The (Ir)relevance of the Third Geneva Convention in Contemporary Armed Conflicts

Sassòli, Marco

THE (IR)RELEVANCE OF THE THIRD GENEVA CONVENTION IN CONTEMPORARY ARMED CONFLICTS
LA (NON-)PERTINENCE DE LA TROISIÈME CONVENTION DE GENÈVE DANS LES CONFLITS ARMÉS CONTEMPORAINS

Marco Sassòli
University of Geneva

Résumé

Marco Sassoli est professeur de droit international à l'université de Genève et commissaire au sein de la Commission internationale de juristes (CIJ). Dans cet article, il examine la pertinence de la Troisième Convention de Genève au regard des conflits armés contemporains et en souligne les limites, parmi lesquelles le fait que la Troisième Convention s'applique aux CAI, qui sont aujourd'hui relativement rares. Tout en soulignant que l'application par analogie de la Troisième Convention aux CANI a également des limites, il affirme que la Troisième Convention garde toute son utilité dans l'éventualité d'un CAI de grande ampleur. Une limite fondamentale à la pertinence de la Troisième Convention concerne l'approche collective, qui selon lui n'est plus appropriée dans beaucoup de conflits armés contemporains et ne correspond pas aux valeurs des droits humains. Une approche plus individualisée serait appropriée, en particulier concernant les causes d'admissibilité, les procédures s'appliquant à la détermination de la nécessité d'interner et le rapatriement. Toutefois, en dépit de ces limites, cette Convention demeure selon lui une référence pour les situations de détention en conflit armé. La Troisième Convention est parfois davantage acceptée et respectée que l'interdiction du recours à la force prévue par la Charte des Nations Unies ou les droits humains, et peut donc faire la différence. Par ailleurs, la Troisième Convention est un modèle accepté en termes de protection de certaines catégories de personnes privées de leur liberté – bien qu'il serait préférable selon lui, de faire une analogie avec la protection des internés civils prévue par la Quatrième Convention. Enfin, les études de terrain démontrent que la Troisième Convention a une influence sur la pratique des acteurs non-étatiques, au-delà de son champ d'application personnel formel, et est donc parfois invoquée avec succès par les délégués du CICR pour améliorer la protection des personnes détenues en CANI.

I. Introduction

The Third Geneva Convention (Convention III) is a universally accepted treaty that offers protection that is detailed and appropriate to the situation of armed conflicts to war victims par excellence: soldiers of one State falling into the power of the enemy State during an inter-

national armed conflict (IAC). It is therefore welcome and fully cogent that the International Committee of the Red Cross (ICRC) published an updated Commentary on that Convention, taking practice of the last 60 years and other branches of international law into account in its interpretation.[1] Nevertheless, IACs are fortunately no longer the predominant type of armed conflict nowadays and the number of prisoners of war (PoWs) in contemporary conflicts is very low. One could therefore wonder whether Geneva Convention III is still relevant in contemporary armed conflicts.

II. Convention III applies only in international armed conflicts

Convention III protects prisoners of war. Prisoners of war and combatants legally exist only in IACs. This is one of the few differences between international and non-international armed conflicts (NIACs), which has survived the recent tendency of bringing IHL of NIACs closer to IHL of IACs via alleged rules of customary law or by analogy.

International armed conflicts are fortunately rare

IACs are rare in the contemporary world. This is fortunate. We hope that this will not change, but it could. In a major IAC with 100'000 PoWs, the collective approach of Convention III, which refers to the persons it protects as a collective category based upon mainly collective criteria determining their status, would be appropriate. More individualistic human rights oriented proposals, which have appeared in recent scholarly writings, including my own,[2] based upon limited, asymmetric IACs with a limited number of PoWs would be unrealistic in such situations, while Convention III, understood according to the updated Commentary, would be fully relevant again. It may conversely be the case that even the updated Commentary interprets some rules, based upon the practice in limited asymmetric IACs with a limited number of PoWs and in the light of other rules of international law in an individualistic way, which would no longer be realistic in a major IAC.

Even in contemporary international armed conflicts, parties often deny prisoner-of-war status to enemies they intern

When we look at the few IACs that currently exist, parties often find an excuse to deny PoW status to enemies they detain under different pretexts. First, they often deny that an IAC exists. Second, even when they recognize the existence of an IAC, they deny that enemies they detain fulfil the conditions to benefit from combatant status, which is, in most cases, a

1 *Commentary on the Third Geneva Convention, Convention (III) relative to the Treatment of Prisoners of War*, ICRC, Cambridge University Press, 2021 (hereafter Updated Commentary GCIII).

2 Marco Sassòli, 'Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War', in: Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions, A Commentary*, Oxford, Oxford University Press, 2015, at 1065.

necessary but not sufficient condition to benefit from PoW status. It is therefore crucial that the updated Commentary on Article 4 of the Convention clearly defines who is, but also who is not a PoW. It in particular rejects the suggestion, made by some States[3] and scholars,[4] that some persons are 'unlawful combatants', bearing the disadvantages of PoW status – to be deprived of freedom for an indefinite period without judicial control – without benefitting of the advantages – in particular combatant immunity and treatment according to Convention III.[5]

Atypical detaining authorities in international armed conflicts have difficulties to comply with Convention III

In addition, in many situations in which Convention III arguably applies, persons who could be PoWs are held by untypical detaining authorities, for whom many rules are not realistic, if interpreted literally. First, already in 1949, resistance movements not only could have had their members benefit from PoW status but also detain members of enemy armed forces, who benefit from PoW status and treatment. They could not, however, possibly ensure, for instance, that those PoWs are interned in a camp put under the immediate authority of a responsible commissioned officer who is a member of the regular armed forces of the State to which they belong.[6] The updated Commentary therefore rightly so softens this requirement.[7] Second, respecting the letter of all rules of Convention III becomes even more difficult when a national liberation movement holds combatants of the party against which it is fighting. It should treat them as PoWs as IHL of IACs applies to national liberation wars according to Protocol I.[8] Third, such difficulties arise even more conspicuously when a proxy armed group holds PoWs. The approach that was for the first time applied by the International Criminal Tribunal for the former Yugoslavia in the Tadić case,[9] according to which IHL of IACs applies to an armed conflict be-

---

3 Most well-known is the position of the US and Israel in this regard, see for example, White House, Office of the Press Secretary, Statement by the Press Secretary to the Geneva Convention, 7 May 2003, available at: https://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030507-18.html; Israel, On Imprisonment of Illegal Combatants, No. 5762, 2002 (amended on 7 December 2008), available at (unofficial translation): https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=7A09C457F76A452BC12575C30049A7BD&action=openDocument&xp_countrySelected=IL&xp_topicSelected=GVAL-992BUG&from=state.

4 Cristopher Greenwood, "International Law and the "War against Terrorism"' (2002) 78 *International Affairs* 301, 316; Ingrid Detter, *The Law of War,* 2nd edn, Cambridge, Cambridge University Press, 2000, at 136; Yoram Dinstein, "Unlawful Combatancy" (2002) 32 *Israel Yearbook on Human Rights* at 247; Ruth Wedgwood, 'Al Qaeda, Terrorism, and Military Commissions' (2002) 96 *The American Journal of International Law*, at 335.

5 Updated Commentary GCIII, *op. cit.*, paragraph 991.

6 As required by GCIII, Art. 39(1).

7 Updated Commentary GCIII, *op. cit.*, paragraph 2483.

8 P I, Art 1(4).

9 ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, paras 87-162.

tween the territorial State and a proxy controlled by another State, corresponds to legal logic. There are, furthermore, strong arguments in favour of overall control as the decisive test.[10] Nevertheless, when this test is applied in practice during an armed conflict to protect persons affected by such conflict, it leads to serious legal and practical challenges. Such challenges are particularly acute when a proxy has to comply with Convention III, which is a part of the IHL of IACs. The fact that the proxy and the controlling State – by definition – deny control is only a part of the problem. Even a proxy willing to apply the Convention will confront serious difficulties to comply, for example, with the need to provide judicial guarantees offered by Convention III which refer to the legislation and courts of the controlling State.[11]

III. Possibilities and risks of applying Convention III to non-international armed conflicts

As most contemporary armed conflicts are NIACs and in line with a general contemporary tendency to apply the same rules in IACs and in NIACs, Convention III could become much more relevant if it could apply by analogy in NIACs. However, firstly, combatant immunity in NIACs is inconceivable. No State would accept that its citizens can wage war against their own government or between each other. No government would renounce in advance the right to punish its own citizen for participating in a rebellion, which would be necessary to apply PoW status to the situation.

Secondly, the right to detain members of adverse armed forces without any individual decision as long as the conflict lasts, which is a consequence of PoW status, would not be recognized by any State as a right also belonging to armed groups. An automatic right to intern is equally inappropriate, although sometimes suggested by States,[12] for members of armed groups held by a State. Indeed, upon arrest it is more difficult to identify fighters (i.e. members of an armed group) as compared to soldiers of another State's armed forces in an IAC. A tribunal can make the correct classification, but it will only have its say if the arrested person is not classified as a PoW.[13] Second, PoWs in IACs must be released and repatriated at the cessation

10 Updated Commentary, *op. cit.*, paragraphs 302-306.

11 GCIII, Arts 82, 84, 87, 99 and 102.

12 See United States District Court of Colombia, "Respondents' Memorandum regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay", in re: Guantanamo Bay Detainee Litigation, 13 March 2009, p. 1, available at: https://www.justice.gov/sites/default/files/opa/legacy/2009/03/13/memo-re-det-auth.pdf.

13 GCIII, Art 5, prescribes status determination tribunals for detained persons only when the Detaining Power wants to *deny* them PoW status.

of active hostilities,[14] but that moment in time is more difficult to determine in a NIAC and even then IHL does not oblige governments to release captured rebels.[15]

Finally, however, when it comes to the treatment of enemy fighters interned by the government, problems similar to those when PoWs are held arise, and many of them could be solved in ways similar to the ones in which Convention III solves them for PoWs. When it comes to government soldiers held by armed groups, such analogy is subject to more limitations because of the capacity of most armed groups to comply with many of the sophisticated rules of Convention III.

IV. The collective approach of Convention III is no longer appropriate for many contemporary armed conflicts

A more fundamental problem affecting not the applicability but the appropriateness of Convention III for contemporary armed conflicts, even when they constitute IACs, is that unlike what has been the case before 1949, today PoW status and treatment is no longer the best one can get in an IAC under IHL.

The right to detain PoWs without any judicial procedure for an indefinite period – until the cessation of active hostilities – is shocking from a human rights perspective and not foreseen for any other category of persons under IHL. Convention III nevertheless assumes that it is in the interest of a captured person to get a PoW status.

First, according to Article 5 of Convention III, when doubts exists regarding the status of persons who 'committed a belligerent act', they must be treated as PoWs 'until such time as their status has been determined by a competent tribunal'. No procedure, however, is prescribed for the reverse case: persons who are treated by a belligerent as PoWs but who want to contest their qualification as combatants. In 1949, only the advantages of PoW status and the related combatant immunity from prosecution were seen. Today, it is understood that Convention III implies also disadvantages. A person should therefore be able to oppose PoW status. Possible solutions include allowing such persons to institute habeas corpus proceedings under domestic law and IHRL.[16] Indeed, persons who deny being PoWs argue that the detaining power does not have the legal basis offered by Convention III allowing to deprive them of their liberty.

---

14 GCIII, Art. 118.

15 APII, Art 6(5), simply *encourages* the widest possible amnesty.

16 UN Working Group on Arbitrary Detention, "United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court", Principle 16 and Guideline 17, paragraphs 30 and 95, as annexed to UNGA, "Report of the Working Group on Arbitrary Detention" (2015) UN Doc A/HRC/30/37.

Another possibility, suggested by the updated Commentary *de lege ferenda* is to apply Article 5 procedures to such cases.[17]

Second, assuming that Convention III offers best protection, among the people benefiting from (but also enduring) PoW status it includes untypical categories of persons, who would benefit more from civilian status. The extreme case is crews of a merchant ship sailing under the flag of the adverse party in an IAC, who have PoW status.[18] This totally disregards today's realities of commercial shipping. Taken literally it means that in case of an IAC between Liberia and Sierra Leone lasting for four years, a Filipino sailor working on a ship owned by a Greek company sailing under Liberian flag and transporting Chinese goods may be interned without any individual procedure for four years. The updated Commentary correctly suggests that this should be limited to 'members of the crew whose professional activities are directly linked to the military activities of the armed forces'.[19]

Even beyond those extreme examples, the collective approach of Convention III no longer corresponds to individual human rights values. Only the obligation to repatriate seriously wounded or sick PoWs takes the specificities and the will in each case into account.[20] In conformity with the growing tendency in international law to fully take the circumstances of each individual case into account, the time may have come in many conflicts not to determine collectively the time when a fighter must be released and repatriated, but to determine this through individual procedures. One could thus imagine that even during a contemporary, limited IAC, periodic individual determinations be made to balance that individual's right to freedom against the legitimate security interests of the Detaining Power, *i.e.* the probability that this individual will again participate in hostilities and the extent of the threat this individual represents when doing so. The collective, undifferentiated right to intern PoWs until the cessation of active hostilities may, however, become again realistic and protective in a major IAC, for which GCIII was made.

At the cessation of active hostilities, the collective obligation to repatriate all PoWs without delay[21] may again raise difficulties for some PoWs in contemporary IACs if they do not wish to be repatriated. May or must the detaining power not repatriate them in such a case despite the

---

17 See Updated Commentary GCIII, para. 1121; Françoise Hampson, "The Geneva Convention and the Detention of Civilians and Alleged Prisoners of War", (1991) 4 *Public Law* 507; Marie-Louise Tougas, "Determination of Prisoner of War Status", in: Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions, A Commentary*, Oxford, Oxford University Press, 2015, at 953-4.

18 GCIII, Art. 4(A)(5).

19 Updated Commentary GCIII, op. cit., paragraph 1058.

20 GCIII, Art. 109.

21 GCIII, Art. 118(1).

clear wording of Article 118 of Convention III and the risks of abuse? Although repatriation is compulsory under Convention III and PoWs cannot renounce their rights,[22] the *jus cogens* principle of *non-refoulement* under IHRL and international refugee law now prohibit the forcible repatriation of PoWs fearing persecution.[23] However, as this exception offers the detaining power room for abuse and risks rekindling mutual distrust between parties that just stopped hostilities, the prisoner's wishes should be the determining factor, but it can be difficult to objectively ascertain those wishes. The practice of the last 50 years is to let the ICRC ascertain the wishes of the PoW and not to repatriate those who refuse.[24] However, in the current migration unfriendly international political environment, any suggestion that the individual may freely choose where to live sounds very exotic. Therefore, the updated ICRC Commentary suggests a nuanced solution. It is, however, not clear whether it goes beyond a very wide understanding of the *non-refoulement* principle.[25]

V. Convention III remains nevertheless a blueprint for conflict-related detention, profoundly anchored in the culture and traditions of all peoples

Despite all aforementioned limitations to the relevance of Convention III in contemporary armed conflicts, it remains, beyond its formal applicability, a blueprint for conflict-related detention. It is furthermore deeply anchored in the culture of peoples and States. This was evidenced by a profoundly inhumane regime like that of Saddam Hussein in Iraq. Without hesitation it violated the prohibition of the use of force under the UN Charter against Iran and Kuwait and committed egregious Human Rights violations against Iraqis. However, it treated at least those Iranian PoWs the ICRC was allowed to visit during the IAC between Iran and Iraq lasting from 1981-1988 – and the ICRC was allowed to visit most of the Iranian PoWs – more or less in conformity with Convention III.[26] The Convention made the difference.

In armed conflicts and beyond, many people are still deprived of their liberty not because of what they did, but merely because they belong to a certain category of persons. Convention III remains a blueprint for the treatment of such persons. Admittedly, in both IACs and NIACs, an analogy with civilian internees, whose treatment is regulated by Convention IV in a way

---

22 GCIII, Art 7.

23 For a detailed argument, see Marco Sassòli "Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War", in: Clapham, Gaeta and Sassòli (eds), *The 1949 Geneva Conventions, A Commentary*, Oxford, Oxford University Press, 2015, at 1051-4.

24 For detailed references on this point, *ibid*., at 1055-6.

25 Updated Commentary GCIII, op. cit., paragraphs 4467-4473.

26 See e.g. UN Security Council, *Prisoners of war in Iran and Iraq: the report of a mission dispatched by the Secretary-General, January 1985*, 22 February 1985, S/16962, paragraph 54(b)

very much inspired by the regulations of Convention III,[27] would be preferable. That analogy would in particular be much more appropriate with regards to the admissible reasons for and the procedure leading to such internment, in particular in NIACs.[28] However, the regime protecting civilian internees is much less well anchored in public conscience world-wide than PoW status.

Beyond its formal passive personal field of application, many parties to contemporary armed conflicts invoke Convention III. This is not only done for the benefit of persons belonging to that party. Field research has shown that armed non-State actors practice when depriving government soldiers they captured of their liberty is consistent in granting those soldiers a status similar to PoW under Convention III.[29] This status entails that the detention is based on the membership to government armed forces, and that detainees are entitled to combatant immunity. Cases of prosecution of government soldiers for the mere fact of having directly participated in hostilities are very rare.

Even ICRC delegates in the field often successfully invoke rules of GCIII by analogy for the benefit of persons detained in NIACs, although this may not be exactly what the ICRC legal division advises them to do. What is even more interesting, is that parties to NIACs apparently most often do not object but enter into a discussion about whether the relevant standards were or were not respected.

VI. Conclusion

In conclusion, Convention III remains a cornerstone of IHL. Fortunately, IACs to which it formally applies have become rare. This could, however, change and the Convention, as interpreted in the updated Commentary would then be entirely fit to serve its purpose. For many recent limited asymmetric IACs and for NIACs, that require a more individualized approach, it is not fully adapted, in particular concerning the admissible reasons for and procedure determining the need of internment. Nevertheless, even when its letter does not apply, Convention III remains a blueprint for rules on the treatment of people deprived of their liberty not because of what they did, but merely because they belong to a certain category of persons – a reason unacceptable under Human Rights law, but which is still frequent both in and outside armed conflicts.

---

27 See GCIV, Arts. 80-135.

28 Updated Commentary GCIII, *op. cit.*, paragraphs 759-761.

29 Jelena Plamenac, *Unravelling Unlawful Confinement in Contemporary Armed Conflicts: Belligerents' Detention Practices in Afghanistan, Syria and Ukrain*e, forthcoming, Brill, 2022.