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The history of international humanitarian law treaty-making

Frits Kalshoven

The law of armed conflict has a long history behind it. Examples of conduct foreshadowing today’s principles and rules have been found in the records of ancient armed conflicts. Over time, incidental practice developed into a body of customary law. Then, in the mid-nineteenth century, states began to conclude treaties to govern the conduct of war. This is where we find our starting point.

1 First Steps (1850–1880)

The first three treaties on international humanitarian law (IHL) were concluded in the period 1850–1880, each one on a specific aspect of warfare. Two other documents that covered the generality of warfare are mentioned as well because of their great influence on subsequent treaty-making.

1.1 Declaration of Paris (1856)

In the Crimean War (1853–1856) between Russia and a coalition including Turkey, France and Great Britain, warships of the latter two states were engaged in cutting off Russia’s imports and exports, whether carried on enemy or neutral vessels. Disputes arising out of such acts of naval warfare were a matter for national prize courts, and these frequently held different views. In order to avoid the occurrence of such differences of opinion among their courts, France and Great Britain in 1854 agreed not to issue letters of marque, or to permit their warships to seize enemy goods on neutral vessels or neutral goods on enemy vessels.

On 30 March 1856, at the Congress of Paris, the belligerent parties signed the Treaty of Paris that brought the war to an end. The Congress thereupon signed the Declaration of Paris

2 Letters mandating private vessels (so-called ‘privateers’) to capture enemy vessels and bring these before prize courts to be sold.
3 At the time, a meeting of Austria, France, Prussia, Russia, Sardinia-Piedmont, Turkey and Great Britain.
4 115 CTS 1.
which reaffirmed the above rules, on the understanding that goods qualifying as contraband remained open to seizure. The Declaration also prohibited privateering and provided that a blockade, to be binding, must be effective.

That same year, another 45 of the then-existing states acceded to the Declaration.

1.2 Geneva Convention (1864)

On 8 November 1862, a pamphlet appeared in Geneva that described in detail a battle that had been fought on 24 June 1859 near Solferino (northern Italy) between armies of Austria and of France and Piedmont-Sardinia, leaving some 40,000 dead and wounded of all parties. It also described the attempts at evacuating the wounded, irrespective of allegiance, to Castiglione and other nearby localities, and the efforts made to have them taken up and cared for by the inhabitants. Its author, Henry Dunant, a Swiss banker who by happenstance had come to play a central role in the process of collecting and caring for the wounded of Solferino, concluded his A Memory of Solferino with two suggestions: (1) in time of peace, permanent aid societies should be created in all countries, so as to have, at the outbreak of war, qualified volunteers available to bring aid to the wounded of all parties; and (2) the principle underlying the functioning of such societies should be embodied in an internationally agreed and properly ratified document.

A Memory of Solferino fell on fertile soil; public opinion at the time was susceptible to notions of social cooperation and improvement of the public weal, and the example of Florence Nightingale and her colleagues treating British wounded soldiers in a hospital on Turkish soil had made people’s minds ripe for Dunant’s suggestions. Matters moved rapidly: in 1863, a Committee of Five set up in Geneva (with Dunant one of them) convened a conference of state representatives that concluded, inter alia, that committees should be created in every country with the task to prepare in peacetime, in contact with their government, for the volunteers’ wartime activities; and volunteers in action would wear, ‘as a uniform distinctive sign, a white armblet with a red cross’.6

Implementing Dunant’s second suggestion, a diplomatic conference convened by the Swiss Federal Council on 22 August 1864 adopted the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, laying down the principles that ‘wounded and sick combatants’, no matter their nationality, ‘shall be collected and cared for’; that ‘ambulances and military hospitals’ accommodating such persons ‘shall be recognised as neutral and, as such, protected and respected’; that members of the local population who take up wounded shall be equally protected and ‘shall remain free’ – indeed, generals of the warring parties ‘shall make it their duty to notify the inhabitants of the appeal made to their humanity’.7 And, last but not least, the Convention introduced a ‘distinctive and uniform flag’ bearing ‘a red cross on a white ground’.8

With that, the foundations for a system for the ‘amelioration of the condition of the wounded and sick of armies in the field’ had been laid. The Committees would become the National Red Cross (later also Red Crescent) Societies, and the Geneva Committee, the ICRC. And a treaty had been adopted that could be hoped to support the infant organisational structure.

5 Un Souvenir de Solferino was privately printed and distributed by Dunant. Much later it was republished more than once, eg by the Institut Henry-Dunant (1969).
7 129 CTS 361, arts 6, 1, 5.
8 Ibid art 7.
1.3 St Petersburg Declaration (1868)

While a ‘soldier in the field’ could be wounded by any of the weapons in use, the rifle bullet was the most common among them. Bullets were solid objects. So had been the cannon ball, but this had largely been replaced with the artillery shell. In the same trend, explosive bullets were being designed in several countries. Russia in 1863 had used such a munition to blow up enemy ammunition carts, and a new type produced in 1867 would explode upon contact with a ‘soft target’ (say, a human body).9 And ‘rifle-shells’ tested by British forces in India, while apparently useful for range-finding in the mountains, might have a ‘profound effect on enemy morale’ as well.10

Should the explosive bullet be welcomed, or banned? Like the ordinary bullet, the explosive bullet could eliminate just one person, at the cost of inflicting very grave wounds, similar to those caused by the burst of an artillery shell. Was this extra damage justifiable? There was the potential effect on soldiers’ morale. For some, like the British, this could be an argument in favour of the rifle shells when used against enemy forces. Others might fear for the morale of their own troops and, thus, come to the opposite conclusion.

Fear for the morale of own armed forces probably was at the root of the initiative, taken in 1868 by the Russian Czar, Alexander III, to convene a meeting at St Petersburg to discuss a ban on use of the new projectiles. The 16-state International Military Commission decided accordingly and, on 11 December 1868, signed a Declaration renouncing the use of ‘any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances’.11 With that, the introduction of the rifle shells was effectively forestalled. Artillery shells, being above that weight, remained unaffected, in spite of their well-known wounding capacity.

The Declaration proclaims that ‘the necessities of war ought to yield to the requirements of humanity’: a principle that may be said to lay at the root of the law of armed conflict.12 As well, the war effort should be directed against ‘the military forces of the enemy’, not against entire populations; and it should be limited to ‘weakening’ the enemy forces, by ‘disabling’ the greatest possible number of men’. Weapons therefore should not ‘uselessly aggravate the sufferings of disabled men, [n]or render their death inevitable’. The logical further conclusion follows: weapons which might cause such effects ‘would, therefore, be contrary to the laws of humanity’ – and the lightweight explosive projectiles would be a case in point.

In a final paragraph, the contracting states reserved to themselves to deal with future weapons developments, in order to ‘conciliate the necessities of war with the laws of humanity’.

1.4 Lieber Code (1863)

In 1863, a field manual for an armed conflict saw the light of day in Washington. The conflict was the American Civil War (1861–1865) between the United States and the Confederation, and the document, the ‘Instructions for the Government of Armies of the United States in the

11 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St Petersburg Declaration) (11 December 1868) 138 CTS 297.
12 ‘Limitation and restraint of course are, of all principles pervading the law of war, the most central and crucial’: Geoffrey Best, Humanity in Warfare (Columbia University Press 1980) 157.
Field’, promulgated as General Orders No 100 by President Abraham Lincoln. While written for an internal war, the document largely reflected the existing laws and customs of war: after all, their main author, Francis Lieber, had earlier been a German professor of law. The 157 articles of the Lieber Instructions (or Lieber Code, as they are usually named) have strongly influenced the subsequent efforts at codifying the law of war.

One issue, singled out here because of its lasting importance, concerns the fate of irregular fighters. Two articles are relevant. Article 82 provides that men who in unoccupied territory commit hostilities without being part of the hostile army ‘shall be treated summarily as highway robbers or pirates’. And Article 85 deals summarily with similar activities in occupied territory: those who ‘rise in arms’ against the occupant are ‘war rebels’ and ‘may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not’. I return to these issues later in the chapter.

1.5 Brussels Declaration (1874)

In Europe, the Franco–German War (1870–1871) had once again brought to light the lack of ‘precision and authority’ of the existing customary law, leading to much discussion and an appeal to the authorities to ‘dissipate the existing fog’. Particularly urgent issues included bombardment, occupation and, of course, the definition of combatants. The time had clearly come for an international conference on these matters.

Accordingly, on 27 July 1874, on the initiative of the Czar, 15 European states convened in Brussels to discuss a Russian draft text. On 27 August, the conference concluded its work with the presentation of two documents: a Final Protocol, duly signed by the participating states and explaining what had been done and in what spirit; and a ‘Project of an International Declaration Concerning the Laws and Customs of War’, characterised in the Protocol as

a conscientious inquiry of a nature to serve as a basis for an ulterior exchange of ideas, and for the development of the provisions of the Convention of Geneva of 1864 and of the Declaration of St. Petersburg of 1868.

The Russian project had actually included several of the rules of the Geneva Convention of 1864, exposing them to amendment at the conference. That the Convention needed redrafting was well known. However, the ICRC felt that the Brussels Conférence, with many officers on the delegations, would not be the proper forum for this undertaking, and on its request the Geneva rules were removed from the project. A simple referral remained, to the effect that the fate of the sick and wounded remained governed by the Convention of 1864, ‘save such modifications as the latter may undergo’. With that, the law of war had split into two branches, each following its own path of development: one, known as the law of Geneva; the other, after the venue where the ‘ulterior exchange of ideas’ would result in regulations of land warfare being adopted, as the law of The Hague.

15 1 *AJIL Supp* 96.
16 Moynier (n 13) 8.
17 Brussels Declaration (n 15) art 35.
18 De Breucker (n 14) 72.
Before moving on, we note how Brussels dealt with Lieber’s ‘highway robbers and pirates’ and ‘war rebels’. After much debate, with Belgium and the Netherlands opposing Germany, the first rule was replaced with the provision that the population of non-occupied territory rising in defence against an invading army must be regarded as combatants ‘if they respect the laws and customs of war’.\textsuperscript{19} And the harsh ‘war rebel’ rule was simply left out, thus leaving the matter of armed resistance in occupied territory to the unwritten – and uncertain – law of nations.\textsuperscript{20}

2 The turn of the century

The main events in this next period were the two ‘International Peace Conferences’ held at The Hague, one from 18 May to 29 July 1899 (Hague I), and the next from 15 June to 18 October 1907 (Hague II). While results on the theme of ‘peace and disarmament’ remained modest, the negotiations on ‘mitigating the horrors of war’ have yielded a rich harvest of conventions and declarations on the laws of war on land (at Hague I) and at sea (at Hague II).

2.1 Warfare on land

Hague I adopted the Hague Convention (II) on Land Warfare with annexed Regulations on Land Warfare.\textsuperscript{21} The Regulations had been drafted on the basis of the Brussels Declaration of 1874. Hague II confined itself to minor alterations. References in this section are to the 1907 version.\textsuperscript{22}

Warfare on land was the business of states’ armies. They qualified as ‘belligerents’, the ‘laws, rights, and duties of war’ applied to them, and combatants who fell into enemy hands had ‘a right to be treated as prisoners of war’:\textsuperscript{23} a situation for which Chapter II of the Regulations provided a complete regime. The ‘militia and volunteer corps’ of the time qualified as well, provided they were commanded by ‘a person responsible for his subordinates’, had a ‘fixed distinctive emblem recognizable at a distance’, ‘carried arms openly’ and ‘conducted their operations in accordance with the laws and customs of war’.\textsuperscript{24} These four conditions actually reflected the normal condition of states’ armies.

Not everything was permitted, as expressed in the general principle that ‘[t]he right of belligerents to adopt means of injuring the enemy is not unlimited’.\textsuperscript{25} There followed a list of prohibitions, out of which we mention the bans on use of ‘poison or poisoned weapons’ and of ‘arms, projectiles, or material calculated to cause unnecessary suffering’.\textsuperscript{26} Connected to these prohibitions were two declarations adopted at Hague I, one prohibiting the use of projectiles diffusing ‘asphyxiating or deleterious gases’, and the other (building on St Petersburg) that of so-called dum-dum bullets.

Bombardment of undefended localities was prohibited, ‘by whatever means’:\textsuperscript{27} a phrase showing that the notion of bombs dropped out of the air was no longer a mere fancy. In bombarding defended towns and similar places, where civilians would be living as well, a warning

\textsuperscript{19} Brussels Declaration (n 15) art 10.
\textsuperscript{20} De Breucker (n 14) 50–54.
\textsuperscript{21} 189 CTS 429.
\textsuperscript{22} 205 CTS 277.
\textsuperscript{23} Ibid art 3.
\textsuperscript{24} Ibid art 1.
\textsuperscript{25} Ibid art 22.
\textsuperscript{26} Ibid art 23(a), (c)
\textsuperscript{27} Ibid art 25.
was required, ‘except in cases of assault’. Attempts should also be made to spare buildings devoted to ‘religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected’, unless they were being used for military purposes: the first rules on protection of objects singled out for their cultural or medical importance.

An invasion of foreign territory could expect resistance by the local army, but by members of the population as well: Lieber’s ‘highway robbers or pirates’. Brussels had classified them as combatants, provided they respected the laws of war. The Hague now was less lenient: they would not ‘qualify’ as belligerents and might at best be ‘regarded’ as such (and not sanctioned for their actions), but this only if they had started their actions ‘on the approach of the enemy’, ‘spontaneously’ and ‘without having had time to organise themselves’ into true armies, and they also must ‘respect the laws and customs of war’ and ‘carry arms openly’. Surely a list of requirements that betrays the limited sympathy the major powers could muster for such a so-called levée en masse opposing their invading armies.

Occupation of enemy territory entailed an obligation for the occupant to rule it, as far as the territory was ‘actually placed under the authority of the hostile army’. The occupant must do whatever he can ‘to restore, and ensure, as far as possible, public order and safety’. On the other hand, the temporary ‘authority of the legitimate power’ in his hands did not turn him into the sovereign legislator: he must, ‘unless absolutely prevented, [respect] the laws in force in the country’.

What about Lieber’s ‘war rebels’? The Regulations are once again silent on armed resistance in occupied territory. Yet, this time the ‘silence’ was not absolute. After difficult negotiations, with Russia and Germany on one side and Belgium on the other, the chairman of the commission discussing the Regulations, Fedor de Martens (an Estonian serving the Czar) read out the text of a preambular paragraph based on a Belgian draft. It stated that although not everything could have been regulated, unforeseen cases would not be ‘left to the arbitrary judgment of military commanders’: in such cases ‘the inhabitants and the belligerents’ would ‘remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience’. The clause, in effect, would become famous as the Martens Clause.

The Regulations did not by themselves constitute a treaty: they were ‘annexed’ to the Convention, and ratifying states undertook to issue instructions to their armed forces ‘in conformity’ with the Regulations. While this left the Regulations in the realm of customary law, they had been thoroughly examined and negotiated, and Hague II wrote into the Convention that a belligerent state which violated their provisions would, ‘if the case demands, be liable to pay compensation’. The conclusion may be that by 1907, the Regulations had turned into a sort of written or ‘hard’ customary law.

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29 Ibid art 27.
30 Ibid art 2.
31 Ibid art 42.
32 Ibid art 43.
34 1907 Hague Convention (IV) (n 22) art 1.
2.2 Naval warfare

Warfare at sea always was fundamentally different from land warfare in that the high seas were no man’s land, open to the shipping of all nations. Territorial seas, at the time usually three nautical miles wide, were under the jurisdiction of the coastal state, whether belligerent or neutral. Hague II codified the law for many situations flowing from this scheme. This included striking a balance between the belligerents’ interests and those of neutral shipping and neutral coastal states. A few lines must suffice to introduce this part of the law of war.

Sea warfare was conducted by warships: vessels built, registered, equipped and manned as such. However, merchant vessels could be converted to warships; they then must meet a list of conditions guaranteeing their recognisability. As for weaponry, limits were set to the use of automatic contact mines, first of all to limit the risks for commercial shipping; in principle, they had to become harmless once they were no longer under control. Limits of a different order governed the bombardment by warships of cities and other inhabited places on the shore: bombardment of undefended localities was strictly prohibited, and fire directed at other localities could solely be aimed at military works and other enumerated objects that qualified as military objectives.

Rules governing the impact of the war on shipping included such disparate matters as the departure of neutral vessels from belligerent harbours at the outbreak of war, the inviolability of postal correspondence on board neutral and enemy vessels, and the immunity from capture of fishing vessels and small local traders.

Hague II had not by far codified the law for every conceivable situation; as noted in the preamble of Convention (XI) on certain cases of capture, the codified law did not affect ‘the common law now in force with regard to the matters which that law has left unsettled’. Mention is made, in this respect, of the Convention (XII) on the international prize court. The convention remaining unratified, the court was never created.

2.3 Geneva law

The first Geneva Convention, written in 1864 without a basis in practice, was marked for revision from its early days. As noted, Russia had included some of its provisions in the project for the Brussels Declaration of 1874; with this attempt warded off, the Declaration referred to the Convention of 1864, with such ‘modifications as the latter may undergo’. The same clause subsequently came to figure in the Hague Regulations of 1899. In 1906, a new Geneva Convention finally replaced the old one (and the Regulations of 1907 no longer referred to ‘modifications’).

The Geneva Convention of 1906 was as long and practical as the Convention of 1864 had been short and experimental. It dealt extensively with the condition of the wounded and sick (including the dead), the personnel – both military and that of volunteer aid societies – of

36 Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War (18 October 1907) 205 CTS 367.
37 Convention (XII) Relative to the Creation of an International Prize Court (18 October 1907) 205 CTS 381.
38 Moynier (n 13) 5–13.
39 1899 Hague Regulations (n 21) art 21.
‘sanitary’ formations and their ‘materièl’, and the distinctive emblem. Some broad strokes may suffice.

The wounded and sick must be ‘respected’ (ie not harmed) and, positively, ‘cared for’, ‘without distinction of nationality’ and ‘by the belligerent in whose power they are’. If this was the enemy, they also became prisoners of war. Then, the local population could play a role as well; to that end, ‘military authority’ could ‘make an appeal to the charitable zeal of the inhabitants’.

Elaborating the principles, the Convention dealt with such matters as the possession and use of weapons by the personnel of a sanitary establishment and the guards; the work in their proper functions by sanitary personnel who have fallen in the power of the enemy; and the power of a belligerent intercepting an evacuation convoy, ‘if required by military necessity’, to break it up, therewith ‘charging himself with the care of the sick and wounded whom it contains’.

A final point: since the emblem had been open to abuse, the parties undertook to take the necessary legislative and practical measures to prevent and repress such abuses.

The Hague Convention (X) of 1907 adapted the principles of 1906 to maritime warfare. It introduced the ‘hospital ship’: a vessel built or equipped ‘solely with a view to assisting the wounded, sick and shipwrecked’. Hospital ships could be operated by a belligerent state or by a voluntary aid society in that state or in a neutral state. They had to be painted white, with a broad horizontal band around the ship: green for the state-operated or ‘military’ hospital ship, red for the other ones; and, apart from national flags, they flew ‘the white flag with a red cross’. Their task was to ‘afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality’. However, belligerents to that end could also ‘appeal to the charity of the commanders of neutral merchant ships, yachts, or boats to take on board and tend the sick and wounded’: a nice parallel to land warfare’s appeal by ‘military authority’ to the ‘charitable zeal of the inhabitants’.

A final note on the treaties mentioned in this section: they all were written for, and applied in ‘war’, a situation that was either declared or could be recognised from the facts. Rather than describing this, the treaties set forth in detail the relations among the belligerents that were, or were not, or were no longer, parties to a given treaty. Most ruinous was the ‘si omnes’ clause: when a non-party state joined a war between parties, the treaty was no longer applicable between the original parties as well.

3 The interbellum

As noted, the outbreak of the World War had prevented the planned third Hague peace conference. Striking features of that war had been the endless trench warfare on the French–German border, with the thousands upon thousands of victims; the introduction of British tanks, stopped
by the ever heavier German machine guns; the use by Germany and Great Britain of lethal gas; the rapid development of air warfare, including the bombing of industrial and other non-military targets; and submarine warfare, both against enemy warships and commercial shipping.

The League of Nations, established in 1920, had peace, not war, on its agenda. Yet, law of war issues came up in meetings under its auspices. Thus, a five-power conference (US, Great Britain, France, Italy and Japan) held in Washington in 1922 on the limitation of armaments took positions on submarine warfare and the use of chemical weapons. However, most interesting was its decision to have an international Commission of Jurists elaborate rules of aerial warfare and wartime control of wireless telegraphy.

3.1 Hague Rules of Air Warfare (1923)

The Commission of Jurists met at The Hague. It was composed of six teams, one from each of the parties to the conference and one from the Netherlands. In 1923 it presented its results, usually indicated as Hague Rules. The Rules on wireless telegraphy mainly had to do with neutrality. In contrast, the 62 articles of the Rules of Air Warfare provided a complete set of rules on this novel, three-dimensional form of warfare, with chapters on the participants (the ‘belligerents’), hostilities, relations to enemy and neutral aircraft, etc.

The chapter on hostilities opened with the statement that ‘the use of tracer, incendiary or explosive projectiles by or against aircraft’ was permitted. This confirmed practice; as noted in the rule, it also overruled the 1868 St Petersburg Declaration: a clear case of customary law setting aside a rule of treaty law.

The first rule on air bombardment was a radical ban on the practice of terror bombing. Then, for a bombardment to be legitimate, it had to be ‘directed at a military objective’, that is, an object figuring on an exclusive list and the destruction or injury of which ‘would constitute a distinct military advantage to the belligerent’. Moreover, any objective located in a city or other civilian habitation could only be bombed if this locality was situated in the ‘immediate vicinity of the operations of the land forces’. So, in today’s terms: no strategic bombing. And where bombardment was permissible, special care should be taken of objects selected for their cultural or medical importance.

The 1923 Hague Rules were never signed. Yet, they have not been without influence; as one author had it: ‘Although the rules were not ratified, both sides [to the Second World War] publicly acclaimed their adherence and accused their opponents of violations.’ And on 30 September 1938, a short while before the outbreak of the war, the League Assembly adopted a resolution which, without referring to the Hague Rules, reaffirmed the ban on intentional bombing of civilian populations. It stated that only identifiable military objectives could be

49 Covenant of the League of Nations, being Articles 1–26 of the Treaty of Versailles (28 June 1919) 225 CTS 188.
50 17 AJIL Supp 242.
51 17 AJIL Supp 245.
52 Ibid pt II, ch IV, art 18.
53 Ibid art 22.
54 Ibid art 24.
55 Ibid art 25, reaffirming HR art 27.
attacked, and attacks must take care that civilian populations in the vicinity were not bombed through negligence.\footnote{57 Protection of Civilian Populations against Bombing from the Air in Case of War, League of Nation Assembly Res (30 September 1938), reprinted in Schindler and Toman (n 6) 329.}

### 3.2 Geneva Gas Protocol (1925)

The use of poison and poisonous weapons, since long prohibited under customary law and in writing since the Hague Regulations of 1899/1907, came up in the post-First World War debate, if only as a consequence of the use of various types of gas by both sides in trench warfare. A clause in the treaty concluded at the Washington conference of 1922 on the use of submarines and noxious gases in warfare placed on record the parties’ assent to the existing prohibition, their agreement ‘to be bound thereby as between themselves’ and their invitation to ‘all other civilized nations to adhere thereto’.\footnote{58 Treaty Relating to the Use of Submarines and Noxious Gases in Warfare (6 February 1922) 25 LNTS 202, art 5.} However, the treaty never entered into force.

The legal regulation of the use of noxious gas resurfaced again in 1925, at an international conference in Geneva on the international arms trade. Prompted by a French proposal, the conference also adopted the so-called Geneva Gas Protocol.\footnote{59 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (17 June 1925) 94 LNTS 65.} Like the Washington treaty, the Protocol reaffirmed the existing prohibition on wartime use of poison gases, liquids etc, to which it added the use of ‘bacteriological methods of warfare’. In the course of time, it would be ratified or acceded to by 137 states; the United States ratified after 50 years, in 1975.

While the Protocol was silent on whether a belligerent attacked with gas would be entitled to respond in kind, many states expressly reserved their right to such a response. A number of them have since withdrawn this reservation. Apart from that, none of the 188 states which since have become party to the Chemical Weapons Convention can be deemed to have retained such a right, given the text of Article 1 by which each state party accepts ‘never under any circumstances … to use chemical weapons’.

### 3.3 Naval warfare

Submarine warfare during the First World War, with its innumerable victims on the high seas, had led to the insight that the applicable law needed to be reaffirmed. With the Washington treaty of 1922 unratified, a next attempt was made at the 1930 London conference on naval armaments. The conference adopted a treaty, Part IV of which codified two principles ‘accepted as established rules of international law’: ‘In their actions with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.’ And, cases of resistance apart, no warship, ‘whether surface vessel or submarine’, may sink a merchant vessel ‘without having first placed passengers, crew and ship’s papers in a place of safety’. Although this treaty also failed to attract sufficient ratifications, Part IV was saved: on 6 November 1936, again in London, a Procès-verbal containing the verbatim text of Part IV was signed and entered into force that same day.\footnote{60 173 LNTS 353.} It was ultimately accepted by 39 states.\footnote{61 Adam Roberts and Richard Guelff, Documents on the Laws of War (3rd edn, OUP 2000) 1145.}
3.4 Geneva Conventions (1929)

In 1929, a diplomatic conference held in Geneva adopted two Conventions: one, on the wounded and sick of armies in the field; and the other, on the treatment of prisoners of war.

The new Convention for the wounded and sick replaced the Convention of 1906, bringing it up-to-date in the light of the First World War practice. We single out one interesting clause on application. It provided that ‘the provisions of the present Convention shall be respected [by the parties] in all circumstances’.62 As explained by the former secretary-general of the conference, the phrase served to remind the parties of their obligation to apply in peace time the rules in the Convention written for that period. He added that he did not believe it implied application in civil war as well, no matter how desirable this might be.63

The Convention on the treatment of prisoners of war completed the provisions in Chapter II of the Hague Regulations of 1899/1907. Here too, experiences of the First World War were worked into the text. We just mention the labour of prisoners of war, their relations with the authorities (through a representative of their choice) and with the outside world, and their punishment, whether disciplinary or judicial, for acts committed before or during imprisonment.64 One major achievement was the prohibition of reprisals:65 the infliction of forms of maltreatment in response to similar behaviour by the enemy. Another point of interest was the description of a protecting-power system, by which a state charged with the protection of a belligerent’s interests could send representatives to control the situation of prisoners of war in the hands of the other belligerent.66

We note that the prisoners-of-war Convention contains the same ‘all circumstances’ provision,67 making it all the more improbable that the drafters would have had civil war in mind. And, a last point, the same articles in both Conventions do away with the ‘si omnes’ clause, specifying that they remain binding if non-parties are among the belligerents.

Herewith, Geneva law had come to cover the wounded and sick (and shipwrecked) and the prisoners of war. Still absent was the civilian population, a category that during the First World War had suffered badly in many countries.68 The 1929 diplomatic conference did not have the matter on its agenda. Yet, it adopted a resolution recommending that steps be taken towards the conclusion of a convention on the protection of civilians in enemy or occupied territory.69 A text drafted by the ICRC to that end found approval in the Red Cross world, but by the time the Swiss authorities could have convened the next diplomatic conference, the next war had started.70

62 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929) 118 LNTS 303, art 25.
64 Convention relative to the Treatment of Prisoners of War (27 July 1929) 118 LNTS 343.
65 Ibid art 2.
66 Ibid art 86.
67 Ibid art 82.
70 Draft International Convention on the Condition and protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent (recommended by the XV International Red Cross Conference, Tokyo, 1934), reprinted in Schindler and Toman (n 6) 445.
In sum, the interbellum brought a very modest harvest of IHL treaty law: on Hague law, the 1925 Gas Protocol and the 1936 Procès-verbal on submarine warfare; and on Geneva law, the two Conventions of 1929. Efforts such as the 1923 Hague Rules on air warfare and the 1938 League Assembly resolution on bombardment were useful but insufficient. And work on the protection of civilian populations had just begun.

4 The aftermath of the Second World War up to the present

The Second World War once again brought untold misery, with the holocaust and the ‘atomic bomb’ as horrendous culminating points. Once this war terminated, the creation of the UN was a sign of hope, and so was the establishment of the Nuremberg and Tokyo Tribunals which dealt with the major war criminals of the Axis Powers. At the same time, warfare continued, this time of another type: the decolonisation wars or wars of national liberation.

IHL treaty law had been developing over this entire period, at the outset still according to the Geneva and Hague split. In the 1970s, the two fields could be seen to merge. The present section reflects this development.

4.1 Geneva Conventions (1949)

In 1949, a diplomatic conference in Geneva produced four Conventions, three to replace the Conventions of 1906 and 1929, and the fourth for the protection of civilians – at last!

The Conventions are characterised by a number of common provisions. Common Article 1 reaffirms the phrase, introduced in 1929, that states parties ‘undertake to respect and to ensure respect [for each Convention] in all circumstances’. The phrase is widely interpreted as allowing states not party to an armed conflict to urge the parties thereto to respect the law.

Like their predecessors, the Conventions apply in ‘war’, completed now in Common Article 2 with ‘any other armed conflict’ between two or more states. The new, more objective clause offers outsiders (other states, the UN, the ICRC) a tool to urge application of the Conventions.

A major step forward has been the adoption of Common Article 3. This by now famous provision lays down minimum rules that must be applied by all the parties to an internal armed conflict that occurs within the territory of a state. The rules protect persons who do not, or no longer, take part in the hostilities: they must always be ‘treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’. Prohibited in particular are all kind of ‘violence to life and person’, ‘outrages upon personal dignity’, hostage taking, summary executions, etc.

A last element common to the four Conventions mentioned here is the introduction of ‘grave breaches’: select acts, committed wilfully against protected persons or property. The Conventions do not themselves provide sanctions for these acts, nor do they open a road to international adjudication. Rather, it is for the states parties to make the acts publishable in their domestic legislation.

71 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (‘London Agreement’) (8 August 1945) 82 UNTS 280.
72 Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res 260 (III) (9 December 1948) 78 UNTS 277 is not treated here, since it does not regulate the conduct of war.
73 See also Frits Kalshoven, ‘The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit’ (1999) YBIHL 3, reprinted in Kalshoven, Reflections (n 10) 665.
74 GCI art 49; GCII art 50; GCIII art 129; GCIV art 146.
In Geneva Convention III, the list of protected persons has been completed with the members of ‘organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied’75 – Lieber’s ‘war rebels’ at long last brought under protection, always on the understanding that they respect the four conditions set forth in the Hague Regulations of 1899/1907.

As for the newcomer: Geneva Convention IV does not protect against bombardment or any other effects of hostilities. It does aim to protect against other, often equally serious effects of war on freedom, security and health. Thus, a Part on ‘general protection of populations against certain consequences of war’ deals with agreed ‘safety zones’ for qualifying groups of persons, protection of civilian hospitals and of land, sea and air transport of wounded and sick civilians, child welfare and family news, etc.76 One singularly important provision obliges all states, whether belligerent or not, to allow the free passage of medical, hospital and religious consignments, as well as of essential foodstuffs etc for ‘children under fifteen, expectant mothers and maternity cases’.77

Specific protection is accorded ‘protected persons’, categories of persons defined as ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’.78 Geneva Convention IV provides in detail for the ‘status and treatment’ of these persons. Selected here are the rules aiming to prevent a repetition of the events that occurred in the Second World War when, the moment the United States joined the war, it interned the Japanese persons living in the country. Internment remains permitted, but only when this is absolutely necessary for reasons of state security, and under periodical review by a competent court or administrative board.79 In occupied territory as well, internment remains possible.80 For either case of internment, Geneva Convention IV provides a detailed set of regulations, much like the rules for prisoners of war in Geneva Convention III.81

4.2 Hague Convention (1954)

Monuments and other types and sizes of cultural objects had been exposed during the Second World War to all kinds of maltreatment, from wanton destruction to forced exportation. The Hague Regulations were of course totally inadequate, and new treaty law on the subject was urgently needed. To that end, an intergovernmental conference convened by UNESCO met in 1954 in The Hague, and on 14 May 1954 it adopted the Convention for the Protection of Cultural Property in the Event of Armed Conflict.82

The Convention distinguishes general and special protection. General protection covers all objects that fall under the description of ‘movable or immovable property of great importance to the cultural heritage of every people’, from ‘monuments of architecture’ to ‘important collections of books’.83 Under the heading ‘respect’, both parties to the conflict are urged to refrain

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75 GCIII art 4(A)(2).
76 GCIV pt II.
77 Ibid art 23.
78 Ibid art 4.
79 Ibid arts 41–43.
80 Ibid art 78.
81 Ibid arts 79–141; cf GCIII arts 21–48.
82 249 UNTS 240.
83 Ibid art 1.
from any act that might put such a protected object at risk.\textsuperscript{84} Objects may be marked with an emblem that consists of a blue-and-white shield.\textsuperscript{85}

In contrast, special protection can only be granted to a limited number of refuges sheltering movable objects or centres containing immovable items, that are situated far from any object that might be regarded as a military objective, and are not themselves used for a military purpose.\textsuperscript{86} For a refuge or centre to be granted the special protection requires a long process that ends with its inscription in a register held at UNESCO.\textsuperscript{87} Few objects have actually been so registered.

The provisions on application of the Convention are copies of the relevant rules in the Geneva Conventions.\textsuperscript{88} As another sign of the closing gap between the two branches of IHL, the provisions of the Convention that ‘relate to respect for cultural property’ are declared applicable in non-international armed conflicts as well.\textsuperscript{89}

The conference also adopted a Protocol, aimed against the practice of exportation of cultural property.\textsuperscript{90} In a detailed set of rules, the parties undertake to prevent the practice or, where it has occurred, to help mending the consequences.

### 4.3 Protocols I and II Additional to the 1949 Geneva Conventions (1977)

On 8 June 1977, after four years of negotiations, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in Geneva adopted two Protocols additional to the 1949 Conventions, one for international armed conflicts and the other for non-international armed conflicts. (The conference, after its French acronym, is referred to as the CDDH.)

Preparations for the event went back to 1956, when the ICRC published Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.\textsuperscript{91} Welcomed in 1957 by the XIXth International Conference of the Red Cross, the text drew few reactions from governments. Then, in December 1968, the UN General Assembly adopted Resolution 2444 (XXIII) which in few words affirmed three principles formulated in 1965 at the XXth International Conference of the Red Cross: no unlimited right for belligerent parties to adopt means of injuring the enemy, prohibition of attacks directed against the civilian population, and distinction at all times between combatants and civilians ‘to the effect that the latter be spared as much as possible’. Soon thereafter, government and Red Cross expert meetings had begun preparing for the diplomatic conference.\textsuperscript{92}

\textsuperscript{84} Ibid art 4.

\textsuperscript{85} Ibid arts 6, 16.

\textsuperscript{86} Ibid art 8.

\textsuperscript{87} Ibid art 8(6).

\textsuperscript{88} Ibid art 18; cf GCI–IV art 2.

\textsuperscript{89} Ibid art 19.

\textsuperscript{90} 249 UNTS 358.

\textsuperscript{91} Schindler and Toman (n 6) 339.

Opened in 1974, with the Vietnam war coming to an end, the CDDH spent most of its first session on the qualification of decolonisation wars: international or internal? It decided by overwhelming majority, and in conformity with the position long taken by the majority at the UN General Assembly, that wars of national liberation had to be recognised as international armed conflicts.93

With liberation wars thus brought within the ambit of Additional Protocol I, its provision on application is completed with a paragraph stating that liberation wars are included among the situations where the 1949 Geneva Conventions are applicable.94 Another provision opens the possibility for ‘the authority representing’ a people fighting a liberation war to unilaterally ‘undertake to apply the Conventions and this Protocol’: from the moment the depositary (Switzerland) receives this undertaking, and assuming the colonial power is party to the Protocol, the Conventions and the Protocol are in force and binding on all the parties to the conflict.95 However, this is a rather theoretical construct that has not been applied in practice.

The decision of 1974 also necessitated another look at the term ‘combatant’. As with the classical irregular fighter in occupied territory, the officially recognised liberation fighter could not very well be expected to wage war according to the rules written for traditional armies. The solution, finally found in direct contact between the US and Vietnamese heads of delegation, is in two parts: (1) a redefinition of the term ‘armed forces’ brings the state armies and other armed groups under the same rules, and (2) the irregulars are granted some flexibility in meeting the obligation of all combatants to distinguish themselves from civilians whenever they are ‘engaged in an attack or in a military operation preparatory to an attack’.96 Several states in ratifying Additional Protocol I have added their understanding that apart from wars of liberation, the latter rule will apply solely in occupied territory. The US, for its part, completely rejects the new rule as favouring terrorism. With that, it may be said to revert to, nay surpass, Lieber’s classification of irregular fighters in occupied territory as ‘war rebels’.

The use by the US of defoliants in Vietnam led to yet another renovation in Additional Protocol I: the set of ‘basic rules’ (no unlimited right to choose methods or means of warfare, no weapons ‘of a nature to cause superfluous injury’) was completed with the prohibition ‘to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment’.97

With Geneva and Hague law flowing into a single stream, Additional Protocol I has sections on the ‘wounded, sick and shipwrecked’, ‘methods and means of warfare’ and ‘combatant and prisoner-of-war status’, as well as a long section headed ‘civilian population’ that shows when, how and to what extent civilians can be protected against the vicissitudes of warfare. To many, this complete set of rules for the protection of civilians against ‘dangers arising from military operations’ is the greatest achievement of the CDDH. Without going any further into the details of Additional Protocol I, it may be noted that as of December 2015, 174 states are party to it and the most important non-party, the US, accepts many of its provisions as customary law.

94 API art 1(4).
95 Ibid art 96(3).
96 Ibid arts 43, 44; see also Frits Kalshoven, ‘The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977’ in Kalshoven, Reflections (n 10) 181, 197
97 API art 35.
Fewer words are spent here on Additional Protocol II. It is applicable in select non-international armed conflicts. The conflict must be between the armed forces of a state party and ‘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’.

A last-minute compromise between the many states who wanted no Protocol at all and those who aimed at a text as close to Additional Protocol I as possible, Additional Protocol II has no rules on ‘methods and means of warfare’ or ‘combatant and prisoner-of-war status’, and but a few on protection of the civilian population. It does make provision for the ‘humane treatment’ of all persons who take no direct part in hostilities: a set of provisions that borrows from Common Article 3 of the 1949 Conventions, completed with human rights. As well, a section on ‘wounded, sick and shipwrecked’ provides the basics of this oldest part of Geneva law. Additional Protocol II has been accepted by 168 states.


Even before the CDDH, the feeling had become widespread that not only the ‘methods of warfare’ but certain ‘means of warfare’ should be tackled too. Attention went in particular to weapons such as small-calibre rifle munitions, landmines and incendiary weapons, and the action sought was not prohibition of possession (a disarmament measure) but prohibition or limitation of use. The CDDH not being empowered to negotiate a treaty on these matters, pressure from the ‘activists’ resulted in the establishment of an ad hoc committee that examined these matters throughout the four sessions of the conference, thus preparing the ground for further action. Its final report induced the CDDH to recommend that a government conference be speedily convened to carry the matter further. Taking up the suggestion, the UN General Assembly resolved in December 1977 that such a conference be held in 1979.

After due preparation, the UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects met in Geneva in two sessions: one in September 1979 and the second in September/October 1980. On 10 October 1980, it adopted a Convention with the same long name but usually referred to as the Convention on Certain Conventional Weapons (CCW).

The CCW is an umbrella to which Protocols can be annexed that contain the substantive rules on use of given weapons. The list of Protocols includes mines and booby traps (II), incendiary weapons (III), blinding laser weapons (IV) and ‘explosive remnants of war’ (V) including unexploded bomblets of cluster munitions. Both on anti-personnel mines and cluster munitions separate conventions have been adopted, in 1997 and 2008 respectively, which complete the prohibition on their use with a ban on possession, production, etc.

The scope of application of the CCW was originally identical to that of Additional Protocol I: international armed conflicts, including wars of liberation. The fact that non-international armed conflicts were not included soon proved unfortunate, given the increase of such situations. Fortunately, the CCW provides for review conferences. The second review conference decided in December 2001 to expand the application of the CCW and the annexed protocols to all non-international armed conflicts. This revision of Article 1 has been in force since 18 November 2003.

98 APII art 1(1).
100 1342 UNTS 137.
101 Ibid art 8.

An international conference at The Hague, organised jointly by the Netherlands government and UNESCO, in March 1999 adopted a Second Protocol to the Convention of 1954.\(^{102}\) It largely rewrites the part of the Convention on general protection in terms of Additional Protocol I. It also replaces the part on special protection with a system of ‘enhanced protection’ of objects that qualify as ‘cultural heritage of the greatest importance to humanity’ and meet further stringent conditions. The system rests on registration on a list maintained by the Committee for the Protection of Cultural Property in the Event of Armed Conflict, being the executive organ of the Protocol that consists of the representatives of 12 states parties. Like other recent products, the Second Protocol is applicable in all armed conflicts, whether international or non-international.\(^{103}\)


In 2006, two narrowly connected issues were resolved that had emerged in 1949 when Israel signed the Geneva Conventions under the reservation that although it respected the use by others of the red cross or crescent, it would itself ‘use the Red Shield of David as the emblem and distinctive sign of the medical services of its armed forces’. Israel clearly would never change its position, and the international community proved equally unwilling to accept an additional emblem for a single state. In consequence, the Magen David Adom Society could not be admitted to the Red Cross and Red Crescent Movement. The same applied to the Palestine Red Crescent Society, since Palestine was not a recognised state.

Both problems were finally resolved in a series of manoeuvres that on 21 June 2006 enabled the Movement to accept both candidates. The central piece was the adoption, on 8 December 2005, by an ad hoc diplomatic conference, of Protocol III Additional to the 1949 Geneva Conventions.\(^{104}\) This introduces a new emblem, defined as ‘a red frame in the shape of a square on edge on a white ground’ and referred to as the ‘red crystal’. It can be used as a protective emblem (emphasising the protected status of the person or object carrying it) and, in limited circumstances, as an indicative emblem with another, unrecognised, emblem (say, the Red Shield of David) at its centre. Additional Protocol III, in force since 14 January 2007, on 22 November 2007 was ratified by Israel.

With this purely Geneva bit of news, we conclude our history of the law of armed conflict. More could have been written about recent developments, in particular in the sphere of international criminal law, but this would have made the present chapter much too long. For these further developments, the reader may be referred to the relevant other chapters of this volume.

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102 2253 UNTS 212.
103 Ibid arts 3, 22.
104 2404 UNTS 261.