



GEOFFREY BEST

# WAR & LAW

SINCE 1945

# War and Law Since 1945

GEOFFREY BEST

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# War and Law Since 1945

*'In memory of Pierre Boissier and of Hedley Bull'*

## Preface

This book is the outcome of many years' thinking and writing about certain questions arising from the relationship between what we call civilization and war. For instance, why do different societies have different ideas about right and wrong behaviour in war? How did the system of international law which the European society of States evolved for itself and then disseminated all round the globe come to have at its heart a body of rules and principles for the proper conduct of wars, and why were they formulated just so? And, irrespective of whether it may have worked well or badly in times past, does this body of rules and principles in our own time successfully moderate the conduct of wars (armed conflicts, as many nowadays prefer to call them) as the theory of our civilization expects it to do?

It is with the third of these questions—not 'why do wars happen?' but 'what happens in wars?'—that this book is mainly concerned. War, in one form or another, is something of which many States, societies, and persons in our contemporary world have direct and, very often, unhappy experience. To all the others who are spared direct experience of it, war remains a subject of intense anxiety and interest because of the sympathy and indignation felt for its victims by onlookers, who moreover must often reflect that their own immunity might not last for ever. War and the risk of war are universally acknowledged to be, if not the outstanding shame and horror of our age, at least top-equal with the outstanding ones. It is precisely on that account that the parts of international law supposed to control and moderate it, the Laws of War as they were formerly known, have become, in our age, more highly developed than ever before and popularly known as International Humanitarian Law.

Law is not the only means by which the nastiness of war-conduct can be moderated, but it is a prominent one, deep-rooted in the history of our civilization and, it can be argued, rather an admirable one. The present generation has witnessed two big bursts of activity to enlarge and refine it: the first, directly after the Second World War; the second, in the 1970s, with debate about its merits still going on. Almost all armed forces profess to incorporate elements of it in their basic instruction, and some of them are known effectively to do so. So much attention is being paid to it in contemporary debate and reportage about the causes and conduct of wars that one may reasonably guess that more people are now aware of it (or, more likely, bits of it) than in any previous period of human history.

Certainly more lawyers—some of the ablest of them, civilians based in non-military institutions—are engaged in teaching it and in talking and writing about it than ever before. This expansion of the law of war's substance and personnel has included unprecedented efforts to extend general knowledge and appreciation of it; above all, the International Red Cross's programme of virtually unlimited 'dissemination'. Its popular title brings it automatically within the attention-range of everyone interested in what are known as humanitarian and human rights issues and events. The question whether, for all its contemporary sophistication and apparent high repute, it actually works well or not, is therefore one which may be expected to interest a large number and wide range of people.

So much of a lifetime's experience has gone into this book that I wish it were possible to mention all the many persons who have signally helped, guided, and supported me. I beg readers however to believe that while responsibility is emphatically mine alone for whatever may be found wrong in these pages, many others are entitled to share the credit for whatever may be right. Some, to whom I feel more than ordinarily indebted, will be named at the end. But first, I must mention certain institutions which have done much to make the work possible.

The International Committee of the Red Cross, through various of its dignitaries and officials, has been generously supportive and encouraging ever since I had the privilege of introduction to it twenty-three years ago by Pierre Boissier. My admiration for the work of the ICRC is as warm as my regard for those members of its staff whom I have seen most of; and if in recent years I have called upon them less than formerly, it is in large part because I began to fear that over-dependence on them and their great institution might constrain my independence of judgment, or conduce to a misleading impression that I have written a Genevan sort of book. Not everything I write conforms to what, rightly or wrongly, I perceive as ICRC orthodoxy; but nothing that I write is meant to diminish, or indeed is capable of diminishing, the ICRC's uniquely valuable place in the global order of humanitarian things. I trust that readers will have no difficulty in realizing that my long studies of IHL have only fortified my sense of its extreme importance, and my respect for that unique organization which is, so to speak, its curator.

To the Joseph Rowntree Charitable Trust, I am hugely indebted for the means to write Part II of the book. Its generous research grant enabled me to make such use of public archives in the USA, Canada, Australia, France, Ireland, and Sweden as time and authority permitted. There was enough left over to buy a few extremely expensive law books and to pay for secretarial

help of the sort which is so helpful to writers whose retirement precedes their mastery of the word processor. Besides gratitude, I owe to these benefactors an apology for having taken so much longer over the work than was at first expected. Illness through much of the 1980s was not the only cause of that delay. The more I thought about my project, and the more I looked at the ordinary run of writing about contemporary humanitarian law, the more did I realize that the most useful book I could write was not the comprehensive description I had originally thought of but an analytical critique; a look from the outside rather than from inside; a critique which moreover would place IHL in among the other great international institutions which have a part in the endeavour to promote peace and to prevent or at least to limit wars. Because I very much dislike war, it is with regret that I have been driven to the conclusion that this branch of international law seems unable to do as much to prevent war as many of us had hoped, or to make its conduct less atrocious. If my explanation of the law's practical shortcomings lends strength to the movement to correct them, I shall feel well rewarded.

Retirement (rather too early, in my case) is a mixed blessing. Time on one's hands is good; but on the other side of that attractive medal loom losses of administrative support and scholarly comradeship. Severe deprivation of those kinds has been kept from me by the generosity of the following institutions, to which I am heartily grateful: the Research School of Social Sciences at the Australian National University, for a three months' fellowship in 1984; the Woodrow Wilson International Center in Washington, DC, for a guest scholarship in 1985; the London School of Economics and Political Science, for three years' fellowship in its Centre of International Studies, 1982–5, followed by academic membership of its International Relations department through 1985–8; and the Warden and Fellows of St Antony's College, for the senior associate membership with which they honoured me when I moved to Oxford and began to help with the work of its IR group in 1988. I am obliged to the Nuffield Foundation for the 'small research grant' which enabled me to have a second bite at the National Archives in Washington in October 1990. And I can hardly find words adequate to say how grateful I am to Ivon Asquith, Anne Gelling, Tony Morris, and others at the Oxford University Press for having remained so patient and considerate throughout so many years of waiting.

For permission to use, to varying extents, books and papers in their keeping, and for assistance in the use of them (almost everywhere I have been impressed by the helpfulness of librarians and archivists), I thank the authorities in charge of the British Library, the Bodleian Library, the Public

Record Office, and the British Red Cross; in the USA, the Library of Congress, the National Archives, and the American Red Cross; the Australian Red Cross and the Australian Archives; the Archives of the Departments of External Affairs in Ottawa, Dublin, and Stockholm; and those of the Ministère des Affaires étrangères at the Quai d'Orsay in Paris.

Two groups of people I must thank by name for their helpfulness. One group is those benevolent persons, experienced in this or that part of the IHL story, who let me talk with them about it and in one way or another sought to advance my understanding of it. All those occasions were informal. None of them took the form of an 'interview'. I was not 'muck-raking'. Sometimes I heard nothing I did not know or intuit already. But encounters with persons who have participated in parts of the history one is writing about leave their mark in various ways, and I am sure that the texture of my book would be thinner without them. May I therefore—with profound apologies for omitting such titles as I am aware of, for fear of omitting those I am not—mention as supportive interlocutors at one time or another: Adelouahib Abada, Georges Abi-Saab, George Aldrich, Maggie Black, Melchior Borzinger, Peter Cameron, Daniel Dufour, Brian Hodgson, Jean Hoefliger, Sylvie-Stoyanka Junod, Charles Lysaght, James Makin, Ian Marriott, Toby Nichols, John de Salis, Frank Sieverts, and Waldemar Solf.

And finally there are some individuals I must mention, because of their unfailing helpfulness on many occasions when I have most needed them. Everyone else who has been helpful will, I'm sure, not think me ungrateful to them if I say how particularly grateful I am to (alphabetically, and again omitting titles) Sydney Bailey, François Bédarida, Marigold Best, the late Hedley Bull, Owen Chadwick, Wilhelm Deist, Michael Dockrill, Michael Donelan, Brian Elliot, Hans-Peter Gasser, Françoise Hampson, Michael Howard, Andrew Hurrell, Christiane Johannot (as she then was), Frits Kalshoven, George Kateb, Michael Meyer, Tony Morris (my patient and resourceful editor at the OUP), William V. O'Brien, W. Hays Parks, Adam Roberts, Brian Roberts, the late Christopher Thorne, Michel Veuthey, and Andrew Wheatcroft. Some of them may be surprised to see what they have helped me to write. The responsibility for the book is, of course, and I repeat, entirely mine.

G.B.

# Abbreviations, Short Titles, and Archive References

## 1. Abbreviations

AEC	Atomic Energy Commission
<i>AmJIL</i>	<i>American Journal of International Law</i>
AP <sub>1</sub> , AP <sub>2</sub>	Additional Protocols 1 and 2 (1977)
<i>BYIL</i>	<i>British Yearbook of International Law</i>
CBW	Chemical and Biological Warfare
CDDH	Conférence Diplomatique sur le Droit Humanitaire (1974–7)
GA	General Assembly (of the United Nations)
GC	Geneva Convention
HCP	High Contracting Party
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
IGO	Inter-Governmental Organization
IHL	International Humanitarian Law
IMT	International Military Tribunal
ILC	International Law Commission
ICRC	International Committee of the Red Cross
<i>IRRC</i>	<i>International Review of the Red Cross</i>
NGO	Non-Governmental Organization
OAS	Organization of American States
<i>PASIL</i>	<i>Proceedings of the American Society of International Law</i>
POW	Prisoner of War
PP	Protecting Power
PR	Public Relations
UDHR	Universal Declaration of Human Rights (1948)

## Short Titles (*of books often referred to*)

Bothe, Partsch, and Solf	Michael Bothe, Karl Josef Partsch, and Waldemar Solf, <i>New Rules for Victims of Armed Conflicts</i> (Nijhoff, The Hague, etc., 1982).
<i>Final Record</i>	<i>Final Record of the Diplomatic Conference of Geneva of 1949</i> , 3 vols., the 2nd in two parts A and B (Federal Political Dept., Berne, n.d.)
Official Commentary	the ICRCs <i>Commentary on the Additional Protocols of 8 June 1977</i> . . . (Nijhoff and the ICRC, Geneva, 1987). Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman are listed as editors, but so many other names appear with equal prominence on the title-page, it is not clear which of them would head the poll in a library catalogue.

- Oppenheim L. Oppenheim, *International Law*, 2: *Disputes, War and Neutrality*, 7th edn. edited by Hersch Lauterpacht (Longmans, London, 1952)
- Pictet's *Commentary* the ICRC's (Official) *Commentary on the Geneva Conventions of 12 August 1949*, 4 vols., one for each of the four Conventions, published in Geneva respectively in 1952, 1960, 1960, and 1958. They are separately edited by a variety of hands, but Jean S. Pictet is described as the 'general editor', and they are always referred to by his distinguished name.
- Roberts and Guelff Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War* (2nd edn., Clarendon Press, Oxford, 1989).
- Schindler and Toman Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* ... (2nd edn., Sijthoff, Alphen aan den Rijn, and the Henry Dunant Institute, Geneva, 1981).
- Schwarzenberger Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*; ii, *The Law of Armed Conflict* (Stevens, London, 1968).

### Archive References

- Am RC The Archives of the American Red Cross, Washington, DC.
- AUST Records of the Department of External Affairs, The Australian Archives, Canberra.
- AUST RC Archives and Registry of the Australian Red Cross Society, East Melbourne.
- CAN Records of the Department of External Affairs, Ottawa.
- FR Ministère des Affaires étrangères. Archives et Documentations, Centre des Archives Diplomatiques de Nantes.
- IR Archives of the Irish Department of External Affairs, held in the National Archives, Dublin.
- SW Archives of the Ministry for Foreign Affairs, Stockholm.
- UK Archives of the Foreign Office (FO), Home Office (HO), and War Office (WO) held in the Public Record Office (PRO), Kew, near London.
- US State Department papers held in the Diplomatic Branch of the National Archives, Washington, DC.

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.

Hersch Lauterpacht, in *British Yearbook of International Law* (1952), 382

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PART I

The Background to the  
Laws of War



# 1 | Introduction

## War, Law, and the Laws of War

This book's premiss is that there is more armed conflict in the world than is good for its inhabitants and the reputation of their species as one characterized by the faculty of reason and a sense of morality. War always has been and still remains a problem and puzzle from many points of view. The author does not believe that war must in all circumstances be a bad thing or the worst of all conceivable things, but he is among those who believe that there has often been and that there continues to be more war and armed struggle than there should be, and that much of it is more deadly, destructive, and cruel than it need be. Law is far from being the only means by which humankind and its civilizations have sought to reduce the incidence and to mitigate the effects of public and political violence, but it is—not least because of its ties to religion and ethics—one of the most interesting of them; one moreover which contemporary preoccupations with humanitarianism and human rights have made rather fashionable. The purpose of this book is to examine its place and usefulness in this global context.

What, then, has law to do with war? The question is all the more worth putting because at first sight law and war appear to be opposites. The Romans, who knew a lot about both, left a broad hint that indeed they were so: *inter arma silent leges*. If law signifies the calm hearing of ordered arguments and the settlement of disputes not by violence but by lights of justice and reason, how can it be consistent with an institution which represents the turning from rational discourse in order to settle disputes by a trial of armed strength? Resort to the violence of armed conflict, with all its usual chances and accidents, its frequent furies and inhumanities, its lists of casualties, trails of desolation, and legacies of hatred, looks like the antithesis of everything comprised in that ark of civilization's covenant, the rule of law. War unquestionably has those unruly, disreputable, and horrid attributes. They are a truth-telling and legitimate way of representing it. They are among the reasons why pacifists decide to have nothing to do with it and why conscientious non-pacifists hesitate before resorting to war or (supposing that they have any choice) letting it be forced upon them. But