

# The Geneva Convention and the South African War of Liberation

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This article is devoted to the contribution that South African liberation movements have made to the progressive development of the laws of armed conflicts. It shows how liberation movements, especially within South Africa, have contributed to the development of new laws of armed conflicts by exposing the weaknesses of the old laws. The liberation struggles were recognised by the international comity of nations as being so important as to warrant a thorough review of the laws of warfare in the Geneva Diplomatic Conference which drafted the new laws.

International law does not cease to exist in the event of armed conflict. Diplomatic and treaty relations, the rights of persons who are in a country with which their government is at war, and the rights and responsibilities of nations that want to remain neutral, are aspects of international law<sup>1</sup>.

The laws regulating armed conflicts are divided into two categories. The first regulates the conditions under which a government may or may not resort to war as an instrument of national policy. The Charter of the United Nations has outlawed the use of war except for self-defence. Wars have also been replaced, in legal terms, by 'armed conflicts'. The second, which is the scope of this paper, regulates the way in which armed conflicts are fought. This second category has also been classified as the Law of the Hague and the Geneva Conventions which lays down the rights and duties of belligerents in the actual conduct of hostilities and limits the use of weapons. The Laws of Geneva consists of rules which have been designed to ensure respect, protection and humane treatment of war casualties and non-combatants. These rules have been periodically revised and adapted to modern needs and conditions. The 1949 Geneva Conventions, in their application to international conflicts, are a recent and relatively complete codification of rules for the benefit of civilians, prisoners of war, the wounded, the sick and the shipwrecked. The Conventions also established the machinery to ensure that the rules are observed (Suther 1975:211-219).

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<sup>1</sup> No. 24/80: 'Apartheid' – Notes and Documents, United Nations Centre.

The origin of the Geneva Conventions is beyond the scope of this paper. A series of Conventions, whose primary focus was the amelioration of the condition of soldiers wounded in the field and prisoners of war was held in Geneva from 1864 onwards. At the 1949 Diplomatic Conference in Geneva four Conventions were agreed upon for the amelioration of the condition of wounded and sick in the armed forces in the field, shipwrecked members of the armed forces at sea, the treatment of prisoners of war, and the protection of civilian persons in time of war. The objectives of the Conventions was to extend the category of persons covered (wounded personnel, to prisoners of war, to civilians)<sup>2</sup>. It could be argued that it is pointless having laws of war when the object is to win and this must take priority over any legal niceties. Where the laws do apply they are followed more often than not, for instance it is now rare for soldiers to take no prisoners in a battle. When the laws are followed by one side, the other side is thereby encouraged to do the same. Even if the laws are followed on only one occasion in a war, the people who benefit would certainly not regard the laws as being pointless.

Whilst the new Geneva Conventions were set out in the wake of World War II, the conflicts since 1945 have taken on different forms, and the Conventions have had a limited application. Wars traditionally took place between nations, hence the Geneva Conventions have been based on this notion. However, most conflicts since 1945 have lacked a clear international character and have tended to be internal. At the 1949 Geneva Diplomatic Conference for the first time provision was made for the respect of basic human values and prohibiting certain acts in such conflicts. The Charter of the United Nations however outlawed international conflicts but did not cover internal conflicts at all. In any case it is difficult to define when an internal disturbance had reached the level of an internal or a non-international conflict.

A further concern was the application of the Geneva Conventions to wars of national liberation, that were already in progress by 1949. The Geneva Conventions were mainly devised by countries that had colonial empires and by the USSR. No representatives of national liberation movements were invited. Though guerrilla warfare was the world's oldest form of fighting, it received no specific attention. This omission reflected the historical, cultural and legal background of most of the nations represented at Geneva. Their method of fighting involved soldiers who wore uniforms, carried their arms openly, fought in organised groups and in theory obeyed the laws of armed conflicts. Hence they made no specific provisions for wars of national liberation that in any case did not enjoy the same standing in 1949 as they would later. In 1949 it was widely assumed that the decolonisation process would be slow, orderly and based on negotiation.

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<sup>2</sup> ICRC/League of Red Cross Societies (1971:377).

It should be remembered that the Geneva Conventions were designed to regulate conventional international conflicts. No special attention was given to wars of national liberation and to guerrilla fighters, thereby implying that such persons were not 'privileged' combatants. The laws of armed conflicts began as rules relating to those who were directly involved in a conflict; the Fourth Convention, on civilians, was the newest. Persons who were 'privileged' could expect prisoner-of-war (POW) status upon capture and medical treatment. Combatants who were not 'privileged' were not eligible to the protection of international law and therefore branded as 'bandits', 'terrorists', etc., and subject to severe national laws. Whilst most nations were bound by the Conventions, no state can claim to have followed them in all conflicts.

However, gradually the situation started to change. From 1968 onwards, the United Nations General Assembly adopted resolutions seeking the application of the Geneva Conventions to the South African liberation struggle. In resolution 2396 which referred to South Africa's apartheid policies, it expressed concern over the persecution of opponents of apartheid and treatment of freedom fighters who were taken prisoner during the struggle for liberation and condemned the Government for its degrading treatment of political prisoners. It called for the release of such prisoners. It also declared that freedom fighters should be treated as prisoners of war under international law, especially the Geneva Convention dealing with the treatment of Prisoners of War. The South African Government ignored the request and was condemned by the General Assembly<sup>3</sup>.

Western Powers that had special influence in South Africa because of their investments, did nothing to carry out these directives. South Africa's attitude illustrated the weakness of the Geneva Conventions and most of international law in general: lack of external enforcement measures. The majority of people, suffering under 'apartheid', required protection immediately. The legal vacuum created by South Africa's attitude towards the Geneva Conventions highlighted the fact that if a government regarded its opponents as 'terrorists' or 'bandits' it encouraged them to act like terrorists or bandits. There was no incentive for them to follow the laws of armed conflicts.

It is necessary to look at the way in which the Geneva Conventions was updated. In one important field, the protection of human rights in armed conflicts was first put under scrutiny when a resolution sponsored by India, Czechoslovakia, Jamaica, Uganda and the United Arab Republic was adopted at the International Conference on Human Rights in Teheran (22 April-13 May 1968). It drew attention to the inadequacy of the existing humanitarian conventions in their effective application to armed conflicts. The resolution also called for the conventional

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<sup>3</sup> United Nations, General Assembly Resolution 1506 (XXIV) of 21 November 1969.

protection of the victims of racist and colonial regimes and the protection under international law of such victims who were imprisoned and for their treatment as prisoners of war or political prisoners (Suter 1977). This important resolution was inspired by the sustained pressure of the non-governmental sector. The resolution reflected an international concern over the suffering of civilians and armed personnel, particularly in the Indo-Chinese, Middle East and southern Africa conflicts (MacBride 1969:64f).

The resolution had significant results. For the first time it established a linkage between human rights, armed conflicts and the laws of armed struggle for liberation. It paid particular attention to the plight of persons struggling against minority, racist or colonial regimes and called for their treatment as prisoners of war. This was taken up by the United Nations General Assembly a few months later. It was the first time in almost two decades that a United Nations body had decided to consider the need for codifying the laws of armed conflicts, thereby making a significant contribution to the development of the laws of armed conflicts. It augmented the initiative being undertaken by the International Committee of the Red Cross (ICRC) to update the Geneva Conventions. Thus the 1968 resolution became one of the most important developments in Human Rights<sup>4</sup>.

ICRC, after consultations with national governments produced two draft Additional Protocols to the four Geneva Conventions. Whilst the first dealt with international conflicts, the second provided rules for non-international conflicts. The last stage of the ICRC's work was the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in armed conflicts. The first session took place between 20 February and 29 March 1974. The debate centred on the status of national liberation movements, in effect, those of Southern Africa and the Palestinian Liberation Organisation. This debate had the most significant results both for liberation movements and for the history of international law<sup>5</sup>.

As far as the legal status of wars of national liberation was concerned the majority of the member states of the United Nations wanted captured members of liberation movements to be granted prisoner of war status. The logical action, would be to decree all wars of national liberation to be international conflicts. This suggestion was opposed by most Western states. National liberation movements recognised by regional intergovernmental organisations (the League of Arab States and the Organisation of African Unity) were present. There was also the determination and solidarity of 'Third World' nations and their allies to work for the

<sup>4</sup> A/CONF.32/41, Final Act of the International Conference on Human Rights, p.18.

<sup>5</sup> Geneva, ICRC, *Draft Additional Protocols to the Geneva Conventions of 12 August 1949*. (1973:40-44).

victory of all liberation movements recognised by the League of Arab States and by the Organisation of African Unity.

The debate was resolved in favour of the liberation movements. The issue of the legal status of wars of national liberation in essence was a dispute over the history of colonialism. In the past Western powers did treat wars of national liberation as international conflicts. In the eighteenth century, France had aided the American colonies in their fight for independence against Britain. In the First World War, President Woodrow Wilson of the United States proclaimed the doctrine of national self-determination as 'an imperative principle of action which statesmen will henceforth ignore at their peril' (Thompson 1966:571). The United Nations practice has long shown that opposition to colonialism and apartheid were matters of international concern. The United Nations Security Council had intervened, in effect, on the side of South Africa's national liberation struggle by imposing a partial arms embargo<sup>6</sup>.

In its preparatory work for the Diplomatic Conference, the ICRC, in consultations with national governments, drafted a provision for Protocol I that met U.N. requirements. Article 42 dealt with a new category of prisoners of war. In addition to the persons mentioned in article 4 of the Geneva Convention, members of organised resistance movements who have been captured are prisoners of war provided such movements belong to a party to the conflict, even if that party was represented by a government or an authority not recognised and provided that such movements:

- 1.1 were under a command responsible to a party to a conflict;
- 1.2 distinguished themselves from the civilian population in military operations;
- 1.3 conducted their military operations in accordance with the Geneva Conventions.

The Protocol stated that non-fulfillment of these conditions by individual members of the resistance movement should not deprive other members of the movement of the status of prisoners of war. Members of a resistance movement who violated the Conventions if prosecuted, should enjoy the judicial guarantees provided by the Convention, and, if sentenced, should retain the status of prisoners of war.

It also stipulated that in cases of armed struggle where nations exercise their right to self-determination as guaranteed by the United Nations Charter and the Declaration on Principles International Law, members of organised liberation movements should be treated as prisoners of war as long as they are detained.

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<sup>6</sup> Geneva ICRC, *Draft Additional Protocols to the Geneva Conventions of 12 August 1949*. (1973:47-48).

Non-aligned states were not satisfied with the proposal that captured freedom fighters should be granted prisoner of war status as though they were fighting in an international conflict. They insisted that the rules that relate to international conflicts should apply to all aspects of wars of national liberation (Forsythe 1975:77-91).

The result was that in Article 1 (general principles and scope of application), the parties undertook to respect the adopted Protocol in all circumstances. In cases not covered by the Protocol or other international agreements, civilians and combatants should remain under the protection of the authority of the principles of international law. This Protocol, which supplements the Geneva Convention for the protection of war victims, should apply to members of organised resistance movements. The Protocol in the main referred to armed struggle against colonialism, alien occupation and racist regimes in order to exercise their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law in accordance with the Charter of the United Nations. The Geneva Convention now applied to all cases of declared war or any other armed conflict. This was a significant breakthrough in the legal and diplomatic struggle against apartheid.

The Conference revealed the unwillingness of the Western powers to support apartheid. The South African liberation movement was now entitled to the legal status of an armed force fighting in an international conflict<sup>7</sup>. South Africa which was represented at the first session (1974) of the Diplomatic Conference was heavily criticised and had few allies willing to speak openly in its favour. Two members (Senegal and Madagascar) disputed the South African delegation's credentials on the ground that the government of South Africa represented only a minority of the population and pursued a policy of racial discrimination contrary to the spirit and aims of the Conference. Other delegations saw their role limited only to determining the validity of the credentials of participants and not deciding who may attend the conference<sup>8</sup>.

South Africa, naturally opposed the provisions dealing with wars of national liberation. Session but its delegation took little part in the detailed negotiations. The South African delegation did not attend the 1975 session of the Diplomatic Conference and gave no explanation for its absence. The Portuguese Government by

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<sup>7</sup> A/32/144 of 14 August 1977. 'Respect for human rights in armed conflicts'. Fourth session of the Diplomatic Conference on Reaffirmation and Development of International and Humanitarian Law Applicable in Armed Conflicts: Report of the Secretary-General.

<sup>8</sup> Conference document CDDH/51 Rev. 1, United Nations Centre against Apartheid, 2 September (1974:5-7).

that time was following new policies towards its colonies after the overthrow of the dictatorship, and the South African Government had responded to the collapse of the Portuguese colonial empire by initiating its short-lived 'détente' policy<sup>9</sup>. Whilst South Africa did not withdraw from this session, its delegation did not attend the third (1976) and the final (1977) sessions, and did not sign the Protocols. The Pan Africanist Congress of Azania (PAC), the African National Congress (ANC) did sign the additional Protocols<sup>10</sup>.

The South African national liberation movement was now determined to increase the armed struggle. Rural guerrilla war had already begun. A protracted conflict had become inevitable. This could threaten the economic stake of the West in South Africa. In this situation it was possible that the West would change its 'pro' South Africa bias.

Since the South African Government did not sign the Protocol it was decided that the International Committee of the Red Cross, at the request of the United Nations General Assembly, should impress upon it that it should follow the laws of armed conflicts in combating the liberation movement. The Geneva Diplomatic Conference gave considerable attention to the breaches of the Geneva Conventions and the First Protocol which listed various war crimes, including the practices of 'apartheid' and other inhuman and degrading practices based on racial discrimination. Western governments were requested to encourage South Africa to stop committing the war crime of apartheid<sup>11</sup>.

A highly publicised case to illustrate the difference in approach was the case of Solomon Mahlangu, a South African school student. He left South Africa to join Umkhonto we Sizwe, the military wing of the ANC, after the Soweto uprisings of 1976. When he returned with two comrades in June 1977 he was captured in Johannesburg. He was tortured under interrogation and tried for murder. Although he claimed that he was not present when the shooting took place, he was sentenced to death for the murder of two whites. The ANC maintained that Mahlangu should be treated as a prisoner of war under the terms of the Geneva Convention of 12 August 1949. The Geneva Diplomatic Conference has recognised this claim. The execution of Solomon Mahlangu on 6 April 1979 illustrated the fact that the actions of the South African government were based on an entirely different principle<sup>12</sup>.

In the light of the Truth and Reconciliation Commission hearings since 1994, the human rights abuses during the 'apartheid' era, would in all probability

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<sup>9</sup> For a South African perspective see Wall (1975).

<sup>10</sup> Conference document CDDH/Summary Record/30, 18 April (1975:94).

<sup>11</sup> *Geneva Conventions*, Additional Protocol 1, article 1(1).

<sup>12</sup> Notes and Documents, No. 4/79, Commission of Human Rights, United Nations Centre against 'Apartheid', pp.22-23.

have been limited had the laws of the Geneva Convention been upheld. The ceremony held on 13 August 1999 to mark the 50<sup>th</sup> Anniversary of the Geneva Convention which calls on all nations to eradicate conflict should serve as a poignant reminder of human suffering.

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