THE GENEVA CONVENTIONS

THE 1949 CONVENTIONS

There was one final achievement of humanitarian law before the Cold War set in to ferment conflicts of a kind which the post-war peacemakers failed to envisage. The four Geneva Conventions of 1949 state the principles of international law as they had by then emerged in relation to the treatment of: sick and wounded combatants on land (I) and at sea (II), prisoners-of-war (III) and civilians (IV).

The 1949 Geneva Conventions provide:

I 'For humane care of sick and wounded combatants on land', irrespective of their race, religion or politics; immunity for hospitals and medical personnel and army chaplains; special recognition of the role of the Red Cross and Red Crescent organizations.

II Similar provisions applied to those 'wounded, sick or shipwrecked at sea', with detailed rules for the immunity of hospital ships.

III 'Rules for securing the humane treatment of prisoners-of-war', protecting them from being used for military labour or in medical experiments or as objects of public insult or curiosity. Use of POWs as hostages in combat zones (i.e. to deter enemy fire) is absolutely forbidden, as is torture or any form of coercion designed to extract information. The prisoner must give his name, rank, regimental number and date of birth: on thus achieving POW status he is entitled to 'be quartered under conditions as favourable as those for the forces of the detaining power' and to have nutritious food, warm clothing and bedding, and permission to pray and to smoke. POWs are to receive monthly pay (75 Swiss francs for generals, 8 Swiss francs for privates) and must be allowed to receive food parcels and send and receive mail. They must be given one musical instrument of their choice (a requirement in memory of the music at Terezin and other ghettos). They must be permitted to organize discipline in their own camps, and to make formal complaints about their treatment.

IV 'For the Protection of Civilian Persons in Time of War'. This Convention secures humane treatment for persons in occupied territories and those who have been interned on suspicion of involvement in resistance movements. The former class of 'protected persons' are entitled to respect for their family and customs and religion, and women are guaranteed protection from rape and forced prostitution. Civilians must not be used for reprisals or as hostages, or as forced labourers or subjects of mass deportations. The occupying power cannot punish civilians for activities prior to the occupation, and is entitled to execute them only for acts of spying, sabotage or murder.

These Conventions begin, most importantly, with three articles which are common to each of them. The first (common Article 1) pledges respect for the Convention 'in all circumstances', thereby excluding any excuse of national necessity or self-defence. Common Article 2 applies the Convention rules not only to declared wars but to 'any other armed conflict' arising among the parties, and requires signatories to abide by the rules even if other states do not (thus excluding a familiar reservation to previous treaties entered by states only prepared to stick to the rules as long as their enemies did). The point at which 'armed conflict' begins, thereby attracting the Geneva regime, is not defined. It would require hostile acts by an army rather than a police force, and would seem to exclude occasional border skirmishes and destabilizing tactics which did not involve the use of force.

It is important to note that the Geneva Convention scheme which state parties promise to enforce by tracking down individuals suspected of 'grave breaches' and putting them on trial applies only to crimes committed in the course of international armed conflict. Although common Article 3 promises a minimum of humane treatment in 'armed conflict not of an international character' to all civilians and non-combatants, this promise comes without an enforcement mechanism for breaches, however grave. This is because in 1949 no state was prepared to allow international law to intrude upon its sovereignty when it came to putting down insurgencies and armed revolt. Genocide apart, states were not ready to concede to the international community a jurisdiction by treaty to punish their officials

for torture or other brutalities inflicted upon citizens within their own borders. It was the achievement of international human rights law, by the time of the *Tadić Case* in 1996, to render largely academic this difference between 'international' and 'internal' atrocities although the distinction may still have some significance. For example, the Geneva Conventions with their 'grave breaches' regime did not apply to the civil war in Afghanistan between the Taliban and the Northern Alliance until October 2001 when the United States intervened with B52s and turned the fight into an international armed conflict. Even then, the US denied that Convention III was applicable to Taliban and al-Qaida fighters captured on the battlefield, since the former were not in a military uniform and the latter were, in addition, under no clear chain of command (see chapter 12). Common Article 3 extends the promise of a minimum standard of humanity to wars that are not declared, and to violent insurgencies, internecine struggles and armed resistance to state power (although not to riots, criminal disorder or sporadic outbreaks of civil disturbance). There has been some dispute over the level of internal violence covered by common Article 3: there would have to be fighting between two armed forces with the rebels having a sufficiently organized command structure to impose Convention discipline.

Common Article 3 is apt to protect all non-combatants who are caught in the crossfire of a civil war. It specifically prohibits murder, torture, hostage-taking, 'outrages upon personal dignity' and extra-judicial executions, and covers any military, police or guerrilla action which has the deliberate result of killing or maiming civilians or prisoners. It applies to the 'High Contracting Parties to the Conventions', which means virtually every state, and must also as a matter of customary law apply by analogy to the leaders of organized guerrilla forces, since those who seek forcibly to control the state take on the basic humanitarian duties of the government they wish to supplant.

Common Article 3 helps to integrate human rights with the law of war. It was no mean achievement to persuade colonial powers that their right to put down rebellions should be limited by some basic humanitarian duties to citizens and to injured rebels. Nuremberg idealism played some part (as, more craftily, did the Soviet Union's desire for a propaganda stick with which to beat Western states

opposed to the rebellions it was fomenting in their colonies). Asian countries, led by Burma, opposed the article on the ground that it was bound to 'incite and encourage insurgency', apparently by encouraging rebels to believe they would be protected from summary execution and by giving their causes some form of legitimacy by making *them* subject to international legal obligations. At a sensible level, common Article 3 does no more than record the obligation undertaken by all state parties to observe basic human rights in times of conflict, thereby imparting to conflicts within a state an obligation recognized in wars between states.[6] The position has been confused, however, by a 1977 protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) which covers similar ground to common Article 3. Here because the provisions were meant to state international law the diplomats who did the drafting were much more careful, and clearly wished to take a step backwards. Their definition of armed conflict is much narrower (the rebel force must possess troops and control territory).

Each state has a duty, under articles common to the four Conventions which deal with 'repression of abuses and infractions', to search out suspects alleged to have committed 'grave breaches' of the Conventions and to put them on trial, regardless of their nationality. 'Grave breaches' are crimes so serious that in 1949 states were prepared, by ratifying the Conventions, to undertake to put the suspect on trial themselves or to extradite him to a country prepared to do so. They do *not* encompass crimes against common Article 3 committed in civil war, but include the following crimes if committed in *international* conflict:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly.[7]

This is, inevitably, a 'catch as catch can' approach, in which few in practice are caught. Occasionally, ratifying states have acted to bring their own officers to justice – Lieutenant Calley for the My Lai massacre in Vietnam, for example. In Calley's case, however, politics (in the form of President Richard Nixon) intervened to ensure that justice was not done. Calley was properly convicted of complicity in

the deaths of seventy innocent Vietnamese villagers by ordering his troops to 'waste them': he personally shot a 2-year-old child. He was sentenced to life imprisonment, which Nixon ordered to be reduced to three years. Calley served only three days in prison, spending his sentence at his home on a military base, replete with live-in lover.

Convention III (treatment of prisoners-of-war) and Convention IV (treatment of civilians) adopt an enforcement mechanism through the agency of 'protecting powers' – one nominated by each combatant – tasked with visiting prisons and war zones and generally monitoring the treatment of persons caught up in the conflict. This was always an unworkable idea (adopted from the role played by 'seconds' at a duel) and has generally been ignored: in only four conflicts have 'protecting powers' been appointed, and their role has been limited to exchanges of diplomatic niceties. More helpful work on the ground has been done by the International Committee of the Red Cross (ICRC), whose role is written into the Conventions (common Article 3 gives it a right to enter into battlefields and war zones). However, the Red Cross, to justify this privilege, makes a fetish of its commitment to confidentiality, both in observations within war zones and in its dealings with governments and militias. Its present ethics of humanitarian intervention (which are not shared by other aid agencies) require its workers to turn a blind eye to human rights violations, in the belief that their silence is the price of being invited back, or into the next war zone. It has declined for this reason to allow its employees, and even former employees, to give evidence to the Hague and Arusha Tribunals, which have upheld this privilege against testifying although it deprives them of valuable first-hand accounts of atrocities and reliable evidence against those responsible. The problem is important, since Red Cross officials always acquaint commanders with evidence of atrocities being committed by their troops, and if they take no action then these commanders will be guilty of command responsibility for any war crimes those troops subsequently commit. Their conviction, however, may depend on evidence from the Red Cross officials – who will refuse to breach confidence. The ICRC was permitted to inspect the prison at Guantanamo Bay, but its report, presented to the US authorities, could not be made public, despite international concern over the conditions in which the detainees were

being kept. In these circumstances, ICRC inspection is a very limited safeguard.

THE 1977 PROTOCOLS

The Geneva Convention system comprised a fine set of rules for the protection of the victims of war, but said nothing sensible about enforcement. In 1974, the Swiss government (which a cynic might think to have profited from these Conventions rather more than the victims of war) issued invitations to a diplomatic talk-fest which lasted on and off for three years and resulted in even more rules and even less prospect of enforcing them. As a drafting exercise, Protocols I and II serve to update the language of the 1949 Conventions and to elaborate, in particular, the duties owed to civilian populations by military commanders. Protocol I summarizes, in Article 35, the three basic rules of war:

(1) In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.
(2) It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
(3) It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Rule 3 is elaborated in some detail, confining bombardment to military targets in the hope of minimizing civilian casualties and avoiding damage to churches, historic monuments or other cultural property. Special provision is made for the treatment of spies and mercenaries (the latter making their first appearance in these treaties) and henceforth warring parties must take care not to cause serious damage to the natural environment. Specially defined protection is given to refugees, women and children, and even to journalists, who on the production of an identity card from their government are to be accorded civilian status so long as they take no action inconsistent with that status (a reference, presumably, to shooting for one side, not to the common journalistic practice of propagating one side's disinformation).

Swelling the ranks of 'diplomats' in Geneva to produce these protocols were, for the first time, representatives of national liberation fronts, and care was taken to apply Protocol I to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination' (Article 4). This definition extends a full-blooded humanitarian regime (rather than just the 'elemental decency' guarantee of common Article 3) to many civil wars. An international element must be proved, however, to attract the full Protocol I regime, and will generally be found in countries where the belligerent parties are supported by foreign powers. This is not necessarily the case with 'racist regimes' (the protocol drafters had South Africa and Rhodesia in mind) unless the international element is located in the moral and financial support given by other states to liberation groups or in the economic sanctions applied in support of their rights to self-determination.

Protocol II applies extensive humane treatment principles (taken from the Civil Covenant) to victims of government or anti-government forces in *non*-international armed conflicts, so long, at least, as the dissident forces are armed, under responsible command and 'exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol'.[8] This formulation gives rise to definitional difficulties. It is not even clear that it would apply to organizations like the ANC in South Africa in the period when it had no 'territories' of its own but operated from bases provided or suffered by other countries, and it would not seem to apply to an armed underground resistance, however disciplined and justified in its cause. It would apply to forces like those of al-Qaida (made up of Arabs, Pakistanis, Chechyens and even a few Chinese Muslims) which fought alongside the Taliban in the civil war against the Northern Alliance, unless they could be described as mercenaries – which they cannot, since Protocol I defines this unprotected species as 'motivated essentially by the desire for private gain', by which it means wealth rather than religious advancement. Since neither the US nor Afghanistan had ratified the 1977 Protocols, the status of Taliban fighters captured during the international armed conflict in 2001 fell to be determined under the 1949 Convention, much to the disgruntlement of President Bush, who bridled at the notion that US taxpayers should

supply the prisoners with musical instruments. (He forgot that the Taliban ban all music: a Guantanamo Bay prison orchestra is an unlikely prospect.)

But definitions do not much matter, because neither protocol has teeth. Protocol II, indeed, lacks gums: its Article 3 ('non-intervention') provides:

> (1) Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
>
> (2) Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

So what is the point? A state party might openly order genocide, rape, pillage and torture of any civilians and POWs, and bomb all Red Cross hospitals: however barbarically its own rules are broken, Protocol II refuses to contemplate even indirect intervention by other states. It has, indeed, provided a possible argument against the legality of NATO's attack on Serbia in 1999: Milošević is claiming that his army was 'maintaining law and order' in Kosovo against an insurrectionary terrorist force, the Kosovo Liberation Army.

The enforcement provisions of Protocol I (applying in situations of international armed conflict) appear at first blush to be an improvement on the 1949 Conventions which merely called on states to investigate and punish 'grave breaches' (presumably identified by the 'protecting powers' who would hover like referees over the contest). There are provisions introduced in 1977 to emphasize command responsibility, requiring military commanders to ensure their troops were aware of their obligations and making them 'responsible' (but to whom?) for violations. There are pious duties imposed on states to assist other states in respect of criminal proceedings and extradition involving war crimes (subject always to the terms of extradition treaties) and there is an impressive provision that states whose armies violate the Geneva Conventions or the Protocol shall 'if the case demands, be liable to pay compensation'. But there is no court or

tribunal nominated or given the power to assess any such payment, let alone order it to be made.

Most fantastical of all is Article 90, which provides that serious violations of the 1949 Conventions or of Protocol I should trigger the establishment, in conjunction with the United Nations, of an international fact-finding commission, comprising fifteen members 'of high moral standing and acknowledged impartiality' who shall inquire into 'grave breach' allegations by seeking out evidence and visiting the *locus in quo*. The commission must send its report to all parties, but '*shall not report its finding publicly* [my italics], unless all the parties to the conflict have requested the Commission to do so'.[9] No international fact-finding commission has ever been set up, notwithstanding repeated violations of the Conventions and the Protocol since 1977. The procedure is so cumbersome and so carefully designed to ensure secrecy (because no state would agree to publication of an adverse report) that it was obvious to all delegates that it would never be invoked. There is evidence from some of the diplomats who enjoyed themselves conferencing for three years in Geneva that these protocols were never really intended to be more than a comforting pretence that their member states (many of whom subsequently refused to ratify them) were active in the cause of peace. In one respect, as we shall see in chapter 7, Protocol II has seriously damaged the development of international human rights law, by an irresponsibly drafted subsection (Article 6(5)) which invites authorities in power at the end of hostilities to 'endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict' – a passage which has been seized upon by courts anxious to uphold pardons extracted by tyrants and torturers and death squads against future prosecution for committing crimes against humanity (see page 280). The 1949 Geneva exercise was informed by a genuine optimism that it would work, and (having been ratified now by 189 nation states) is properly regarded as the modern bedrock of international humanitarian law. The 1977 Protocols, however, are badly drafted exercises in cynical diplomacy which have failed to achieve normative status, because many powerful nations have refused to ratify them.

GOOD CONVENTIONS

The result of these exercises is a set of overlapping rules spanning hundreds of pages, supplemented by hundreds of thousands of pages of minutes and conference transcripts and '*travaux préparatoires*'. These war laws are, on paper, exquisitely humane. It is difficult indeed for many Third World readers of Geneva Convention III not to yearn for the pleasures of POW status, given the two-star treatment they mandate, at least for the officer class. Convention IV accords rights to civilians in occupied territories which many impoverished peoples in unoccupied territories do not possess. As one delegate put it, 'The cure for all China's problems would be to persuade some other power to occupy the entire country.'

The fact that these rules are unreal has undoubtedly contributed to the extent to which in real life they have been flouted or (worse) rejected out of hand, the 'elemental decency' provisions having been jettisoned along with the luxury articles. Thus the Vietcong and North Vietnam refused to recognize the 'bourgeois' POW convention: the experience of US soldiers in their 'tiger cages' is a reminder that the prisoners they took could have done without an officers' mess or regular wages in Swiss francs or musical instruments, if only they had been accorded a 'bread and water' prison existence monitored by the Red Cross. It is ironic to have to condemn humanitarian law for being *too* humane, but that fact has undoubtedly contributed to the flouting of some of its important provisions. The United Nations should have put in place a simple system which delivered on basic rights to prisoners-of-war, internees and citizens of occupied territories. Instead, we have complicated rules, sophisticated to the point of unreality, and a delivery system which depends on what the International Committee of the Red Cross is able to make of it. In some cases (notably Israel and Palestine), it has been able to negotiate entry to prisons. In others, it has signally failed to obtain access to government torture chambers or to the makeshift jails of guerrilla groups.

The test of international law is not, however, whether it is regularly flouted but whether it is occasionally enforced – a prospect which is

apt to diminish the number of future floutings. The enforcement machinery does not need to involve criminal responsibility: in the case of obnoxious weaponry, for example, what matters most is a proper verification system. And as a last resort there must be a rule requiring the international community to take preventive action to demolish weapons of mass destruction before they destroy masses. On this most anxious score, how does international humanitarian law rate? Regrettably, even when conventions, conferences, treaties and the pronouncements of the UN's General Assembly all lead logically to one result under customary international law, it is more customary to ignore that result if it interferes with military thinking.

Take, for example, the practice of carpet-bombing an area of both military significance and high population density. This is directly contrary to the Hague Rules of Aerial Warfare, which require all bombing to have a military objective. Aerial bombardment which 'terrorizes the civilian population' is prohibited. Nothing could be plainer than this rule against indiscriminate bombing; yet Allied embarrassment over the RAF's use of 'area bombardment' against Dresden and other German cities means that this war crime does not feature in the 1949 Geneva Conventions (a point unpersuasively made in defence of Nixon and Kissinger when they ordered the bombing of Cambodia). Saturation bombing of a city is a crime, and the failure of the plenipotentiaries in Geneva to acknowledge it either in 1949 or 1977 meant that Picasso painted *Guernica* in vain. It is still not specifically listed among the war crimes in Article 8 of the ICC Statute, though some of these provisions are wide enough to incriminate a future Bomber Harris, or even a Kissinger.

CHEMICAL AND BIOLOGICAL WEAPONS

There has been rather more agreement, at least on paper, over atrocious weaponry which the military is either prepared to give up or regards as incapable of further development. The use, or at any event the first use, of chemical weapons has been contrary to international law since 1925, when a surprisingly large number of states ratified the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and Other Gases and of Bacteriological Methods of Warfare.

These signatories did not raise so much as an eyebrow to stop Italy using poison gas a few years later in its Abyssinian campaign. Although chemical weapons have been routinely condemned at the UN Conference on Disarmament held (in Geneva, of course) every year since 1972, most states looked the other way when Iraq and Iran mustard-gassed each other's troops during the Iran–Iraq War. In March 1988 Iraq used gas to kill 8,000 Kurds at Halabja, thanks to German companies shipping stocks of Zyklon-B gas, of the kind once used to exterminate Jews in the concentration camps. This produced a certain amount of embarrassment when it was exposed as part of 'Iraqgate'. However, the UN conference caravanserai moved on to finalize the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

In due course, 145 states, including (ironically and ominously) Iraq itself, pledged to forswear the manufacture or use of chemical weaponry, and were this time prepared in principle to permit their good intentions to be checked by an organization headquartered in The Hague, the Organization for the Prohibition of Chemical Weapons (OPCW), which has made over 1,000 inspections since 1997, and banned fourteen substances (including Sarin gas, used by terrorists in the Tokyo subway). But it has no power to order the destruction of stocks, and inspections are not compulsory: states cruel enough to manufacture and/or use chemical weapons (e.g. North Korea, Iraq, Syria and Somalia) have all refused OPCW inspections. The real need is to establish a system for policing the manufacturers and merchandisers of biological and chemical weapons, so that they become liable to individual prosecution for knowingly assisting the production, distribution or use of such weapons in breach of the Convention.

There is some overlap with the earlier Convention on the Prohibition of the Development, Production and Stockpiling of Bacterial (Biological) and Toxic Weapons and Their Destruction (1972), which has 144 state parties. This treaty has yawning gaps – there is no prohibition, for example, on research into biological warfare or on the sale of toxins to individuals or organizations rather than to states. Attempts have recently been made to strengthen it by setting up an international body to conduct mandatory inspections, but the Bush administration (under pressure from pharmaceutical companies