

## REPORTS AND DOCUMENTS

# The Geneva Conventions and Public International Law

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With sixty years of hindsight, it seems particularly appropriate to reflect on the trajectory of international humanitarian law (IHL) as shaped by the 1949 Geneva Conventions. The near universal acceptance of the Conventions and their secure integration into the international system can sometimes lead us to underestimate the significance of their impact. It is this transformative impact on public international law which will be the focus of this note.

To start, I will briefly review the historical context from which the 1949 Conventions materialized. Calamitous events and atrocities have always driven the development of IHL. In 1863, the American Civil War gave rise to the Lieber Code. This ultimately gave birth to the branch of IHL commonly known as the Hague Law, which governs the conduct of hostilities. One hundred and fifty years ago, the battle of Solferino – immortalized in Henry Dunant’s moving memoir of suffering and bloodshed – inspired the Red Cross Movement. Thence began the other branch of IHL, the Geneva Law, which – starting with the first Geneva Convention in 1864 – has provided for the protection of victims of war, the sick, the wounded, prisoners and civilians.

In the twentieth century, Nazi atrocities led to Nuremberg, the Genocide Convention, the adoption of the Universal Declaration of Human Rights and the

human rights clauses in the UN Charter. At around the same time, the 1949 Geneva Conventions were adopted. While the First, Second and Third Geneva Conventions followed earlier, more rudimentary models of IHL, the common clauses of the Conventions and the Fourth Geneva Convention were entirely new conceptions. Not surprisingly, the committee that drafted the common clauses was chaired by one of the eminent international lawyers of the time, Maurice Bourquin. The most famous of these common clauses is of course common Article 3, which for the first time in the history of international law introduced regulation of non-international armed conflicts into multilateral treaties. Through international criminal courts, this article has evolved into a mini-code of criminal proscriptions.

The 1949 Geneva Conventions were the flagship of the post-World War II legal changes that shifted the paradigm of many aspects of IHL from an inter-State archetype to a homocentric system, which included rules on individual criminal responsibility. The Geneva Conventions also introduced the system of grave breaches and the obligation of all states parties to prosecute or to extradite violations listed as such, *aut dedere aut judicare*. The conventions thus make an important contribution to the principle of universal jurisdiction over crimes *jure gentium*. Although the Conventions contemplated exercising jurisdiction by the detaining powers, it is now accepted that international criminal courts may also exercise jurisdiction over grave breaches.

## From Hague IV to Geneva IV

To understand how significant the 1949 Geneva Conventions were, it is useful to consider the legal protections that preceded them. The most significant of the latter were included in the Fourth Hague Convention, which contains important but inadequate rules governing the protection of civilians in occupied territory, including the duty to maintain law and order and the prohibition of collective punishment. Of the fifteen articles of the Hague Regulations on ‘Military Authority over the Territory of the Hostile State’, only three relate to the physical integrity of civilians. The other provisions deal essentially with the protection of property. The sufferings of populations in Nazi-occupied Europe demonstrated very well the gaps in the Fourth Hague Convention, and the need for a more protective regime.

The ICRC had prepared a draft civilians’ convention (the ‘Tokyo draft’) that would have supplemented the Hague Convention, but the onset of World War II suspended any progress. Of course, it would take a true optimist to believe that the existence of a civilians’ convention during World War II would have prevented the worse Nazi atrocities (such as the Holocaust), as well as those committed by Japan, from occurring, but it would at least have given the ICRC more of a standing to intervene.

Informed by the carnage of World War II, the Fourth Geneva Convention created a new balance between the rights of occupiers and the rights of occupied populations. The Fourth Hague Convention established important limitations on the occupier’s permissible activities; by contrast, the Fourth Geneva Convention

obligated the occupier, as Sir Hersch Lauterpacht memorably wrote, ‘to assume active responsibility for the welfare of the population under his control.’<sup>1</sup> These obligations included ensuring the population’s basic needs in terms of food, health, and administration of justice; and more broadly, protection of the individual’s human dignity. In further contrast to Fourth Hague Convention, the Fourth Geneva Convention contains detailed provisions on the protections afforded to civilians – aliens, the general population, vulnerable groups such as children and women, and internees – not only in occupied territories, but also in all territories of the parties to the conflict. It may be worthwhile recalling the ancient pedigree of the rules on humane treatment of the civilian population of occupied countries. In the context of theft of a church object during the Hundred Years War, and the hanging ordered for the offender, Shakespeare’s Henry V declared: ‘we would all have all such offenders so cut off, and we here give express charge that in our marches through the country there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language.’ The Fourth Geneva Convention constitutes a great leap in what has been a very long march towards a more proactive approach to safeguarding civilian welfare.

## From reciprocity to individual responsibility and rights

How much humanitarian law has already departed from its previous foci can be seen by revisiting the now largely obsolete *si omnes* clause of the Fourth Hague Convention, as well as the question of belligerent reprisals.

The *si omnes* clause found in early law of war treaties provided that if one party to a conflict was not a party to the instrument, no parties were bound by the instrument. The Fourth Hague Convention’s *si omnes* clause was invoked as a defence and threatened the integrity of Nuremberg prosecutions. It was only by considering the Hague Regulations – made inapplicable by the *si omnes* clause – as a mirror of customary law that the argument of the Nuremberg defendants could be answered. While Hague IV is still in force, the fact that most of its provisions are now regarded as customary law, means that the Convention’s general participation clause can now be regarded as having fallen in desuetude.

And what about the Geneva Conventions? The general participation clause was explicitly reversed in the 1929 Prisoner of War (POW) Convention and in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Article 82 of the POW Convention provided that ‘[i]n time of war if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto’.

1 Hersch Lauterpacht, ‘The Law of War’, in Elihu Lauterpacht (ed), *International Law: Collected Papers – Disputes, War and Neutrality*, Cambridge University Press, Cambridge, 2004, p. 604.

Common Article 2(3) of the 1949 Geneva Conventions goes even further. It provides that even if one belligerent is not a Party to the Convention, but accepts it for the specific conflict only, the parties shall be bound by the Convention in relation to it. This idea of broadening the potential contractual reach of a convention had been broached in 1929 but was rejected at that time.

The Geneva Conventions also broadened their applicability by excluding the principle of reciprocity. Common Article 1 of the 1949 Geneva Conventions, which provides that ‘The High Contracting Parties undertake to respect and ensure respect for the present Convention *in all circumstances*’, epitomizes this denial of reciprocity. The ICRC Commentary to the First Geneva Convention further emphasizes the unconditional and non-reciprocal character of the obligations: ‘[a] State does not proclaim the principle of the protection due to wounded and sick combatants in the hope of saving a certain number of its own nationals. It does so out of respect for the human person as such’.<sup>2</sup>

Another aspect of Common Article 1, the charge that parties ‘ensure respect’, also derives from the rejection of reciprocity and goes to the heart of accountability for violations of international humanitarian law. The International Court of Justice held this article to be declaratory of customary law in its 1986 judgment in *Nicaragua v. United States*, concluding that the Geneva Conventions were merely specific expressions of general principles of IHL, which obligated the United States to respect their provisions.

Although the initial purpose of Common Article 1 may have been to specify the obligation of a party to ensure that its entire civilian and military apparatus respect the Conventions, it has subsequently been interpreted as providing standing for States parties to the Convention *vis-à-vis* violating States. Parties can therefore endeavour to bring a violating party back into compliance, thus promoting universal application. To a large extent, this later interpretation was triggered by the ICRC’s commentaries to the Geneva Conventions and the supportive literature generated by them. The exact scope of the rights of third parties under Common Article 1, however, is still unclear. Nevertheless, Common Article 1 can already be seen as the humanitarian law’s analogue to the human rights principle of *erga omnes*.

We can further observe the departure from the principle of reciprocity in the treatment of reprisals, at least in treaties, though less in state practice. From the 1929 Convention relative to the Treatment of Prisoners of War to the 1977 Additional Protocol I to the Geneva Conventions, the domain of legitimate reprisals has shrunk dramatically. The 1929 POW Convention prohibited reprisals against prisoners of war. The 1949 Geneva Conventions dramatically expanded the prohibition on reprisals to include persons, installations, or property protected by their provisions, as well as prohibiting collective punishment and terrorization of the civilian population, and the taking of hostages. Additional Protocol I prohibits

2 Jean Pictet, *Commentary I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 28–29.

reprisals against the entire civilian population, civilian objects, and cultural objects (reprisals against the latter are also prohibited by the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict). The Protocol also prohibits reprisals against objects indispensable to the survival of the civilian population, the natural environment, and works or installations containing so-called ‘dangerous forces’, such as nuclear or toxic materials. Finally, Protocol II to the Convention on Conventional Weapons prohibits reprisals through the use of mines, booby-traps and other devices.

Modern treaties have thus reduced legitimate reprisals to those against the armed forces; but since attacks against the military are, in any event, lawful under *jus in bello*, these treaties in effect have nearly eliminated reprisals against non-military targets. Practice of states lags, however, behind such enlightened normative texts.

The principle of reciprocity, still prominent in the law of war, has thus undergone important changes. Although reciprocity still applies to the creation of obligations under the Geneva Conventions, its reach is limited. It does not enable the termination of obligations on grounds of breach. For example, the denunciation clause of the Geneva Conventions provides that a denunciation cannot take effect until peace has been concluded and the release and repatriation of the persons protected by the Conventions have been completed. Article 60(5) of the Vienna Convention on the Law of Treaties resonates with these provisions of the Geneva Conventions. Under this article, the party victim to a breach of treaty cannot invoke the breach as a ground for terminating or suspending the treaty provisions of a humanitarian character relating to the protection of the human person. A breach, and consequently the principle of reciprocity, may therefore not be invoked to justify derogations from humanitarian law with regard to protected persons, especially civilians. As the ICRC Commentary notes, ‘the Conventions are coming to be regarded less and less as contracts on a basis of reciprocity concluded in the national interest of each of the parties, and more and more as solemn affirmations of principles [and] unconditional engagements’.<sup>3</sup>

## Inalienability of individual rights

The transition from contractual principles governing interstate relations to universal ones is also evidenced in the proposals for a preamble to the 1949 Geneva Conventions. While no preamble was included in the four Conventions because of disagreements on its content, concern for human rights was nonetheless very present among the delegates. A French proposal, which was to become the preamble to the draft Convention, amply demonstrates this concern, stating that: ‘The High Contracting Parties, conscious of their obligation to come to an agreement in

3 Pictet, above note 2, p. 28.

order to protect civilian populations from the horrors of War, undertake to respect the principles of human rights which constitute the safeguard of civilization.’

Although the French proposal was not accepted, much of its language can be found in Common Article 3. The International Court of Justice has already paid Common Article 3 the highest tribute in the *Nicaragua* decision, by describing it as a reflection of ‘elementary considerations of humanity’. The establishment of mechanisms for the repression of grave breaches and the evolution of international criminal jurisdiction also demonstrate the intent to reach individuals as the ultimate subjects of humanitarian rights and obligations.

While even the early Geneva Conventions conferred protections on individuals as well as States, whether those protections belonged to the contracting States or to the individuals themselves was unclear. The 1929 Geneva Prisoners of War Convention first paved the way for recognition of individual rights by using the term ‘right’ in several provisions. It was not until the 1949 Geneva Conventions, however, that ‘the existence of rights conferred on protected persons was affirmed’ through several key provisions.<sup>4</sup> These provisions clarified that rights are granted to the protected persons themselves. They also introduced into international humanitarian law an analogue to *jus cogens*, which is so central to human rights law. In IHL, this analogue preceded by two decades the recognition of *jus cogens* in the Vienna Convention on the Law of Treaties. According to Common Article 6/6/6/7, agreements by which either States or the individuals themselves purport to restrict the rights of protected persons under the Conventions will have no effect. These invalidating provisions are conceptually different from the concept of *jus cogens* of Article 53 of the Vienna Conventions on the Law of Treaties. The resolution of conflicts between this Common Article and later agreements may thus be difficult; however, given the widespread recognition of the Geneva Conventions as customary law – and in some cases, as peremptory law – the invalidating provisions will probably prevail.

Common Article 6/6/6/7 was adopted in reaction to agreements during World War II between belligerents, such as those between Germany and the Vichy government which, under pressure by the Nazi authorities, deprived French prisoners of war of certain protections under the 1929 POW Convention. Another Common Article (7/7/7/8) further provides that: ‘[Protected persons] may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be’.

Several provisions of the Geneva Conventions similarly use the language of ‘rights’, ‘privileges’, ‘entitlements’ or ‘claims’. States may not waive such rights. The ICRC Commentary specifies that the prohibition upon renunciation of rights is absolute. This prohibition was adopted in light of experience showing that persons

4 Jean Pictet, *Commentary II: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960, p. 58.

may be pressured into making waivers, but that proving duress or pressure is difficult.

The significance of the rights conferred by the Geneva Conventions is reinforced by the recognition of the broad applicability and customary nature of the Conventions. The International Court of Justice and the international criminal tribunals have repeatedly affirmed the universal applicability of the Geneva Conventions. In the *Case Concerning the Armed Activities on the Territory of the Congo* (New Application: 2002, *Democratic Republic of the Congo v. Rwanda*), in which the Court explicitly acknowledged for the first time the existence of peremptory norms in international law, it confirmed that in the Nicaragua decision, it had upheld the four Geneva Conventions as ‘concrete expressions’ of general principles of humanitarian law. The Court also affirmed the expansive applicability of the Geneva Conventions in its 1996 *Advisory Opinion regarding the Legality of the Threat or Use of Nuclear Weapons*. In its opinion, the Court determined that the Convention ‘constitutes intransgressible principles of international customary law’. Moreover, in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004, where it recognized Israel had violated certain obligations *erga omnes*, the Court reaffirmed that Article 1 of the Fourth Geneva Convention requires every State party to the Convention to ensure compliance with its provisions, regardless of whether the state is a party to a specific conflict.

In conclusion, it should be underscored that the Geneva Conventions of 1949 – important as they were even at the time of their adoption – have gained even more authority with the passage of time, and their impact on public international law is difficult to overestimate. Firstly, they achieved universality as the most highly ratified treaties in the world, apart perhaps from the Charter of the United Nations and the Convention on the Rights of the Child. Secondly, most of their provisions are recognized as customary law, and often as *jus cogens* or peremptory norms. Thirdly, they have shown unusual adaptability to changed circumstances. For example, the strict interstate obligations pertaining to repatriation of POWs to the country of origin have been attenuated by the principle of individual autonomy of the POW. Another sign of the Conventions’ versatility is the change in the requirement of different captor/detainee nationalities for the status of protected persons. This requirement, so difficult to apply to wars involving fragmentation of states, has been superseded in the jurisprudence of international criminal tribunals by the more flexible concept of belonging to adversary groups. This vitality of the Conventions is in a great degree due to another unique aspect: the role of the ICRC and its outstanding reputation as the institutional guardian of the Conventions.

Confronted by crises and atrocities which sadly continue unabated, it is easy to forget how much worse the fate of all humans would be in the absence of the Geneva Conventions and the International Committee of the Red Cross. In the midst of the atrocities that persist today, they hold us to a higher standard of human dignity that cannot be contracted away.