DOCUMENTS ON THE LAWS OF WAR

Edited by Adam Roberts and Richard Guelff

Second Edition

Revised and Updated

DOCUMENTS ON THE LAWS OF WAR

Edited by

ADAM ROBERTS
M.A. (Oxford)

and

RICHARD GUELFF
B.A. (Yale), M.Sc. (London),
J.D. (S. California), LL.M. (Cambridge)

SECOND EDITION

CLARENDON PRESS · OXFORD
1989

Oxford University Press, Walton Street, Oxford OX2 6DP
Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Petaling Jaya Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland
and associated companies in
Berlin Ibadan

Oxford is a trade mark of Oxford University Press

First published 1982
Second Edition (with revisions and additions) 1989

British Library Cataloguing in Publication Data
Documents on the laws of war. — 2nd ed.
1. War. International law, 1856–1989.
Collections
I. Roberts, Adam II. Guelff, Richard, 1950–
341.6'09'034
ISBN 0–19–825658–2
ISBN 0–19–825657–4 (pbk.)

Library of Congress Cataloging in Publication Data
Documents on the laws of war/edited by Adam Roberts and Richard Guelff. — 2nd ed.
Includes index. Bibliography:
1. War (International law) I. Roberts, Adam. II. Guelff, Richard, 1950– .
JX4505.D62 1989 341.6—dc19 88–36932
ISBN 0–19–825658–2
ISBN 0–19–825657–4 (pbk.)

Set by Graphicraft, Hong Kong
Printed in Great Britain by Biddles Ltd
Guildford and King's Lynn

For Captain Pierre Henri Guelff, SC, USN

Note on Second Edition

This is an extensively revised edition of the book first published in 1982. It incorporates depositary information (lists of states parties etc.) which is up to date as of 1 July 1988. In the cases of the 1925 Geneva Protocol and the 1948 Genocide Convention, some more recent depositary information has also been included, in the form of a postscript and a footnote.

The editorial matter has been substantially revised and updated, not only to repair omissions, but also to take into account diplomatic, legal, and military developments since 1982, and new writings in the field. In particular, the Introduction, and the prefatory notes to the documents, contain numerous and substantial changes; the concluding notes, with the lists of states parties, have been updated; a new appendix showing emblems and signs has been added; and the index revised to take account of these changes. The select bibliography has been enlarged.

The texts of the documents have not required amendment, other than a single word in the 1981 UN Weapons Convention, Protocol I, Article 3(3)(*a*), which was the subject of a general corrigendum by the Depositary.

After careful consideration, and for reasons set forth in the Introduction, we decided against adding any additional pre-1982 documents or parts thereof.

Since 1982 there have been no new international conventions on the laws of war. However, there have been ongoing deliberations, mainly under UN auspices, on a wide variety of matters. These are reported at the relevant points in the Introduction and in the prefatory and concluding notes. We have included on p. 146 selected extracts from the final declaration of the 1989 Paris Conference on the Prohibition of Chemical Weapons.

Acknowledgements

We could not have prepared either the original or this revised edition without incurring many debts of gratitude. While first collaborating on this project, both of us were on the teaching staff of the London School of Economics and Political Science, where many people, especially in the departments of International Relations and Law, made it possible for us to carry out this work.

In London, we relied heavily on the excellent library of the Institute of Advanced Legal Studies; and at LSE we used extensively the international law collection in the British Library of Political and Economic Science.

In Geneva, our project received much encouragement and expert assistance from many people. First and foremost, from the International Committee of the Red Cross, whose library contains many materials not obtainable elsewhere, and whose legal department gave much help and advice: we are particularly grateful for the help given over a long period by Dr Hans-Peter Gasser, Legal Adviser to the Directorate, and by Bruno Zimmermann, Deputy Head of the Legal Division. We also received generous encouragement and advice from Dr Jiri Toman of the Institut Henry-Dunant, who himself has collaborated on an extremely useful comprehensive work in this field. We also used the resources of the libraries of the Institut Henry-Dunant, the Graduate Institute of International Studies, and the United Nations.

We received further advice from Julian Perry Robinson of the Science Policy Research Unit of the University of Sussex.

The Depositaries of the various international agreements contained in this book were particularly helpful. The foreign ministries of France, the Netherlands, Switzerland, UK, and the USSR, the Treaty Section of the UN, and the Office of International Standards and Legal Affairs of UNESCO, all provided very full information in the summer of 1988 for this revised edition, supplementing information provided previously for the original edition.

In preparing this revised edition, we relied especially on three resources at Oxford University: the Bodleian Law Library, the official papers section of the Bodleian in the Radcliffe Camera, and the Codrington Library at All Souls College. We are very grateful to the staff of all these and many other libraries for their assistance.

To all those who helped, who are so many that it is impossible to

name them all here, we owe deepest thanks. We take responsibility for any error.

The many suggestions received in response to the original edition were extremely helpful to us in preparing the present work. Any suggestions for future revisions may be sent to us care of the publisher.

31 January 1989

Adam Roberts
Richard Guelff

Principal Abbreviations

AJIL	*American Journal of International Law*
BFSP	*British and Foreign State Papers*
Cd., Cmd. & Cmnd.	Command Papers, laid by command of the Crown before UK Parliament
CTS	*Consolidated Treaty Series*, ed. Clive Parry
ICRC	International Committee of the Red Cross
ILM	*International Legal Materials*
IRRC	*International Review of the Red Cross*
LNTS	*League of Nations Treaty Series*
Martens NRG	G. F. Martens, *Nouveau Recueil Général de Traités*, published in several series
UK Misc.	UK Miscellaneous Papers
UKPP	UK *Parliamentary Papers (House of Commons and Command)*
UKTS	UK *Treaty Series*
UNTS	*United Nations Treaty Series*

Contents

Introduction by the Editors

This book is a comprehensive collection of documents and other basic factual information on the 'laws of war' – that is to say, on those aspects of international law which relate to the conduct of armed conflict and military occupations.

The focus of this book is on the laws of war as they are currently applicable. Hence, we have included three main kinds of item: (1) the texts of international agreements which are formally in force today; (2) detailed lists of the states which are parties to the various international agreements; and (3) certain texts which, while not themselves constituting formal international agreements, are none the less an authoritative exposition of the law and have clear contemporary relevance.

THE TERM 'LAWS OF WAR'

The term 'laws of war' is taken in this volume as referring only to the rules governing the actual conduct of armed conflict (*jus in bello*) and not to the rules governing the resort to armed conflict (*jus ad bellum*). For most purposes, *jus ad bellum* can legitimately be regarded as a separate question meriting separate attention. The reason for this lies in the cardinal principle that *jus in bello* applies in cases of armed conflict whether the conflict is lawful or unlawful in its inception under *jus ad bellum*. However, *jus ad bellum* and *jus in bello* do each contain aspects of the principle of proportionality, in the former relating to self-defence, and in the latter relating to the conduct of hostilities. Further, practice shows that the criteria of self-defence have often been raised during a conflict, alongside *jus in bello*.[1]

The term 'laws of war' is a well-recognized term of art, and not one of absolute precision. The application of the laws of war does not depend upon the recognition of the existence of a formal state of 'war', but (with certain qualifications) comprehends situations of armed conflict and military occupation in general, whether formally recognized as 'war' or not. This has come to be reflected in the terminology of the most recent documents, in which the term 'war' has been superseded by 'armed conflict', 'armed hostility', or other comparable terms. Although the term 'laws

[1] Article 51 of the UN Charter, which has to be read in conjunction with Article 2(4) prohibiting 'the threat or use of force . . .', recognizes 'the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. In numerous conflicts, including those between Israel and its neighbours, the 1982 Falklands War, and the naval operations in the Gulf in 1987–8, the targeting and scale of particular uses of force have been extensively discussed in terms of whether they constituted necessary and proportionate measures of self-defence.

of armed conflict' may therefore be more precise, the 'laws of war' is widely used and understood.[2]

THE DIFFERENT SOURCES OF THE LAW

The idea that the conduct of armed conflicts is governed by rules appears to have been found in almost all societies, without geographical limitation.[3]

The historical development of the laws of war has had an important impact on both the form and the content of the present law. While this volume focuses on the laws of war as they are currently applicable, a word about the historical background may be useful.

The regulation of armed conflict has occupied the attention of scholars, statesmen, and soldiers for thousands of years. The Greeks and Romans customarily observed certain humanitarian principles which have become fundamental rules of the contemporary laws of war.[4] During the Middle Ages, a law of arms was developed in Europe to govern discipline within armies as well as to regulate the conduct of hostilities.[5] As the body of international law began to develop in Europe, early writers (such as Legnano, Victoria, Belli, Ayala, Gentili, and Grotius)[6] gave priority to consideration of hostility in international relations. The work of Grotius has since come to be regarded as perhaps the first systematic treatment of international law, and one in which the laws of war played a principal part. Equally important, the practice of states led to the gradual emergence of customary principles regarding the conduct of armed hostilities.

International Agreements

Although the foundation of the contemporary legal regime is thus very old, it was only in the second half of the nineteenth century that the customary

[2] The International Committee of the Red Cross (ICRC) has increasingly used the term 'international humanitarian law applicable in armed conflicts'. This term has found its way into some international agreements such as the 1977 *Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* in connection with 1977 Geneva Protocols I and II.

[3] For example, see S. V. Viswanatha, *International Law in Ancient India*, Longmans Green, Bombay, 1925, pp. 108–200; Emmanuel Bello, *African Customary Humanitarian Law*, Oyez, London, and ICRC, Geneva, 1980, pp. 1–62; and Majid Khadduri, *War and Peace in the Law of Islam*, Johns Hopkins Press, Baltimore, Maryland, [1955], pp. 83–137.

[4] See Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, Macmillan, London, 1911, vol. II, pp. 166–384.

[5] See Maurice Keen, *The Laws of War in the Late Middle Ages*, Routledge and Kegan Paul, London, 1965.

[6] Giovanni da Legnano, *De Bello, de Represaliis et de Duello*, Bologna, 1477; Franciscus de Victoria, *Relectiones Theologicae*, Lyons, 1557; Pierino Belli, *De Re Militari et Bello Tractatus*, Venice, 1563; Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari*, Douay, 1582; Alberico Gentili, *Commentationes de Jure Belli*, London, 1588–9, and *De Jure Belli, libri tres*, Hanau, 1598; and Hugo Grotius, *De Jure Belli ac Pacis, libri tres*, Paris, 1625.

principles began to be codified in particular binding multilateral agreements. Since that time, such international agreements have taken the form of declarations, conventions, and protocols. The major agreements are mentioned below.

The first such agreement was the 1856 Paris Declaration on maritime war. Other agreements followed: the 1864 Geneva Convention on wounded and sick, and the 1868 St. Petersburg Declaration on explosive projectiles. The 1868 Additional Articles on wounded, and the 1874 Brussels Declaration on the laws and customs of war, were signed but did not enter into force.

The process of codification accelerated at the turn of the century. The First Hague Peace Conference, held in 1899, led to the conclusion of three conventions (two of which dealt with the laws of land and maritime war) and three declarations (relating to particular means of conducting warfare). Following the First Hague Peace Conference, states adopted the 1904 Hague Convention on hospital ships and the 1906 Geneva Convention on wounded and sick. The Second Hague Peace Conference, held in 1907, led to the conclusion of thirteen conventions (ten of which dealt with the laws of land and maritime war) and one declaration (relating to a particular method of conducting warfare). While no single conference since the Second Hague Peace Conference has succeeded in formulating as many conventions concerning the laws of war, the process of codification continued, with varying degrees of success. In 1909 the London Declaration on naval war was signed, but did not enter into force.

At the conclusion of the First World War the 1919 Treaty of Versailles as well as other peace treaties expressly recognized that certain methods of conducting warfare were prohibited. In 1922 the Treaty of Washington on submarine and gas warfare was signed, but did not enter into force. The 1925 Geneva Protocol on gas and bacteriological warfare, the 1929 Geneva Convention on wounded and sick, the 1929 Geneva Convention on prisoners of war, the 1930 London Treaty on naval armaments and warfare, and the 1936 London Procès-Verbal on submarine warfare were all signed in this inter-war period, and all of these agreements entered into force.

After the Second World War additional international agreements were concluded. In 1948 the UN Genocide Convention was adopted. Particular progress in codification was made at the 1949 Geneva diplomatic conference with the adoption of the four 1949 Geneva Conventions (relating to wounded and sick; wounded, sick, and shipwrecked; prisoners of war; and civilians). Further codification continued thereafter, with the 1954 Hague Convention and Protocol on the protection of cultural property, and the 1968 UN Convention on statutory limitations regarding war crimes. The most recent codification comprises the 1977 UN Convention on the hostile use of environmental modification techniques; the two 1977 Geneva Protocols on victims of armed conflicts; and the 1981 UN Convention on specific conventional weapons.

Customary Law

Despite the importance of international agreements in the contemporary development of the law, any work concerning the laws of war which is limited to international agreements runs the risk of distorting not only the form but also the substance of the law. As noted above, the present laws of war emerged as customary rules from the practice of states. The codification of rules into particular agreements which began to occur in the second half of the nineteenth century did not displace customary law. During the very process of codification it was recognized that much of the law continued to exist in the form of unwritten customary principles. This was expressly enunciated in what has come to be known as the Martens Clause, which first appeared in the Preamble to 1899 Hague Convention II:

> Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience.[7]

The Martens Clause is not merely of historical interest. Although there has been a great deal of subsequent codification of the laws of war, a significant part of the law continues to be in the form of customary principles. A common article in each of the four 1949 Geneva Conventions borrows from the very terminology of the Martens Clause in reaffirming that even if a party denounces the Convention, this:

> shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.[8]

Perhaps the most fundamental customary principle is that the right of belligerents to adopt means of injuring the enemy is not unlimited. This notion, which clearly rests at the very foundation of the laws of war, was incorporated in the 1874 Brussels Declaration and the 1880 Oxford Manual, and was formally codified in the 1899 and 1907 Hague Regulations, and in the Preamble of the 1981 UN Weapons Convention.

Other fundamental customary principles may not be incorporated quite so explicitly into particular agreements, but they nevertheless form the

[7] For the version of the Martens Clause which appeared in 1907 Hague Convention IV see below, p. 45.

[8] 1949 Geneva Convention I, Article 63; Convention II, Article 62; Convention III, Article 142; and Convention IV, Article 158. The same principle was reaffirmed in 1977 Geneva Protocol I, Article 1; 1977 Geneva Protocol II, Preamble; and 1981 UN Weapons Convention, Preamble.

foundations on which such agreements rest. The principles of proportionality and of discrimination, derived from the more basic principle that belligerent rights are not unlimited, are leading examples.[9]

Proportionality is a principle which seeks to establish criteria for limiting the use of force. Like many principles, it is not simple, and its requirements in a given instance are open to debate. It can refer to two different things: (*a*) proportionality of a belligerent response to a grievance — in which sense it is a link between *jus ad bellum* and *jus in bello*;[10] and (*b*) proportionality in relation to the adversary's military actions or to the anticipated military value of one's own actions, including proportionality in reprisals.

Discrimination, on the other hand, can be specified rather more precisely. It is about care in the selection of methods, of weaponry and of targets. Regarding the latter, it includes the idea of the immunity of non-combatants and those *hors de combat*, but it is not only about that: it can also refer to geographical and other limitations.

Many writings on the laws of war, especially military manuals, put much emphasis on three customary principles which incorporate the general principles of proportionality and discrimination. These three principles are: (1) the principle of necessity, sometimes called military necessity; (2) the principle of humanity; and (3) what is still called the principle of chivalry. These three principles have been defined as follows:

> 1. Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied.
> 2. The employment of any kind or degree of force not required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources is prohibited.
> 3. Dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict are forbidden.[11]

All three principles are integrally related and require an appropriate balance to be struck. In general, the law which has been codified is the product of such balancing; consequently, arguments of military necessity cannot be used as pretexts for evading applicable provisions of the law. In general, military necessity has been rejected as a defence for acts forbidden by

[9] The principles of proportionality and discrimination are central to the 'Just War' tradition of thought which emerged in the Christian Church in the Middle Ages. On the history of these principles, see particularly James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, Princeton University Press, Princeton, New Jersey, [1981], pp. 196–228.

[10] Christopher Greenwood, 'The Relationship between *ius ad bellum* and *ius in bello*', *Review of International Studies*, Guildford, Surrey, no. 9, 1983, pp. 221–34.

[11] United States, Department of the Navy, Office of the Chief of Naval Operations, *The Commander's Handbook on the Law of Naval Operations*, NWP 9, Washington, DC, July 1987, p. 5–1.

the customary and conventional laws of war because such laws have, in any case, been developed with consideration for the concept of military necessity. The only exception to this arises with provisions which expressly contain the specific qualification that particular rules are only applicable if military circumstances permit. Where new law is in the process of being created, or where certain long-established general terms such as 'unnecessary suffering' are being interpreted, the balancing process continues to be applicable.

In general, customary international law is binding on all states. Principles of customary law may come to be codified in a particular agreement: in such a case, the principles remain binding on all states as customary law, but those parties to the agreement are further bound through their treaty obligations. Customary law may also develop to bring the substance of pre-existing written agreements within its ambit; in such a case, the particular agreement (which is already binding upon all states which are parties to it) then becomes generally binding upon all states as customary law. Perhaps the best recognized example of this is 1907 Hague Convention IV. In its 1946 Judgment, the International Military Tribunal at Nuremberg stated that the provisions of the Convention were declaratory of the laws and customs of war.[12] In 1948 the International Military Tribunal for the Far East sitting in Tokyo expressed a similar view.[13]

Although the primary sources of the law are custom and treaties, the other areas in which evidence of the law may be found should not be ignored. They are discussed under separate headings below.

Judicial Decisions

The decisions of international and national judicial bodies, possessing the necessary jurisdiction to render legally binding decisions, have long played an important role in the clarification and development of the law. The International Military Tribunals which sat in Nuremberg and Tokyo following the Second World War are the best known, but in fact the overwhelming majority of those accused of committing crimes against international law during the Second World War were tried (during and after the war) by national courts or military courts established by occupying states. In addition, some members of armed forces were tried by their own national military courts. If attention is frequently focused on Second World War cases, it should be noted that in conflicts both before and since that time there have been very many judicial decisions relating to the laws of war, principally before national courts, but also before the International Court in the Hague.

[12] See the extract from the 1946 Nuremberg Judgment which includes this statement, below, p. 156.

[13] International Military Tribunal for the Far East, Judgment delivered 4–12 November 1948, duplicated transcript, p. 30.