

What Americans think of international humanitarian law

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Abstract

The United States' foreign policy in the first decade of the twenty-first century and its involvement in armed conflicts in Iraq and Afghanistan have given rise to a reinvigorated interest in international humanitarian law (IHL), commonly referred to in the United States as the law of armed conflict. Conversations about whether to classify detainees as prisoners of war, debates about what constitutes torture, and numerous surveys attempting to measure the public's knowledge about and views on the rules of war are offering an opportunity to examine Americans' views on IHL.

* The views reflected in this paper are those of the authors and do not represent the official position of the American Red Cross or its affiliates.

This article will reflect on those views, providing numerous examples to illustrate the complexities encountered when near universally accepted legal standards of conduct are layered upon the fluid and unpredictable realities of modern warfare. The article will also highlight the impact that battlefield activities can have on domestic debates over policy choices and national conscience.



For the majority of the twentieth century, the United States was generally regarded by the international community as a consistent advocate of human rights and, during times of conflict, a faithful adherent to its international obligations as a signatory to the Geneva Conventions.¹ Although there were isolated deviations from this record – such as the 1968 My Lai massacre of civilians in Vietnam – there are also historical examples that were deemed within the purview of military necessity at the time, but would most certainly be judged unacceptable today, such as the fire bombing of German cities and Tokyo during World War II. These instances aside, the general perception of the US, domestically and internationally, was that the country followed the rules to which it ascribed through international treaties. However, some widely publicized incidents in the aftermath of the 11 September 2001 terrorist attacks and during the course of the decade-long war on terror have cast a shadow across the view that many around the world hold of the US. These incidents have included accusations of torture, extraordinary renditions, detainee mistreatment at the Abu Ghraib prison in Iraq, and indeterminate terms of detention for some Guantánamo detainees.

The incidents mentioned above have raised awareness in recent years of the Geneva Conventions and their status as the rule book for the conduct of war. The debates that ensued across the United States' social and political landscape during this same time-frame suggest, however, that, while people may have become more aware of the Conventions' existence, they have not necessarily become better versed in the Conventions' content and the significance of that content. For example, in a public opinion survey conducted in February 2011 by the American Red Cross in the US, 55% of adults surveyed felt that they were somewhat or very familiar with the Geneva Conventions, but 51% also stated that they believed it was acceptable to torture enemy soldiers.² Additionally, most Americans are not aware of the role that the US played in the nineteenth-century development of codified rules governing the conduct of war. At a panel discussion at the American Society of International

- 1 See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (GC I or First Geneva Convention); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 (GC II or Second Geneva Convention); Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (GC III or Third Geneva Convention); Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (GC IV or Fourth Geneva Convention).
- 2 American Red Cross, 'Survey on international humanitarian law', March 2011, research conducted by ORC International, available at: <http://www.redcross.org/www-files/Documents/pdf/international/IHL/IHLSurvey.pdf> (last visited December 2011).

Law held in May 2011, panellists discussed the birth of international humanitarian law concepts during the American Civil War 150 years earlier. John Witt, Professor of Law at Yale Law School, described the 1863 creation of the Lieber Code and its goal of maintaining America's commitment to international customary law and to humane treatment in times of war.³ However, public knowledge of this extraordinary document is extremely low, and ignorance of the fact that many rules of war actually originated in the US hinders acceptance of laws that are often perceived by some in the US as international 'impositions' on American sovereignty.⁴

The goal of this article is to take stock of current perceptions of international humanitarian law (IHL) in the United States through examining the results of the American Red Cross and other surveys conducted over the past decade, to analyse samples of public commentary and US government policies on issues relevant to IHL, and to reflect on the impact of the actions of military and civilian decision-makers on IHL perceptions. Understanding the level of IHL knowledge and the public's acceptance of its tenets is important. Those indicators speak to the importance of educational opportunities through which better understanding can be achieved. As Daniel Muñoz-Rojas and Jean-Jacques Fresard point out, education can play a key role in bridging the gap between the broad consensus that exists in the acknowledgement of IHL norms and the relativism with which those same norms are applied against a specific situation.⁵ The indicators above also shed light on how the American views toward IHL may shape public attitudes toward the application of IHL in future US international engagements.

The article is divided into three sections. The first section provides an overview of IHL in the United States by highlighting its historical development and its applications in the war on terror, the state of American public opinion on the topic, and the influence of the media in shaping those views. The article will address these issues by reviewing results from numerous public opinion surveys, including one conducted by the American Red Cross in March 2011, by examining public statements made by policy-makers, and by referring to academic works engaged in the long-standing debate on the influence that media and entertainment have on the public's views toward violence and elements of IHL, such as torture and detention.

The second section looks at the obligations to disseminate IHL. The focus is on the legal foundations and the contemporary challenges that shape the dissemination of IHL across the US. The third section presents three case studies that highlight the debates in the US on various aspects of IHL: these are the reaction to the International Committee of the Red Cross (ICRC)'s teaching of first aid to members of the Taliban in Afghanistan; views expressed about the requests to allow

3 American Society of International Law discussion, 'The Civil War and the law of war', 18 May 2011, recording available at: http://www.asil.org/activities_calendar.cfm?action=detail&rec=196 (last visited 17 August 2011).

4 Andrew McCarthy, 'International law targets American sovereignty', in *National Review Online*, accessed at: <http://www.nationalreview.com/articles/213091/international-law-targets-american-sovereignty/andrew-c-mccarthy> (last visited December 2011).

5 Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations', in *International Review of the Red Cross*, Vol. 86, No. 853, March 2004, pp. 191–192.

family visits to detainees in Guantánamo Bay, Cuba; and the decisions made by military and civilian leaders to attempt to reduce the level of collateral damage from military strikes in Afghanistan. The article concludes with a brief analysis of why perceptions of IHL matter and how the current perceptions may influence future American engagement abroad.

IHL in the United States: history, public opinion, and the media

Background to the current debate

The four Geneva Conventions of 1949, to which all states in the world have agreed to be bound, and their Additional Protocols form the core of IHL. Many of the obligations enshrined in the Geneva Conventions today have their origins in a document entitled the 'Instructions for the government of armies of the United States in the field'. Requested by President Abraham Lincoln to lay out a set of rules for the conduct of wartime activities by the Union Army during the American Civil War, that document, the so-called Lieber Code, was disseminated to the Union Army in 1863.⁶ In a similar way, the Geneva Conventions prescribe the standards of protection to be granted to people and property affected (or possibly affected) by war, and limit the use of means and methods of warfare out of humanitarian considerations. Unlike the Lieber Code, however, which was a domestic instrument, the Geneva Conventions form part of public international law, the body of law that regulates inter-state relations. The provisions that they contain seek to strike a balance between humanitarian concerns and the military interests of states. Until the elaboration of Additional Protocol II, the majority of rules included in the Geneva Conventions applied only to international armed conflicts, with Common Article 3 to the four Conventions being the only provision regulating non-international armed conflict. Additional Protocol II of 1977 codified and elaborated the rules applicable to non-international armed conflicts but its provisions only apply to states that have ratified it. While the US has signed Additional Protocol I,⁷ Additional Protocol II,⁸ and Additional Protocol III,⁹ it has yet to ratify – and thus become a State Party to – Additional Protocols I and II (it deposited its instrument of ratification for Additional Protocol III in 2006¹⁰). While the language in

6 A complete version of the Lieber Code can be found on numerous websites, including those of the International Committee of the Red Cross, available at: <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>, and of Yale University Law School, available at: http://avalon.law.yale.edu/19th_century/lieber.asp (last visited December 2011).

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977.

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II), 8 June 1977.

9 Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Additional Protocol III), 8 December 2005.

10 The Geneva Distinctive Emblems Protection Act 2006 (H.R. 6338), signed by the President, 12 January 2007.

Additional Protocol III is general in nature, providing for the international recognition of a third protective emblem – commonly referred to as the Red Crystal – the ratification resolution text forwarded to the US Senate by the Executive Branch highlighted the value of this emblem for those ‘governments and national societies that face challenges using the existing emblems’.¹¹

Despite the US not having ratified Additional Protocols I and II, domestic legislative action has codified many of the provisions contained therein, particularly as those provisions parallel the components of Common Article 3. The War Crimes Act of 1996 (18 U.S.C. § 2441) as amended, imposes criminal penalties for breaches of the 1949 Geneva Conventions, including violations under Common Article 3.¹² In succeeding years, the war on terror led US officials to re-examine the War Crimes Act provisions. The Military Commissions Act of 2006 (P.L. 109-336) amends the War Crimes Act so as to criminalize only certain violations of Common Article 3, known as ‘grave breaches’ to the Conventions.¹³

In terms of implementation of IHL standards, the war on terror has also presented particularly thorny legal questions for the US government for determining the appropriate interpretation of IHL domestically. The Bush Administration, and some academics, argued that members of Al Qaeda and the Taliban technically do not qualify for prisoner-of-war status because they do not meet the conditions of Article 4(A) of the Third Geneva Convention Relative to the Treatment of Prisoners of War (a) ‘being commanded by a person responsible for his subordinates’; (b) ‘having a fixed distinctive sign recognizable at a distance’; (c) ‘carrying arms openly’; and (d) ‘conducting their operations in accordance with the laws and customs of war’.¹⁴ Others said that Taliban detainees should be legally considered prisoners of war because one element of the definition of that category in the Third Geneva Convention is that ‘[p]risoners of war, in the sense of the present Convention, are . . . members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces’.¹⁵ Despite this definitional ambiguity, in military practice the objective is to ensure that those detained by the US military are treated humanely, including those held in

11 See US Senate Treaty Document 109-10, ‘Protocol III to 1949 Geneva Convention and an Amendment and Protocol to 1980 Conventional Weapons Convention’, 109th Congress, 2nd Session, U.S. Government Printing Office, available at: <http://www.gpo.gov/fdsys/pkg/CDOC-109tdoc10/html/CDOC-109tdoc10.htm> (last visited December 2011).

12 See text of Military Commissions Act of 2006, Section 6(2), available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf (last visited December 2011). Michael John Garcia also provides an analysis of the law’s impact in ‘The War Crimes Act: current issues’, Congressional Research Service RL33662, 22 January 2009, p. 1, available at: <http://www.fas.org/sgp/crs/intel/RL33662.pdf> (last visited December 2011).

13 Military Commissions Act, above note 12, Section 6(2).

14 See CG III, Art. 4. See also Jay Bybee, ‘Status of Taliban forces under Article 4 of the Third Geneva Convention of 1949’, Memorandum Opinion to the President, US Department of Justice, 7 February 2002, available at: <http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf> (last visited December 2011).

15 GC III, Art. 4. George Aldrich, writing in the German Red Cross journal, *Humanitäres Völkerrecht*, in 2002, argued that detained Taliban fighters should be afforded prisoner-of-war status because they are military members of a Party to the conflict as required by the Third Geneva Convention. See his article, ‘The Taliban, Al Qaeda, and the determination of illegal combatants’, available at: http://www.pegc.us/archive/Journals/aldrich_illegal_combatants.pdf (last visited December 2011).

relation to the war on terror. Although some detainees have not been classified as prisoners of war, Defense Department lawyers are instructed that the Third Geneva Convention ‘nonetheless provides a useful template for detainee protection and care’.¹⁶

Public opinion

In order to understand better the opinions of American citizens about IHL, the American Red Cross commissioned a survey in February 2011 on views of specific protections afforded under the Geneva Conventions.¹⁷ In this section we compare those poll results with other survey findings on similar topics to get a broader picture of American attitudes.

Americans tend to express strong moral positions. In a 2008 poll, for example, more than two-thirds of Americans supported ‘using United States troops to stop a government from committing genocide and killing large numbers of its own people’.¹⁸ In the 2011 American Red Cross poll, about 70% of Americans believed that depriving civilians of food, medicine, or water to weaken an enemy is rarely or never acceptable, and only one in five found the use of hostage-taking of civilians in order to get something in exchange from the enemy an acceptable tactic. Four out of five Americans also agreed that increasing the accuracy of military weapons to reduce civilian casualties is an important goal.¹⁹ However, other widely held opinions on humanitarian issues might appear at odds with this broad public identification with morality and might reveal other dilemmas that US citizens are facing as they weigh the threat of deaths of innocent civilians with humane treatment of detainees.

One phenomenon that has surprised many observers has been that of the opinions expressed by Americans about torture over the past decade. It is important to note as we begin this discussion that when examining the polling data on such specifics as torture, research has demonstrated a significant disparity between the perceptions of Americans’ support for torture as presented by journalists and politicians and the conclusions reached as a result of polling data analysis. For example, in examining thirty-two public survey polls on torture between 2001 and 2009, Paul Gronke and Darius Rejali did not find a majority of Americans willing to accept the use of torture, even in cases where it might prevent a terrorist attack, until

16 Marie Anderson and Emily Zukauskas (eds), *Operational Law Handbook 2008*, The Judge Advocate General’s Legal Center and School, Charlottesville, 2008, p. 26.

17 The American Red Cross survey was conducted on 24–27 February 2011 using two telephone surveys and it included 1,019 adults aged 18 or over and 502 young people aged 12–17. Select variable weighting for adults respondents included age, sex, race, geographic region, and education level. Youth weighting used the same criteria, with the omission of the education level. The margin of error was $\pm 3.1\%$ at the 95% confidence level for adults and $\pm 4.4\%$ for the 95% confidence level for the young people.

18 The Chicago Council on Global Affairs, ‘Anxious Americans seek a new direction in United States foreign policy: results of a 2008 survey of public opinion’, p. 12, available at: http://www.thechicagocouncil.org/UserFiles/File/POS_Topline%20Reports/POS%202008/2008%20Public%20Opinion%202008_US%20Survey%20Results.pdf (last visited 17 August 2011).

19 American Red Cross, above note 2.

the summer of 2009.²⁰ On the issue of ‘enhanced interrogation techniques’, polling throughout the last decade demonstrated that the majority of Americans opposed the use of all of the most severe interrogation methods, including waterboarding, electric shock, forced nakedness, and exposure to extreme heat or cold.²¹ The opposition to these methods was not dependent on any one method being linked to the term ‘torture’. These polling results stand in contrast to the ‘conventional wisdom’ of what ‘most Americans’ believe, so often cited by journalists, public commentators, and even the American public when speculating on the beliefs of their fellow citizens. All this being said, the fact that polling data indicates that a substantial percentage of the American public accepts the use of torture in some circumstances is cause for concern in the evaluation of IHL and its tenets in the minds of the American public.

Relying on what they term ‘false consensus’, Gronke and Rejali argue that there is a long psychological tradition of people believing that the views that they hold are reflective of the view of the majority of their compatriots.²² This phenomenon can lead people to transfer their own viewpoint to another without actually having any data to substantiate the claim. This caveat to the actual survey data aside, the thirty-two surveys referenced by Gronke and Rejali reveal a consistent trend between those polled who accept the use of torture to some degree in the war on terrorism and those who oppose its use outright, with a gradual increase in those accepting torture. From 2001 to 2009, twenty-nine of the thirty-two surveys reported that at least 30% of the respondents found torture acceptable.²³ In only the last two of the surveys, conducted in 2009, was the majority 50% threshold reached. The American Red Cross survey in 2011 revealed that 51% of adults (age 18 and older) polled believed that it was at least sometimes acceptable to torture enemy soldiers in order to get important military information.²⁴ This belief stands in direct contrast to the provisions of the Third Geneva Convention, outlining the treatment of prisoners of war, which states in Part III, Section 1, Article 17:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

The American Red Cross survey also sampled young people (aged 12–17) separately from adults, leading to interesting results.²⁵ Only one in five of these respondents reported being familiar with the Geneva Conventions, and 59% felt that it was at least sometimes acceptable to torture captured enemy soldiers. What came as

20 Paul Gronke and Darius Rejali, ‘U.S. public opinion on torture, 2001–2009’, in *PS: Political Science and Politics*, July 2010, p. 437.

21 *Ibid.*, p. 441.

22 *Ibid.*, p. 440.

23 *Ibid.*, p. 439.

24 American Red Cross, above note 2.

25 American Red Cross, above note 2.

perhaps the biggest surprise, however, was that 41% of the young people surveyed believed that the torture of captured American soldiers is at least sometimes acceptable. This was despite the fact that seven in ten young people reported having a close friend or relative who has served in the armed forces.

In general, the young people surveyed were more likely to find activities violating IHL acceptable in wartime. There were notable gaps between adult and youth acceptance of two particular activities in the survey: 56% of young people felt that killing enemy prisoners is an acceptable form of retaliation if the enemy has killed prisoners that it has captured, while only 29% of adults felt that it was acceptable conduct. As noted above in regard to the opinions on torture, the belief that retaliation against enemy soldiers is acceptable is in violation of the Third Geneva Convention (Part III, Section 1, Article 13).²⁶

According to the survey, the issue of neutral organizations being allowed to visit prisoners to determine their welfare is also clearly misunderstood in the United States, particularly by young people. A full 71% of youth respondents and 55% of adults felt that a warring party could refuse to grant such neutral access. On a positive note, however, young people in particular expressed a strong interest in increased efforts to educate the public on IHL, with almost eight in ten agreeing that the government should educate people of their age on the rules of war before they are old enough to vote or to enlist in the military. Education efforts and innovative initiatives to engage the young and to fill this knowledge gap on global issues and IHL will be addressed below in the section on ‘Dissemination of IHL’.

Influence of the media

While there are strong opinions about the influence of television programming, movies, and video games on the attitudes and behaviour of young people, the academic debates continue regarding whether there is a correlation between the exposure to violence and media programming glorifying or sanctioning torture and a young person’s preponderance to engage in unhealthy violent activity or possess beliefs and attitudes supporting torture. Two examples of the extreme sides of this debate can be found in the writings of Craig Anderson, *et al.* on one side, and Jonathan Freedman, on the other. Anderson’s 2003 group study entitled: ‘The influence of media violence on youth’ begins with the statement ‘Research on violent television and films, video games, and music reveals unequivocal evidence that media violence increases the likelihood of aggressive and violent behavior in both immediate and long-term contexts’.²⁷ Freedman, on the other hand, said: ‘I began systematically reading and reviewing every single scientific study I could find that dealt with the question whether exposure to film and television violence causes aggression’, then concluded that the research on the subject generally does *not* demonstrate that exposure to media violence

²⁶ *Ibid.*

²⁷ Craig A. Anderson *et al.*, ‘The influence of media violence on youth’, in *Psychological Science in the Public Interest*, Vol. 4, No. 3, December 2003, p. 81.

causes aggression.²⁸ While Anderson and his colleagues cite examples of violent events taking place that nearly copy plots in video games or movies, Freedman provides other examples in which perpetrators of violent acts who were supposedly motivated by a movie or television show never actually saw the media event alleged to have driven them to violence.

Academic studies on the relationship between violence in the media and real-life acts of violence are inconclusive at best. Scholars split themselves between those who argue that a link between television and actual violence exists and those who are sceptical of causality between media violence and more aggressive behaviour. In particular, one popular American television series, *24*, led to debate among commentators that it could be causing the American public to accept the practice of torture. Watched by millions from 2001 to 2010, in a period when the issue of torture became part of the public debate, *24* regularly depicted scenes of torture. American security agents were alternately the perpetrators and the victims of the torture depicted in the show. This long-running and widely watched series coincided with the initiation of wars in Afghanistan and Iraq and subsequent torture and detainee abuse scandals. Owing to this chronological coincidence, many point to *24* in discussions of American views on torture. At a June 2011 panel dialogue on humanitarian law, Rosa Brooks mentioned *24* as one factor in the shifting perceptions of the norms and particularly the morality of torture.²⁹ Another scholar has pointed out that the central character, Jack Bauer, 'dramatized torture, making it real: something enacted in people's living-rooms'.³⁰ In 2007, a journalist also noted that, while network television shows such as *24* broadcast scenes of torture and cable channels ran violent shows incorporating torture (such as *The Sopranos*), no less than eight films that included graphic scenes of torture were also being shown in cinemas at the time.³¹

The idea of the 'ticking time-bomb scenario', depicted repeatedly in *24*, asks whether torture is acceptable when a high-casualty terrorist attack is imminent and someone in custody knows where the bomb is. Proponents of torture have used the dilemma to argue that torture could potentially be used to disclose information that would enable authorities to stop the attack. During the primaries in the 2008 presidential campaign, for example, this scenario was posed to candidates during a debate – the question and the answers to it revealed that 'the way that entertainment depicts reality can have significant political implications'.³² Senator John McCain, a

28 Jonathan Freedman, *Media Violence and its Effect on Aggression: Assessing the Scientific Evidence*, University of Toronto Press, Toronto, 2002, p. ix.

29 Rosa Brooks, remarks made on 3 June 2011 at the United States Institute of Peace for an event to publicize the American Red Cross IHL survey. A full audio of that event can be found at: <http://www.usip.org/newsroom/multimedia/audio/ten-years-after-911-evaluating-decade-conflicts-the-rules-war> (last visited December 2011).

30 James Curran, *Media and Democracy*, Routledge, New York, 2011, p. 70.

31 John Hayes, 'Films and TV up the ante on graphic torture scenes', in *Pittsburgh Post-Gazette*, 19 January 2007, available at: <http://www.post-gazette.com/stories/ae/movies/films-and-tv-up-the-ante-on-graphic-torture-scenes-468338/> (last visited December 2011).

32 See J. Curran, above note 30, p. 69, and Rosa Brooks, 'The GOP's torture enthusiasts', in *Los Angeles Times*, 18 May 2007, available at: <http://www.latimes.com/news/opinion/commentary/la-oe-brooks18may18,0,732795.column> (last visited December 2011).

former prisoner of war and himself a victim of torture, and Congressman Ron Paul stated unambiguously that torture would still be wholly unacceptable under such circumstances.³³

Academics, lawyers, policy-makers, and members of the public alike have often ignored the holes in the theoretical situation of the ticking time bomb, however. On television, it is easy to meet the numerous requirements central to this argument:

that the torture be effective enough to elicit the information needed in the short time available; that the information the captive gives under torture will be accurate rather than designed to mislead in order to buy time; and of course that [the persons detained] actually have the information in the first place.³⁴

The prevalence of torture on television and the recurrence of the ticking time-bomb scenario depicted as a realistic threat to ordinary citizens is a part of the public dialogue in the US, a part of how Americans view themselves and are viewed by others, even if Americans' acceptance of torture remains relatively stable.

The issue of political leaders' views on waterboarding is another factor that has contributed to confusion among the US public about torture and humane treatment. US media, elected officials, and candidates for public office have introduced the term 'waterboarding' into political debates, usually without any substantive discussion of the act itself, its history, or how exactly it has been used in recent years. During a nationally televised presidential campaign debate focusing on the topic of national security held on 12 November 2011, candidates Herman Cain and US Representative Michele Bachmann stated that they did not believe that waterboarding was torture and that they would reinstate the practice if elected to the United States presidency.³⁵ These proclamations were made despite a historical US judicial precedent dating back to the Spanish American War in which servicemen and lawmen were prosecuted and convicted for using the waterboarding technique as a form of torture.³⁶ This is not to say that all elected officials or political candidates in the United States share the opinions of Mr. Cain or Ms Bachmann. US Representative Ron Paul, another participant in the debate, maintained his stance against torture as expressed in the 2008 campaign mentioned above. In a statement to the media two days after the Republican presidential primary debate,

33 See United States presidential debate between candidates Mitt Romney and John McCain, 28 November 2007, available at: <http://www.youtube.com/watch?v=tNf6ubjdYmc&feature=related> (last visited December 2011).

34 Bob Brecher, *Torture and the Ticking Time Bomb*, Blackwell, Malden, MA, 2007, p. 16.

35 For a full transcript of the debate proceedings, see The American Presidency Project, 'Republican candidates debate in Spartanburg, South Carolina', available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=97038#axzz1hrizZzUf> (last visited December 2011).

36 For a brief summary of some of these cases, see 'Background information on waterboarding', available at: http://usiraq.procon.org/sourcefiles/background_information_waterboarding.pdf (last visited December 2011).

President Obama reiterated his belief that waterboarding is torture and that it is inconsistent with how the US conducts itself.³⁷

A complete discussion of different strategies to deter terrorists, interrogate terrorists, and punish terrorists is usually lacking in the current media context of short sound bites. A substantive discussion of US values, goals, and strategies is needed to debate the efficacy of various policies and their underlying assumptions. For such a debate to be productive, it is essential for everyone to have a basic knowledge of what is and is not already required by the Geneva Conventions and IHL, as well as how the law of war has been developed by US military and civilian leaders throughout our nation's history.

Regarding the role of the media, there is currently no consensus on whether the media and the violence often depicted therein have a direct impact on levels of violence or acceptance of practices that, in the real world, would constitute violations on IHL. What is clear is that the debate is alive and well. News coverage of political debates dealing with questions of national security, and the continued creation of entertainment products in which violence is a prominent theme, will ensure that the link continues to be examined and discussed. The conversation also provides a useful entrée into promoting the need for greater awareness about IHL and the international obligations of states who are party to the Geneva Conventions and their Protocols.

The obligation to disseminate IHL: the American experience

Legal basis

The dissemination of the rules of war as established in the four Geneva Conventions is a fundamental responsibility of each signatory to the Conventions. Each Geneva Convention contains an Article directing that:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.³⁸

The International Federation of Red Cross and Red Crescent Societies has an obligation to 'assist in the promotion and the development of international humanitarian law and to disseminate this law'.³⁹ In the US, the American Red

37 Mary Bruce, 'Obama says GOP candidates are wrong, waterboarding is "torture"', in *ABC News Online*, 14 November 2011, available at: <http://abcnews.go.com/blogs/politics/2011/11/obama-says-gop-candidates-are-wrong-waterboarding-is-torture/> (last visited December 2011).

38 This requirement is found in Articles 47, 48, 127, and 144 of GC I, II, III, and IV respectively.

39 Section 1, Art. 5, para. 1 (B) (c) of the IFRC Constitution, revised and adopted by the VIth Session of the General Assembly, Rio de Janeiro, Brazil, 23–26 November 1987, available at: http://www.ifrc.org/Global/Governance/Statutory/Constitution_revised-en.pdf (last visited December 2011).

Cross, in support of the International Federation, in accordance with Article 3.2 of the Statutes of the International Red Cross and Red Crescent Movement and as a humanitarian auxiliary to the US government, plays a key role in disseminating the principles of IHL to the civilian population through its Exploring Humanitarian Law (EHL) programme.⁴⁰ As will be described in more detail below, the United States Department of Defense conducts a Law of War Program that mandates training and education for all military men and women and establishes a Law of War Working Group to facilitate collaboration across the military legal community in IHL matters.⁴¹

Contemporary challenges

Awareness levels of the rules of war are higher in the military than the civilian population in the US. The 2011 American Red Cross poll found that only about half of Americans in general indicated awareness of the Geneva Conventions, while about four in five who have served in the military are aware of them.⁴² Training on international law issues is usually required before deployment to combat situations. There were mandatory refresher courses before Operation Iraqi Freedom, and later training courses were mandated during the course of operations 'to address observed areas of concern, such as overzealous detention of civilians'.⁴³ Department of Defense Directive Number 2311.01E requires that the heads of each Defense Component, 'institute and implement effective programs to prevent violations of the law of war, including law of war training and dissemination' as required by the Geneva Conventions.⁴⁴ Training takes place both in American military academies, which offer their officer cadets courses on military law, and in general instruction for enlisted troops during basic training courses. All soldiers in the US Army are expected to take some form of training on military justice and the law of armed conflict every six months, and all Marine Corps commanders and officers are required to be trained in the law of war.⁴⁵ The Air Force requires start-of-service training for all personnel, and specialized law of armed conflict training based on personnel duties during service.⁴⁶ The United States Military Academy at West

40 Handbook of the International Red Cross and Red Crescent Movement, Geneva, 2008, p. 522. Details of the American Red Cross EHL programme are available at: <http://www.redcross.org/portal/site/en/menuitem.86f46a12f382290517a8f210b80f78a0/?vgnextoid=22874749b48bb110VgnVCM10000089f0870aRCRD> (last visited December 2011).

41 See United States Department of Defense Directive 2311.01E, 9 May 2006, updated 15 November 2010, available at: http://www.fas.org/irp/doddir/dod/d2311_01e.pdf (last visited December 2011).

42 American Red Cross, above note 2.

43 Marc Warren, 'The "fog of law": the law of armed conflict in Operation Iraqi Freedom', in Raul A. Pedrozo (ed.), *The War in Iraq: A Legal Analysis*, International Law Studies Series Vol. 86, United States Naval War College, Newport, RI, 2010, p. 169.

44 Department of Defense, above note 41, Section 5, para. 5.7.2, p. 4.

45 See Marine Corps Order 3300.4, Department of the Navy, United States Marines Headquarters, 20 October 2003, available at: <http://www.marines.mil/news/publications/Documents/MCO%203300.4.pdf> (last visited December 2011).

46 See Air Force Policy Directive 51-4, Department of the Air Force, 4 August 2011, available at: <http://www.e-publishing.af.mil/shared/media/epubs/afpd51-4.pdf> (last visited December 2011).

Point requires all students to take a course on constitutional and military law, and the United States Naval Academy curriculum includes a legal studies course requirement that, in part, introduces students to the law of armed conflict.⁴⁷ Requirements on teaching the law of armed conflict to all Air Force Academy cadets have also been put in place, and the United States Naval War College has a renowned international law department.

The Department of Defense has expressed interest in addressing the requirement of ensuring effective training is provided to service members. Efforts have been made to improve training on the rules of war, particularly after the incidents at Abu Ghraib prison in Iraq in 2003 and the resulting increase in scrutiny of US detention programmes. After the extent of the abuses at Abu Ghraib was revealed, an investigative panel noted the strong need for professional ethics training for all personnel involved in detention operations.⁴⁸ The panel also emphasized the need to reinforce the standard of reciprocity within the context of IHL,⁴⁹ namely, that the laws are there to be observed and upheld by all parties, and in ideal situations each party to a conflict will honour their obligations in the hope that their forces will be granted like consideration by the opposing side. The independent panel noted that taking those steps would facilitate the 'preservation of United States societal values and international image that flows from an adherence to recognized humanitarian standards'.⁵⁰

Several studies have been undertaken within the Department of Defense to uncover deficiencies and to develop potential strategies to avoid the abuses of the early and mid-2000s in the Iraq and Afghanistan wars: 'in exercises conducted before the war, considerable effort was put into training to apply the law of armed conflict in targeting decisions and in the rules of engagement'.⁵¹ Legal experts were tasked with creating pocket cards and training vignettes on rules of engagement and the law of war for the education of troops in the conflict. Efforts were also made to attach judge advocate officers to every battalion in forward operating environments so that commanders had the necessary legal advice readily accessible at all times. This requirement has thus far been welcomed unanimously by commanding officers who have been assigned judge advocates as a clear 'force multiplier that enhanced the ability of the battalion to accomplish its mission'.⁵² While these steps were not sufficient to prevent the abuse that occurred at Abu Ghraib in 2003, they are

47 For information on US service academy curricula, see their respective webpages. The US Naval Academy course NL400, 'Law for the junior officer', for example, is a required professional education course for all midshipmen cadets. The Air Force Academy offers two courses, 'Law 361: modern application of the law of armed conflict (LOAC)' and 'Law 466: advanced topics in the law of armed conflict (LOAC)' to fulfil its IHL training requirements.

48 'Final Report of the Independent Panel to Review DoD Detention Operations', August 2004, p. 91, available at: <http://www.au.af.mil/au/awc/awcgate/dod/d20040824finalreport.pdf> (last visited December 2011).

49 *Ibid.*

50 *Ibid.*

51 M. Warren, above note 43, p. 170.

52 See 'Legal services support to operational commanders: a summary of observations and lessons from OEF/OIF judge advocates and infantry commanders', Marine Corps Center for Lessons Learned, 3 May 2006, p. 9, available at: <http://info.publicintelligence.net/MarinesLegalSupport.pdf> (last visited December 2011).

important moves that can begin to make a difference in the understanding of international law obligations among American troops.

While the US armed forces have training systems in place that can be enhanced and improved, it is important that policy-makers who influence military procedures receive increased training and awareness on the rules of war. Unfortunately, the opinions of political leadership on the issues and morality of torture have been no more coherent than those of the public. The current political climate also reveals lack of clarity, misperceptions, and occasional disregard for international legal norms. The comments of candidates for political offices, as highlighted in the previous section on the role of the media, offer just one example of IHL norms being blurred for possible political expediency. The debate over humane treatment of detainees or torture suspects has become confusing and difficult to follow. The United States Congress tried to add clarity through legislation by defining torture in the War Crimes Act of 1996, as amended. Some argued that the clarification was needed because of the changing threats of terrorism and changing nature of war. Others argued that the definition of torture in the Geneva Conventions was still adequate and useful, and that any attempt to redefine it would mean reducing US commitment to humanitarian principles.

Outside the military and government policy arena, the education of America's citizenry on the tenets of IHL is equally important, and, according to the American Red Cross poll, desired. Approximately 80% of young people polled indicated that they believed that educating people of their age about IHL before they are old enough to enlist in the military could reduce civilian casualties.⁵³ As mentioned previously, under the Statutes of the International Red Cross and Red Crescent Movement, the American Red Cross fulfils an auxiliary role to the US government by assisting the government in fulfilling its Convention-mandated duty to disseminate knowledge of the body of law to the public.⁵⁴ The American Red Cross programming on this issue has been expanding over the last several years, and new programmes have been developed to instruct community members, teachers, and students on the basics of the rules of war. The EHL programme, a curriculum developed by the ICRC, has been introduced in schools in sixty countries around the world since 2002.⁵⁵ More than 2,000 American teachers across the country have been trained to use EHL in their classrooms to address the knowledge gap on global issues and IHL.⁵⁶ EHL introduces young people to the fundamental rules and principles of IHL, based on both historical and contemporary conflicts, and shows how the laws of armed conflict aim to protect life and human dignity to reduce the suffering and devastation caused by war. Perhaps most importantly, the programme

53 American Red Cross, above note 2.

54 The basis for this obligation stems from the Statutes of the International Red Cross and Red Crescent Movement, Section II, Art. 3, Para. 2, available at: <http://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf> (last visited December 2011).

55 More information on the ICRC's EHL programme is available at: http://www.ehl.icrc.org/index.php?option=com_content&task=blogcategory&id=49&Itemid=468 (last visited December 2011).

56 See American Red Cross, 'Exploring humanitarian law: a guide for teachers', available at: <http://ehl.redcross.org> (last visited December 2011).

strives to prepare students to understand better a world fraught with complex dilemmas that often occur in the fog of war, recognizing that young people today are also the political and military leaders, policy- and decision-makers, service members, and humanitarian workers of tomorrow.

The goal is ultimately to develop young people's understanding of the humanitarian issues and the legal protections that arise in times of conflict, so that, when confronted with a difficult and complex decision, they will have developed the critical thinking and analytical skills to make choices that can prevent violence, and to take action to improve the world around them. In recognition of the 150th anniversary of the start of the United States Civil War in 2011, and in an effort to show the relevance of IHL in American history, the American Red Cross developed a special Civil War module for its EHL curriculum.⁵⁷ Featuring prominently in that module is a discussion about President Lincoln's Lieber Code to regulate the conduct of hostilities and its impact on the conduct of the war, including specific rules for protecting civilians and their property, treating prisoners and the wounded humanely, and prohibiting the use of torture. The Lieber Code represented the first attempt to codify the laws and customs of war. Despite the fact that the Code significantly influenced other military codes, especially in Europe, and also became the basis for many international humanitarian treaties, very few Americans are aware of this important legacy of the Civil War. One of the Red Cross survey findings revealed that only 7% of adults know that the US first adopted rules regulating warfare during the American Civil War.⁵⁸ Interestingly, the percentage of young people surveyed who were aware of this fact was more than double that of the adults, at 18%.

In addition to efforts to educate students and build awareness of IHL at the high-school level, outreach efforts on college campuses have been intensifying to capture the increasing interest by undergraduate, graduate, and law professors in humanitarian law issues around the country. The American Red Cross is also starting to work with US-based humanitarian organizations to develop IHL training tools for their staff involved in international field operations, many in current conflict settings. The need for training in IHL among organizations involved in humanitarian work in the field also highlights the existing gap in knowledge on the protections afforded by IHL and constitutes an important area where capacity-building is of critical practical and operational importance. One excellent example of international capacity-building in the IHL arena can be found at the United States Institute for Peace, which has published a *Law of War Manual* and conducts a 'Law of War' course as part of its programming.⁵⁹

57 See American Red Cross, 'The American Civil War: a humanitarian perspective', Lessons and Resources for Teachers and Students, 2010, available at: <http://ehl.redcross.org/resources/downloads/CivilWarLessons.pdf> (last visited December 2011).

58 American Red Cross, above note 2.

59 For details on USIP's Law of War materials, see their website at: <http://www.usip.org/publications/law-war-training-publications-military-and-civilian-leaders> (last visited December 2011).

Case studies

The engagement of the United States in a wide-ranging effort against global terrorism and its conduct of two wars over the past decade have given rise to a number of humanitarian law issues, which have repeatedly generated intense media storms and occasionally ardent public outcries, particularly over policies on the treatment of prisoners detained in the course of hostilities. As the effort has shifted from Iraq to Afghanistan, the issue of collateral damage and civilian casualties has also become highly visible. In this section, the article will look at three case studies to bring the focus onto the views of Americans toward IHL standards. The cases will deal with impartial humanitarian assistance, detainee rights to maintain contact with family members, and efforts made by the US military to decrease civilian casualties. All reinforce the findings of public opinion surveys of fairly widespread misunderstandings of IHL standards.

First aid and the Taliban

A telling example of American perceptions of IHL is the public furore over medical training and treatment of Taliban forces by the ICRC. Despite the overarching benefits of medical training for all those involved in armed conflict, some in the US voiced concerns through blog postings and other social media channels. Some said that the practice is ‘treason’ if done by Americans, ‘aiding the enemy’, or providing ‘logistical support they would not otherwise have, freeing up manpower resources for combat – or terror’.⁶⁰ Others feared a slippery-slope effect: if medical training is provided, then other types of training would be appropriate as well.⁶¹ There were calls by some bloggers to reconsider donations to the ICRC, references to the millions of dollars that the US government donates in American tax money to the organization, and even an occasional call to put the ICRC on trial for these actions.⁶² The American Red Cross received nearly 300 inquiries and complaints from the public after the news broke, indicating a misunderstanding over the separate roles of a national society, such as the American Red Cross, and the ICRC within the International Red Cross and Red Crescent Movement.⁶³

60 Ashish Sumar Sen, ‘Taliban learning first aid from Red Cross workers’, in *Washington Times*, 26 May 2010, available at: <http://www.washingtontimes.com/news/2010/may/26/taliban-learning-first-aid-from-red-cross-workers/?page=all> (last visited December 2011) (see comments on 28 May 2010 at 4:12 AM and 27 May 2010 at 4:42 AM).

61 *Ibid.*

62 See ‘Red Cross lends a hand to the taliban’, in *FrumForum*, 27 May 2010, available at: <http://www.frumforum.com/red-cross-lends-a-hand-to-the-taliban/> (last visited December 2011).

63 The American Red Cross is one of 187 national societies belonging to the International Federation of Red Cross Red Crescent Societies. Its primary mission is to respond to humanitarian disasters in the United States and around the world. The ICRC is a Swiss corporation entrusted by the High Party States of the Geneva Conventions to serve as an impartial humanitarian ‘guardian’ of those Conventions that form the basis of IHL. Both organizations are members of the International Red Cross and Red Crescent Movement, but with very different humanitarian missions. The American Red Cross neither plays any role nor takes any position on the confidential bilateral relationships that exist between the ICRC and individual states.

What critics of the ICRC actions failed to understand is that all four of the Geneva Conventions stipulate that the provisions of the respective Conventions 'constitute no obstacle to the humanitarian activities which the [ICRC] or any other impartial humanitarian organization may, subject to the consent of the parties to the conflict concerned, undertake for the protection' of the wounded and sick,⁶⁴ shipwrecked,⁶⁵ prisoners of war,⁶⁶ and civilian persons.⁶⁷ Medical personnel and chaplains are also covered by the text in the First and Second Conventions. Common Article 3 in all four Conventions extends this access to conduct impartial humanitarian activities to conflicts not of an international character.

Impartiality and neutrality are principles that guide ICRC operations around the world. The organization strives to ensure 'its impartial assistance – with its partners – to all wounded and sick, whichever group they belong to'.⁶⁸ Supplying impartial health care and training increases the chances of survival for all participants in armed conflict. Medically trained combatants are better equipped to provide assistance to wounded and sick individuals on both sides of the conflict. In addition, the ICRC's impartial and neutral approach has helped foster a level of access to conflict areas unmatched by any other humanitarian organization.

The Geneva Conventions make medical care for the wounded a high-priority obligation of parties involved in both international and non-international armed conflict. Medical care and basic training of armed forces allows this obligation to be fulfilled, although the ICRC is not legally obliged to provide training and medical supplies to a party to an armed conflict. When the story was first reported by the international press in May 2010, the ICRC had trained more than seventy members of the opposition forces fighting against the Afghan government and coalition forces in basic first aid and had provided some basic medical supplies to the groups.⁶⁹ At the same time, more than a hundred Afghan soldiers, policemen, and taxi drivers who double as unofficial ambulance drivers had also been trained. This training had been occurring for more than four years, and it was provided to participants from both sides of the conflict for practical reasons in order to allow some stabilization of wounded combatants and anyone else injured in the course of the conflict.

The ICRC noted that 'it had introduced the classes because pitched battles, landmines and roadblocks stopped people in the most volatile areas from getting to the hospital'.⁷⁰ Moreover, the organization viewed the three-day course including lessons in IHL and basic first aid as 'a chance to remind all sides about respect for

64 GC I, Art. 9.

65 GC II, Art. 9.

66 GC III, Art. 9.

67 GC IV, Art. 10.

68 ICRC, 'First aid and hospital care', 29 October 2010, available at: <http://www.icrc.org/eng/what-we-do/health/first-aid-hospital-care/overview-first-aid-hospital-care.htm> (last visited December 2011).

69 CNN World, 'Red Cross defends helping Taliban treat casualties', 27 May 2010, available at: http://articles.cnn.com/2010-05-27/world/afghanistan.red.cross.taliban_1_icrc-kandahar-taliban?_s=PM:WORLD (last visited December 2011).

70 Jon Boone, 'Red Cross gives first aid lessons to Taliban', in *The Guardian*, 25 May 2010, available at: <http://www.guardian.co.uk/world/2010/may/25/red-cross-first-aid-taliban> (last visited December 2011).

civilians and proper treatment of detainees'.⁷¹ For example, a driver who transports those needing medical care in Helmand told the ICRC that a two-hour drive to the closest medical facility could take as long as six or seven hours owing to insecurity, mines, checkpoints, and roadblocks along the way.⁷² While some in the Afghan government expressed strong disapproval of the ICRC activities, a NATO spokesman relayed support for the humanitarian work of the ICRC in Afghanistan and noted that coalition forces 'also provide treatment to any case caught up in this conflict, including [their] opponents, in line with [their] own obligation to respect the rules of armed conflict'.⁷³ A Fox News reporter noted on air that American marines interviewed on a base in Afghanistan were not shocked or upset by the news because they routinely treated wounded Taliban members when they captured them in combat.⁷⁴

Some of the public debate over this issue of first aid training did incorporate an understanding of humanitarian principles and showed that real-life dilemmas from the battlefield are never simple and can provide a good opportunity for people with different views to engage in substantive dialogue. Many of the comment sections of blog postings and opinion articles point to the importance of the ICRC remaining neutral and impartial in conflict situations, as it is indeed required to do by the Geneva Conventions.⁷⁵ Some opinions point to a need for greater education of the tenets of IHL and how it can be violated. For example, some question whether non-governmental organizations violate these legal norms by providing assistance to combatants known to commit crimes of war frequently.⁷⁶ The complexity of the current reality of conflicts is well discussed in Fiona Terry's 2011 article, 'The International Committee of the Red Cross in Afghanistan: reasserting the neutrality of humanitarian action'.⁷⁷ Arguing that the ICRC's work in Afghanistan facilitating the protection of civilians caught in the conflict was in accordance with its mandate from States Parties to the Geneva Conventions, Terry acknowledges that some critics challenge that mandate when it involves organizations such as the Taliban or Al Qaeda.⁷⁸ Article 10 of the Fourth Geneva Convention declares that

the provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may . . . undertake for the protection of civilian persons and for their relief.

71 CNN World, above note 69.

72 International Committee of the Red Cross, 'Afghanistan: ICRC steps up efforts to help the sick and wounded', operational update, 25 May 2010, available at: <http://www.icrc.org/eng/resources/documents/update/afghanistan-update-250510.htm> (last visited December 2011).

73 J. Boone, above note 70.

74 Fox News, 'Red Cross teaching Taliban first aid', 26 May 2010, available at: <http://video.foxnews.com/v/4214695/red-cross-teaching-taliban-first-aid/> (last visited 16 August 2011).

75 A. S. Sen, above note 60.

76 *Ibid.*

77 Fiona Terry, 'The International Committee of the Red Cross in Afghanistan: reasserting the neutrality of humanitarian action', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, pp. 173–188.

78 *Ibid.*, p. 186.

An article by the law professor Kenneth Anderson, as cited in Terry's piece, argues that opposition groups are not governments, thus nullifying the ICRC's mandate.⁷⁹ This demonstrates the varied public knowledge in the US of the protections that IHL affords to combatants, humanitarian workers, and healthcare providers in times of conflict. The passion of the discourse also highlights the immediacy of the topic to Americans given the US involvement in the conflict. Whether these issues would receive the same reaction if the story was about ICRC activity in a remote conflict in Africa, where the US is not involved, is an interesting question to ponder.

The importance of this case lies in the revelation that American perceptions about fundamental battlefield conduct often do not reflect acceptance of core IHL principles. Caring for the sick and wounded was the essence of Clara Barton's work during the American Civil War that was one of the factors in the creation of the American Red Cross. It is therefore interesting to see that the application of this standard of conduct on the modern battlefields of Afghanistan and Iraq is difficult for some Americans to accept. There is a clear educational opportunity in this case for the EHL programme in the US.

Family visits for Guantánamo detainees

On 11 May 2011, the *Washington Post* published a news story with the headline 'Guantanamo Bay detainees' family members may be allowed to visit'. Within twenty-four hours there were 190 comments posted to this story, the vast majority highly critical of the reported negotiations between the ICRC and the US Department of Defense seeking to allow family members of detainees held by the United States at Guantánamo Bay, Cuba, to visit their relatives.⁸⁰ On media websites that allow user feedback to articles, those posted online about the potential visits were often harshly critical of allowing family visits to Guantánamo. While not all disagreed with the idea, those who did not support family visits made comments that ranged from some calling the idea 'silly' to those who termed the decision-makers involved 'imbeciles' and the ICRC a 'terrorist sympathizer'. A commenter who called into a radio show discussion of the family visit topic was adamantly against the policy, calling the detainees at Guantánamo 'animals' that deserve no rights.⁸¹ An online commenter stated emphatically in reference to a news article on MSNBC.com that he would no longer support the Red Cross. The same commenter, revealing his misunderstanding of the roles of the government and humanitarian

79 Kenneth Anderson, 'Humanitarian inviolability in crisis: the meaning of impartiality and neutrality for U.N. and NGO agencies following the 2003–2004 Afghanistan and Iraq conflicts', in *Harvard Journal of Human Rights*, Vol. 17, 2004, p. 63.

80 Peter Finn and Julie Tate, 'Guantanamo Bay detainees' family members may be allowed to visit', in *Washington Post*, 11 May 2011, available at: http://www.washingtonpost.com/national/guantanamo-bay-detainees-family-members-may-be-allowed-to-visit/2011/05/11/AFGAMtsG_story.html (last visited December 2011).

81 'Family visits at Gitmo?', recording of 18 May 2011, segment on Southern California Public Radio show *AirTalk*, available at: <http://www.scpr.org/programs/airtalk/2011/05/18/19126/family-visits-at-gitmo> (last visited December 2011).

actors involved, asked about those released from Guantánamo who ‘are back out there trying to kill Americans. What is the Red Cross doing about that?’⁸²

The Third Geneva Convention provides the legal framework for the treatment of prisoners of war. Among the provisions that oblige states to ensure that ‘prisoners of war must at all times be humanely treated’ is an entire section dedicated to relations of prisoners with the external world.⁸³ Article 71 of that Convention provides for the assurance that prisoners will be permitted to exchange correspondence with their families.⁸⁴ Several provisions embodied in IHL stress the importance of maintaining family links and maintain that ‘other than in absolutely exceptional circumstances, the authorities must allow and even arrange for the exchange of family news within a reasonable lapse of time’.⁸⁵ The ICRC facilitates these linkages in practice. While the US does not consider those held at its facility in Guantánamo Bay, Cuba, to be prisoners of war, the guidance in the Conventions is still considered a model for treatment by the US military, as discussed previously.⁸⁶

Interestingly, this pledge by the US to abide by the provisions in the Geneva Conventions reinforces the validity of the family visit request. If the position is accepted that the detainees are not eligible for prisoner-of-war status, then as foreign nationals present in the territory of a party to the conflict, the detainees could receive the protections of the Fourth Geneva Convention, which provides for the protection of civilian persons and those removed from the conflict owing to sickness, injury, or detention.⁸⁷ Article 25 allows for the conveyance of news of a strictly personal nature to and from family members. Article 116 specifically allows for the receipt of visitors by detainees, especially near relatives, at regular intervals.

Regardless of the legal justification used, the ICRC was in keeping with its impartial humanitarian mandate in making the request for family visits to Guantánamo. The ICRC considers its role as a facilitator of family messages as fulfilling two functions, namely to remind ‘authorities of their obligations with regard to establishing and maintaining family contact’ and simultaneously to provide detainees with the ability ‘to exchange news of a strictly private and family nature’.⁸⁸ The ICRC was granted the right of access to prisoners of war and civilians interned in international armed conflict by the Geneva Conventions.⁸⁹ That right is also applicable in situations of non-international armed conflicts with the permission of the detaining state. The US encourages this work by allowing access to persons it has detained around the world, including during the current ongoing conflicts. The ICRC has been visiting the facilities at Guantánamo Bay quarterly since early 2002, assessing the conditions and treatment of those held there and assisting them in communications with their families, as they do with detainees held

82 See comments at: <http://www.msnbc.msn.com/id/43008249/> (last visited December 2011).

83 GC III, Art. 13, Part II, and Part III, Section 5.

84 GC III, Art. 71.

85 Alain Aeschlimann, ‘Protection of detainees: ICRC action behind bars’, in *International Review of the Red Cross*, Vol. 87, No. 857, March 2005, p. 116.

86 M. Anderson and E. Zukauskas, above note 16.

87 GC IV, Art. 4.

88 See A. Aeschlimann, above note 85, p. 116.

89 See GC I/II/III, Art. 9, and GC IV, Art.10.

elsewhere around the world. The ICRC reports that, between 2002 and 2009, it facilitated the exchange of over 43,000 Red Cross messages between detainees and their families.⁹⁰

Beyond assistance with mail exchanges, the ICRC has also worked with the US government to create other mechanisms for family communication. In April 2008, for example, authorities allowed the implementation of 'a system enabling detainees to regularly speak to their families by telephone, facilitated by the ICRC through its delegations around the world'.⁹¹ This policy began as a single phone call allowed annually per detainee, and although more than one call per year is now permitted, detainees must still meet certain undisclosed conditions set by the military to be eligible. The ICRC reports that, at Guantánamo, 'Around 1,800 telephone calls have been made since the system was established'.⁹² This is reinforced by a second system that facilitates telephone calls for detainees in cases of emergency, such as when a death occurs in the family. Beginning in September 2009, the ICRC and the Department of Defense collaborated to set up monitored video links for some detainees to speak with their family and close friends.⁹³ Access to this system was based in part on capacity in their country of origin, so the programme slowly expanded over the following years. Yemeni detainees, for example, the largest nationality represented at the base, gained access to video links in late 2010. Some of those detainees had been held for over nine years, making the one-hour video-conference calls the first time that they had seen family members in almost a decade. So-called 'high-value' detainees held in the tightest security facility at Guantánamo are allowed written communication but not telephone or video contact with family members.⁹⁴ The administration has acknowledged that it is also exploring the possibility of allowing actual visits to the facility by detainee family members.

The Obama Administration expressed a commitment to close the facility in early 2009, but efforts to do so have stalled and now appear unlikely to be successful at any point in the near future. The United States Congress has made several moves to restrict the options open to the Administration related to the prison camp and the detainees housed there, and President Obama has been forced to back away from plans for detainee transfers and a quick closure of the detention facility. Meanwhile, US public opinion has shown increased support for keeping the facility open, with 58% of those polled by Rasmussen in March 2011 saying that Guantánamo should not be closed.⁹⁵ The question of family contact therefore has repercussions that

90 ICRC Regional Delegation for the United States and Canada, 'News and notes', February 2009, available at: http://archive.constantcontact.com/fs013/1102236947549/archive/1102427885827.html#LETTER_BLOCK7 (last visited December 2011).

91 ICRC, 'Persons detained by the US in relation to armed conflict and the fight against terrorism – the role of the ICRC', 9 January 2012, available at: <http://www.icrc.org/eng/resources/documents/misc/untied-states-detention.htm> (last visited December 2011).

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

95 See Rasmussen Reports, 'Most voters still support Guantanamo prison, military tribunals for terrorists', 14 March 2011, available at: http://www.rasmussenreports.com/public_content/politics/general_politics/

could affect detainees for a prolonged and indefinite period of time well into the future.

The ICRC and the Department of Defense have released few details on possible visits because their discussions are confidential. However, family visits to those convicted of terrorism already occur at other US detention facilities on the American mainland. Under strict supervision, up to five family visits per month are permitted at the highest-security US federal prison installation in existence, the United States Penitentiary Administrative Maximum Facility near Florence, Colorado.⁹⁶ Prisoners detained there include ‘shoe bomber’ Richard Reid and numerous individuals convicted of involvement in terrorist attacks, including the 1993 attack against the World Trade Center in New York and the 1999 American embassy bombings in Africa. Family visits to detainees are also permitted at US military detention centres in Afghanistan at Bagram Airbase, the largest detention facility in Afghanistan.⁹⁷

The viscerally negative reactions to the news of visit requests and to reports on medical care and training of the Taliban among both policy-makers and members of the public illustrates a trend towards either misunderstanding or disregarding principle tenets of IHL. The position of the United States Executive Branch that detainees at Guantánamo are not legally entitled to prisoner-of-war privileges afforded by the Geneva Conventions but that detainee treatment will still be modelled after the Geneva Conventions provisions makes it difficult to know exactly which provisions apply and do not apply. Members of the United States Congress have sought to define these privileges and where they end as well. A better understanding of the Geneva Convention requirements would be helpful for all of those engaged in the discussion, even those arguing that the Geneva Conventions are not applicable to this case. Furthermore, an understanding of why the Geneva Conventions offer this privilege and how the detaining authorities themselves may benefit from them (e.g. a more compliant and stable prisoner population) could better guide the discussion if the US seeks those benefits as well in this particular case, whether it is legally obliged to do so or not. Further working to clarify the legal situation for detainees and combatants involved in the war on terrorism is also a deeply needed effort so that the appropriate standards for their treatment are made clearer to everyone.

Collateral damage in Afghanistan

The number of civilians killed in the war in Afghanistan will probably never be known, but it is clear that it will run into the thousands by the end of the conflict. These casualties have been caused directly and indirectly by all parties to the conflict, whether international troops or anti-government forces. Reliable statistics,

[march_2011/most_voters_still_support_guantanamo_prison_military_tribunals_for_terrorists](#) (last visited December 2011).

96 ADX Florence, ‘Visiting procedures handbook’, available online through the Federal Bureau of Prisons at: http://www.bop.gov/locations/institutions/flm/FLM_visit_hours.pdf (last visited December 2011).

97 ICRC, above note 91.

however, are nearly impossible to establish in such a dangerous operating environment. The United Nations Assistance Mission to Afghanistan has published estimates on civilian casualties since 2006, with the caveat that the numbers potentially under-report casualties, and from 2006 to 2010 alone an estimated 8,832 non-combatants were killed in the conflict.⁹⁸ Civilian casualties rose each year that statistics were collected, though 'efforts by international and Afghan military forces to reduce civilian casualties resulted in fewer civilians killed and injured by these forces in 2010 than in previous years'.⁹⁹

From a purely humanitarian perspective, the degree of collateral damage in Afghanistan, including civilian deaths, is deeply concerning. From a legal perspective, it raises questions about the combatants' adherence to the provisions in the Fourth Geneva Convention, Additional Protocol I, and the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict.¹⁰⁰ The Fourth Geneva Convention provides for the protection of civilian peoples in time of war. Article 27 specifically requires that protected persons be humanely treated and protected against all acts of violence or threats thereof. Article 51 of Additional Protocol I offers more detailed protections to civilians in conflict, outlining prohibitions on general attacks on civilians, indiscriminate attacks, attacks for purpose of reprisal, and so forth. The 1954 Hague Convention addresses the need to protect cultural and historically sensitive sites from destruction during times of war.

Public opinion in the US on this issue is important given that the US has led international forces in Afghanistan since 2001. In the February 2011 American Red Cross poll, 29% of adults and 37% of young people believed that it was at least sometimes acceptable to deprive civilians in combat areas of food, medicine, or water in order to weaken the enemy. When asked whether a ban on landmines should be implemented, 70% of adults and 57% of young people agreed, owing to the strong possibility of civilian casualties. A 1999 ICRC survey also found that between 5% and 10% more American respondents than other Security Council member citizens sanctioned actions such as attacking civilians to weaken the enemy or to punish them for aiding the enemy.¹⁰¹ Yet, as mentioned above concerning the landmine issue, almost three in four American adults and three in five young people supported increasing the accuracy of weapons to reduce unintended civilian casualties. The ICRC study noted that

Pragmatic views of the power of weapons of mass destruction, lack of direct experience of war on US territory, constant media exposure to conflicts that

98 United Nations Assistance Mission in Afghanistan and Afghanistan Independent Human Rights Commission, *Afghanistan Annual Report 2010: Protection of Civilians in Armed Conflict*, Kabul, Afghanistan, March 2011, p. i, available at: <http://unama.unmissions.org/Portals/UNAMA/human%20rights/March%20PoC%20Annual%20Report%20Final.pdf> (last visited December 2011).

99 *Ibid.*, p. iv.

100 Convention for the Protection of Cultural Property in the Event of an Armed Conflict, The Hague, 14 May 1954, available at: <http://www.icrc.org/ihl.nsf/FULL/400> (last visited December 2011).

101 Greenberg Research, Inc, 'The people on war report: International Committee of the Red Cross worldwide consultation on the rules of war', December 1999, p. 62, available online at: http://www.icrc.org/eng/assets/files/other/icrc_002_0758.pdf (last visited December 2011).

claim untold numbers of civilian lives – along with many other factors – may help explain this trend¹⁰²

of differing American public views toward non-combatant casualties as compared to citizens in other nations.

The issue of civilian casualties has become a very clear and public concern of international force commanding officers in Afghanistan in recent years. A December 2008 tactical directive by the International Security Assistance Force Commander, General David McKiernan, stressed that ‘minimizing civilian casualties is of paramount importance’¹⁰³ to operations and that training to prevent those casualties was critical. The succeeding commander, General Stanley McChrystal, elevated the prevention of non-combatant casualties even further in both tactical directives and in discussions with American officials and the media. His mid-2009 revision of the tactical directive guiding forces operating in Afghanistan argued that soldiers ‘must avoid the trap of winning tactical victories – but suffering strategic defeats – by causing civilian casualties or excessive damage and thus alienating the people’.¹⁰⁴ He noted that this is not only a legal and moral issue but that it also is significantly related to efforts to win public opinion and thereby bolster support for the Afghan government. Lowering non-combatant deaths by tightening military rules of engagement was a central tenet of McChrystal’s Afghan strategy, and this included limits on the use of airstrikes, restrictions on the use of certain weapons against locations where the likelihood of civilian presence is high, and modified policies that affect operations by American Special Forces.

These tactical shifts aimed at reducing collateral damage were widely discussed in the media. Some praised the moves that were publicized by General McChrystal in mid-2009. In June 2009, the *New York Times* argued in an editorial that ‘[p]rotecting Afghan civilians, and expanding the secure space in which they can safely go about their lives and livelihoods must now become the central purpose of American military operations in Afghanistan’.¹⁰⁵ The Council on Foreign Relations Fellow Micah Zenko argued in *The Guardian* that the directive issued by McChrystal was ‘much welcomed and long overdue’, but that it was also unlikely to lower the number of civilian casualties noticeably, owing to ‘insufficient ground forces, the nature of the enemy and the constant fog of war’.¹⁰⁶ In a February 2010 public radio interview, Sarah Holewinski from the Campaign for Innocent Victims

102 *Ibid.*, p. 61.

103 International Security Assistance Force Commander Gen. David McKiernan, ‘Tactical directive’ (non-classified excerpts), Kabul, Afghanistan, 30 December 2008, available online at: http://www.nato.int/isaf/docu/official_texts/Tactical%20Directive_090114.pdf (last visited December 2011).

104 International Security Assistance Force Commander Gen. Stanley McChrystal, ‘Revised tactical directive’ (non-classified excerpts), Kabul, Afghanistan, 2 July 2009, available online at: http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (last visited December 2011).

105 See ‘Editorial: measuring success in Afghanistan’, in *The New York Times*, 8 June 2009, p. A18, available at: <http://www.nytimes.com/2009/06/08/opinion/08mon1.html> (last visited December 2011).

106 Micah Zenko, ‘Collateral damage in Afghanistan is unavoidable’, in *The Guardian*, 30 June 2009, available at: <http://www.guardian.co.uk/commentisfree/cifamerica/2009/jun/24/mcchrystal-usa-afghanistan-air-attacks> (last visited December 2011).

in Conflict praised the strides made by the military under McChrystal, noting that civilian deaths caused by international forces had dropped by about 30% since the new directive had been issued.¹⁰⁷ After McChrystal's removal from command in 2010, Senator Patrick Leahy of Vermont praised his efforts to reduce civilian casualties in Afghanistan and stated that: "There is no basis . . . military or otherwise, to criticize these efforts to protect civilian lives".¹⁰⁸

Unfortunately, few polls have examined American public opinion on the topic of civilians killed in conflicts. There was, however, a vocal backlash by some against the new restrictions placed on troops in Afghanistan that were meant to save civilian lives. Diana West of the *Washington Examiner* characterized the rationale behind the new rules of engagement to protect civilians as 'hallucinatory thinking',¹⁰⁹ while Senator Joseph Lieberman of Connecticut argued that the welfare and safety of American troops was paramount and noted that the new rules endangered them and harmed morale.¹¹⁰ A *New York Times* article also cited several members of the US military serving in Afghanistan who felt that they were at greater risk under the new rules, which they felt 'concede advantages to insurgents'.¹¹¹

Gauging public opinion on these issues of civilian casualties is difficult owing to a lack of polling data and scholarly analysis of the topic. Polls tend to focus on American opinions about soldiers in the field rather than the effects of the war on Afghan civilians. While praised by many as important for moral, legal, or strategic reasons, US military actions to reduce civilian casualties have not always been greeted positively by media analysts and politicians, many of whom worry in particular about the effects that such moves will have on the safety of American troops. The American military has made notable efforts to reduce some activities that cause casualties among non-combatants (as noted above with regards to McChrystal's tactical directives), and statistical evidence reveals that policies such as reducing the use of air support in combat situations have in fact lowered civilian casualty rates, and the majority of those casualties in Afghanistan are now caused by insurgent forces.¹¹² In-depth analysis of public opinion on this issue would be extremely useful in helping to address gaps in the understanding of the

107 Matthew Bell, 'McChrystal Apologizes for Afghan civilian deaths', *Public Radio International*, 24 February 2010, available at: <http://www.pri.org/stories/world/middle-east/mcchrystal-apologizes-for-afghan-civilian-deaths1888.html> (last visited December 2011).

108 Senator Patrick Leahy, 'Press release: protecting Afghan civilians', 29 June 2010, available at: http://leahy.senate.gov/press/press_releases/release/?id=6ade9d06-01eb-4b7a-8fd8-943ff531eddb (last visited December 2011).

109 Diana West, 'Afghan war rules endanger U.S. troops', in *Washington Examiner*, 13 September 2009, available at: <http://washingtonexaminer.com/opinion/op-eds/2009/09/diana-west-afghan-war-rules-endanger-us-troops/36582> (last visited December 2011).

110 Roxana Tiron, 'Lieberman: rules of engagement hurting morale of U.S. troops in Afghanistan', in *The Hill*, 4 July 2010, available at: <http://thehill.com/homenews/senate/107125-lieberman-rules-of-engagement-hurting-troop-morale-in-afghanistan> (last visited December 2011).

111 C. J. Chivers, 'General faces unease among his own troops, too', in *New York Times*, 22 June 2010, p. A11, available at: <http://www.nytimes.com/2010/06/23/world/asia/23troops.html> (last visited December 2011).

112 Laura King, 'New U.S. Tactics Said to Reduce Afghan Civilian Deaths', *L.A. Times Online*, 28 August 2009, available at: <http://articles.latimes.com/2009/aug/28/world/fg-afghan-civilians28> (last visited December 2011).

principles and enormously useful for Americans as the conflict in Afghanistan comes to a close.

Conclusion: why perceptions matter

While assessing people's perceptions of complex issues such as IHL and its application to the modern battlefield is always a somewhat subjective exercise, based on trusting sincerity in survey responses and accepting public statements at face value, this article has dared to examine a number of public opinion polls, policy-maker statements, and blog/internet comment sites in an attempt to understand better how Americans view IHL and its application in real-world situations. The reality is that many Americans have never been taught about the Geneva Conventions, except perhaps that they exist. The fact that two in five young people and one in three adults in the US believe that American soldiers detained abroad can be tortured in some circumstances is disturbing, and it should trigger intense focus on these issues.

The US is currently engaged in a political exercise to choose its next president. As highlighted earlier, there have been candidates for this highest of American offices who would consider resorting to interrogation techniques generally regarded as torture should the situation dictate such extreme measures. It is not known with any high degree of certainty whether the individuals stating such a position were fully aware that such practices would be in direct violation of IHL. It can only be hoped that before they would be forced to decide such a course of action as the American President that they and/or their legal advisors would recognize that torture, under any circumstances, is illegal under international law (and US domestic law) and, further, that it undermines the international standing of the US.

Perceptions on IHL matter because the same people who will elect the next president are the parents, teachers, and role models of America's next generation of soldiers, policy-makers, and presidents. The messages that our young people receive today will shape how they behave when they are faced with the battlefield decision whether to destroy a village, kill or torture a captured soldier, or provide medical aid to a wounded enemy combatant. The youth respondents in the American Red Cross survey overwhelmingly stated that they want more IHL education. If the perceptions of Americans toward IHL presented in this paper are any indication, those respondents should be applauded for their youthful wisdom and provided with the knowledge they desire.

IHL education in the United States has taken on new importance over the past decade. Department of Defense policies have refocused the need for the broadest exposure to IHL among American military forces. The American Red Cross, in co-ordination and collaboration with the ICRC, is positioning itself to be a national leader in increasing the understanding of IHL in schools and communities across the US. One can only hope that, if this article were to be rewritten in ten to fifteen years' time, the educational efforts in civilian and military circles would reap a more enlightened perception of IHL among the American citizenry.