



General Assembly Third Committee Topic Background Guide  
***Topic 3: Strengthening International Humanitarian Law***<sup>1</sup>

October 5, 2009

According to the UN Charter, the founding members of the UN were determined “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law [could] be maintained.”<sup>2</sup> Since 1945, member states have paid particular attention to international humanitarian law (IHL).

IHL draws from the international human rights expressed in the Universal Declaration of Human Rights (UDHR) to limit the effects of war on civilians, wounded and sick soldiers, and prisoners of war. Most of the limitations states have agreed to are expressed in the four Geneva Conventions of 1949:

- First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Third Geneva Convention relative to the Treatment of Prisoners of War
- Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War<sup>3</sup>

Before these agreements entered into force in 1950, prisoners of war (POWs), wounded soldiers, health care workers, and civilians were at the mercy the opposing sides on a battlefield. Since 1950, the Geneva Conventions have declared that even in war, soldiers and civilians have basic human rights. Violations of these laws are considered war crimes.<sup>4</sup>

The Geneva Conventions came into effect once the first two states had ratified them. Like other international treaties, the Conventions are the law of the land only in states that have ratified them. Moreover, each state party has the prerogative to make declarations or express reservations explaining how it interprets certain parts of the agreement.<sup>5</sup>

In recent years, US interpretations of the Geneva Conventions have received a great deal of attention in conjunction with its treatment of prisoners in the “war on terror.” This has led to calls to clarify and strengthen international humanitarian law.

#### *History and Current Events*

The Geneva Conventions of 1949 updated and extended earlier international agreements on the laws of war. For example, the First Convention dates back to 1864, when 14 European states reacted to the violence of the

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<sup>1</sup> This document was written by Kelsi N. Steele, 2009 Secretary-General and Karen Adams, Faculty Advisor.

<sup>2</sup> “Charter of the United Nations,” Preamble, <http://www.un.org/aboutun/charter/>

<sup>3</sup> For the text of the conventions, see International Committee of the Red Cross, “The Geneva Conventions: The Core of International Humanitarian Law,” <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions>

<sup>4</sup> Karen A. Mingst and Margaret P. Karns, *The United Nations in the 21<sup>st</sup> Century*, 3<sup>rd</sup> edition (Boulder: Westview, 2007), p. 199.

<sup>5</sup> For a list of state parties to the Geneva Conventions and their declarations and reservations, see International Committee of the Red Cross, “The Geneva Conventions: The Core of International Humanitarian Law.”

## Montana Model UN High School Conference

1859 Battle of Solferino between France and Italy by agreeing to provide the newly-created International Committee for the Red Cross (ICRC) access to battlefields to care for the wounded. Similarly, the Second Convention updates the 1907 Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, and the Third Convention expands the Prisoners of War Convention of 1929. Only the Fourth Convention was completely new in 1949.<sup>6</sup>

The decision to expand the three earlier international agreements and write a new agreement on the effects of war on civilians was a reaction to the horrors of World War II. According to Philip Spoerri, ICRC Director of International Law, “there can ...be no doubt that the decision to draft the Geneva Conventions of 1949 was sealed by the tragedy of the Second World War and that the conventions were intended to fill the gaps in international humanitarian law exposed by the conflict.”<sup>7</sup>

To draft the new conventions, the ICRC convened the Diplomatic Conference of Geneva from April 21 to August 12, 1949. According to Spoerri, the conference included “representatives from 64 countries, covering almost every State in the world at that time... It took almost four months to complete... much longer than anticipated.”<sup>8</sup>

In writing the Conventions, the delegates were strongly influenced by Article Five of the UDHR, which states that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”<sup>9</sup> Moreover, the UDHR’s “provision on the right to life... helped to shape ... their elaboration of humanitarian law dealing with sick and wounded combatants, the treatment of prisoners of war, and most innovatively, the protection of civilian populations in times of war.”<sup>10</sup>

The four Conventions are considered one treaty and therefore require one ratification per state. The first two states to ratify the Conventions were Switzerland and Monaco. Once they had done so, the treaty came into effect. Today 194 states are party to the Geneva Conventions.

A number of states have also negotiated, signed, and ratified three additional protocols. Additional Protocol I and II (1977) “strengthen the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts and place limits on the way wars are fought.” Protocol II was the first international treaty devoted solely to situations of non-international armed conflicts. Additional Protocol III (2005) recognized the “red crystal” as a third international emblem (in addition to the “red cross” and “red crescent”) for health and human rights workers entitled to protection and access to the wounded and imprisoned.<sup>11</sup>

Other international agreements that limit the effects of war on soldiers and civilians include the Geneva Protocol of 1925, which banned the use of poison gases. Similar subsequent agreements include the Biological and Toxins Convention of 1972 and the Chemical Weapons Convention of 1993.

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<sup>6</sup> International Committee of the Red Cross, “The Geneva Conventions: The Core of International Humanitarian Law.”

<sup>7</sup> Philip Spoerri, “The Geneva Conventions of 1949: Origins and Current Significance,” Ceremony to celebrate the 60th anniversary of the Geneva Conventions, 12 August 2009, International Committee of the Red Cross website, <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-120809?opendocument>

<sup>8</sup> Spoerri, “The Geneva Conventions of 1949.”

<sup>9</sup> “Universal Declaration of Human Rights,” Article 5, available at <http://www.un.org/en/documents/udhr/>

<sup>10</sup> Paul Gordon Lauren, *Visions Seen: The Evolution of International Human Rights*, 2<sup>nd</sup> edition (Philadelphia: University of Pennsylvania Press, 2003), p. 236.

<sup>11</sup> International Committee of the Red Cross, “The Geneva Conventions: The Core of International Humanitarian Law.”

## Montana Model UN High School Conference

The Geneva Conventions have been effective in improving the situation for soldiers and civilians in many international conflicts. For example, in 2000, when Ethiopia and Eritrea were fighting a brutal war, representatives from the ICRC were able to visit 1,000 Ethiopian POWs and 4,300 civilian internees, exchange 16,326 messages between Ethiopian and Eritrean POWs and their families, organize safe passage across the front lines for 12,493 civilians of Ethiopian origin, and distribute aid to over 150,000 civilians affected by the conflict.<sup>12</sup>

Despite these successes, four major challenges remain. First, international humanitarian law (IHL) applies only during times of war. But what counts as war? Does it refer only to formally-declared armed conflicts among states? Or does it apply to any use of force, both between and within states? There are vast differences in the number of wars one arrives at using these definitions. This has been an important issue ever since the First Geneva Convention was negotiated in 1864. The states that negotiated the 1949 Conventions tried to address this by inserting into each of the four conventions a Common Article Three, which lists several protections that individuals “in enemy hands” should have in any conflict. In 1977, a number of states negotiated more detailed provisions of this nature in Additional Protocols I and II.<sup>13</sup> But some states, including the United States, have never ratified the additional protocols.<sup>14</sup> Since the “war on terror” began in 2001, the US has held prisoners at Guantanamo Bay and in other facilities under conditions that according to the ICRC violate the Geneva Conventions. During the Bush administration, the US justified these actions partly with reference to the non-official nature of the conflicts in Afghanistan and Iraq, neither of which was officially declared a war by the US Congress.<sup>15</sup>

The second challenge is defining who is a combatant and therefore entitled to the standards for prisoners and wounded soldiers spelled out in the Conventions. As Jakob Kellenberger, President of the ICRC, explained in a ceremony to celebrate the 60th anniversary of the Geneva Conventions in August 2009, IHL “stipulates that those involved in fighting must make a...distinction between combatants on the one hand, who may lawfully be attacked, and civilians on the other hand, who are protected against attack unless...they directly participate in hostilities.” One of the main dilemmas in applying IHL is “that neither the Geneva Conventions nor their Additional Protocols spell out what precisely constitutes ‘direct participation in hostilities.’” As Kellenberger explains, this difficulty has been compounded by the fact that civilians have become more and more involved in support operations related to combat and are even used by combatants as “human shields.” In addition, “combatants do not always clearly distinguish themselves from civilians, neither wearing uniforms nor openly carrying arms.”<sup>16</sup> Whether terror suspects are or are not combatants has been a major point of contention during the war on terror. The George W. Bush administration argued they are not. Yet Common Article Three “prohibits murder, mutilation, torture, cruel,

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<sup>12</sup> Spoerri, “The Geneva Conventions of 1949.”

<sup>13</sup> International Committee of the Red Cross, “The Geneva Conventions: The Core of International Humanitarian Law.”

<sup>14</sup> State parties to Protocol I and Protocol II are listed on the International Committee of the Red Cross Website at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> and <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P>

<sup>15</sup> International Committee of the Red Cross, “US detention related to the events of 11 September 2001 and its aftermath - the role of the ICRC,” May 11, 2004, available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwplList454/593709C3D0B1296DC1256F430044235D>. *Final Report of the Independent Panel to Review DoD Detention Operations* (The Schlesinger Report), August 2004, <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>, pp. 5-19. International Committee of the Red Cross, “ICRC reactions to the Schlesinger Panel Report,” August 9, 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/iwplList454/575E02112A2CA3DAC1256F09004B16F7>

<sup>16</sup> Jakob Kellenberger, “Sixty years of the Geneva Conventions: learning from the past to better face the future,” Ceremony to celebrate the 60th anniversary of the Geneva Conventions, 12 August 2009, International Committee of the Red Cross website, <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-president-120809?opendocument>

## Montana Model UN High School Conference

humiliating and degrading treatment, the taking of hostages and unfair trial” of any person in enemy hands.<sup>17</sup> In 2009, President Obama signed an executive order affirming that Article Three “is a minimum standard for the treatment of anyone detained by the United States in connection with an armed conflict.”<sup>18</sup> According to Knut Dörmann, the head of the ICRC's legal division, the language of this article is vague and should be amended so it applies more clearly to detained terror suspects.<sup>19</sup>

A third and related challenge is that compliance with IHL is often seen as an asset to one side and a disadvantage to another. Often the concern is that a militarily weak party faced with a more powerful opponent might disregard fundamental rules of IHL in an effort to even out the imbalance. For example, although terrorism (deliberate attacks on civilians) is illegal under the Fourth Geneva Convention, groups such as al Qaeda carry out terrorist attacks because they are too weak to confront their adversaries on a battlefield. But it is not just weak groups that ignore the laws of war when it is to their advantage. During the “war on terror,” the US has argued that despite its overall military strength, the willingness of terrorists to take the lives of innocent civilians means that it is justifiable to use all means necessary, including torture, to obtain information from prisoners who may have information about terrorist activities. As Kellenberger explains, regardless of which actors first violate IHL, there is a risk that others will follow suit, leading to a free-for-all in which all of the rules of war are ignored and the situation becomes worse for everyone.<sup>20</sup>

Finally, IHL has only recently begun to deal with infrastructure, the environment, and cultural artifacts. Yet attacks on infrastructure such as bridges and electrical and water treatment facilities imperil the health and safety of civilians, as do the environmental effects of war in general. Similarly, attacks on cultural artifacts can be part of a systematic campaign against certain cultural groups. These aspects of war are not treated by the Geneva Conventions but have been addressed to some extent in the Additional Protocols.<sup>21</sup>

Although the Geneva Conventions have been widely ratified, only states that have signed and ratified them are responsible for upholding them. Thus, if a state chooses not to ratify the Conventions, there is little the international community can do. Even among states that agreed to uphold IHL it is difficult to obtain compliance because it is primarily up to states themselves to “impartially investigate whether serious violations occurred [by members of their forces or other persons under their jurisdiction], and impose punishments on individuals found guilty that are commensurate with their deeds.”<sup>22</sup>

When self-monitoring is insufficient, states and individuals may be tried in the courts of states that have “universal jurisdiction.”<sup>23</sup> This rarely happens, however, because states are reluctant to set a precedent that might

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<sup>17</sup> International Committee of the Red Cross, “The Geneva Conventions: The Core of International Humanitarian Law.”

<sup>18</sup> International Committee of the Red Cross, “US detention related to the fight against terrorism – the role of the ICRC,” 4 March 2009, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/united-states-detention-faq-240209>

<sup>19</sup> Knut Dörmann, “Geneva Conventions still going strong at 60,” International Committee of the Red Cross website, 7 August 2009, <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-convention-interview-120809>

<sup>20</sup> Kellenberger, “Sixty years of the Geneva Conventions.”

<sup>21</sup> Additional Protocol I, Article 48. See also Additional Protocol II, Article 13. International Committee of the Red Cross, “What are the essential rules of international humanitarian law?,” 31 October 2002, <http://www.icrc.org/web/eng/siteeng0.nsf/html/5KZFFJU>

<sup>22</sup> Human Rights Watch, “Q & A on Accountability for Violations of International Humanitarian Law in Sri Lanka,” 27 April 2009, <http://www.hrw.org/node/82756>

<sup>23</sup> Henry Kissinger, “The Pitfalls of Universal Jurisdiction,” *Foreign Affairs* (July/August 2001), available at <http://www.globalpolicy.org/intljustice/general/2001/07kiss.htm>. Kenneth Roth, “The Case for Universal

## Montana Model UN High School Conference

one day be turned against their own citizens. Alternatively, individuals who perpetrate war crimes may be tried in *ad hoc* (one-time) tribunals such as the Nuremberg Trials (established by the victorious allies) and the tribunals for Rwanda and the former Yugoslavia (established by the UN Security Council). *Ad hoc* tribunals are often seen as “victor’s justice,” however. States that win wars have not historically been held accountable for violations of IHL.

In 1998, to make enforcement of IHL more impartial, a number of states agreed to establish a permanent court to try individuals for war crimes and other crimes against humanity. The International Criminal Court (ICC), came into force in 2002 when the Rome Treaty was ratified by 60 countries.<sup>24</sup> There are several important things to know about the ICC. First, individuals, not states, are tried by the ICC. Second, individuals such as military commanders, soldiers, and civilian heads of government can be tried only if they are citizens of a state party or if the crime occurred in the territory of a state party. Third, individuals can be tried by the ICC only if there is evidence that they recklessly or intentionally committed war crimes, and domestic courts in the states in question have ignored the issue. Fourth, ICC cases are either selected by ICC judges or referred by the UN Security Council. The involvement of the Security Council has raised questions about whether citizens of the Permanent Five members of the Security Council would ever be held accountable for war crimes that their governments did not want to prosecute. Fifth, like other treaties, participation is voluntary. The US, for example, has not ratified the Rome Treaty and does not participate in the ICC.

### *Previous Committee Work on This Topic*

The GA-3 has a difficult task in encouraging Member States to agree that IHL is important enough both to impose and to further develop. In 2007, the GA-3 affirmed in Draft Proposal 55 “the commitment of all States to fulfill their obligations under ... instruments of international law, in particular those of international human rights law and international humanitarian law.” Also in 2007, the committee deplored in Draft Proposal 47 “the occurrence of violations of human rights and fundamental freedoms in the context of the fight against terrorism.”<sup>25</sup>

The language became more severe in 2008, when resolutions were passed in the General Assembly (GA) based on recommendations made by the GA-3. GA Resolution 148 (March 4, 2008) emphasized “that acts of torture in armed conflict are serious violations of international humanitarian law and in this regard constitute war crimes.” Furthermore, GA Resolution 159 (March 11, 2008) urged “States, while countering terrorism, to ensure due process guarantees, consistent with all relevant provisions of the Universal Declaration of Human Rights...and the Geneva Conventions of 1949.”<sup>26</sup>

### *Conclusion*

2009 marks the 60<sup>th</sup> anniversary of the Geneva Conventions. Although they have served as the foundation of international humanitarian law since 1949, the language in which they were drafted leaves many issues unresolved. According to ICRC Director of International Law Philip Spoerri, “to the extent that international conflicts and occupations continue to exist and will occur in the future, the Conventions remain valid and relevant. It is therefore very important to preserve this precious humanitarian [law] obtained through the universal acceptance of the Conventions. Whatever developments may occur in the future, these should build upon these existing rules.”<sup>27</sup>

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Jurisdiction,” *Foreign Affairs* (September/October 2001), pp. 150, available at <http://www.foreignaffairs.org/20010901faresponse5577/kenneth-roth/the-case-for-universal-jurisdiction.html>

<sup>24</sup> International Criminal Court, “About the Court,” <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>, accessed 5 October 2009.

<sup>25</sup> These proposals are available at <http://www.un.org/ga/third/62/propolist.shtml>.

<sup>26</sup> These resolutions are available at <http://www.un.org/ga/62/resolutions.shtml>.

<sup>27</sup> Spoerri, “The Geneva Conventions of 1949.”

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In developing your country's position on this issue, consider the following questions:

- Has your country signed and ratified the 1949 Geneva Conventions and/or Additional Protocols?
- Is your country a member of the International Criminal Court?
- Is your country currently involved in a conflict in which the Geneva Conventions might apply?  
Has it been involved in such a conflict in the past? Did it abide by the Conventions? Why or why not?
- What are your country's capabilities for the use of force? Is IHL an asset or obstacle for your country?
- What is your country's position on and role in the "war on terror"?
- How best can the Geneva Conventions be strengthened and enforced?

### *Recommended Reading*

Human Rights Watch. "Q & A on Accountability for Violations of International Humanitarian Law in Sri Lanka." 27 April 2009. Available at <http://www.hrw.org/node/82756>.

This article provides an overview of current debates about IHL through a case study of the recent war in Sri Lanka. In addition, the HRW site provides information on human rights violations by various countries. It is a good source to find out what your country's policies have been with regard to torture and other war crimes.

International Committee of the Red Cross. "The Geneva Conventions: The Core of International Humanitarian Law." Website. Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions>.

This site is an excellent place to begin your research. It provides an overview of IHL, plus links to the text of all of the Geneva Convention treaties and protocols, and lists of member states and their reservations and declarations.

International Committee of the Red Cross. "US detention related to the fight against terrorism – the role of the ICRC." 4 March 2009. Available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/united-states-detention-faq-240209>

This document provides insight into the ICRC's operations with respect to the war on terrorism.

Kellenberger, Jakob. "Sixty years of the Geneva Conventions: learning from the past to better face the future." Ceremony to celebrate the 60th anniversary of the Geneva Conventions. 12 August 2009. International Committee of the Red Cross website. Available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-president-120809?opendocument>.

This speech by the current president of the ICRC discusses the history and development of IHL and the Geneva Conventions.

Spoerri, Philip. "The Geneva Conventions of 1949: origins and current significance." Ceremony to celebrate the 60th anniversary of the Geneva Conventions. 12 August 2009. International Committee of the Red Cross website. Available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-120809?opendocument>

In this speech, the ICRC's Director of International Law discusses current challenges to IHL.