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CHAPTER BIBLIOGRAPHY

Suggested readings:

BEST Geoffrey, *War and Law since 1945*, Oxford, Clarendon Press, 1994, 454 pp.

BOUCHET-SAULNIER Françoise, *The Practical Guide to Humanitarian Law,* Lanham (Maryland), Oxford, Rowman & Littlefield, 2007, 2nd ed., 555 pp.

BUIRETTE Patricia & LAGRANGE Philippe, *Le droit international humanitaire*, Paris, La Découverte, 2008, 122 pp.

CARIO Jérôme, *Le droit des conflits armés*, Panazol, Lavauzelle Éditions, Centre de Recherche des Écoles de Saint-Cyr, 2002, 192 pp.

DAVID Éric, *Principes de droit des conflits armés*, Brussels, Bruylant, 4th ed., 2008, 1117 pp.

DEYRA Michel, *Le droit dans la guerre*, Paris, Gualino, 2009, 283 pp.

DINSTEIN Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, CUP, 2010, 320 pp.

DJIENA WEMBOU Michel-Cyr & FALL Daouda, *Le droit international humanitaire, théorie générale et réalités africaines*, Paris, L'Harmattan, 2000, 431 pp.

FLECK Dieter (ed.), *Handbook of Humanitarian Law*, Oxford, OUP, 2nd ed., 2008, 770 pp.

GARDAM Judith, *Humanitarian Law*, Aldershot, Ashgate, 1999, 570 pp. GASSER Hans-Peter, *International Humanitarian Law, an Introduction*, Geneva, Henry-Dunant Institute, 1993, 92 pp.

GREEN Leslie C., *Contemporary Law of Armed Conflict*, 3rd ed., Manchester (USA), New York,

Manchester University Press, 2008, 434 pp.

GREENWOOD Christopher, *Essays on War in International Law*, London, Cameron May, 2006, 700 pp.

HAROUEL-BURELOUP Véronique, *Traité de droit humanitaire*, Paris, PUF, 2005, 556 pp.

HENCKAERTS Jean-Marie & DOSWALD-BECK Louise, *Customary International Humanitarian Law*, Cambridge/Geneva, CUP/ICRC, 2005, 3 Vol., 5032 pp.

KALSHOVEN Frits & ZEGVELD Liesbeth, *Constraints on the Waging of War*, Geneva, ICRC, 2001, 223 pp.

KEWLEY Gretchen, *Humanitarian Law in Armed Conflicts*, Collingwood, 1984, 63 pp.

KOLB Robert, *Ius in bello – Le droit international des conflits armés: Précis*, Basel, Helbing Lichtenhahn; Brussels, Bruylant, 2nd ed., 2009, 551 pp.

KOLB Robert, HYDE Richard, *An Introduction to the International Law of Armed Conflicts*, Oxford-Portland, Oregon, Hart, 2008, 348 pp.

OPPENHEIM Lassa, "International Law: A Treatise", in LAUTERPACHT Hersch (ed.), Vol. II, *Disputes, War and Neutrality*, London, Longman, 7th ed., 1952, 941 pp.

PICTET Jean, *Development and Principles of International Humanitarian Law*, The Hague, Geneva, M. Nijhoff, Henry-Dunant Institute, 1985, 99 pp.

RODRIGUEZ-VILLASANTE Y PRIETO José Luis, *Derecho internacional humanitario*, Valencia, Tirant lo Blanch, Spanish Red Cross, 2nd ed., 2007, 1006 pp.

ROGERS Anthony P.V., *Law on the Battlefield*, 2nd ed., Manchester, Manchester University Press, 2004, 269 pp.

ROUSSEAU Charles, *Le droit des conflits armés*, Paris, Pedone, 1983, 629 pp.

SOLIS Gary, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, CUP, 2010, 659 pp.

Swiss Federal Department of Foreign Affairs, *ABC of International Humanitarian Law*, Berne, Swiss Federal Department of Foreign Affairs, 2009, 44 pp.

Further readings:

BALENCIÉ Jean-Marc & LA GRANGE Arnaud de, *Les nouveaux mondes rebelles: conflits, terrorisme et contestations*, Paris, Michalon, 2005, 503 pp.

BELANGER Michel, *Droit international humanitaire général*, Paris, Gualino, 2nd ed., 2007, 156 pp.

BIAD Abdelwahab, *Droit international humanitaire*, Paris, Ellipses, 2nd ed., 2006, 139 pp.

BULA-BULA Sayeman, *Droit international humanitaire,* Louvain-la-Neuve, Bruylant-Academia, 2010, 402 pp.

CASSESE Antonio, *Violence and Law in the Modern Age*, Cambridge, Oxford, Polity Press, Blackwell, 1988, 194 pp.

FRIEDMAN Leon (ed.), *The Law of War, A Documentary History,* New York, Random House, 2 Vol., 1972, 912 pp.

GREEN Leslie C., *Essays on the Modern Law of War*, Ardsley, New York, Transnational Publishers, 1999, 604 pp.

GREENSPAN Morris, *The Modern Law of Land Warfare*, Berkeley & Los Angeles, University of California Press, 1959, 724 pp.

GUTMAN Roy, RIEFF David & DWORKIN Anthony (eds), *Crimes of War, What the Public Should Know*, London, Norton, 2nd ed., 2007, 447 pp.

ENGDAHL Ola & WRANGE Pal (eds), *Law at War: The Law as it Was and the Law as it Should Be, Liber Amicorum Ove Bring*, Leiden, Boston, M. Nijhoff, 2008, 325 pp.

ISHOY Rikke, *Handbook on the Practical Use of International Humanitarian Law*, 2nd edition, Kobenhavn, Danish Red Cross, October 2008, 142 pp.

KALDOR Mary, *New and Old Wars, Organized Violence in a Global Era*, Stanford, Stanford University Press, 1999, 206 pp.

KALSHOVEN Frits, *Reflections on the Law of War: Collected Essays*, Leiden, Boston, M. Nijhoff, 2007, 1115 pp.

McCOUBREY Hilaire, *International Humanitarian Law – The Regulation of Armed Conflicts*, Dartmouth,

1990, 227 pp.

McCOURBEY Hilaire, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, Aldershot [etc], Dartmouth, Ashgate, 2nd ed., 1998, 326 pp.

MACDOUGAL Myres S. & FELICIANO Florentino P., *The International Law of War: Transnational Coercion and World Public Order*, Dordrecht, M. Nijhoff; New Haven, New Haven Press, 2nd ed., 1994, 872 pp.

MEYER Michael A. (ed.), *Armed Conflict and the New Law: Aspects of the 1977 GenevaProtocols and the 1981 Weapons Convention*, London, British Institute of International and Comparative Law, 1989, 298 pp.

NAHLIK Stanislaw E., "A Brief Outline of International Humanitarian Law", in *IRRC*, No. 241, July 1984, pp. 187-226.

NEFF Stephen, *War and the Law of Nations: a General History,* Cambridge, CUP 2005, 443 pp.

PAUST Jordan J., BASSIOUNI M. Cherif, SCHARF Michael, GURULÉ Jimmy, SADAT Leila, ZAGARIS Bruce & WILLIAMS Sharon A., *Human Rights Module on Crimes Against Humanity, Genocide, Other Crimes Against Human Rights, and War Crimes*, Durham, Carolina Academic Press, 2001, 369 pp.

SCHWARZENBERGER Georg, *International Law as Applied by International Courts and Tribunals – The Law of Armed Conflict*, London, Stevens & Sons, Vol. II, 1968, 881 pp.

SOLF Waldemar A. & ROACH Ashley, *Index of International Humanitarian Law*, Geneva, ICRC, 1987, 283 pp.

Compilation of documents:

CAREY John, DUNLAP William & PRITCHARD John (eds), VEUTHEY Michel, LAVOYER Jean-Philippe [*et al.*], *International Humanitarian Law*, Ardsley, New York, Transnational Publishers, 2003-2006, 3 Vol. (338, 367, 387 pp.)

DAVID Éric, TULKENS Françoise & VANDERMEERSCH Damien, *Code de droit international humanitaire, textes réunis au 1er janvier 2010*, Brussels, Bruylant, 4th ed., 2010, 972 pp.

FORREST MARTIN Francisco, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis*, Cambridge, CUP, 2006, 990 pp.

HAROUEL Véronique, *Grands textes de droit humanitaire*, Paris, PUF, Que Sais-je ?, No. 3604, 2001,

127 pp.

O'CONNELL Mary Ellen, *International Law and the Use of Force*, New York, Foundation Press, 2005, 618 pp.

PERRAKIS Stelios & MAROUDA Maria-Daniella, *Armed Conflicts and International Humanitarian Law: 150 Years after Solferino: Acquis and Prospects*, Athènes, Sakkoulas; Brussels, Bruylant, European Centre for Research and Training on Human Rights and Humanitarian Action, 2009, 653 pp.

ROBERTS Adam & GUELFF Richard, *Documents on the Laws of War*, Oxford, Clarendon Press, 3rd ed., 2000, 765 pp.

SCHINDLER Dietrich & TOMAN Jiri (ed.), *The Laws of Armed Conflicts*, *A Collection of Conventions, Resolutions and Other Documents*, Leiden, Boston, M. Nijhoff, 4th ed., 2004, 1493 pp.

Bibliographies:

"Bibliography 1998-1999: International Humanitarian Law", in *YIHL*, Vol. 2, 1999, pp. 571-607.

Bibliography of International Humanitarian Law Applicable in Armed Conflicts [Compiled by Huong Thi Huynh under Jiri Toman's direction; Foreword by Jean Pictet], Geneva, ICRC, Henry-Dunant Institute, 2nd ed., 1987, 604 pp.

Public International Law: a Current Bibliography of Books and Articles = Völkerrecht: laufende Bibliographie = Droit international public: bibliographie = Derecho internacional público: bibliografía, semi-annual review published by the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg.

A. Concept and Purpose of International Humanitarian Law

I. Philosophy of International Humanitarian Law

Introductory text

International Humanitarian Law (IHL) can be defined as the branch of international law limiting the use of violence in armed conflicts by:

a. sparing those who do not[1] or no longer[2] directly[3] participate in hostilities;
b. restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for[4] – can only be to weaken the military potential of the enemy.[5]

It is from this definition that the basic principles of IHL may already be drawn, namely:

- the distinction between civilians and combatants,
- the prohibition to attack those *hors de combat*,
- the prohibition to inflict unnecessary suffering,
- the principle of necessity, and
- the principle of proportionality.

This definition nevertheless also reveals the inherent limits of IHL:

- it does not prohibit the use of violence;
- it cannot protect all those affected by an armed conflict;
- it makes no distinction based on the purpose of the conflict;
- it does not bar a party from overcoming the enemy;
- it presupposes that the parties to an armed conflict have rational aims and that those aims as such do not contradict IHL.

Contribution

The law of armed conflicts is characterized by both simplicity and complexity – simplicity to the extent that its essence can be encapsulated in a few principles and set out in a few sentences, and complexity to the extent that one and the same act is governed by rules that vary depending on the context, the relevant instruments and the legal issues concerned. [...] The law of armed conflicts – as we have stated repeatedly – is simple law: with a little common sense and a degree of clear-sightedness, anyone can grasp its basic tenets for himself without being a legal expert. To put things as simply as possible, these rules can be summed up in four precepts: do not attack non-combatants, attack combatants only by legal means, treat persons in your power humanely, and protect the victims. [...] At the same time, the law of armed conflicts is complex since it does apply only in certain situations, those situations are not always easily definable in concrete terms and, depending on the situation, one and the same act can be lawful or unlawful, not merely unlawful but a criminal offence, or neither lawful nor unlawful! ...

[**Source**: DAVID Éric, *Principes de droit des conflits armés*, Brussels, Bruylant, 3rd ed., 2002, pp. 921-922; original in French, unofficial translation.]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BEST Geoffrey, “The Restraint of War in Historical and Philosophical Perspective”, in *Humanitarian Law of Armed Conflict – Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, M.

Nijhoff, 1991, pp. 3-26.
- HENSEL Howard M. (ed.), *The Legitimate Use of Military Force: the Just War Tradition and the Customary Law of Armed Conflict*, Hampshire, Ashgate, 2008, 300 pp.
- WALZER Michael, *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, 3rd ed, New York, Basic Books, 2000, 361 pp.

Further reading:

- BELLAMY Alex J., *Just Wars: from Cicero to Iraq*, Cambridge, Malden, Polity, 2006, 280 pp.
- BOUTHOUL Gaston, *Le phénomène guerre: méthode de la polémologie, morphologie des guerres, leurs infrastructures*, Paris, Payot, 1962.
- DAVID Charles-Philippe, *La guerre et la paix, Approches contemporaines de la sécurité et de la stratégie*, Paris, Presses de la Fondation nationale des Sciences politiques, 2000.
- DELMAS Philippe, *Le bel avenir de la guerre*, Paris, Gallimard, 1997, 281 pp.
- EHRENREICH Barbara, *Le sacre de la guerre: essai sur les passions du sang*, Paris, Calmann-Lévy, 1999, 328 pp.
- FURET Marie-Françoise, MARTINEZ Jean-Claude & DORANDEU Henri, *La guerre et le droit*, Paris, Pedone, 1979, 335 pp.
- GLUCKSMANN André & WOLTON Thierry, *Silence, on tue*, Paris, Grasset, 1986, 290 pp.
- HOWARD Michael, "*Temperamenta Belli*: Can War be Controlled?", in HOWARD Michael, *Restraints on War*, Oxford, OUP, 1977.
- IGNATIEFF Michael, *Warrior's Honour: Ethic War and the Modern Conscience*, New York, Metropolitan Books, 1997, 207 pp.
- JUNGER Ernst, *La guerre comme expérience intérieure*, Paris, Bourgois, 1997, 164 pp.
- LÉVY Bernard-Henri, *Réflexions sur la guerre, le mal et la fin de l'histoire (précédé de: Les damnés de la guerre)*, Paris, Grasset, 2001, 408 pp.
- LUTTWAK Edward N., "Give War a Chance", in *Foreign Affairs*, July-August 1999, pp. 36-44. *Preventing Deadly Conflict: Final Report, Carnegie Commission on Preventing Deadly Conflict*, New York, 1997.
- RUFIN Jean-Christophe, *L'aventure humanitaire*, Paris, Gallimard, 2001, 176 pp.
- TANNER Fred, "Conflict Prevention and Conflict Resolution: Limits of Multilateralism", in *IRRC*, No. 839, September 2000, pp. 541-558.
- THÜRER Daniel, "International Humanitarian Law: Essence and Perspectives", in *Revue suisse de droit international et européen*, 2, 2007, pp. 157-164.
- VAN CREVELD Martin, *On Future War*, London, Brassey's, 1991, 254 pp.
- VAN CREVELD Martin, *The Transformation of War*, New York, Free Press, 1991, 254 pp.

II. Can warfare be regulated by law?

Introductory text

In defending the acts of Milo in an internal armed conflict in Rome, Cicero pleaded, *"... silent enim leges inter*

arma."[6] To this day, many question or deny that law can regulate behaviour in such an exceptional, anarchic and violent situation as armed conflict – all the more so as all internal laws prohibit internal armed conflicts and international law has outlawed international armed conflicts. How can legal considerations be expected to restrict human behaviour when individual or collective survival is at stake?

Armed conflicts nevertheless remain a reality, one perceived by all those involved as being morally different from a crime committed by one side or a punishment inflicted by the other. There is no conceptual reason why such a social reality – unfortunately one of the most ancient forms of intercourse between organized human groups – should not be governed by law. History has shown that the appearance of any reality in a society – be it highly organized or not – sparks the concomitant appearance of laws applicable to it. The applicability of internal law – penal and disciplinary military law – to behaviour in armed conflict has, moreover, never been questioned. To the contrary, armed conflicts as distinct from anarchic chaos cannot be imagined without a minimum of uniformly respected rules, e.g., that the fighters of one side may kill those of the opposing side but not their own commanders or comrades.

In the reality of even contemporary conflicts, the expectations of belligerents, and the arguments (hypocritical or not) invoked by governments, rebels, politicians, diplomats, fighters, and national and international public opinion, are based on standards, not only on when armed violence may (or, rather, may not) be used, but also on how it may be used. When it comes to judging behaviour (and this is what law is all about) IHL is omnipresent in contemporary conflicts:[7] in United Nations Security Council resolutions and on the banners of demonstrators, in politicians' speeches and in newspaper articles, in opposition movement political pamphlets and in NGO reports, in military manuals and in diplomatic aide-mémoires. People with completely different cultural and intellectual backgrounds, emotions, and political opinions agree that in an armed conflict killing an enemy soldier on the battlefield and killing women and children because they belong to the "enemy" are not equivalent acts.[8] Conversely, no criminal justice system confers a different legal qualification on a bank robber who kills a security guard and one who kills a bank customer.

It can be objected that this only proves that behaviour even in war is subject to moral strictures, but not that it can be subject to legal regulation. Either this objection reserves the term "law" to rules regularly applied by the centralized compulsory system of adjudication and enforcement that is typical of any domestic legal system – in which case international law, and therefore also IHL, is not law – or it fails to understand that it is precisely during such controversial activity as waging war, where each side has strong moral arguments for its cause, that the function of law to limit the kind of arguments that may be deployed is essential to ensure minimum protection for war victims. As for the reality, every humanitarian worker will confirm that when pleading the victims' cause with a belligerent, whether a head of State or a soldier at a roadblock, even the most basic moral arguments encounter a vast variety of counterarguments based on collective and individual experience, the culture, religion, political opinions and mood of those addressed, while reference to international law singularly restricts the store of counterarguments and, more importantly, puts all human beings, wherever they are and from wherever they come, on the same level.

Regarding the completely distinct question of why such law is, should be, or is not respected in contemporary conflicts, law can only provide a small part of the answer, which is discussed elsewhere in this book under "implementation." The main part of the answer can by definition not be provided by law. As Frédéric Maurice, an International Committee of the Red Cross delegate wrote a few months before he was killed on 19 May 1992 in Sarajevo by those who did not want that assistance be brought through the lines to the civilian population there, as prescribed by International Humanitarian Law:

"War anywhere is first and foremost an institutional disaster, the breakdown of legal systems, a circumstance in which rights are secured by force. Everyone who has experienced war, particularly the wars of our times, knows that unleashed violence means the obliteration of standards of behaviour and legal systems. Humanitarian action in a war situation is therefore above all a legal approach which precedes and accompanies the actual provision of relief. Protecting victims means giving them a status, goods and the infrastructure indispensable for survival, and setting up monitoring bodies. In other words the idea is to persuade belligerents to accept an exceptional legal order – the law of war or humanitarian law – specially tailored to such situations. That is precisely why humanitarian action is inconceivable without close and permanent dialogue with the parties to the conflict."[9]

Quotation

Thucydides on might and right "The Athenians also made an expedition against the Isle of Melos [...]. The Melians [...] would not submit to the Athenians [...], and at first remained neutral and took no part in the struggle, but afterwards upon the Athenians using violence and plundering their territory, assumed an attitude of open hostility. [...] [The Melians and the Athenians] sent envoys to negotiate. [...]

Melians: [...] [Y]our military preparations are too far advanced to agree with what you say, as we see you are come to be judges in your own cause, and that all we can reasonably expect from this negotiation is war, if we prove to have right on our side and refuse to submit, and in the contrary case, slavery. [...]

[...]

Athenians: For ourselves, we shall not trouble you with specious pretences [...] of how we [...] are now attacking you because of wrong that you have done us – and make a long speech which would not be believed [...] since you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must."

[**Source**: Thucydides, *History of the Peloponnesian War* (translated by Richard Crawley) (London: Everyman, 1993) Online: http://eserver.org/history/peloponesian-war.txt]

[**N.B.**: The Athenians finally lost the war.]

CASES AND DOCUMENTS

- UN, Minimum Humanitarian Standards [Part B., paras 14-16]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- IGNATIEFF Michael, *Warrior's Honour: Ethnic War and the Modern Conscience*, New York, Metropolitan Books, 1997, 207 pp.
- KENNEDY David, *Of War and Law*, Princeton, Oxford, Princeton University Press, 2006, 191 pp. The Hebrew University Faculty of Law, "The Morality and Law of War", in *Israel Law Review*, vol. 40, No. 3, 2007, pp. 671-851.

III. International Humanitarian Law and cultural relativism

[See also **Introductory Text** and **Quotations** under Historical Development of International Humanitarian Law]

Introductory text

Up until the 1970s, IHL – or at least its codified norms – was strongly influenced by Western culture and European powers. However, the humanitarian ideas and concepts formalized in humanitarian law treaties are shared by many different schools of thought and cultural traditions.[10]

These *international dimensions of IHL* should never be underestimated or forgotten: very often respect for and implementation of the rules will in fact depend on the establishment of a clear correlation between the applicable treaties and local traditions or customs.

Jean Pictet, one of the most famous scholars and practitioners of IHL, tried to explain the cultural universalism of this branch of public international law:

"[...] The modern world has placed its hopes in internationalism and therein no doubt its future lies. Now, in an international environment, man's rights can only be on what is universal, on ideas capable of bringing together men of all races. [...] Similarity alone can be the basis for universality and, although men are different, human nature is the same the world over. International humanitarian law in particular has this universal vocation, since it applies to all men and countries. In formulating and perfecting this law, [...] the International Committee of the Red Cross has sought precisely this common ground and put forward rules acceptable to all because they are fully consistent with human nature. This is, moreover, what has ensured

the strength and durability of these rules.

However, today the uniformity of human psychological make-up and the universality of standards governing the behaviours of nations are recognized, and no longer is there belief in the supremacy of any one civilization: indeed the plurality of cultures and the need to take an interest in them and study them in depth is recognized. This leads to an awareness that humanitarian principles are common to all human communities wherever they may be. When different customs, ethics and philosophies are gathered for comparison, and when they are melted down, their particularities eliminated and only what is general extracted, one is left with a pure substance which is the heritage of all mankind."[11]

Contribution

Its relationship with universal values is probably one of the greatest challenges faced by humanity. The law cannot avoid addressing it. Unfortunately, the question of the universal nature of international humanitarian law has prompted little scholarly deliberation, unlike the body of human rights law, whose universal nature has been forcefully called into question – by anthropologists, among others, and particularly since the 1980s.

In fact, the debate seems at first glance to have been boxed into a corner, to have reached stalemate. The advocates of universalism and those of relativism have managed to pinpoint the weaknesses of the positions held by the opposite camp. Certainly the Western nature of the major texts of international humanitarian law and human rights law is evident, as is the danger of protection for the victims diminishing as a result of upholding any kind of tradition. Positivist legal experts and specialists in the social sciences also evidently have difficulty in finding a common set of terms.

Nonetheless, the great non-Western legal traditions present, both for international humanitarian law and for human rights law, obstacles which at first seem insurmountable, at least in terms of their legitimacy.

However, it cannot be denied that respect for human dignity is an eminently universal concept. The foundations of international humanitarian law, or at least their equivalents, are thus found in the major cultural systems on our planet: the right to life, the right to physical integrity, the prohibition of slavery and the right to fair legal treatment. However, a considerable problem is the fact that those principles are not universally applied. In the animist world, for instance, how a prisoner is treated is generally determined by the relationship between opposing clans and other groups.

This does not, however, necessarily negate the universal foundations of international humanitarian law. Non-Western cultures cannot escape the steamroller of modern life, and the hybridization of human

societies is very real. In a number of African countries, for example, three legal systems operate side by side: a modern system, an Islamic system and a customary system.

Moreover, the showing of respect for other cultural systems – a gift to us from anthropology – must not mean that we cast aside the greatest achievement of modern times: the critical faculty. Thus, if we came across a group of human beings who practised the systematic torture of prisoners in the name of tradition or religion, this would not make torture somehow more acceptable. In fact, a mistake has been made – particularly in the West – since the end of the colonial era: the discovery of the wealth of all those cultures previously crushed in the name of progress does not somehow exempt them from critical judgement. Universalism does not require unanimity.

Some supporters of radical relativism seem to have forgotten that humanity and culture cannot exist without prohibitions. In any society, individuals are taught from a very early age to control their aggressive and sexual drives. This is a necessary rite of passage from nature to culture. In fact, many lines that may not be crossed are precisely what makes us human. International humanitarian law represents precisely the limits that combatants must never exceed if they are not to sacrifice their humanity and revert to a state of raw nature. Is the whole of international humanitarian law universal? The foundations of that law certainly are, since they derive from natural law. The fact that fundamental legal rules exist is based on an intuitive force and can even be said to be a requirement of the human condition, which causes killing, torture, slavery and unfair judgement to arouse repulsion not only among the vast majority of intellectuals but among ordinary people as well. Whether attributed to reason, universal harmony or the divine origin of mankind, sound assertions are made about human nature. International humanitarian law therefore attains a universal dimension by symbolizing common human values.

[**Contribution** by Louis Lafrance, who has masters degrees in psychology from the University of Montreal and in international law from the University of Quebec in Montreal. Mr Lafrance has spent time in many conflict countries, first as a journalist and then as a human rights specialist working for the United Nations. This text is based on his masters dissertation, which deals with the universal nature of international humanitarian law in conflicts in countries in which State structures have broken down. Original in French, unofficial translation]

CASES AND DOCUMENTS

- Israel, Cheikh Obeid et al. v. Ministry of Security [Opinion of Judge Englard]
- Saudi Arabia, Use of the Red Cross Emblem by United States Forces
- Afghanistan, Separate Hospital Treatment for Men and Women
- Afghanistan, Code of Conduct for the Mujahideen
- Somalia, Traditional Law and IHL
- Iraq, Crimes by Militia Groups

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BARNIDGE Robert P., “Islam and International Humanitarian Law: a Question of Compatibility?”, in *IYHR*, Vol. 40, 2010, pp. 257-274.
- BAUDENDISTEL Rainer, “Force Versus Law: The International Committee of the Red Cross and Chemical Warfare in the Italo-Ethiopian War 1935-1936”, in *IRRC*, No. 322, March 1998, pp. 81-104.
- BELLO Emmanuel G., *African Customary Humanitarian Law*, Geneva, ICRC, 1980, 157 pp.
- BENNOUNE Karima, “As-Salamu ‘Alaykum? Humanitarian Law in Islamic Jurisprudence”, in *MJIL*, 1994, pp. 605-643.
- BOISARD Marcel A., L’humanisme de l’Islam, Paris, Albin Michel, 1979, 436 pp. BRING Ove, “Humanitarian Law and Literature: from Utopia to Slaughterhouse-five”, in *YIHL*, Vol. 10 (2007), 2009, pp. 3-44.
- COCKAYNE James, “Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations”, in *IRRC*, No. 847, September 2002, pp. 597-626.
- DIALLO Yolande, “African Traditions and Humanitarian Law”, in *IRRC*, No. 179, February 1976, pp. 57-63.
- DJIBRIL Ly, “The Bases of Humanitarian Thought in the Pulaar Society of Mauritania and Senegal”, in *IRRC*, No. 325, December 1998, pp. 643-653.
- DJIENA WEMBOU Michel-Cyr, “Le droit humanitaire africain: sources, contenu et portée”, in *African Journal of International and Comparative Law*, Vol. 12/1, 2000, pp. 1-22.
- DJIENA WEMBOU Michel-Cyr & FALL Daouda, *Le droit international humanitaire, théorie générale et réalités africaines*, Paris, L’Harmattan, 2000, 431 pp.
- DRAPER Gerald I.A.D., “The Contribution of the Emperor Asoka Maurya to the Development of the Humanitarian Ideal in Warfare”, in *IRRC*, No. 305, June 1995, pp. 192-206.
- EL-DAKKAH Said, “International Humanitarian Law between the Islamic Concept and Positive International Law”, in *IRRC*, No. 275, April 1990, pp. 101-114.
- GARDAM Judith., “A Feminist Analysis of Certain Aspects of International Humanitarian Law”, in *AYIL*, 1988-89, pp. 265-278.
- HENSEL Howard M. (ed.), *The Prism of Just War: Asian and Western Perspectives on the Legitimate Use of Military Force*, Farnham, Burlington, Ashgate, 2010, 283 pp.
- MERON Theodor, *Henry’s Wars and Shakespeare’s Laws: Perspectives on the Law of War in the Later Middle Ages*, Oxford, Clarendon Press, 1993, 237 pp.
- MIRBAGHERI Farid, “Islam and Humanitarian Values”, in *Refugee Survey Quarterly*, Vol. 21/3, 2002, pp. 139-149.
- PENNA Lakshmikanth Rao, “Written and Customary Provisions Relating to the Conduct of Hostilities and Treatment of Victims of Armed Conflicts in Ancient India”, in *IRRC*, No. 271, August 1989, pp. 333-348.
- SCHMITT Michael N. “Bellum americanum: the U.S. View of Twenty-First Century War and its

Possible Implications for the Law of Armed Conflict", in *MJIL*, Vol. 19/4, 1998, pp. 1051-1090.
- SINGH Nagendra, "Armed Conflicts and Humanitarian Laws of Ancient India", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva/The Hague, ICRC/M. Nijhoff, 1984, pp. 531-536.
- SULTAN Hamed, "The Islamic Concept", in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1988, pp. 29-39.
- VILJOEN Frans, "Africa's Contribution to the Development of International Human Rights and Humanitarian Law", in *African Human Rights Law Journal*, Vol. 1/1, 2001, pp. 18-39.
- ZEMMALI Ameur, "Imam Al-Awzai and his Humanitarian Ideas (707-774)", in *IRRC*, No. 275, April 1990, pp. 115-123.
- ZEMMALI Ameur, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire*, Paris, Pedone, 1997, 519 pp.

Further reading:

- ADACHI Sumio, "The Asian Concept", in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1988, pp. 13-19.
- ACHOUR Yadh Ben, "Islam and International Humanitarian Law", in *IRRC*, No. 215, March-April 1980, pp. 59-69.
- AN-NA'IM Abdullahi Ahmed, "Problems of Universal Cultural Legitimacy for Human Rights", in DENG Francis M., *Human Rights in Africa: Cross-Cultural Perspective*, Washington, The Brookings Institute, 1990, 331 pp.
- HUSSEIN Musa Youssouf (ed.), *Spared from the Spear. Traditional Somali Behaviour in Warfare*, Nairobi, ICRC, 1997.
- ICRC, *Under the Protection of the Palm: Wars of Dignity in the Pacific*, Suva, ICRC, 2009, 56 pp.
- MILLET-DEVALLE Anne-Sophie (dir.), *Religions et droit international humanitaire: Nice 18-19 juin 2007*, Paris, Pedone, 2008, 218 pp.
- MUBIALA Mutoy, "African States and the Promotion of Humanitarian Principles", in *IRRC*, No. 269, April 1989, pp. 93-110.
- POPOVSKI Vesselin, REICHBERG Gregory M. & TURNER Nicholas, *World Religions and Norms of War*, New York, United Nations University Press, 2009, 335 pp.
- RUDA José-Maria, "The Latin American Concept", in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1988, pp. 42-58.
- UNNIKRISHNAN P.V., "Humanitarian Values in India", in *Refugee Survey Quarterly*, Vol. 21/3, 2002, pp. 150-155.
- VANHULLEBUSCH Matthias, "General Principles of Islamic Law of War: a Reassessment", in *Yearbook of Islamic and Middle Eastern Law*, Vol. 13, 2007, pp. 37-56.
- VEUTHEY Michel, "Humanitarian Law and Spirituality", in *Refugee Survey Quarterly*, Vol. 21/3, 2002, pp. 45-110.

Footnotes

- [1] For example, civilians.
- [2] For example, those who have surrendered (i.e., in international armed conflicts, prisoners of war) or can no longer participate (such as the wounded and sick).
- [3] If International Humanitarian Law wants to protect anyone, it cannot consider merely any causal contribution to the war effort as participation, but only the contribution implementing the final element in the causality chain, i.e., the application of military violence.
- [4] The State fighting in self-defence has only to weaken the military potential of the aggressor sufficiently to preserve its independence; the aggressor has only to weaken the military potential of the defender sufficiently to impose its political will; the governmental forces involved in a non-international armed conflict have only to overcome the armed rebellion and dissident fighters have only to overcome the control of the government of the country (or parts of it) they want to control.
- [5] In order to «win the war» it is not necessary to kill all enemy soldiers; it is sufficient to capture them or to make them otherwise surrender. It is not necessary to harm civilians, only combatants. It is not necessary to destroy the enemy country, but only to occupy it. It is not necessary to destroy civilian infrastructure, but only objects contributing to military resistance.
- [6] “Laws are silent among [those who use] weapons” (Cited in Cicero, *Pro Milone*, 4.11).
- [7] He or she who doubts this has a good reason to read this book, which does not consist of opinions of the authors but of a selection of the variety of instances in which International Humanitarian Law was invoked in recent conflicts.
- [8] Even those who consider all soldiers as murderers in reality want to make an argument against war and not against the individual soldiers
- [9] MAURICE Frédéric, “Humanitarian ambition”, in *IRRC*, Vol. 289, 1992, p. 371.
- [10] *See* infra, Historical Development of International Humanitarian Law.
- [11] PICTET Jean, “Humanitarian Ideas Shared by Different Schools of Thought and Cultural Traditions”, in *International Dimensions of Humanitarian Law*, Geneva, Dordrecht, Henry Dunant Institute, M. Nijhoff, 1988, pp. 3-4

B. International Humanitarian Law as a Branch of Public International Law

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- ABI-SAAB Georges, “The Specificities of Humanitarian Law”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva/The Hague, ICRC/M. Nijhoff, 1984, pp. 265-280.

I. International Humanitarian Law: at the vanishing point of international law

Introductory text

Public international law can be described as composed of two layers: a traditional layer consisting of the law regulating coordination and cooperation between members of the international society – essentially the States and the organizations created by States – and a new layer consisting of the constitutional and administrative law of the international community of 6.5 billion human beings. While this second layer tries to overcome the law's typical traditional relativity, international law still retains a structure that is fundamentally different from that of any internal legal order, essentially because the society to which it applies and which has created it is, despite all modern tendencies, infinitely less structured and formally organized than any nation-State.

To understand IHL, one must start with the concepts and inherent features of the traditional layer: IHL was conceived as a body of law regulating belligerent inter-State relations. It is to a large extent irrelevant, however, to contemporary humanitarian problems unless understood within the second layer. Indeed, inter-State armed conflicts tend to have disappeared, except in the form of armed conflicts between the members of organized international society or, on the one hand, those who (claim to) represent it and, on the other hand, States outlawed by it – a phenomenon of the second layer.

From the perspective of both layers, IHL is perched at the vanishing point of international law, but is simultaneously a crucial test for international law. From the perspective of the first layer, it is astonishing but essential for our understanding of the nature and reality of international law to see that law governs inter-State relations even when they are belligerent, even when the very existence of a State is at stake, and even when the most important rule of the first layer – the prohibition of the use of force – has been violated or when a government has been unable to impose its monopoly of violence within the territory of the State. In the latter case, which is tantamount to a non-international armed conflict, what is most striking is not so much the fact that international law regulates a situation that transcends the axioms of the first layer, but the fact that its international rules apply not only to the use of force by the government but also directly to all violent human behaviour in the situation. From the perspective of the second layer, it is perhaps even more difficult to conceive – but essential to understand – that international law governs human behaviour, even when violence is used, and even when essential features of the organized structure of the international and national community have fallen apart. No national legal system contains similar rules on how those who violate its primary rules have to behave while violating them.

IHL exemplifies all the weakness and at the same time the specificity of international law. If the end of all law is the human being, it is critical for our understanding of international law to see how it can protect him or her even, and precisely, in the most inhumane situation, armed conflict.

Some have suggested – albeit more implicitly than explicitly – that IHL is different from the rest of international law, either because they wanted to protect international law against detractors claiming to have

an obvious *prima facie* case proving its inexistence, or because they wanted to protect IHL from the basic political, conceptual or ideological controversies inevitably arising between States and between human beings holding diverging opinions on the basic notions of international law and its ever changing rules. This suggestion, however, cannot be accepted, as it fails to recognize the inherent inter-relation between IHL and other branches of international law. IHL, distinct from humanitarian morality or the simple dictates of public conscience, cannot exist except as a branch of international law, and international law must contain rules concerning armed conflict, as an unfortunately traditional form of inter-State relations. Indeed, law has to provide answers to reality, it has to rule over reality; it cannot limit itself to reflecting reality. The latter, the necessarily normative character of law, the inevitable distance between law, on the one hand, and politics and history, on the other, is even more evident for IHL, given the bleak reality of armed conflicts, which cannot possibly be called humanitarian.

Quotation 1

[I]n the matter of those parts of the law of war which are not covered or which are not wholly covered by the Geneva Conventions, diverse problems will require clarification. These include such questions as to implications of the principle, which has been gaining general recognition, that the law of war is binding not only upon states but also upon individuals i.e. both upon members of the armed forces and upon civilians; the changed character of the duties of the Occupant who is now bound, in addition to ministering to his own interests and those of his armed forces, to assume an active responsibility for the welfare of the population under his control; the consequences, with regard to appropriation of public property of the enemy, of the fact that property hitherto regarded as private and primarily devoted to serving the needs of private persons, is subjected in some countries to complete control by the state; the resulting necessity for changes in the law relating to booty; the emergence of motorized warfare with its resulting effects upon the factual requirements of occupation and the concomitant duties of the inhabitants; the advent of new weapons such as flame-throwers and napalm when used against human beings a problem which may be postponed, but not solved, in manuals of land warfare by the suggestion that it raises a question primarily in the sphere of aerial warfare; the problems raised by the use of aircraft to carry spies and so-called commando troops; the limits, if any, of the subjection of airborne and other commando forces to the rules of warfare, for instance, in relation to the treatment of prisoners of war; the reconciliation of the obviously contradictory principles relating to espionage said to constitute a war crime on the part of spies and a legal right on the part of the belligerent to employ them; the humanization of the law relating to the punishment of spies and of so-called war treason; the prohibition of assassination in relation to so-called unarmed combat; authoritative clarification of the law relating to the punishment of war crimes, in particular with regard to the plea of superior orders and the responsibility of commanders for the war crimes of their subordinates; the regulation, in this connexion, of the question of international criminal jurisdiction; the elucidation of the law, at present obscure and partly contradictory, relating to ruses and stratagems, especially with regard to the wearing of the uniform of the enemy; the effect of the prohibition or limitation of the right of war on the application of rules of war, in particular in hostilities waged collectively for the enforcement of international obligations; and many others. In all these matters the lawyer must do his duty regardless of dialectical doubts – though with a feeling of humility springing from the knowledge that if international law is, in some ways,

at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law. He must continue to expound and to elucidate the various aspects of the law of war for the use of armed forces, of governments, and of others. He must do so with determination though without complacency and perhaps not always very hopefully – the only firm hope being that a world may arise in which no such calls will claim his zeal. [**Source**: LAUTERPACHT Hersch, "The Problem of the Revision of the Law of War", in *BYIL*, Vol. 29, 1952-53, pp. 381-382]

Quotation 2

[I]t is in particular with regard to the law of war that the charge of a mischievous propensity to unreality has been levelled against the science of international law. The very idea of a legal regulation of a condition of mere force has appeared to many incongruous to the point of absurdity. This view, which is entitled to respect, is controversial – at least so long as the law permitted or even authorized resort of war. And it may be argued that even if war were to be unconditionally renounced and prohibited – which is not as yet the case – juridical logic would have to stop short of the refusal to provide a measure of legal regulation, for obvious considerations of humanity, of hostilities which have broken out in disregard of the fundamental prohibition or recourse to war. The same applies to hostilities and measures of force taking place in the course of collective enforcement of international law or in the course of civil wars. [**Source**: LAUTERPACHT Elihu (ed.), LAUTERPACHT Hersch, *International Law, Collected Papers: The Law of Peace*, Cambridge, Cambridge University Press, Part. 2, 1975, pp. 37-38]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- LAUTERPACHT Hersch, "The Problems of the Revision of the Law of War", in *BYIL*, Vol. 29, 1952, pp. 360-382.
- LAUTERPACHT Hersch, "The Limits of the Operation of the Law of War", in *BYIL*, Vol. 30, 1953, pp. 206-243.

1. Is international law "law"?

Quotation 1

As "force" made giant strides, so "law" tried to keep abreast. Single laws have tried to turn aside the sword. Not only has a new world organisation been set up, the United Nations, which its founders hoped would prevent a repetition of the "Great New Fact" (expression Churchill coined in speaking of the atomic bomb). But legal rules have also been devised to help curb the new violence. However, pressure from conflicting economic and military interests and the clash of antagonistic ideologies has prevented this "new" law from shaping the actions of states. Today, "classic" or traditional law, which was realistic (because it faithfully reflected the balance of power among subjects of the international

community), has been overlaid by “idealistic” law: a set of rules and institutions that, to a large extent, reflect the need to transform relations as they now stand and proclaim a duty to do more than merely consecrate things as they are. [...]

[I]t would be a great mistake to refuse to examine the relations that exist between these two poles [...] on the premise that states, those “cold monsters”, without souls, never listen to the voice of “law” since they are moved only by motivations of “power” and “force”. In my opinion, this premise is false. On closer examination, it is not true that, when their essential military, economic and political interests are at stake, states trifle with the Tables of the Law [...]. Their strategy is more subtle than simply transgressing the legal “commandments”. It consists in preventing their legal crystallisation, or – if the pressure of public opinion makes this impossible – in wording them in terms as ambiguous as possible. By so doing, they can then interpret these legal standards as best they please, adapting them to requirements of the moment and bending them to their contingent interests. If we thumb through the records of the last forty or fifty years, we can easily see that no state, great or small, has ever admitted to breaking the commonly accepted legal canons. (Take, for example, the ban on chemical warfare, or on weapons that cause unnecessary suffering; the ban on indiscriminate attacks on undefended towns, or, on a larger scale, on acts of genocide, and so on.) Whenever they are accused of violating these and other no less important international rules, states immediately make denials, or else they point to the exceptional circumstances which they feel legitimize their course of action; or they say that the international rules prohibit not their own but other forms of behaviour.

[...]

The role of public opinion has grown over the years. Thus in 1931 the eminent English jurist J.L. Brierly noted that within the state a breach of law can go unnoticed and, in any case, when it is noticed the transgressor is often indifferent to “social stigma”; on the other hand, in the international community it is almost impossible for states to perpetrate grave violations of hallowed standards of conduct and escape public disapproval, and besides, states are necessarily very sensitive to public censure. Today, the growing power of the press and of the mass media generally has greatly increased the importance of public opinion especially in democratic countries. But even states in which the media is manipulated by government authorities cannot ignore the repercussions of their political, military and economic action on the opinion of foreign governments, promptly alerted by the various (often western) channels of information.

By relying on these forces, as well as on many non-governmental organizations which are more and more committed and pugnacious, there is hope that something may as yet be achieved. By acting on the “twilight” area in which violations prevail and law seems to dissolve into air, jurists, and all those who are involved in the conduct of state affairs, can be of some use to the voices of dissent and above all, to those who have been, or may in future be, the victims of violence.

[**Source**: CASSESE Antonio, *Violence and Law in the Modern Age*, Princeton, Princeton University Press, 1988, p. 4-7]

Quotation 2

The Limitations of International Law. [...] To many an observer, governments seem largely free to decide whether to agree to new law, whether to accept another nation's view of existing law, whether to comply with agreed law. International law, then is voluntary and only hortatory. It must always yield to national interest. Surely, no nation will submit to law any questions involving its security or independence, even its power, prestige, influence. Inevitably, a diplomat holding these views will be reluctant to build policy on law he deems ineffective. He will think it unrealistic and dangerous to enact laws which will not be used, to base his government's policy on the expectation that other governments will observe law and agreement. Since other nations do not attend to law except when it is in their interest, the diplomat might not see why his government should do so at the sacrifice of important interests. He might be impatient with his lawyers who tell him that the government may not do what he would like to see done.

These depreciations of international law challenge much of what the international lawyer does. Indeed, some lawyers seem to despair for international law until there is world government or at least effective international organization. But most international lawyers are not dismayed. Unable to deny the limitations of international law, they insist that these are not critical, and they deny many of the alleged implications of these limitations, if they must admit that the cup of law is half-empty, they stress that it is half-full. They point to similar deficiencies in many domestic legal systems. They reject definitions (commonly associated with the legal philosopher John Austin) that deny the title of law to any but the command of a sovereign, enforceable and enforced as such. They insist that despite inadequacies in legislative method, international law has grown and developed and changed. If international law is difficult to make, yet it is made; if its growth is slow, yet it grows. If there is no judiciary as effective as in some developed national systems, there is an International Court of Justice whose judgements and opinions, while few, are respected. The inadequacies of the judicial system are in some measure supplied by other bodies: international disputes are resolved and law is developed through a network of arbitrations by continuing or ad hoc tribunals. National courts help importantly to determine, clarify, develop international law. Political bodies like the Security Council and the General Assembly of the United Nations also apply law, their actions and resolutions interpret and develop the law, their judgements help to deter violations in some measure. If there is no international executive to enforce international law, the United Nations has some enforcement powers and there is "horizontal enforcement" in the reactions of other nations. The gaps in substantive law are real and many and require continuing effort to fill them, but they do not vitiate the force and effect of the law that exists, in the international society that is.

Above all, the lawyer will insist, critics of international law ask and answer the wrong questions. What matters is not whether the international system has legislative, judicial or executive branches, corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in relations between nations. The question is not whether there is an effective legislature; it is whether there is law that responds and corresponds to the changing needs of a changing society. The question is not whether there is an effective judiciary, but whether disputes are resolved in an orderly fashion in accordance with international law. Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behavior, whether international behavior reflects stability and order. The fact is, lawyers insist, that nations have accepted important limitations on their sovereignty, that they have observed these norms and undertakings, that the result has been substantial order in international relations.

Is it Law or Politics?

The reasons why nations observe international law, in particular the emphasis I have put on cost and advantage, may only increase skepticism about the reality of the law and its influence in national policy. [...] Nations decide whether to obey law or agreements as they decide questions of national policy not involving legal obligation – whether to recognize a new regime, or to give aid to country X – on the basis of cost and advantage to the national interest. That nations generally decide to act in accordance with law does not change the voluntary character of these decisions. Nations act in conformity with law not from any concern for law but because they consider it in their interest to do so and fear unpleasant consequences if they do not observe it. In fact, law may be largely irrelevant. Nations would probably behave about the same way if there were no law. The victim would respond to actions that adversely affect its interests and the threat of such reaction would be an effective deterrent, even if no law were involved.

This skepticism is sometimes supported by contrasting international law with domestic law in a developed, orderly society. Domestic law, it is argued, is binding and domestic society compels compliance with it. No one has a choice whether to obey or violate law, even if one were satisfied that observance was not in one’s interest. In international society, the critics insist, nations decide whether or not they will abide by law. Violations are not punished by representatives of the legal order acting in the name of the society. Any undesirable consequences of violation are political, not legal; they are the actions of other nations vindicating their own interests, akin to extra-legal consequences in domestic society, like “social stigma.” The violator may even be able to prevent or minimize adverse consequences. In any event, he will continue to be a full member of international society, not an outlaw.

The arguments I have strung together command consideration. Some of them are mistaken. Others do indeed reflect differences between international and domestic law, the significance of which must be

explored.

Much of international law resembles the civil law of domestic society (torts, contracts, property); some of it is analogous to “white collar crimes” (violations of antitrust or other regulatory laws, tax evasion) sometimes committed by “respectable” elements. Like such domestic law, international law, too, has authority recognized by all. No nation considers international law as “voluntary.” If the system is ultimately based on consensus, neither the system nor any particular norm or obligation rests on the present agreement of any nation; a nation cannot decide that it will not be subject to international law; it cannot decide that it will not be subject to a particular norm, although it may choose to risk an attempt to have the norm modified; surely, it cannot decide to reject the norm that its international undertakings must be carried out. Like individuals, nations do not claim a right to disregard the law or their obligations, even though – like individuals – they may sometimes exercise the power to do so. International society does not recognize any right to violate the law, although it may not have the power (or desire) to prevent violation from happening, or generally to impose effective communal sanction for the violation after it happens. [...]

Much is made of the fact that, in international society, there is no one to compel nations to obey the law. But physical coercion is not the sole or even principal force ensuring compliance with law. Important law is observed by the most powerful, even in domestic societies, although there is no one to compel them. In the United States, the President, Congress, and the mighty armed forces obey orders of a Supreme Court whose single marshal is unarmed.

Too much is made of the fact that nations act not out of “respect for law” but from fear of the consequences of breaking it. And too much is made for the fact that the consequences are not “punishment” by “superior,” legally constituted authority, but are the response of the victim and his friends and the unhappy results for friendly relations, prestige, credit, international stability, and other interests which in domestic society would be considered “extra-legal.” The fact is that, in domestic society, individuals observe law principally from fear of consequences, and there are “extra-legal” consequences that are often enough to deter violation, even where official punishment is lacking. (Where law enforcement is deficient, such consequences may be particularly material.) In the mainstreams of domestic society an illegal action tends to bring social opprobrium and other extra-legal “costs” of violation. This merely emphasizes that law often coincides so clearly with the interests of the society that its members react to antisocial behavior in ways additional to those prescribed by law. In international society, law observance must depend more heavily on these extra-legal sanctions, which means that law observance will depend more closely on the law’s current acceptability and on the community’s – especially the victim’s – current interest in vindicating it. It does not mean that law is not law, or that its observance is less law observance.

There are several mistakes in the related impression that nations do pursuant to law only what they

would do anyhow. In part, the criticism misconceives the purpose of law. Law is generally not designed to keep individuals from doing what they are eager to do. Much of law, and the most successful part, is a codification of existing mores, of how people behave and feel they ought to behave. To that extent law reflects, rather than imposes, existing order. If there were no law against homicide, most individuals in contemporary societies would still refrain from murder. Were that not so, the law could hardly survive and be effective. To say that nations act pursuant to law only as they would act anyhow may indicate not that the law is irrelevant, but rather that it is sound and viable, reflecting the true interests and attitudes of nations, and that it is likely to be maintained. At the same time much law (particularly tort law and "white collar crimes") is observed because it is law and because its violation would have undesirable consequences. The effective legal system, it should be clear, is not the one which punishes the most violators, but rather that which has few violations to punish because the law deters potential violators. He who does violate is punished principally, to reaffirm the standard of behavior and to deter others. This suggests that the law does not address itself principally to "criminal elements" on the one hand or to "saints" on the other. The "criminal elements" are difficult to deter; the "saint" is not commonly tempted to commit violations, and it is not law or fear of punishment that deters him. The law is aimed principally at the mass in between – at those who, while generally law-abiding, may yet be tempted to some violations by immediate self-interest. In international society, too, law is not effective against the Hitlers, and is not needed for that nation which is content with its lot and has few temptations. International law aims at nations which are in principle law-abiding but which might be tempted to commit a violation if there were no threat of undesirable consequences. In international society, too, the reactions to a violation – as in Korea in 1950 or at Suez in 1956 – reaffirm the law and strengthen its deterrent effect for the future.

In many respects, the suggestion that nations would act the same way if there were no law is a superficial impression. The deterrent influence of law is there, though it is not always apparent, even to the actor himself. The criticism overlooks also the educative roles of law, which causes persons and nations to feel that what is unlawful is wrong and should not be done. The government which does not even consider certain actions because they are "not done" or because they are not its "style" may be reflecting attitudes acquired because law has forbidden these actions.

In large part, however, the argument that nations do pursuant to law only what they would do anyhow is plain error. The fact that particular behavior is required by law brings into play those ultimate advantages in law observance that suppress temptations and override the apparent immediate advantages from acting otherwise. In many areas, the law at least achieves a common standard or rule and clarity as to what is agreed. The law of the territorial sea established a standard and made it universal. In the absence of law, a foreign vessel would not have thought of observing precisely a twelve-mile territorial sea (assuming that to be the rule), nor would it have respected the territorial sea of weaker nations which had no shore batteries. In regard to treaties, surely, it is not the case that nations act pursuant to agreement as they would have acted if there were none, or if it were not

established that agreements shall be observed. Nations do not give tariff concessions, or extradite persons, or give relief from double taxation, except for some quid pro quo pursuant to an agreement which they expect to be kept. Nations may do some things on the basis of tacit understanding or on a conditional, reciprocal basis: If you admit my goods, I will admit yours. But that too is a kind of agreement, and usually nations insist on the confidence and stability that come with an express undertaking. [...]

The most common deprecation of international law, finally, insists that no government will observe international law "in the crunch, when it really hurts." If the implication is that nations observe law only when it does not matter, it is grossly mistaken. Indeed, one might as well urge the very opposite: violations in "small matters" sometimes occur because the actor knows that the victim's response will be slight; serious violations are avoided because they might bring serious reactions. The most serious violation – the resort to war – generally does not occur, although it is only when their interests are at stake that nations would even be tempted to this violation. On the other hand, if the suggestion is that when it costs too much to observe international law nations will violate it, the charge is no doubt true. But the implications are less devastating than might appear, since a nation's perception of "when it really hurts" to observe law must take into account its interests in law and in its observance, and the costs of violation. The criticism might as well be levered at domestic law where persons generally law-abiding will violate laws, commit even crimes of violence, when it "really hurts" not to do so. Neither the domestic violations nor the international ones challenge the basic validity of the law or the basic effectiveness of the system.

The deficiencies of international law and the respects in which it differs from domestic law do not justify the conclusion that international law is not law, that it is voluntary, that its observance is "only policy." They may be relevant in judging claims for the law's success in achieving an orderly society. In many domestic societies, too, the influence of law is not always, everywhere, and in all respects certain and predominant; the special qualities of international society, different perhaps only in degree, may be especially conducive to disorder. Violations of international law, though infrequent, may have significance beyond their numbers: international society is a society of states, and states have power to commit violations that can be seriously disruptive; also, the fact that the units of international society are few may increase the relative significance of each violation. Still, violations of international law are not common enough to destroy the sense of law, of obligation to comply, of the right to ask for compliance and to react to violation. Rarely is even a single norm so widely violated as to lose its quality as law. Agreements are not violated with such frequency that nations cease to enter into them, or to expect performance or redress for violation. Colonialism apart, even political arrangements continue to thrive and to serve their purposes, although they may not run their intended course. Over-all, nations maintain their multivaried relations with rare interruptions. There is, without doubt, order in small, important things.

Whether, in the total, there is an effective “international order” is a question of perspective and definition. Order is not measurable, and no purpose is served by attempts to “grade” it in a rough impressionistic way. How much of that order is attributable to law is a question that cannot be answered in theory or in general, only in time and context. Law is one force – an important one among the forces that govern international relations at any time; the deficiencies of international society make law more dependent on other forces to render the advantages of observance high, the costs of violation prohibitive. In our times the influence of law must be seen in the light of the forces that have shaped international relations since the Second World War.

The Law’s Supporters and its Critics

International law is an assumption, a foundation, a framework of all relations between nations. Concepts of statehood, national territory, nationality of individuals and associations, ownership of property, rights and duties between nations, responsibility for wrong done and damage inflicted, the fact and the terms of international transactions – all reflect legal principles generally accepted and generally observed. The law provides institutions, machinery, and procedures for maintaining relations, for carrying on trade and other intercourse, for resolving disputes, and for promoting common enterprise. All international relations and all foreign policies depend in particular on a legal instrument – the international agreement – and on a legal principle – that agreements must be carried out. Through peace treaties and their political settlements, that principle has also helped to establish and legitimize existing political order as well as its modifications – the identity, territory, security, and independence of states, the creation or termination of dependent relationships. Military alliances and organizations for collective defense also owe their efficacy to the expectation that the undertakings will be carried out. International law supports the numerous contemporary arrangements for cooperation in the promotion of welfare, their institutions and constitutions. Finally, there is the crux of international order in law prohibiting war and other uses of force between nations. The law works. Although there is no one to determine and adjudge the law with authoritative infallibility, there is wide agreement on the content and meaning of law and agreements, even in a world variously divided. Although there is little that is comparable to executive law enforcement in a domestic society, there are effective forces, internal and external, to induce general compliance. Nations recognize that the observance of law is in their interest and that every violation may also bring particular undesirable consequences. It is the unusual case in which policy-makers believe that the advantages of violation outweigh those of law observance, or where domestic pressures compel a government to violation even against the perceived national interest. The important violations are of political law and agreements, where basic interests of national security or independence are involved, engaging passions, prides, and prejudices, and where rational calculation of cost and advantage is less likely to occur and difficult to make. Yet, as we have seen, the most important principle of law today is commonly observed: nations have not been going to war, unilateral uses of force have been only occasional, brief, limited. Even the uncertain law against intervention, seriously breached in several instances, has undoubtedly deterred intervention in many

other instances. Where political law has not deterred action it has often postponed or limited action or determined a choice among alternative actions.

None of this argument is intended to suggest that attention to law is the paramount or determinant motivation in national behavior, or even that it is always a dominant factor. A norm or obligation brings no guarantee of performance; it does add an important increment of interest in performing the obligation. Because of the requirements of law or of some prior agreement, nations modify their conduct in significant respects and in substantial degrees. It takes an extraordinary and substantially more important interest to persuade a nation to violate its obligations. Foreign policy, we know, is far from free; even the most powerful nations have learned that there are forces within their society and, even more, in the society of nations that limit their freedom of choice. When a contemplated action would violate international law or a treaty, there is additional, substantial limitation on the freedom to act. [...]

[**Source**: HENKIN Louis, *How Nations Behave: Law and Foreign Policy*, New-York, Columbia University Press, 2nd ed., 1979, pp. 25-26; 89-90; 92-95, and 320-321; footnotes omitted.]

Quotation 3

[A] third idea of rules or norms may be emphasized: that of prescriptive statements which exert, in varying amounts, a psychological “pressure” upon national decision-makers to comply with their substantive content. For example, the norms relating to “freedom of the seas” probably exert an effective pressure against all nation-state officials not to attempt to expropriate to their own use the Atlantic Ocean, and not to interfere with numerous foreign shipping or fishing activities on the high seas. The idea of a rule of law as an indicator of a psychological pressure upon the person to whom it is addressed might be illustrated by a hypothetical example of one of the simplest of all possible rules of law – a “stop” sign on a street or highway. Imagine that one of these traffic signs exists in a community where every driver habitually does not bring his motor vehicle to a full “stop” at the particular sign, but rather shifts into low gear or otherwise slows down his motor vehicle when approaching the sign and then passes it. Has the traffic ordinance represented by the sign been violated? Yes, from a technical, as well as a legal, point of view. A policeman could, if he so desired, arrest any or all of the drivers in that community for failing to observe the “stop” sign. But does the violation of the “stop” sign mean that the sign is of no value in that particular community? Here the answer would have to be in the negative, for the sign functions as a kind of “pressure” upon drivers to slow down. If its purpose was to help to prevent traffic accidents, it may have succeeded admirably by getting motor vehicles to slow down and proceed with caution. [...] [O]ne might very well interpret many international rules relating to rights of neutrals, prisoners of war, and so forth, as “pressures” that have some influence in shaping the conduct of war, no matter how many outright violations of those rules occur. [...] [**Source**: D’AMATO Anthony, *The Concept of Custom in International Law*, Ithaca, Cornell University Press, 1971, pp. 31-32]

2. International Humanitarian Law: the crucial test of international law

3. International Humanitarian Law in an evolving international environment

CASES AND DOCUMENTS

- ICRC, Protection of War Victims [Para. 3.1.1]
- ICRC's Approach to Contemporary Security Challenges
- ICRC, The Challenges of Contemporary Armed Conflicts
- ICRC, Sixtieth Anniversary of the Geneva Conventions
- UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, The September 11 2001 Attacks
- Syria, Press conference with French President Francois Hollande and Russian President Vladimir Putin

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BELLINGER John [et al.], "War Bound by Law: Non-State Actors and the Law of Armed Conflict in the Twenty-First Century", in *Duke Journal of Comparative and International Law*, Vol. 20, No. 3, 2010, pp. 331-471.
- BREAU Susan & JACHEC-NEALE Agnieszka (eds), *Testing the Boundaries of International Humanitarian Law*, London, The British Institute of International and Comparative Law, 2006, 343 pp.
- BUGNION François, "Le droit international humanitaire à l'épreuve des conflits de notre temps", in *IRRC*, No. 835, September 1999, 487-498 pp.
- CLAPHAM Andrew, "Non-State Actors", in CHETAIL Vincent (ed.), *Post-conflict Peacebuilding: a Lexicon*, Oxford, OUP, 2009, pp. 200-213.
- DAILLIER Patrick, "Les opérations multinationales consécutives à des conflits armés en vue du rétablissement de la paix", in *Recueil des cours [de l'] Académie de droit international*, T. 314, 2005 pp. 424-431.
- DARCY Shane, MAGLIVERAS Konstantinos D. & HANKEL Gerd, "Reforming the Laws of War", in QUENIVET Noëlle & SHAH-DAVIS Shilan (eds), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague, T.M.C. Asser Press, 2010, pp. 317-360.
- FLECK Dieter, "Contemporary Challenges of International Humanitarian Law", in *Russian Yearbook of International Law 2008*, 2009, pp. 65-79. Hague Academy of International Law: Centre for Studies and Research in International Law and International Relations, *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, Leiden, Boston, M. Nijhoff, 2008, 227 pp.
- HEINTSCHEL VON HEINEGG Wolff & EPPING Volker (eds), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen*, Berlin, Heidelberg, Springer, 2007, 280 pp.
- HERRMAN Irène & PALMIERI Daniel, "Les nouveaux conflits: une modernité archaïque ?", in *IRRC*,

No. 849, March 2003, pp. 23-44.
- LAVOYER Jean-Philippe, “Should International Humanitarian Law be Reaffirmed, Clarified or Developed?”, in *IYHR*, Vol. 34, 2004, pp. 35-58.
- MULINEN Frédéric de, “La nécessité de comprendre le droit des conflits armés au 21ème siècle”, in *RDMDG*, Vol. 38-1/4, 1999, pp. 313-327.
- MURPHY Ray, “Contemporary Challenges to the Implementation of International Humanitarian Law”, in *The Quarterly Journal*, Vol. 3/3, 2004, pp. 99-113. “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Excerpt of the Report Prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, Geneva, December 2003-March 2004”, in *IRRC*, No. 853, March 2004, pp. 213-244.
- NOONE Gregory P. [et al.], “Prisoners of War in the 21st Century: Issues in Modern Warfare”, in *Naval Law Review*, Vol. 50, 2004, pp. 1-69.
- OSWALD Bruce, “The Law on Military Occupation: Answering the Challenges of Detention During Contemporary Peace Operations?”, in *Melbourne Journal of International Law*, Vol. 8, No. 2, 2007, 16 pp.
- PERRIGO Sarah, WITHMAN Jim, *The Geneva Conventions under Assault*, London, New York, Pluto, 2010, 252 pp.
- PFANNER Toni, “Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action”, in *IRRC*, No. 857, March 2005, pp. 149-174.
- QUENIVET Noëlle & SHAH-DAVIS Shilan (eds), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague, T.M.C. Asser Press, 2010, 434 pp.
- RATNER Steven R., “Geneva Conventions”, in *Foreign Policy, March/April 2008*, pp. 26-32.
- REISMAN William Michael, “Assessing Claims to Revise the Laws of War”, in *AJIL*, Vol. 97/1, 2003, pp. 82-90.
- SANDOZ Yves, “Prospects for Future Developments in International Humanitarian Law”, in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (eds), *Making the Voice of Humanity Heard*, Leiden/Boston, M. Nijhoff, 2004, pp. 339-355.
- SANDOZ Yves, “International Humanitarian Law in the Twenty-First Century”, in *YIHL*, Vol. 6 (2003), 2006, pp. 3-40.
- SCHMITT Michael N., War, *Technology, and International Humanitarian Law*, Cambridge, Program on Humanitarian Policy and Conflict Research, 2005, 62 pp.
- SCHMITT Michael N., “21st Century Conflict: Can the Law Survive?”, in *Melbourne Journal of International Law*, Vol. 8, No. 2, 2007, pp. 443-476.
- SKERKER Michael, “Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones”, in *Journal of Military Ethics*, Vol. 3/2, 2004, pp. 27-39.
- WATKIN Kenneth, “21st Century Conflict and International Humanitarian Law: Status Quo or Change?”, in SCHMITT Michael & PEJIC Jelena (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, M. Nijhoff, Leiden/Boston, 2007, pp. 265-297.
- WIPPMAN David & EVANGELISTA Matthew (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, 303 pp.

a. **increasing number of non-international armed conflicts**
b. **peace operations**

CASES AND DOCUMENTS

- The Netherlands, Responsibility of International Organizations
- Democratic Republic of Congo, Involvement of MONUSCO
- Somalia: Deeply Flawed Rape Inquiry

a. **non-State armed groups not even aspiring to become States**
b. **criminalization of armed conflict and of violations of IHL**

4. Application of International Humanitarian Law by and in failed States

CASES AND DOCUMENTS

- ICRC, Disintegration of State Structures [Part II. 2]
- First Periodical Meeting, Chairman's Report [Part II. 2]
- Case Study, Armed Conflicts in the Great Lakes Region [Part III. A. and Part III.C.]
- Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 1 and Part 2]
- Somalia, the fate of Children in the conflict
- South Sudan, The Nuer "White Armies"

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- CAIN Kenneth L., "The Rape of Dinah: Human Rights, Civil War in Liberia, and Evil Triumphant", in *Human Rights Quarterly*, Vol. 21/2, 1999, pp. 265-307.
- GEISS Robin, "Failed States: Legal Aspects and Security Implications", in *German Yearbook of International Law*, Vol. 47, 2004, pp. 457-501.
- GEISS Robin, "Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties", in *IRRC*, Vol. 91, no. 873, March 2009, pp. 127-142.
- KRITSIOTIS Dino, "International Humanitarian Law and the Disintegration of States", in *IYHR*, Vol. 30, 2000, pp. 17-35.
- SMITH Stephen, Somalie. *La guerre perdue de l'humanitaire*, Paris, Calmann-Lévy, 1993, 243 pp.
- THUERER Daniel, "The 'Failed State' and International Law", in *IRRC*, No. 836, December 1999, pp. 731-761.
- THUERER Daniel, "Der Wegfall effektiver Staatsgewalt: Der 'failed State'", in *Berichte der Deutschen*

Gesellschaft für Völkerrecht, Vol. 34, Heidelberg, 1995, pp. 9-47.
- VAN CREVELD Martin, *The Transformation of War*, New York, Free Press, 1991, 254 pp. Armed Conflicts and Disintegration of States: Humanitarian Challenge: 21st Round Table on Current Problems of International Humanitarian Law, 25 Sepitember 1996, San Remo, International Institute of Humanitarian Law, 1996, 107 pp.

Further reading:

- COLLMER Sabine, “Child Soldiers: an Integral Element in New, Irregular Wars?”, in *The Quarterly Journal*, Vol. 3/3, September 2004, pp. 1-11.
- TAUXE Jean-Daniel, “Liberia, Humanitarian Logistics in Question”, in *IRRC*, No. 312, June 1996, pp. 352-354. “Les défis actuels de l’action et du droit humanitaires. Journée d’étude du CICR à Paris et forum de Wolfsberg”, in *Journal du Centre de Recherches en Droit International*, Vol. 27/4, 1997. “Now Back in Liberia, ICRC Calls for Fundamental Reappraisal. ICRC Press Release No. 96/15, 22 April 1996”, in *IRRC*, No. 312, June 1996, p. 351.

5. International Humanitarian Law in asymmetric conflicts

Both sides consider that they cannot “win” without violating (or “reinterpreting”) IHL. [*See supra*, Concept and Purpose of International Humanitarian Law, Can warfare be regulated by law? Quotation: Thucydides on might and right]

CASES AND DOCUMENTS

- ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
- ICRC, Sixtieth Anniversary of the Geneva Conventions
- Israel, Report of the Winograd Commission [Paras 38-45]
- Autonomous Weapon Systems

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BENVENISTI Eyal, “Rethinking the Divide Between Jus ad Bellum and *Jus in Bello* in Warfare against Non-State Actors”, *Yale Journal of International Law*, Vol. 34, No. 2, 2009, pp. 541-548.
- BENVENISTI Eyal, “The Legal Battle to Define the Law on Transnational Asymmetric Warfare”, in *Duke Journal of Comparative and International Law*, Vol. 20, No. 3, 2010, pp. 339-359.
- COURMONT Barthélémy & RIBNIKAR Darko, *Les guerres asymétriques: conflits d’hier et d’aujourd’hui, terrorisme et nouvelles menaces*, Paris, Dalloz, 2nd ed., 2009, 427 pp.
- GEISS Robin, “Asymmetric Conflict Structures”, in *IRRC*, Vol. 88, No. 864, December 2006, pp. 757-777.

- MÜNKLER Herfried, “The Wars of the 21st Century”, in *IRRC*, No. 849, March 2003, pp. 7-22.
- OULD MOHAMEDOU Mohammad-Mahmoud, “Non-Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States”, *Harvard Program on Humanitarian Policy and Conflict Research*, http://www.hpcr.org.
- PAULUS Andreas & VASHAKMADZE Mindia, “Asymmetrical War and the Notion of Armed Conflict: a Tentative of Conceptualization”, in *IRRC*, Vol. 91, No. 873, March 2009, pp. 95-125.
- PFANNER Toni, “Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action”, in *IRRC*, No. 857, March 2005, pp. 149-174.
- ROGERS Anthony P. V., “Unequal Combat and the Law of War”, in *YIHL*, Vol. 7 (2004), 2006, pp. 3-34.
- SCHMITT Michael N., “Asymmetrical Warfare and International Humanitarian Law”, in *The Air Force Law Review*, Vol. 62, 2008, pp. 1-42.
- VALASEK Tomas, “New Threats, New Rules”, in *World Policy Journal*, Vol. 20/1, Spring 2003, pp. 17-24.

Further reading:

- GROSS Michael L., “Asymmetric War, Symmetrical Intentions: Killing Civilians in Modern Armed Conflict”, in *Global Crime*, Vol. 10, No. 4, November 2009, pp. 320-336.
- HEINTZE Hans-Joachim, “Terrorism and Asymmetrical Conflicts: a Role for the Martens Clause?”, in GIEGERICH Thomas (ed.), *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years After the Second Hague Peace Conference*, Berlin, Duncker and Humblot, 2009, pp. 429-434.
- KNOOPS Geert-Jan Alexander, “The Duality of the Proportionality Principle within Asymmetric Warfare and Ensuing Superior Criminal Responsibilities”, in *International Criminal Law Review*, Vol. 9, No. 3, 2009, pp. 501-529.
- LAVOY Peter, *Asymmetric Warfare in South Asia: the Causes and Consequences of the Kargil Conflict*, Cambridge, CUP, 2009, 407 pp.
- SCHRÖFL Josef, COX Sean Michael & PANKRATZ Thomas (eds), *Winning the Asymmetric War: Political, Social and Military Responses*, Frankfurt am Main, P. Lang, 2009, 366 pp.
- VAN BAARDA Ted, VERWEIJ Désiree, *The Moral Dimension of Asymmetrical Warfare: Counter-Terrorism, Democratic Values and Military Ethics*, Leiden, Boston, M. Nijhoff, 2009, 529 pp.

II. Fundamental distinction between *jus ad bellum* (on the legality of the use of force) and *jus in bello* (on the humanitarian rules to be respected in warfare)

Introductory text

IHL developed at a time when the use of force was a lawful form of international relations, when States were not prohibited from waging war, when they had the right to make war (i.e., when they had *jus ad bellum*). It

did not appear illogical for international law to oblige them to respect certain rules of behaviour in war (*jus in bello*) if they resorted to hostilities. Today, the use of force between States is prohibited by a peremptory rule of international law[12] (*jus ad bellum* has changed into *jus contra bellum*). Exceptions are admitted in the case of individual and collective self-defence,[13] based upon Security Council resolutions[14] and, arguably, the right of peoples to self-determination[15] (national liberation wars).

Logically, at least one side of an international armed conflict is therefore violating international law by the sole fact of using force, however respectful it is of IHL. By the same token, all municipal laws anywhere in the world prohibit the use of force against (governmental) law enforcement agencies.

Although armed conflicts are prohibited, they happen, and it is today recognized that international law has to address this reality of international life not only by combating the phenomenon, but also by regulating it to ensure a minimum of humanity in this inhumane and illegal situation. For practical, policy and humanitarian reasons, however, IHL has to be the same for both belligerents: the one resorting lawfully to force and the one resorting unlawfully to force. From a practical point of view, respect for IHL could otherwise not be obtained, as, at least between the belligerents, which party is resorting to force in conformity with *jus ad bellum* and which is violating *jus contra bellum* is always a matter of controversy. In addition, from the humanitarian point of view, the victims of the conflict on both sides need and deserve the same protection, and they are not necessarily responsible for the violation of *jus ad bellum* committed by "their" party.

IHL must therefore be respected independently of any argument of, and be completely distinguished from, *jus ad bellum*. Any past, present and future theory of just war only concerns *jus ad bellum* and cannot justify (but is in fact frequently used to imply) that those fighting a just war have more rights or fewer obligations under IHL than those fighting an unjust war.

The two Latin terms were coined only in the last century, but Emmanuel Kant already distinguished the two ideas. Earlier, when the doctrine of just war prevailed, Grotius' *temperamenta belli* (restraints to the waging of war) only addressed those fighting a just war. Later, when war became a simple fact of international relations, there was no need to distinguish between *jus ad bellum* and *jus in bello*. It is only with the prohibition of the use of force that the separation between the two became essential. It has since been recognized in the preamble to Protocol I:

"The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further 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. [...]"

This complete separation between *jus ad bellum* and *jus in bello* implies that IHL applies whenever there is de facto an armed conflict, no matter how that conflict is qualified under *jus ad bellum*, and that no *jus ad bellum* arguments may be used to interpret it; it also implies, however, that the rules of IHL are not to be drafted so as to render *jus ad bellum* impossible to implement, e.g., render efficient self-defence impossible.

Some consider that the growing institutionalization of international relations through the United Nations, concentrating the legal monopoly of the use of force in its hands or a hegemonic international order, will return IHL to a state of *temperamenta belli* addressing those who fight for international legality. This would fundamentally modify the philosophy of existing IHL.

CASES AND DOCUMENTS

- U.S., Lethal Operations against Al-Qa'ida Leaders

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BOUVIER Antoine, "Assessing the Relationship Between Ius in Bello and Ius ad Bellum: An "Orthodox" View", in *Proceedings of the 100th Annual Meeting*, American Society of International Law, 2006, pp. 109-112
- BUGNION François, "Just War, War of Aggression and International Humanitarian Law", in *IRRC*, No. 847, September 2002, pp. 523-546.
- BUGNION François, "Jus ad Bellum, *Jus in Bello* and Non-International Armed Conflicts", *YIHL*, Vol. 6 (2003), 2007, pp. 167-198.
- GREENWOOD Christopher, "The Relationship Between Ius ad bellum and Ius in bello", in *Review of International Studies*, Vol. 9, 1983, pp. 221-234.

- KOLB Robert, “Origin of the Twin Terms Ius ad bellum – Ius in bello”, in *IRRC*, No. 320, October 1997, pp. 553-562.
- KOOIJMANS Peter, “Is there a Change in the Ius ad bellum and, if so, What Does it Mean for the Ius in bello ?”, in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (eds), *Making the Voice of Humanity Heard*, Leiden/Boston, M. Nijhoff, 2004, pp. 225-237.
- MEYROWITZ Henri, *Le principe de l’égalité des belligérants devant le droit de la guerre*, Paris, Pedone, 1970, 418 pp.
- MOUSSA Jasmine, “Can Jus ad Bellum Override *Jus in Bello* ?: Reaffirming the Separation of the Two Bodies of Law”, in *IRRC*, Vol. 90, No. 872, December 2008, pp. 963-990.
- ROBERTS Adam, “The Equal Application of the Laws of War: a Principle under Pressure”, in *IRRC*, Vol. 90, No. 872, December 2008, pp. 931-962.
- SASSÒLI Marco, “Ius ad bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?”, in SCHMITT Michael & PEJIC Jelena (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, M. Nijhoff, Leiden/Boston, 2007, pp. 242-264.

Further reading:

- BELLAMY Alex J., *Just Wars: from Cicero to Iraq*, Cambridge, Malden, Polity, 2006, 280 pp.
- BOTTOMS Jennifer, “When Close Doesn’t Count: an Analysis of Israel’s *Jus ad Bellum* and *Jus in Bello* in the 2006 Israel-Lebanon War”, in *The Army Lawyer*, April 2009, pp. 23-54.
- BROWNLIE Ian, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, 532 pp.
- DINSTEIN Yoram, *War, Aggression and Self-defence*, Cambridge, CUP, 2001, 300 pp.
- GILL Terry, “The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction between the *Ius ad bellum* and the *Ius in bello*”, in *Leiden Journal of International Law*, Vol. 12/3, 1999, 613-624 pp.
- GREENWOOD Christopher, “Self-Defence and the Conduct of International Armed Conflict”, in DINSTEIN Yoram (ed.), *International Law at a Time of Perplexity*, Dordrecht, M. Nijhoff, 1988, pp. 273-288.
- HENSEL Howard M. (ed.), *The Legitimate Use of Military Force: the Just War Tradition and the Customary Law of Armed Conflict*, Hampshire, Ashgate, 2008, 300 pp.
- LAUTERPACHT Hersch, “Rules of Warfare in An Unlawful War”, in LIPSKY George A. (ed.), *Law and Politics in the World Community*, Berkeley, University of California Press, 1953, pp. 89-113.
- MACDONAGH Melanie, “Can there be such a Thing as a Just War?”, in *International Journal of Human Rights*, Vol. 4/3-4, 2000, pp. 289-294.
- McDONALD Avril, “Declaration of War and Belligerent Parties: International Law Governing Hostilities Between States and Transnational Terrorist Networks”, in *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 279-314.
- MÜLLERSON Rein, “On the Relationship Between *Ius ad bellum* and *Ius in bello* in the General Assembly Advisory Opinion”, in BOISSON DE CHAZOURNES Laurence (ed.), *International Law, the*

International Court of Justice and Nuclear Weapons, Cambridge, CUP, 1999, pp. 267-274.
- ORAKHELASHVILI Alexander, "Overlap and Convergence: the Interaction between *Jus ad Bellum* and *Jus in Bello"*, in *Journal of Conflict and Security Law*, Vol. 12, No. 2, 2007, pp. 157-196.
- SCELLE Georges, "Quelques réflexions sur l'abolition de la compétence de la guerre", in *RGDIP*, 1954, pp. 5-22.
- SHEARER Yvan, "A Revival of the Just War Theory?", in SCHMITT Michael & PEJIC Jelena (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, Leiden/Boston, M. Nijhoff, 2007, pp. 1-20.
- STAHN Carsten, "*Jus ad bellum*", "*Jus in Bello*"... "*Jus Post Bellum*"?: Rethinking the Conception of the Law of Armed Force", in *EJIL*, Vol. 17, No. 5, November 2006, pp. 921-943.
- WALZER Michael, *Just and Unjust Wars, A Moral Argument with Historical Illustrations*, 3rd ed., New York, Basic Books, 2000, 361 pp.
- WRIGHT Quincy, "The Outlawry of War and the Law of War", in *AJIL*, Vol. 47/3, 1953, pp. 365-376.

1. The prohibition of the use of force and its exceptions

CASES AND DOCUMENTS

- International Law Commission, Articles on State Responsibility [Part A., Art 21, Art 25 and Commentary]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BACOT Guillaume, *La doctrine de la guerre juste*, Paris, Economica, 1989, 86 pp.
- BUTLER William E. (ed.), *The Non-use of Force in International Law*, Dordrecht, M. Nijhoff, 1989, 250 pp.
- CASSESE Antonio (ed.), *The Current Legal Regulation of the Use of Force*, Dordrecht, M. Nijhoff, 1986, 536 pp.
- CASSESE Antonio, "Article 51", in COT Jean-Pierre & PELLET Alain (ed.), *La Charte des Nations Unies*, 2nd edition, Brussels/Paris, Bruylant/Economica, 1991, pp. 769-794.
- CASSESE Antonio, *Self-Determination of Peoples: a Legal Reappraisal*, Cambridge, CUP, 1995, 393 pp.
- CHESTERMAN Simon, *Just War or Just Peace: Humanitarian Intervention and International Law*, Oxford, OUP, 2001, 295 pp.
- DINSTEIN Yoram, War, *Aggression and Self-defence*, 3rd edition, Cambridge, CUP, 2001, 318 pp.
- GARDAM Judith, *Necessity, Proportionality and the Use of Force by States*, Cambridge, CUP, 2004, 259 pp.
- GRAY Christine, *International Law and the Use of Force*, 3rd ed., Oxford, OUP, 2008, 455 pp.
- SASSÒLI Marco, "The Concept of Security in International Law Relating to Armed Conflicts", in

BAILLIET Cécilia M., *Security: a Multidisciplinary Normative Approach*, Leiden, Boston, M. Nijhoff, 2009, pp. 7-23.

- VERHOVEN Sten, “A Missed Opportunity to Clarify the Modern Ius ad Bellum: Case Concerning Armed Activity on the Territory of the Congo”, in *Revue de droit militaire et de droit de la guerre*, Vol. 3-4, No 45, 2006, pp. 355-368.

2. The complete separation between *jus ad bellum* and *jus in bello*

P I, Preamble, para. 5

Quotation

PUBLIC LAW II – International Law

Paragraph 53:

[...] The public Right of *States* [...] in their relations to one another, is what we have to consider under the designation of the Right of Nations. Wherever a State, viewed as a Moral Person, acts in relation to another existing in the condition of natural freedom, and consequently in a state of continual war, such Right takes its rise.

The Right of Nations in relation to the State of War may be divided into: 1. The Right of *going to War*; 2. Right *during* War; and 3. Right *after* War, the object of which is to constrain the nations mutually to pass from this state of war, and to found a common Constitution establishing Perpetual Peace. [...]
Paragraph 57:

The determination of what constitutes Right in War is the most difficult problem of the Right of Nations and International Law. It is difficult even to form a conception of such a Right, or to think of any Law in this lawless state without falling into a contradiction. *Inter arma* silent leges. It must then be just the right to carry on War according to such principles as render it always still possible to pass out of that natural condition of states in their external relations to each other, and to enter into a condition of Right.

[**Source**: Kant, I., *The Philosophy of Law. An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*. Translated from the German by W. Hastie BD, Edinburgh, 1887, paras 53 & 57]

CASES AND DOCUMENTS

- France, Accession to Protocol I [Part B., para. 1]
- United Kingdom and Australia, Applicability of Protocol I

- United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Part B.]
- Inter-American Commission on Human Right, Tablada [Para. 173]
- ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Judgement, para. 345(1); Separate opinion, paras 55-63]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Para. 26]

a. **Historical development**

aa) *temperamenta belli* only for those fighting a *bellum justum* (just war)

bb) war as a fact of international life – *jus durante bello* (law during war)

cc) the prohibition of the use of force

Quotation Laws of War. 18. The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that, although the term “laws of war” ought to be discarded, a study of the rules governing the use of armed force – legitimate or illegitimate – might be useful. The punishment of war crimes, in accordance with the principles of the Charter and Judgment of the Nürnberg Tribunal, would necessitate a clear definition of those crimes and, consequently, the establishment of rules which would provide for the case where armed force was used in a criminal manner. The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace. [**Source:** Yearbook of the International Law Commission, New York, UN, 1949, p. 281] dd) peace operations and international police operations: return of temperamenta belli?

CASES AND DOCUMENTS

- UN, A Multinational Force to Facilitate Humanitarian Aid

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- DAILLIER Patrick, “Les opérations multinationales consécutives à des conflits armés en vue du rétablissement de la paix”, in *Recueil des cours [de l’] Académie de droit international*, T. 314, 2005 pp. 424-431.

- FLECK Dieter, “Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?”, in *Frieden in Freiheit = Peace in Liberty = Paix en liberté: Festschrift für Michael Bothe zum 70 Geburtstag*, Baden-Baden, Nomos; Zürich, Dike, 2008, pp. 391-407.
- ZWANENBURG Martin, “Pieces of the Puzzle: Peace Operations, Occupation and the Use of Force”, in *The Military Law and the Law of War Review*, Vol. 1-2, No. 45, 2006, pp. 239-248.

a. **Reasons**

CASES AND DOCUMENTS

- ICRC, Protection Policy [Para. 5.1]
- United States Military Tribunal at Nuremberg, The Justice Trial

aa) Logical reasons: once the primary rules prohibiting the use of force (i.e. *jus ad bellum*) have been violated, the subsidiary rules of *jus in bello* must apply, as they are foreseen specifically for situations in which the primary rules have been violated.

bb) Humanitarian reasons: war victims are not responsible for the fact that “their” State has violated international law (i.e. *jus ad bellum*) and need the same protection, whether they are on the “right” or on the “wrong” side.

cc) Practical reasons: during a conflict, belligerents never agree on which among them has violated *jus ad bellum*, i.e. who is the aggressor; IHL has to apply during the conflict. It will only be respected if both sides have to apply the same rules.

a. **Consequences of the distinction**

aa) The equality of belligerents before IHL

P I, Art. 96(3)(c)

CASES AND DOCUMENTS

- United Kingdom and Australia, Applicability of Protocol I [Part B.]
- Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para. 76]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- MEYROWITZ Henri, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, Pedone, 1970, 418 pp.
- ROBERTS Adam, "The Equal Application of the Laws of War: A Principle under Pressure", in *IRRC*, Vol. 90, No. 872, December 2008, pp. 931-962.

bb) IHL applies independently of the qualification of the conflict under *jus ad bellum*

CASES AND DOCUMENTS

- United States, President Rejects Protocol I
- Israel, Applicability of the Fourth Convention to Occupied Territories
- Amnesty International, Breach of the Principle of Distinction [Part B.]
- United States, United States v. Noriega [Part B. II. A.]
- UN Security Council, Sanctions Imposed Upon Iraq
- Case Study, Armed Conflicts in the former Yugoslavia [para 26]

cc) Arguments under *jus ad bellum* may not be used to interpret IHL

CASES AND DOCUMENTS

- The International Criminal Court [Part A., Art. 31(1)(c)]
- International Law Commission, Articles on State Responsibility [Part A., Art. 25 and Commentary]
- ICJ, Nuclear Weapons Advisory Opinion [Paras 30, 39, 43, 96, 97, and 105]
- France, Accession to Protocol I [Part A.]
- United States Military Tribunal at Nuremberg, The Justice Trial,
- United States Military Tribunal at Nuremberg, United States v. Alfried Krupp et al. [Part 4 (iii)]
- United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Part 3 (v)]
- Singapore, Bataafsche Petroleum v. The War Damage Commission
- Israel, Applicability of the Fourth Convention to Occupied Territories
- Iran/Iraq, 70,000 Prisoners of War Repatriated
- U.S., Lethal Operations against Al-Qa'ida Leaders

dd) *Jus ad bellum* may not render application of IHL impossible

ee) IHL may not render the application of *jus ad bellum*, e.g. self-defence, impossible

a. **Contemporary threats to the distinction**

CASES AND DOCUMENTS

- Convention on the Safety of UN Personnel
- Case No. 23, The International Criminal Court [Parts B., C. and D.]
- United States, President Rejects Protocol I
- UN, UN Forces in Somalia
- Belgium, Belgian Soldiers in Somalia
- Armed Conflicts in the former Yugoslavia [paras 19 and 26]
- Bosnia and Herzegovina, Using Uniforms of Peacekeepers
- U.S., Lethal Operations against Al-Qa'ida Leaders

aa) New concepts of "just" (or even "humanitarian") war

bb) "International police action": international armed conflicts turn into law enforcement operations directed by the international community, those who represent it (or claim to represent it) against "outlaw States".

cc) In many asymmetric conflicts, the means available to the parties are materially so different, and those they actually use morally so distinct, that it appears increasingly unrealistic to subject them to the same rules.

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BURKE Anthony, "Just War or Ethical Peace?: Moral Discourses of Strategic Violence after 9/11", in *International Affairs*, Vol. 80/2, March 2004, pp. 329-353.
- SKERKER Michael, "Just War Criteria and the Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones", in *Journal of Military Ethics*, Vol. 3/1, 2004, pp. 27-39.
- SUBEDI Surya, "The Concept in Hinduism of 'Just War'", in *Journal of Conflict and Security Law*, Vol. 8/2, October 2003, pp. 339-361.

3. The distinction in non-international armed conflicts

CASES AND DOCUMENTS

- Belgium and Brazil, Explanations of Vote on Protocol II [Part B.]
- United States, The Prize Cases
- ICJ, Nicaragua v. United States [Para. 246]
- Inter-American Commission on Human Rights, Tablada [Para. 174]
- Colombia, Constitutional Conformity of Protocol II [Para 20 and para 21]
- U.S., Lethal Operations against Al-Qa'ida Leaders

a. **International law does not prohibit non-international armed conflicts; domestic law does.**
b. **IHL treats parties to a non-international armed conflict equally, but cannot oblige domestic laws to do so.**

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BUGNION François, "*Jus ad Bellum*, *Jus in Bello* and Non-International Armed Conflicts", in *YIHL*, Vol. 6 (2003), 2007, pp. 167-198.

III. International Humanitarian Law: a branch of international law governing the conduct of States and individuals

1. Situations of application

Introductory text

IHL applies in two very different types of situations: *international armed conflicts and non-international armed conflicts*. Technically, the latter are called "armed conflicts not of an international character". It has been held, but is not entirely uncontested, that every armed conflict which "does not involve a clash between nations" is not of an international character, and that the latter phrase "bears its literal meaning".[16] All armed conflicts are therefore either international or non-international, and the two categories have to be distinguished according to the parties involved rather than by the territorial scope of the conflict.

A. **International armed conflict**

The IHL relating to international armed conflicts applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[17]

The notion of "armed conflict" has, from 1949 onwards, replaced the traditional notion of "war". According to the Commentary,[18] "[t]he substitution of this much more general expression ('armed conflict') for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression 'armed conflict' makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict [...] even if one of the Parties denies the existence of a state of war [...]." The ICTY confirmed in the *Tadic* case that "an armed conflict exists whenever there is a resort to armed force between States […]".[19] This definition has since been used several times by the ICTY's Chambers and by other international bodies.[20] When the armed forces of two States are involved, suffice it for one shot to be fired

or one person captured (in conformity with government instructions) for IHL to apply, while in other cases (e.g. a summary execution by a secret agent sent by his government abroad), a higher level of violence is necessary.

The same set of provisions also applies “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance [...].”[21] In application of a standard rule of the law of State responsibility on the attribution of unlawful acts, a conflict between governmental forces and rebel forces within a single country becomes of international character if the rebel forces are de facto agents of a third State. In this event, the latter’s conduct is attributable to the third State[22] and governed by the IHL of international armed conflicts.

According to the traditional doctrine, the notion of international armed conflict was thus limited to armed contests between States. During the Diplomatic Conference of 1974-1977, which lead to the adoption of the two Additional Protocols of 1977, this conception was challenged and it was finally recognized that “wars of national liberation”[23] should also be considered as international armed conflicts.

A. Non-international armed conflict

Traditionally, non-international armed conflicts (or, to use an outdated term, “civil wars”) were considered as purely internal matters for States, in which no international law provisions applied.

This view was radically modified with the adoption of Article 3 common to the four Geneva Conventions of 1949. For the first time the society of States agreed on a set of minimal guarantees to be respected during non-international armed conflicts.

Unlike violence between the armed forces of States, not every act of violence within a State (even if directed at security forces) constitutes an armed conflict. The threshold of violence needed for the IHL of non-international armed conflicts to apply is therefore higher than for international armed conflicts. In spite of the extreme importance of defining this lower threshold below which IHL does not apply at all, Article 3 does not offer a clear definition of the notion of non-international armed conflict.[24]

During the Diplomatic Conference, the need for a comprehensive definition of the notion of non-international armed conflict was reaffirmed and dealt with accordingly in Article 1 of Additional Protocol II.

According to that provision, it was agreed that Protocol II “[s]hall apply to all armed conflicts not covered by Article 1 [...] of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol [...]”.

It should be noted that this fairly restrictive definition applies only to Protocol II. It does not apply to Article 3 common to the four Geneva Conventions.[25] Practically, there are thus situations of non-international armed conflict in which only common Article 3 will apply, because the level of organization of the dissident groups is insufficient for Protocol II to apply, or the fighting is between non-State armed groups. Conversely, common Article 3 will apply to all situations where Protocol II is applicable.

Moreover, the ICC Statute provides an intermediary threshold of application. It does not require that the conflict be between governmental forces and rebel forces, that the latter control part of the territory, or that there be a responsible command.[26] The conflict must, however, be protracted and the armed groups must be organized. The jurisprudence of the ICTY has, in our view correctly, replaced the conflict's protracted character by a requirement of intensity. It requires a high degree of organization and violence for any situation to be classified as an armed conflict not of an international character.[27]

Today, there is a general tendency to reduce the difference between IHL applicable in international and in non-international armed conflicts. The jurisprudence of international criminal tribunals, the influence of human rights and even some treaty rules adopted by States have moved the law of non-international armed conflicts closer to the law of international armed conflicts, and it has even been suggested in some quarters that the difference be eliminated altogether. In the many fields where the treaty rules still differ, this convergence has been rationalized by claiming that under customary international law the differences between the two categories of conflict have gradually disappeared. The ICRC study on customary International Humanitarian Law [28] comes, after ten years of research, to the conclusion that 136 (and arguably even 141) out of 161 rules of customary humanitarian law, many of which are based on rules of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts.

Cases and documents

- Central African Republic, Report of the UN Independant Expert, July 2016
- Syria, Report by UN Commission of Inquiry (March 2017)
- Syria, the Battle for Aleppo
- International Criminal Court, Trial Judgment in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo
- Somalia/Kenya, Al-Shabab Attacks
- Yemen , Humanitarian Impact of the Conflict
- United States, The US Plan to Mitigate Civilian Harm in Armed Conflicts

A. **Other situations**

IHL is not applicable in situations of internal violence and tension which do not meet the threshold of non-international armed conflicts. This point has been clearly made in Article 1(2) of Additional Protocol II, which states: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts

[...]."[29]

CASES AND DOCUMENTS

- International Law Commission, Articles on State Responsibility [Part A., Art 8 and Commentary]
- United States, The Prize Cases
- Israel/Gaza, Operation Cast Lead [Part I, paras 28-67; Part II, paras 273-283]
- Israel/Lebanon/Hezbollah, Conflict in 2006
- ICJ, Nicaragua v. United States [Paras 115, 116, and 219]
- UN Security Council, Sanctions Imposed Upon Iraq
- ICTY, The Prosecutor v. Tadic [Part A., paras 67-70 and 96; Part E., paras 37-100]
- ICTY, The Prosecutor v. Boskoski
- Democratic Republic of the Congo, Conflict in the Kivus
- ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 601]
- ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 7-15]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 2-27]
- Turkey/Iraq, Turkish Military Operations in Northern Iraq
- UN, Statement of a Special Rapporteur on Drone Attacks
- Syria/Turkey/Lebanon
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2011
- Malaysia/Philippines, Conflict over the Sultanate of Sulu
- United States, The US Plan to Mitigate Civilian Harm in Armed Conflicts

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BARTELS Rogier, "Timelines, Borderlines and Conflicts: the Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts", in *IRRC*, Vol. 91, No. 873, March 2009, pp. 35-67.
- CARSWELL Andrew J., "Classifying the Conflict: a Soldier's Dilemma", in *IRRC*, Vol. 91, No. 873, March 2009, pp. 143-161.
- DAHL Arne Willy & SANDBU Magnus, "The Threshold of Armed Conflict", in *Revue de droit militaire et de droit de la guerre*, Vol. 3-4, No. 45, 2006, pp. 369-388.
- GREENWOOD Christopher, "Scope of Application of Humanitarian Law", in FLECK Dieter (ed.), *Handbook of Humanitarian Law*, Oxford, OUP, 2nd ed., 2008, pp. 201-263.
- KWAKWA Edward K., *The International Law of Armed Conflict: Personal and Material Fields of Application*, Dordrecht, Kluwer, 1992, 208 pp.
- O'CONNELL Mary Ellen, Defining Armed Conflict", in *Journal of Conflict & Security Law*, Vol. 13, No.

3, 2008, pp. 393-400.
- SASSÒLI Marco, “The Legal Qualification of the Conflicts in the former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?”, in WANG Tieya & YEE Sienho (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London, 2001, pp. 307-333.
- SCHINDLER Dietrich, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, in *Collected Courses*, Vol. 163, 1979, pp. 119-163.
- SIOTIS Jean, *Le droit de la guerre et les conflits armés d’un caractère non international*, Paris, LGDJ, 1958, 248 pp.
- SIVAKUMARAN Sandesh, “Identifying an Armed Conflict not of an International Character”, in STAHN Carsten & SLUITER Göran (eds), *The Emerging Practice of the International Criminal Court*, Leiden, Boston, M. Nijhoff, 2009, pp. 363-380.
- THAHZIB-LIE Bahia & SWAAK-GOLDMAN Olivia, “Determining the Threshold for the Application of International Humanitarian Law”, in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (eds), *Making the Voice of Humanity Heard*, Leiden/Boston, M. Nijhoff, 2004, pp. 239-253.
- VITE Sylvain, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, in *IRRC*, Vol. 91, No. 873, March 2009, pp. 69-94.

Further reading:

- BALENDRA Natasha, “Defining Armed Conflict”, in *Cardozo Law Review*, Vol. 29, No. 6, 2008, pp. 2461-2516.
- BYRON Christine, “Armed Conflicts: International or Non-International?”, in *Journal of Conflict and Security Law*, Vol. 6, No. 1, June 2011, pp. 63-90.
- CRAWFORD Emily, “Blurring the Lines Between International and Non-International Armed Conflicts: The Evolution of Customary International Law Applicable in Internal Armed Conflicts”, in *Australian International Law Journal*, Vol. 15, 2008, pp. 29-54.
- GAVSHON Daniela, “The Applicability of IHL in Mixed Situations of Disaster and Conflict”, in *Journal of Conflict and Security Law*, Vol. 14, No. 2, 2010, pp. 243-263.
- KÜEFNER Stefanie, “The Threshold of Non-International Armed Conflict: the Tadic Formula and its First Criterion Intensity”, in *Militair-Rechtelijk Tijdschrift*, Vol. 102, Issue 6, 2009, pp. 301-311.
- LA HAYE Eve, *War Crimes in Internal Armed Conflicts*, Cambridge, CUP, 2008, 424 pp.
- STEWART James G., “Towards a Single Definition of Armed Conflict in International Humanitarian Law: a Critique of Internationalized Armed Conflict”, in *IRRC*, No. 850, June 2003, pp. 313-349.
- VERHOEVEN Sten, “International and Non-International Armed Conflicts”, in *Institute for International Law K.U. Leuven*, Working Paper No. 107, 2007, 22 pp.

a. **qualification not left to the parties to the conflict**

CASES AND DOCUMENTS

- Belgium and Brazil, Explanations of Vote on Protocol II [Part B.]
- ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 603]
- Eastern Ukraine, Attacks Against and Military Use of Schools

a. **international armed conflicts**

GC I-IV, Art. 2

CASES AND DOCUMENTS

- Convention on the Safety of UN Personnel
- South Africa, Sagarius and Others
- Belgium, Belgian Soldiers in Somalia
- ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Paras 29-33, 51-52, 178, 217-218]
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Para. 9]
- Georgia/Russia: Tbilisi Nervously Eyes Russia's Border Barricade of South Ossetia
- ICTY, The Prosecutor v. Radovan Karadzic
- United States, Jurisprudence Related to the Bombing of the U.S.S Cole

aa) inter-State conflicts

CASES AND DOCUMENTS

- Malaysia, Osman v. Prosecutor
- Israel, Applicability of the Fourth Convention to Occupied Territories
- United States, United States v. Noriega [Part B. II. A.]
- Case Study, Armed Conflicts in the former Yugoslavia [para 26]
- ICTY, The Prosecutor v. Tadic [Part C., paras 87-162]
- Case Study, Armed Conflicts in the Great Lakes Region [Part 3. A.]
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part I and Part II]
- Cambodia/Thailand, Border Conflict around the Temple of Preah Vihear
- Libya, NATO Intervention 2011
- ECCC, Detention Sites in Cambodia

- old concept of war abandoned

CASES AND DOCUMENTS

- United States, The Prize Cases

- ◦ necessary level of violence?

CASES AND DOCUMENTS

- United States, The Prize Cases
- Cambodia/Thailand, Border Conflict around the Temple of Preah Vihear
- Syria/Turkey/Lebanon
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2011
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para. 26]
- Myanmar, Incidents at Chinese border

- belligerent occupation (even in the absence of armed resistance)

(*See infra*, Civilian Population, IV. Special rules on Occupied Territories, 2) The applicability of the rules of IHL concerning occupied territories)

GC I-IV, Art. 2(2)

bb) national liberation wars P I, Art. 1(4)

CASES AND DOCUMENTS

- France, Accession to Protocol I [Part B., para. 4]
- United Kingdom and Australia, Applicability of Protocol I
- United States, President Rejects Protocol I
- South Africa, Sagarius and Others
- South Africa, S. v. Petane
- South Africa, AZAPO v. Republic of South Africa
- Case Study, Armed Conflicts in the former Yugoslavia [paras 23 and 24]
- Germany, Government Reply on the Kurdistan Conflict
- Philippines, Application of IHL by the National Democratic Front of the Philippines
- The Netherlands, Public Prosecutor v. Folkerts
- The Conflict in Western Sahara
- United States, United States v. Marilyn Buck

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- ABI-SAAB Georges, “Wars of National Liberation in the Geneva Conventions and Protocols”, in *Collected Courses*, Vol. 165, 1979, pp. 353-445.
- KOENIG Christian, *Wars of National Liberation and Modern International Humanitarian Law. A Consideration of the Scope of Application of Article I, para. 4 of Additional Protocol I to the 1949 Geneva Conventions*, Frankfurt, Peter Lang, Europäische Hochschulschriften, Vol. 752, 1988, 209 pp.

Further reading:

- DE SAINT MAURICE Thomas, “Sahara occidental 2001: prélude d’un fiasco annoncé”, in *Actualité et Droit International*, February 2002, http://www.ridi.org/adi, 10 pp.
- DRAPER Gerald I.A.D. “Wars of National Liberation and War Criminality”, in HOWARD Michael, *Restraints on War*, Oxford, OUP, 1979, pp. 135-162.
- DUNBAR Charles, “Sahara Stasis: Status and Future Prospects of the Western Sahara Conflict”, in *The Middle East Journal*, Vol. 54/4, 2000, pp. 522-545.
- HIGGINS Noelle, “The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements”, in *Human Rights Brief*, Vol. 17, Issue 1, 2009, pp. 12-18.
- HIGGINS Noelle, *Regulating the Use of Force in Wars of National Liberation: the Need for a New Regime: a Study of the South Moluccas and Aceh*, Leiden, Boston, M. Nijhoff, 2010, 266 pp.
- WERNER Walter G., “Self-determination and Civil War”, in *Journal of Conflict and Security Law*, Vol. 6/2, 2001, 171-190 pp.
- WILSON Heather A., *International Law and the Use of Force by National Liberation Movements*, Oxford, Clarendon Press, 1988, 209 pp.

a. **non-international armed conflicts**

aa) necessary level of violence: higher than for international armed conflicts

CASES AND DOCUMENTS

- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [paras 101, 105]
- Myanmar, Incidents at Chinese border
- International Criminal Court, Trial Judgment in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo

bb) necessary degree of organization of rebel groups

(*See infra*, Part I, Chapter 12. The Law of Non-International Armed Conflicts)

CASES AND DOCUMENTS

- ICTY, The Prosecutor v. Tadic [Part A., paras 67-70 and 96; Part E., paras 37-100]
- ICTY, The Prosecutor v. Boskoski
- Mali, Conduct of Hostilities
- The armed conflict in Syria
- United States of America, The Death of Osama bin Laden
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para. 42]
- ICTY, The Prosecutor v. Radovan Karadzic
- International Criminal Court, Trial Judgment in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo
- Somalia, The Death of Bilal Al-Sudani

a. **Acts of terrorism?**

Introductory text

IHL only applies to armed conflicts and therefore covers terrorist acts only when they are committed within the framework or as part of an armed conflict. Acts of terrorism committed in situations of internal violence or in time of peace are not covered by IHL. However, acts of terrorism are also prohibited by internal and international criminal law.[30] Violence does not constitute an armed conflict simply because it is committed with terrorist means. As shown above, international armed conflicts are characterized by the fact that two States use violence against each other, while non-international armed conflicts are characterized by the degree of violence and organization of the parties. In both cases it does not matter whether lawful or unlawful means are used. Terrorist acts may therefore constitute (and trigger) an international armed conflict (when committed by a State – or its *de jure* or *de facto* agents – against another State) or a non-international armed conflict (when committed by an organized armed group fighting a State and its governmental authorities).

In both cases (or when terrorist acts are committed during a pre-existing armed conflict), IHL prohibits the most common and typical acts of terrorism, even if committed for the most legitimate cause: attacks against civilians,[31] indiscriminate attacks,[32] acts or threats whose main aim is to spread terror among the civilian population[33] and acts of “terrorism” aimed against civilians in the power of the enemy.[34] In most cases, such acts are considered war crimes that must be universally prosecuted.[35]

There is, however, no universally recognized definition of an act of terrorism. The two main controversies

preventing States from reaching a consensus on this point are related to armed conflicts. On the one hand, some States want to exclude acts committed in national liberation wars and in resistance to foreign occupation from the definition (which conflates, from an IHL perspective, *jus ad bellum* and *jus in bello*). On the other hand, it is suggested that the definition should cover not only attacks against civilians and indiscriminate acts, but also attacks on government agents and property the purpose of which is to compel the government to do or to abstain from doing something. As this is the essence of any warfare, this would label as “terrorist” and criminalize acts which are not prohibited in armed conflicts by IHL (and would therefore not encourage compliance by armed groups).

IHL applies equally to those who commit acts of terrorism (regular armed forces, national liberation movements, resistance movements, dissident armed forces engaged in an internal armed conflict or groups who, as their main action consists of terrorist acts, can be considered as terrorist groups) and to their opponents. Recourse to armed force against groups considered as terrorist is therefore subject to the same rules as in any other armed conflict.

CASES AND DOCUMENTS

- ICRC, The Challenges of Contemporary Armed Conflicts
- France, Accession to Protocol I [Part B., para. 4]
- United Kingdom and Australia, Applicability of Protocol I [Part C - Reservation (d)],
- Amnesty International, Breach of the Principle of Distinction
- United States, The Schlesinger Report
- ICTY, The Prosecutor v. Boskoski [Paras 184-190]
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, The September 11 2001 Attacks
- United States, Use of Armed Drones for Extraterritorial Targeted Killings
- General Assembly, The use of drones in counter-terrorism operations
- U.S., Lethal Operations against Al-Qa’ida Leaders
- United States of America, The Death of Osama bin Laden
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 (Paras 74-79)
- Belgium, Prosecution of Terrorist Crimes in the context of Armed Conflict
- Somalia, The Death of Bilal Al-Sudani

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- FERNANDO-SANCHEZ Pablo Antonio (ed.), *International Legal Dimension of Terrorism* (*See* in

particular Part IV, 'Terrorism and Armed Conflicts"), Leiden, M. Nijhoff, 2009, 512 pp.
- GASSER Hans-Peter, "Acts of 'Terrorism' and International Humanitarian Law", in *IRRC*, No. 897, September 2002, pp. 547-570.
- GASSER Hans-Peter, "Prohibition of Terrorist Acts in International Humanitarian Law", in *IRRC*, No. 253, August 1986, pp. 200-212.
- GASSER Hans-Peter, "International Humanitarian Law, the Prohibition of Terrorist Acts and the Fight against Terrorism", in *YIHL*, Vol. 4, 2001, pp. 329-347.
- GILBERT Paul, *New Terror, New Wars*, Edinburgh, Edinburgh Press University, 2004, 208 pp.
- HOFFMAN Michael H., "State Practice, the Customary Law of War and Terrorism: Adapting Old Rules to Meet New Threats", in *IYHR*, Vol. 34, 2004, pp. 231-249.
- JODOIN Sébastien, "Terrorism as a War Crime", in *International Criminal Law Review*, Vol. 7, No. 1, 2007, pp. 77-115.
- KLABBERS Jan, "Rebel with a Cause? Terrorists and Humanitarian Law", in *EJIL*, Vol. 14/2, April 2003, pp. 299-312.
- LAVOYER Jean-Philippe, "International Humanitarian Law and Terrorism", in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (eds), *Making the Voice of Humanity Heard*, Leiden/Boston, M. Nijhoff, 2004, pp. 255-270.
- LOBEL Jules, "The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan", in *The Yale Journal of International Law*, Vol. 24/2, 1999, pp. 537-557.
- NEUMAN Gerald L. "Humanitarian Law and Counterterrorist Force", in *EJIL*, Vol. 14/2, April 2003, pp. 283-298.
- POWELL C.H. & ABRAHAM Garth, "Terrorism and International Humanitarian Law", in *African Yearbook on International Humanitarian Law*, 2006, pp. 118-147.
- QUENIVET Noëlle, "The Applicability of International Humanitarian Law to Situations of a (Counter-)Terrorist Nature", in ARNOLD Roberta & HILDBRAND Pierre-Antoine (eds), *International Humanitarian Law and the 21st Century's Conflicts*, Lausanne, Edis, 2005, pp. 25-59.
- ROBERTS Adam, "Counter Terrorism, Armed Force and the Laws of War", in *Survival*, Vol. 44/1, 2002, pp. 7-32.
- RUBIN Alfred P., "Applying the Geneva Conventions: Military Commissions, Armed Conflict, and Al-Qaeda", in *The Fletcher Forum of World Affairs*, Vol. 26/1, 2002, pp. 79-81.
- SANDOZ Yves, "Lutte contre le terrorisme et droit international: risques et opportunités", in *Revue Suisse de Droit International et de Droit Européen*, Vol. 3, 2002, pp. 319-354.
- SASSÒLI Marco, "Terrorism and War", in *Journal of International Criminal Justice*, Vol. 4, Issue 5, 2006, pp. 969-981.
- SASSÒLI Marco, "La définition du terrorisme et le droit international humanitaire", in *Revue québécoise de droit international*, Vol. 19, hors-série, 2007, pp. 29-48.
- SAUL Ben, *Defining Terrorism in International Law*, Oxford, OUP, 2006, 373 pp.
- SVARC Dominika, "The Use of Military Force in the Fight Against Terrorism: International Legal Framework", in *ISIL Yearbook of International Humanitarian and Refugee Law*, Vol. 6, 2006, pp. 142-168.
- TRAVALIO Gregory M., "Terrorism, International Law, and the Use of Military Force", in *Wisconsin*

International Law Journal, Vol. 18/1, 2000, pp. 145-191.
- VAREILLES Thierry, *Encyclopédie du Terrorisme International*, Paris, L'Harmattan, 2001, 549 pp.
- WAXMAN Matthew C., "The Structure of Terrorism Threats and the Laws of War", in *Duke Journal of Comparative and International Law*, Vol. 20, No. 3, 2010, pp. 429-455.
- WEDGWOOD Ruth, "Responding to Terrorism: the Strikes Against Bin Laden", in *The Yale Journal of International Law*, Vol. 24/2, 1999, pp. 559-576.
- Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser. L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, http://www.cidh.oas.org/Terrorism/Eng/toc.htm.

a. **The global war on terror?**

Following the attacks of 11 September 2001 against New York and Washington D.C., perpetrated by members of the terrorist group al-Qaeda, the administration of President George W. Bush declared that the United States was engaged in a global "war on terror",[36] an international armed conflict against a non-State actor (al-Qaeda) and its associates. That "war" comprised not only a military campaign against Afghanistan (which harboured al-Qaeda leaders), but also attacks directed at and arrests of suspected members of al-Qaeda or other "terrorists" elsewhere in the world. While the United States claimed in this conflict all the prerogatives that IHL confers upon a party to an international armed conflict, in particular to attack "unlawful enemy combatants" without necessarily trying to arrest them, and to detain them without benefit of a court decision, it denied these detainees protection by most of IHL, arguing that their detention was governed neither by the rules applying to combatants nor by those applicable to civilians.[37]

In 2006, the US Supreme Court held that every armed conflict which "does not involve a clash between nations" is not of an international character, and that the latter phrase "bears its literal meaning".[38]

Under President Barack Obama, the United States has abandoned the terms "war on terror" and "unlawful combatants". While its position was still under review in 2010, it continued to argue that an armed conflict exists (and that IHL applies) between the United States, on the one hand, and al-Qaeda, the Taliban and "associated" forces, on the other. While not explicitly classifying this "novel type of armed conflict" as international or non-international, it holds that, at least by analogy, the IHL of international armed conflicts applies, and that those who provide "substantial support" to the enemy may be attacked and detained under "the laws of war", just as enemy combatants could under the law of international armed conflicts.[39]

Critics object that a conflict between a State or a group of States, on the one hand, and a non-State group such as al-Qaeda, on the other, could at best be a non-international armed conflict, if the requirements of intensity of violence and of organization of the non-State armed group are fulfilled.[40] The IHL of non-international armed conflicts, they argue, does not have a worldwide geographical field of application. Non-international armed conflicts with al-Qaeda may exist in Afghanistan and in Pakistan, but not elsewhere. Even if and where the IHL of non-international armed conflicts applies, its rules on the admissibility of the detention of, and attacks against, enemy fighters are not the same as those applicable in international armed

conflicts to enemy combatants.

CASES AND DOCUMENTS

- ICRC, The Challenges of Contemporary Armed Conflicts
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part IV]
- United States, President's Military Order
- United States, Hamdan v. Rumsfeld
- United States, Military Commissions
- United States, Habeas Corpus for Guantanamo Detainees
- United States, The Obama Administration's Internment Standards
- United States, Closure of Guantanamo Detention Facilities
- United States, Treatment and Interrogation in Detention
- UN, Statement of a Special Rapporteur on Drone Attacks
- United States, Use of Armed Drones for Extraterritorial Targeted Killings
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2011
- General Assembly, The use of drones in counter-terrorism operations
- U.S., Lethal Operations against Al-Qa'ida Leaders
- United States of America, The Death of Osama bin Laden
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [paras 63, 80-83]
- USA, Guantánamo, End of "Active Hostilities" in Afghanistan
- USA, Jawad v. Gates
- Somalia, The Death of Bilal Al-Sudani

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BOGAR Thomas, "Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror", in *Florida Journal of International Law*, Vol. 21, No. 1, April 2009, pp. 29-91.
- BYERS Michael, "Terrorism, the Use of Force and International Law after 11 September", in *ICLQ*, Vol. 51/2, 2002, pp. 401-414.
- CASSESE Antonio, "Terrorism is also Disrupting Crucial Legal Categories of International Law", in *EJIL*, Vol. 12/5, 2001, pp. 993-1001.
- CONDORELLI Luigi & NAQVI Yasmin, "The War against Terrorism and *Jus in Bello*: Are the Geneva Conventions Out of Date?", in BIANCHI Andrea (ed.), *Enforcing International Law Norms against Terrorism*, Oxford, Hart, 2004, pp. 25-37.
- EMANUELLI Claude, "Faut-il parler d'une "guerre" contre le terrorisme?", in *Canadian Yearbook of*

International Law, Vol. 46, 2008, pp. 415-430.
- GRAHAM DAVID E., "The Law of Armed Conflict and the War on Terrorism", in JACQUES Richard B. (ed.), *Issues in International Law and Military Operations*, in International Law Studies, Vol. 80, 2006, pp. 331-337.
- GREENWOOD Christopher, "International Law and the 'War against Terrorism'", in *International Affairs*, Vol. 78/2, 2002, pp. 301-317.
- KRESS Klaus, "Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts", in *Journal of Conflict & Security Law*, Vol. 15, Issue 2, 2010, pp. 245-274.
- LEWIS Michael W., *The War on Terror and the Laws of War: a Military Perspective*, New York, OUP, 2009, 248 pp.
- O'CONNELL Mary Ellen, *International Law and the "Global War on Terror"*, Paris, Pedone, 2007, 93 pp.
- SASSÒLI Marco, "La 'guerre contre le terrorisme', le droit international humanitaire et le statut de prisonnier de guerre", in *CYIL*, Vol. 39, 2001, pp. 211-252.
- SASSÒLI Marco, "Use and Abuse of the Laws of War in the 'War Against Terrorism'", in *Law and Inequality: A Journal of Theory and Practice*, Vol. 22, 2004, pp. 195-221.

Further reading:

- BELLAMY Alex J., "No Pain, No Gain? Torture and Ethics in the War on Terror", in *International Affairs*, Vol. 82, No. 1, January 2006, pp. 121-146.
- CORN Geoffrey S. & JENSEN Eric Talbot, "Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations", in *Israel Law Review*, Vol. 42, 2009, p. 46.
- EVANGELISTA Matthew, *Law, Ethics, and the War on Terror*, Cambridge, Malden, Polity, 2008, 202 pp.
- FISCHER Miles P., "Legal Issues Surrounding Guantánamo Bay: Essay: Applicability of the Geneva Conventions to "Armed Conflict" in the War on Terror", in *Fordham International Law Journal*, Vol. 30, No. 3, February 2007, pp. 509-534.
- FORSYTHE David P., "United States Policy Toward Enemy Detainees in the "War on Terrorism"", in *Human Rights Quarterly*, Vol. 28, No. 2, May 2006, pp. 465-491.
- GOLDSTONE Richard J., "Symposium: from Nuremberg to Abu Ghraib: the Relevance of International Criminal Law to the Global War on Terror", in *Michigan State Journal of International Law*, Vol. 14, No. 1, 2006, pp. 1-138.
- KING Faiza Patel & SWAAK-GOLDMAN Olivia, "The Applicability of International Humanitarian Law to the 'War against Terrorism'", in *Hague Yearbook of International Law*, Vol. 15, 2002, pp. 39-49.
- McDONALD Neil & SULLIVAN Scott, "Rational Interpretation in Irrational Times: The Third Geneva Convention and War on Terror", in *Harvard International Law Journal*, Vol. 44/1, 2003, pp. 301-316.
- McDONALD Avril, "Declaration of War and Belligerent Parties: International Law Governing Hostilities Between States and Transnational Terrorist Networks", in *Netherlands International Law Review*, Vol. 54, No. 2 , 2007, pp. 279-314.
- MILANOVIC Marko, "Lessons for Human Rights and Humanitarian Law in the War on Terror:

Comparing Hamdan and the Israeli Targeted Killings Case", in *IRRC*, Vol. 89, No. 866, June 2007, pp. 373-393.
- PETIT Françoise Camille, "Terrorisme et droit international humanitaire: quelles leçons tirer du statut controversé des prisonniers de Guantánamo ?", in *Droit et Défense*, 2002/3, July-September 2002, pp. 25-32.
- RONA Gabor, ''Interesting Times for International Humanitarian Law: Challenges from the War on Terror'', in *The Fletcher Forum of World Affairs*, Vol. 27, 2003. pp. 55-74.
- RONA Gabor, "A Bull in a China Shop: The War on Terror and International Law in the United States", in *California Western International Law Journal*, Vol. 39, Issue 1, 2008, pp. 135-159.
- SHANY Yuval, "Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror", in *Hebrew University International Law Research Paper*, No. 23-09, 2009, 27 pp.
- TIGROUDJA Hélène, "Quel(s) droit(s) applicable(s) à la 'guerre au terrorisme' ?", in *AFDI*, Vol. 48, 2002, pp. 81-102.
- TURNS David, "The Treatment of Detainees and the "Global War on Terror": Selected Legal Issues", in *IYHR*, Vol. 38, 2008, pp. 145-167.
- VEUTHEY Michel, "Le droit international humanitaire face à la guerre contre le terrorisme", in DOUCET Ghislaine (ed.), *Terrorisme, victimes et responsabilité pénale internationale*, Paris, Calmann-Lévy, 2003, pp. 516-529.
- VIERUCCI Luisa, "Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantánamo Bay Detainees are Entitled", in *Journal of International Criminal Justice*, Vol. 1/2, 2003, pp. 284-314.
- ZWITTER Andrej, "Humanitarian Action on the Battlefields of Global War on Terror", in *The Journal of Humanitarian Assistance*, October 2008, pp. 1-23.

a. **Other situations**

P II, Art. 1(2)

2. Personal scope of application

Introductory text

As IHL developed as the law of international armed conflicts covering, in conformity with the traditional function of international law, inter-State relations, it aimed essentially to protect "enemies" in the sense of enemy nationals. IHL therefore defines a category of "protected persons," consisting basically of enemy nationals, who enjoy its full protection.[41] Nevertheless, the victims of armed conflicts who are not "protected persons" do not completely lack protection. In conformity with and under the influence of international human rights law, they benefit from a growing number of protective rules, which, however, never offer to those who are in the power of the enemy the full protection foreseen for "protected persons". As far back as 1864, the initial Geneva Convention prescribed that "[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for".[42] The rules on the conduct of hostilities apply equally to all

hostilities in international armed conflicts, and all victims benefit equally from them.[43] The law of non-international armed conflicts by definition protects persons against their fellow citizens, i.e., it applies equally to all persons equally affected by such a conflict. Finally, a growing number of IHL rules provide basic, human rights-like guarantees to all those not benefiting from more favourable treatment under IHL.[44] A 1999 ICTY judgement suggested adjusting the concept of "protected persons", beyond the text of Convention IV, to the reality of contemporary conflicts, where allegiance could be determined more by ethnicity than by nationality. The ICTY renounced using the latter as a decisive criteria and replaced it with the criteria of allegiance to the enemy.[45] It remains to be seen if this criteria can be applied in actual conflicts, not only *a posteriori* by a tribunal, but also by the parties to a conflict, by the victims and by the humanitarian actors on the ground.

CASES AND DOCUMENTS

- Georgia/Russia: Tbilisi Nervously Eyes Russia's Border Barricade of South Ossetia

a. **passive personal scope of application: who is protected?**

CASES AND DOCUMENTS

- ECHR, Bankovic and Others v. Belgium and 16 Other States

aa) the concept of "protected persons" GC I, Art. 13; GC II, Art. 13; GC III, Art. 4; GC IV, Art. 4

CASES AND DOCUMENTS

- Netherlands, In re Pilz
- Case Study, Armed Conflicts in the former Yugoslavia [paras 2, 9, and 15]
- Former Yugoslavia, Special Agreements Between the Parties to the Conflicts
- ICTY, The Prosecutor v. Tadic [Part A., para. 81; Part C., paras 163-169]
- ICTY, The Prosecutor v. Rajic [Part A., paras 34-37]
- ICTY, The Prosecutor v. Blaskic [Part A., paras 127-146]
- Switzerland, Military Tribunal of Division 1, Acquittal of G.
- Case Study, Armed Conflicts in the Great Lakes Region (Part III.)
- Colombia, Constitutionality of IHL Implementing Legislation [Paras D.3.3.1.-5.4.3., Para. E.1]
- United States, Trial of John Phillip Walker Lindh
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [paras 88-90]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- SASSÒLI Marco & OLSON Laura M., “The Decision of the ICTY Appeals Chamber in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?”, in *IRRC*, No. 839, September 2000, pp. 733-769.

bb) growing importance of rules deviating from the concept: persons protected by IHL not having “protected person” status

CASES AND DOCUMENTS

- United States, United States v. William L. Calley, Jr.
- ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 629]
- Switzerland, The Niyonteze Case [Part B. III., ch. 3.D.1]

a. **active personal scope of application: who is bound?** (*See infra*, III. International Humanitarian Law: a branch of international law governing the conduct of States and individuals, 5.Relations governed by International Humanitarian Law, c) individual – individual. and Internal Armed Conflict, VIII. Who is bound by the law of non-international armed conflicts?, 2) All those belonging to one party)

CASES AND DOCUMENTS

- ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part B., paras 71-74]
- ICTR, The Prosecutor v. Jean-Paul Akayesu [Part B., paras 425-446]
- Switzerland, The Niyonteze Case [Part A., para. 9 and Part B. III., ch. 3.D.2]
- Syria, Code of Conduct of the Free Syrian Army
- Women and Sexual violence
- Geneva Call and the Chin National Front

3. Temporal scope of application

GC I, Art. 5; GC III, Art. 5; GC IV, Art. 6; P I, Art. 3; P II, Art. 2(2)

Introductory text

With the exception of the rules already applicable in peacetime,[46] IHL starts to apply as soon as an armed conflict arises, e.g., in international armed conflicts as soon as the first (protected) person is affected by the conflict, the first segment of territory occupied, the first attack launched, and for non-international armed conflicts as soon as the necessary level of violence and of organization of the parties is reached.

When those rules of IHL cease to apply is much more difficult to define. One difficulty arises in practice, as in

an international society where the use of force is outlawed, armed conflicts seldom end with the *debellatio* (total defeat) of one side or a genuine peace. Most frequently, contemporary armed conflicts result in unstable cease-fires, continue at a lower intensity, or are frozen by an armed intervention by outside forces or by the international community. Hostilities, or at least acts of violence with serious humanitarian consequences, often break out again later. It is difficult for humanitarian actors to plead with parties that have made declarations ending the conflict that the fighting in reality continues.

Another difficulty results from the texts, as they use vague terms to define the end of their application, e.g., "general close of military operations"[47] for international armed conflicts and "end of the armed conflict"[48] for non-international armed conflicts. For the latter, the ICTY has held that once the necessary level of violence and of organization of the parties is such that the IHL of non-international armed conflicts is applicable, that law continues to apply until the end of the conflict, even when those levels are no longer met.[49] As for occupied territories, Protocol I has extended the applicability of IHL until the termination of the occupation,[50] while under Convention IV it ends one year after the general close of military operations, except for important provisions applicable as long as the occupying power "exercises the functions of government"[51] . What limits the inconveniences resulting from such vagueness and the grey areas appearing in practice (e.g. when a new government agrees with the continued presence of the (former) occupying power or the UN Security Council authorizes the continued military presence of the (former) occupying power) – and is therefore very important in practice – is that IHL continues to protect persons whose liberty is restricted[52] until they are released, repatriated or, in particular if they are refugees, resettled.[53] This does not resolve, however, the regime applying to those who refuse to be repatriated. Furthermore, in the law of international armed conflicts, this extension concerns only persons who were arrested during the conflict, while only the law of non-international armed conflict applies the same to the quite frequent cases of persons arrested after the end of the conflict – but even here only if their arrest is related to the conflict and not if it is related to the post-conflict tension.[54]

CASES AND DOCUMENTS

- The Prosecutor v. Tadic [Part A., paras 67-6; Part E., para. 100]
- Georgia/Russia: Tbilisi Nervously Eyes Russia's Border Barricade of South Ossetia

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- ARY Vaughn A., "Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements", in *Military Law Review*, Vol. 148, 1995, pp. 186-273.
- CAMPBELL Colm, "Peace and the Laws of War: the Role of International Humanitarian Law in the Post-conflict Environment", in *IRRC*, No. 839, September 2000, pp. 627-652.

- DINSTEIN Yoram, “The Initiation, Suspension and Termination of War”, in SCHMITT Michael N. (ed.), *International Law Across the Spectrum of Conflict*, Newport, R.I., 2000, pp. 131-159.
- KOUTROULIS Vaios, *Le début et la fin du droit de l’occupation*, Paris, Pedone, 2010, 334 pp.

a. **beginning of application**

CASES AND DOCUMENTS

- ICTY, The Prosecutor v. Tadic [Part E.]
- ICTY, The Prosecutor v. Boskoski [Paras 239-291]
- United States, The September 11 2001 Attacks
- Eritrea/Djibouti: Repatriation of POWs

a. **end of application**

CASES AND DOCUMENTS

- India, Rev. Mons. Monteiro v. State of Goa
- ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 125]
- Iraq, The End of Occupation
- Sri Lanka, Conflict in the Vanni
- ICTY, The Prosecutor v. Tadic [Part E.]
- Case Study, Armed Conflicts in the Great Lakes Region
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [para. 9]
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [paras 53-69]
- USA, Guantánamo, End of "Active Hostilities" in Afghanistan
- Eritrea/Djibouti: Repatriation of POWs

4. Geographical scope of application

CASES AND DOCUMENTS

- Outer Space/Applicability of IHL in Space
- The Seville Agreement [Art. 5.1.A)a)]
- ICTY, The Prosecutor v. Tadic [Part A., paras 68 and 69]
- ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 635]
- Switzerland, The Niyonteze Case [Part B. III., ch. 3.B.]
- UN, Statement of a Special Rapporteur on Drone Attacks

- United States, Use of Armed Drones for Extraterritorial Targeted Killings
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2011
- General Assembly, The use of drones in counter-terrorism operations
- U.S., Lethal Operations against Al-Qa'ida Leaders
- United States of America, The Death of Osama bin Laden
- Iraq/Syria/UK,Drone Operations against ISIS
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para. 26]
- Somalia/Kenya, Al-Shabab Attacks
- Somalia, The Death of Bilal Al-Sudani

5. **Relations governed by International Humanitarian Law**

Introductory text

International Humanitarian Law (IHL) protects individuals against the (traditionally enemy) State or other belligerent authorities. IHL of international armed conflicts, however, also corresponds to the traditional structure of international law in that it governs (often by the very same provisions) relations between States. Its treaty rules are therefore regulated, with some exceptions, by the ordinary rules of the law of treaties. In addition, it prescribes rules of behaviour for individuals (who must be punished if they violate them) for the benefit of other individuals.

CASES AND DOCUMENTS

- Hungary, War Crimes Resolution [Part IV.]

a. **Individual – State**
   - including his or her own State in international armed conflicts?

CASES AND DOCUMENTS

- United States, United States v. Batchelor
- Democratic Republic of the Congo, Conflicts in the Kivus [Part III, paras 54-60]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- CLAPHAM Andrew, "Non-State Actors", in CHETAIL Vincent (ed.), Post-conflict Peacebuilding: a Lexicon, Oxford, OUP, 2009, pp. 200-213

a. **State – State: International Humanitarian Law in the law of treaties**
   - applicability of treaties based on reciprocity, but no reciprocity in respect for treaties (*See infra*,State responsibility, 2.Consequences of violations, c. applicability of the general rules on State responsibility, dd) but no reciprocity)

CASES AND DOCUMENTS

- Sweden, Report of the Swedish International Humanitarian Law Committee [Part 3.3]
- Germany, Government Reply on the Kurdistan Conflict

- ways to be bound GC I, Arts 56-57 and 60; GC II, Arts 55-56 and 59; GC III, Arts 136-137 and 139; GC IV, Arts 151-152 and 155; P I, Art. 92-94; P II, Arts 20-22

CASES AND DOCUMENTS

- Russian Federation, Succession to International Humanitarian Law Treaties
- Sweden, Report of the Swedish International Humanitarian Law Committee [Part 3.3]
- Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 124-128]
- Germany, Government Reply on the Kurdistan Conflict
- The Netherlands, Public Prosecutor v. Folkerts

- declarations of intention

CASES AND DOCUMENTS

- South Africa, S. v. Petane
- Germany, Government Reply on the Kurdistan Conflict

- interpretation

CASES AND DOCUMENTS

- Israel, Cases Concerning Deportation Orders [3, and Separate Opinion Bach]
- ICTY, The Prosecutor v. Tadic (Part A., paras 71-93 and Part C., paras 282-304)

- reservations

CASES AND DOCUMENTS

- USSR, Poland, Hungary and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III
- United Kingdom and Australia, Applicability of Protocol I [Part C.]
- United States, The Schlesinger Report

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- GAUDREAU Julie, "Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre", in *IRRC*, No. 849, March 2003, pp. 143-184.
- PILLOUD Claude, "Reservations to the Geneva Conventions of 1949", in *IRRC*, No. 180, April 1976, pp. 107-124; No. 181, June 1976, pp. 163-187

- denunciation GC I-IV, Arts 63/62/142/158 respectively; P I, Art. 88; P II, Art. 25

CASES AND DOCUMENTS

- Chile, Prosecution of Osvaldo Romo Mena

- amendment and revision process P I, Art. 97; P II, Art. 24

CASES AND DOCUMENTS

- ICRC, The Question of the Emblem

- role of the depositary GC I-IV, Arts 57/56/136/158; 61/60/140/156; 64/63/143/159 respectively; P I, Arts 100-102; P II, Arts 26-28

CASES AND DOCUMENTS

- UN, Resolutions and Conference on the Respect of the Fourth Convention

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- SASSÒLI Marco, "La Suisse et le droit international humanitaire une relation privilégiée?", in ASDI, Vol. XLV, 1989, pp. 47-71.

a. **Individual – individual**

aa) uncontroversial for criminalized rules

bb) controversial for other rules

CASES AND DOCUMENTS

- United States Military Tribunal at Nuremberg, United States v. Alfried Krupp et al. [Paras 4 (ii) and (vii)]
- The Tokyo War Crimes Trial
- United States, Kadic et al. v. Karadzic

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- ALDRICH George H., “Individuals as Subjects of International Humanitarian Law”, in MAKARCZYK Jerzy (ed.), *Theory of International Law at the Threshold of the 21st Century*, The Hague, Kluwer Law International, 1996, pp. 851-858.

Footnotes

C. Historical Development of International Humanitarian Law

Introductory text

It is commonly agreed that modern, codified International Humanitarian Law (IHL) was born in 1864, when the initial Geneva Convention was adopted.

The Convention’s rules (and those set out in subsequent treaties) were not completely new, however, but derived to a large extent from customary rules and practices.

The laws of war are probably as old as war itself. Even in ancient times, there existed interesting – though primitive – customs and agreements containing “humanitarian” elements, and almost everywhere in the world and in most cultures, these customs had very similar patterns and objectives.

This global phenomenon proves the existence of two things:

- a common understanding of the need for regulations of some kind even during wars;

- the feeling that, in certain circumstances, human beings, *friend or foe*, deserve some protection.

As early as 3000 BC, there existed rules protecting certain categories of victims of armed conflicts and regulations limiting or prohibiting the use of certain means and methods of warfare. These ancient rules may not have been adopted for a humanitarian purpose but rather with a purely tactical or economic objective; their *effect*, however, was humanitarian. For instance (to give but two examples), *the prohibition to poison wells* – very common in African traditional law and reaffirmed in modern treaties – most probably emerged to permit the exploitation of conquered territories rather than to spare the lives of the local inhabitants. Similarly, the main objective of *the prohibition to kill prisoners of war* was to guarantee the availability of future slaves, rather than to save the lives of former combatants.

The existence of such customs, which can be found in cultures, regions and civilizations as diverse as Asia, Africa, pre-Columbian America and Europe, is of fundamental importance. This should always be kept in mind when studying the modern rules of IHL, for it demonstrates that although most of the modern rules are not universal by birth – they have until recently been drafted and adopted mainly by European powers – they are universal by nature, since the principles they codify can be found in most non-European systems of thought.

In spite of their humanitarian importance, all these ancient rules and customs suffered serious shortcomings. In most cases, their applicability was restricted to specific regions, traditions, ethnic or religious groups, did not cover those who did not belong to the same religion or group, and were very often limited to a specific war. Additionally, their implementation was the sole responsibility of the belligerents.

The inception of modern IHL dates back to the battle of Solferino, a terrible battle in northern Italy between French, Italian and Austrian forces in 1859.

A witness to the carnage, Geneva businessman Henry Dunant was struck, not so much by the violence of the fighting as by the miserable fate of the wounded abandoned on the battlefield. Together with the women of the surrounding villages, he tried to alleviate their suffering.

Back in Geneva, Dunant published a short book in 1862, *A Memory of Solferino*,[55] in which he vividly evoked the horrors of the battle, but also tried to find remedies to the suffering he had witnessed. Among other proposals, he invited the States “to formulate some international principle, sanctioned by a Convention inviolate in character” and giving legal protection to wounded soldiers in the field.

Dunant’s proposals met with enormous success all over Europe. A few months after the publication of his book, a small committee, the precursor of the International Committee of the Red Cross,[56] was founded in Geneva. Its main objective was to examine the feasibility of Dunant’s proposals and to identify ways to formalize them. After having consulted military and medical experts in 1863, the Geneva Committee persuaded the Swiss Government to convene a diplomatic conference.

This conference was held in Geneva in August 1864 and adopted the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.

For the first time, States agreed to limit – in an international treaty open to universal ratification – their own power in favour of the individual and, also for the first time, war was subject to written, general law.

Modern IHL was born.

The diagram on p. 144 illustrates the spectacular development experienced by IHL since the adoption of the 1864 Geneva Convention. This development has been marked by three main characteristics, which, without entering into the details, can be described as follows:

a. *the categories of war victims protected* by humanitarian law (military wounded, sick and shipwrecked, prisoners of war, civilians in occupied or "enemy" territories, the whole civilian population) and *of situations in which victims are protected* (international and non-international armed conflicts) *have been steadily expanded*;
b. *the treaties have been regularly updated and modernized* to take account of the realities of recent conflicts; for example, the rules protecting the wounded adopted in 1864 were revised in 1906, 1929, 1949 and 1977 (some critics therefore charge that IHL is always "one war behind reality");
c. the existence, *up until 1977*, of two separate branches of law:
    - Geneva Law, which is mainly concerned with the protection of the victims of armed conflicts, i.e., non-combatants and those who no longer take part in the hostilities;
    - Hague Law, the provisions of which relate to limitations or prohibitions of specific means[57] and methods[58] of warfare.

These two branches of law were merged with the adoption of Protocols I and II in 1977. Today, some people claim that IHL is ill-adapted to contemporary conflicts, but no specific suggestions have been made as to which rules should be replaced or modified, or what should be the content of any new rules. These people implicitly request that exceptions be made to the detriment of some persons (such as "terrorists") and that the existing rules be softened when fighting enemies who systematically violate IHL, in particular those who do not distinguish themselves from the civilian population. Others, however, hold that IHL is not protective enough: according to them, IHL rules on the use of force and on detention should be brought closer to those of human rights law and additional categories of weapons should be prohibited. Finally, some people wonder whether it is realistic to expect armed groups to implement the existing rules of the IHL of non-international armed conflicts. In formal international forums, States nevertheless continue to discuss and adopt protective rules for additional categories of persons and additional prohibitions of means and methods of warfare.

CASES AND DOCUMENTS

- ICRC, Sixtieth Anniversary of the Geneva Conventions
- Colombia, Constitutional Conformity of Protocol II [Para. 9]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BEST Geoffrey, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, London, Weidenfeld and Nicholson, 1980, 400 pp.
- DRAPER Gerald I.A.D, “The Development of International Humanitarian Law”, in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1988, pp. 67-90.
- DARCY Shane, MAGLIVERAS Konstantinos D. & HANKEL Gerd, “Reforming the Laws of War”, in QUENIVET Noëlle & SHAH-DAVIS Shilan (eds), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague, T.M.C. Asser Press, 2010, pp. 317-360.
- GOLDSTONE Richard, “Reflections on the Development of the Law of War”, in *McGill Law Journal*, Vol. 46/1, 2000, pp. 279-290.
- HAGGENMACHER Peter, “Just War and Regular War in Sixteenth Century Spanish Doctrine”, in *IRRC*, No. 290, September-October 1992, pp. 434-445.
- HAGGENMACHER Peter, *Grotius et la doctrine de la guerre juste*, Paris, PUF, 1983, 682 pp.
- HENSEL Howard M. (ed.), *The Legitimate Use of Military Force: the Just War Tradition and the Customary Law of Armed Conflict*, Hampshire, Ashgate, 2008, 300 pp.
- MERIBOUTE Zidane, “Humanitarian Rules and Sanctions in the Major Philosophical and Religious Traditions”, in *LIJNZAAD* Liesbeth, VAN
- SAMBEEK Johanna & TAHZIB-LIE Bahia (eds), *Making the Voice of Humanity Heard*, Leiden/Boston, M. Nijhoff, 2004, pp. 365-384.
- PICTET Jean, “La formation du droit international humanitaire”, in *IRRC*, No. 321, June 2002, pp. 321-344.
- SCHINDLER Dietrich, “International Humanitarian Law: Its Remarkable Development and its Persistent Violation”, in *Journal of the History of International Law*, Vol. 5, 2003, pp. 165-188.

Further reading:

- BELLO Emmanuel G., *African Customary Humanitarian Law*, Geneva, ICRC, 1980, 158 pp.
- BEST Geoffrey, “Restraints on War by Land Before 1945”, in HOWARD Michael (ed.), *Restraints on War*, Oxford, OUP, 1979, pp. 17-37.
- BUGNION François, “The International Committee of the Red Cross and the Development of International Humanitarian Law”, in *Chicago Journal of International Law*, Vol. 5/1, Summer 2004, pp. 191-215.
- CLASTRES Pierre, *Archéologie de la violence : la guerre dans les sociétés primitives*, Marseille, Éditions de l’Aube, 1997, 94 pp.
- DÖRMANN Knut & MARESCA Louis, “The International Committee of the Red Cross and its Contribution to the Development of International Humanitarian Law in Specialized Instruments”, in *Chicago Journal of International Law*, Vol. 5/1, Summer 2004, pp. 217-232.

- DRAPER Gerald I.A.D., “The Contribution of the Emperor Asoka Maurya to the Development of the Humanitarian Ideal in Warfare”, in *IRRC*, No. 305, June 1995, pp. 192-206.
- HOFFMANN Michael H., “The Customary Law of Non-International Armed Conflict: Evidence from the United States Civil War”, in *IRRC*, No. 277, July-August 1990, pp. 322-382.
- JIN Xu, “The Evolution of International Laws of War”, in *Chinese Journal of International Politics*, Vol. 2(2), October 2008, pp. 171-203.
- KOSIRNIK René, “The 1977 Protocols: a Landmark in the Development of International Humanitarian Law”, in *IRRC*, No. 320, September-October 1997, pp. 483-505.
- NOONE Gregory P., “The History and Evolution of the Law of War Prior to World War II”, in *Naval Law Review*, Vol. 47, 2000, pp. 176-207.
- ÖGREN Kenneth, “Humanitarian Law in the Articles of War Decreed in 1621 by King Gustavus II Adolphus of Sweden”, in *IRRC*, No. 313, July-August 1996, pp. 438-442.
- PICTET Jean, “The New Geneva Conventions for the Protection of War Victims”, in *AJIL*, Vol. 45/3, 1951, pp. 462-475.
- SARKIN Jeremy, “The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and their Application since the Nineteenth Century”, in *Human Rights and International Legal Discourse*, Vol. 1, No.1, 2007, pp. 125-172.
- SUBEDI Surya P., “The Concept in Hinduism of ‘Just War’”, in *Journal of Conflict and Security Law*, Vol. 8/2, October 2003, pp. 339-361.
- VALENCIA VILLA Alejandro, “‘Dialogos Militares’ by Diego Garcia de Palacio: the First American Work on the Law of Nations”, in *IRRC*, No. 290, September-October 1992, pp. 446-451.
- VAN CREVELD Martin, *The Transformation of War*, New York, Free Press, 1991, 254 pp.

Quotation 1

The Torah and love for mankind. “Thou shalt love thy neighbour as thyself: I am the Lord.” [**Source**: Moses Leviticus XIX, 18]

“It is not this (rather) the fact that I will choose? To open the snares of wickedness, to undo the bands of the yoke, and to let the oppressed go free, and that ye should break asunder every yoke? It is not to distribute thy bread to the hungry, and that thou bring the afflicted poor into thy house? When thou seest the naked, that thou clothe him: and that thou hide not thyself from the own flesh?”

[**Source**: Isaiah, LVIII, 6-7] **Quotation 2**

Chinese moderation and Confucian culture. “Zigong (Tzu-Kung) asked: ‘is there a simple word which can be a guide to conduct throughout one’s life?’

The master said, ‘It is perhaps the word “Shu”. Do not impose on others what you yourself do not

desire."

[**Source**: Confucius (Kong Zi) (551-479 BC), *The Analects*, XV, 2L]

"Where the army is, prices are high, when prices rise, the wealth of the people is exhausted." "Treat the captives well, and care for them." "Chang Yu: All the soldiers taken must be cared for with magnanimity and sincerity, so that they may be used by us."

[**Source**: Sun Zi (Sun Tzu) (Fourth century BC) "The Art of War" II, 12, 19] **Quotation 3**

Buddhist India and the condemnation of war. "Thus arose His Sacred Majesty's remorse for having conquered the Kalingas, because the conquest of a country previously unconquered involves the slaughter, death and carrying away captive of the people. This is a matter of profound sorrow and regret to His Sacred Majesty." [**Source**: Asoka (Third Century BC), Girnar inscription, Rock Edict XII, Gujarat Province]

Quotation 4 The Gospel and Christian charity. "Then shall the King say unto them on his right hand: Come ye blessed of my Father, inherit the Kingdom prepared for you from the foundation of the world:

For I was and hungered, and ye gave me meat; I was thirsty, and ye gave me drink; I was a stranger, and ye took me in; Naked, and ye clothed me; I was sick, and ye visited me; I was in prison, and ye came unto me."

[**Source**: "The Gospel according to St. Matthew", 25:34-36, Biblia, King James version, *The Holy Bible Containing the Old and New Testaments*, Cambridge, University Press, 1234 pp.]

Quotation 5 Allah's mercy in the Islamic culture. "The Prophet said:

[...], one of the basic rules of the Islamic concept of humanitarian law enjoins the faithful, fighting in the path of God against those waging war against them, never to transgress, let alone exceed, the limits of justice and equity and fall into the ways of tyranny and oppression (Ayats 109 *et seq.* of the second Sura of the Koran, and the Prophet's instructions to his troops.)

[**Source**: SULTAN Hamed, "The Islamic Concept" in *International Dimensions of Humanitarian Law*, Geneva, Henry Dunant Institute, UNESCO, 1988, p. 32] "When you fight for the glory of God, behave like men, do not run away, nor let the blood of women or children and old people stain your victory. Do not destroy palm trees, do not burn houses or fields of wheat, never cut down fruit trees and kill cattle only when you need to eat it. When you sign a treaty, make sure you respect its clauses. As you advance, you will meet men of faith living in monasteries and who serve God through prayer; leave them alone, do not kill them and do not destroy their monasteries ..." [**Source**: ABU BAKR, first successor to the Prophet; quoted in BOISARD Marcel A., "De certaines règles islamiques concernant la conduite des hostilités et de la protection des victimes de conflits armés", in Annales d'études

internationales, 1977, vol. 8, Geneva, p. 151; unofficial translation; see also BEN ACHOUR Zagh, “Islam et droit international humanitaire”, in IRRC, vol. 722, March-April 1980, p. 67]

Development of International Humanitarian Law

3000 BC	Customs, Bilateral treaties, Customary law
1859	Henry Dunant assists the wounded on the battlefield of Solferino
1863	Lieber Code (Instructions for the Government of Armies of the United States in the Field)
1863	Foundation of the ICRC and of the first National Societies
1864	First Geneva Convention
1868	Saint Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles
1880	Oxford Manual on The Laws of War on Land
1899/1907	Hague Conventions

CASES AND DOCUMENTS

- The Hague Regulations

1913	Oxford Manual of the Laws of Naval War

First World War

1925	Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

CASES AND DOCUMENTS

- The Geneva Chemical Weapons Protocol

1929	First Geneva Convention on prisoners of war

CASES AND DOCUMENTS

- United States Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb et al.
- ICTY, The Prosecutor v. Tadic [Part A., para. 97]

Second World War

1945/1948 Establishment of the International Military Tribunals in Nuremberg and Tokyo for the Prosecution and Punishment of the Major War Criminals

1949 **Geneva Conventions**:

I on Wounded and Sick in the Field

II on Wounded, Sick and Shipwrecked at Sea

III on Prisoners of War

IV on Civilians (in the hands of the enemy)

Common Article 3 on non-international armed conflicts

CASES AND DOCUMENTS

- The First Geneva Convention
- The Second Geneva Convention
- The Third Geneva Convention
- The Fourth Geneva Convention
- Sixtieth Anniversary of the Geneva Conventions
- Sweden, Report of the Swedish International Humanitarian Law Committee [Para. 3.2.2]

1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

CASES AND DOCUMENTS

- Convention on the Protection of Cultural Property

Decolonisation, guerrilla wars

1977 Protocols Additional to the Geneva Conventions

CASES AND DOCUMENTS

- The First Protocol Additional to the Geneva Conventions
- The Second Protocol Additional to the Geneva Conventions
- ICJ, Nuclear Weapons Advisory Opinion [Para. 75]
- Sweden, Report of the Swedish International Humanitarian Law Committee [Para 3.2.3]
- Colombia, Constitutional Conformity of Protocol II

Protocol I:

applicable in international armed conflicts (including national liberation wars)

Contents:

Development of the 1949 rules

Adaptation of International Humanitarian Law to the realities of guerrilla warfare

Protection of the civilian population against the effects of hostilities

Rules on the conduct of hostilities

Protocol II:

applicable to non-international armed conflicts

Contents:

Extension and more precise formulation of the fundamental guarantees protecting all those who do not or no longer actively participate in hostilities

Protection of the civilian population against the effects of hostilities

CASES AND DOCUMENTS

- France, Accession to Protocol I
- United Kingdom and Australia, Applicability of Protocol I
- Belgium and Brazil, Explanations of Vote on Protocol II
- United States, President Rejects Protocol I
- South Africa, S. v. Petane

1980 UN Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons

CASES AND DOCUMENTS

- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons
- Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention)
- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)

1993 Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

CASES AND DOCUMENTS

- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

“Ethnic cleansing” in the former Yugoslavia and genocide in Rwanda

1993/1994 Establishment of International Criminal Tribunals for the former Yugoslavia (ICTY), in The Hague, and Rwanda (ICTR) in Arusha

CASES AND DOCUMENTS

- UN, Statute of the ICTY
- UN, Statute of the ICTR

1995/96 Protocols to the 1980 Weapons Convention: Protocol IV on Blinding Laser Weapons

CASES AND DOCUMENTS

- Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)
- United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons

- New Protocol II on Anti-Personnel Land Mines

CASES AND DOCUMENTS

- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)

1997 Ottawa Convention Banning Anti-Personnel Land Mines

CASES AND DOCUMENTS

- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction

1998 Adoption in Rome of the Statute of the International Criminal Court

CASES AND DOCUMENTS

- The International Criminal Court

1999 Protocol II to the Convention on the Protection of Cultural Property

CASES AND DOCUMENTS

- Conventions on the Protection of Cultural Property

2000 Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflicts (amending article 38 of the Convention)

CASES AND DOCUMENTS

- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

2001 Amendment to Article 1 of the Convention on Certain Conventional Weapons of 1980, in Order to Extend it to Non-International Armed Conflicts

CASES AND DOCUMENTS

- Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts

2002 Entry into force of the Statute of the International Criminal Court, on July 1 2002

CASES AND DOCUMENTS

- The International Criminal Court

2003 Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003

CASES AND DOCUMENTS

- Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention)

2005 Publication of the ICRC Study on Customary International Humanitarian Law

CASES AND DOCUMENTS

- ICRC, Customary International Humanitarian Law

2005 Protocol III additional to the Geneva Conventions relating to the Adoption of an Additional Distinctive Emblem

CASES AND DOCUMENTS

- The Third Protocol Additional to the Geneva Conventions

2008 Convention on Cluster Munitions

CASES AND DOCUMENTS

- Convention on Cluster Munitions

Footnotes

D. Sources of Contemporary International Humanitarian Law

I. Treaties

(For a more complete list of International Humanitarian Law treaties and reference to Cases and Documents referring specifically to each treaty, *see supra*, Historical Development of International Humanitarian law. The text of International Humanitarian Law treaties and the current status of participation in those treaties are also available on the ICRC website at http://www.icrc.org)

Introductory text

Historically, the rules of International Humanitarian Law (IHL) (in particular on the treatment and exchange of prisoners and the wounded) have long been laid down in bilateral treaties. The systematic codification and progressive development of IHL in general multilateral treaties also started relatively early compared with other branches of international law – in the mid-19th century. Most often a new set of treaties supplemented

or replaced less detailed, earlier conventions in the wake of major wars, taking into account new technological or military developments. IHL treaties are therefore sometimes charged with being “one war behind reality”. This is true for all law, however. Only rarely has it been possible to regulate or even to outlaw a new means or method of warfare before it becomes operational.[59]

Today, IHL is not only one of the most codified branches of international law, but its relatively few instruments are also well coordinated with each other. Generally the more recent treaty expressly states that it either supplements or replaces the earlier treaty (among the States parties).

IHL treaties have the great advantage that their rules are relatively beyond doubt and controversy, “in black and white”, ready to be applied by soldiers without first obliging them to conduct extensive research on practice. Furthermore, the majority of “new States” have accepted the rules contained in these treaties as legitimate, because they were given the possibility to express themselves during the drafting process. Often following a voluntarist approach, such States agree more readily to be bound by treaties than by other sources of international law.

The disadvantage of IHL treaties, as of all treaty law, is that they are technically unable to have a general effect – to be automatically binding on all States. Fortunately, most IHL treaties are today among the most universally accepted and only few States are not bound by them.[60] This process of acceptance nevertheless generally takes decades and is usually preceded by years of *“travaux préparatoires”*. This is one of the reasons why the 1977 Additional Protocols, which are so crucial for the protection of victims of contemporary armed conflicts, are still not binding for nearly 30 States – among them, unsurprisingly, a number of major powers frequently involved in armed conflicts.

The traditional process of drafting new international treaties, which is based on the rule of consensus between nearly 200 States, ends up conferring a “triple victory” on those who have been described as “digging the grave of International Humanitarian Law”, i.e. those who do not want better protection to exist in a given domain. “They slow the process, they water down the text, and then do not even ratify the treaty once adopted.”[61] They thus leave the States parties that had desired a revision of the law with a text that falls short of their original wishes. To avoid this unsatisfactory state of affairs, some States that genuinely want an improvement have resorted to what is referred to as the “Ottawa procedure”, because it was applied for the first time during the deliberations on the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction of 18 September 1997. Only those States that wished to achieve the result indicated in the title of that treaty were involved in negotiating it. Its opponents were then free to agree to the standards that were set by that method or not. The same method was used in the Oslo process leading to the adoption of the Convention on Cluster Munitions.[62]

However important the treaty rules of IHL may be – and even though compliance is not subject to reciprocity – as treaty law they are only binding on States party to those treaties and, as far as international armed conflicts are concerned, only in their relations with other States party to those treaties.[63] The general law of

treaties[64] governs the conclusion, entry into force, application, interpretation, amendment and modification of IHL treaties,[65] reservations to them, and even their denunciation; the latter, however, only takes effect after the end of the armed conflict in which the denunciating State is involved.[66] The main exception to the general rules of the law of treaties for IHL treaties is provided by the law of treaties itself: once an IHL treaty has become binding on a State, not even a substantial breach of its provisions by another State – including by its enemy in an international armed conflict – permits the termination or suspension of the treaty's application as a consequence of that breach.[67]

1. The Hague Conventions of 1907

CASES AND DOCUMENTS

- The Hague Regulations
- Sweden, Report of the Swedish International Humanitarian Law Committee [Part 3.2.2]
- ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 89]
- Germany, Government Reply on the Kurdistan Conflict [Para. 8]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- EYFFINGER Arthur, "A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference", in *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 197-228.
- SCOTT James Brown, *The Hague Peace Conferences of 1899 and 1907*, Baltimore, The Johns Hopkins Press, 1909, 2 Vol.

2. The Four Geneva Conventions of 1949

CASES AND DOCUMENTS

- The First Geneva Convention
- The Second Geneva Convention
- The Third Geneva Convention
- The Fourth Geneva Convention
- The Sixtieth Anniversary of the Geneva Conventions

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- Département Fédéral des Affaires Etrangères (DFAE), *CICR, 60 ans des Conventions de Genève et*

les décennies à venir = 60 Years of the Geneva Conventions and the Decades Ahead, Geneva, CICR; Berne, DFAE, 2010, 104 pp.
- HOSNI Lori, "The ABCs of the Geneva Conventions and their Applicability to Modern Warfare", in *New England Journal of International and Comparative Law*, Vol. 14, No. 1, 2007, pp. 135-167.
- PERRIGO Sarah & WITHMAN Jim, *The Geneva Conventions under Assault*, London, New York, Pluto, 2010, 252 pp.
- MERON Theodor, "The Geneva Conventions and Public International Law: British Foreign and Commonwealth Office Conference Commemorating the 60th Anniversary of the 1949 Geneva Conventions, London, 9 July 2009", in *IRRC*, Vol. 91, No. 875, pp. 619-625.
- PICTET Jean (ed.), *The Geneva Conventions of 12 August 1949: Commentary, Geneva ICRC, 4 Vol.: Vol. I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, 466 pp.; Vol. II, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 1960, 320 pp.; Vol. III, *Geneva Convention Relative to the Treatment of Prisoners of War*, 1960, 764 pp.; Vol. IV, *Geneva Convention for the Protection of Civilian Persons in Time of War*, 1958, 660 pp. [*See* Commentaries online: http://www.icrc.org/ihl].
- SANDOZ Yves, "Le demi-siècle des Conventions de Genève", in *IRRC*, No. 834, 1999, pp. 246-263.
- SOLIS Gary & BORCH Fred, *Geneva Conventions*, New York, Kaplan, 2010, 316 pp.

3. The Two Additional Protocols of 1977 and the Third Additional Protocol of 2005

CASES AND DOCUMENTS

- The First Protocol Additional to the Geneva Conventions
- The Second Protocol Additional to the Geneva Conventions
- The Third Protocol Additional to the Geneva Conventions

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BOTHE Michael, PARTSCH Karl J. & SOLF Waldemar A., with the collaboration of EATON Martin, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague, M. Nijhoff, 1982, 746 pp.
- KOSIRNIK René, "The 1977 Protocols: a Landmark in the Development of International Humanitarian Law", in *IRRC*, No. 320, September-October 1997, pp. 483-505.
- LEVIE Howard S., *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, New York, Oceana Publications, 2 Vol., 1979-1981.
- LEVIE Howard S. (ed.), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, Dordrecht, M. Nijhoff, 1987, 635 pp.

- PERNA Laura, *The Formation of the Treaty Law of Non-International Armed Conflicts*, Leiden, M. Nijhoff, 2006, 168 pp.
- PULLES Gerrit Jan, "Crystallising an Emblem: on the Adoption of the Third Additional Protocol to the Geneva Conventions", in *YIHL*, Vol. 8 (2005), 2007, pp. 296-319.
- QUEGUINER Jean-François, "Introductory Note to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), in *International Legal Materials*, Vol. 45, No. 3, May 2006, pp. 555-561.
- QUEGUINER Jean-François, "Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)", in *IRRC*, Vol. 89, No. 865, March 2007, pp. 175-207.
- SANDOZ Yves, SWINARSKI Christophe & ZIMMERMANN Bruno (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Dordrecht, ICRC, M. Nijhoff, 1987, 1625 pp. [*See* Commentaries online: http://www.icrc.org/ihl].
- JUNOD Sylvie S., "Additional Protocol II: History and Scope", in *American University Law Review*, Vol. 33/1, 1983, pp. 29-40.

Further reading:

- DINSTEIN Yoram, "Comments on Protocol I", in *IRRC*, No. 320, September-October 1997, pp. 515-519.
- ROBERTS Guy B., "The New Rules for Waging War: The Case Against Ratification of Additional Protocol I", in *Virginia Journal of International Law*, Vol. 26, 1985, pp. 109-170.
- SOFAER Abraham D., "Agora: The US Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims, The Rationale for the United States Decision", in *AJIL*, Vol. 82, 1988, pp. 784-787.

II. Customary Law

Introductory text

Those who uphold the traditional theory of customary law and consider that it stems from the actual behaviour of States in conformity with an alleged norm face particular difficulties in the field of IHL. First, for most rules this approach would limit practice to that of belligerents, i.e., a few subjects whose practice it is difficult to qualify as "general" and even more as "accepted as law".[68] Second, the actual practice of belligerents is difficult to identify, particularly as it often consists of omissions. There are also additional difficulties, e.g., war propaganda manipulates truth and secrecy makes it impossible to know which objectives were targeted and whether their destruction was deliberate. Finally, States are responsible for the behaviour of individual soldiers even if the latter did not act in conformity with their instructions, but this does not imply that such behaviour is also State practice constitutive of customary law. It is therefore particularly difficult to determine which acts of soldiers count as State practice.

Other factors must therefore also be considered when assessing whether a rule is part of customary law:

whether qualified as practice *lato sensu* or as evidence for *opinio juris*, statements of belligerents, including accusations against the enemy of violations of IHL and justifications for their own behaviour, should also be taken into account.

To identify "general" practice, statements of third States on the behaviour of belligerents and abstract statements on an alleged norm in diplomatic forums also have to be considered. Military manuals are even more important, because they contain instructions by States restraining their soldiers' actions, which are somehow "statements against interest". Too few States – and generally only Western States – have sophisticated manuals the contents of which are open to public consultation as evidence for "general" practice in the contemporary international community. Moreover, some of those manuals are said to reflect policy rather than law.[69]

For all these reasons, particular consideration has to be given in the field of IHL to treaties as a source of customary international law – in particular to the general multilateral conventions codifying the law and the process leading to their preparation and acceptance. Taking an overall view of all practice, it may, for example, be found that a rule set out in the two 1977 Additional Protocols corresponds today to customary law binding on all States and belligerents, either because it codifies (*stricto sensu*) previously existing general international law,[70] because it translates a previously existing practice into a rule, because it combines, interprets or specifies existing principles or rules,[71] because it concludes the development of a rule of customary international law or because it was a catalyst for the creation of a rule of customary IHL through subsequent practice and multiple consent of States to be bound by the treaty. It is therefore generally agreed today that most, but clearly not all, of the rules set out in the Additional Protocols formulate parallel rules of customary international law. Whether such customary rules necessarily also apply in non-international armed conflicts is in our view another issue, one which must be decided on the basis of the practice and *opinio juris* of States (and, some would add, armed groups) in non-international armed conflicts. Even persistent objectors cannot escape from their obligations under *jus cogens*, i.e. from most obligations under IHL.

Although IHL is widely codified in broadly accepted multilateral conventions, customary rules remain important to protect victims on issues not covered by the treaties, when non-parties to a treaty (or even entities which cannot become parties because they are not universally recognized) are involved in a conflict, where reservations have been made to the treaty rules, because international criminal tribunals prefer – rightly or wrongly – to apply customary rules, and because in some legal systems only customary rules are directly applicable in domestic law.

The ICRC's comprehensive study[72] has found, after ten years of research on "State practice" (mostly in the form of "official practice", i.e. declarations rather than actual behaviour), 161 rules of customary International Humanitarian Law. It considers that 136 (and arguably even 141) of those rules, many of which are based on rules of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts. The study in particular leads to the conclusion that most of the rules on the conduct of

hostilities – initially designed to apply solely to international armed conflicts – are also applicable as customary rules in non-international conflicts, thus considerably expanding the law applicable in those situations.

Given the time-consuming nature and other difficulties of treaty-making in an international society with some 200 members and the rapidly evolving needs of war victims for protection against new technological and other inhumane phenomena, the importance of custom – redefined or not – may even increase in this field in the future.

Custom, however, also has very serious disadvantages as a source of IHL. It is very difficult to base uniform application of the law, military instruction and the repression of breaches on custom, which by definition is in constant evolution, is difficult to formulate and is always subject to controversy. The codification of IHL began 150 years ago precisely because the international community found the actual practice of belligerents unacceptable, and custom is – despite all modern theories – also based on the actual practice of belligerents.

Quotation 1

Perhaps it is time to face squarely the fact that the orthodox tests of custom – practice and *opinio juri*s – are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek: much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory, it involves topical policy decisions, and it is often the focus of contention. Anything less like custom in the ordinary meaning of that term it would be difficult to imagine. [...]

[**Source**: JENNINGS Robert Y., “What Is International Law and How Do We Tell It When We *See* It?”, in *Annuaire suisse de droit international*, Vol. 37, 1981, p. 67]

Quotation 2 PRESCRIPTION.

[T]he method of explicit agreement, particularly in the field of management of combat, has never been able to achieve much more in formulation than a general restatement of pre-existing consensus about relatively minor problems. Negotiators, seated about a conference table contemplating future wars and aware of the fluid nature of military technology and technique, imagine too many horrible contingencies, fantastic or realistic, about the security of their respective countries to permit much commitment.

Much more effective than explicit agreement in the prescription of the law of war has been the less easily observed, slow, customary shaping and development of general consensus or community expectation. Decision-makers confronted with difficult problems, frequently presented to them in terms of principles as vague and abstract as “the laws of humanity and the dictates of the public conscience”

and in terms of concepts and rules admitting of multiple interpretations, quite naturally have had recourse both to the experience of prior decision-makers and to community expectation about required or desired future practice and decision. [...]

[**Source**: McDOUGAL Myres S. & FELICIANO Florentino P., *Law And Minimum World Public Order: The Legal Regulation of International Coercion*, New Haven and London, Yale University Press, 1961, p. 50; footnotes omitted.]

CASES AND DOCUMENTS

- ICRC, Customary International Humanitarian Law
- ICJ, Nuclear Weapons Advisory Opinion [Paras 66, 82]
- Sweden, Report of the Swedish International Humanitarian Law Committee
- United States, President Rejects Protocol I
- United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Para. 3(ii)]
- ICRC Appeals on the Near East
- Israel, Cheikh Obeid et al. v. Ministry of Security
- Israel, Cases Concerning Deportation Orders [Paras 4 to 7]
- ICJ, Nicaragua v. United States [Para. 186]
- Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 156-165]
- South Africa, Sagarius and Others
- South Africa, S. v. Petane
- ICTY, The Prosecutor v. Tadic [Part A., para. 99]
- ICTY, The Prosecutor v. Kupreskic et al. [Paras 527-534 and 540]
- Colombia, Constitutional Conformity of Protocol II [Paras 6-10]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- BOTHE Michael, “Customary International Humanitarian Law: Some Reflections on the ICRC Study”, in *YIHL*, Vol. 8 (2005), 2007, pp. 143-178.
- BUGNION François, “Customary International Humanitarian Law”, in *African Yearbook on International Humanitarian Law 2008*, 2007, pp. 59-99.
- DINSTEIN Yoram, “The ICRC Customary International Humanitarian Law Study”, in *IYHR*, Vol. 36, 2006, pp. 1-15.
- GREENWOOD Christopher, “Customary Law Status of the 1977 Additional Protocols”, in DELISSEN Astrid J.-M. & TANJA Gerard J. (eds), *Humanitarian Law of Armed Conflicts, Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, M. Nijhoff, 1991, pp. 119-126.
- HENCKAERTS Jean-Marie & DOSWALD-BECK Louise, *Customary International Humanitarian Law*,

Cambridge/Geneva, CUP/ICRC, 2005, 3 Vol., 5032 pp.
- HENCKAERTS Jean-Marie, “Study on Customary Rules of International Humanitarian Law: Purpose, Coverage and Methodology”, in *IRRC*, No. 835, September 1999, pp. 660-668
- HENCKAERTS Jean-Marie, “International Humanitarian Law as Customary International Law”, in *Refugee Survey Quarterly*, Vol. 21/3, 2002, pp. 186-193.
- HENCKAERTS Jean-Marie, “Importance actuelle du droit coutumier”, in TAVERNIER Paul & BURGORGUE-LARSEN Laurence, *Un siècle de droit international humanitaire*, Bruxelles, Bruylant, 2001, pp. 21-28.
- HENCKAERTS Jean-Marie, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict”, in *IRRC*, No. 857, March 2005, pp. 175-212.
- HENCKAERTS Jean-Marie, “The Importance of Customary International Humanitarian Law Today”, in *Humanitäres Völkerrecht: Informationsschriften*, Vol. 22, 3/2009, 2009, pp. 125-130.
- LAUCCI Cyril, “Customary International Humanitarian Law Study: Fundamental Guarantees”, in *Slovenian Law Review*, Vol. 6, No. 1-2, December 2009, pp. 191-204.
- KÄLIN Walter, “The ICRC’s Compilation of the Customary Rules of Humanitarian Law”, in GIEGERICH Thomas (ed.), *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years After the Second Hague Peace Conference*, Berlin, Duncker and Humblot, 2009, pp. 417-428.
- MERON Theodor, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, 263 pp.
- MERON Theodor, “The Continuing Role of Custom in the Formation of International Humanitarian Law”, in *AJIL*, Vol. 90/2, 1996, pp. 238-249.
- SASSÒLI Marco, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht, mit besonderer Betrachtung der Regeln zum Schutz der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*, Basel, Frankfurt am Maim, Helbing & Lichtenhahn, 1990, 590 pp.
- TAVERNIER Paul & HENCKAERTS Jean-Marie (Dir.), *Droit international humanitaire coutumier : enjeux et défis contemporains*, Brussels, Bruylant, 2008, 289 pp.
- VALE MAJERUS Isabel, *De quel droit ? Le droit international humanitaire et les dommages collatéraux*, Paris, Le Serpent à Plumes, 2002, 229 pp.
- WILMSHURST Elizabeth & BREAU Susan (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge, CUP, 2007, 433 pp.

Further reading:

- ALDRICH George H., “Customary International Humanitarian Law: an Interpretation on Behalf of the International Committee of the Red Cross”, in *BYIHL*, 76, 2006, pp. 503-532.
- BELLINGER John & HAYNES William J., “A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law”, in *IRRC*, Vol. 89, No. 866, June 2007, pp. 443-471.
- BELLO Emmanuel G., *African Customary Humanitarian Law*, Geneva, ICRC, 1980, 158 pp.

- BRUDERLEIN Claude, “Customs in International Humanitarian Law”, in *IRRC*, No. 285, November-December 1991, pp. 579-595.
- CASSESE Antonio, “The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts”, in CASSESE Antonio (ed.), *Current Problems of International Law*, Milan, Giuffrè, 1975, pp. 287-318.
- CRAWFORD Emily, “Blurring the Lines Between International and Non-International Armed Conflicts: The Evolution of Customary International Law Applicable in Internal Armed Conflicts”, in *Australian International Law Journal*, Vol. 15, 2008, pp. 29-54.
- FLECK Dieter, “International Accountability for Violations of the Ius in Bello: the Impact of the ICRC Study on Customary International Humanitarian Law”, in *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006, pp. 179-199.
- HENCKAERTS Jean-Marie, “The ICRC Customary International Humanitarian Law Study: a Rejoinder to Professor Dinstein”, in *IYHR*, Vol. 37, 2007, pp. 259-270.
- HENSEL Howard M. (ed.), *The Legitimate Use of Military Force: the Just War Tradition and the Customary Law of Armed Conflict*, Hampshire, Ashgate, 2008, 300 pp.
- HOFFMANN Michael H., “State Practice, the Customary Law of War and Terrorism: Adapting Old Rules to Meet New Threats”, in *IYHR*, Vol. 34, 2004, pp. 231-249.
- KRIEGER Heike, “A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study”, in *Journal of Conflict and Security Law*, Vol. 11, No. 2, pp. 265-291.
- ROWE Peter, “The Effect on National Law of the Customary International Humanitarian Law Study”, in *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006, pp. 165-177.
- TURNS David, “Weapons in the ICRC Study on Customary International Law”, in *Journal of Conflict & Security Law*, Vol. 11, No. 2, 2006, pp. 201–237.

1. Sources of customary International Humanitarian Law

CASES AND DOCUMENTS

- ICRC, Customary International Humanitarian Law [Parts D. and E.]

2. International Humanitarian Law treaties and customary International Humanitarian Law

Quotation

For the contention that a treaty becomes binding upon all nations when a great majority of the world has expressly accepted it would suggest that a certain point is reached at which the will of non-parties to the treaty is overborne by the expression of a standard or an obligation to which the majority of States subscribe. The untenability of that view is quite clear in the case of treaties establishing the basic law of an international organization or laying down detailed rules concerning such matters as copyrights or customs duties or international commercial arbitration [...] Treaties of an essentially

humanitarian character might be thought to be distinguishable by reason of their laying down restraints on conduct that would otherwise be anarchical. In so far as they are directed to the protection of human rights, rather than to the interests of States, they have a wider claim to application than treaties concerned, for example, with the purely political and economic interests of States. The passage of humanitarian treaties into customary international law might further be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of The Hague. These observations, however, are directed to a distinction which might be made but which is not yet reflected in State practice or in other sources of the positive law.

[**Source**: BAXTER Richard R., "Multilateral Treaties as Evidence of Customary International Law", in *The British Year Book of International Law*, 1965-66, pp. 285-286]

CASES AND DOCUMENTS

- Sweden, Report of the Swedish International Humanitarian Law Committee [Part 3.2.2]
- United States Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb et al.
- ICRC Appeals on the Near East
- Israel, Ayub v. Minister of Defence
- Israel, Cases Concerning Deportation Orders, [Paras 4-7]
- ICJ, Nicaragua v. United States [Paras 174-178, 181, 185 and 218]
- Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 29-32, 56-62]
- South Africa, Sagarius and Others
- South Africa, S. v. Petane
- Inter-American Commission on Human Rights, Tablada [Para. 177]
- UN, Statute of the ICTY [Part A., para. 2]
- ICTY, The Prosecutor v. Strugar [Part A.]
- ICTR, The Prosecutor v. Jean-Paul Akayesu [Paras 608-610]
- United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments)

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- CASSESE Antonio, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law", in *UCLA Pacific Basin Law Journal*, Vol. 3/1-2, 1984, pp. 55-118.
- GREENWOOD Christopher, "Customary Law Status of the 1977 Geneva Protocols", in *Humanitarian Law of Armed Conflict – Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, M. Nijhoff, 1991, pp. 93-114.

- MERON Theodor, “The Geneva Conventions as Customary Law”, in *AJIL*, Vol. 81/2, 1987, pp. 348-370.

Further reading:

- ABI-SAAB Georges, “The 1977 Additional Protocols and General International Law: Preliminary Reflexions”, in *Humanitarian Law of Armed Conflict Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, M. Nijhoff, 1991, pp. 115-126.
- KASTO Jalil, “Jus Cogens and Humanitarian Law”, in *International Law Series*, Vol. 2, Kingston, Kall Kwik, 1994, 95 pp.

III. Fundamental principles of International Humanitarian Law

Introductory text

“General principles of law recognized by civilized nations”[73] may first be understood as those principles of domestic law which are common to all legal orders. Given the large number of States and the great variety of their legal systems, only very few such principles can be formulated precisely enough to be operational. Such principles, e.g., good faith and proportionality, which have also become customary law and have been codified, nevertheless also apply in armed conflicts and can be useful in supplementing and implementing IHL. Other principles may be seen as intrinsic to the idea of law and based on logic rather than a legal rule. Thus if it is prohibited to attack civilians, it is not law but logic which prescribes that an attack directed at a military objective has to be stopped when it becomes apparent that the target is (exclusively) civilian.[74]

Even more important for IHL than the foregoing are *its* general principles, e.g., the principle of **distinction** (between civilians and combatants, civilian objects and military objectives), the principle of **necessity**,[75] and the **prohibition on causing unnecessary suffering**. These principles, however, are not based on a separate source of international law, but on treaties, custom and general principles of law. On the one hand, they can and must often be derived from the existing rules, expressing the rules’ substance and meaning. On the other, they inspire existing rules, support them, make them understandable, and have to be taken into account when interpreting them.

Express recognition of the existence and particularly important examples of the general principles of IHL are the “elementary considerations of humanity”[76] and the so-called “Martens clause”, which prescribes that in cases not covered by treaties (and traditional customary international law) “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.[77]

It is recognized that this clause itself is part of customary international law. It is very important that both clauses underline that not everything that is not prohibited is lawful in war and that answers to questions relating to the protection of war victims cannot be found exclusively through a purely positivist approach; it is,

however, not easy to find precise answers to real problems arising on the battlefield through these clauses. In a world with extremely varied cultural and religious traditions, in which people have diverging interests and different historical perspectives, those clauses can generally no more than indicate in which direction to look for a solution.

Quotation

The International Conventions contain a multitude of rules which specify the obligations of states in very precise terms, but this is not the whole story. Behind these rules are a number of principles which inspire the entire substance of the documents. Sometimes we find them expressly stated in the Conventions, some of them are clearly implied and some derive from customary law.

We are acquainted with the famous Martens clause in the preamble to the Hague Regulations, referring to the “principles of the law of nations, as they result from usages established among civilized peoples”. A number of articles in the Geneva Conventions of 1949 also refer to such principles, which are as vitally important in humanitarian law as they are in all other legal domains. They serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination.

In the legal sector now under consideration, the minimum principles of humanitarian law are valid at all times, in all places and under all circumstances, applying even to states which may not be parties to the Conventions, because they express the usage of peoples, [...].

The principles do not in any sense take the place of the rules set forth in the Conventions. It is to these rules that jurists must refer when the detailed application of the Conventions has to be considered.

Unfortunately we live in a time when formalism and logorrhea flourish in international conferences, for diplomats have discovered the advantages they can derive from long-winded, complex and obscure texts, in much the same way as military commanders employ smoke screens on battlefields. It is a facile way of concealing the basic problems and creates a danger that the letter will prevail over the spirit. It is therefore more necessary than ever, in this smog of verbosity, to use simple, clear and concise language.

In 1966, the principles of humanitarian law were formulated for the first time based in particular on the Geneva Conventions of 1949. [...]

[**Source**: PICTET Jean S., *Development and Principles of International Humanitarian Law*, Geneva, M. Nijhoff, 1985, pp. 59-60; footnotes omitted.]

CASES AND DOCUMENTS

- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
- Nuclear Weapons Advisory Opinion [Para. 78]
- ICJ, Nicaragua v. United States [Paras 215, 218]
- ICTY, The Prosecutor v. Kupreskic et al. [Paras 525-527]
- Autonomous Weapon Systems

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- ABI-SAAB Rosemary, "The 'General Principles' of Humanitarian Law According to the International Court of Justice", in *IRRC*, No. 259, July 1987, pp. 367-375.
- DUPUY Pierre-Marie, "Les 'considérations élémentaires d'humanité' dans la jurisprudence de la Cour internationale de Justice", in *Mélanges en l'honneur de Nicolas Valticos*, Paris, Pedone, 1999, pp. 117-130.
- GREIG D.W., "The Underlying Principles of International Humanitarian Law", in *Australian Yearbook of International Law*, Vol. 9, 1985, pp. 46-85.
- MERON Theodor, "The Martens Clause, Principles of Humanity and Dictates of Public Conscience", in *AJIL*, Vol. 94/1, 2000, pp. 78-89.
- MERON Theodor, "The Humanization of Humanitarian Law", in *AJIL*, Vol. 94/2, 2000, pp. 239-278.
- PICTET Jean, *Development and Principles of International Humanitarian Law*, Geneva, Dordrecht, Henry-Dunant Institute, M. Nijhoff, 1985, 99 pp.

Further reading:

- BLISHCHENKO Igor P., "Les principes du droit international humanitaire", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva/The Hague, ICRC/M. Nijhoff, 1984, pp. 291-300.
- CHETAIL Vincent, "The Fundamental Principles of Humanitarian Law through the Case Law of the International Court of Justice", in *Refugee Survey Quarterly*, Vol. 21/3, 2002, pp. 199-211.
- GARDAM Judith, "The Contribution of the International Court of Justice to International Humanitarian Law", in *Leiden Journal of International Law*, Vol. 14-2, 2001, pp. 349-365.
- MACCORMACK Timothy L.H., "A non liquet on Nuclear Weapons – The ICJ Avoids the Application of General Principles of International Humanitarian Law", in *IRRC*, No. 316, January-February 1997, pp. 76-91.

1. The Martens Clause

GC I-IV, Arts 63/62/142/158 respectively P I, Art. 1(2) P II, Preamble, para. 4

CASES AND DOCUMENTS

- UN, Minimum Humanitarian Standards [Part B., paras 84 and 85]
- ICJ, Nicaragua v. United States [Para. 218]
- ICTY, The Prosecutor v. Kupreskic et al. [Paras 525-526]
- Colombia, Constitutional Conformity of Protocol II [Para. 22]
- Autonomous Weapon Systems

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- CASSESE Antonio, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, in *EJIL*, Vol. 11, No.1, 2000, pp. 187-216.
- CRAWFORD Emily, “The Modern Relevance of the Martens Clause”, in *ISIL Yearbook of International Humanitarian and Refugee Law*, Vol. 6, 2006, pp. 1-18.
- HEINTZE Hans-Joachim, “Terrorism and Asymmetrical Conflicts: a Role for the Martens Clause?”, in GIEGERICH Thomas (ed.), *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years After the Second Hague Peace Conference*, Berlin, Duncker and Humblot, 2009, pp. 429-434.
- PUSTOGAROV Vladimir V., “The Martens Clause in International Law”, in *Journal of the History of International Law*, Vol. 1/2, 1999, pp. 125-135.
- TICEHURST Rupert, “The Martens Clause and the Laws of Armed Conflict”, in *IRRC*, No. 317, March-April 1997, pp. 125-134.
- VEUTHEY Michel, “Public Conscience in International Humanitarian Law Today”, in FISCHER Horst, FROISSART Ulrike, HEINTSCHEL VON HEINEGG Wolff & RAAP Christian (eds), *Crisis Management and Humanitarian Protection: In Honour of Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, pp. 611-642.

2. Principles of International Humanitarian Law

a. humanity

CASES AND DOCUMENTS

- ICJ, Nicaragua v. United States [Para. 242]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- COUPLAND Robin, “Humanity: What is it and how does it influence International Law?”, in *IRRC*, No. 844, December 2001, pp. 969-990.
- SLIM Hugo, “Sharing a Universal Ethic: the Principle of Humanity in War”, in *International Journal of Human Rights*, Vol. 2/4, 1998, pp. 28-48.
- MERON Theodor, “The Humanization of International Humanitarian Law”, in *AJIL*, Vol. 94/2, 2000, pp. 239-278.

a. **necessity**

aa) historically: a general circumstance precluding unlawfulness bb) today:

- an exception, justifying conduct contrary to an IHL rule: only where explicitly provided for in that rule
- a restrictive principle:
  - behind many rules
  - directly applicable to battlefield behaviour?

CASES AND DOCUMENTS

- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [paras 56, 177]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

- DRAPER Gerald I.A.D., “Military Necessity and Humanitarian Imperatives”, in *RDMDG*, Vol. 12/2, 1973, pp. 129-151.
- DUNBAR N.C.H., “The Significance of Military Necessity in the Law of War”, in *Juridical Review*, Vol. 67/2, 1955, pp. 201-212.
- GARDHAM Judith, *Necessity, Proportionality and the Use of Force by States*, Cambridge, CUP, 2004, 259 pp.
- O’BRIEN William V., *Military Necessity: The Development of the Concept of Military Necessity and its Interpretation in the Modern Law of War*, Georgetown University, Thesis, 1953, 318 pp.
- RAUCH Elmar, “Le concept de nécessité militaire dans le droit de la guerre”, in *RDMDG*, Vol. 18, 1980, pp. 205-237.
- SCHMITT Michael N., “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, in *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, pp. 795-839.

Further reading:

- HAYASHI Nobuo, “Requirements of Military Necessity in International Humanitarian Law and International Criminal Law”, in *Boston University International Law Journal*, Vol. 28, Issue 1, 2010, pp. 39-140.
- MELZER Nils, “Targeted Killing or Less Harmful Means?, Israel’s High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity”, in *YIHL*, Vol. 9, 2009, pp. 87-116.
- PROKOSCH Éric, “Arguments for Restricting Cluster Weapons: Humanitarian Protection Versus ‘Military Necessity’”, in *IRRC*, No. 299, March-April 1994, pp. 183-193.
- RAGONE P.A., “The Applicability of Military Necessity in the Nuclear Age”, in *JILP*, Vol. 16/4, 1984, pp. 701-714.

a. **proportionality**

CASES AND DOCUMENTS

- ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part B., paras 36-85]
- Israel, Operation Cast Lead[Part I, paras 120-126; Part II, paras 230-232]
- Israel, The Targeted Killings Case [Paras 40-46]
- Afghanistan, Goatherd Saved from Attack
- Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 28-30, 41-47]
- Autonomous Weapon Systems
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para. 42]

(*See also infra*, Conduct Hostilities, II. The protection of the civilian population against the effects of hostilities, 6) Prohibited attacks, c) indiscriminate attacks, dd) principle of proportionality)

a. **distinction**

(*See infra*,)

a. **prohibition on causing unnecessary suffering**

(*See infra*, Conduct of Hostilities, III. Means and methods of warfare, 1. The basic rule: Article 35 of Protocol I)

a. **independence of *jus in bello* from *jus ad bellum***

(*See supra*, Fundamentals, B. International Humanitarian Law as a Branch of Public International Law, II.

Fundamental Distinction between Jus ad bellum (Legality of the Use of Force) and *Jus in bello* (Humanitarian Rules to be Respected in Warfare))

Footnotes

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