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The Geneva Convention is Woefully Outdated

John Dwight Ingram*

I. Introduction

The subject for this article was suggested to me by a former student, Nadia Nagib Wallace, who was in an honors course in Constitutional Law for seniors, which I taught for many years at North Shore Country Day School.¹ As I thought about her thesis I realized that the requirements of the Geneva Convention have never really made sense in my lifetime and they probably had not for a long time before, not since perhaps the days of knights and chivalry. In “modern” war, the widely accepted purpose is to kill and destroy the enemy and its property. In essence, the only logical “rules” must be “no holds barred.”

To put my views in proper historical context, I should state briefly that I grew up as the son of a pragmatic idealist who truly believed that it was important to “keep the world safe for democracy.” Immediately after college graduation in 1916, he went to India and Mesopotamia² with the YMCA in support of the British Army. As soon as the United States entered the war in 1917, he returned home and enlisted in the Tank Corps, serving in France and then in the Army of Occupation in Germany in 1919.

I grew up in the 1930s, conscious at a very young age of Mussolini’s aggression in Ethiopia, and the lack of will in the League of Nations to come to the aid of Haile Selassie. Subsequent attempts to slow Hitler’s conquests were equally ineffectual, and so we came to

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1. Ms. Wallace subsequently received an A.B. degree from Mt. Holyoke College and a J.D. from the University of Illinois. She is currently an attorney in the office of the Corporation Counsel of the City of New York.

2. Now Iraq.

World War II, with slave labor and genocide by the Germans. Other atrocities included the Japanese “death march” on Bataan, the war in Vietnam, and other regional conflicts involving many violations of the “rules of war,” especially highlighting the problem of who is a civilian and who is a combatant.

II. “Rules of War” and the “Geneva Convention”

Over the centuries, international laws or rules have emerged to regulate wartime conduct. These rules are designed to protect prisoners of war, civilians, non-military targets, and other humanitarian concerns, and also to control the means and methods of warfare. Warring parties are expected to attack only military targets, not civilian, and to limit the damage inflicted to only that needed to achieve an appropriate military gain. Of course, it should be recognized that, even without these “rules,” there have always been pragmatic restraints on warfare. For a variety of reasons—“military, political, and economic”—combatants have strong incentives to use no more force or destruction than is required to achieve their goals.³ Going beyond that is likely to “waste . . . resources, provoke . . . retaliation, invite . . . moral condemnation, and impede . . . post-war relations with the enemy nation.”⁴ Despite these inherent and long-standing restraints, for many centuries there have been attempts to promulgate, and gain acceptance for, “rules of war.”⁵

A. *Early History*

The concept of “rules of war” goes far back into ancient history. The law of Manu in India prohibited “the killing of the unarmed, sleeping or wounded enemy and the use of poisoned weapons or barbed arrows.”⁶ Going further, in 550 B.C. a Persian king ordered his army doctors to care for wounded enemies.⁷ On the other hand, the guiding principle in Roman law held that “anything goes” in warfare—family, property and lives of enemies could be freely taken, and slavery and confiscation were common.⁸

In the Middle Ages wars were often fought between Christian

3. Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INTL. L.J. 49, 53 (1994).

4. *Id.* at 53-54.

5. *Id.* at 54.

6. Bernhardt, Rudolf, 2 *Encyclopedia of Public International Law* 532 (Geneva Red Cross Conventions and Protocols) (1992) (Copy of source is on file with author) [hereinafter Geneva Red Cross Convention].

7. *Id.*

8. *Id.*

nations, or between Christians and infidels.⁹ Of course, it was a basic tenet of Christianity to “love thy enemy.”¹⁰ A first step in response to this commandment was the right to asylum,¹¹ and the exclusion of fighting during certain sacred periods.¹²

Many of the practices of chivalry in these early times were actually the product of a desire of the Church “to protect its patron class, wealthy knights and nobles.”¹³ Thus, in 1139, the Church “denounc[ed] the crossbow as deadly and ‘odious to God’ because it was used by peasants to cut down knights and nobles at long range.”¹⁴ The result of such chivalric rules was to preserve the lives of knights and nobles so that they could continue to “plunder and kill peasant soldiers, non-Christian enemies, and civilians of all religions and ethnicities.”¹⁵

After the Middle Ages, knighthood declined and wars were increasingly fought by armies composed largely of mercenaries.¹⁶ Brutality in warfare became common, perhaps reaching its worst point in the Thirty Years War (1618-1648).¹⁷ Between 1648 and 1792 most warfare involved small professional armies, but that changed with the “people’s armies of the French Revolution,” whose patriotism and lust for conquest largely negated any thought of humanitarian concerns.¹⁸ With the advent of large conscript armies in the following years, casualty rates rose enormously for both the military and non-combatants.¹⁹ For example, about sixty percent of the wounded died in the Crimean War (1853-56).²⁰

B. Geneva Convention and 1977 Protocols

In 1859 a Swiss citizen, Henry Dunant, observed the scene of thousands of wounded soldiers lying helpless and abandoned without care after the Battle of Solferino.²¹ This prompted him to propose the creation of voluntary relief agencies that could provide care for the

9. *Id.* E.g., the Crusades.

10. *Id.*

11. *Id.* Proclaimed at the Council of Orleans in 511 A.D.

12. *Id.* Instituted by the Council of Elne in 1027 A.D., the periods were Holy Week, Lent, Easter, Advent and Christmas.

13. *Id.* at 532.

14. Jochnick & Normand, *supra* note 4, at 61.

15. *Id.*

16. Geneva Red Cross Convention, *supra* note 7 at 532.

17. *Id.*

18. Jochnick & Normand, *supra* note 4, at 63 n. 52.

19. *Id.*

20. Geneva Red Cross Convention, *supra* note 7, at 533.

21. *Id.*

wounded in wartime.²² This led to the Red Cross movement and the first Geneva Convention in 1864, which proposed an agreement to protect wounded soldiers and those caring for them in times of war.²³ Twelve nations signed on initially, and others followed in later years.²⁴ There were subsequent Geneva Conventions in 1907, 1929, and 1949—the product of 1949 and its modifications in 1977 is what is referred to today as “The Geneva Convention.”²⁵ Its provisions have been accepted by virtually all of the nations of the world.²⁶

The Geneva Convention was aimed primarily at protecting and aiding the “victims of armed conflict,” especially the wounded, civilians, and prisoners of war.²⁷ During that same time period, rules governing “the employment of force in armed conflict” were developed in the Hague Conventions.²⁸ In sum, the result of these international agreements was the wide acceptance of “rules of war.”

Among the major provisions of these “rules of war” are the following:²⁹

Wounded enemy soldiers should be cared for adequately.

Medical equipment and personnel should not be attacked or damaged.

Prisoners of war should be treated humanely.

Civilians should be protected and treated humanely.

Murder, mutilation, cruel treatment, and biological experiments are prohibited.

Use of methods and weapons of warfare which will cause unnecessary injury or suffering, or which are intended or expected to “cause widespread, long-term and severe damage to the natural environment,” is prohibited.³⁰

22. *Id.*

23. *Id.*

24. See The Red Cross & Red Crescent Movement and the Geneva Conventions, available at http://www.redcross.org.au/ihl/articles/movement_and_the_geneva_conventi.htm (last visited November 23, 2002).

25. Geneva Red Cross Convention, *supra* note 7, 531-34.

26. *Id.*

27. Richard John Erickson, *Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict*, 19 VA. J. INTL. L. 557, 557 (1979).

28. *Id.*

29. See Society of Professional Journalists, *Reference Guide to the Geneva Conventions*, available at <http://www.genevaconventions.org/> (last visited June 21, 2004).

30. Erickson, *supra* note 28, at 560.

Bombardment of undefended or “open” towns or cities is prohibited.³¹

III. Violation of the Rules of War

Until fairly recently civilians were largely spared from the ravages of war because the belligerents did not have the technical ability to involve them. Bombardment could be done only at close range, and when troops got that close it was only sensible to simply to move in and occupy undefended areas rather than destroy them.³² But, with the development of airplanes and long-range artillery on both land and sea, the industry and civilian population of an enemy became desirable targets.³³ War was now “total,” involving all persons and the entire economic structure of each warring nation. In addition to the direct military benefit from destruction of an enemy’s productive capacity, some saw an additional benefit in the effect such attacks might have on enemy morale—the “will” to fight or support of the nation’s war effort.³⁴

Other examples of violations of the rules of war within my lifetime come readily to mind: the Nazis systematic imprisonment and annihilation of millions of Jews and others; their use of humans for medical experiments; the deportation of people in conquered countries to work as slave laborers; and the destruction of whole towns and their inhabitants.³⁵ On the other side of the world, there was the Bataan Death March in 1942 during which most of the American prisoners of the Japanese died.³⁶

Lethal and damaging gas was used in World War I, and more recently by the United States in Vietnam.³⁷ After the recent invasion of Afghanistan by the United States, our government announced that it would not abide by the Geneva Convention as to the treatment of those taken prisoner in Afghanistan and Pakistan.³⁸ Those prisoners arrived in

31. Jochnick & Normand, *supra* note 4, at 67.

32. *Id.*

33. *Id.* at 78.

34. *Id.* Of course, the devastation of civilians and their property is hardly a new “war practice.” One is reminded of Union General William Sherman’s March from Atlanta to the Sea toward the end of the Civil War. As he so succinctly stated, “War is hell.” Lt. Cmdr. Kenneth B. Brown, *Counter-Guerrilla Operations: Does the Law of War Proscribe Success?*, 44 NAVAL L. REV. 123, 123 (1997).

35. Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 834-35 (1990).

36. The Supply Sgt. of my army unit in 1952 was a survivor of that horrible experience.

37. Erickson, *supra* note 28, at 562. Herbicide orange “allegedly caused long-term genetic damage and long-term devastation of land.”

38. See The Emergency Campaign to Defend Dissent and Advance Civil Rights, *United States Refuses to Abide by Geneva Convention*, available at http://www.iacenter.org/geneva_usrefuse.htm (last visited June 21, 2004).

Cuba after being hooded, shackled, and blindfolded during a twenty-seven hour flight.³⁹ They were then housed in “outdoor six by eight foot open-air chain link cages. . . .”⁴⁰ Also, it seems to be widely known that Israel routinely violates the rules of war “by using Palestinians as human shields . . . or bulldozing the houses of innocent civilians . . . or torturing suspects. . . .”⁴¹

IV. Winning Is the Only Goal

There is a widely accepted guideline in big-time college and professional sports that “winning is the only thing.”⁴² Coaches and others talk constantly about good sportsmanship, following the rules and “moral victories,” but their actions often belie their words. Coaches and players lose their jobs and grants-in-aid⁴³ if they do not win. The pervasive inroads of this “must-win” philosophy have reached through all levels of sports, reaching all the way down to Little League and especially affecting coaches, parents, and other fans. At all levels, many of those involved are quite willing to bend or break the rules of the game, eligibility, or anything else. “Anything goes” as long as you do not get caught.⁴⁴

The same attitude can be found as to obedience of the “rules of war.” Nations and their leaders have almost universally accepted the Geneva Convention and other rules of war, and frequently make public pronouncements as to their commitment to those humane guidelines. Yet, when the chips are on the table, every nation and its leaders will heed the words of “German Chancellor von Bismarck: ‘What leader would allow his country to be destroyed because of international law?’”⁴⁵ A review of the history of warfare makes it clear that “the right of states

39. *Id.*

40. *Id.*

41. Georgie Anne Geyer, *Now isn't the time for bush league moves; Is U.S. responsible for Israeli Policies*, CHI. TRIB., May 10, 2002, at § 1, 23.

42. This statement is usually attributed to Vince Lombardi, the highly successful coach of the Green Bay Packers.

43. These are often called “scholarships,” an obvious misnomer, since college players are signed up to play their sport; their only “scholarly” requirement is to do well enough in their studies to remain eligible to play.

44. I have sometimes wondered if there is a gender distinction on this point, at least up until high school. When I played sports it never occurred to me to voluntarily call a foul on myself. It was up to the officials to see it and call it. Yet when I later watched my daughters and other girls play soccer and field hockey, the players routinely called violations (such as illegal touching) on themselves and voluntarily yielded possession of the ball. Perhaps this was a result of the greater emphasis for boys on playing hard and winning, as opposed to the common attitude for girls that the important thing was to play and have fun. As female participation in sports has grown in recent years, any such gender distinction may well have largely disappeared.

45. Jochnick & Normand, *supra* note 4, at 63-64.

to self-preservation is prior to all obligations under international law [,] and . . . the practical reality [is] that military commanders will always choose to violate the law if necessary to avoid defeat."⁴⁶ "[W]hen its survival was at stake, a state [would consider itself] 'obliged, for the salvation of its country, to violate the rights of another state.'"⁴⁷ This "must win" approach is reflected in the concept of "military necessity," which makes it plausible for warring parties to justify almost any conduct they wish to pursue.⁴⁸

A. *Frighten the Enemy into Submission*

A war conducted with energy cannot be directed merely against the combatant forces of the enemy State and the positions they occupy, but it will and must in like manner seek to destroy the total intellectual and material resources of the latter. Humanitarian claims, such as the protection of men and their goals, can only be taken into consideration in so far as the nature and object of war permit.⁴⁹

Whereas in earlier years it was possible, if desired, to separate wartime combatants from non-combatants, the growth of industrialization and the role of industry in producing the tools of war removed the immunity from attack that "civilian" areas had previously enjoyed. Every part of a warring nation's economy—factories, farms, mineral deposits, and even schools (which were training future contributors to the overall war effort)—could now be deemed justifiable military targets, "an integrated part of the whole war-machine."⁵⁰ Since the early weapons of long-range bombardment were not very accurate, there was unavoidably some incursion on purely non-military and non-productive areas by aircraft and artillery attacks.⁵¹ This gradually led to a new view that such attacks produced the bonus result of frightening an enemy's civilian population. As stated by the Chief of the German Naval Staff in regard to attacks in Antwerp and Britain, "we should leave no means untried to crush England, and . . . successful air raids on London, in view of the already existing nervousness of the people, would prove a valuable means to [that] end."⁵² That attitude was clearly present in World War II with the German bombing⁵³ of London, Coventry and

46. *Id.* at 63, n.56.

47. *Id.*

48. *Id.* at 64.

49. *Id.*

50. *Id.* at 77-78.

51. *Id.* at 81.

52. *Id.*

53. First by conventional aircraft and in 1944 by buzz-bombs across the English

other civilian targets in England; the firebombing of Tokyo; and the essentially total destruction of the city of Dresden.⁵⁴ The Allies' Combined Chiefs of Staff set a goal of "undermining the morale of the German people to a point where their capacity for armed resistance is fatally weakened."⁵⁵ The use of atomic bombs in Hiroshima and Nagasaki was justified by the belief that this would terrorize the Japanese people and their government to such an extent that they would seek peace and an end to the war. That seems to have worked, and probably saved the lives of millions of Allied military personnel and Japanese military and civilians. As a practical matter, if weakening civilian morale was a legitimate target, any bombing could be justified. In modern times, "it is a whole nation which wills and makes war. . . . The man in the street, the voter, not the soldier or sailor, is the master, the principal, the person to be impressed and won over."⁵⁶

B. Scare Tactics May Boomerang

Despite some success in the weakening of enemy morale,⁵⁷ in many cases it has not only failed to shatter enemy morale, but may well have stiffened the spirit of resistance and a unified determination to fight back.⁵⁸ This was clearly evident in the reactions of the British people to German bombing after the fall of France in 1940, as exemplified by the words of Winston Churchill to the effect that "we will never give up." It is also well recognized that "German [mis-] treatment of civilians in occupied [areas in Europe] during World War II spurred active resistance, making these areas harder to control."⁵⁹ Similarly, in guerrilla warfare, "history clearly shows that those who rely on brutality and indiscriminate firepower to quash a guerrilla movement will likely only fuel the fire they are attempting to extinguish."⁶⁰

C. Guerrilla Warfare, Civil War, Rebellion

People on the outside just have no idea of what this war is all about or how it is fought. It is a rough and brutal war. The Viet Cong have never heard of the Marquis of Queensbury or Geneva Conventions,

Channel.

54. Jochnick & Normand, *supra* note 4

55. *Id.* at 88.

56. *Id.* at 78, n.132.

57. E.g., Japan in 1945.

58. Jochnick & Normand, *supra* note 4, at 89.

59. *Id.* at 54, n.12.

60. Brown, *supra* note 35, at 123-24.

and we can not afford to lose just because we have heard of them.⁶¹

Those who fight against guerrilla operations rarely resist the urge to employ tactics and methods as brutal and “unlawful” as those of the guerrillas. However, throughout history there is clear evidence that the use of such tactics and methods is usually counter-productive, since the usual effect is to stiffen resistance and strengthen the support of the guerrillas by the civilian population.⁶²

Guerrilla warfare has been a part of life for many centuries,⁶³ and is, today, the most common form of warfare.⁶⁴ Possession of atomic weapons by a number of nations has made full-scale all-out warfare like that in World War II unlikely to occur. In the past fifty years virtually all warfare has been relatively local and limited, with at least one side and usually both feeling little if any restraint attributable to any “rules of war.”

Forces opposing guerrilla fighters find it virtually impossible to determine who is and who is not an enemy. Guerrilla fighters have the great advantage of being able to disappear or blend into the civilian population. Thus, the opposing forces have a strong incentive to destroy everything that may be useful to the guerrilla fighters: crops, livestock, houses, etc. Also, massive destruction in an area will encourage people to move away, thus removing a major source of support for the guerrillas. In addition to such “voluntary” evacuations, there is a strong incentive to actively remove civilians from the area of conflict.⁶⁵

V. Conclusion

Although it is highly questionable, perhaps it made sense in the days of knights and chivalry to have “rules of war.” More recent attempts to codify and enforce such rules have had little real effect on the conduct of warfare. The impracticality of the Geneva Convention and the later Protocols can be readily seen in some rather silly distinctions that the “rules” attempt to make. For example, one should not “kill, injure or capture an adversary by resort to perfidy.”⁶⁶ The definition of “perfidy” includes “feigning of an intent to negotiate under a flag of truce . . . [or] feigning . . . civilian, non-combatant status. . . .”⁶⁷ Yet “ruses of war” were permitted, that is, “acts . . . intended to mislead an adversary . . .

61. *Id.* at 123 (quoting an American official in Saigon during the Vietnam War).

62. *Id.* at 123-24.

63. Brown, *supra* note 35, at 124. E.g., Alexander the Great was met with opposition by guerrillas around 329 B.C.

64. Two recent examples are Somalia and Afghanistan.

65. Brown, *supra* note 35, at 139-41.

66. Erickson, *supra* note 28, at 564.

67. *Id.*

[such as] the use of camouflage, decoys, mock operations and misinformation.”⁶⁸

Another example can be found in the “rules” regarding occupants of aircraft. The “rules” prohibited attacking a “person parachuting from an aircraft in distress . . . during his descent,” but the rule did not apply to airborne troops.⁶⁹ Yet both aircraft pilots and airborne paratroops are valuable assets of a warring nation, and the destruction of either seems fully justified.

Many of my friends were in combat areas during World War II and the Korean War. Others were in supposedly non-combat areas in Britain, France and Germany during World War II. Almost without exception they accept the fact that if a war must be engaged in, it must be fought to win. It may seem nice to talk about humanitarian “rules of war,” but no nation and its people will allow such rules to impede or endanger its ability to win. We should be realistic and accept the fact that “rules of warfare” are at the very least outdated, and probably never did make much sense. Perhaps if people, and especially their leaders, fully recognized that warfare, even when relatively localized, will surely involve massive destruction of property and people, both military and civilians, there will finally be a compelling motivation to employ other methods to resolve disputes. While we still fear the possibility of nuclear warfare, its potential horror may well be sufficient to prevent it from happening. For those involved in smaller wars, the consequences can be just as devastating, because any war will be fought to win at any cost. I still believe that the nations and people of the world can live in peace, and can find peaceful and effective ways to resolve their disputes. Perhaps I am an unrealistic dreamer, but I hope not.

68. *Id.* at 564-65.

69. *Id.* at 574.