The Geneva Conv

According to the Old Testament, Jericho's problems were just beginning when the walls came tumbling down. Joshua, the commander of the invasion force, ordered that the survivors—man and woman, young and old, along with all of the sheep and oxen—be put to the sword. Then he burned what was left of the town, saving only the silver, gold, and vessels of brass and iron.

That was not far from the norm for war through most of recorded history. Massacre, subjugation, enslavement, and pillage were standard practice. St. Augustine wrote about "just war" in the fifth century and there were sporadic attempts to establish laws and rules for war. However, none of the efforts took lasting root until 1864.

It began with Henry J. Durant, a Swiss businessman traveling in Italy in 1859 where he was struck by the plight of wounded soldiers, left on the field after the battle of Solferino in the second Italian War of Independence. Durant and a group of his colleagues formed the International Committee for the Relief to the Wounded and persuaded 16 nations to send representatives to a conference in Geneva in 1863.

The conference produced a paper, the "Convention for the Amelioration of the Condition of the Wounded in Armies in the Field," in August 1864. It was only two pages long and had just 10 articles. It called on nations to collect and care for the sick and wounded, "to whatever nation they may belong," and to respect ambulances and military hospitals as neutral.

Medical facilities were to be marked by a distinctive symbol, "a red cross on a white ground." The red cross is said to be a reversal of the Swiss flag, chosen as a compliment to the host nation, although the notes of the conference give no explanation. In time, Durant's committee was renamed the Red Cross and the 1864 statement became known as the First Geneva Convention.

National societies were formed in support. The American Red Cross was founded in 1881 by Clara Barton, who led the campaign that resulted in US ratification of the Geneva Convention in 1882.

The original Convention was amended and supplemented by further conventions and protocols, culminating in the definitive Geneva Conventions of 1949, which have been ratified and given the force of law by virtually every nation in the world. The International Committee of the Red Cross (ICRC) is recognized as the custodian of the Geneva Conventions.

Once regarded as sacrosanct, the Geneva Conventions have run into controversy in recent years as political winds pushed them in new directions. Today, the basic Conventions are often subordinated to a broader concept called "International Humanitarian Law," the definition and origins of which are difficult to pin down and which, in any case, did not exist until the end of World War II.

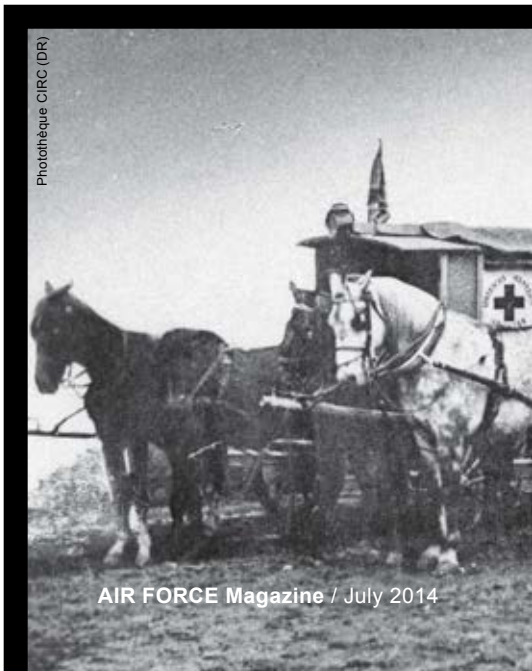
Advocates of International Humanitarian Law—the ICRC foremost among them—are increasingly focused on civilian victims of war and on rights and protections for insurgents and irregular combatants. For members of the regular armed forces, the emphasis has shifted from their protection and medical care to their obligations and liabilities under the Conventions.

Filling in the Gaps

Although the 1864 Convention laid the cornerstone for what was to come, it was very limited in scope. It did not include prisoners of war or sailors wounded in battles at sea. It said nothing about the rules or laws of war or about civilians caught up in the devastation of war. Those issues would be taken up in other venues.

The Lieber Code, developed in the United States by political philosopher Francis Lieber, is largely overlooked by history but it was a seminal influence on the laws of war. It was adopted by the US Army and promulgated as General Order 100 in 1863. It sought "to ameliorate the ravages of combat" and established rules for the protection of persons and property and for treatment of deserters, prisoners of war, partisans, captured messengers, and

Below: Prisoner of war Lt. Col. James Hughes, clearly injured, is paraded through the streets of Hanoi by North Vietnamese guards in 1970. Below center: A red cross on this Serbian horse drawn ambulance marks it as noncombatant to provide protection for the wounded and those caring for them. Below right: In the dock at the Nuremberg Trials are (first row, left to right), Hermann Goering, Rudolf Hess, Joachim von Ribbentrop, and Wilhelm Keitel.The tribunal set a precedent for trial (and capital punishment) for offenses not specified in any law or treaty.



Photothèque CIRC (DR)

ENTIONS EVOLVE

By John T. Correll

The first Convention, 150 years ago, was about aid for soldiers wounded in battle. Today the focus is on "International Humanitarian Law."

others. The Army kept it in effect until the publication of its *Rules of Land Warfare* manual in 1914.

The Hague Conventions, second in fame only to Geneva, began in 1898 with a call from Russia for a conference on limitation of armaments. Russia, behind in the arms race, hoped to slow down its rivals, principally Austria. The Hague in the Netherlands was selected as the site because it was the seat of government of a small neutral country. The delegates balked at the declared purpose of the meeting, which was the limiting of arms. The first Hague Convention in 1899 included a five-year ban on projectiles dropped from balloons as well as prohibition of "asphyxiating gas" and dum-dum bullets and other ammunition that expanded on contact with human bodies.

The follow-on Hague conference of 1907 was of far greater importance. It produced several proposed treaties, the main one being the fourth—"Convention Respecting the Laws and Customs of War on Land"—known ever since as "Hague IV."

Hague IV stipulated that prisoners of war were to be humanely treated and if questioned, were obliged to give only their "true name and rank." It also set four conditions that had to be met to qualify for protection under the Convention.

Combatants had to (1) be commanded by a person responsible for his subordinates; (2) have a "fixed distinctive emblem recognizable at a distance"; (3) carry arms openly; and (4) conduct operations "in accordance with the laws and customs of war." For most combatants, the fixed distinctive emblem would be a uniform.

The Hague definition of a lawful combatant was repeated by the Geneva Conventions of 1949. However, another provision of Hague IV—that the Convention applied only to "contracting powers" who agreed to it—would be radically changed in future developments.

Meanwhile, a limited-purpose Geneva Convention in 1906 extended protective coverage to those wounded in war at sea. The original convention had applied only to "armies in the field."

Japan Opts Out

In World War I, both sides used poison gas against enemy soldiers. This was forbidden by the Hague Conventions, but the grim wartime experience led to the Geneva Protocol of 1925, which added another layer of prohibitions on chemical and biological weapons. This is still the main agreement on the issue today. When Syria used chemical weapons against its own people in 2013, it was denounced as a breach of the Geneva Protocol.

The international community gathered again at Geneva in 1929 and strengthened the previous treaties on POWs and those wounded in battle. Among other things, it provided authority for the investigation of accusations of noncompliance.

Japan refused to sign the Convention. Under the Japanese code of *bushido,* "the way of the warrior," surrender was dishonorable. Japan did not allow its own military members to be taken prisoner and did not want to be told how to treat combatants of other nations who fell into its hands. The full implications of this policy would be seen in World War II, when Japan was notorious for its mistreatment and summary execution of allied POWs.

The Soviet Union also rejected the new Convention, announcing that it would instead follow the Hague Conventions on POWs, which did not require inspection of prison camps and other considerations for prisoners.

The Geneva Convention of 1929 said that its provisions would be in effect in wartime so long as one of the belligerents was a party to the agreement. This loosened the Hague IV rule that treaties applied only to "contracting powers" who agreed to them.

Neither the Hague or the Geneva Conventions anticipated the atrocities committed by the Germans and the Japanese in World War

Photo via National Archives

II. None of the existing treaties offered protection for civilians. As the evidence of the Holocaust emerged, it was clear that the laws of war were incomplete. The Geneva and Hague conventions did not cover the main Nazi offenses. The Germans were undeniably guilty, colossally so. The legal question was: of what?

Nuremberg

Twenty-two former high officials of the Third Reich were tried by the International Military Tribunal at Nuremberg in 1945-1946. Of these, 19 were convicted and 12 were sentenced to death by hanging.

The Nuremberg indictments were based on the Tribunal's charter from the governments of the United States, France, Britain, and the Soviet Union. The Tribunal was empowered to try and punish (a) "Crimes Against Peace," which meant the planning and waging of a war of aggression; (b) "War Crimes," defined as "violations of the laws or customs of war"; and (c) "Crimes Against Humanity," to include murder, extermination, and "other inhumane acts." The Tribunal had authority in such crimes "whether or not in violation of the domestic law of the country where perpetrated."

From this charter, the prosecutors drew up an indictment with four counts: crimes against peace, war crimes, crimes against humanity, and conspiracy to engage in the other three counts. Each charge was accompanied by a long list of specifications. The Tokyo war crimes trial—officially, the International Military Tribunal for the Far East—generally followed the pattern of the Nuremberg Trials.

The Nuremberg Tribunal set a precedent for trial (and imposition of capital punishment) for offenses not specified in any law or treaty. The concept of war crimes was firmly embedded.

Concurrently, the United Nations charter in 1945 created the International Court of Justice as the judicial branch of the UN. Its mandate covered not only international conventions "expressly recognized by contesting states" but also "international custom" and "general practice accepted as law." The court was further directed to consider "judicial decisions and the teachings of the most highly qualified publicists of the various nations."

The principle of "customary international law" was off and running and international judicial review—in which the Geneva and Hague Conventions would be regarded as subject to interpretation by the courts—was not far behind.

World War II had brought on a redistribution of global power. The big nations never regained their prewar domination and the relative strength of the smaller nations increased steadily.

Expanding the Coverage

A short reference to "the Geneva Conventions" usually means the four conventions—designated by Roman numerals I through IV—from the big international conference of 1949. They have been ratified by a record 194 nations.

The 1949 Conventions are comprehensive, incorporating the previous Geneva treaties and adding important new articles. Conventions I and II, dealing with sick and wounded in the field and at sea, were not much different from before but III and IV introduced fundamental change.

Convention III bestowed eligibility for POW status and protection on "militias, volunteer corps, and organized resistance movements." What the delegates had in mind was the French resistance from World War II, but they opened the door for al Qaeda terrorists in the 21st century. Prisoners, whether regulars or irregulars, could not "be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." All were to be "treated humanely."

Convention IV, "Protection for Civilian Persons in Time of War," was entirely new, stimulated principally by German atrocities in

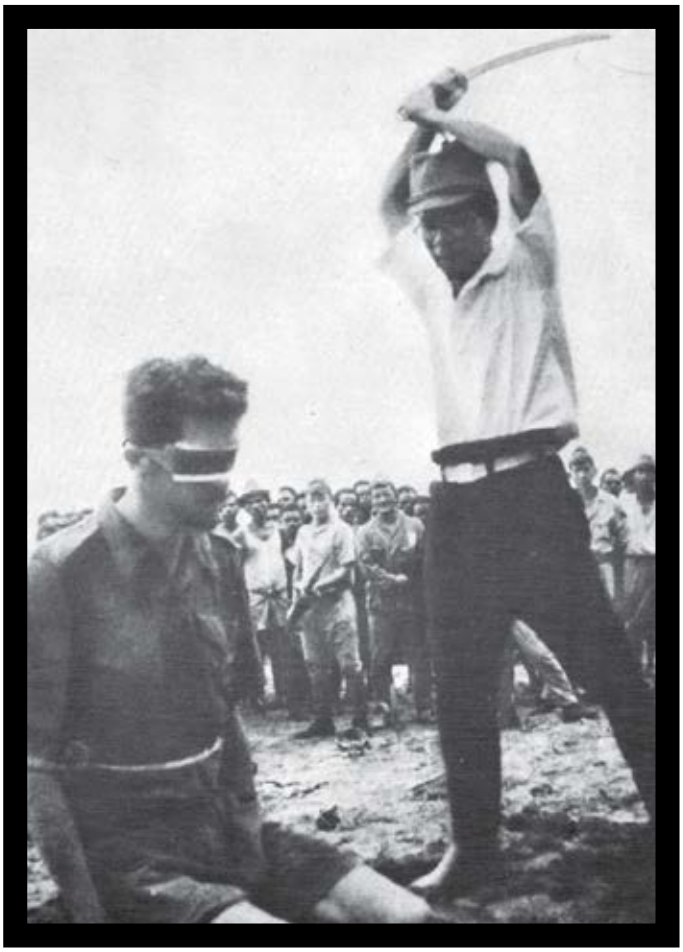


Photo via Wikipedia

A Japanese officer beheads Sgt. Leonard Siffleet, an Australian commando, in 1943. Japan, regarding surrender as dishonorable, did not sign the Geneva Convention on POWs.

World War II. It prohibited violence to life or person, the taking of hostages, "outrages upon personal dignity," and execution without a "judgment pronounced by a regularly constituted court."

By the 1970s, irregular warfare and unconventional conflict were on the rise. The Geneva rules were not of much benefit to insurgents, so supporters of such conflicts set about what the Red Cross described as "loosening" the "identification requirement for guerilla fighters." National liberation groups, including the Palestine Liberation Organization, were invited to an ICRC meeting in Geneva to help draft "additional protocols" to supplement the 1949 Conventions.

The new protocols, introduced in 1977, said the Geneva rules applied to "peoples" fighting "colonial domination, alien occupation, and racist regimes." The requirement for uniforms or other means of distinguishing combatants was not eliminated outright but the protocols envisioned situations when "an armed combatant cannot so distinguish himself." Even if a guerrilla fighter failed to meet the usual tests for POW status, "he shall nevertheless be given protections equivalent in all respects to those accorded to prisoners of war."

US representatives from the Ford Administration helped negotiate the additional protocols and the Carter Administration signed them with no public debate. The Joint Chiefs of Staff opposed ratification on the grounds that the protocols legitimized terrorists and enabled them to hide within the civilian populace.

President Reagan pulled the plug on ratification, saying that, "We must not and need not give recognition and protection to terrorist groups as a price for progress in humanitarian law." The

Washington Post agreed, saying the PLO and other groups had "hijacked" the Red Cross convention.

More than 150 countries have ratified the 1977 additional protocols and the clamor continues for the United States to do so as well.

Unlawful Combatants

During World War II, a German submarine delivered eight saboteurs to a beach on Long Island. They were soon captured, convicted, and sentenced to death by a military tribunal. The Supreme Court upheld the decision. Chief Justice Harlan F. Stone said the Germans were "unlawful combatants" who had buried their uniforms and did not bear arms openly.

The term "unlawful combatant" was not specifically mentioned in the 1949 Conventions, which kept intact the Hague requirements for POW status. Even so, the issue remained in play and gained momentum after the 1977 protocols. Insurgents, fighting without uniforms and using terrorist tactics, claimed the protection of the conventions.

In 2002, White House counsel Alberto R. Gonzales advised President Bush that Geneva Convention III did not apply to al Qaeda terrorists. Gonzales then plunged deeper into murky territory with an argument that "the nature of the new war" and the need to obtain information quickly "renders obsolete Geneva's strict limitations on questioning of enemy prisoners." In his opinion, "waterboarding," an interrogation technique in which water was poured into a prisoner's breathing passages, was legal.

Legal officers in the Defense and State departments disagreed with Gonzales and Sen. John McCain (R-Ariz.), who had been a POW in the Vietnam War, declared that waterboarding was torture. Several senior Republican senators warned that protection for US troops in future conflicts would be endangered if nations felt free to reinterpret the Geneva conventions as they saw fit. North Vietnam had ratified the Conventions in 1957 but justified abuse and torture of American POWs by calling them war criminals.

In 2006, the Supreme Court ruled that the "humane treatment" clause of Geneva Convention III did apply to the prisoners held at Guantanamo Bay, Cuba. Consequently, the Administration decided that basic Geneva protections would be accorded to terrorism suspects in US custody.

The Obama Administration continued some of the Bush Administration policies, such as trying terrorists by military tribunals and holding them in long-term detention without trial if necessary to protect critical secret information. The 2010 defense authorization act changed the term "unlawful enemy combatant" to "unprivileged enemy belligerent," although the difference was essentially cosmetic.

Targets and Drones

The question of lawful targets is a recurring issue, especially where airpower and bombing

The Emblems

Geneva conventions and protocols recognize three protective emblems: The Red Cross, the Red Crescent, and the Red Crystal. The original one, the Red Cross, had no religious significance, but some nations were suspicious of that assurance.

In the Russo-Turkish War of 1877-1878, the Ottoman Empire adopted the Red Crescent as its protective sign while continuing to respect the Red Cross. Subsequent Geneva conventions confirmed the status of the Red Crescent as well as the Red Lion With Sun, which was used by Iran from 1924 to 1980.

In 1949, the new state of Israel sought recognition for the Magen David Adom, the "Red Star of David," as a protective symbol but was turned down because of opposition by Islamic nations. The Magen David Adom organization was denied membership in the International Federation of Red Cross and Red Crescent Societies. This prevailed through 2000 when the American Red Cross began withholding funds from the Federation in protest.

In 2005, Geneva Additional Protocol III created a third protective symbol, the Red Crystal, which is a red diamond shape on a field of white, for use by nations that had a problem with the Red Cross or the Red Crescent. In 2006, the Red Cross-Red Crescent foundation admitted Magen David Adom as a member.

There is a difference in "protective" and "indicative" use of the symbols. As a protective device, the emblems carry the full shielding value conferred by the Geneva Conventions. In addition, national societies are authorized to use the symbols as indicative devices for various other identification purposes. Protocol III permits the "incorporation" of other devices within the Crystal by national societies within their own territory.

Thus, Israel can use the Magen David Adom inside the Red Crystal diamond within Israel for indicative purposes, but is limited by Protocol III to using the Red Crystal "in its pure form" for protective purposes anywhere else. The Red Lion With Sun, dropped by Iran in 1980 because of its association with the deposed Shah, retains its official status as a protective symbol.

Decoding the Language

In diplomacy, a convention is an international agreement or treaty. However, the term "Geneva Conventions" is regularly used in two different ways, and is correct in both usages: It may refer either to the series of conferences—the First Geneva Convention (1864), the Second (1906), the Third (1929), or the Fourth (1949)—or to the agreements that came out of those conferences. Reference to the "Geneva Conventions," unless otherwise modified, means the group of four instruments adopted at the Fourth Convention in 1949.

In addition to that, there are several "Geneva Protocols" produced by conferences in 1925, 1977, and 2005. There is no legal difference in protocols, conventions, and treaties. The United Nations Definition of Key Terms says that "no precise nomenclature exists," but that "convention" is generally used for "formal multilateral treaties with a broad number of parties" where a "protocol" may be an agreement "less formal than those entitled treaty or convention."

The Hague Conventions from 1899, 1907, and 1954 have the same standing. The key aspect is ratification. Under Article VI of the Constitution of the United States, a treaty (or convention or protocol), once ratified, becomes part of "the supreme Law of the Land."

The Geneva Conventions have nothing to do with the "Geneva Accords," an altogether different set of international agreements in 1954, 1988, and 1991.

are concerned. Some are always ready to label any airstrike a war crime, especially if there are civilian casualties or collateral damage.

Geneva Convention IV defines military action against persons or property a "grave breach" of the treaty, but only if it is "not justified by military necessity and carried out unlawfully and wantonly."

Even the more tightly worded 1977 additional Protocols recognized the principle of necessity. The injunction against attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, [or] damage to civilian objects" was limited to instances in which the action is "excessive in relation to the concrete and direct military advantage anticipated."

In 1999, Amnesty International asked the International Criminal Tribunal for the former Yugoslavia to charge NATO with war crimes for the air campaign in Kosovo. The court accepted and investigated the case (implying jurisdiction) but the prosecutors declined to indict.

The use of drones for lethal strikes in Afghanistan and Pakistan has again raised the targeting controversy. A coalition of nongovernmental organizations, led by Amnesty International and Human Rights Watch, formed the "Campaign to Stop Killer Robots." The Peshwar High Court in Pakistan ruled that drone strikes violate the UN charter and the Geneva Convention. In 2013, Sen. Dianne Feinstein (D-Calif.) and others proposed a new special court to oversee selection of drone targets for lethal attacks.

The ICRC takes the position that drone strikes are neither expressly prohibited or specifically mentioned in treaties or other legal instruments but cautions that drone operators are "no different than the pilots of manned aircraft" in "their obligation to comply with international humanitarian law."

Lawfare

The idea of "universal jurisdiction"—meaning that any state or international organization can claim criminal jurisdiction no matter where or by whom an offense was committed—has become enormously popular.

The concept did not exist until the 1990s but it supposedly drew inspiration from the Nuremberg trials and the case in 1961 when Israel apprehended Adolf Eichmann in Argentina and took him to Jerusalem for trial.

The ICRC maintains that universal jurisdiction "is firmly rooted in humanitarian law" and that "although the Geneva Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have generally been interpreted as providing for universal jurisdiction."

Activists, impatient with what they have been able to achieve through formally adopted conventions and protocols, look to the international courts, which are not reluctant to weigh in on major issues. For example, although the Geneva Protocol prohibits chemical and biological weapons, none of the Geneva treaties mentions nuclear weapons. Nevertheless, the International Court of Justice ruled in 1996 that use of nuclear weapons was subject to international humanitarian law and contrary to its principles and rules.

The International Criminal Court, created at a conference in Rome in 1998, is the latest forum for prosecution of "war crimes and crimes against humanity." Henry A. Kissinger says that "the ideological supporters of universal jurisdiction also provide much of the intellectual compass for the emerging International Criminal Court." The United States has declined to ratify the "Rome Statute" establishing this court.

Another new term—but from the opposite point of view—is "Lawfare," derived from an abbreviation of *"law* as a means of *warfare."* Former Justice Department officials David B. Rivkin and Lee A. Casey explain that "lawfare describes the growing use of international law claims, usually factually or legally meritless, as a tool of war." Al Qaeda, they said, "is an experienced lawfare practitioner. Its training manual, seized by British authorities in Manchester, England, openly instructs detained al Qaeda fighters to claim torture and other forms of abuse as a means of obtaining a moral advantage over their captors."

Gozo13fox photo via Wikipedia

Insurgents captured in Iraq in 2006. FIghting without uniforms and using terrorist tactics, many insurgents are quick to claim equal protection under the Geneva Convention.

The Watchword is IHL

The ICRC relentlessly pushes "international humanitarian law," which it has come to regard as the central objective, with the Geneva Conventions and other considerations subordinate to it. However, the ICRC says, "the cornerstone of IHL is the Geneva Conventions" and "while some states have not ratified important treaty law, they remain nonetheless bound by rules of customary law."

As the ICRC sees it, "customary international law is made up of rules that come from a general practice accepted as law and that exist independent of treaty law." It "is not written but derives from a general practice accepted as law." ICRC says the term "international humanitarian law" is synonymous with "law of war" and "law of armed conflict."

The problem, said Knut Dorman, head of the ICRC legal division, is that "Treaty law still falls short of meeting some essential protection needs." In particular, "the so-called 'global war on terror' raised important issues about the law ... and led to a reassessment of the balance between the requirements of state security and protection of the individual. In many cases, actions were taken to the detriment of the individual."

This drift in focus and emphasis has undercut the credibility of the Geneva Conventions in the minds of some, but most senior officials and analysts in the United States are still committed in their support.

"We obey the law of war if for no other reason than because reciprocity tells us that what goes around comes around; if we abuse our prisoners today, tomorrow we will be the abused prisoners," says Gary D. Solis, former Marine Corps officer and a former professor of law at West Point, currently at Georgetown University Law Center. "We obey the law of war because it is the law and because it is the honorable path for a nation that holds itself out as a protector of oppressed peoples. We abide by the Geneva Conventions because it's the right thing to do." ■

John T. Correll was editor in chief of Air Force Magazine *for 18 years and is now a contributor. His most recent article, "The Semi-Secret Birth of the Luftwaffe," appeared in the June issue.*