THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW

SECOND EDITION

EDITED BY

DIETER FLECK

The Handbook of International Humanitarian Law

The Handbook of International Humanitarian Law

SECOND EDITION

Edited by
DIETER FLECK

In collaboration with
Michael Bothe, Horst Fischer, Hans-Peter Gasser,
Christopher J. Greenwood,
Wolff Heintschel von Heinegg, Knut Ipsen, Ben F. Klappe,
Jann K. Kleffner, Nilendra Kumar,
Stefan Oeter, Roger O'Keefe, Rüdiger Wolfrum

OXFORD
UNIVERSITY PRESS

1

HISTORICAL DEVELOPMENT AND LEGAL BASIS

I. Definition of the Term 'Humanitarian Law'

The use of force is prohibited under Article 2 (4) of the UN Charter. States may resort to force only in the exercise of their inherent right of individual or collective self-defence (Article 51 UN Charter) or as part of military sanctions authorized by the Security Council (Articles 43–48 UN Charter). International humanitarian law applies with equal force to all the parties in an armed conflict irrespective of which party was rjesponsible for starting that conflict. It comprises the whole of established law serving the protection of man in armed conflict. 101

1. *Introduction.* Although the subject of this Handbook is the law applicable to the conduct of hostilities once a state has resorted to the use of force (the *ius in bello*), that law cannot be properly understood without some examination of the separate body of rules which determines when resort to force is permissible (the *ius ad bellum*). The modern *ius ad bellum* is of relatively recent origin and is based upon Article 2 (4) and Chap. VII of the UN Charter.

2. *The Charter Prohibition on the Use of Force.* Article 2 (4) of the UN Charter states that: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.' By prohibiting the use of *force*, rather than *war*, this provision avoids debate about whether a particular conflict constitutes war. Although some writers have endeavoured to read Article 2 (4) narrowly, arguing that there are instances in which the use of force may occur without it being directed 'against the territorial integrity or political independence of any state' or being 'in any other manner inconsistent with the purposes of the United Nations',[1] the prevailing view is that any use of force by one state against the forces of another, or on the territory of another, will contravene Article 2 (4) unless it can be justified by reference to one of the specific exceptions

[1] See the discussion of this question by various writers in Cassese (Ed.), (1979).

to that provision. The UN Charter expressly provides for two such exceptions: military action authorized by the Security Council and the right of individual or collective self-defence. In addition, there has in recent years been considerable support for the existence of a right to use forces in cases of extreme humanitarian need.[2]

3. *Military Actions authorized by the Security Council.* The extensive limitation placed by the Charter upon unilateral resort to force by states is linked to, but not dependent upon,[3] the system of collective security in Chap. VII of the UN Charter. Under Article 39 of the Charter, the Council is empowered to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression'. Once it has taken this step, Articles 41 and 42 give the Council power to take measures to restore international peace and security.[4]

a) Under Article 41, the Council may require member states to apply economic sanctions and other measures not involving the use of armed force, a power which it has used, for example, in relation to Iraq's invasion of Kuwait,[5] Libya's refusal to co-operate with investigations into terrorist attacks on aircraft,[6] and the situation in the former Yugoslavia.[7] Where the Council has imposed sanctions under Article 41, it may authorize states to use limited force to prevent ships or aircraft from violating those sanctions.[8] The power extends far beyond the imposition and enforcement of economic sanctions and has been used, for example, to create the international criminal tribunals for the former Yugoslavia[9] and Rwanda.[10]

b) Article 42 then provides: 'should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.'

c) To give effect to this provision, Article 43 envisaged that member states would conclude with the UN a series of bilateral agreements under which they would make forces and other facilities available to the Council on call. Articles 46–47 provided that plans for the use of armed force were to be made by the Council with the assistance of a Military Staff Committee which was charged by Article 47 with responsibility, under the Council, for 'the strategic direction of any armed forces placed

[2] See e.g. Holzgrefe/Keohane (Eds.); Ku/Jacobson (Eds.); Greenwood, *Essays* (2006), 593. See below, para. 5.

[3] ICJ, *Corfu Channel case*, ICJ Reports 1949, 3.

[4] Decisions of the Council adopted under Chapter VII of the Charter are capable of creating legally binding obligations for States (see Arts 2 (5) and 25 of the Charter); by virtue of Art. 103, the obligation to carry out the decisions of the Council, as an obligation arising under the Charter, prevails over obligations under other international agreements; see the ICJ Orders in the *Lockerbie cases* (*Libya v United Kingdom; Libya v United States*), ICJ Reports 1992 3 at para. 39 and 114 at para. 42.

[5] Res. 661 (1990).

[6] Res. 748 (1992). See also the decisions of the ICJ in the *Lockerbie* cases (above, n. 4).

[7] Res. 757 (1992).

[8] e.g. Res. 665 (1990).

[9] Res. 827 (1993).

[10] Res. 955 (1994)

at the disposal of the Security Council'. Due to Cold War rivalries and different perceptions of the UN's military role, no Article 43 agreements were concluded and the Military Staff Committee has never functioned as intended.[11] Nevertheless, the Security Council has authorized a number of operations which have involved the deployment of military forces.

d) Until the 1990s most of these were peace-keeping operations, in which UN forces, made up of units contributed on a voluntary basis by various member states, were deployed with the consent of the states in whose territory they operated. The sole purpose of these forces was to police a cease-fire line or to monitor compliance with a truce or deliver relief supplies. The UN forces in Cyprus, Cambodia, Croatia, Lebanon, and on the Iran-Iraq border are all examples of this kind of peacekeeping by consent. Although peacekeeping forces are not intended to engage in combat operations, they have sometimes become involved in fighting when attacked.[12]

e) Increasingly, however, the Council has gone beyond peacekeeping and has authorized enforcement action of the kind envisaged in Article 42. In the Korean conflict in 1950 the Council (which was able to act because the USSR was boycotting its meetings) condemned North Korea's invasion of South Korea, and called upon all member states to go to the assistance of South Korea.[13] Following Iraq's invasion of Kuwait in 1990 the Council adopted Resolution 678, which authorized those States co-operating with the Government of Kuwait to use 'all necessary means' to ensure that Iraq withdrew from Kuwait and complied with the various Security Council resolutions on the subject and to 'restore international peace and security in the area'. It was this resolution which provided legal authority for the use of force by the coalition of states against Iraq in 1991.[14] In the absence of Article 43 agreements, the Council was not able to require states to take part in these operations. Instead, it relied upon voluntary contributions of forces from a wide range of states.[15] Nor did the Council and the Military Staff Committee direct the two operations. In Korea, the Council established a unified command under the United States and expressly left to the United States Government the choice of a commander, although the contingents operating in Korea were regarded as a UN force and were authorized to fly the UN flag.[16] In the Kuwait conflict, the Council authorized the use of force, but command and control arrangements were made by the states concerned and the coalition forces fought as national contingents, not as a UN force. The Kuwait operation has come to be a model for numerous other instances of enforcement action involving the use of armed force, for example in Somalia, Haiti, and the former Yugoslavia.

[11] Bowett, *UN Forces*, 12.

[12] e.g. in the Congo. On the application of international humanitarian law to armed forces, see below, Section 1309.

[13] Bowett, *UN Forces*, 29.

[14] Greenwood, *Essays* (2006), 517.

[15] In Korea, sixteen states contributed forces. The coalition forces in the Kuwait conflict were drawn from twenty-eight states.

[16] Res. 84 (1950).

f) It was at one time argued that neither the Korean nor the Kuwaiti operation constituted enforcement actions of the kind provided for in Article 42 of the Charter, because neither operation was controlled by the Council and neither was based upon the use of forces earmarked for UN operations under Article 43 agreements. Yet there is nothing in Article 42 which stipulates that military enforcement action can only be carried out using Article 43 contingents, nor does Chapter VII preclude the Security Council from improvising to meet a situation in which military operations can effectively be conducted only by large national contingents contributed by states which wish to retain control in their own hands. Moreover, the Charter expressly envisages that the Council might authorize an *ad hoc* coalition of States to carry out its decisions, for Article 48 provides that: 'The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.' While the wording of the key resolutions in both Korea and Kuwait leaves room for argument on this point, both operations should be seen as instances of enforcement action authorized by the Council.[17]

g) If the legal basis for an operation is to be found in the enforcement powers of the Security Council, then the objectives for which force is used may go beyond the limits of what is permissible in self-defence. In the Kuwait case, a military action which was based on the right of collective self-defence could not lawfully have gone beyond liberating Kuwait and ensuring Kuwait's future security, whereas enforcement action against Iraq would have justified more extensive measures to re-establish peace in the region. For example, Res. 678 authorized the coalition to ensure that Iraq complied with all relevant Security Council resolutions and 'to restore international peace and security in the area',[18] a goal which went beyond what would be permissible in self-defence[19] and thus indicated that the operation was seen by the Council as enforcement action. This aspect of Res. 678 also proved important after the achievement of the ceasefire which ended the immediate hostilities in Kuwait in March 1991. Subsequent resolutions of the Security Council, noticeably Res. 687 (1991) and 1441 (2002) made clear that the threat to international peace and security had not ended with the ceasefire. It was on that basis that the United States, United Kingdom and a number of other states maintained in 2003 that the authorization to use force remained in being and provided a legal basis for the renewal of military action against Iraq.[20]

[17] Greenwood, 55 *Modern Law Review* (1992), 153; Schachter, 85 *AJIL* (1991), 452; Rostow, 85 *AJIL* (1991), 506.

[18] Res. 678, para. 2.

[19] For the limits of self-defence, see below.

[20] Greenwood in Bothe/O'Connell/Ronzitti (Eds.). For criticism of this position, see Lord Alexander of Weedon, 'Iraq: the Pax Americana and the Law', 2003 Justice Annual Lecture; Lowe, 52 *ICLQ* (2003) 859; Wolfrum, 7 *Max Planck Year Book of UN Law* (2003) 1, Franck, 97 *AJIL* (2003) 607.

h) Only the Security Council has the authority to authorize enforcement action[21] but it may choose to make use of other organizations (or, as in Kuwait and Korea, *ad hoc* coalitions) to carry out such action. Articles 52 and 53 of the Charter provide that regional organizations may undertake enforcement action with the authorization of the Security Council. The decision of the Organization on Security and Co-operation in Europe (OSCE) to constitute itself as a regional organization under Article 53 makes it possible for the OSCE, with the consent of the Security Council, to undertake action of this kind in Europe. In such a case, there seems to be no legal obstacle to the OSCE using NATO or the WEU as the military vehicle for conducting such operations.

i) One feature of Security Council action in recent times has been the expansion of the concept of 'international peace and security'. Originally perceived as confined to 'inter-state' threats, it is now treated as covering the threat posed by international terrorism.[22] The Council has also considered that the humanitarian situation within a state is capable of amounting to a threat to international peace and security without necessarily pointing to inter-state repercussions.[23]

4. *The Right of Self-Defence.* Article 51 of the Charter provides that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.' The term 'armed attack' is not defined. In its decision in *Nicaragua v United States*, the ICJ held that armed attacks included 'not merely action by regular armed forces across an international border', but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [*inter alia*]... an actual armed attack conducted by regular forces... or its substantial involvement therein'.[24] On this basis, systematic terrorist attacks organized, or perhaps sponsored, by a state could constitute an armed attack to which the victim state could respond in self-defence. However, the Court went on to set a threshold by ruling that terrorist or irregular operations would constitute an armed attack only if the scale and effects of such an operation were such that it 'would have been classified as an armed attack rather than as a mere frontier incident had it been

[21] The General Assembly asserted such a power in its 1950 Resolution on Uniting for Peace, UNGA Res. 377(V), but this claim was questioned by the ICJ in the *Certain Expenses Advisory Opinion*, ICJ Reports 1962, 151 and has not been repeated in more recent times.

[22] See, e.g., Res. 1368 (2001) and 1373 (2001).

[23] See especially Res. 794 (1992) the preamble of which stated that 'the magnitude of the human tragedy caused by the conflict in Somalia ... constitutes a threat to international peace and security'.

[24] ICJ Reports, 1986, 14, at para. 195. The Court was quoting from Article 3 of the Definition of Aggression, annexed to UN GA Res. 3314 (1975).

carried out by regular armed forces'. In other words, the Court considered that the concept of 'armed attack' in Article 51 was narrower than the concept of 'use of force' in Article 2 (4).

a) In addition to an attack upon the territory of a state, it is generally accepted that an attack against a state's warships, military aircraft, or troops overseas will amount to an attack upon the state itself. It has sometimes been argued that an attack upon a merchant ship should not be treated as an armed attack upon the state whose flag it flies and will not, therefore, trigger the right of self-defence.[25] This view is not, however, accepted by the majority of naval states. During the Iran-Iraq War, for example, most of the states which deployed naval forces to the Gulf made clear that those forces would defend merchant ships flying the same flag from attack. There have also been a number of cases (of which the best known is the Entebbe incident) in which one state has used force to protect its citizens from attack in the territory of another state. The legality of such actions has been questioned. Nevertheless, a state consists of people as well as territory and it would be a strange law of self-defence which allowed a state to use force in response to the military occupation of an uninhabited island but not in response to an attack which threatened the lives of its citizens. Where a state deliberately attacks foreign nationals on its territory, it seems a reasonable exercise of the right of self-defence for the state of those nationals to use force to rescue them.[26]

b) The increasing threat posed by terrorism and the military responses which it has attracted, particularly after the 11 September 2001 atrocities in the United States have given rise to a debate as to whether an armed attack can emanate from non-state actors, such as terrorists, even if their acts are not attributable to a state.[27] Nothing in the text of Article 51 requires that the concept of armed attack be limited to acts for which states are responsible in international law. Nor was such a limitation evident in customary international law prior to the adoption of the Charter; indeed, the famous *Caroline* incident in 1837[28] which is widely regarded as the fountainhead of the modern law on self-defence was itself about a military reaction to attacks by non-state actors. Nor is there any obvious logic in restricting the right of self-defence by excluding it in cases where the attack is not attributable to a state. Moreover, the notion that an armed attack can emanate from a non-state actor is supported by the international reaction to the 11 September 2001 attacks on the United States by the terrorist group known as Al-Qaeda; the Security Council,[29] NATO[30] and the Organization of American States[31] all treated these as armed attacks for the purposes of the law of self-defence and the United States and other governments invoked the right of self-defence as the basis for the subsequent

[25] Bothe in Dekker/Post, 209.
[26] See Ronzitti, *Rescuing Nationals Abroad.*
[27] Greenwood, *Essays* (2006), 409.
[28] *Jennings*, 32 *AJIL* (1938), 82.
[29] Res. 1368 (2001) and 1373 (2001) which expressly refer to the right to self-defence.
[30] See the decision of the North Atlantic Council on 12 September 2001, 40 *ILM* (2001), 1267.
[31] See the decision of the Foreign Ministers of the OAS, 40 *ILM* (2001), 1273.

military action in Afghanistan. Nevertheless, a number of commentators disagree[32] and the ICJ, in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, appeared to assume that an armed attack had to be in some way attributable to a state, while recognizing that the Security Council had provided otherwise in Resolutions 1368 and 1373.[33]

c) A particularly difficult question, left open by the ICJ in the *Nicaragua* and later cases, is whether a state must wait until it is attacked before it can respond in self-defence or whether it is entitled to pre-empt an attack by taking measures of 'anticipatory self-defence'.[34] Although the text of Article 51 appears to rule out any concept of anticipatory self-defence, it does not *create* the right of self-defence but preserves a right described as 'inherent'. Before 1945 it was generally assumed that the right of self-defence included a right of anticipatory self-defence provided that an armed attack was imminent.[35] Since 1945 there have been numerous instances of states asserting a right of anticipatory self-defence.[36] Apart from Israel's invocation of this right in 1967, for which it was not condemned by the Security Council or the General Assembly, the United States has repeatedly asserted a right of anticipatory self-defence and this was reflected in the rules of engagement issued to United States naval forces in the Persian Gulf during the Iran-Iraq War. The United Kingdom, France, the USSR, and on one occasion during the Congo conflict the UN itself have also claimed a right of anticipatory self-defence.[37] It is noticeable that when Israel relied upon this argument in attempting to justify its destruction of Iraq's nuclear reactor in 1981, debate in the UN Security Council centred not upon whether there was a right of anticipatory self-defence but upon whether any threat to Israel was sufficiently close in time to bring that right into operation. The Security Council concluded that any threat posed by Iraq to Israel in 1981 was too remote to meet the requirement that an armed attack must be 'imminent'.[38]

[32] E.g. Randelzhofer in Simma (Ed.), 802.

[33] ICJ Reports, 2004, 136 at para. 139. For criticism of the Court's approach, see the Separate Opinion of Judge Higgins at para. 33. See also the decision in *Case concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, ICJ Reports 2005, para. 146.

[34] Compare Bowett, *Self-Defence in International Law* with Brownlie, *International Law and the Use of Force by States*.

[35] See the *Caroline* dispute between Britain and the United States in 1837, *Jennings*, 32 *AJIL* (1938), 82.

[36] See, however, Gray, (2004), 129–133 for a different assessment of this practice.

[37] Not all of these claims were well founded. The USSR's claim of anticipatory self-defence as a justification for its intervention in Czechoslovakia in 1968 was fanciful. The point, however, is that so many states expressly recognized that such a right exists.

[38] Debate of 12 June 1981, S/PV 2280, and Res. 487 (1981). Although the U.S. has advanced the position that states may enjoy a right of pre-emptive military action even when no armed attack is imminent [see the National Security Strategy 2006, reviewed by Crook, 100 *AJIL* (2006) 690], this theory has attracted very little support and is difficult to reconcile with state practice or academic commentary; see, e.g., the statement by Lord Goldsmith, the Attorney-General of England and Wales, that the United Kingdom's position was that 'international law permits the use of force in self-defence against an imminent attack but does not authorize the use of force to mount a pre-emptive strike against a threat that is more remote'. It is important to note, however, that he added 'those rules must be applied in the context of the particular facts of each case', House of Lords debate, 21 April 2004.

d) The notion of collective self-defence is that one state may come to the assistance of another which has been the victim of an armed attack. In the *Nicaragua* case, the ICJ held that for a state to be able to justify going to the assistance of another state by way of collective self-defence, two requirements must be satisfied: the second state must have been the victim of an armed attack (or such an attack must be imminent), so that that state is itself entitled to take action by way of individual self-defence, and it must request military assistance from the first state. In the absence of a request for assistance from the state attacked, the Court considered that the right of collective self-defence could not be invoked.[39]

e) The right of self-defence is preserved only 'until the Security Council has taken measures necessary to restore international peace and security'. It is not clear what action on the part of the Council will put an end to the right of self-defence. Purely verbal condemnation of an aggressor by the Council cannot be sufficient for, as the UK Representative at the UN stated during the Falklands conflict, Article 51 'can only be taken to refer to measures which are actually effective to bring about the stated objective'.[40] When Iraq invaded Kuwait, however, the Security Council reinforced its immediate demand for Iraqi withdrawal by imposing economic sanctions upon Iraq.[41] A number of commentators argued that the imposition of sanctions removed the scope for military action against Iraq under Article 51 unless the Security Council adopted a further resolution specifically authorizing military action. Yet to argue that, as soon as the Security Council adopts any kind of sanctions, the right of self-defence is suspended strains the meaning of Article 51, since it ignores the requirement that the measures must be 'necessary' to maintain peace and security. If any action by the Council required the victim of an armed attack to suspend action in self-defence, that would scarcely induce states to refer situations of this kind to the Security Council. The better view is that only when the Security Council takes measures which are effective in terminating an armed attack, or expressly calls upon a state to cease action in self-defence, are Article 51 rights suspended.[42]

f) Not all the conditions for a valid exercise of the right of self-defence are stated in Article 51 of the Charter. It was accepted by both parties in the *Nicaragua* case, and confirmed by the ICJ, that measures taken in self-defence must not exceed what is necessary and proportionate. These requirements have been described as being 'innate in any genuine concept of self-defence',[43] and it is these requirements which distinguish the modern law of self-defence from the traditional concept of the 'just war'. In just war theory, once a state had a valid reason for resorting to force, there was no limit on the extent of force which could be employed (other than those which stemmed from the humanitarian requirements of the law of armed conflict). Self-defence, by contrast, permits only the use of force to put an end to an armed attack

[39] *Nicaragua case, supra* n. 24.
[40] UN Doc. S/15016.
[41] Res. 661 (1990).
[42] Greig, 40 *ICLQ* (1991), 366.
[43] Brownlie, *International Law and the Use of Force by States*, 434.

and to any occupation of territory or other forcible violation of rights which may have been committed. That does not mean that the state which uses force in self-defence must use no more force than has been used against it. Such a rule would be practical nonsense. The United Kingdom, for example, could not have retaken the Falkland Islands after the Argentine invasion of 1982 using only the degree of force which had been used by Argentina, for Argentina had placed a far larger force on the Islands than the small British garrison overcome in the initial invasion. The correct test is that stated by Sir Humphrey Waldock when he said that the use of force in self-defence must be '... strictly confined to the object of stopping or preventing the infringement [of the defending state's rights] and reasonably proportionate to what is required for achieving this objective'.[44] In the case of the Falklands, the United Kingdom was entitled to use such force as was reasonably necessary to retake the Islands and to guarantee their security against further attack. The limitations which the principles of necessity and proportionality impose upon the degree of force which may be used have implications for the conduct of hostilities which are examined in the commentary to Section 130 below.

5. *Humanitarian Intervention.* It has already been suggested that the Security Council now treats some humanitarian emergencies as threats to international peace and security warranting enforcement action. However, claims by States that they had a right to use force in extreme humanitarian cases, even without Security Council sanction, were generally rejected prior to 1990 (e.g. India's assertion of such a right in the Bangladesh conflict in 1971 and Vietnam's in Cambodia in 1979 encountered widespread opposition[45] although Tanzania's overthrow of the Amin Government in Uganda in 1979 received more of a welcome). However, there was a marked change in the 1990's.[46] The ECOWAS intervention in Liberia and the intervention by US, British and French forces in Iraq in 1991 and 1992 involved invocations of a right of military action in cases of extreme humanitarian concern[47] which met with little opposition. The NATO States also relied on such a right when they intervened in Kosovo in 1999.[48] A draft resolution which would have condemned this action as illegal was defeated by twelve votes to three in the Security Council. The United Kingdom Government asserted in 2004 that 'there is increasing acceptance of the view taken in 1999 that imminent humanitarian crises justify military intervention'.[49]

6. *Other Possible Justifications for the Use of Force.* On occasions a number of other possible justifications for military action have been advanced. Reprisals, the protection of nationals abroad, intervention to promote self-determination, and intervention in an internal conflict at the request of the government of the state

[44] Waldock, 81 *RdC* (1952), 451.
[45] Both states also relied on the right of self-defence.
[46] See Greenwood, *Essays* (2006), 593.
[47] See Jennings and Watts, *Oppenheim's International Law* (vol. I, 9th ed., 1992), 442–444.
[48] Greenwood, n. 46, above.
[49] Lord Goldsmith, n. 38, above.

concerned have all been cited. Of these, intervention to protect nationals is properly regarded as an aspect of the right of self-defence, for the reasons given above. Armed reprisals, though once lawful, have been condemned by both the Security Council and the General Assembly and their legal basis must now be regarded as highly doubtful.[50] Intervention to promote self-determination is also of doubtful legality. Even if it might be said to exist in the classic case of a colonial people fighting a war of independence, it is unclear that it could be extended to more modern cases of pro-democratic intervention. Finally, intervention in a state with the consent of the government of that state has generally been taken as involving no use of force *against* that state, unless the state concerned was already in a condition of civil war.

7. *The Equal Application of International Humanitarian Law.* Once hostilities have begun, the rules of international humanitarian law apply with equal force to both sides in the conflict, irrespective of who is the aggressor. On the face of it, this seems completely illogical. To place the aggressor and the victim of that aggression on an equal footing as regards the application of humanitarian law appears to contravene the general principle of law that no one should obtain a legal benefit from his own illegal action: *ex injuria non oritur ius.* Yet the principle that humanitarian law does not distinguish between the aggressor and the victim is well established. In the Diplomatic Conference which adopted the two 1977 Protocols Additional to the Geneva Conventions,[51] the Democratic Republic of Vietnam argued that states which committed acts of aggression should not be allowed to benefit from the provisions of humanitarian law. This argument was roundly rejected and the Preamble to AP I reaffirms that: 'the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.

A number of war crimes trials held at the end of the Second World War make clear that the provisions of the earlier Hague Conventions on the laws of war[52] are also equally applicable to all parties in a conflict.[53] The reason for this apparently illogical rule is that humanitarian law is primarily intended to protect individuals, rather than states, and those individuals are, in general, not responsible for any act of aggression committed by the state of which they are citizens. Moreover, since in most armed conflicts there is no authoritative determination by the Security Council of which party is the aggressor, both parties usually claim to be acting in self-defence, as Iran and Iraq did throughout the 1980–1988 Iran-Iraq War. Any attempt to make the rules of humanitarian law distinguish between the standards of treatment to be accorded to prisoners of war or civilians belonging to the

[50] See, however, Bowett, 66 *AJIL* (1972), 1.

[51] See Section 127 below.

[52] See Section 126 below.

[53] See e.g. *United States v List*, Annual Digest 15 (1948), 632 and the *Singapore Oil Stocks* case 23 *ILR* (1956), 810.

aggressor and those belonging to the state which was the victim of aggression would thus almost certainly lead to a total disregard for humanitarian law. As Sir Hersch Lauterpacht said, '... it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them'.[54] After initial hesitation,[55] similar reasoning has led to general acceptance that a UN force, or a force acting under the authority of the Security Council, is also bound to observe the rules of international humanitarian law.

International humanitarian law constitutes a reaffirmation and development of the traditional international laws of war (*ius in bello*). In this context, most rules of the law of war now extend even to those international armed conflicts which the parties do not regard as wars. The term 'international humanitarian law' takes this development into account. 102

1. *The Scope of 'International Humanitarian Law'.* The term 'international humanitarian law' is of relatively recent origin and does not appear in the Geneva Conventions of 1949.[56] International humanitarian law comprises all those rules of international law which are designed to regulate the treatment of the individual—civilian or military, wounded or active—in international armed conflicts. While the term is generally used in connection with the Geneva Conventions and the Additional Protocols of 1977, it also applies to the rules governing methods and means of warfare and the government of occupied territory, for example, which are contained in earlier agreements such as the Hague Conventions of 1907 and in treaties such as the Inhumane Weapons Convention of 1980. (For a full list of these treaties, see Sections 125–128.) It also includes a number of rules of customary international law. International humanitarian law thus includes most of what used to be known as the laws of war, although strictly speaking some parts of those laws, such as the law of neutrality, are not included since their primary purpose is not humanitarian. This Handbook, however, deals with all of the rules of international law which apply in an armed conflict, whether or not they are considered to be part of international humanitarian law.

A significant development in the law is that, whereas the older treaties applied only in a 'war', today humanitarian law is applicable in any international armed conflict, even if the parties to that conflict have not declared war and do not recognize that they are in a formal state of war. This matter is discussed further in the commentary to Chapter 2.

2. *Reciprocity.* In contrast to human rights treaties, which usually require each party to the treaty to treat all persons within its jurisdiction in accordance with

[54] H. Lauterpacht, 30 *BYIL* (1953), 206, 212; see also Greenwood, in 9 *Review of International Studies* (1983), 221, 225.

[55] Bowett, *UN Forces*, 484; see Section 208 below.

[56] Partsch, II *EPIL*, 933–936.

the treaty's requirements, even if they are citizens of a state not party to that treaty, humanitarian treaties are binding only between those states which are parties to them.[57] In the 1991 Kuwait conflict, several of the coalition states (such as Italy, Canada, and Saudi Arabia) were parties to AP I but they were not obliged to apply its provisions in the conflict because Iraq was not a party to the Protocol.[58] However, once it is established that a humanitarian law treaty is binding upon states on both sides in a conflict, the application of the treaty is not dependent upon reciprocity. As the ICRC Commentary to the Geneva Conventions puts it, a humanitarian law treaty does not constitute '... an engagement concluded on the basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties.'[59]

Thus, the fact that one side in a conflict violates humanitarian law does not justify its adversary in disregarding that law.[60] Moreover, it is not necessary today that all the states involved in a conflict must be parties to a particular humanitarian treaty for that treaty to apply in the conflict. If there are states on both sides of the conflict which have become parties to a particular humanitarian treaty, the treaty is applicable between them, even though it does not bind them in their relations with those states which have not become parties. In this respect, humanitarian law has changed since the beginning of the twentieth century, for the older humanitarian law treaties contained what was known as a 'general participation clause', under which a treaty would apply in a war only if all the belligerents were parties to that treaty.

3. *Humanitarian Law and the Law of Human Rights.* International humanitarian law obviously has much in common with the law of human rights, since both bodies of rules are concerned with the protection of the individual.[61] Nevertheless, there are important differences between them. Human rights law is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a state and its citizens. International humanitarian law, by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a state and the citizens of its adversary, a relationship otherwise based upon power rather than law. It is now clear that human rights treaties are, in principle, capable of application in armed conflict.[62]

That does not mean, however, that human rights treaties in any way supplant international humanitarian law. First, the scope of application of human rights

[57] An important exception is some of the weapons treaties, noticeably the Biological Weapons Convention, the Chemical Weapons Convention and the Landmines Convention which impose absolute obligations on the States party to them.

[58] Many provisions of AP I were, however, declaratory of customary law and as such were applicable to all the states in the Kuwait conflict (see commentary to Section 127).

[59] Pictet, *Commentary*, Vol. IV, 15.

[60] For the special case of reprisals, see Sections 476–479 and 1406.

[61] Robertson, in Swinarski (Ed.), *Essays in Honour of Jean Pictet*, 793.

[62] This has been reaffirmed by the ICJ in its advisory opinions on *Nuclear Weapons*, ICJ Reports 1996, 226, at para. 25 and *Legal Consequences of the Construction of a Wall*, ICJ Reports, 2004, 136, paras. 102–142 [106].

treaties is often more restricted than that of humanitarian law. Thus, Article 1 ECHR requires each state party to secure 'to everyone within its jurisdiction' the rights and freedoms in the Convention. In *Bankovic v Belgium and Others*, the Grand Chamber of the European Court of Human Rights held that the inhabitants of Belgrade were not within the jurisdiction of the European members of NATO during the NATO aerial bombardment of that city in the 1999 Kosovo conflict, with the result that the provisions of the Convention were not applicable.[63] Nevertheless, the law of human rights and the powers of human rights tribunals have become increasingly important in armed conflicts, particularly in relation to the government of occupied territory,[64] though even there their field of application may be different from, and more restricted than, that of humanitarian law agreements.[65] Secondly, even where human rights treaties are applicable, they will frequently refer to humanitarian law as the *lex specialis*. Thus, the International Court in its advisory opinion on *Nuclear Weapons* held that the application of the right to life provision in the ICCPR in time of armed conflict was subject to the relevant norms of humanitarian law.[66] For further considerations concerning the relevance of human rights in armed conflicts see below, Sections 254–261.

International humanitarian law sets certain bounds to the use of force against an adversary. It determines both the relationship of the parties to a conflict with one another and their relationship with neutral states. Certain provisions of international humanitarian law are also applicable in the relationship between the state and its own citizens. 103

1. International humanitarian law is not concerned with the legality of a state's recourse to force. That is a matter for the *ius ad bellum*, discussed in the commentary to Section 101. Humanitarian law sets limits to the way in which force may be used by prohibiting certain weapons (such as poison gas) and methods of warfare (such as indiscriminate attacks), by insisting that attacks be directed only at military objectives, and even then that they should not cause disproportionate civilian casualties. It also regulates the treatment of persons who are *hors de combat*: the wounded, sick, shipwrecked, persons parachuting from a disabled aircraft, prisoners of war, and civilian internees, as well as the enemy's civilian population. Although primarily concerned with the relationship between the parties to a conflict, a distinct branch of the laws of armed conflict, the law of neutrality, regulates the relationship between the belligerents and states not involved in the conflict. Unlike the rules dealing with the relationship between the parties to a conflict, the law of neutrality

[63] 123 *ILR*, 94.

[64] *Cyprus v Turkey*, 120 *ILR*, 10.

[65] See the decisions of the English courts in *R (Al Skeini) v Secretary of State for Defence*: High Court ([2004] EWHC 2911 Admin), judgment of 14 December 2004; Court of Appeals ([2005] EWCA Civ 1609) judgment of 21 December 2005; House of Lords ([2007] UKHL 26) judgment of 13 June 2007.

[66] ICJ Reports 1996, 226, para. 25.

has not been the subject of much codification and still consists largely of customary international law. It is considered in Chapter 11 of this Handbook.

2. Most rules of humanitarian law concern the way in which a party to a conflict treats the nationals of its adversary and nationals of third states who may be serving in the forces of the adversary or resident in its territory. For the most part, humanitarian law does not attempt to regulate a state's treatment of its own citizens. Thus, it has been held, for example, that a national of one party to a conflict who serves in the armed forces of an adversary against his own state is not entitled to be treated as a prisoner of war if captured,[67] although this decision has been criticized[68] and is probably untenable in a case where nationality has been forced upon the person concerned (e.g. as a result of the annexation of the territory in which he resides) and perhaps where large numbers of people have taken up arms against the state of their nationality.[69] There are, however, some provisions of humanitarian law which are expressly intended to apply to the relationship between a state and its own citizens. Article 3 of the four Geneva Conventions and AP II each lay down a legal regime for civil wars and internal armed conflicts. In addition, some provisions of the Geneva Conventions and AP I require a state to take positive steps in relation to its own citizens by, for example, ensuring that members of its armed forces receive instruction in international humanitarian law, or encouraging the dissemination of the principles of that law amongst the civilian population.[70] A state is also required to take steps to prevent its citizens from violating provisions of humanitarian law and must, for example, take action to prevent or prosecute grave breaches of that law by its nationals.[71]

104 Apart from the general rules which apply to all types of warfare, special rules apply to the law of land warfare, the law of aerial warfare, the law of naval warfare, and the law of neutrality.

The general rules of humanitarian law and their application in land and aerial warfare are considered in Chapters 2 to 9 and Chapter 12 of this Handbook. The law of naval warfare is the subject of Chapter 10. Although many of the rules of humanitarian law (for example, those related to the treatment of prisoners of war) are common to all forms of warfare, naval warfare is in other respects subject to a distinct legal regime. The environment in which naval warfare takes place is very different from that of land warfare, its scope for affecting the rights of neutrals is far greater and the rules which govern naval warfare have not, for the most part, been the subject of as much attention in recent years as the rules applicable to land warfare. Apart from the GC II, which deals with the wounded, sick, and shipwrecked at sea, none of the post-1945 treaties have been specifically concerned with naval warfare and some of

[67] See the decision of the Privy Council in *Public Prosecutor v Oie Hee Koi*, 42 *ILR*, 441.
[68] Levie, *Prisoners of War*, 74–76; Baxter, 63 *AJIL* (1969), 290.
[69] Lauterpacht, H. (Ed.), *Oppenheim's International Law*, Vol. II, 252–253.
[70] See Section 136.
[71] See Sections 1407–1413.

the most important provisions of AP I are not applicable to warfare at sea, except in so far as it may affect the civilian population on land or is directed against targets on land.[72] The result is that much of the law of naval warfare still consists of rules of customary international law. The International Institute of Humanitarian Law has conducted a study on international law applicable to armed conflict at sea.[73] The law of neutrality is also largely a matter of customary law. The entire institution of neutrality has been questioned in recent times, on the ground that the UN Charter has effectively rendered it obsolete.[74] Nevertheless, the events of the Iran–Iraq War show that the law of neutrality remains important, even if there are doubts about its exact content.

II. Historical Development

The following historical references may promote appreciation of the development and value of international humanitarian law. 105

Throughout its history, the development of international humanitarian law has been influenced by religious concepts and philosophical ideas. Customary rules of warfare are part of the very first rules of international law. The development from the first rules of customary law to the first written humanitarian principles for the conduct of war, however, encountered some setbacks. 106

The laws of war have a long history,[75] as the following paragraphs show, although it has been suggested that military practice in early times fell far short of existing theory, and that such rules of warfare as can be identified in early times have little similarity to modern international humanitarian law.[76] From the Middle Ages until well into the seventeenth century discussion of the rules of war in Europe was dominated by theological considerations, although some elements of classical philosophy remained influential.[77] The codification and written development of the law did not begin until the nineteenth century.

Some rules which imposed restrictions on the conduct of war, the means of warfare, and their application can be traced back to ancient times. 107

[72] See Article 49, para., 3 AP I.

[73] *San Remo Manual*, 1994.

[74] See E. Lauterpacht, *Proceedings of the American Society of International Law* 62 (1968), 58; Norton, 17 *Harvard Journal of International Law* (1976), 249.

[75] Verzijl, vols. IX and X; Friedman, L. (Ed.).

[76] Münch, IV *EPIL*, 1386–1388.

[77] Holland, 40.

— **The Sumerians regarded war as a state governed by the law, which was started by a declaration of war and terminated by a peace treaty. War was subject to specific rules which, *inter alia* guaranteed immunity to enemy negotiators.**
— **Hammurabi King of Babylon, (1728–1686 BC), wrote the 'Code of Hammurabi' for the protection of the weak against oppression by the strong and ordered that hostages be released on payment of a ransom.**
— **The law of the Hittites also provided for a declaration of war and for peace to be concluded by treaty, as well as for respect for the inhabitants of an enemy city which has capitulated. The war between Egypt and the Hittites in 1269 BC, for instance, was terminated by a peace treaty.**
— **In the 7th century BC, Cyrus I, King of the Persians, ordered the wounded Chaldeans to be treated like his own wounded soldiers.**
— **The Indian epic Mahabharata (c. 400 BC) and the Laws of Manu (after the turn to a new era) already contained provisions which prohibited the killing of a surrendering adversary who was no longer capable of fighting; forbade the use of certain means of combat, such as poisoned or burning arrows; and provided for the protection of enemy property and prisoners of war.**
— **The Greeks, in the wars between the Greek city-states, considered each other as having equal rights and in the war led by Alexander the Great against the Persians, respected the life and personal dignity of war victims as a prime principle. They spared the temples, embassies, priests, and envoys of the opposite side and exchanged prisoners of war. For example, the poisoning of wells was proscribed in warfare. The Romans also accorded the right to life to their prisoners of war. However, the Greeks and Romans both distinguished between those peoples whom they regarded as their cultural equals and those whom they considered to be barbarians.**

1. These examples show that the laws regulating the conduct of hostilities were recognized in many early cultures. The theory that humanitarian law is essentially 'Eurocentric' is in reality more a criticism of most literature on the subject than a reflection of historical fact. Thus, several of the principles of modern humanitarian law have precursors in ancient India.[78] In recent years much has also been written about the humanitarian principles which can be identified in African customary traditions.[79] As may be expected, the wide range of cultural traditions to which this paragraph refers displays a diversity of practice. Nevertheless, certain common themes can be identified, several of which continue to enjoy a prominent place in modern international humanitarian law.

[78] Singh, in Swinarski (Ed.), *Essays in Honour of Jean Pictet*, 531.
[79] Bello.

a) In many cultural traditions there was an emphasis upon the formalities for opening and closing hostilities. The Sumerian and Hittite traditions are in this respect similar to the later Roman *ius fetiale* which required a formal declaration of war at the commencement of hostilities. In part, this tradition reflects the perception of war as a formal legal condition, as opposed to a factual condition, a perception which has only declined in importance in the twentieth century.[80] The attachment to formalities was also important, however, in serving to distinguish between hostilities entered into by a state and violence which had no official sanction.

b) The protection accorded to ambassadors and the respect for truces and for negotiations held during a war were the precursors of modern principles regarding ceasefires and parlementaires.[81]

c) The prohibition on certain types of weapon, particularly poison, is found in many different traditions and is now embodied in a number of important modern agreements.[82]

2. However, while some cultures respected the lives of prisoners and the wounded, the majority of prisoners faced death or enslavement. A similar fate usually befell the civilian population of a city which resisted attack, although in some traditions the population was spared if there was a timely surrender and the city did not have to be taken by storm.

> **Islam also acknowledged the essential requirements of humanity. In his orders to his commanders, the first caliph, Abu Bakr (about 632), stipulated for instance the following: 'The blood of women, children and old people shall not stain your victory. Do not destroy a palm tree, nor burn houses and cornfields with fire, and do not cut any fruitful tree. You must not slay any flock or herds, save for your subsistence.' However, in many cases Islamic warfare was no less cruel than warfare by Christians. Under the reign of leaders like Sultan Saladin in the twelfth century, however, the laws of war were observed in an exemplary manner. Saladin ordered the wounded of both sides to be treated outside Jerusalem and allowed the members of the Order of St. John to discharge their hospital duties.** 108

Several studies have now shown that many of the central principles of humanitarian law were deeply rooted in Islamic tradition.[83] Although Saladin was unusual amongst both Muslims and Christians during the Crusades in his humane treatment of prisoners and the wounded, he was by no means alone in regarding warfare as subject to principles of law. Three centuries after Saladin, the Turkish Sultan Mehmet extended to the population of Constantinople a greater degree of mercy than might have been expected given that the city had been taken by storm.[84]

[80] See Sections 203 and 245–249.
[81] See Chapter 2.
[82] Article 23, lit. a, HagueReg and GasProt.
[83] Khadduri.
[84] Runciman, 152.

109 **In the Middle Ages feud and war were governed by strict principles. The principle of protecting women, children, and the aged from hostilities was espoused by St Augustine. The enforcement of respect for holy places (Truce of God) created a right of refuge, or asylum, in churches, the observance of which was carefully monitored by the Church. The knights fought according to certain (unwritten) rules. The rules of arms were enforced by the arbiters of tribunals of knights. Those rules applied only to knights, not to the ordinary people. The enemy was frequently regarded as an equal combatant who had to be defeated in an honourable fight. It was forbidden to start a war without prior notification.**

St Augustine's influence on the laws of war during the Middle Ages derived in part from his development of the theory of the 'just war'. Whereas the earliest Christian writers had generally been pacifists, St Augustine reasoned that a Christian committed no wrong by participating in a just war.[85] Augustine's views were later adopted by influential writers such as St Thomas Aquinas, who maintained that a just war required lawful authority, just cause, and rightful intention. The first requirement was important in distinguishing between hostilities entered into on the authority of a prince, on the one hand, from the lawless activities of brigands and war lords on the other. Once the idea that warfare might have a legal and theological basis was accepted, it followed naturally (at least in conflicts between Christian princes) that considerations of law and humanity should also influence the conduct of war. The rules which developed for the regulation of warfare between knights reflected these considerations as well as a general code of chivalry.[86] These rules undoubtedly had a civilizing effect and were a valuable humanitarian development. It should, however, be borne in mind that this code was largely devised for the benefit of the knights and that the purpose of some of the rules was not so much humanitarian as an attempt to prevent the development of weapons and methods of warfare which would threaten their position. Thus, the attempt by the Lateran Council in 1137 to ban the crossbow was motivated as much by a desire to get rid of a weapon which allowed a foot soldier to threaten an armoured knight as by humanitarian concern at the injuries which crossbow bolts could cause. Moreover, the code was intended to apply only to hostilities between Christian princes and was seldom applied outside that context, for example, in the Crusades.

110 **The 'Bushi-Do', the medieval code of honour of the warrior caste of Japan, included the rule that humanity must be exercised even in battle and towards prisoners of war. In the seventeenth century the military tactician Sorai wrote that whoever kills a prisoner of war shall be guilty of manslaughter, whether that prisoner had surrendered or fought 'to the last arrow'.**

[85] Russell.
[86] Keen; Draper, 7 *IRRC* (1965), 3.

As a result of the decline of the chivalric orders, the invention of firearms, and above all the creation of armies consisting of mercenaries, the morals of war regressed towards the end of the Middle Ages. Considerations of chivalry were unknown to these armies. Equally, they made no distinction between combatants and the civilian population. Mercenaries regarded war as a trade which they followed for the purpose of private gain. 111

For the modern law regarding mercenaries, see Article 47, para. 1, AP I and Section 303 below.[87]

At the beginning of modern times the wars of religion, and particularly the Thirty Years War, once again employed the most inhuman methods of warfare. The cruelties of this war particularly led to the jurisprudential consideration of the *ius in bello* and established a number of principles to be observed by combatants. In his work '*De iure belli ac pacis*', published in 1625, Hugo Grotius, the father of modern international law, signalled the existing bounds to the conduct of war. 112

The savagery of warfare in the late sixteenth and early seventeenth centuries is summed up by Grotius in a passage in which he explained why he wrote about the laws of war: 'I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations should be ashamed; men resorting to arms for trivial or for no reasons at all, and when arms were once taken up no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.'[88] In effect, what Grotius described was the breakdown of both the *ius ad bellum* of the Middle Ages (the 'just war' doctrine) and the *ius in bello*. His *'De iure belli ac pacis'* was to have considerable influence on the rebuilding of the latter body of law, although it was not until the twentieth century that any real progress was made in developing a new *ius ad bellum*. Nevertheless, Grotius was not the only writer of this period to focus on the laws of war. Gentilis, who like Grotius was an exile from his own country, published his seminal work *'De iure belli'* in England in 1598,[89] while the Spanish writer Vitoria was also influential in reviving interest in this area of the law, particularly by suggesting that rules of international law might apply to warfare between Christian states and the Indians of the New World.

A fundamental change in the attitude of states to the conduct of war came only with the advent of the Age of Enlightenment in the eighteenth century. In 1762 Jean-Jacques Rousseau made the following statement in his work 'Du Contrat Social': 'War then is a relation, not 113

[87] Hampson, 32 *NYIL* (1991), 3.
[88] Grotius, 28 (Prolegomena).
[89] Holland, 40.

between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders...The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders while they are bearing arms; but as soon as they lay them down and surrender they become once more merely men, whose life no one has any right to take.'[90] From this doctrine, which was soon generally acknowledged, it follows that acts of hostility may only be directed against the armed forces of the adversary, not against the civilian population which takes no part in the hostilities. These ideas also found expression in several international treaties concluded at that time.

The acceptance during the late eighteenth century of the ideas to which Rousseau gave voice in the passage quoted was a landmark in the development of humanitarian law; it was the first recognition of the principle that the purpose of using force is to overcome an enemy state, and that to do this it is sufficient to disable enemy combatants. The distinction between combatants and civilians, the requirement that wounded and captured enemy combatants must be treated humanely, and that quarter must be given, some of the pillars of modern humanitarian law, all follow from this principle. While the French revolutionary wars were in many respects cruel by modern standards, they are important for the development of humanitarian law in that they demonstrated in military practice many of the ideas enunciated by Rousseau and other writers of the Enlightenment.[91] The treaty of friendship and commerce between Prussia and the United States in 1785, whose most important authors are deemed to be King Frederick the Great and Benjamin Franklin, contained some exemplary and pioneering provisions for the treatment of prisoners of war. It was also one of the first attempts to record new principles of humanitarian law in written form, although it was to be another seventy years before the conclusion of the first multilateral treaty on the subject.

114 **In the nineteenth century, after a few interim setbacks, humanitarian ideas continued to gain ground. They led to remarkable initiatives by individuals as well as to numerous international treaties. These treaties imposed restrictions on both the instruments of warfare and the methods of their use.**

The nineteenth century saw the ideas which had gained acceptance in the late eighteenth century given practical effect. A number of major international treaties,

[90] J.-J. Rousseau, *op. cit.*, Livre I, Chapitre IV: 'La guerre n'est donc point une relation d'homme à homme, mais une relation d'État à État, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes *ni même comme citoyens, mais comme soldats; non* point comme membres de la patrie, mais comme ses défenseurs. ... La fin de la guerre étant la destruction de l'Etat ennemi, on a droit d'en tuer les défenseurs tant qu'ils ont les armes à la main; mais sitôt qu'ils les posent et se rendent, cessant d'être ennemis ou instruments de l'ennemi, ils redeviennent simplement hommes et l'on n'a plus de droit sur leur vie.'

[91] Best, 31–127.

some of which are still in force, were adopted, codifying several of the customary rules of warfare and developing those rules in various ways. In addition, the initiative of a number of private individuals led to the creation of what became the International Committee of the Red Cross, which has played a central role in the development and implementation of the rules of humanitarian law.[92]

Florence Nightingale soothed the sufferings of the sick and wounded through her efforts as an English nurse in the Crimean War (1853–1856). She later made an essential contribution towards the renovation of both the civil and military nursing systems of her country. 115

Although she cannot be said to have had a direct effect upon the development of humanitarian law, her work in developing a military medical and nursing service to care for the wounded and sick on the battlefield (which was also a feature of the American Civil War) was an essential prerequisite to the development of that body of humanitarian law which deals with the wounded and sick and which was the subject of the first Geneva Convention.[93]

In 1861 Francis Lieber (1800–1872), a German-American professor of political science and law at Columbia University, N.Y., prepared on the behalf of President Lincoln a manual based on international law (the Lieber Code) which was put into effect for the first time in 1863 for the Union Army of the United States in the American Civil War (1861–1865). 116

The Lieber Code[94] is the origin of what has come to be known as 'Hague Law', so called because the principal treaties which dealt with the subject were concluded at The Hague. Hague Law is the law of armed conflict written from the standpoint of the soldier, in the sense that it takes the form of a statement of the rights and duties of the military in a conflict. Lieber's Code was the first attempt to set down, in a single set of instructions for forces in the field, the laws and customs of war. Its 157 Articles are based on the philosophy of the Enlightenment described in the preceding paragraph, stressing e.g. that only armed enemies should be attacked,[95] that unarmed civilians and their property should be respected,[96] and that prisoners and the wounded should be humanely treated.[97] The Code is, however, far more than a statement of broad general principles. The treatment of prisoners of war, for example, is the subject of detailed regulation,[98] as are the arrangements for exchange of prisoners, truce, and armistice.[99] The Code is the more remarkable for having been issued during a civil war when the Union Government had been at

[92] See Section 1422.
[93] See Sections 117 and 118.
[94] Schindler/Toman, 3.
[95] Article 15.
[96] Articles 22–23 and 34–38.
[97] Article 49.
[98] Articles 49–59.
[99] Articles 105–147.

pains to insist that no state should recognize the Confederacy. In that sense it was many years ahead of its time; even today the rules of humanitarian law applicable in internal armed conflicts are more limited in their scope than the provisions of the Lieber Code.

117 **The Genevese merchant Henry Dunant who, in the Italian War of Unification, had witnessed the plight of 40,000 Austrian, French, and Italian soldiers wounded on the battlefield of Solferino (1859), published his impressions in his book 'A Memory of Solferino' which became known all over the world. In 1863 the International Committee of the Red Cross (ICRC) was founded in Geneva on his initiative.**

What shocked Dunant after the Battle of Solferino was the lack of any systematic effort by the armies concerned to care for the wounded, who were left to die on the battlefield, and often robbed and murdered by local inhabitants. In so far as medical services were available, their providers appeared unprotected from attack or capture. Dunant organized teams of volunteers to collect and care for the wounded at Solferino. The ICRC, for whose foundation he was responsible, was and remains an exclusively Swiss organization which has promoted the creation of better medical services in wartime, and the adoption of international agreements dealing first with the wounded and subsequently with the whole field of humanitarian law.[100]

118 **The 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field defined the legal status of medical personnel. It stipulated that wounded enemy soldiers were to be collected and cared for in the same way as members of friendly armed forces. These rules were extended and improved by the Geneva Convention of 1906.**

The 1864 Geneva Convention marks the beginning of the development of what has become known as 'Geneva Law'. In contrast to Hague Law (see commentary to Section 116), Geneva Law is written from the standpoint of the 'victims' of armed conflict: the wounded, sick, shipwrecked, prisoners of war, and civilians. It does not purport to define the rights and duties of the military but rather to lay down certain basic obligations designed to protect those victims, while leaving to customary law and Hague Law questions which do not fall within its provisions. The borderline between Hague and Geneva Law has now largely been eroded and AP I contains elements of both these legal traditions. The 1864 and 1906 Conventions have been superseded by the more detailed provisions of GC I and GC II, 1949.[101] Certain principles are, however, common to all these treaties. All provide that the parties to a conflict must not only abstain from attacking the wounded and medical personnel

[100] See Willemin/Heacock; Boissier; Durand, (1978).
[101] See Chapter 6.

caring for them, but must also collect and provide care for them. The use of the Red Cross emblem (and later the Red Crescent) as a protected sign also stems from these conventions.

The 1868 Declaration of St Petersburg was the first to introduce limitations on the use of weapons of war. It codified the customary principle, still valid today, prohibiting the use of weapons to cause unnecessary suffering. 119

1. The Declaration of St Petersburg was the result of an initiative by the Russian Government to obtain the agreement of the major powers to outlaw the use in war between themselves of 'rifle shells', small projectiles which exploded or caught fire on impact.[102] These exploding or inflammable bullets caused far worse injuries than the ordinary bullets of the time (the effects of which were almost invariably disabling and frequently fatal). The Preamble to the Declaration states that: 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; for this purpose it is sufficient to disable the greatest possible number of men; this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable'. It concludes that 'the employment of such arms would, therefore, be contrary to the laws of humanity'. The parties therefore agreed to renounce the use, in conflicts between themselves, of 'any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances'. This provision remains in force and has now acquired the status of customary international law, although the evolution of aerial warfare led to it being interpreted as permitting the use of such projectiles against aircraft.[103]

2. The importance of the 1868 Declaration lies not so much in the specific ban which it introduced as in its statement of the principles on which that ban was based. The Preamble to the Declaration reflects the theories developed by Rousseau nearly a century earlier[104] and is the classic statement of the principle that it is prohibited to employ weapons or methods of warfare which are likely to cause unnecessary suffering.[105] Humanitarian law accepts that one of the legitimate objects of warfare is to disable enemy combatants (and in many cases this necessarily involves killing) but it rejects the use of weapons which cause additional suffering for no military gain.[106] That principle remains important today. It is one of the general principles of humanitarian law, by which the legality of all weapons and means of warfare fall to be measured. It also inspired a number of other international agreements banning specific weapons, such as poison gas and soft-headed or 'Dum-Dum' bullets.[107]

[102] Kalshoven, *Arms, Armaments* 205.
[103] See e.g. Article 18, para. 1, HRAW 1923.
[104] See Section 113.
[105] See now Article 35, para. 1, AP I and Article 23, lit. e, HagueReg. See also Section 130.
[106] See Chapter 4.
[107] See Section 128.

120 The 1874 Brussels Declaration provided the first comprehensive code of the laws and customs of war. That Declaration was further developed at the Hague Peace Conferences of 1899 and 1907. The most important result was the Hague Regulations Concerning the Laws and Customs of War on Land (HagueReg).

The conference which drew up the Brussels Declaration was also the result of a Russian initiative, although some of the inspiration for the project lay in the earlier Lieber Code. The Declaration[108] itself was never ratified but many of its provisions were incorporated into the Manual of the Laws and Customs of War adopted by the *Institut de Droit International* at its Oxford session in 1880 ('the Oxford Manual').[109] The Brussels Declaration and the Oxford Manual, although not legally binding, were highly influential and many of the provisions of the HagueReg can be traced back to them. Although parts of the Regulations have been superseded by the Geneva Conventions and AP I, many remain in force and are now regarded as declaratory of customary international law.[110] Thus, the section of the Regulations dealing with the government of occupied territory is still of considerable importance and is generally regarded as applicable to Israel's occupation of territories in the Middle East.[111]

121 World War I, with its new munitions and unprecedented extension of combat actions, demonstrated the limits of the existing law.

The most important development of World War I, in so far as it affected humanitarian law, was the evolution of aerial warfare and other forms of long range bombardment. These took place in spite of the requirement of Article 25 HagueReg, that attacks on undefended towns and villages were prohibited. An undefended town was defined as one which could be captured without the use of force (a legacy of early customary rules which distinguished between the treatment of a city taken by storm and one which surrendered). Aerial warfare opened up the possibility of bombarding towns hundreds of miles behind enemy lines. These towns might be undefended in the sense that no forces were stationed near them, but they did not fall within the terms of Article 25 because they could not be captured without force. Aerial warfare thus posed an unprecedented threat to civilians for which the existing laws made no provision. World War I also revealed deficiencies in the legal protection of the wounded and prisoners of war, which led to the adoption of new Geneva Conventions in 1929 (see Section 123). The widespread use of poison gas during World War I also resulted in the adoption in 1925 of the Geneva Gas Protocol.[112]

[108] Schindler/Toman, 25.
[109] Schindler/Toman, 35.
[110] Decision of the International Military Tribunal in Nuremberg.
[111] Bar-Yaacov, 24 *Israel Law Review* (1990), 485.
[112] See Section 128.

In 1923 the Hague Rules of Aerial Warfare (HRAW 1923) were formulated, together with rules concerning the control of radio communications in times of war. Although they were never legally adopted, they were influential in the development of legal opinion. 122

1. World War I had highlighted the danger to the civilian population from aerial warfare, and in the aftermath of that War numerous proposals were made to subject aerial warfare to new legal constraints. The obvious military advantages of aerial warfare, however, prevented agreement on a new legal regime at the Washington Conference on the Limitation of Armaments, 1921–1922. Nevertheless, some of the states represented at that Conference appointed a Commission of Jurists, chaired by the United States lawyer John Bassett Moore, with representatives from France, Italy, Japan, The Netherlands, and the United Kingdom, to investigate the subject and to make proposals. That Commission drew up the HRAW 1923 in an attempt to achieve a balance between military interests and the protection of the civilian population. The rules[113] prohibited attacks on civilians and aerial bombardment 'for the purpose of terrorizing the civilian population'.[114] Attacks had to be confined to military objectives, and in Article 24 the Commission attempted to draw up a list of these. Certain objectives were given special protection and the Rules also included a duty to minimize incidental civilian casualties.

2. The HRAW 1923 were never legally adopted and their principles were widely disregarded during World War II.[115] The attempt to devise a list of military objectives was probably doomed to failure, since objectives which have military value will vary over time and from one conflict to another. Nevertheless, although they never entered into force, the Rules were widely regarded at the time as an important statement of the legal principles which should govern aerial warfare. The basic principles which they laid down, though not the list of targets, were embodied in a resolution of the Assembly of the League of Nations in 1938. That resolution (modelled on a statement by the Prime Minister of the United Kingdom to the House of Commons) recognized the urgent need for the adoption of regulations dealing with aerial warfare and stipulated that the Assembly: 'Recognizes the following principles as a necessary basis for any subsequent regulations: (1) The intentional bombing of civilian populations is illegal; (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable; (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.'[116]

3. After World War II the ICRC drew up in 1956 the Delhi Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.[117]

[113] For more detailed consideration, see Sections 325–329 and 448–449.
[114] Article 22.
[115] See Spaight.
[116] Schindler/Toman, 221.
[117] Schindler/Toman, 251.

These Draft Rules and the ICRC Commentary upon them show the influence of the HRAW 1923. More importantly, many of the principles laid down in the 1923 Rules have been adopted, albeit in a modified form, in AP I of 1977, and have thus become binding treaty law.

123 **In 1929 the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and the Convention relative to the Treatment of Prisoners of War were signed in Geneva. They developed the terms of the Geneva Convention of 1906 and part of the Hague Regulations of 1907.**

The 1929 Geneva Conventions[118] were influenced by the experience of World War I and contained more detailed regulations for the treatment of the wounded and prisoners of war than their predecessors. Although the Conventions were in force during World War II, some of the major protagonists, including the USSR and Japan, were not parties to them. Nevertheless, at the end of the War, tribunals in a number of war crimes ruled that the main provisions of the Prisoners of War Convention had become part of customary international law and were thus binding on all states by 1939.[119] The 1929 Conventions have now been superseded[120] by the 1949 Geneva Conventions.

124 **The first regulations on naval warfare were already developed by the Middle Ages. These regulations, which primarily embodied the right to search vessels and their cargo and the right of seizure, were subsequently changed several times. The treatment of ships belonging to neutral states lacked uniform regulation and was disputed. In the Baltic Sea, the Hanseatic League used its almost unrestricted naval supremacy to enforce embargoes in times of war, which were not only detrimental to its adversary, but also made it impossible for neutral states to trade with that adversary. The ability of neutral states to pursue their maritime trade activities in times of war could only override the attempts by belligerents to cut their adversaries off from ship-to-shore supplies if the position of these powerful neutral states was secured. In the eighteenth century, this led to the formation of alliances between neutral states, and to the deployment of their naval forces to protect their right to free maritime trade. The 1856 Paris Declaration Concerning Maritime Law (ParisDecl 1856) was the first agreement to address the protection of neutral maritime trade.**

1. Although the law of naval warfare has never been subjected to such detailed regulation by treaty as the law of land warfare, the customary law on the subject

[118] Schindler/Toman, 325 and 339.

[119] *United States v Von Leeb*, 15, *Annual Digest*, 376; Baxter, 41 *BYIL* (1965–1966), 286.

[120] While it took some time for states parties to the 1929 Conventions to become parties to the 1949 Conventions, the latter are today universally binding, see below, Section 125, para. 1.

developed at an earlier date. This development was largely due to the fact that naval warfare involved a far greater degree of contact between combatants and neutrals and so brought into conflict the right of a combatant to conduct war effectively and the right of a neutral state's shipping to enjoy the freedom of the seas. Moreover, the law of naval warfare was unusual in that each warring nation established a tribunal (or series of tribunals) to rule on the legality of interference with neutral shipping. The British Prize Court played a particularly important part in the development of the laws of naval warfare, since throughout the eighteenth and nineteenth centuries Great Britain was the dominant maritime power. Nevertheless, belligerent treatment of neutral shipping remained a source of controversy and the United States, which remained neutral throughout the French Revolutionary and Napoleonic wars, engaged in hostilities with France (1797–1801) and Britain (1812–1815) partly on account of what it regarded as the infringement of neutral rights.

2. The influence of neutral states generally declined after the late eighteenth century and the balance tipped in favour of belligerent rights, although the Paris Declaration went some way to arrest this process. The United States, which had been a champion of neutral rights in the period 1789–1815, took a broad view of the rights of a belligerent during the Civil War (1861–1865), greatly extending for example the doctrine of continuous voyage. This process was taken even further during the World Wars of the twentieth century.

3. The Paris Declaration of 1856 was important not only for its provisions on neutrality but also for its abolition of privateering, in which a belligerent authorized private shipping to prey upon the enemy's merchant ships.

III. Legal Sources

The four Geneva Conventions have come to be internationally binding upon all states: 125

- **— Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I);**
- **— Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II);**
- **— Geneva Convention III Concerning the Treatment of Prisoners of War (GC III);**
- **— Geneva Convention IV Concerning the Protection of Civilian Persons in Time of War (GC IV).**

The Geneva Conventions of 1949 have now achieved universal participation with 194 parties (there are 192 members of the United Nations). Since the Conventions