicion toward the U.S.S.R. and worked in close collaboration on important issues such as the treatment of prisoners of war, the use of weapons of mass-destruction and indiscriminate bombings.

3. American Attitude toward the Soviet Union

International law was split between two universalistic competing ideologies⁸⁷. This was the conclusion that Professor Quincy Wright, advisor to Justice Jackson at the Nuremberg trials, reached in 1954. His remarks were sound to the extent that they shed some light on a trend that would have deep influence on the construction of international law during the Cold War era. However, for the legal advisors working for the DoS and the Department of Defense, the ideological antagonism identified by Wright was already the intellectual environment within which they were working on international legal issues since the end of the Second World War.

The discussions over the Geneva Conventions did not occur in a political vacuum. On the contrary, the Geneva Conventions reflected the emerging ideological battle between the Western and the Communist blocs. International humanitarian law became a problem that had reached beyond the mere issues of international legal techniques and vocabulary. The emerging world of the Cold War introduced a new question into the discussions over the negotiations of the Geneva Conventions : what kind – Western or Communist – of laws of war will be incorporated in these international conventions? This historical context marked by an ideological rivalry constituted the juridical, political, and intellectual environment in which the new laws of war were negotiated and developed before being introduced into the Conventions. In that sense, the Cold War colonized the whole diplomatic process as well as the norms that were included into the Conventions⁸⁸.

⁸⁶ Geoffrey Best, *View from Whitehall*, *supra* note 83, 7-8.

⁸⁷ Quincy Wright, *International Law and Ideologies*, 48:4 AM. J. INT'L L. 616 (1954).

⁸⁸ For similar reflections with regard to the colonization of human rights by the Cold War anxieties, see *Oral History Interview with Durward V. Sandifer*, May 29th 1973, Harry S. Truman Library, 100. Sandifer believed “that the cold war did color the nature of the debate that took place [in the United Nations Human Rights Commission] »; Rein Müllerson, *Human Rights Diplomacy*, Londres, Routledge, 1996, 116; Louis Henkin, *The Universal Declaration and the Cold War*, 97:2 AM. PHIL. ASS'N NEWSL. 90 (1998).

The encounter with the Soviet “Other” was decisive in how the American government defined international humanitarian law and deployed this vision throughout the diplomatic process leading to the adoption of the Geneva Conventions. Soviet law, as well as the political and military power of the USSR, was challenging American and Western values and legal systems⁸⁹ by promoting what was considered by many U.S. legal advisors as a non-universal international legal system based on Marxist states sharing common values and ideology⁹⁰. As Professor Kurt Wilk put it in one of the rare article on the impact of the Cold War on the system of international law, “confronted with these challenges, the universal validity of international law appears no longer as an existing phenomenon that may be traced back to its origins and on to its eventual completion”⁹¹. Although they had inherited humanitarian tradition associated with the laws of war, the norms finally included in the Geneva Conventions of 1949 were also the product of contingencies. Post-1945 international humanitarian law thus stemmed from a particular historical context squeezed between the traumatism of two world wars and the advent of the Cold War. The challenge that the American delegation faced in Geneva was to guarantee the development and the modernization of the laws of war while preventing communist ideology from penetrating and polluting the international humanitarian law of the future.

The expansion of Soviet totalitarianism in Europe and Asia in the years following the end the Second World War became a permanent source of anxieties for the U.S. government as well as for American political and juridical institutions and values⁹². Domestically, the nature of the Soviet regime became closely associated with the Nazi system⁹³. In the U.S. legal community, these two menacing totalitarian, coercive and arbitrary regimes were considered as the antithesis of the American constitutional system⁹⁴. “The Nazi example implied that the road to hell is always there, always possible”⁹⁵. The mere existence of the Soviet regime constituted a potential threat to the American institutions that needed to be fought domestically.

⁸⁹ Harold J. Berman, *The Challenge of Soviet Law*, 62:2 HARV. L. REV. 220 (1948) and Harold J. Berman, *The Challenge of Soviet Law: III. Law of New Type*, 62:3 HARV. L. REV. 449 (1949).

⁹⁰ *Ibid.* à la p. 668.

⁹¹ Kurt Wilk, *International Law and Global Ideological Conflict: Reflections on the Universality of International Law*, 45 A.J.I.L. 648, 648 (1951).

⁹² For example, Fritz Morstein Marx – a specialist of totalitarian regime and legal commentator – believed that the imminence of a Third World War created a sense of anxiety that made him feared an anti-democratic drift in the U.S. in Fritz Morstein Marx, *Effects of International Tension on Liberty under Law*, 48 COLUM. L. REV. 555 (1948).

⁹³ Les K. Adler and Thomas G. Paterson, *Red Facism: The Merger of Nazi Germany and Soviet Russia in the American Image of Totalitarianism, 1930's – 1950's*, 75:4 AM. HIST. REV. 1046 (1970).

⁹⁴ Herman Belz, *Changing Conceptions of American Constitutionalism in the Era of World War II and the Cold War*, 59:3 J. AM. HIST. 640, 641 (1972)..

⁹⁵ Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 YALE J.L. & HUMAN. 171, 219 (2000).

U.S. juridical, political and social institutions needed to adapt themselves to the Communist “Other”, for the shadow of totalitarianism was always there, even in the United States⁹⁶.

Domestic anxieties were also shared by the American foreign policy-makers. The Soviet Union represented a double-menace for the American government⁹⁷. U.S. officials feared the spread of Soviet military power as well as Moscow’s appeal for revolution in the non-communist world⁹⁸. According to American officials, Western values were under a state of global siege. Taking the example of the United Nations, the Secretary of State, George C. Marshall, feared the weakening of U.S. leadership in world politics, the postwar allied unity and the newly established United Nations.

...the warmongering campaign in the UN [of the USSR] is designed to weaken our world leadership and to prevent the UN from being effectively used as a means of pressure against communistic expansion. It is intended to arouse fears and develop indecision and hesitation on our part.⁹⁹

A firm response against the global threat of communism was required and international law constituted one of the medium that could be used to carry this message around the world. The American government was the only possible leader for this mission. “Since it so, a first phase of our quest for peace must be to restore our moral influence [...] We [the United States] shall, I hope, continue to be imbued with a righteous faith and a sense of mission in the world”¹⁰⁰. In dealing with its Cold War anxieties, the U.S. government contributed to the insertion of “ideology” into the Geneva Conventions and to frame the debate over the renewal of the laws of war in Cold War terms.

In the early days of the Geneva Conference of 1949, the U.S. delegation was surprised by “Soviet behaviour”. They did not object to the draft articles under discussions and even agreed to work in

⁹⁶ David Ciple, *Liberalism in the Shadow of Totalitarianism*, Cambridge, Harvard University Press, 2006; Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C.L. REV. 1193 (1998); Richard, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423 (1996).

⁹⁷ *Address to Be Made by John Foster Dulles before the National Publishers Association, January 17th 1947*, Papers of Benjamin V. Cohen, Library of Congress, Box 8, Folder: John Foster Dulles.

⁹⁸ For Michael Hunt, American officials feared communist revolution, because it was carrying a radically different political project than the one that guided the American revolution. “Revolution was a solemn affair, to be conducted with a minimum of disorder, led by respectable citizens, harnessed to moderate political goals, and happily concluded only after a balanced constitution, essential to safeguarding human and property rights, was securely in place. In other words, a successful revolution was inextricably tied in the minds of Americans to methods and goals familiar from their own revolution and their own political culture” in Michael Hunt, *Ideology and American Foreign Policy*, New Haven, Yale University Press, 1988, 116 and 124.

⁹⁹ *Memorandum for the Secretary of Agriculture – Resume of World Situation (prepared by Secretary Marshall)*, November 12th 1947, RG – 59, Decimal File, 1945-1949, 711.61 – 1-147 to 711.61 – 4-3048, Box 3321.

¹⁰⁰ *Northwestern University Commencement Address to Be Delivered by John Foster Dulles at Evanston, Illinois, on June 18th 1947*, Papers of Benjamin V. Cohen, Library of Congress, Box 8, Folder: John Foster Dulles,.

collaboration with the Spanish. As it will be confirmed later on, the American delegates had anticipated that the Soviet delegation would play the role of the “great humanitarians and possibly endeavor to embarrass those who oppose working drafts on practical and legal ground”¹⁰¹.

The American attitude towards the Soviet Union was firmly in place before the conference even started. Acheson was convinced that the Soviet delegate would use the Conference as a “sound board [for] call[ing] further attention to East-West controversial issues”¹⁰². On the one hand, all the delegations knew that the Conventions would have any value without Soviet participation. On the other hand, the Soviet absence from the negotiating table at the two previous conferences of 1947 and 1948 greatly increased, in the opinion of U.S. legal advisors, Soviet bargaining power at the Geneva conference of 1949 “by putting a premium on their mere attendance and sharpening up the necessity of their concurrence in the final drafts”¹⁰³.

Despite the cordial tone that seems to have characterized the discussions between Soviet and American representatives¹⁰⁴, there were tensions between the two delegations. For example, on May 13 1949, in an article published in *Pravda*, the official newspaper of the Soviet communist party, a journalist strongly criticized British and American positions. The former was described as a colonialist and imperialist state striving to limit the conventions while the latter was qualified as uncooperative and systematically opposed to all Soviet proposals that “one would think [...] would [have] receive[d] support [sic] all civilized honest people”¹⁰⁵. Diplomatic euphemisms hid a deeper ideological division between Washington and Moscow. According to the archives of the American delegation, three issues were at the heart of American foreign policy during the diplomatic negotiations that led to the adoption of the Geneva conventions and their subsequent implementation: the legal constraints on aerial bombardments

¹⁰¹ *U.S. Consulate to the Secretary of State, May 2 1949, supra* note 84.

¹⁰² *Dean Acheson to Berlin and London (secret telegram)*, March 30 1949, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 4.

¹⁰³ *Albert Clattenburg Jr., Chairman of the American Delegation, to the Secretary of State, August 26 1947, supra* note 52, 11.

¹⁰⁴ *American Consulat in Geneva to the Secretary of State*, July 3 1949, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Subject Files Relating to the Preparation of the Geneva Convention, 1946-1949, Box 677. The Soviet behaviour was described as follow: “more significant was approach Soviet followed endeavor gain point. Most cordial. No desk pounding. Referred to the fact that on most issues this Conference US-USSR together particularly effort maintain so far as possible Stockholm draft. General Slavine [Soviet Chief of Mission] in almost pleading tone urged in closing remarks mutual appreciation and respect for other all future dealings”.

¹⁰⁵ *American Embassy in Moscow to the Secretary of State*, May 13 1949, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Subject Files Relating to the Preparation of the Geneva Convention, 1946-1949, Box 677.

considering the advent of the atomic bomb during the Second World War, the problem of repatriating of prisoners of war, and the U.S. ratification of the Geneva Conventions.

4. The Geneva Conventions Enter in the Cold War

A. Aerial Bombardments and the Atomic Bomb

The arrival of air power radically modified the way military strategists thought about the war. The advent of aerial bombardment was accompanied by a sense of awe and foreboding, for technology had transported the war behind enemy lines¹⁰⁶. New technology of war was eroding the distinction between the military and the civilian. For example, the Zeppelin raids over London during the First World War put the legality of aerial bombardments and the relationship between civilian populations and war¹⁰⁷ at the forefront of the discussion on IHL.

In an era of total war and aerial bombardments, we witnessed in the first half of the twentieth century two contradictory reconceptualizations of the population located behind the enemy's lines. On the one hand, since the civilian populations were essential to the war effort, they could consequently be conceived as a potential target. On the other hand, civilian populations were, in the aftermath of the First World War, conceptually feminized and described by lawyers as a vulnerable and powerless mass of indistinct people deserving protection¹⁰⁸. But, for the military and politicians, this new reality was simply incorporated in their strategy for war under expressions such as air defence, strategic bombing. This contested picture of civilian populations in times of war would permeate the Geneva Conventions and will be defended by the American delegation throughout the negotiation process. Nazi attack on international law during Second World War will become all more powerful when harnessed to the Soviet threat¹⁰⁹.

International law was – and still is – caught between the opposing doctrine of military necessity and humanitarian ideals. Military officials often blurred the frontiers between military necessity and humanitarianism by justifying less accurate bombings – the question whether the bombings were really

¹⁰⁶ Tami Davis Biddle, "Air Power" in Michael Howard, George J. Andreopoulos and Mark R. Shulman, eds., *supra* note 28, 140, 140.

¹⁰⁷ Charles S. Maier, *Targeting the Cities: Debates and Silences about the Aerial Bombing of World War II*, 87:859 INT'L REV. OF THE RED CROSS 429, 434 (2005).

¹⁰⁸ Amanda Alexander, *The Genesis of Civilian*, 20 LEIDEN J. INT'L L. 359 (2007).

¹⁰⁹ Mark Mazower, *Dark Continent: Europe's Twentieth Century*, New York, Vintage, 2000.

accurate or was thought to be remained open – on the need to undermine enemy’s population morale¹¹⁰. This problem was already evident during the First World War. It became salient during the Second World War which took to a new level aerial bombardments, their impacts on civilian population and consequently, the demand for new international norms to regulate them. As Chris Af Jochnik and Roger Normand recognized it, “if civilian morale was a justifiable target, then in practical terms, no bombing could be legally condemned”¹¹¹.

To avoid this legal deadlock, the American government introduced during the Second World War the idea of precision bombings targeting industrial and other “strategic” or “sensitive” areas considered as necessary to the enemy’s war effort¹¹². This modification in the legal terminology employed to describe aerial bombardments did not really change the nature of these attacks. It simply created room for the apparition of new legal vocabulary, such as “collateral damage”, to describe “accidental” deaths occurring in the civilian populations. However, “precision bombings” subtly shifted the terms of the debate on aerial bombings and more globally, on the use of indiscriminate bombardments in times of warfare. While initially aerial bombings were subjected to the tests of necessity and proportionality, the idea of “precision bombings” shifted the emphasis of the analysis. Implicit in the concept of “precision bombings” – precision was a relative term during the Second World War – is the idea that the belligerent has made everything possible to mitigate the effects of his aerial bombardments on the civilian populations. For the military, these bombings are, thus, “necessary” and “proportional” before the occurrence of the bombings. In that sense, “precision bombings” seem to be at first sight acceptable within the narrow military context, since it creates a disjuncture between the cause – “good” bombing – and the effects – indiscriminate killings within the civilian populations. Since the bombings are inherently “good”, the deaths can only be attributed to human, mechanical and/or technical errors occurring *during* the bombing, not to the military planners as such. Because the terminology of “precision bombings” implicitly confers a sense of legality or at least, of legitimacy, to the actual bombings, these bombings are not submitted to the same scrutiny of the “regular” aerial bombardments. They are evaluated within their narrow and technical context.

This is the vision that the U.S. government and its allies of the Second World War defended during the negotiations over the Geneva Conventions. This point was crucial, for the U.S. government – among others – had made extensive use of incendiary bombs against German and Japanese cities causing

¹¹⁰ This led Lester Nurick to affirm, in 1945, that the noncombatant “is legally subject to almost unrestricted artillery and naval bombardment” in Lester Nurick, *The Distinction between Combatant and Noncombatant in the Law of War*, 39:4 AM. J. INT’L L. 680, 696 (1945).

¹¹¹ Chris Af Jochnik and Roger Normand, *supra* note 24, 88.

¹¹² Charles S. Maier, *supra* note 107, 434.

widespread devastation and condemning tens of thousands of people to incineration¹¹³. The American government appeared to want to avoid an open condemnation of its practices during the Second World War. As Leaster Nurick of the Judge Advocate General's Department put it in 1945, "when it [aerial bombardment] was profitable to do so, belligerents have not generally refrained from bombing because of vague doubts as to legality"¹¹⁴. This was important since the Nazi were being tried for war crimes in Nuremberg during the drafting of the Geneva Conventions, although not for indiscriminate bombings. Professor Dunbar recognized that "it is significant that no attempt was made by the Allies at Nuremberg to stigmatise as unlawful the method of aerial bombing employed by Germany which included the indiscriminate use of flying bombs and rockets"¹¹⁵. Also, it is probable that the American certainly wanted to keep its military options opened in future wars: strategic bombings had become incredibly important and constituted the main way to deploy nuclear weapons.

The Soviet delegation, as the U.S. representatives had anticipated, introduced at the Geneva Conference a proposed resolution condemning weapons of mass-extirmination, and by extension aerial bombings. The Soviet Union and its allies never stopped condemning and criticizing the fact that the Conference limited itself to the revision of the rules for the protection of war victims (prisoners of war, civilians, wounded, etc.) without revising the rules pertaining to the general conduct of hostilities as such¹¹⁶.

American delegates didn't really know whether the expression "mass-extirmination" included the atomic bomb or not.

Although SOVDEL [Soviet Delegation] avoided direct reference to secret weapon and refused to give concrete examples of cases intended to be covering [sic] by phrases "means of exterminating the civilian population", it is abundantly clear from debate on article 29A that Soviet [sic] is seeking to outlaw aerials [sic] bombardment by characterizing [sic] as a serious crime¹¹⁷.

U.S. position on the issue "of means of exterminating the civilian population" became deeply entrenched and were in open opposition to Soviet views. This created a feeling of uneasiness among the delegations present at the Conference about how should the International Committee of the Red Cross handle the

¹¹³ *Ibid.*, 439.

¹¹⁴ Lester Nurick, *supra* note 110, 689.

¹¹⁵ N.C.W. Dunbar., *The Legal Regulation of Modern Warfare*, 40 TRANSACTIONS OF THE GROTIUS SOCIETY 83, 89 (1954).

¹¹⁶ François Bugnion, *Droit de Genève et droit de La Haye*, 83 INT'L REV. OF THE RED CROSS 901 (2001) (FR.) [*Droit de Genève et droit de La Haye*].

¹¹⁷ *American Consulate in Geneva to Secretary of State*, June 18 1949, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Executive Division, 1920-1975, Box 3.

issues of indiscriminate bombings and the use of atomic weapons¹¹⁸. In a long memorandum, Dean Acheson, the U.S. Secretary of State, in 1949, urged the American delegation to “kill” the highly anticipated Soviet resolution on this issue.

Nonetheless, Acheson strongly believed and urged the U.S. delegation to reject the Soviet proposal since the control of atomic energy was already under the jurisdiction of the UN Commission of Atomic Energy¹¹⁹. He wanted to avoid what international legal scholars nowadays call the fragmentation of international law through the multiplication of international organizations for the control¹²⁰. However, the Soviet stance on the issue would prove to be somehow contradictory because, few weeks after the adoption of the Conventions, on August 29 1949, Moscow executed its first official atomic test. U.S. foreign policy was caught between an internationalization that threatened to undermine the primacy of their position in the field of nuclear energy and the desire to internationalize in order to maintain their supremacy in this field. This echoed back to the wartime problems and the making of the first American nuclear bomb which was developed without the cooperation of Moscow. In addition, American suspicions toward Soviet intent on nuclear issues were further reinforced by the disclosure of Soviet penetration of the Manhattan project.

Acheson argued that a convention on the prohibition of atomic weapons, standing alone, provided no assurances that the Soviet or any other country would develop its own atomic weapon. He doubted that nations possessing atomic weapons would effectively destroy all its arsenal. Furthermore, Acheson doubted “that nations not known to have atomic weapons, but who might have them, would carry out their obligations” or even, that nations would be prevented from manufacturing those weapons¹²¹. He was worried about the security needs of the United States – and the firm opposition of the Joint Chief of Staff to any prohibition on the use of the atomic bomb¹²² – since such a ban on nuclear weapons “would not

¹¹⁸ In April 1950, the ICRC confirmed its uneasiness in dealing these two subject-matters in an “appeal” to the parties to the Geneva Conventions while the ICRC revealed that it wasn’t competent and that the laws of war are the responsibility of states in François Bugnion, *Droit de Genève et droit de La Haye*, *supra* note 116, 912.

¹¹⁹ *Dean Acheson to the American Consulate in Geneva*, July 8 1949, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Subject Files Relating to the Preparation of the Geneva Convention, 1946-1949, Box 677 [*Dean Acheson to the American Consulate in Geneva*, July 8 1949].

¹²⁰ Mario Prost and Paul Kingsley Clarke, *Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?*, 5:2 CHINESE J. INT’L L. 341 (2006) (Arguing that international organizations are more “shapers” that “makers” of international law and their multiplication is therefore not a source of fragmentation).

¹²¹ *Dean Acheson to the American Consulate in Geneva*, July 8 1949, *supra* note 119.

¹²² *Minutes of Conference Held in State Department at 4:00 P.M., July 7, 1949*, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Subject Files Relating to the Preparation of the Geneva Convention, 1946-1949, Box 669 [*Minutes of Conference Held in State Department at 4:00 P.M., July 7, 1949*].

protect the world against atomic warfare". The Secretary of State rejected the failure in reaching an agreement over the control of atomic weapons onto Moscow's shoulders. Acheson believed that the Soviet resolution was an obvious attempt to seek endorsement of the repeatedly rejected Soviet position in a forum where the members did not have the necessary technical competence to discuss atomic energy related issues. More troublesome for the Americans, this resolution was the fact that the resolution aimed at publicly embarrassing them¹²³.

Following Acheson's intervention, the American delegation became more anxious about the Soviet proposal to ban atomic weapons. The American consulate in Geneva began to probe the views of other delegations participating at the conference. Extensive discussions were held with French, British and Latin American representatives in order to secure their support for an eventual vote against the Soviet resolution to ban weapons of mass-extermination¹²⁴. Few days before the closing of the diplomatic conference, the American delegation was still anxiously preparing its argument against the Soviet proposal. The emphasis was not put on its legality as such but rather, on the fact that the United Nations had already inherited the responsibility to manage atomic energy and that the "curtain countries" had stubbornly refused to cooperate with the rest of world. American delegates needed to avoid giving the impression that responsibility for failing to reach an agreement on the use of these weapons was shared. Soviet Union had to be the only bearer of the failure to reach an agreement on this issue¹²⁵.

The Soviet resolution was finally submitted to the plenary meeting on August 9, three days before the closing of the Conference. In his speech, the Soviet representative, General Slavine, remarked that the "draft Civilian Convention does not protect the civilian population against the effect of modern weapons of warfare, such as the atomic bomb, and bacteriological, chemical, and other means of mass destruction"¹²⁶. Slavine called upon national delegates to condemn the use of such methods of warfare and to declare that these weapons of mass extermination were contrary to elementary principles of

¹²³ *Ibid.*

¹²⁴ *American Consulate in Geneva to the Secretary of State*, July 11 1949, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Subject Files Relating to the Preparation of the Geneva Convention, 1946-1949, Box 677

¹²⁵ *Dean Acheson to the American Consulate in Geneva (for Yingling)*, August 5 1949, RG – 59, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Subject Files Relating to the Preparation of the Geneva Convention, 1946-1949, Box 677.

¹²⁶ *Verbatim Report of the Thirty-Four Plenary Meeting held on August 9 1949 at 10 a.m. Draft Resolution Proposed by the Delegation of the Union of Soviet Socialist Republics (CDG/PLEN.131) and motion of inadmissibility of that draft (CDG/PLEN.177)*, August 9 1949, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 7 at p. 3 [*Draft Resolution Proposed by the Delegation of the Union of Soviet Socialist Republics*].

international law¹²⁷. What seemed to be clear for Moscow, at least in appearance, divided international lawyers of that time and still today. While almost every international lawyers had condemned the use by Nazi Germany of V1 and V2 missiles against the civilian population of London, the same international lawyers remained silent or at least nebulous and vague on the legality of the use of the nuclear weapons¹²⁸. Josef Kunz provided the readers of the *American Journal of International Law* with a rather provocative response as to why international lawyers had refused to condemn the use of the atomic bomb. “The reason for this silence seems to be the fact the atomic bombs were first used by the United States”¹²⁹.

Hersch Lauterpacht, one of the most prominent human rights lawyers of that period, expressed mixed feelings on the issue. He linked the use of atomic weapons to the question of aerial bombardments. He concluded that the legality both were beyond a categorical answer. International law was powerless to prevent the use of the weapons and that their regulation was the responsibility of governments¹³⁰. Even the International Court of Justice (ICJ) was forced to face this question. It struggled with the issue and in the end, the Court failed to reach a satisfying answer from an international legal standpoint¹³¹. Even the ICJ could not escape the conundrum that the American delegation had to face during the Geneva Conference. With the Cold War and the communist challenge, U.S. legal advisors succeeded in defusing the crisis over weapons of mass extermination. Particularly, they came off with a simple solution: qualifying the issue as political and excluding it from the realm of international humanitarian law. In that sense, by refusing to incorporate any reference to weapons of mass extermination such as nuclear armaments in the Geneva conventions, the United States government contributed to the colonization of the Geneva conventions by its Cold War anxieties.

The American delegation along with British and Commonwealth countries support, strongly opposed the Soviet draft. Lieutenant Colonel Hodgson, the Australian representative, rejected the resolution on procedural grounds, arguing that it had not been previously submitted to the Bureau of the international conference and was not within the ambit of the original invitation from the Swiss Federal Council. He also reminded the members that this resolution had been rejected at the meeting held in Stockholm in 1948. According to Hodgson, the Soviet delegation was using a “back-door method [for] getting the

¹²⁷ *Ibid.*, 3.

¹²⁸ Josef L. Kunz, *The Laws of War*, 50 AM. J. INT’L L. 313, 333 (1956).

¹²⁹ *Ibid.*

¹³⁰ Hersch Lauterpacht, *supra* note 2, 369-373.

¹³¹ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. 226 (July 8 1996). See also the comment of Martti Koskenniemi, *Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons*, 10:1 LEIDEN J. INT’L L. 137 (1997).

conference to accept something which is completely unacceptable”¹³². After heated discussions, the draft was declared inadmissible by a vote of thirty-five against nine and 5 abstentions.

This situation had created anxieties within the American administration. A ban on aerial bombardments or even an international prohibition on the use of the atomic bomb in future conflicts was a direct challenge to U.S. military doctrine and force structure. The proposal also worked for Soviet Union conventional strength stationed in Europe and Asia. At the request of the Policy Planning Staff and the Office of the Secretary of State, an important study of the practice of bombing civilian populations was prepared in order to provide legal and policy advisors with a clearer picture of aerial bombardments since 1937¹³³. The subject of atomic weapons was considered to be outside the scope of this study. The author’s conclusions defended allies bombings of Germany, Italy and Axis occupied countries. “When the United States Air Forces commenced operations in Europe, they directed their attacks at specific industries and services, particularly at those contributing to the support of the enemy’s armed forces [...] In the course of these operations, civilian casualties were inevitable”¹³⁴. But, the most interesting conclusion developed by the author of this report is the *ex post facto* justification for the bombardments of civilian populations. According to the report, the legality of aerial bombardments could be legally justified if analyzed in conjunction with the idea of total war.

World War II contributed to the classic understanding of the art of war of [sic] a new principle, namely, the principle of capacity for war. Gradually during World War II it came to be recognized that the enemy’s economy and industry, from which the enemy’s armed drew their strength and substance, were essential parts of the enemy’s capacity for waging war and that as such they were valid and important objectives of attack in the all-out effort to win the war¹³⁵.

U.S. government advisors were slowly preparing their country for a war against the Soviet Union. The fate of the free world was in the hands of the American government¹³⁶. The Cold War was thus, in the mind of many American officials, a sort of global state of exception where there was no room for international law, at least, with regards to indiscriminate bombardments and atomic weapons. DoS legal advisors opposition to Soviet proposal on the ban of weapons of mass extermination appeared to be the right decision, for the

¹³² *Draft Resolution Proposed by the Delegation of the Union of Soviet Socialist Republics*, *supra* note 126, 11.

¹³³ Richard S. Paterson, *Bombing of Civilians. A Survey of Policy and Practice since 1937*, Research Project No. 156, May 24, 1950, Division of Historical Policy Research, Office of Public Affairs, Department of State, RG – 59, International Organization Files of Herbert A Fierst, 1946-1954, Entry 697, Lot File 55D560, Box 5 [*Bombing of Civilians. A Survey of Policy and Practice since 1937*].

¹³⁴ *Ibid.*, 90.

¹³⁵ *Ibid.*, 91.

¹³⁶ Public Papers of the Presidents, Harry S. Truman, 1945-1953, *Remarks to a Group of New Democratic Senators and Representatives*, April 6 1949, online : Harry S. Truman Library <<http://www.trumanlibrary.org/publicpapers/index.php?pid=1087&st=&st1=>>.

U.S. government still had room for using its tactical and strategic weapons without being constrained by IHL. The anxieties were multiplied exponentially later in August 1949 when the Soviet Union exploded their first atomic bomb, *First Lightning*, a replica of *Fat Man*, the American atomic bomb that had exploded over Nagasaki four years earlier.

However, the use of indiscriminate bombings and atomic weapons were not the only Cold War subjects over at the Geneva Conference of 1949. In the aftermath of the Second World War, the repatriation of prisoners had become an urgent problems for all the conflict's combattants. With the increasing tensions between the Western and Communist blocs, this issue would sonner or later become another major bone of contention between Moscow and Washington.

B. Repatriation of Prisoners of War

The repatriation of war was a major for the U.S. administration and military. It was a major issue in U.S. public opinion and with the rise of the Cold War, the issue became intermingled with the deeper ideological confrontation with the communists. As with the questions of aerial bombardments and weapons of mass extermination, the Soviet threat and Cold War anxieties provided the ideological context for U.S. legal advisors analysis and dictated the American delegation's legal standing on PoW issues at the Geneva Conference.

The U.S. army captured more than 7 000 000 prisoners of war during the Second World War¹³⁷. It did not base its wartime prisoners of war policy upon reciprocity or the threat of retaliation against American prisoners of war detained in belligerents countries¹³⁸. Notwithstanding, prisoners have always been in a peculiar legal situation in times of warfare caught in an intractable conundrum between the need to secure their protection as prisoners of war and the imperative of achieving war for the detaining army¹³⁹. Consequently, there is always a possibility that the detaining power contravenes the basic rules related to their treatment.

The American army had been generally respectful of the old and established rules of international humanitarian law related to the treatment of prisoners of war. Whereas the Red Army's behaviour during

¹³⁷ Paul Joseph Springer, *American Prisoner of War Policy and Practice from the Revolutionary War to the War on Terror* (May 2006) (Unpublished Ph.D. dissertation, Texas A&M University), 169.

¹³⁸ *Ibid.*, 201.

¹³⁹ Joan Baumont, *Review Article – Prisoners of War in the Second World War*, 42:3 J. CONTEMP. HIST. 535, 536 (2007).

the Second World War rarely bothered about respecting customary international humanitarian law in the treatment of PoW¹⁴⁰. At the Yalta Conference, held in February 1945, the U.S. and Soviet governments agreed to repatriate all citizens, not just prisoners of war, at the end of the war. This encounter with the Soviet “Other” over repatriation shaped the prisoners of war policy that would adopt the American government at the Geneva Conference of 1949 and applied during the Korean war. In the last weeks of the Second World War, the first problems between the U.S. government and Stalin came to light. Moscow was pretending that it was not detaining American PoW while the Americans were arguing that more than 23 000 American PoW were being detained by the Red Army. Although this account remains unsettled¹⁴¹, the treatment of the PoW issue by the Soviet Union left a strong impression from 1945 onward on U.S. policy-makers about the nature of the Communist regime¹⁴². On the other hand, the Soviet Union demanded for its own PoWs to be returned and this included the return of East Europeans combatants to the Red Army.

However, up until the 1949 Geneva Conference, the U.S. government duly applied the repatriation rule contained in article 75 of the 1929 Geneva Convention on the treatment of prisoners of war which provides that every PoW will be repatriated at the end of the conflict. The provision nevertheless remained silent on the country of repatriation. State parties to the Convention seemed to have tacitly agreed that the country of repatriation will be the country of origin of the prisoner of war¹⁴³. However, in Geneva, this question became another important bone of contention between the USSR and the United States.

¹⁴⁰ The Red Army killed, tortured, raped or enslaved thousands of Germans, Eastern Europeans and Japanese PoW during and after the Second World War. For an historical account, see Norman Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945-1949*, Cambridge, Harvard University Press, 1995; Bernard Wasserstein, *Barbarism and Civilization: A History of Europe in Our Time*, Oxford, Oxford University Press, 2007, 356-357. For the official view, see George Ginsburgs, *Laws of War and War Crimes on the Russian Front During World War II: The Soviet View*, 11:3 SOVIET STUD. 253, 278-279 (1960) (Arguing that the Red army was generally respectful of the old and established rules warfare while on controversial issues (guerrillas, resistance, etc.) of international law of warfare, Soviet Union has generally disagreed with its Western counterparts).

¹⁴¹ Timothy K. Nenniger, *United States Prisoners of War and the Red Army, 1944-1945: Myths and Realities*, 66:3 J. MIL. HIST. 761 (2002).

¹⁴² Russell D. Buhite, *Soviet-American Relations and the Repatriation of Prisoners of War, 1945*, 35:3 HISTORIAN 384, 396 (1973).

¹⁴³ The case of the French “Malgré-Nous” (“despite us”) is in this regard very interesting. The “Malgré-Nous” were French from the region of Alsace-Lorraine who were forcibly incorporated in the Wehrmacht right after the annexation of the territory by the Nazi regime. To fill the losses on the Eastern front and in Soviet Union, the authorities of occupation implemented a mandatory draft regime for all young male of the two regions. Those captured by the Red Army were initially considered as German soldiers. It was only after several months of captivity in Soviet gulag that Moscow finally decided to recognize their status of prisoners of war. Their story is told in Gaël Moullec, *Alliés ou ennemis? Le GUPVI-NKVD, le Komintern et les “malgré-nous”: le destin des prisonniers de guerre français en URSS (1942-1955)*, 42:2/4 CAHIERS DU MONDE RUSSE 667 (2001) (Fr.).

It was only at the Geneva Diplomatic Conference of 1949 that the American government and its Western allies slowly changed their minds on the issue of repatriation. With the advent of the Cold War and the decline of collaboration between Soviet Union and the United States, many U.S. officials began to fear an imminent war with the Soviet Union. When this possibility became clear in the minds of the U.S. policy-makers, they sought to introduce more protection for prisoners of war in the Third Geneva Convention of 1949 by broadening the responsibilities of the detaining state toward PoW.

American prisoners of war protection was not the only issue that the American government had to address. As an occupying power in Germany and in Japan, the U.S. administration was also responsible for the security of German and Japanese prisoners of war held, among others, in Soviet labour camps dissiminated across the country. In that sense, the dispute over PoW between the Soviet Union and the United States was taking a worldwide dimension. The interpretation of international humanitarian law thus became dominated by this vision of a Cold War. According to U.S. figures, there were approximately 375 000 Japanese prisoners of war being held in Soviet prisons more than four years after the end of the Second World War in the Pacific¹⁴⁴. The American government sought the help of its British ally and of the ICRC in reaching a satisfactory agreement over the repatriation of these prisoners of war. The Soviet government was apparently using these PoWs as free labour and for propaganda purposes. This further undermined the view that the Soviet Union was respecting the rights of PoWs. For example, Moscow tried some of these prisoners for having allegedly participated in bacteriological warfare against the Red Army¹⁴⁵.

Moscow contested U.S. figures and evidence. TASS, the Soviet news agency, indicated in a press release that the repatriation of Japanese prisoners of war from the U.S.S.R. had been completed in full and accused the United States of detracting the attention of world opinion from the U.S. policy directed “toward the economic and political enslavement of Japan”¹⁴⁶. As it was stated in an unsigned report, there was a “startling discrepancy” of more than 300 000 men between the Supreme Commander of the Allied

¹⁴⁴ *Memorandum of Conversation between Mr. Graves (Counsellor, British Embassy), Mr. Allison (Dept. of State) and Mr. Green (Dept. of State)*, December 30 1949, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 4.

¹⁴⁵ *American Embassy in Tokyo to the Secretary of State*, December 27 1949, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 4.

¹⁴⁶ *Communication of TASS Concerning the Completion of Repatriation of Japanese Prisoners of War from the Soviet Union*, June 9 1950, RG – 59, Bureau of Security and Consular Affairs. Records Relating to the Prisoners of War Conference of the International Red Cross Committee, Entry 1555, Lot File 59D539

Powers (SCAP) and Japanese government statistics and the TASS statement¹⁴⁷. Similarly, treatment of German prisoners of war by the Soviet government was also extremely problematic. Thousands of Germans PoWs were held in labour camps in Soviet Union, tortured and condemned to death following fake criminal procedures¹⁴⁸. This added to U.S. distrust and fears and did not say anything about Soviet adherence and compliance with IHL.

In both cases – German and Japanese – ideology and practical motives played a fundamental role in the treatment of prisoners of war¹⁴⁹. On the Eastern Europe front, ideological, racial considerations (like the enslavement of soldiers for labour) determined the fate of thousands of German – in the case of Germans, the motives were pragmatic – and Soviet prisoners of war¹⁵⁰. For example, thousands of German prisoners of war were used to build the metro in Moscow, construct power plants, railway tracks, and the defence industries located in the Ural mountains¹⁵¹. In this de-humanization process of the enemy, international law and humanitarian consideration simply vanished. On the Western front, even in Germany, a humanitarian ethos survived the ideological considerations on the battlefield. As Professor Mackenzie put it, “the enemy was to a greater or lesser extent a comrade”¹⁵². However, the Pacific war saw sharply different U.S. and Japanese PoW policies. The U.S. military generally respected the 1929 Geneva Conventions, while the Japanese exerted all kinds of violence (torture, enslavement, etc.) against American prisoners of war for pragmatic and xenophobic reasons¹⁵³.

The American government maintained a deeply ambivalent legal position on the issue of PoWs repatriation. In the early months following the end of the Second World War, the American administration agreed with the Soviet Union on repatriation issue – soldiers would be send back to their countries of origin regardless of their wishes. But, with the advent of the Cold War and the negotiation of the Geneva Convention on the Prisoners of War, U.S. legal advisors slowly realized that article 118 of the

¹⁴⁷ *The Repatriation of Japanese from Areas under the Control and Influence of the USSR*, no date, RG – 59, Bureau of Security and Consular Affairs. Records Relating to the PoW Conference of the International Red Cross Committee, Entry 1555, Lot 59D539, Box 4.

¹⁴⁸ *Documentation Concerning German Prisoners of War Sentenced in the USSR, Bonn*, September 1 1950, RG – 59, Bureau of Security and Consular Affairs. Records Relating to the Prisoners of War Conference of the International Red Cross Committee, Entry 1555, Lot 59D539, Box 3 at p. 4.

¹⁴⁹ S. P. MacKenzie, *The Treatment of Prisoners of War in World War II*, 66:3 J. MOD. HIST. 487, 489 (1994).

¹⁵⁰ *Ibid.*, 511-512.

¹⁵¹ Stephanie Carvin, *Caught in the Cold: International Humanitarian Law and Prisoners of War During the Cold War*, 11:1 J. CONFLICT & SECURITY L. 67, 70 (2006).

¹⁵² S.P. MacKenzie, *supra* note 149, 504.

¹⁵³ *Ibid.*, 513.

Third Geneva Convention¹⁵⁴ provides the right to a detaining power to grant asylum to a PoW or at least to offer him the choice of its destination. In a memorandum, U.S. legal advisors produced an extensive review of state practice and the historical development of the laws of war related to the treatment of prisoners of war. This memorandum concluded that prisoners of war had the right to refuse to be repatriated to their country of origin and consequently, they had the right to choose the country of repatriation¹⁵⁵. Some contemporary writers agreed with that position¹⁵⁶. This is a really interesting argument since “it seemed that the drafters of the Geneva Conventions had not considered the fact that some POWs may not wish to return home”¹⁵⁷. In that sense, the new position defended by the U.S. government in Geneva seemed to have been motivated more by Cold War politics and imperatives than by humanitarian considerations. The U.S. position defended by American governmental officials in the years following the adoption of the Geneva Conventions in 1949 starkly contrasts with the Geneva Conventions and its *travaux préparatoires*. However, this line of argument – the PoW has the right to choose where he will be repatriated – did not seem to convince everyone within the U.S. administration. For example, General Dillon, a former representative of the United States at the Geneva Conference of 1947, the Red Cross Conference of 1948 held in Stockholm and the Geneva Diplomatic Conference of 1949, was still arguing in 1951 that the Third Geneva Convention was more “logic[al]” and “clear” because it was establishing absolute standards for the treatment of prisoners of war and giving less latitude and discretion to the detaining power than the 1929 Geneva Convention¹⁵⁸. General Dillon’s dissension from the official line of argument within the U.S. administration exposed the conundrum DoS legal advisors were facing: respecting international humanitarian law or diverting the norms so that they contribute to American effort in the global Cold War. U.S. legal advisors were convinced that they were still sticking to a formal positivistic analysis of international law, since their opinion stemmed from what they perceived to be common sense and reflecting world opinion. Their renewed interpretation of the

¹⁵⁴ The first paragraph of Article 118 reads as follow : “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph. In either case, the measures adopted shall be brought to the knowledge of the prisoners of war”.

¹⁵⁵ *Memorandum. Legal Considerations Underlying the Position of the [sic (incomplete title)]*, September 1 1954, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot 68D69, Box 9 [*Memorandum. Legal Considerations Underlying the Position of the [sic (incomplete title)]*, September 1 1954].

¹⁵⁶ Richard R. Baxter, *Asylum to Prisoners of War*, 30 BRIT. Y.B. INT’L L. 489 (1953) (Baxter was a member of the American delegation to the Geneva Conference of 1949); Carl E. Lundin Jr. *Repatriation of Prisoners of War: The Legal and Political Aspects*, 39 A.B.A. J. 559 (1953) (Lundin was a member of the Office of the Judge Advocate General of the Navy).

¹⁵⁷ Stephanie Carvin, *Caught in the Cold*, *supra* note 151 at 81.

¹⁵⁸ Gerald J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 MIAMI L. Q. 40, 46 (1950).

Geneva Conventions enshrined U.S. conception of individual freedom and liberty while the Moscow's conservative interpretation – the PoW must be repatriated to his country of origin – negated these universal truths.

Moscow attitude toward PoW repatriation was criticized for its intransigence and its literal and positivistic interpretation of article 118 of the Third Conventions¹⁵⁹ which provides that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”¹⁶⁰. According to Soviet reading of the article, every prisoner, without exception, had to be repatriated, with the logical consequence that this might include forcible repatriation for soldiers who resist repatriation. Moscow invoked three reasons to justify its claim¹⁶¹. First, the language used in the Third Convention was preemptory and therefore, it didn't allow a “humanitarian” exception. Secondly, the 1949 Geneva Conference refuse to include in the final draft the Austrian amendment providing that “prisoners of war ... shall be entitled to apply for their transfer to another country which is ready to accept them”. The rejection of the Austrian amendment made the demonstration that states were not willing to develop a different interpretation of the principle of repatriation that departed from the interpretation established in the Geneva Convention of 1929 and by state practice. Finally, article 7 of the Third Geneva Convention of 1949, which provides that no prisoner of war may renounce the rights secured to them under the convention, didn't allow room for humanitarian considerations.

These arguments were contested. In an article published in 1953, Professor Gutteridge – who as member of the British delegation was one of the few women who participated at the Conference – summarized the counter-arguments that could be deployed against the Soviet reading of the Third Convention. First, forcible repatriation was not explicitly included in the Convention. States had the responsibility to repatriate every prisoner of war in his home country. But, in cases where a prisoner was obstinately refusing the repatriation, did the detaining state have the discretionary power to grant asylum to the said prisoner? Secondly, with regard to the Austrian amendment, the rejection of the amendment in 1947 by the Diplomatic Conference did not mean that states had excluded the possibility that individual consideration could, in exceptional case, never be envisaged. Thirdly, Gutteridge underlined the fallacy of the Soviet argument on article 7. It was designed to prevent situations where prisoners of war could forcibly be retained at the conclusion of hostilities on the pretext that they had renounced their rights to

¹⁵⁹ Jan P. Charnatz and Harold M. Witt, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 YALE L.J. 391 (1952).

¹⁶⁰ *Third Geneva Conventions*, *supra* note 15.

¹⁶¹ J.A.C. Gutteridge, *The Repatriation of Prisoners of War*, 2 INT'L & COMP. L.Q. 207, 212-213 (1953) [*Repatriation*].

repatriation. Article 7 was also drafted to prevent prisoners of war from seeking asylum in the detaining country or to ensure the forcible repatriation of PoW who had genuine reasons for fearing political persecution¹⁶². Cold War anxieties and the Korean war convinced U.S. legal advisors and Western international lawyers of the need to develop alternative interpretations of the IHL concerning repatriation of prisoners of war. Firstly, the United States government wanted to protect its soldiers who were involved in the Korean war. Secondly, DoS advisors also wanted to win the battle over world public opinion by putting forward humanitarian arguments in order to discredit the Soviet Union. In that sense, the communist challenge and the rise of a global Cold War constrained the American administration to develop alternative legal arguments and doctrines in order to enable them to better manage the tensions between their responsibilities of leader of the “free world” and the need to adhere to a universal system of international.

The Soviet decision to favour forcible repatriation of its prisoners of war and citizens had important and compelling humanitarian consequences for the American government. First, the U.S. and Soviet governments did not define the meaning of “Soviet citizen” in the Yalta agreement. This created problems as to how to qualify a “Soviet citizen” as such. Those who resided in the territories annexed in 1939-1940 – the Baltic states and Poland – were also claimed by Moscow as Soviet citizens, but the United States never recognized *de jure* Soviet territorial claims in these areas¹⁶³. Thousands of so-called “Soviet citizens” were “repatriated” and sent directly to prisons in contravention of the Third Convention. Moscow appeared to have systematically sent its repatriated soldiers in Gulags¹⁶⁴. Following Stalin’s Order 270 stated that every Red Army soldiers who allowed himself to be captured alive would be considered as a traitor to the motherland¹⁶⁵. These two facts constituted compelling reasons for the U.S. government to refuse to repatriate Communist prisoners of war who didn’t want to go back in their home country. Soviet actions and arguments accentuated U.S. distrust and convinced DoS legal advisors of the need to find alternative legal interpretations and doctrines to fill the loopholes of the Third Geneva Conventions.

Those responsible for U.S. detention camps in Europe and on American soil were also facing major problems with the treatment of Soviet prisoners of war. Hundreds of PoWs detained in camps controlled by the Western allies killed themselves upon being notified of their repatriation to their impending

¹⁶² *Ibid.*, 215.

¹⁶³ Cathal J. Nolan, *Americans in the Gulag: Detention of US Citizens by Russia and the Onset of the Cold War, 1944-1949*, 25 J. CONTEMP. HIST. 523, 532 (1990).

¹⁶⁴ *Ibid.*, 530.

¹⁶⁵ Stephanie Carvin, *Caught in the Cold*, *supra* note 151, 71.

repatriation home¹⁶⁶. For example, over two days in June 1945, 134 Soviet soldiers committed suicide in an Austrian PoW camp. This situation was echoing Marshal Zhukov who bluntly said to General Eisenhower in 1945 that “you have to be a brave man to be a coward in the Soviet army”¹⁶⁷. Discovery of Soviet “inhumanity” compelled many American officials to develop and deploy a new international legal vocabulary and framework to deal with the issue of prisoners of war repatriation. Humanitarianism slowly penetrated the military vocabulary. Admittedly, the American government modified its attitude for military, humanitarian and public opinion reasons. But, it is interesting to note that the encounter with the Communist “Other” on the Korean peninsula convinced the U.S. government to develop new legal arguments and doctrines.

The reality on the battlefields of the Cold War was slightly different from what states had known during World War II. During the Korean War, the American government developed an entirely new system for the confinement of prisoners of war with disastrous results¹⁶⁸. Because Korean and Chinese communist prisoners did not behave in the traditional or expected manner – numerous riots erupted in U.S. camps –, the United States was forced to create new methods of detention. The problem was that the prisoner of war treatment offered by the U.S. had no effect whatsoever upon the treatment of American PoW detained by the Communist armies. Communists seemed to be unconcerned by the fate of their own prisoners beyond their propaganda value. Consequently, any threat of retaliation against Communist PoW were useless¹⁶⁹.

The complexity of this issue was further aggravated by the fact that the UN, not the United States army, assumed the responsibility for the international military intervention in Korea¹⁷⁰. The newly created United Nations military force further complicated the task of U.S. officials. They had to determine whether the U.N. – a new international legal actor¹⁷¹ – was a party to the Geneva Conventions and if it was the case, what were its duties and international obligations. There was another important problem, intimately related to the previous one, with which DoS lawyers had to deal with. Neither North Korea, Communist China, nor the Soviet Union had ratified the Geneva Convention of 1949. So, how would the Geneva Conventions be applied by the belligerents in the Korean conflict? This problem was partly

¹⁶⁶ Cathal J. Nolan, *supra* note 163, 531-532.

¹⁶⁷ G.I.A.D. Draper, *An Outline of Soviet Military Law*, 5 MIL. L. REV. 1, 11 (1959).

¹⁶⁸ Paul Joseph Springer, *supra* note 137, 212.

¹⁶⁹ *Ibid.*, 229.

¹⁷⁰ For further discussions, see Julian G. Verplaetse, *The Ius in Bello Military Operations in Korea 1950-1953*, 23 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 679, 720-738 (1963); Jan Mayda, *The Korean Repatriation Problem and International Law*, 47 AM. J. INT’L L. 414 (1953).

¹⁷¹ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, 1949 I.C.J. 174 (April 11 1949).

resolved by the Chinese Communist regime, however, sent a note to the Swiss government, depositary of the treaties, in which they stated that they “recognized” the four Geneva Conventions. Even then, what did a “recognition” of the Geneva Conventions mean for the Chinese government, U.S. military and international law as a whole was extremely nebulous.

These two problems – whether the UN is a party or not to the Conventions and the non-ratification by the Communist belligerents involved in the Korean war – posited complex legal questions to DoS and Department of Defense legal advisors. Regarding the non-ratification of the Conventions by the “commies”, as Dean Acheson used to call them, while they agreed in July 1950 to abide by the Third Geneva Convention on the Prisoners of War, they failed to live up to their international obligations. They refused to comply with the Convention and to cooperate with the ICRC which was charged with monitoring the application of the Convention during the conflict on the Korean peninsula¹⁷². Beyond the ideological assumptions underlying Communist behaviour toward prisoners of war, the ill-treatment was also due to purely material considerations. For example, North Korea refused to comply with the Third Convention and to allow ICRC representatives on its territory simply because Korean authorities wanted to prevent their soldiers from discovering that prisoners of war were receiving a better treatment than the one experienced by themselves¹⁷³.

With regard to whether the U.N. was party to the Geneva Conventions, the American government seemed to have eluded the question by relying on its previous opinion related to the repatriation of prisoners of war. They repeated the argument that, according to the Third Convention, PoW have the choice to seek asylum in the detaining country and the latter has the right to grant the status or not. This was quite a surprising and simple answer to a far more complex issue, for it omitted two fundamental questions. First, who would be, in the end, responsible for the repatriation of the PoW: the international organization or the member states? Secondly, and closely related to the first question, if the responsibility to repatriate lied in the hands of the state party acting under the U.N. unified military command, how would the states share this responsibility. In addition, what would happen with the states involved in the intervention that had not ratified the Geneva Conventions? Were they bound by the Geneva conventions through their acceptance to participate in the conflict under the U.N. military command? These issues – still debated

¹⁷² *Dean Acheson to the American Embassy in Moscow*, July 25 1952, RG – 59, International Organization Files of Herbert A Fierst, 1946-1954, Entry 697, Lot File 55D560, Box 5 [*Dean Acheson to the American Embassy in Moscow, July 25 1952*].

¹⁷³ Stephanie Carvin, *Caught in the Cold*, *supra* note 151, 80.

today¹⁷⁴ – were given only scarce attention by the American government which was rather trying to build a case in the public opinion against the “shocking position” adopted by the Communist countries on the issue of forcible/non-forcible repatriation¹⁷⁵. The US government brought the issue to the General Assembly in the fall of 1952¹⁷⁶ and in subsequent years¹⁷⁷ without any significant result. Again, Soviet challenge and Cold War anxieties dictated the orientation of the reflection within the DoS. The focus was not put on the technical and legal aspect of whether the U.N. was a party or not to the Geneva conventions, but rather, on the ideological aspects of the question. The American government was involved in an ideological battle over the repatriation of PoW but also, over the meaning and purpose of international law. U.S. legal opinion had to prevail in order to protect the international society against anti-universalistic conceptions of international law.

The Department of States’ lawyers discussed the whole legal issue *in abstracto* without paying attention to practical aspects of the legal conclusions they had reached. According to these legal advisors, the United Nations command appeared to have regarded itself as a detaining power. It is worth quoting at length the analysis of Charles Runyon, a legal advisor in the Department of State.

Under Security Council resolutions, probably the most adequate description of the situation was that the Unified Command assumed the powers and responsibilities of a detaining power, deriving its authority from the resolutions of the Security Council and assuming an obligation to give effect in good faith to the rights bestowed on prisoners of war by the Geneva Conventions. Since the unified command was exercised over a number of different “military units” – American, British, French, etc. – it would [be] difficult to say that any of these units was a “detaining power”. Neither does it appear possible to say that a mere military command – the UNC [United Nations Command] – could be a “detaining power” in the sense of a politically and internationally responsible entity¹⁷⁸.

¹⁷⁴ For instance, see (among a vast literature on the responsibility of international organizations), the current work of the Special Rapporteur of the International Law Commission on the Responsibility of International Organizations, Giorgio Gaja, and Jean D’Aspremont, *Abuse of the International Legal Personality of International Organizations and the Responsibility of Member States*, 4 INT’L ORG. L. REV. 91 (2007).

¹⁷⁵ *Memorandum. Legal Considerations Underlying the Position of the United Nations Command Regarding the Issue of Forced Repatriation of Prisoners of War*, not dated (estimated date: fall 1954), RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot 68D69, Box 9.

¹⁷⁶ *United States Delegation to the Seventh Session of the General Assembly. Issue of Non-Forcible Repatriation: Some Questions and Answers Regarding the Law*, November 3 1952, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot 68D69, Box 9.

¹⁷⁷ *Position Paper for the Fourth Session of the United Nations Ad Hoc Commission on Prisoners of War, Geneva, August 21 to September 12, 1953*, RG – 59, International Organization Files of Herbert A Fierst, 1946-1954, Entry 697, Lot File 55D560, Box 5.

¹⁷⁸ *Some Problems in the Application of the Geneva Prisoners of War Conventions of 1949 Raised by Events of the Korean Conflict*, June 25 1954, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot 68D69, Box 9 at p. 6 [*Some Problems in the Application of the Geneva Prisoners of War Conventions [sic] of 1949 Raised by Events of the Korean Conflict, June 25 1954*].

The opinion did not clarify this important legal conundrum in the wake of the Korean war and simply added that “a satisfactory solution can be worked out as problems arise”¹⁷⁹. In the Korean case, the solution adopted was through administrative arrangements passed between the “detaining power” – the Unified Command – and the governments that had provided the U.N. with military units. The management of the prisoners of war problem became more acute for the U.N. and the US government when they discovered that hundreds of communists soldiers had surrendered to the U.N. forces and been brought to prison camps. Once over there, they were systematically organizing riots and creating disorder designed to undermine the U.N. prisoner regime¹⁸⁰.

In other cases, PoW detained by the U.S. whose country was now under the yoke of the communist regime obstinately refused to be repatriated to their “new” home country. Many of these PoW preferred committing suicide because they feared that they would be put on train and send to a labour camp in Siberia. For the American government, this was an important issue. “Defectors proved beyond question one of the major points of Communist vulnerability and presented the most difficult complex of policy and legal questions”¹⁸¹. These defectors could obviously be used as propaganda tools by either Washington or Moscow. Legal advisors had to develop the necessary international legal vocabulary to justify the reconceptualization of the doctrine and the rejection of what was then an established principle of international law, namely the principle of repatriation at the end of an armed conflict. Under the pressure of the Cold War and the military encounter with the Communist “Other” on the Korean peninsula, U.S. legal advisors circumvented the doctrine by integrating humanitarian considerations into the principle of repatriation. However, American Cold War anxieties had a deeper impact on U.S. vision of international law. DoS legal advisors associated the defense of the free world with the defense of America’s vision of international law.

C. U.S. Ratification of the Geneva Conventions

In the wake of the Geneva Conference and with the advent of the Korean war, many U.S. officials developed the view that their country was playing a crucial and exceptional role in the defense of Western civilization against the spread of communist ideology. With regard to IHL, this role was complicated the

¹⁷⁹ *Ibid.*, 6.

¹⁸⁰ According to Acheson, Communist prisoners of war captured in Korea even took the American General Dood in hostage before releasing him in *Dean Acheson to the American Embassy in Moscow, July 25 1952, supra* note 172.

¹⁸¹ *Some Problems in the Application of the Geneva Prisoners of War Conventions of 1949 Raised by Events of the Korean Conflict, June 25 1954, supra* note 178.

necessity to respond to the Soviet challenge while at the same preserving the universal character of IHL. When came the time to ratify the Conventions, IHL and the Cold War became a matter of internal politics and foreign policy. To lead the free world and defend the interest of international law, the United States had to ratify the Conventions. However, the ratification also meant that the U.S. government would legally constrained itself in the conduct of its foreign policy. This tension between the needs of a realist foreign policy in the Cold War and the idealism associated with international law transpired from the whole process of ratification of the Geneva Conventions by the American government.

Many feared that American's leadership in the world might have adverse effect on the United States' capacity to lead the free world. This was the view of Aaron Bradshaw, Brigadier general of the U.S. Army. "It is believed that the United States, of all the Nations of the World, is in a most disadvantageous position and most liable to international embarrassment in the even of conflict"¹⁸². This premise was based on two considerations. First, the United States had the highest (and still has) capability for support of an occupied territory and consequently, much more was expected from the United States than any other country. Secondly, there was this idea that the United States could, with few of other states, be considered as a potential occupying power¹⁸³. In this circumstance, the ratification of the Geneva Conventions became an important political – national and international – issue for the American government. Indeed, when the Korean war broke out, the United States were signatories, but not yet a party to the Geneva Conventions. This ambiguous legal situation was highly problematic for the armed forces. So long as the United States remains a signatory but not yet a party to the Geneva Conventions of 1949, it was difficult for the Armed forces to carry out planning in preparation for possible future hostilities. The Army needed certainty in the conduct of its operations.

The Korean problems was not the problem that the military planners had in mind in in the early fifties. The occupation of Germany also compelled American military officials to obtain legal certainty from the Department of State so as to allow them to develop firm plans for the handling of prisoner of wars and for the conduct of military government in occupied areas¹⁸⁴. There was disagreement within the American administration about how to handle the problem of ratification of the prisoners of war convention. Since

¹⁸² Aaron Bradshaw Jr., *Brigadier General to the Provost Marshal General*, November 2 1949, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 4 [*Aaron Bradshaw Jr., Brigadier General to the Provost Marshal General, November 2 1949*].

¹⁸³ *Ibid.*.

¹⁸⁴ Wilber N. Brucker, *General Counsel, Department of Defense, to the Secretary of State*, May 5 1954, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Executive Division, 1920-1975, Box 3 [*Wilber N. Brucker, General Counsel, Department of Defense, to the Secretary of State, May 5 1954*].

1952, the DoS had requested that public Senate hearings be postponed indefinitely pending the resolution over the treatment of the prisoners of war problems in Korea while the Department of Defense (DoD) strongly suggested that the Department of State removed its injunction on the hearings. Furthermore, the military recommended the Department of State to secure the advice and consent of the Senate to the ratification as soon as possible¹⁸⁵. The different departments of the United States did not fully agree on the issue. There was dissension between the DoS and the DoD.

According to the Department of the Defense, the ratification was not simply a matter of legal certainty for the conduct of its military operations. U.S. reputation in the global war on communism was also at stake.

While the political considerations bearing upon the ratification of the Geneva Conventions of 1949 are essentially within the province of your Department [DoS], the Department of Defense nevertheless could not fail to be concerned by the political effect of further delay in ratification, now that the U.S.S.R. has, it is understood, deposited its ratifications of these treaties¹⁸⁶.

The basic assumption underlying the perception of the DoS of the Geneva Conventions was reciprocity. With the Korean war fresh in the memory, U.S. legal advisors were of the opinion that the Geneva Conventions had not been drafted for application in a war in which “one side would regard prisoners captured and held by the other side as a valuable resource which should continue to be exploited and in which many of those surrendering should perhaps be regarded more as political refugees than as prisoners of war”¹⁸⁷. Again, Cold War anxieties dictated DoS legal advisors attitude on the ratification of the Conventions. They had to alleviate the tensions between the need to lead the free world against the Communist threat and the need to preserve the unity and universality of international law.

The DoS legal advisors had a broader perspective on the policy issues involved in the ratification of the Geneva Conventions compared to their colleagues of the DoD. World public opinion constituted a strong incentive to ratify the Conventions, since they emphasized humanitarian principles¹⁸⁸. The advisors remained nonetheless divided on the legal value to give to the Conventions in time of conflict against the Communists. According to Mr. English, legal advisor to the DoS, “a number of problems arose at that

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Mr. English to Mr. Drumright, Ratification of the Geneva Convention of 1949*, undated, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 1.

¹⁸⁸ *Mr. English to Mr. Popper, Ratification of the Geneva Conventions of 1949*, May 13 1954, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 1 [*Mr. English to Mr. Popper, Ratification of the Geneva Conventions of 1949, May 13 1954*].

time which those who were most closely concerned believed cast some doubt upon the validity of the Conventions in any war with the Communist bloc”¹⁸⁹. The applicability of the Conventions in times of war was not a new questions.

Throughout the Korean war, the DoS¹⁹⁰ and DoD¹⁹¹ held divergent opinions on the applicability of the Geneva Conventions. While the DoS was more concerned with the “international” and “public opinion” implications of possible breaches of the Geneva Conventions by the U.S. government and the U.N. led military forces in Korea, the military were, as far as they were concerned, uncertain about the bindingness of the Conventions in times of war against Communist countries.

It might be mentioned also that to enforce compliance with the detailed provisions of all Conventions by all forces under CINCUNC [Commander in Chief, United Nations command] [sic] would require diversion of sizable U.S. Forces from combat missions at the battle front, and would result in interference by the United States in the affairs of the Republic of Korea, which would nullify U.S. policy to respect fully the sovereignty of the Republic of Korea¹⁹².

In that sense, the U.S. administration was deeply divided over the mismatch between international humanitarian law and military necessity, between international law and the realities of the American Cold War foreign policy. The encounter on the battlefield with the Communist “Other” urged the American administration to reevaluate the international humanitarian legal framework established in Geneva in 1949 and to even reconsider the value of these rules in the global war on communism.

One of the main problems with the Geneva Conventions was the question of forcible repatriation of PoW. The American government could not ratify the Conventions without obtaining strong guarantees as to how U.S. PoW would be treated by Communist armies and elsewhere in the world. According to U.S. legal advisors, there was now a firmly established principle of customary international law allowing detaining state to grant asylum to prisoners of war. As we have seen, the Soviet thesis, as defended by the Soviet Ambassador to the U.N., Vichinsky, was that the convention was clear and did not allow prisoners of war to choose their destination after the hostilities ad ended: they should be immediately repatriated to their country of origin. However, this position was contradicting by Soviet repatriation practice since

¹⁸⁹ *Ibid.*

¹⁹⁰ *John D. Hickerson (for the Secretary of State), Assistant Secretary of State, to Robert A. Lovett, Secretary of Defense, April 21 1952, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 1.*

¹⁹¹ *Marshall S. Carter (for the Secretary of Defense), Brigadier General, to the Secretary of State, May 15 1952, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 1.*

¹⁹² *Ibid.*

1918¹⁹³. Even if the evidence appeared to support American arguments, DoS legal advisors were nevertheless preoccupied by the constrain international humanitarian law would exert on the conduct of military operations. They wondered if “our ratification of the Conventions might not handicap us in any possible future conflict with the Communist bloc”¹⁹⁴. The American government thus carefully studied the possibility of ratifying the PoW convention with a reservation on articles concerning repatriation. It feared the questions of the Senate Foreign Relations Committee based upon the Korean experience where soldiers of the UN led force, many of which were Americans, were simply massacred and tortured by Communist forces (and vice-versa)¹⁹⁵. The ratification process put the American administration under pressure. On the one hand, the leadership of the U.S. administration in the free world and the promotion of the unity and universality of international law was at stake. On the other hand, the U.S. government did not want to limit its capacity to intervene military operations for defending the free world.

U.S. Legal advisors also studied the possibility of objecting to the reservations formulated by the Soviet government upon the ratification of the Conventions¹⁹⁶. U.S.S.R. made three reservations, but only two were relevant for the American government¹⁹⁷. First, the Soviet Union said that it did not recognize the right for a state detaining PoW to ask a neutral state or a humanitarian organization to undertake the function of the protecting state, unless the state of origin of the PoW had agreed to such a transfer. For the DoS legal advisors, this reservation was problematic. The Conventions could not properly work without the observation of a neutral government or humanitarian organization and therefore the “Soviet reservation may be suspect in the light of Soviet practice as intended to lay foundations for frustrating the application of the Conventions”¹⁹⁸. Considering the nature of the Soviet rule, it seemed unlikely to the DoS legal advisors that any protecting power would be admitted to the Soviet Union or that they would be allowed the freedom of movement necessary to adequately safeguard the interests of the U.S. PoW

¹⁹³ *Dean Acheson to the American Embassy in Moscow, July 25 1952, supra note 172.*

¹⁹⁴ *Mr. English to Mr. Popper, Ratification of the Geneva Conventions of 1949, May 13 1954, supra note 188.*

¹⁹⁵ On the mass killings of the Korean war, see Dong Choon Kim, *Forgotten War, Forgotten Massacres – The Korean War (1950-1953) as Licensed Mass Killings*, 6:4 J. GENOCIDE RESEARCH 523 (2004).

¹⁹⁶ *American Embassy in Bern to the Secretary of State, December 24 1949, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 4; Robert Murphy to the Secretary of State, Ratification of the 1949 Geneva Conventions for the Protection of War Victims, January 4 1955, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 1 at p. 2 [Robert Murphy to the Secretary of State, Ratification of the 1949 Geneva Conventions for the Protection of War Victims, January 4 1955].*

¹⁹⁷ Richard R. Baxter, *The Geneva Conventions of 1949 Before the United States Senate*, 49 AM. J. INT’L L. 550 (1955) [*Geneva Conventions and the Senate*].

¹⁹⁸ *Robert Murphy to the Secretary of State, Ratification of the 1949 Geneva Conventions for the Protection of War Victims, January 4 1955, supra note 196, 2.*

detained in Communist camps¹⁹⁹. The U.S. government was even ready to designate India as the protecting power in a future war against the Soviet Union even though the American government was quite unhappy about India's equivocal position in world affairs²⁰⁰.

Secondly, Moscow did not consider itself bound by the obligation to extend the application of the Convention to PoWs convicted of pre-capture war crimes²⁰¹. The wording of the declaration seemed to be unclear and the legal advisor decided to request the Swiss government, depository of the Conventions, to endeavour to obtain more information from the Soviet authorities on the legal meaning of their reservation²⁰². Nonetheless, the history of the debates over this provision during the spring and summer of 1949 provides us with some important insights as to how the DoS legal advisors interpreted this provision. In effect, the U.S. government wanted to provide its nationals with a supplementary protection in case they were made prisoners of war by the Soviet government and convicted by Soviet tribunals for war crimes. There was a need to protect American and Western military from the hazard of the communist judicial systems. This provision was aimed at protecting military against the communist legal system by inserting in the Conventions a provision overriding the national systems of military courts.

Formulating rejection to Soviet reservations entailed important legalistic issues that could have a real impact on the battlefield. Following the International Court of Justice advisory opinion in the Genocide convention case²⁰³, the legal advisor of the Department of State reached the conclusion that

U.S. ratification accompanied by a refusal to agree to the U.S.S.R. reservations by the United States would preclude the establishing of treaty obligations between the U.S.S.R. and the United States, but would permit both to become parties, vis-à-vis states not objecting to any reservations which these two countries might have made²⁰⁴.

¹⁹⁹ *Outline of Elements of the Problem Connected with the Designation of Protecting Power (Department of State memorandum)*, January 28 1955, RG – 59, Legal Adviser Records relating to the Red Cross and Geneva Conventions, 1941-1967, NND Project No. 979139, Entry 5210, Lot File 68D69, Box 1 at p. 7 [*Outline of Elements of the Problem Connected with the Designation of Protecting Power*].

²⁰⁰ *Ibid.*, 8-9

²⁰¹ *Robert Murphy to the Secretary of State, Ratification of the 1949 Geneva Conventions for the Protection of War Victims, January 4 1955, supra note 196.*

²⁰² *Ibid.*.

²⁰³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, 1952 I.C.J. 15 (May 28 1951).

²⁰⁴ *Some Problems in the Application of the Geneva Prisoners of War Conventions of 1949 Raised by Events of the Korean Conflict, June 25 1954, supra note 178, 7.*

American advisors were nonetheless confident that the U.S.S.R. would respect the Geneva Conventions in a conflict against the United States because of article 2(3) of the Prisoners of War Convention of 1949²⁰⁵ which reads as follow:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

The discussions over the ratification of the Geneva Conventions highlighted the ideological impact of the Cold War on the construction and perception of the Geneva Conventions within the DoS. At the beginning of the negotiation of the Conventions, the members of the American delegation had a fairly open-minded and purely positivistic approach to the drafting of the covenants. The advent of the Cold War operated a deep shift in the mind of the DoS' legal advisors and open the field to global policy issues which had not been considered – as far as the archives can tell – during the drafting of the Conventions. In that sense, the ideological confrontation informed the way legal advisors of the DoS construed international humanitarian legal arguments in the wake of the Geneva Conference of 1949. The new laws of war were therefore construed in Cold War terms: the American government had the responsibility to protect Western values against communist ideology. In a memorandum to the Secretary of State, one legal advisor explained that “our failure to ratify them [Geneva Conventions], after the leading part we took in their negotiation, can only give rise to the most unfortunate inferences and be the basis for effective Soviet propaganda”²⁰⁶. The U.S. government finally ratified the Conventions on August 12, 1955 with two reservations. The first relates to the use of the Red Cross emblem. The second concerns the imposition of death penalty on civilians who committed criminal acts against the occupying power.

Because of fears that the territorial sovereign would, as one of its last acts before being ousted from an area by the enemy, abolish the death penalty in the area about to be occupied, the United States [...] reserved the right to impose this penalty without regard to the pre-existing law of the occupied area²⁰⁷.

In 1955, the DoS and DoD juristes prepared a document entitled *Soviet Attitude toward the Laws of War* in which they outlined their own comprehension of the Soviet legal philosophy of warfare. This

²⁰⁵ *Third Geneva Convention, supra* note 15. Article 2(3) which reads as follow: “Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof”.

²⁰⁶ *Robert Murphy to the Secretary of State, Ratification of the 1949 Geneva Conventions for the Protection of War Victims, January 4 1955, supra* note 196.

²⁰⁷ Richard R. Baxter, *Geneva Conventions and the Senate, supra* note 197, 551.

memorandum reinforced and systematized what seemed to be a widely shared set of beliefs among American officials. The Soviet Union was a threat to the peace and security of the world and consequently, for the whole system of humanitarian law developed in the previous decades. The report also provided a basis for reinforcing the sense of legitimacy and legality of American warfare methods in the atomic era. “Wars, according to Soviet ideology, when fought by the USSR, are just wars”²⁰⁸. Consequently, Communist “just war” excluded the possibility of violations of the laws of war by the Soviet Union. According to the authors of the memorandum, the changing Soviet attitude toward the laws of war was related to Soviet estimates of progress and the potentialities of the Communist revolutionary movement throughout the world. “In a period of optimism, such as the early 1920’s, in which the advance of the revolutionary tide meant wars to the finish with doomed bourgeois governments and classes, restrictions on the methods and modes of combat took a minor place”²⁰⁹. But as the regime came to accommodate itself to a more or less prolonged existence side-by-side with capitalist countries or started feeling threatened or encircled by non-communist countries, Moscow, according to the authors of the report, sought to make the cause of peace and international legality its own²¹⁰. This conclusion was in contradiction with the growing ideological perceived within the American administration and with the image of Stalin’s Russia that was coming to place. However, this conclusion also suggests that the U.S. legal advisors appeared to believe that there was a possibility for the Soviet Union to join the rank of legality and consent to a universal vision of international law. In other words, the United States remained the leaders of the international legality. It was up to the Soviet Union to abide by the rule of international law.

Conclusion: Toward an American Tradition of International Law ?

The objectives of this paper are twofold: substantive and methodological. From a substantive point of view, this paper argued that the American administration’s encounter with the Soviet “Other” triggered a process to renew international law, redefine its vocabulary and fundamental structures. In its encounter with the Communist “Other”, the United States redefined its own political and juridical identity in opposition to the Communist project. This process exerted a profound influence on how the American government subsequently redefined its relationship with international law. As Dudziak noticed, the war

²⁰⁸ *Soviet Attitude toward the Laws of War*, January 26 1955, RG – 389, Records of the Department of Defense, Department of the Army, Office of the Provost Marshal General. Executive Division, 1920-1975, Box 12 [*Soviet Attitude toward the Laws of War*].

²⁰⁹ *Ibid.*, 3.

²¹⁰ *Ibid.*

fought against the communists – both literally and figuratively – exerted a fundamental influence on the reconstruction and redefinition of U.S. institutions²¹¹. American identity and stance toward international law was reshaped in this threatening encounter with the Communist “Other”. In this process, the American government associated the preservation of the universality and unity of international with the defense of its national interests in the rising world of the Cold War against the Soviet Union’s anti-universalistic philosophy. This conclusion invites us to question the iterative aspects of the historical and complex relationship that the American government has entertained with international law since the foundation of the country²¹² for this history goes far beyond the divide between realism and idealism in the conduct of American foreign policy²¹³.

In the present “War on Terror”, the American government faces a delusive and invisible enemy that doesn’t carry a global counter-hegemonic project for the world, but does negate the validity of the liberal and democratic peace project carried by the United States government. This encounter with the global threat of terrorism triggered a new quest for the “soul” of the United States²¹⁴. As it happened during the early years of the Cold War, this reaffirmation of the American “self” and the search for an equilibrium between its international and national imperatives had a deep impact on international law, its foundations and structures. For example, the United States government legal advisors adopted a “radical” statehood approach to the detention of Al-Qaeda and Talibans prisoners²¹⁵. As in the aftermath of the Second World War and in the encounter with the Soviet “Other”, U.S. legal advisors have devised new international legal technologies, reformulated and modernized old legal arguments and deployed these tools in the “War on Terror” following the encounter with the terrorist “Other”. This new legal vocabulary developed by the American administration since 2001 seems to convey the idea that these new legal devices and

²¹¹ Mary L. Dudziak, “Making Law, Making War, Making American” in Christopher Tomlins and Michael Grossberg, eds., *The Cambridge History of Law in America: Volume 3, The Twentieth Century and After (1920–)*, New York, Cambridge University Press, 2008, 680, 682-683.

²¹² For a discussion of the early years of the United States, see David Armitage, *The Declaration of Independence and International Law*, 59:1 WILLIAM & MARY QUARTERLY 39 (2002).

²¹³ Like Goldsmith and Krasner seem to suggest in Jack Goldsmith and Stephen D. Krasner, *The Limits of Idealism*, 132:1 DAEDALUS 47 (2003).

²¹⁴ On this point, see Michael C. Desch, *America’s Liberal Illiberalism: The Ideological Origins of Overreaction in U.S. Foreign Policy*, 32:3 INT’L SECURITY 7 (2008) (Arguing that “liberalism impels Americans to spread their values around the world and leads them to see the war on terrorism as a particularly deadly type of conflict that can be won only by employing illeberal tactics. What makes the war on terrorism so dangerous, in this view, is not so much the physical threat to the United States, but rather the existential threat to the American way of life and the uncivilized means adversaries employ in seeking to destroy it” (p. 8).

²¹⁵ For the apology of a stato-centrist approach to detention and handling of Al-Qaeda and Talibans detainees by the United States government, see Robert J. Delahunty and John Yoo, *Statehood and the Third Geneva Convention*, 46:1 VA. J. INT’L L. 131 (2005); John C. Yoo, *The Status of Soldiers and Terrorists under the Geneva Conventions*, 3:1 CHINESE J. INT’L L. 135 (2004). For a critic from a French commentator, see Marc Finaud, *L’abus de la notion de “combattant illégal”: Une atteinte au droit international humanitaire*, 110:4 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 861 (2006) (Fr.).

technologies translate into legal vocabulary the anxieties that currently inhabit the U.S. administration²¹⁶. In a similar fashion, the perception of a need to renew the laws of war – for good or for bad – seems to be widely shared within U.S. legal academia²¹⁷.

This paper has also attempted to shed light on the role of the legal advisor in the making of the American foreign policy. Kenneth Anderson was right when he noticed that the function of military lawyers and more generally, of governmental legal advisors, is to protect a technical legal result in legal terms²¹⁸. However, he appears to be mistaken when he states that law “is a language conspicuously devoid of references to an underlying moral vision of the laws of war, a technical language with little to indicate that a moral vision even exists in which this lawyerly language and concern for client interests are embedded”²¹⁹. This vision is far too simplistic for two reasons. First, the legal advisor does not work, think and “apply” the law in an ideological, political and/or moralistic vacuum²²⁰. Rather, there is a sort of dialogue between the immediate intellectual environment in which the advisor works and the legal advisor him/herself. Secondly, as this paper made it clear, the law, whether it be domestic or international, is not value-neutral. It reflects its historical context as well as the immediate ideological environment in which the legal argument is deployed. The job of the legal advisor goes far beyond the mere “application” of the law. He translates political, economic, military and social anxieties in legal vocabulary and legal argument for its government²²¹.

From a methodological standpoint, this paper has put forward the idea that a particular legal argument stems from a specific historical context and ideological environment. For example, the problem of

²¹⁶ Thomas W. Smith, *Protecting Civilians... or Soldiers? Humanitarian Law and the Economy of Risk in Iraq*, 9 INT’L STUD. PERSP. 144 (2008) (Arguing that the “perception of risk increasingly govern U.S. interpretation of its humanitarian obligations under international law, threatening to dilute the doctrine of proportionality and reverse the customary and legal relationship between combatants and non-combatants”).

²¹⁷ For a recent proposition of reform of the Geneva Convention, see Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443 (2007) (Stressing that the principal challenge terrorist networks pose is that they require international humanitarian law to graft conventions onto an unconventional form of organized violence); Renée De Nevers, *The Geneva Conventions and New Wars*, 121:3 POL. SCI. Q. 369 (2006) (Noticing that the laws of war are now facing new types of “war” and new types of “warrior” and arguing for a strengthening and broadening of the Geneva Conventions rather than a mere rejection);

²¹⁸ Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 CHI. J. INT’L L. 445, 445 (2003).

²¹⁹ *Ibid.*

²²⁰ For a recent example, see Eric Lichtblau, *Report Assails Political Hiring In Justice Dept.*, New York Times, Jun. 25 2008, A1; Carrie Johnson, *Justice Dept. Sued Over Political Bias*, Washington Post, Jul. 7 2008, at A3.

²²¹ This is well illustrated in Christopher P.M. Waters, *Is the Military Legally Encircled?*, 8:1 DEF. STUD. 26 (2008). In this article, Waters argues that the legal encirclement – the idea according to which military actions are more and more constrained by regulatory and legal creep as well as by an increasing litigiousness – of the military is a metaphor and is largely misplaced). For the opposite argument, see Major Michelle Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MIL. L. REV. 1 (2007).

repatriating prisoners of war and the arguments developed by the legal advisors of the U.S. government in the early years of the Cold War wouldn't make any sense today. The problem has almost disappeared and the ideological contingencies of the Cold War vanished more than 15 years ago. Legal arguments and practices are pure historical contingencies stemming from the anxieties animating individuals in a particular moment in time and space²²².

In recounting the history of the relationship between the United States and international humanitarian law in the early Cold War years, this study departed from the conventional metanarrative of international humanitarian law which links the past, present and future of the laws of war in a usable past. A past shaped according to the need of the legal argument. The laws of war have a history, but this history is not linear. To the contrary, it is somewhat chaotic, somewhat contingent. Admittedly, intellectual and legal connections can be established between The Hague Conventions of 1907 and the Geneva Conventions of 1949, for example. But, one must keep in mind that these conventions are also the product of a particular historical context and translate in legal vocabulary anxieties that were animating the chancelleries of the world at a particular moment in history. These are historical facts that cannot be reduced to mere theories based on often erroneous and reductionist assumptions about war, international law and humanitarian values²²³.

²²² Law as such is the result of an historical process of accretion. But discourses about law's meaning remain, in our opinion, the results of historical contingencies. Thanks to Professor Barros for having brought to my attention this nuance.

²²³ For theoretical failures, see, among a vast and essentially American literature, James D. Morrow, *When Do States Follow the Laws of War?*, 101:3 AM. POL. SCI. REV. 559 (2007); Eric Posner, A., *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297 (2003). However, we are conscious that making a theory is also sharing his own vision of the world about it is and how it ought to be. Consequently, theories should not be exclusively considered for their "scientific" value but also, for the insights they provide into the political project that their writers carry. For example, Posner's international legal project has been associated with the American nationalist school of international law by Alejandro Lorite Escorihuela, *supra* note 14.