



War's long legacy: the continued importance of the Geneva Conventions 75 years later

August 8, 2024, Accountability / Analysis / Conduct of Hostilities / Generating Respect for IHL / IHL / Law and Conflict

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Ellen Policinski
Legal Adviser, ICRC



Next week marks the 75th anniversary of the four Geneva Conventions of 1949. Against a backdrop of over 120 armed conflicts worldwide, this should prompt us not to celebrate, but to reflect: how were these now universally accepted humanitarian norms drafted, and are they still fit for purpose today?

In this post, ICRC Legal Adviser Ellen Policinski examines how the Geneva Conventions are interpreted and applied today, providing concrete examples from the ICRC's updated Commentaries. She goes on to investigate the recurring critique that international humanitarian law (IHL) is somehow outdated, examining who benefits from the narrative that the Geneva Conventions and IHL more generally are not appropriate legal tools to govern armed conflicts today.

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The very first Geneva Convention was adopted in 1864, inspired by the activism of Swiss businessman Henry Dunant and the work of the *International Committee for the Relief of Wounded Combatants*, predecessor to the International Committee of the Red Cross (ICRC). The Convention was designed to protect wounded and sick members of the armed forces, as well as those who collected and cared for them. Over time, the Geneva Convention was revised and updated three times – in 1906, 1929 and 1949.

The *Geneva Conventions* were drafted in 1949, following the horrors of the Second World War. As is plainly seen in the *drafting history*, all of those involved in the negotiations had been impacted by the war in some way – as a diplomat, a combatant, a civilian living in occupied territory, or an *ICRC or National Red Cross/Red Crescent Society delegate* attempting to provide much needed relief.

Given that they are *universally accepted* today, it's easy to underestimate how innovative the norms established in these treaties were at the time, in particular the Fourth Geneva Convention's protections for civilians. Looking at contemporary sources, we can see the impact this latter had when it was adopted. In 1952, just a few years after their adoption, *Hersch Lauterpacht wrote*: “While [the first] three Conventions merely revise and expand—though on a very considerable scale—treaties already in existence, the fourth Convention, namely, that for the Protection of Civilians in Time of War, covers in many respects entirely new ground not touched by the Hague Conventions.”

Lauterpacht *also noted* the protections provided by Common Article 3 in non-international armed conflicts, another innovation: “The Convention imposes certain minimum obligations of humane treatment even in armed conflicts which are not of an international character and even if the parties to the conflict, which may not be states, are not parties to the Convention – an interesting example of obligations being imposed upon entities which are not normally subjects of international law.”

Retrofuturism? Applying 1940s innovations in the 2020s

Seventy five years later, some may *question* whether these Conventions, so advanced in 1949, remain relevant in today's wars, which look very different from the Second World War. Part of the answer is that they were drafted in sufficiently broad terms to withstand the test of time. The drafters were keenly aware that they were creating documents that would need to last. During negotiations, they often referred to the need to avoid drafting narrowly worded provisions.

For example, when *more detailed rules* were proposed to regulate the delivery of humanitarian relief in occupied territories, *the ICRC pointed out* that future conflicts may evolve in unexpected ways, proposing that “a few general principles only should be established, drawn up in sufficiently elastic terms to allow relief work to be undertaken in all circumstances.” Drafters *also pointed out* that it wasn't certain that the model of aid delivery that worked well during the Second World War would be well adapted to future situations of occupation. Furthermore, they *noted* that the 1929 Geneva Conventions had been too closely related to the events of the First World War, making them difficult to apply in the Second World War. Ultimately the drafters indeed opted for texts of what became *Articles 59–62 of the Fourth Convention* containing relatively general regulations that allowed for future developments they may not have been able to predict.

Another part of the answer comes from the fact that states have been interpreting and applying the Geneva Conventions all along, demonstrating that their terms are sufficiently elastic to remain relevant in a changing world. States' interpretations have necessarily taken developments in technology, law, medical understandings and social norms into account. For example, communication technologies, and in particular social media, have evolved in ways that the drafters could not have predicted. This has implications for the *obligation to protect prisoners of war and protected civilians from public curiosity*, for example.

For the same reason, the fastest way for *correspondence with and on behalf of prisoners of war and other protected persons* is no longer by telegram, as envisaged by the drafters. More modern means of communication may be used, although letters and cards are still sent. Similarly, the quickest way to *communicate with the National Information Bureaux and Central Tracing Agency*, including information about the deceased, is likely to be electronic, although the security of the information must also be considered and *data protection standards apply* to personal information collected and transmitted under the Geneva Conventions.

The Geneva Conventions are also interpreted and applied in light of legal developments since 1949. For instance, the development of jurisprudence in the field of international criminal law has confirmed that members of a Party's *own* armed forces benefit from the protections contained in *Common Article 3*.

Another example is treaties negotiated since 1949 that provide specific protections to groups of people also protected under the Geneva Conventions. For example, the 1979 *Convention on Elimination of All Forms of Discrimination Against Women*, which reinforces protections for women in armed conflict, including the prohibition of discrimination against women. All prisoners of war must be provided *adequate medical care*, which, for women prisoners of war, includes pre-natal and post-natal care, where necessary. *Employing gender advisers can assist states* in implementing these obligations.

Similarly, the 2006 *Convention on the Rights of Persons with Disabilities* complements the Geneva Conventions to ensure that persons with disabilities are adequately protected by the law. For example, where parties to a conflict *must assist certain civilians exposed to grave danger*, the measures they implement must take persons with disabilities into account. One way they could do this is by providing them with *accessible temporary shelters where they are evacuated*.

Since prisoners of war are entitled to the same judicial guarantees as members of the Detaining Power's own forces, developments in international law (including human rights law) give more substance to the Third Convention's *provisions on judicial guarantees*. Developments in human rights law protecting children should be taken into account in *sentencing and treatment of children* who are convicted of criminal or disciplinary offenses.

An example of a shift in medical understanding that many may find striking is the *attitude towards tobacco use*. Originally the drafters of the Geneva Conventions considered tobacco a food product, and even posited that it would have a positive impact on the mental health of prisoners and detainees. Medical understandings about the effects of tobacco have impacted how provisions permitting tobacco use are interpreted. Given current medical understandings, the requirement to provide a *safe and healthful place of internment* may now in fact limit tobacco use. Other international or domestic legal

and policy considerations, for example the *WHO Framework Convention on Tobacco Control*, may also be relevant in relation to where tobacco may be used and by whom, for example a prohibition on smoking in or near public buildings or an age limit on who is permitted to access tobacco products.

Changes in social understandings of gender as a construct have had an *impact on the interpretation of a variety of provisions* in the Geneva Conventions. One example is the requirement of equal treatment of prisoners of war, which can require that prisoners be treated differently according to their specific needs and any risks they face due to their environment. *Menstrual products* must also be made available for women prisoners of war.

Changes in social understandings of disability have also had an impact on the interpretation and application of a variety of provisions. Historically, disability has often been viewed as a medical problem that needed treatment or “fixing”, and persons with disabilities were seen as victims of their impairments deserving of charity. The updated Commentary moves away from these approaches and rather adopts a social and human rights model informed by the Convention on the Rights of Persons with Disabilities in order to come to a *more inclusive interpretation of the law*, considering the diverse barriers and risks faced by different persons with disabilities.

These and many more examples are being brought to light through the ICRC’s *ongoing project to update its Commentaries* on the 1949 Geneva Conventions and their 1977 Additional Protocols. These examples demonstrate how these core IHL treaties can and do continue to play an important role in governing the way in which wars are fought. For this to happen, it is essential for states to interpret and *apply the law in good faith* and to give effect to the *object and purpose* for which these Conventions were adopted.

Do the Geneva Conventions “work”? A perennial question

Despite examples of contemporary relevance, some commentators continue to look at the way the Geneva Conventions are applied in practice and say that they aren’t effective. In fact, claims that the Geneva Conventions or international humanitarian law generally doesn’t “work” have taken one form or another since the ink on the 1864 Geneva Convention was barely dry. They were raised after the first application of the Convention in the 1866 Austro-Prussian war. At that time, the ICRC *sought to counter the criticism* by publishing the *very first ICRC Commentary in 1870*.

Sadly, nearly every time an armed conflict breaks out there are claims that international humanitarian law is not fit for purpose in today’s wars, either *because the nature of warfare has fundamentally changed*, because there is an *existential threat* to the security of a state that should excuse setting aside the established rules of war, or *some mixture of the two*.

Both lines of argument rely on a naïve and romantic view of past armed conflicts. This vision of a mythical chivalrous past ignores the capacity of the human imagination for cruelty, as demonstrated by the horrors seen in past wars. The things that are presented as “new” in today’s armed conflicts are almost never without historical antecedents, and these are the very things that IHL, including the Geneva Conventions, was designed to regulate.

Looking only at the Second World War, which was the background against which the 1949 Geneva Conventions were negotiated, one sees *genocide, pseudo-medical experimentation*, widespread use of *torture, hostage taking*, the *complete destruction of cities*, the nuclear destruction of *Hiroshima and Nagasaki*, a staggering amount of *sexual violence*, the *starvation of civilian populations*, and the *mistreatment of prisoners of war*, and the *use of human shields*.

Perhaps these outrageous events have lost their shock-value all these decades later, but there is no doubt that they were *horrific*. The drafters of the Geneva Conventions had *lived through these horrors*— as soldiers, diplomats, *humanitarians*, both occupied and occupier, they witnessed them first-hand, were detained and deported, sought asylum, and lost contact with family members, some of whom were sent to concentration camps never to return. They were not naïve and they certainly did not have a rosy view of armed conflict. The Conventions they drafted were grounded in the horrific realities of war, which have not fundamentally changed.

That explains why the Geneva Conventions and IHL more broadly continue to have an impact. The law *is respected*. This isn’t apparent from reading or watching the news, because it is the nature of the news to report only on that which is abnormal. That is not to say that the law is never violated. It is, and those instances should be addressed. But to say that the law doesn’t “work” at all because we can point to examples of wrongdoing is nonsense. Murders happen, and even go *unpunished*, and there are very few who would call into question laws criminalizing homicide. To return to the words of *Hersch Lauterpacht*, “Rules of warfare are not primarily rules governing the technicalities and artifices of a game. They have evolved or have been expressly enacted for the protection of actual or potential victims of war.” Simply put, *IHL matters*.

As the ICRC has repeatedly stated: what is needed is not more or different rules, it is *better respect for existing rules*, something *all states have a stake in*. This is not to say that perfect application of the Geneva Conventions would lead to an ideal world. International humanitarian law is the minimum standard. But let us not lose sight of *the fact* that IHL has a positive impact on people’s lives, is widely accepted and remains more relevant today than ever before.

Thinking critically: a call to action on the 75th anniversary of the Geneva Conventions

General claims that IHL no longer “works”, when made in an academic way, may appear innocuous, but when these same claims are made by parties to armed conflict they are much less so. A claim that the law does not “work” is a claim that the law does not apply to them; that they need not adhere to the rules designed for exactly the situation they are in or that they are entitled to act in a way that is incompatible with their own humanity, and to the detriment of the humanity of others.

These claims are insidious and risk undermining the effectiveness of the law by giving the false impression to those giving and following orders that they do not need to adhere to the rules of war, and by fueling the political rhetoric of those in positions of power that they should not subject themselves to

constraints their opponents do not adhere to. Just as destructive, claims that the law is ineffective can sap the willpower of those who work diligently to promote and raise awareness of IHL and those who work to ensure that the law is complied with.

The question that we, as responsible global citizens must ask is: who benefits from us thinking this way?

It is certainly not the populations affected by armed conflict. IHL provides important safeguards for the wounded and sick, prisoners of war, and civilians. It also provides guarantees for those seeking to deliver humanitarian relief. As the ICRC has *previously observed*, “international humanitarian law is a body of rules whose basic tenets, if applied in good faith and with the requisite political will, continue to serve their intended purpose – which is to regulate the conduct of war and thereby alleviate the suffering caused by war.”

Especially on the occasion of the 75th anniversary of the Geneva Conventions, the core IHL treaties, it is up to each of us to think critically about claims that IHL isn't working, for whatever reason. So the next time you hear or read the claim that IHL doesn't work, or that IHL violations aren't the most serious type of international crimes, ask yourself this one question: Who benefits?

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