

# Changing War,



The sixtieth anniversary of the four Geneva Conventions on the protection of war victims is an occasion for both celebration and taking stock. There is much to cheer, but there is also a huge question about the relevance of the conventions to the ever-changing phenomenon of war. Many western leaders have suggested that they need to be re-negotiated. However, by little-noticed process of common law, the Conventions have already adapted, although incompletely, to changes in war. The question now is: should there be further adaptation or a completely new convention?

# Changing Law



**t**HE ATTEMPT BY LEGAL AGREEMENT to limit the inhumanity and destructiveness of war is a difficult enterprise. Clausewitz expressed the perennial doubt about the project when, in his classic *On War*, he referred to 'certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom.' Two centuries later, such doubts persist about the laws of war – now more commonly called international humanitarian law – so what exactly is there to celebrate?

## THREE CHEERS

The four 1949 conventions address a limited range of matters relating almost exclusively to inter-state rather than civil wars:

- *wounded and sick military personnel on land;*
- *wounded, sick and shipwrecked military personnel at sea;*
- *prisoners of war;*
- *civilians.*

Contrary to common belief, they do not regulate war in general, or provide rules of the game: they do something more limited and practical, protecting particular classes of people. These four agreements have survived their first sixty years remarkably well. Three grounds for celebration stand out.

**Universality.** When, on August 12 1949, the representatives of sixty-four states, at a diplomatic conference in Geneva, approved the text of the four conventions, would any delegate have dared hope that sixty years later, well into a new millennium, the treaties would still be the central pillars of the laws of war, and all the states in the world would have become parties to them? In fact 194 states are now parties to the Conventions; two more than the current membership of the United Nations.

**Core of law.** The four conventions have become the core of an expanding body of law. The two additional protocols approved in 1977, which address international and civil wars, are far more than minor add-ons. Protocol I in particular spells out in unprecedented detail the international rules governing certain aspects of warfare, and is notably more ambitious than the four 1949 conventions on which it is based.

Subsequent treaties prohibiting the use of antipersonnel

landmines, and now cluster weapons, reinforce the sense that the law is not static but expanding, and is addressing important issues such as those weapons that kill indiscriminately, often long after a war is over.

**Implementation.** The final and most important ground for celebration is that despite all the well-known difficulties, and many violations, there have been significant acts of implementation both by states and international bodies. Many people, including thousands of prisoners, have benefitted. International bodies, including the UN, have come to see the Conventions as important, and have set up criminal tribunals and other implementation mechanisms.

## GHOST AT THE FEAST

However, there is a ghost at this sixtieth anniversary feast. In the past six decades, conflict has changed in ways that challenge the image of war that pervades the Conventions as a contest between organised states and their uniformed armed forces. In fact almost all the wars since the Second World War have been civil wars, in which at least one side, and sometimes more than one, was not a state.

Civil wars are notoriously bitter: unlike many international conflicts, their winners often aim to take all, leaving little room for moderation or compromise; the insurgents may lack secure territory and resources to hold prisoners in safe and decent conditions; the state may be reluctant to dignify its opponents with the status of prisoners of war; and keeping civilians out of the conflict can be especially difficult. The fact that many civil wars have become internationalised, as the war in Afghanistan was in 2001 if not before, does not eliminate the difficulty of applying international rules in such circumstances.

These changes in war are sometimes over-stated. The claim commonly made that now eighty or ninety percent of all deaths in war are civilians is not based on any careful assessment of statistics, and is an urban myth of our times. Yet, even if such figures are exaggerated, the continuing threat to civilians in war is one of many reminders of the limits of what has been achieved by the Geneva stream of law.

The growth of international terrorism since the early 1970s has accentuated the challenge both because its targets are often civilians, and because of the problem of how to respond. Many terrorist acts, directly aimed at civilians, have been defended by their perpetrators on the ground that the underdog fighting in a righteous cause should not be bound by rules designed by and for states.

And if that is not challenge enough to the laws of war, the

question of how those suspected of involvement in terrorism should be categorised and treated had been troublesome for many states, including Britain, long before the United States detention centre at Guantanamo Bay became a symbol for how not to answer it.

These challenges, arising from the changing character of war – and also from the notable reduction in the incidence and human cost of inter-state wars – have led to repeated suggestions that the Conventions, allegedly designed for a completely different world, now need to be revised or updated. Many members of US President George Bush's administration indicated the need for such revision; and so did then-British Defence Minister John Reid in a 2006 speech.

The striking feature of such statements is that they were never backed up by concrete suggestions as to the proposed content of any new convention. The suspicion naturally arose that the point of advocating a renegotiation was not to achieve a new treaty, but to cast a shadow over the application of the existing rules.

## RULES EVOLVED

In much of the discussion of a possible new convention there was one other omission. There was no reference to the many ways in which, by continuous reinterpretation, the Conventions have evolved to take account of developments in warfare. This has happened over many issues.

Take the important and politically sensitive matter of the repatriation of prisoners of war at the end of hostilities. It used to be assumed that prisoners were simply sent back to their home country, and this is reflected in the words of Convention III, Article 118: 'Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.'

This was always going to be hard to apply in cases – the first major one was at the end of the Korean war – where many prisoners had good reason to decide not to go back. In the event, the Geneva provisions were reinterpreted to allow for the possibility that prisoners could freely choose not to return home.

In Korea, some fifty thousand elected not to return to North Korea. In the 1991 Gulf War around ten thousand Iraqi prisoners of war made a similar decision. This change in the interpretation of the law, highly contentious at the time of Korea in the early 1950s, was accepted four decades later with scarcely a murmur.

In 2001 there was another variation the law concerning prisoners. In a little-noted part of a key White House press statement on prisoners, issued on February 7 2002, the US government indicated that the prisoners at Guantanamo would not receive certain specific privileges recognised in Geneva Convention III, including access to a canteen to purchase food, soap and tobacco, a monthly advance of pay, the ability to consult personal financial accounts, and the ability to receive scientific equipment, musical instruments, or sports outfits. Almost everything else

in the White House statement that day led to objections, but there were none about this.

As regards another difficult and emotive subject, occupied territories, there is a provision in Geneva Convention IV, the Civilians Convention, Article 6, that many of the rules of the convention should cease to apply in occupied territory 'one year after the general close of military operations.' This let-out clause was widely viewed as inappropriate in the Israeli-Occupied Territories, and became a dead letter. It was effectively rescinded in 1977 Protocol I.

It has been in the treatment of those detained on suspicion of involvement in terrorism that the most remarkable adaptation of the Conventions has taken place. As is well known, there is a problem in calling for the application of these Conventions in the case of terrorist suspects, because it is not self-evident that the context is one of international war between states; and even where that context exists, as it certainly did in the US military operations in Afghanistan in late 2001, it is not clear that all those detained met the conditions for being considered prisoners of war.

The legal limbo of the detainees in Guantanamo and other points around the world was the dreadful result. Yet a way out was found when the US Supreme Court, in the Hamdan case in June 2006, usefully interpreted the 1949 Conventions' common Article 3, which addresses 'armed conflict not of an international character', to apply not only to civil wars but also to the struggle between Al Qaeda and states. In the eyes of the Supreme Court, 'not of an international character' meant 'not between states', and therefore applied to US operations against non-state entities. On this basis it held that common Article 3's provisions calling for judicial guarantees for detainees applied to those held in Guantanamo.

Despite developments such as that case, detention is the subject on which there is the strongest argument for a new international convention. A principal reason is that in many security operations, including in present-day Afghanistan, detainees are held in circumstances where their status is unclear, where the grounds on which they are held is not subject to rigorous review, and where the right of the International Committee of the Red Cross or other bodies to monitor conditions is not assured. The impressive evidence of torture of detainees held in the 'war' on terror adds to the case for strengthening the rules relating to detention.

Since detention can occur in many kinds of situation, and not only in international war or civil war, a new convention would not necessarily fit tidily in the category of the laws of war, and might need to be negotiated under NATO, the UN as well as the Red Cross. It would be an ironic outcome of the many flawed calls for a revision of the Conventions if they resulted in an agreement negotiated under another framework, and which supplemented rather than revised the 1949 Conventions and which actually provided clearer rules and guidelines on how detainee problems are managed.

Meanwhile, in marking sixty years of the Conventions, it is not just their endurance that should be praised, but their little-noted but remarkable capacity to adapt to changed circumstances.

