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Introduction

1.1 War and law

Events such as the armed conflicts in the former Yugoslavia; between Iraq and Iran or Ethiopia and Eritrea; in Afghanistan, Iraq, Sudan, Rwanda, the Congo, Somalia, Sri Lanka and Colombia, remind us day after day of the cruelty of war and the suffering, death and destruction it entails. They also raise an obvious question: is the behaviour of the parties to such armed conflicts subject to any restrictions? The answer is that such restrictions do exist, even though they may not always be crystal clear or completely unequivocal. Confining ourselves to the realm of law (rather than that of morality alone) they are found in such diverse branches as the law of the United Nations Charter, human rights law, environmental law, the law of neutrality and, last but not least, the 'law of war' or *jus in bello*: a body of law specifically designed to 'constrain the waging of war'.

The law of war is often referred to as 'international humanitarian law applicable in armed conflict' or, shorter, 'law of armed conflict' or 'humanitarian law'. While the inclusion of 'humanitarian' accentuates the element of protection of victims and its omission that of warfare, the various phrases all refer to the same body of law. We shall be using the terms interchangeably, as we do with 'war' and 'armed conflict'. The book aims to provide information about the origin, character, content and current problems of the law of war. In the process, we shall come across the other aforementioned relevant bodies of law as well, but our main focus is on the law of war in its proper sense.

In the perspective of the law of armed conflict, wars happen: in the past, usually between states; today, more often involving non-state organised armed groups. The legal assessment of recourse to war is a matter for *jus ad bellum*, with the law of the UN Charter as its present centrepiece. For *jus in bello*, i.e. the law relating to the actual waging of war, the occurrence of armed conflict is a matter of fact, and the same goes for the loss of human life and damage to other values it necessarily entails. It should be

understood that, rather than granting states or individuals a right to take human lives or bring about such other damage, the *jus in bello* sets limits to acts of war and thereby provides the yardstick by which to measure the justifiability of those acts.

It should also be understood that the limits set by *jus in bello* do not purport to turn armed conflict into a socially acceptable activity like the medieval jousting tournament: their aim goes no further than to prevent wanton cruelty and ruthlessness and to provide essential protection to those most directly affected by the conflict.

The 'limits' of the law of war may be distinguished into principles and rules. Overriding principles are military necessity and humanity. The first principle tells us that for an act of war to be at all justifiable requires that it is militarily necessary: a practical consideration; and the other, that the act cannot be justified if it goes beyond what can be tolerated from a humanitarian point of view: a moral component. Obviously, these are extremely broad principles: over time, they have been elaborated into ever more detailed principles and rules.

One other fundamental principle of the law of war we highlight at the outset is the 'equality' of the belligerent parties. They may be blatantly unequal in many respects, as with last century's wars of national liberation (with a state fighting against a 'people'), today's internal armed conflicts (such as the long-lasting war in Colombia), or the invasion in 2003 of Iraq by the United States of America and its partners: no matter the inequalities, the parties are equally subject to the principles and rules of the law of war.

The principles and rules of the law of war are referred to in the title of this book, with a term borrowed from Grotius' famous treatise *De iure belli ac pacis*, as 'constraints on the waging of war'. Writing at the time of the Thirty Years War (1618–48) Grotius compared the practice of conducting virtually unrestricted war – all the barbaric things belligerents could do, as he said, with impunity as far as the positive law of his time was concerned – with another, more commendable mode of waging war, respecting the "rule of right" and refraining from certain modes of acting "on higher grounds and with greater praise among good men". The *temperamenta belli*, or 'moderations of war', which he then expounded as requirements of a higher, moral order correspond in many respects with the rules of the law of armed conflict as we know it today.

Without such legal restraints, war may all too easily degenerate into utter barbarism. The result need not only be that the impact of the 'scourge of war' referred to with such evident horror in the Charter of the United

Nations becomes immeasurably more devastating and the loss of human dignity for those actively engaged in hostilities commensurately greater; another likely effect is that after the war, the restoration of peace between parties that have fought each other with such utter ruthlessness will be that much more difficult – to the point where it may become virtually impossible.

1.2 Sources of the law of armed conflict

The law of armed conflict has a long history behind it. Even in a distant past, military leaders have been known to order their troops to spare the lives of captured enemies and treat them well, or to spare the enemy civilian population; and upon the termination of hostilities, belligerent parties might agree to exchange the prisoners in their hands. In the course of time, such practices could develop into generally preferred behaviour, whether on the basis of recognised principle or in the shape of customary rules of war: legal norms, that is, which parties to an armed conflict ought to respect even in the absence of a binding unilateral declaration or agreement to that effect.

The scope and content of these non-written rules of war long remained elusive and uncertain. The most effective way for states to remove such uncertainty is by treaty-making, that is, by negotiating agreed versions of the rules and embodying these in internationally accepted, binding instruments. These are generally called treaties; some bear other names, such as convention, declaration or protocol. While treaties can be concluded between two states (bilateral treaties), we are concerned here with treaties concluded between a number of states (multilateral treaties).

Multilateral treaty-making became an important instrument for the regulation of international relations in the nineteenth century. With the number of states much smaller than it is today, and without a United Nations or anything comparable to it, this was done in ad hoc international conferences, whether or not specially convened for that purpose. Two such meetings were convened in the 1860s to deal with a single aspect of the law of war: one, in 1864 in Geneva, on the fate of wounded soldiers on the battlefield; the other, in 1868 in St Petersburg, on the use of explosive rifle bullets. These modest beginnings are at the root of two distinct, though never entirely separate, currents in this body of law, each characterised by its own particular perspective. One, usually (and for reasons to be explained below) known as the law of The Hague, concerns the conduct of war and permissible means and methods of war; the other,

styled the law of Geneva, is more particularly concerned with the condition of war victims in enemy hands (such as prisoners of war, or interned civilians).

In the course of time, the treaty law of armed conflict has come to cover ever more ground and gone into ever greater detail (often in reaction to experiences of previous wars). Four major conventions concluded at Geneva in 1949 have now been acceded to by all existing states plus the Vatican. As a consequence, sight might be lost of the fact that a good part of their content rests on generally recognised principles and, on the basis of established practice, may belong to customary law as well. With other treaties in this field having fewer (sometimes far fewer) parties, it is well to remember that treaties bind only the states parties. At the same time, rules in these treaties that already belonged to customary law or that have developed into rules of customary law after the conclusion and entry into force of the treaty, or that reflect generally recognised principles of law, bind non-party states as well.

For long years, treaty-making in the sphere of the law of armed conflict was confined to 'war' in the sense of armed conflicts between states (beginning with the Geneva Conventions of 1949 usually referred to as 'international armed conflicts'). From that date, treaty law also came to include rules applicable in armed conflicts waged within the territory of a state between its armed forces and one or more organised armed groups, or between such groups – or "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties", as they are styled in common Article 3, the single article of the Conventions that is so applicable. (These conflicts are often referred to as 'non-international armed conflicts'; we prefer the shorter phrase 'internal armed conflicts'.) In later years, in reaction to the ever higher incidence of such conflicts, more and more rules of existing treaty law were made applicable to these conflicts as well. Then again, recent events have given rise to the question of what rules of armed conflict, if any, govern the case of states locked in combat with non-state armed groups that are not, or not exclusively, located in their own territory, so that the conflict is neither 'international' nor 'internal' in the proper sense.

Shortly after the Second World War, the International Military Tribunals of Nuremberg and Tokyo held that the rules on warfare laid down in a treaty concluded in 1899 and revised in 1907, the Hague Convention with annexed Regulations on Land Warfare, had before that war already acquired the status of customary law. More recently, judicial bodies such as the International Court of Justice and the Yugoslavia and

Rwanda Tribunals have in turn found that given rules of recent treaty law possessed the character of customary law as well. In particular, this more recent extension of the scope of the customary law of armed conflict appears to rest on the assumption that for this type of armed conflict, general opinion about preferred behaviour outweighs the requirement of demonstrable practice seen as law. To the extent that this 'general opinion of preferred behaviour' reflects accepted principle, we would prefer to call it that.

In 2005, the International Committee of the Red Cross (or ICRC) published a comprehensive study on 'Customary International Humanitarian Law': a task it had been invited to undertake in 1995 by the 26th International Conference of the Red Cross and Red Crescent. The study, the result of a vast effort, lists a large number of rules the ICRC had identified as belonging to present-day customary law. It may be commented again that in particular with respect to internal armed conflict not all of these rules may rest on the type of actual field practice traditionally required of rules of customary law. Yet they may well reflect existing principles and thus deserve to be promoted under that heading.

1.3 Implementation and enforcement

It is one thing for the representatives of states to negotiate rules of international humanitarian law, and even to be convinced that in doing so they – often, the military officers on the list of states' delegations – have taken realities into account to such a degree that there will be no basis for invoking 'military necessity' in justification of a deviation from the rules. It is another thing to ensure that the rules are applied in practice.

A number of factors may exert a negative influence on the implementation of the rules. Starting at the top: it may be decided at the highest level of authority that certain rules will be disregarded. Examples include the decisions, taken on both sides in the Second World War, to make the enemy civilian population a target of air bombardment, and the decision taken towards the end of that war by President Truman of the United States to use the atomic bomb against Japanese cities. Another important negative factor arises when situations occur that are more than normally conducive to unlawful modes of combat. The phenomenon of 'asymmetrical warfare' might be an example. Other examples include: heavy emphasis on the alleged ideological or religious character of the war; depicting the adversary as barbarian; hostilities carried out as a technical operation at long distance (the bomber operating at high altitudes, the long-range

missile) or involving, in a guerrilla-type war, tactics that expose the civilian population to enhanced risk.

For another thing, it would be a sheer miracle if all members of the armed forces were angels, or even simply law-abiding men and women – and even more so if they remained so through every phase of the war. Factors such as insufficient or wrongly oriented training programmes or lack of discipline may play a role in this respect. Yet another factor at the root of many violations of humanitarian law – and which operates at all levels, from the highest political and military leaders to the common soldier – is sheer ignorance of the rules.

In the face of so many adverse factors, what can be done to improve the record of respect for the humanitarian law of armed conflict? A first point to note is that this is first and foremost the responsibility of the states concerned, and, in an internal armed conflict, of the non-state armed groups as well. It has long been realised, however, that this is not enough and outside help is necessary. Reference has already repeatedly been made to the ICRC, the Geneva-based, Swiss organisation, which is active worldwide and which from its inception in 1863 has been the main promoter and guardian, initially, of the law of Geneva in the narrow sense but in more recent times of all humanitarian law. Other instruments and methods have developed, both inter-state and in the context of international organisations, which contribute to the promotion and, if necessary, enforcement of international humanitarian law. We shall come across these various devices and means as they become relevant in the subsequent chapters.

1.4 Structure of this book

It remains to explain the structure of this book. As in the previous editions, the material is divided into historical periods, for two reasons. One is that the body of humanitarian law as we know it today has developed first and foremost as treaty law. Since a treaty applies between the parties to it and is not necessarily set aside by a later treaty on the same subject, the situation may arise where some states are party to the new treaty (for instance, the Protocol of 1977 that deals extensively with combatant behaviour and the protection of civilians) whereas other states are party only to older ones. Therefore, to be useful to all readers, the subject matter of this book is presented in chronological order. Even so, we occasionally include a reference to subsequent developments that are more fully dealt with further on in their relevant historical framework.

The chronological approach serves another purpose as well: it enables today's commentators, including the media, to discover what law was applicable to events they are reviewing. This may help prevent the sometimes too easy comment that lays events of the past against the yardstick of today. To give just one example: the treatment of populations under German occupation in the Second World War was governed by the relevant rules of the Hague Regulations of 1899/1907, complemented by such rules of customary law as might have developed since but prior to the war; not, therefore, by the rules of occupation law laid down in the Fourth Geneva Convention of 1949 'Relative to the Protection of Civilian Persons in Time of War', which is subsequent to the war and in effect was drafted to take into account the experiences gained in that unhappy period.

With these considerations in mind, the division of the subject matter across the chapters is as follows: Chapter 2 provides a broad sketch of trends in the historical development of the humanitarian law of war. Chapter 3 deals at greater length with the law as it stood prior to 1977 (the year two protocols additional to the Geneva Conventions of 1949 were adopted). Chapter 4 describes the legal situation as it arises from these protocols. Chapter 5 sets forth the many developments that have occurred since. In conclusion, Chapter 6 briefly summarises some basic features of this body of law.

2

The main currents: The Hague, Geneva, New York

The present chapter starts out with the birth, in the 1860s, of two 'branches' of the law of armed conflict: the law of The Hague (Section 2.1) and the law of Geneva (Section 2.2).

Just about a century after those early beginnings, in the 1960s and 1970s, the United Nations began to take an active interest in the promotion and development of the law of armed conflict, under the heading 'human rights in armed conflict'. Apart from enabling the General Assembly to incorporate the subject under a previously existing agenda item, this marked the increasingly important relationship between the law of armed conflict and human rights law. This 'current of New York' is the subject of Section 2.3.

Section 2.4 explains how the three 'currents' of The Hague, Geneva and New York, without losing their identities, progressively converged into a single movement and later on, in the 1990s, developed close links with the field of international criminal law as well.

2.1 The Hague

The development of the branch of the law of armed conflict usually referred to as the 'law of The Hague' did not begin in The Hague at all but, rather, at two locations far from that city: Washington and St Petersburg.

Washington was the place where in 1863, in the course of the American Civil War (1861–5), the President of the United States of America (the Northern side in the war) promulgated a famous order entitled 'Instructions for the Government of Armies of the United States in the Field'. The text had been prepared by Francis Lieber, an international lawyer of German origin who had emigrated to America. The Instructions (or Lieber Code, as they are often called) provided detailed rules on the entire range of land warfare, from the conduct of war proper and the treatment of the civilian population to the treatment of specific categories of persons such as prisoners of war, the wounded, *franc-tireurs* and so forth.

Although technically an internal document destined for use by one party in an ongoing civil war, the Lieber Code came to serve as a model and a source of inspiration for the efforts, undertaken later in the nineteenth century at the international level, to arrive at a generally acceptable codification of the laws and customs of war. It thus has exerted great influence on these subsequent developments.

St Petersburg was where, in 1868, another remarkable document saw the light: the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. In more than one respect, it was the antipode of the Lieber Code. While the Code was a piece of domestic legislation covering an extremely broad range of issues, the Declaration was an international treaty yet bearing on one single, highly specific aspect of the conduct of war. The question at issue was the employment of certain recently developed light explosive or inflammable projectiles. The explosive rifle projectile in particular had already proved its effects on enemy materiel. When used against human beings, it was no more effective than an ordinary rifle bullet: it could put just one adversary out of combat, but owing to its design, it was apt to cause particularly serious wounds to the victim.

The International Military Commission that, on the invitation of the Russian Government, met in St Petersburg in 1868 "to examine the expediency of forbidding the use of certain projectiles in time of war between civilised nations", did not take long to conclude that the new projectiles must be banned from use. Starting from the proposition that "the progress of civilisation should have the effect of alleviating as much as possible the calamities of war", the Commission alleged that "the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy". For this purpose it would be "sufficient to disable the greatest possible number of men", and "this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable". The employment of such weapons "would, therefore, be contrary to the laws of humanity".

Since in the eyes of the Commission the projectiles at issue met these criteria of uselessly aggravating sufferings or rendering death inevitable, its next step was to fix "the technical limits at which the necessities of war ought to yield to the requirements of humanity". This it did with ostensibly mathematical precision: 400 grammes was to be the critical weight. The choice for 400 grammes was random: rifle bullets weighed far less, and the artillery shells of the time were considerably heavier. Yet, the

relevant point was the establishment of a fixed dividing line somewhere between these two. Although explosive artillery shells were apt to inflict equally grave wounds, to the point of "rendering the death of disabled men inevitable", they could disable more than one man at a stroke and therefore were not in the same class as rifle bullets. Apart from that, artillery shells were designed to be used against entirely different, 'hard' targets in the first place and therefore had to remain outside the scope of the prohibition: in their case, the balance between military utility and the requirements of humanity worked out differently.

A last point addressed in the Declaration of St Petersburg concerns the question of future developments in weaponry. Here again the text is worthy of note: "The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity."

2.1.1 The Hague Peace Conferences

With this we finally arrive at The Hague, where in 1899, once again on the initiative of the Russian Government (though this time on the invitation of the Dutch Government), delegates of twenty-nine states met to discuss matters of peace and war. The stated main purpose of the First Hague Peace Conference was to create conditions precluding further wars. The hope was to bring this about by introducing compulsory inter-state arbitration, coupled with the convening at regular intervals of international conferences to discuss any problems that might arise in connection with the maintenance of peace. The Conference failed to achieve this goal: while it was generally agreed that international arbitration was an excellent means for settling inter-state disputes, a significant number of states were not prepared to waive the right to decide in future, with respect to each dispute as it presented itself and in the light of all prevailing circumstances, whether or not to submit it to arbitration.

While the maintenance of peace might have been its main goal, the initiators of the Conference realistically did not exclude the possibility of future armed conflicts. With a view to that possibility, the Conference discussed a number of proposals relating to the conduct of war.

One proposal was for a codification of the 'laws and customs of war on land'. The proposal was largely based on a text drafted by an earlier