

THE PARALLAX VIEW: A CRITICAL HISTORY OF THE ORIGINS OF THE GENEVA CONVENTIONS

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Cet article offre une revue critique des Conventions de Genève, démontrant en fait que leurs origines et leur évolution sont le produit tout autant d'enjeux politiques et militaires que du bourgeoisement de valeurs véritablement humanitaires. L'auteur y retrace d'abord l'historique du droit international humanitaire. Il examine ensuite quelques développements marquants de la seconde moitié du dix-neuvième siècle, avant d'analyser les Conventions de Genève depuis 1864 dans le contexte d'un climat politique international chargé et marqué par guerres et atrocités. Il conclut avec quelques réflexions sur l'impact des Conventions de Genève sur le droit international humanitaire contemporain.

This paper critically assesses the development of the Geneva Conventions, showing that their origins and evolution owe as much – if not more – to great power politics and military needs as to the dictates of humanity. Following a brief introduction, the paper first looks at the historical, legal and philosophical examples that are often taken to be precursors to IHL. It then examines the later 19th century period, before analyzing the history of the various Geneva Conventions up to 1949, and their relationship with other developments in the same period, in particular the Hague Law. The conclusion of the 1949 Geneva Conventions and later their 1977 Additional Protocols will be examined briefly, along with some contemporary issues.

I INTRODUCTION

The year 2004 marked the 140th anniversary of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864 Geneva Convention).¹ Originating from an idea formulated by Henri Dunant, one of the five founders of the International Committee of the

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1 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864 Geneva Convention) (22 August 1864) <www.icrc.org> (last accessed 31 July 2005).

Red Cross (ICRC),² this instrument, adopted by 16 States at the Diplomatic Conference convened by the Swiss government in Geneva in August 1864, laid the foundations for the first codification and later development of one of the two main arms of the contemporary law of armed conflict, the so-called Geneva law or international humanitarian law (IHL).³

One could be forgiven for passing on the opportunity to celebrate such a momentous occasion. A glance at the recent past shows that the reality has not yet caught up with the discourse and rhetorics of the international community. The first half of the 1990s saw some of the worst atrocities committed since World War II occurring on the doorstep of Western Europe in the former Yugoslavia, especially in Bosnia-Herzegovina.⁴ A few years later, a coalition of NATO member States embarked on a 78-day bombing campaign to force the then Yugoslav government to end the alleged repression of the predominantly ethnic Albanian population of the province of Kosovo.⁵ Beyond Europe, from April to mid-July 1994, almost one million people in Rwanda perished as the result of a genocide taking place against the background of a civil war, with the international community tangled in a web of politics and self-interests.⁶ The Sudan also saw its fair share of suffering with the civil war erupting along primarily religious lines between Khartoum and the South, and more recently in the Darfur region, leaving over one million people dead.⁷ The 20th

2 F Bugnion "The International Committee of the Red Cross and the Development of International Humanitarian Law" (2004) 5 *Chi J Int'l L* 191, 191-192.

3 Bugnion, above n 2, 193. The law of armed conflict has two principal subdivisions, traditionally referred to as Geneva and Hague law. The Geneva law or international humanitarian law (IHL), derives from the Geneva Conventions and Conferences and focuses on the protection of the victims of armed conflict. The other arm of the law of armed conflict, the Hague law, was partially codified in 1899 and 1907 at The Hague Peace Conferences in conventions and regulations which govern the rights and obligations of belligerents. It focuses on methods and means of warfare, tactics and the general conduct of hostilities: see Lt-Comm G P Noone "The History and Evolution of the Law of War Prior to World War II" (2000) 47 *Naval L Rev* 176, 177-178.

4 See generally M Almond *Europe's Backyard War: The War in the Balkans* (Mandarin, London, 1994); C Gray "Bosnia and Herzegovina: Civil War or Inter-state Conflict? Characterization and Consequences" (1996) 67 *BYIL* 155.

5 The ethnic cleansing campaign and the wave of refugees who poured into Macedonia before and after the NATO campaign saw the displacement of over half a million people within and beyond Kosovo's borders: see generally M Barutciski "Peut-on justifier l'intervention de l'OTAN au Kosovo sur le plan humanitaire? Analyse de la politique occidentale et ses conséquences en Macédoine" (2000) 38 *Can Yb Int'l L* 121.

6 "The Road out of hell" (27 March 2004) *The Economist* 25.

7 In respect of Darfur alone, recent figures show that approximately 50 000 people have been killed (Gareth Evans, co-chair of the International Commission on Intervention and State Sovereignty "No more Rwandas or Darfurs: The International Responsibility to Protect" (University of Sydney, Sydney, 3 September 2004) <<http://www.crisisweb.org>> (last accessed 28 August 2005) and 1.65 million displaced, with 200,000 as refugees in neighbouring Chad: International Commission of Inquiry on Darfur *Report to the United Nations Secretary-General* (25 January 2005) 3.

century witnessed two global wars, countless humanitarian crises and the trend in the new millennium runs unabated, with conflicts in Afghanistan and Iraq still in the limelight.⁸

IHL protects both civilians and combatants in the midst of an armed conflict. Its history suggests that the advent of IHL is somehow a natural humanitarian response to an evident need, growing out of a recognition by both individuals and society in general that, especially in wars, there is a duty to protect and preserve those who cannot protect themselves or who need special attention.⁹ It is a small leap from this assumption to a perception of IHL as the result of a gradual step towards more humane norms that also better recognize human rights. Much writing about the early development of IHL appears to adopt this perception, presenting IHL as the culmination of earlier humanizing ideals always present in societies¹⁰ but especially developing during the Enlightenment.¹¹

This paper argues, instead, that the advent of IHL had much more complex roots and that its eventual crystallization into legal norms owed as much – if not more – to great power politics and military needs, as it did to the dictates of humanity.¹² Modern IHL will be shown, in fact, as developing to meet late 19th century imperial concerns and as a response to the effect of technology on warfare.

The aim of the paper is not to critically review the whole body of IHL but to offer a different history of the origins of the Geneva Conventions to make us appreciate the apparent contradictions in the praxis of states regarding the treatment of civilians and combatants and the development of IHL in general. The paper first looks at the historical, legal and philosophical examples that are often taken to be precursors to IHL. It then examines the later 19th century period, before analyzing the history of the various Geneva Conventions up to 1949, and their relationship with other developments in the same period, in particular the Hague law. The conclusion of the 1949 Geneva Conventions and later their 1977 Additional Protocols will be examined briefly, along with some contemporary issues, to show the continuing impact of power politics in a United Nations Charter-based world.

8 See, for instance, B Bearak "Uncertain Toll in the Fog of War: Civilian Deaths in Afghanistan" (10 February 2002) *New York Times* <www.nytimes.com> (last accessed 4 August 2005); S Tavernise "Iraqi death toll exceeded 800 a month, data shows" (15 July 2005) *International Herald Tribune* <www.iht.com> (last accessed 3 September 2005).

9 Noone, above n 3, 188-190.

10 See, for instance, G Herczegh *Development of Humanitarian Law* (Akademiai Kiado, Budapest, 1984) 27; J Pictet *Development and Principles of International Humanitarian Law* (Martinus Nijhoff, Dordrecht, 1985) 5-6; F Kalshoven *Constraints on the Waging of War* (Martinus Nijhoff, Dordrecht, 1987) 7-9.

11 See for instance Herczegh, above n 10, 18-19; L Friedman (ed) *The Law of War, A Documentary History* (Random House, New York, 1972) 3-15.

12 G Best *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Methuen, London, 1983) chapter 1 [*Humanity in Warfare*].

II HISTORICAL ANTECEDENTS

A From Ancient History to the Middle Ages

Most writers seeking to trace the origins of modern IHL refer to ancient or medieval history to suggest that the need for restraint in warfare, including humanitarian provisions, has long been recognized in something approaching law or custom. From the Book of Deuteronomy to the Code of Manu and Mahabharata, from Roman and Islamic practice to the importance of chivalry in the Middle Ages, many texts allegedly contain rules advocating respect for the adversary as well as protection for the weak and wounded.¹³ Some authors go into slightly more detail and more conscientiously point out the unevenness and fragility of these basic humane rules and their essentially limited character.¹⁴ This picture of a humanitarian veil shielding the weak and wounded, nevertheless partial and imperfect, fitted well with the overall theme, that the impulse to humanitarian protection is not new but has become steadily more powerful, with the 1864 Geneva Convention opening a new era hailing the principles of humanity.¹⁵

This view is an attractive albeit a simplistic one. It relies on a 19th century belief in the idea of progress in history.¹⁶ It is more appropriate to see early examples of humanitarian regulation or action in their own context, as products of their own time and not as part of a great historical sweep. It seems reasonable to accept that humanitarian initiatives were usually driven not only by genuine humane impulses, but also by practical considerations and self-interest. For instance, chivalry, including banning the use of crossbows, was less an ancestor of modern IHL than a buttress to the existing ruling class and feudal system, including its interest in war.¹⁷ Humanitarian regimes tended to flourish most easily and thoroughly where they represented a consensus amongst a relatively homogenous set of ruling elites possessing shared values.

13 L C Green *The Contemporary Law of International Armed Conflict* (Manchester University Press, Manchester, 1993) 21; T L H McCormack "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime" in T L H McCormack and G J Simpson (eds) "The Law of War Crimes. National and International Approaches (Kluwer Law International, The Hague, 1997) 31, 32-39.

14 Pictet, above n 10, 5-18; Noone, above n 3, 181-182.

15 Pictet, above n 10, 2, 5; Bugnion, above n 2, 193-194.

16 J Glover *Humanity: A Moral History of the Twentieth Century* (Pimlico, London, 2001) 3.

17 C Jochnick and R Normand "The Legitimation of Violence: A Critical History of The Laws of War" (1994) 35 Harv Int'l LJ 49, 60-61. Pictet, above n 10, 15-16, explicitly points out that chivalry was there to protect knights, not humanity generally. The 1139 ban on crossbows did not apply to infidels, and only nobles had their lives spared or could purchase freedom.

B Early Modern and Enlightenment Thought and Action

A series of mostly legal writers are often credited with founding or contributing to modern IHL. Vitoria in the 16th century,¹⁸ Grotius in the midst of the Thirty Years War,¹⁹ Vattel and Rousseau in the 18th century, were much more concerned with elaborating the law of non-combatants than that of fighters, which they largely left to the custom of the soldiers, as illustrated by the principle of military necessity.²⁰ This was at the same time that they were abandoning the search for a comprehensive definition of just and unjust wars, accepting that some wars would be necessary or inevitable, and simply trying to confine them within some acceptable parameters of legitimacy, encapsulated in the principle of humanity.²¹ The period was one of optimism, when many thinkers thought humanity perfectible. The development of a humanitarian law was merely one expression of this confidence.

It has been suggested that there was by the 18th century some sort of customary law of war, based on this consensus. This claims rather too much. Publicists were writers rather than international lawyers in the modern sense.²² However much they were studied and referred to, they did not operate in a system of international law as understood today.²³ Most importantly, any humanizing tendency in the limited wars of the 18th century easily collapsed under the weight of the Napoleonic wars.²⁴

It is, therefore, suggested that the Enlightenment was neither another step along the road to progress leading to modern IHL nor was it truly a period of solidification of custom. IHL remained to be not just codified, but established, in the 19th and 20th centuries.

C The 19th Century

The question, therefore, is why and how did the later 19th century lead to the first and subsequent codifications and establishment of IHL? If it was not the product of centuries of progress or the natural result of the Enlightenment, what was it?

18 Friedman, above n 11, 11-15.

19 See extracts from Book III of H de Groot *On the Law of War and Peace* (translated by A C Campbell, London, 1814).

20 Best, *Humanity in Warfare*, above n 12, 31-41, 61. A rule of IHL can be disregarded in the light of the principle of military necessity when expressly permitted by the particular rule itself.

21 Best, *Humanity in Warfare*, above n 12, 42-43.

22 Best, *Humanity in Warfare*, above n 12, 34-35.

23 Pictet, above n 10, 20-21, who also thought that there was a nascent customary law evolving at this time, but only in pockets, piecemeal, and easily defeated in times of more total war.

24 Medical personnel and hospitals, till then usually protected during conflicts, were once again "fair game" under Napoleon: Kalshoven, above n 10, 8.

The first codifications of Geneva did not happen in a vacuum, but at the same time and arguably on the same impetuses as codification of the law of war generally.²⁵ The 1864 Geneva Convention was preceded by the Lieber Code in 1863,²⁶ which was the first national military code, promulgated by the United States federal government to govern the behaviour of its military and that of opposing forces during hostilities in the Civil War then underway. The Code was notable for its breadth, its systematic nature and the explicit codification of violations as crimes.²⁷ The 1860s also saw the first arms control instrument in 1868, in the Saint Petersburg Declaration.²⁸ Law of war codification efforts continued, with the abortive Brussels Conference of 1874²⁹ and a model code published by the newly formed *Institut de Droit International*.³⁰

All of these developments had as their immediate stimuli either new modern wars or new methods of waging war. The American Civil War was arguably the first modern industrial war, and the battle of Solferino, while a relatively traditional daylong battle, was notable for its size – 300,000 combatants – and as marking the end of a relatively quiet period in European war making.³¹ It is hardly surprising that war itself should be the catalyst for development and codification of its laws, including IHL. It does help to show, though, that IHL has usually been reactive in its development and has tended to proceed hand in hand with technology, and with laws and rules that actually help to support war as much as to control it.³²

This last point bears further scrutiny. In the 19th century, a contest between a peace movement and a war movement developed.³³ The peace movement flourished after the end of the Napoleonic wars, drawing strength from movements such as free trade and internationalism and an ambivalent balance of power. A more amorphous war party emerged as a response, drawing strength from emergent nationalism and imperialism, Hegelian views of history and simplistic or corrupted views

25 Herczegh, above n 10, 26-27; Green, above n 13, 118.

26 Friedman, above n 11, xiii-xviii, 158-186.

27 McCormack, above n 13, 42.

28 Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles (11 December 1868) <www.icrc.org> (last accessed 28 August 2005).

29 Project of an International Declaration concerning the Laws and Customs of War (27 August 1874) <www.icrc.org> (last accessed 28 August 2005). See Best, *Humanity in Warfare*, above n 12, 156.

30 Best, *Humanity in Warfare*, above n 12, 144.

31 For a historical account of the battle of Solferino, see H Dunant *Un Souvenir de Solferino* (1862); R Arnaud *The Second Republic and Napoleon III* (translated by E F Buckley, Putnam's Sons, New York, 1937).

32 See af Jochnick and Normand, above n 17, 77-89, on the ways in which the law of war tends to support and legitimate war, despite being allegedly directed at controlling it.

33 G Best *War and Law After 1945* (Clarendon Press, Oxford, 1994) 45 [*War and Law*]; Best, *Humanity in Warfare*, above n 12, 130-138.

of Darwinism. It was able to profit from the advent of codification, as it was then able to say that war need not be cruel and non-combatants would be protected or kept out of it.³⁴ The military were actually able to militarize or integrate the nascent national ICRC societies into their structures, from the 1870s onwards.³⁵ While Dunant and the early ICRC movement were undoubtedly acting out of genuine humanitarian ideals, it is at least arguable that both the ICRC and the Geneva Law, which underpins it, developed because it was useful to the military.

It is a short step from here to argue that the modern law of war, including IHL, developed when and as it did because it suited the political interests of the day. This was the time of rapid imperial expansion, and it is easy to see both the Hague and Geneva law as a prop to this. War and force, essential to imperial expansion, were "sanitized" and made credible and humane.

It is submitted, instead, that the 1864 Geneva Convention should not be seen as the beginning of humanitarian developments towards modern IHL, but as part of the wider beginnings to a codified law of war, which had as much or more to do with protecting existing military and political interests. An examination of the history of the revised and subsequent Geneva Conventions confirms this view.

III THE GENEVA CONVENTIONS 1864 -1949

The traditional view is that, from modest beginnings in 1864, the Geneva law has evolved and improved through each of its manifestations to gradually add more humanitarian protections and subject matters until, by 1949, it came to be known as a reasonably comprehensive body of law protecting victims from the horrors of war.³⁶ The reactive nature of the developments is acknowledged, as combatants and the ICRC learned lessons from two horrific global conflicts.³⁷ By 1949, the results could be claimed as "revolutionary", with the four 1949 Conventions based on solid foundations of humanitarianism and, by then, human rights.³⁸ A more cynical view suggests that while there were obviously developments, they tended to coincide with and support great power interests. Sadly, this latter view more correctly describes the development of IHL.

A The 1864 Geneva Convention³⁹

The original Convention was a very brief instrument of 10 articles, only one of which actually dealt with treatment of the sick and wounded.⁴⁰ It nevertheless established as law the principles that

34 Best, *War and Law*, above n 33, 45.

35 Best, *Humanity in Warfare*, above n 12, 141-143.

36 Herczegh, above n 10, 21-48.

37 Kalshoven, above n 10, 10.

38 H Lauterpacht "The Problem of the Revision of the Law of War" (1952) 29 BYIL 360, 361, 382.

39 1864 Geneva Convention, above n 1.

the wounded should be treated humanely, no matter what side they came from, and that hospitals, ambulances and medical staff were "neutral".⁴¹ The 1864 Geneva Convention was also novel in that it was opened for any State to sign.⁴² The Convention was, however, by implication only binding between signatories, or in conflicts where all combatant States were signatories.⁴³ This clause of universal participation, also referred to as *clausula si omnes*, meant that it was sufficient for one of the parties to the conflict not to be bound by the Convention for all the others to be absolved from applying it, even between themselves.⁴⁴

It is, however, the context in which the Convention was adopted that raised the greatest expectations. In effect, "[f]or the first time in history, a multilateral treaty to establish rules for the future was adopted in peacetime, independently of any settlement of an earlier conflict."⁴⁵

B The 1906 Revision

The 1864 Geneva Convention did not cover warfare at sea, treatment of non-combatants or ex-combatants such as prisoners of war (POWs). The fact that these topics were eventually addressed through the 1899 and 1907 Hague Conventions on the law and custom of war shows not only the interconnectedness of the two arms of the law of armed conflict, but also the interest and power of the political and military establishment to control that law.⁴⁶ This is further confirmed by the examination of the 1906 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1906 Geneva Convention).⁴⁷

With 33 articles divided into eight chapters, the 1906 Geneva Convention is more detailed and more precise in its terminology than the Convention of 1864. New provisions are included

40 1864 Geneva Convention, above n 1, art 6.

41 1864 Geneva Convention, above n 1, arts 1 and 2. See also Best, *Humanity in Warfare*, above n 12, 150.

42 1864 Geneva Convention, above n 1, art 9. By 1899 48 states had.

43 1864 Geneva Convention, above n 1, arts 9 and 10.

44 This type of provision was regularly embodied in treaties codifying the laws of war. The effect of such a provision was, according to L. Oppenheim *International Law* (vol 2, 7 ed by H Lauterpacht, Longman, London, 1952) 234-235:

[T]o deprive some of the Conventions of their binding force either from the beginning of the War or in the course of it as soon as a non-signatory State, however insignificant, joined the ranks of the belligerents ... The effect might be that in a war in which a considerable number of belligerents are involved, the action of one State, however small, in a distant region of war, might become the starting point for a general abandonment of the restraints of the Convention.

45 Bugnion, above n 2, 193.

46 On the Hague Conferences, see af Jochnick and Normand, above n 17, 68-77.

47 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1906 Geneva Convention) (6 July 1906) <www.icrc.org> (last accessed 2 September 2005).

concerning the burial of the dead and the transmission of information. The voluntary aid societies are explicitly recognised for the first time. On the other hand, provisions that had proved to be impracticable are changed. The prerogatives of the inhabitants bringing help to the wounded are reduced to more reasonable proportions. The duty to repatriate the wounded who are unfit for further service is transformed into a mere recommendation.

The 1906 Geneva Convention may be considered as a step forward, placing more direct obligations on the combatants to care for enemy wounded, rather than simply handing them back to the other side.⁴⁸ Unfortunately, the Convention was weakened by the retention of the *clausula si omnes*. The effect of this was that at the beginning of World War I the IHL Conventions in existence at the time were not formally applicable. Moreover, the 1906 Geneva Convention allowed a party to denounce it and withdraw on a year's notice.⁴⁹ In fact, the Convention can be seen as re-establishment or confirmation of military control and interests. Designation of medical personnel as neutral is dropped, and explicit provision for limitation due to military necessity is spread throughout.⁵⁰ The 1906 Geneva Convention retained its humanitarian core, but IHL was the servant, not the master.

C 1929 Improvements⁵¹

1929 brought relatively modest changes to the 1906 Geneva Convention, but out of the discussions emerged a whole new convention on POW, the Convention relative to the Treatment of Prisoners of War (1929 POW Convention). The *si omnes* provision is watered down but not removed completely.⁵² The conclusion would seem to have been that requiring participation of all belligerents for the Conventions to be effective was impractical. Also, no doubt the weakening of traditional colonial powers by World War I made the ability to prevent new accessions both less necessary and less defensible.

Given the cataclysmic events of 1914-1918, the changes seem modest: arguably the 1929 POW Convention merely codifies what was found to work in the "Great War" and gives some recognition

48 Herczegh, above n 10, 30-31. Interestingly, the obligation to protect the sick and wounded now appears in Article 1 of the Convention.

49 1906 Geneva Convention, above n 42, art 33. See also Herczegh, above n 10, 33-34.

50 Best, *Humanity in Warfare*, above n 12, 153.

51 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1929 Geneva Convention) (27 July 1929) <www.icrc.org> (last accessed 2 September 2005); Convention relative to the Treatment of Prisoners of War (1929 POW Convention) (27 July 1929) <www.icrc.org> (last accessed 2 September 2005).

52 1929 Geneva Convention, above n 51, art 25.

to the good work done by the ICRC.⁵³ Coverage remains incomplete; naval wounded are still part of the Hague Conventions and civilians are not protected at all, despite attempts to move towards this at that time.⁵⁴ It would take World War II, with even greater horrors, to bring about further development. Even then, great power interests and concerns appear to have influenced the results, at least as much as humanitarian concerns.

IV THE 1949 GENEVA CONVENTIONS⁵⁵

Drafted in response to the atrocities of World War II and following the Nuremberg trials, the 1949 Geneva Conventions are often tipped as "the bedrock of the humanitarian law in force today"⁵⁶ and the leading role of the ICRC in their architecture is widely acknowledged and recorded.⁵⁷ It is not the purpose of this paper to deal with the content of the 1949 Geneva Conventions. More interesting here are the motivations and interests of the parties who eventually came to conclude them.

A General Features of the Conventions

In summary, the first three Geneva Conventions expand on existing law in relation to the sick and wounded in the armed forces, at sea or shipwrecked and POWs. They extend the protections and classes of persons protected and improve the devices for implementation and enforcement. The fourth Geneva Convention breaks new grounds by spelling out the rights of civilians during an armed conflict. The 1949 Geneva Conventions apply, with the exception of Article 3 common to all four Conventions, to international conflicts, that is, armed conflicts between any two or more of the contracting States.⁵⁸ Common Article 3 attempts to lay down minimum standards of humane

53 The 1929 POW Convention, above n 47, was signed by 47 governments. Neither Japan nor the Soviet Union adhered to it. Japan gave a qualified promise to abide by the Geneva rules in 1942 whereas the Soviet Union announced in 1941 that it would observe the terms of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907) <www.icrc.org> (last accessed 1 September 2005), which did not provide (as did the 1929 POW Convention) for neutral inspection of prison camps, for the exchange of prisoners' names and for correspondence with prisoners.

54 See Best, *War and Law*, above n 33, 54.

55 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (12 August 1949) 75 UNTS 31; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) 12 August 1949) 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War (Convention III) (12 August 1949) 75 UNTS 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War (Convention IV) (12 August 1949) 75 UNTS 287.

56 Bugnion, above n 2, 194.

57 Bugnion, above n 2, 194-195.

58 See common Article 2 to the four Geneva Conventions, above n 55.

treatment for non-international conflicts by prohibiting certain actions against those not actively involved in the hostilities, with a non-discrimination clause and a duty to care for the sick and wounded.⁵⁹

The 1949 Conventions are as remarkable for what they leave out as what they include. The two most obvious holes in the Conventions are, first, the lack of any real preamble and, therefore, of the proposed statement of the role of human rights in IHL,⁶⁰ and, second, the failure of the new "civilians" Convention to deal at all with the issue of indiscriminate bombing.⁶¹ Both are good examples of how attempts to advance humanitarian principles could easily fall victim to practical politics.

59 Common Article 3 to the four Geneva Conventions, above n 50:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

60 Best, *War and Law*, above n 33, 70-71.

61 Best, *War and Law*, above n 33, 106-113. This is hardly surprising since no defendant was ever prosecuted at Nuremberg for indiscriminate bombing and the Tribunal itself accepted that morale bombing was a customary practice of nations, in fact condoning "attacks against civilians, even atomic attacks, under a broad interpretation of military necessity that recognized a legitimate purpose in the bombardment of cities to induce to surrender": Jochenik and Normand, above n 17, 92.

The bombing debate, for instance, came down to a contest between the main bombers of World War II – the United States and Great Britain – and the Soviet Union, which for its own political reasons, wanted to portray itself as the power genuinely committed to peace. Given the absence, as the vanquished, of the main bombarded States, Germany and Japan, it is hardly surprising that bombing was not even on the agenda until the Soviet Union brought it up.⁶² It is highly arguable, however, that the United States and Great Britain were concerned to prevent indiscriminate bombing going on the agenda, not only to thwart Soviet points-scoring, but to avoid any criticism of their past actions and any restriction of their freedom to use their military hardware.⁶³ In the end, the Soviet initiative was defeated by procedural moves⁶⁴ and the continued ability of great powers to control the Geneva Conventions, and IHL in general, to suit their own interests was amply demonstrated.

It is both obvious and unsurprising that in other areas too, the Conventions were shaped by the experiences of the World War II allies. Thus, major revisions to the existing Conventions on treatment of the sick and wounded and of POW were relatively easy to agree to and the Western allies seemed to have worked co-operatively to achieve these.⁶⁵ Once it came to genuinely new material, such as the "civilians" Convention and applicability of the Conventions to internal conflicts, the different experiences and interests of the French, British and US allies made more of a difference. The combined effect of Western Europe's experience of occupation, and its apparent fear of the future ambitions of the Soviet Union, were arguably as big or bigger contributors to the agreement of the novel Convention as any general consensus on its humanitarian necessity.⁶⁶

Overall, participants in the development of the new Conventions could be characterized, and often saw themselves, as divided between idealists and realists. Generally, the diplomats and soldiers were in the realist camp whereas European technical experts and ICRC participants were perceived as the idealists.⁶⁷ There are clearly cases where the idealists won. For instance, the

62 Best, *War and Law*, above n 33, 103, 106. It had been a possible agenda item in 1946, but was diverted by United States proposals to consider atomic bombing through the new International Atomic Energy Agency.

63 G J Simpson "Didactic and Dissident Histories in War Crimes Trials" (1997) 60 *Alb L Rev* 801, 830-831, indicating that the notion of military necessity was used at Nuremberg to legitimize both German and Allies' bombings of civilian populations.

64 Best, *War and Law*, above n 33, 113.

65 Despite the apparent United Kingdom's suspicion of the diplomatic role of the ICRC: Best, *War and Law*, above n 33, 89.

66 Best, *War and Law*, above n 33, 87, 89. Apparently Great Britain would have much preferred not to have had it.

67 Best, *War and Law*, above n 33, 105.

inclusion of common articles to expand State jurisdiction for prosecutions of "grave breaches"⁶⁸ was an ICRC initiative.⁶⁹ However, governments ensured humanitarianism would only go so far as political and military necessity dictated. In this critical respect, the 1949 Conventions are arguably little different to that of 1906.⁷⁰

Attempts at extending the laws of war to cover armed conflicts regardless of type were hampered by the notion of State sovereignty. It was not in the interest of States to recognize that the humanitarian law of war applied to conflicts within their territory, as it might legitimize movements rebelling against States and prevent the treatment of the members of such movements as mere criminals or traitors.⁷¹

In the end, Article 3, common to all four Geneva Conventions, listed minimum humanitarian protection in all armed conflicts to persons not actively taking part in hostilities. It included civilians and members of armed forces who were no longer taking part in hostilities. It required these persons to be treated humanely, without discrimination, and entitled them to due process before a regularly constituted tribunal. This extension reflects the 20th century trend to guarantee fundamental human rights from which a State cannot derogate. Non-international conflict was deliberately not defined – another indication of States' reluctance to allow international law to apply to conflicts challenging their authority, legitimacy or existence.⁷² Article 3 also specified that application of these minimum humanitarian principles had no effect on the status of the parties. This meant the State could still treat participants in rebellious movements as criminals, and application of the Conventions did not

68 Convention I, above n 55, art 50; Convention II, above n 55, art 51; Convention III, above n 55, art 130; Convention IV, above n 55, art 147.

69 Best, *War and Law*, above n 33, 93-94.

70 See Convention IV, above n 55, Preamble, where it is stated that "these provisions, the wording of which has been inspired by the desire to diminish the evils of war, *as far as military requirements permit*, are intended to serve as a general rule of conduct" (emphasis added). This is further recognition of the fact that IHL has always been drafted in the light of military needs.

71 See C Greenwood "The Law of War (International Humanitarian Law)" in M D Evans *International Law* (OUP, Oxford, 2003) 789, 792-793. It was more effective for States to deal with rebels under the provisions of criminal law than giving them the status (and benefits) of POW.

72 The Commentary of the ICRC considers the vagueness of the expression "armed conflict" and the omission of a list of certain conditions for application as wise, reasoning "the more specific a list tries to be the more restrictive it becomes": J Pictet *Commentary on the Geneva Conventions of 12 August 1949* (vol III, ICRC, Geneva, 1960) 39. Others call the lack of a definition of non-international armed conflict an imperfection in order to get an agreement at all: K Suter *An International Law of Guerrilla Warfare* (Frances Pinter Ltd, London, 1984) 69; Greenwood, above n 71, 815-816.

mean internal dissidents would gain international status or legitimacy for their cause.⁷³ IHL has, therefore, always been and remained in 1949, the product of what major States allowed it to be.

B 1977 Additional Protocols

The push to expand the applicability of the Conventions to non-international conflicts, as well as the need to reinforce the Hague law, re-surfaced in the 1950s and 1960s as internal conflicts caused intensive and large-scale destruction, newly independent States – following the decolonisation process – found it increasingly difficult to accept rules which they had not helped to draft and the devastation of the Vietnam war sent shockwaves around the world.

The Additional Protocols of 1977 extend and reaffirm the 1949 Conventions.⁷⁴ In particular, they recognize national struggles for self-determination as international conflicts and include non-international conflicts – to the extent they amount to a civil war, that is, where government and rebel forces each have partial control of the territory.

Additional Protocol I, mainly adopted in reaction to the Vietnam War, aimed at bringing IHL up to date and made some fundamental changes to the rules of war. Changes related to the definition of combatants in relation to those not wearing a recognized uniform, the protection given to civilian and non-military objects, the prohibition on action likely to have a long-term deleterious effect upon civilians and the broadening of the concept of "grave breaches". Interestingly, the concept of military necessity failed to emerge from the Diplomatic Conference with much clarification. Portions of Protocol I have been recognized as being reflective of customary international law.⁷⁵

The move to include certain types of internal conflicts came predominantly from Third World and Socialist States. They managed to have the first session of the 1974-77 Geneva Diplomatic Conference adopt a provision equating national liberation with international conflict.⁷⁶ The final

73 A case in point relates to the Algerian War from 1954 to 1962, in which the Algerian National Liberation Front (FLN) wanted to gain independence from France. From the legal point of view, it was clear that common Article 3 should be applicable to this conflict. The FLN was ready to accept the application of Article 3, but the French Government never explicitly accepted its obligation to comply with it: L Moir *The Law of Internal Armed Conflict* (Cambridge University Press, Cambridge, 2002) 68.

74 Protocol No I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3; Protocol No II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609.

75 C Greenwood "Customary Law Status of the 1977 Geneva Protocols" in A J M Delissen and G J Tanja (eds) *Humanitarian Law of Armed Conflict. Challenges Ahead* (Nijhoff, Dordrecht, 1991) 93, 95. The United States are a party to the Geneva Conventions but not to the Additional Protocols, although it recognises Protocol II as desirable and most provisions of Protocol I as reflecting customary international law: see M Sassoli, "Use and Abuse of the Laws of War in the 'War on Terrorism'" (2004) 22 *Law & Ineq* 195, 199.

76 See generally G Abi-Saab "Wars of national liberation in the Geneva Conventions and Protocols" (1979) 165 *Recueil des Cours* 353.

vote in 1977 led to a provision in Additional Protocol I including struggles in which peoples "are fighting against colonial domination and alien occupation and against racist regimes in their exercise of their right of self-determination" as international armed conflicts.⁷⁷ Protocol II incorporated internal wars of the civil war type, that is, opposing two organized armed forces with de facto control of part of the territory. It specifically excluded situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence.⁷⁸ Protocol II confers less extensive guarantees than Protocol I and its field of application is more restricted than that of common Article 3. This reveals, once more, how difficult it is to strengthen protection in non-international armed conflicts in the face of the principle of State sovereignty.

There is in fact a scale of internal conflicts and disturbances with, at the lower level internal disturbances and acts of terrorism which do not amount to an armed conflict, a medium stage where the fighting may be described as an armed conflict where all parties are bound by common Article 3, the situation next where rebels acquire sufficient control of territory to meet the requirements of Protocol II.⁷⁹ The problem lies in the difficulty in determining which point on the scale has been reached. The State involved might take a very different view from that taken by other parties. As a result, Protocol II has rarely been applied in armed conflicts. Its applicability to occupied territories has been questioned by Israel in relation to the West Bank, by Iraq as regards Kuwait after its illegal occupation in 1990 and by Indonesia following its formal annexation of East Timor in 1976.⁸⁰

Some decisions of the International Criminal Tribunal for the Former Yugoslavia in the 1990s have sought to identify in customary international law norms applicable to non-international armed conflicts⁸¹ and recent studies have concluded that many principles of customary international law "apply in both international and non-international armed conflicts and [show] the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts."⁸² The degree of subjectivity underlying the decision of a party whether to respect IHL or not highlights the fact that the effectiveness of the humanitarian law machinery remains questionable unless States can be brought to comply with existing norms.⁸³

77 Protocol I, above n 74, art 1(4).

78 Protocol II, above n 74, art 1(2).

79 Greenwood, above n 71, 815-816.

80 On a recent in-depth study of internal armed conflicts, see A Cullen "Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law" (2005) 183 *Military L Rev* 66.

81 *The Prosecutor v Dusko Tadic (a/k/a Dule)* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (2 October 1995) IT-94-1-AR72, para 70 (Appeals Chamber, ICTY).

82 J-M Henckaerts "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict" (2005) 87 *Int'l Rev Red Cross* 1, 23.

83 Greenwood, above n 71, 817-819; Henckaerts, above n 82, 23.

V RECENT DEVELOPMENTS: SAME OLD SONG OR NEW BEGINNINGS?

The realistic yet bleak picture depicted so far should not, however, distract from the appeal of the Geneva Conventions. 192 States have ratified the 1949 Geneva Conventions and there are now over 150 States parties to the Additional Protocols.⁸⁴ States and non-State actors have often made an effort to acknowledge the Conventions and apply them in the course of internal and international armed conflicts.⁸⁵ The emerging role of the non-governmental organizations (NGOs) and of the wider civil society has embellished the promises of the Geneva Conventions and their ideals have been integrated in the discourse of oppressed peoples everywhere; the ICRC and the Geneva Conventions give some hope of a brighter future to the victims of armed conflicts. Furthermore, the recent publication of a massive work under the auspices of the ICRC, highlighting the recognition in military manuals and governmental practices of the customary character of the Geneva Conventions, bolsters the view that the Geneva Conventions are respected in the field.⁸⁶

A list of all the IHL related treaties States have adopted in the past 30 years certainly shows that, if not the Conventions themselves, at least their philosophy has inspired the international community to commit to the principle of humanity. Conventions prohibit or restrict the use of certain weapons that are deemed to be excessively injurious or to have indiscriminate effects, chemical and biological weapons.⁸⁷ For instance, the ICRC and other NGOs have been the main architects of the 1997 Land Mines Convention.⁸⁸ They have navigated through tumultuous political waters to obtain from an overwhelming majority of States, even most of the reluctant ones, a chorus of agreement about the barbarous nature of mines. Other advancements in which they have played a major role relate to the prosecution of IHL crimes and the wider need to combat impunity,

84 Statement by the International Committee of the Red Cross "Status of the Protocols additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts" (20 October 2000) (United Nations, General Assembly, 55th session, Sixth Committee, agenda item 155).

85 Bugnion, above n 2, 211.

86 J-M Henckaerts and L Doswald-Beck *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005).

87 See, for instance, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (10 April 1972) 26 UST 583; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on the Destruction (13 January 1993) 32 ILM 800.

88 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (18 September 1997) 36 ILM 1507. See K Dormann and L Maresca "The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments" (2004) 5 Chi J Int'l L 217, 218-224.

epitomized by the creation of a permanent criminal tribunal, now a reality, and a breed of ad hoc international and mixed tribunals.⁸⁹

This dose of optimism does, however, mask some ongoing trends, which show again the extent to which the Geneva Conventions, and IHL more generally, remain subject to power politics. For instance, depleted uranium ammunition, despite its recognized impact on the human and natural environment, has played a key role in sustaining military campaigns in Kosovo and Iraq.⁹⁰ The advantages procured by this type of ammunition, governments and military argue, outweigh its harmful effects and it is most likely many States will resist any attempt at prohibiting its use.⁹¹ More worrying is the free-flowing interpretation and discretionary application of the Geneva Conventions with respect to the Taliban and Al Qaeda fighters detained in Guantanamo Bay.⁹² A discussion on this issue would visibly go beyond the scope of this paper. Suffice it to remember the United States administration's efforts at circumventing the application of the Geneva Conventions, under the guise of the war on terror, through an interpretation that contradicts literally the very *travaux préparatoires* leading to, and actual wording of, the relevant Geneva Conventions.⁹³

This bird eye's view of the recent evolution of the IHL proves that good intentions surveyed in some areas are still counter-balanced by distorted and self-fulfilling interests in others.

89 On the International Criminal Court, for instance, see W A Schabas "International Criminal Court: The Secret of its Success" (2001) 12 *Crim L F* 415; L S Sunga "Full Respect for the Rights of Suspect, Accused and Convict: from Nuremberg and Tokyo to the ICC" in M Henzelin and R Roth (eds) *Le droit pénal à l'épreuve de l'internationalisation* (LGDJ, Paris, 2002) 217; K Y Sok *The International Criminal Court: A Commentary of the Rome Statute* (Wisdom House Publications, Leeds, 2003); P Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press, Cambridge, 2003); Dormann and Maresca, above n 88, 224-232.

90 On the use of depleted uranium in recent conflicts, see J T Burton "Depleted Morality: Yugoslavia v. Ten NATO Members and Depleted Uranium" (2000) 19 *Wis Int'l L J* 17; D Fahey "The Final Word on Depleted Uranium" (2001) 25 *Fletcher F World Aff* 189; United Nations Environment Programme *Depleted Uranium in Kosovo* (Geneva, 2001); United Nations Environment Programme *Depleted Uranium in Bosnia and Herzegovina* (Geneva, 2003).

91 For a puzzling account of the use of depleted uranium ammunition and its supposedly limited impact on the human and physical environment, see R Smith "Depleted Uranium and Human Health" (2005) 30 *NZ Int'l Rev* 16.

92 See A Costi "Human Rights before the US Supreme Court: Lessons from Guantanamo Bay" in P Morris and H Greatrex (eds) *Human Rights Research* (Victoria University, Wellington, 2004) 1.

93 Sassoli, above n 75, 207-209. See also J J Paust "War and Enemy Status after 9/11: Attacks on the Laws of War" (2003) 28 *Yale J int'l L* 325; M Mofidi and A E Eckert "'Unlawful Combatants' or 'Prisoners of War': The Law and Politics of Labels" (2003) 36 *Cornell Int'l L J* 59.

VI CONCLUSION

No doubt, the 140th anniversary of the emergence of the Geneva law should be celebrated for all its achievements. The present analysis shows, however, that the history of the early crystallization and later development of the Geneva Conventions resulted to a large extent from vested interests of belligerent states. In the end, IHL became part of international law and took the shape it did, because the major players saw advantages in it, or had learned from bitter experiences in disastrous wars. Clearly IHL is essential in the modern world and does much good; the world should not be surprised, though, if it remains largely controlled by great power politics, with humanitarian principles and the Geneva Conventions able to influence too often only where they are deemed convenient.⁹⁴

The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public.

94 Henckaerts, above n 82, 2.