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The Development and Principles of International Humanitarian Law

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Series Preface

Over half a century ago, Sir Hersch Lauterpacht, then Whewell Professor of International Law at the University of Cambridge, observed that 'if international law is the vanishing point of law, the law of war is at the vanishing point of international law'. He was wrong. While it is true that the law of war, or international humanitarian law as it has become known, is particularly vulnerable to the vagaries of political, social and economic influences, it has nevertheless proven itself a robust normative regime that positively shapes man's most destructive undertaking – warfare. No other body of law can be credited with saving more lives or alleviating as much suffering.

These six volumes comprise a collection of particularly significant works on humanitarian law. They are intended for use by scholars, practitioners and students who seek to better understand the topics addressed herein, together with their lineage. Just as importantly, they allow users to begin to separate the wheat from the chaff. The proliferation of publications in the field, in part a sad reflection of the fact that armed conflict remains so horribly pervasive, as well as the digitization that facilitates access to journals that would not otherwise be readily available, often results in information overload. A Ministry of Defence legal adviser looking for background material to address a situation involving belligerent occupation will, for instance, uncover scores of articles. The student writing a dissertation on the law of targeting or a scholar penning an article on detention will find him- or herself buried in material. Unfortunately, some of what they unearth will prove misguided, out of context or simply wrong. This collection will not break down these obstacles in their entirety. But it does afford a useful starting-point by offering topically arranged humanitarian law journal essays that have been thoroughly vetted by many of the top experts in the field.

In this regard, a few words on the process used to choose the essays are helpful. It began with the selection of those subjects that we believed comprised the *sine qua non* of international humanitarian law – development, principles, scope, application, conduct of hostilities, detention, occupation, implementation and enforcement. We then contacted over 60 recognized humanitarian law experts, both academics and seasoned legal advisers. They were provided the topics and asked in a very open-ended fashion to identify pieces they considered 'classics', believed to be 'essential' in a compilation of this nature, have found to be especially influential, used regularly in their work or deserved greater attention on the basis of their quality and insights. The experts were asked to pay particular attention to those essays that may have been 'forgotten' over time, but merited 'rediscovery'. Many of them responded in depth. We also benefited from the work of a five-member team from Emory Law School's International Humanitarian Law Clinic which conducted an exhaustive literature review to locate essays relied on regularly by writers – the 'usual suspects', if you will. Finally, as editors we took the liberty of adding a few pieces to the pool *sua sponte*.

Armed with a daunting inventory of candidates for inclusion, we began the difficult task of whittling it down. Many essays proved to be consensus choices among the experts; often the Emory team had also identified them. These provided the skeleton for the project. We then fleshed out the collection based on two key factors: quality assessments by the experts and topic coverage. The latter criterion proved particularly central to the process, for our objective was to produce a collection that not only contained thoughtful and influential works, but also addressed most key humanitarian law topics.

Beyond esteem factors and topical relevance, some essays were selected on account of their temporal significance, that is, having been written at key junctures in the development of international humanitarian law. As an example, the collection includes pieces written in the immediate aftermath of the First and Second World Wars and the attacks of 11 September 2001. Others were published soon after adoption of the 1949 Geneva Conventions or the 1977 Additional Protocols. We hope they both afford insight into the perspectives at play as humanitarian law was evolving and provide a context for understanding the genesis of contemporary norms.

In the end, we were unable to include many insightful and influential works. Exclusion was frequently a mere matter of being cursed with too many good choices on a particular topic. Although no reader is likely to be entirely satisfied with the essays included, or comfortable with the omission of others, we hope the rigorous selection process has resulted in a collection that is both useful and enlightening.

This project would not have been possible without the help of many supporters. We are, of course, deeply indebted to the many international experts who took time from their busy schedules to offer recommendations and comments over the course of the three-year effort. Although we cannot possibly name them all, particular appreciation is due to Ken Anderson, Yutaka Arai, Louise Arimatsu, Laurie Blank, Gabriella Blum, Bill Boothby, Ove Bring, Claude Bruderlein, Knut Dörmann, Alison Duxbury, William Fenrick, Dieter Fleck, Steven Haines, Agnieszka Jachec-Neale, Dick Jackson, Marie Jacobsson, Claus Kress, William Lietzau, Noam Lubell, Lindsay Moir, John Murphy, Sean Murphy, Mary Ellen O'Connell, Bruce Oswald, Hays Parks, Stephen Pomper, Jean-Francois Queguiner, Noelle Quenivet, Adam Roberts, A.P.V. Rogers, Peter Rowe, Joseph Rutigliano, Robert Sloane, Dale Stephens, Ken Watkin and Sean Watts.

We are equally indebted to the brilliant group of young scholars at Emory Law School, whom we dubbed our 'IHL Detectives' – Flora Manship, Carmel Mushin, Jeannine Privat, Nandini Rao and, in particular, Benjamin Farley. Their ability to identify and locate 'lost treasures' of humanitarian law was awe-inspiring. All have since graduated, and we wish them the very best in their professional careers.

Three people deserve special mention and gratitude. Laurie Blank, Director of the Emory's International Humanitarian Law Clinic, ably and tirelessly supervised her team. Beyond supervision, she also devoted an enormous amount of her own time to the substance and administration of the project. At European University Viadrina, Kaya Kowalski took on the task of collating materials and later working with us as we made the final selections for the collection. She was unflappable in the face of our long and sometimes contentious deliberations and always exceptionally good-natured and professional. Finally, we thank our editor at Ashgate, Valerie Saunders, who showed the patience of Job throughout.

We hope this collection proves valuable in the years to come. For our part, it was a fascinating endeavour.

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Introduction

Development

Part I of this volume is devoted to the development of international humanitarian law. The term 'development' is not to be understood as synonymous with the history of that body of law, for the volume's purpose is not to provide a comprehensive historic overview of legal rules and principles applicable in armed conflict from its roots – European and non-European. Although the 'fathers' of modern international law, including Vitoria, Gentili, Suárez, Grotius and other eminent scholars such as Bijnkershoek, Vattel, Pufendorf and Wolff laid the foundations of modern international humanitarian law, an adequate examination of the different (and very diverse) phases marking the historic development of this body of law would exceed available space and likely fail to capture the full complexity and scope of their work. Therefore, we have decided to approach the development of international humanitarian law from the perspective of the 'modern' law of war – that is, as it has developed since the middle of the nineteenth century.

'International humanitarian law' was traditionally understood as comprising the rules governing the protection of victims of armed hostilities ('Geneva' Law), whereas the conduct of hostilities was subject of the law of war ('Hague' Law), a distinction the 1977 Additional Protocol I to the 1949 Geneva Conventions overcame. The terms 'law of war', used in some of the essays contained in this volume, and international humanitarian law are synonymous. Neutrality law is the exception; although it has remained a distinct part of the 'laws of war', it is not, *strictu sensu*, a component of 'international humanitarian law'. That said, the volume includes one essay dealing with the law of neutrality because its rationale and its essentials are of continuing relevance to the relationship between belligerents and states not parties to a conflict, including their respective nationals.

In 'Shakespeare's Henry the Fifth and the Law of War' (Chapter 1), Theodor Meron approaches the law of war from an unusual perspective – Shakespeare's play *The Life of Henry the Fifth*. For Meron, the work offers 'an ideal vehicle for consideration of the late medieval practice and rules of warfare' (p. 3). It is important to note that the practice and rules referred to in the play are not those of the 'fathers' of international law, as no evidence exists that Shakespeare was familiar with their works. Rather, Shakespeare relied on Henry V's proclamations, with which he became familiar through Holinshed's and Hall's *Chronicles*. Meron assesses Shakespeare's text in the light of both fifteenth-century law and the writings of fifteenth- and sixteenth-century scholars (including Vitoria and Gentili). He employs these foils to examine the law's evolution since Shakespeare's times. This unconventional approach produces a rich contribution to the understanding of international humanitarian law's history and development.

Having identified the law applicable at the time of Henry V and of Shakespeare, Meron scrutinizes the 'just cause' (a requirement for waging war and causing death) of the 1415 invasion of France. The effect of a 'just cause' on the legality of the conduct of hostilities was

quite remarkable at the time, but later declined in importance (as evidenced by the works of Vitoria, Gentili, Suárez and Ayala). Today, as Meron notes, the lawfulness of resort to armed force has no bearing on the equal application of the *jus in bello*, although there have been some notable endeavours to interpret and apply the *jus in bello* in the light of the *jus ad bellum*. This subject is dealt with in *The Scope and Applicability of International Humanitarian Law* in this series.

As regards the *jus in bello* (international humanitarian law), Meron first examines the rules applicable in the fifteenth and sixteenth centuries to a declaration of war; they were later prominently codified in Article 1 of the 1907 Hague Convention Relative to the Opening of Hostilities. Despite the fact that a declaration of war is no longer a precondition to the application of international humanitarian law, by Common Article 2 of the 1949 Geneva Convention such law still continues to apply to situations of 'declared wars'.

Meron then turns to the issues of responsibility and liability. In the late medieval feudal structure, the king was not responsible for his soldiers' improper acts, but a commanding officer could be held criminally responsible for them. The individual criminal responsibility of military commanders is therefore not a twentieth-century concept (*Yamashita* case). With the emergence of absolutist structures at the end of the Middle Ages, the rules regarding responsibility and liability evolved. For instance, Gentili and Grotius recognized liability for neglect if the king had knowledge of a wrong. In 1907 states accepted the imposition of state responsibility for violations of international humanitarian law in Article 3 of Hague Convention IV.

Also noteworthy are Meron's discussions of siege, occupied territory, prisoners of war and the legal status of heralds and ambassadors. They offer readers a unique insight into the state of the *jus in bello* during the late Middle Ages, the writings of the 'fathers' of international law and the manner in which international humanitarian law has developed since the days of Henry V.

'The Legitimation of Violence: A Critical History of the Laws of War' by Chris af Jochnick and Roger Normand (Chapter 2) is the first of their two-part legal analysis of the 1991 Gulf War. A rather sceptical examination of the historical development of international humanitarian law, it 'challenges the notion that the laws of war serve to restrain or "humanize" war' (p. 50). In particular, the authors reject the common perception of international humanitarian law as a well-balanced compromise between military necessity and humanity. For them, the 'laws of war have been formulated deliberately to privilege military necessity at the cost of humanitarian values' (ibid.). They 'have facilitated rather than restrained wartime violence' (ibid.).

Jochnick and Normand argue that the principle of distinction and rule of proportionality do not limit the conduct of hostilities for reasons of humanity, but simply derive from the principle of war known as 'economy of force'. In other words, they are merely 'inherent restraints dictated by military self-interest' (p. 54). Similarly, they suggest that, although the seminal codifications of international humanitarian law that followed major wars may have been prompted by 'noble sentiments', eventually 'military concerns have dictated the substantive content of the laws of war' (p. 56). Thus, international humanitarian law serves as a humanitarian veil that influences the discourse regarding the legitimacy of armed hostilities and is designed to secure public support for war.

Jochnick's and Normand's critique may not be as relevant as they believe. The fact that international law in general, and international humanitarian law in particular, are the product of a congruence of self-interests on the part of states does not, as such, justify the conclusion that the principles underlying it are of negligible import. Recent practice has aptly demonstrated the continuing, and growing, relevance of the principle of humanity. The attention afforded to application of the principle of distinction and rule of proportionality is illustrative.

Although the authors retain a critical perspective throughout the essay, their discussion of the development of the 'modern' *jus in bello* is useful. They quickly dispense with the persistent misperception that wars were fought without legal constraint prior to the codifications of the nineteenth century. Yet, they suggest that the more or less sophisticated rules in place neither abolished atrocities nor served genuinely humanitarian objectives. Rather, they protected the interests of 'privileged knights and nobles' (p. 61). Consistent with their overriding theme, Jochnick and Normand maintain that the early laws of war, especially those identified in the writings of the 'fathers' of international law, were nothing but lip service paid to the just war doctrine and had no lasting impact on the conduct of hostilities.

The discussion of the historical phase preceding the codifications of the nineteenth and twentieth centuries begins with an analysis of the concept of *Kriegsraison.* According to the authors, it has not been replaced by *Kriegsmanier* – that is, the laws of war. Instead, it survives in the form of the principle of military necessity, thereby enabling belligerents to cloak atrocities in purported legal legitimacy.

Jochnick and Normand illustrate their position by reference to the Lieber Code, the humanitarian provisions of which are subject to derogation 'based on an open-ended definition of military necessity' (p. 65), as well as the 1868 St Petersburg Declaration, the 1874 Brussels Declaration and the 1907 Hague Conventions. The latter are adjudged to be 'humanitarian failures' that did little to deter the atrocities of the First World War (p. 68). Indeed, for the authors, the late nineteenth- and early twentieth-century codifications merely contain rules on 'obsolete methods or means of warfare whose limitation did not put one or more states at a disadvantage' (p. 77). Unsurprisingly, Jochnick and Normand arrive at similarly negative conclusions vis-à-vis the inter-war codification efforts and the broader relevance of international humanitarian law during the First World War. The findings of the Nuremberg Tribunal are even said to have 'actually bolstered the rights of belligerents to engage in "normal" wartime atrocities' (p. 95).

The authors conclude by claiming that the 'fact that nations have adopted a legal framework that allows them to conduct wars relatively uninhibited by humanitarian constraints does not preclude the development of alternative legal frameworks that effectuate different values and yield different results' (p. 95). Whether or not one shares their critical assessment, the essay is worth reading because it approaches international humanitarian law from a perspective that deviates from accepted views.

In 'Some Questions of International Law in the European War' (Chapter 3), written as the First World War was underway, James Garner assesses four legal issues raised by that conflict: (1) neutrality, (2) use of naval mines, (3) aerial bombardment of undefended towns, and (4) destruction of protected objects 'as punitive measures'.

He first addresses the violation of Belgian neutrality in 1914. Garner's analysis is more complex than simply finding that Germany violated the law of neutrality laid down in the 1907 Hague Convention V (which he seems to accept as reflective of customary international

law) and the Treaty of 1839. On the contrary, he accepts the premise of a right of self-preservation as a justification for transit across Belgian territory (although he concludes that the justification was a mere pretext).

The acknowledgement by Garner and other contemporary writers of the concept of self-preservation in cases where the violation of neutrality is necessary 'and not merely a simple utility' (p. 105) is particularly interesting. His reference to, inter alia, the *Caroline* case suggests that Garner is in fact making use of the right of self-defence as a justification for the violation of neutral status.

In view of the German offer to simply transit Belgium and compensate the Belgians for the act after the war, Garner asks whether Belgium would have been entitled to take a 'benevolent' position by allowing the transit. Until the first half of the nineteenth century, most scholars (including Grotius, Vattel and Wheaton) shared the view that a neutral state may permit the right of passage if it is granted impartiality. Writers of the second half of the century took the opposite view. Garner agrees with the latter, concluding that '[i]f any doubt existed ..., it has been removed by the Hague Convention' – that is, by Articles 2 and 5 of Hague Convention V. It should also be noted that Garner affirms a right and duty on the part of Great Britain to intervene in order to prevent violation of the Treaty of 1839, by which the neutrality of Belgium had been established.

The second section of the essay deals with the German practice of 'scattering mines indiscriminately' in the open sea (p. 111). Garner begins with an overview of the drafting history of the 1907 Hague Convention VIII. Despite observing that 'its provisions for the security of neutral shipping are inadequate', he correctly concludes that 'the statement sometimes made that the convention prohibits the laying of mines in the open sea is quite without foundation' (p. 115). Nevertheless, Garner considers the German practice as being in violation of the laws of war based on the International Law Association's 1906 finding that the use of naval mines in the open seas is absolutely prohibited. This interesting conclusion is at odds with the provisions of Hague Convention VIII.

Garner next turns to aerial warfare, a novel method of warfare that, in 1915, was unregulated by treaty law. States participating in the Second Hague Peace Conference had been unwilling to 'surrender the advantages of a mode of warfare the possibilities of which had been fully demonstrated' (p. 121). However, Article 25 of the 1907 Hague Regulations, amended upon motion by the French delegation, covers aerial bombardments if and to the extent that the places concerned are undefended. As to the term 'undefended', Garner argues that it is not synonymous with either 'unfortified' or 'open'. Accordingly, a place is not 'undefended' when occupied. Although Garner characterizes the German bombardment of Paris and Antwerp as being 'within the letter of the law' (p. 125), he qualifies this conclusion by noting that the 'indiscriminate dropping of bombs on hospitals, churches, art galleries, and private houses, and the killing of innocent non-combatants' (pp. 125–6) is contrary to the spirit of Hague Convention IV – that is, in violation of the principle of humanity.

A similar approach is taken with regard to the destruction of protected objects and the killing of hostages as punitive measures, especially in Louvain and Aerschot. It must be emphasized that Garner does not rely solely on British and Belgian reports because 'simple justice to the military commanders of a great civilized state against whom the charges are made requires that whenever the evidence is doubtful, judgment should be suspended until the facts are fully known' (p. 127). Hence, he starts from the premise that the German explanations of the

situations in question were valid. Reminding the reader that similar atrocities occurred during numerous wars of the nineteenth century, he recognizes the right of an occupying power to inflict collective punishment for acts of violent resistance, albeit subject to proportionality with the offence. Accordingly, the destruction of cultural objects in Louvain that had not been used for military purposes and the killing of hostages, both justified as belligerent reprisals or 'punitive measures', were, for Garner, violations of the law because they were disproportionate to the alleged offences committed by Belgian citizens. Interestingly, for this determination Garner also relies on the basic principle that the rights of belligerents are not unlimited and on the Martens Clause. He concludes by stating that '[t]he old idea that it is permissible to a belligerent to resort to any measures which in his judgment may induce an enemy to sue for peace is, happily, no longer recognized' (p. 134). This is a correct statement as to the law in force in 1915, which had been affirmed only seven years prior to the outbreak of the First World War.

Jean Pictet's 'The New Geneva Conventions for the Protection of War Victims' (Chapter 4) illustrates the remarkable developments in international humanitarian law since the codifications that occurred between the nineteenth century and the end of the Second World War. The inter-war years were witness to impressive efforts to progressively develop the law by setting forth further constraints on belligerent measures. Notable in this regard were the 1923 Draft Hague Rules on Aerial Warfare, the 1925 Geneva Gas Protocol and the 1936 Submarine Protocol. Since these instruments concern specific methods or means of warfare, they are examined in *The Conduct of Hostilities in International Humanitarian Law*, Volumes I and II, of this series.

Pictet provides an excellent overview of the *travaux préparatoires* of the four Geneva Conventions and highlights the main achievements brought about by their adoption. He rightly points at their applicability to armed conflicts that have not been formally declared and to 'civil wars'. With regard to the latter, he concedes the difficulty of applying the provisions to non-state actors, but emphasizes the minimum safeguards of common Article 3 and the possibility of ICRC involvement. Further achievements relate to the protection of prisoners of war and medical and religious personnel, and to the rules on grave breaches.

Pictet reminds us, in conclusion, that:

> The Geneva Conventions start from the hypothesis that law is a primordial element of civilization. Their struggle is against war, which now threatens to annihilate entire peoples. Their aim is to safeguard respect for the human person, the fundamental rights of man and his dignity as a human being. (p. 152)

In his essay 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision' (Chapter 5), Josef Kunz acknowledges the 'great achievement' of the 1949 Geneva Conventions, but urges further efforts to improve the international humanitarian law. This essay remains highly topical because the situation in 1951 to a certain extent mirrors that which exists today.

Kunz begins by comparing the inter-war period with that after the Second World War. He asserts that the general refusal to deal with issues of international humanitarian law derives from 'the ideology of extreme pacifists, well intentioned, good, but utterly utopian' (p. 155). He reminds us that 'total war is the result of the combination of technological progress in arms with a changed manner of waging war, [and] of the combination of unlimited use of highly

destructive weapons for unlimited war aims' (p. 156). Kunz sees an unremitting trend towards 'mechanized warfare', warning us that '[p]ilotless planes, directed by remote control, radar-controlled glide-bombs, [and] "guided missiles" open the way for a new phase of total war: from mechanized to automatic warfare' (p. 157). But he also emphasizes that, since weapons are only objects, 'everything depends on the heart of men who use them' (bid.).

International humanitarian law, in view of such development, is no longer sufficient to regulate the conduct of hostilities; it is, according to Kunz, in a 'chaotic status [*sic*]' (p. 158). With regard to land warfare, he identifies numerous problematic issues: 'new' methods and means of warfare, occupation law, guerrilla warfare, resistance movements and espionage. In the naval arena, he singles out the distinction between warships and merchant vessels, the use of naval mines, 'war zones', prize law and booty of war, submarine warfare and blockade. Observing that the UN Charter has not 'abolished' war, he argues that there is, at a minimum, a need for regulating '[m]ilitary action under the direction of the Security Council' and civil wars (p. 170).

Kunz concludes by pleading for a revision of the laws of war. He stresses that:

> Rules of war, including rules of combat, ... are essential to protect soldiers and civilians ...; they are essential ... not [as] a matter of sentiment, but of military necessity. An army, as distinguished from a savage horde, must know what to expect, must know under what rules fighting is to be carried on' (p. 175).

Such arguments are as valid today as they were in 1951.

In 'The Laws of War' (Chapter 6) Josef Kunz explains how the 'chaotic status' of the *jus in bello* can be overcome by its revision. He emphasizes that any revision in order to be acceptable to all important states must start from three premises: (1) While humanitarian interests must be taken into account 'to the highest possible degree', the necessities of war may not be disregarded; (2) the revised laws of war must have a realistic basis; and (3) they must be free from ambiguity (p. 182).

A revision may not question the principle of equal application of the law of armed conflict. Kunz strongly argues against those who take the view that, under the Charter of the United Nations, the *jus in bello* should discriminate between the aggressor and the victim of aggression. Consequently, he advocates an equal application even if UN forces are engaged in armed hostilities. Moreover, Kunz is not prepared to distinguish between large-scale and limited armed conflicts or to join those who consider the so-called 'Hague Law' to have become obsolete.

If those preliminary considerations are observed, it is still necessary to undertake a 'correct investigation as to what are the laws of war actually in force' (p. 191). Kunz warns that the 'question is to determine objectively and equally far removed from wishful thinking and from prejudiced proposals *de lege ferenda*, to what extent the traditional law is still binding'(p. 195). Kunz characterizes the law of neutrality as 'one of the most uncertain parts of international law' (p. 193), although it 'remains of great importance' (p. 194). With compelling arguments he rejects all allegations of a 'death' of the law of neutrality and stresses that 'only decisions of the Security Council under Article 39, which the Members under Article 25 are bound to accept and to apply, exclude neutrality' (p. 192). Equally, he rejects the position according to which the so-called 'Hague Law' has become obsolete by the practice of the belligerents of

the Second World War. Hence, the urgently necessary revision of the *jus in bello* does not take place in a legal vacuum.

Kunz concludes by reminding us of the many aspects of the law of armed conflict that need revision and clarification and of the necessity for a critical study of the War Crimes Trials and of the 'new law of the Geneva Conventions of 1949'.

The essays by George Aldrich and Michael Matheson are of continuing relevance in view of the persistent refusal of the United States to ratify the 1977 Additional Protocols. Aldrich headed the US delegation to the Conference that adopted the Protocols. Michael Matheson was the Deputy Legal Adviser of the US Department of State in 1987. Aldrich argues in favour of Additional Protocol I by responding to the criticism of its various provisions. Matheson explains the US position concerning the relation of customary international law to the 1977 Additional Protocols. Although there are good reasons to assume that Matheson's remarks were not purely personal in character, the contention that they reflect the official US position vis-à-vis the Additional Protocols has been questioned.

In 'Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I' (Chapter 7), Aldrich rejects the contention that Additional Protocol I fundamentally alters customary law, constitutes a backward step in the effort to protect non-combatants and limit the destruction of warfare, and is unacceptable 'politically, militarily and practically' (p. 205). He reminds the reader that the US delegation was in constant contact with the Secretary of Defense and the Joint Chiefs of Staff and that at the time of signing there was a general consensus that Protocol I was both a 'major accomplishment' and in the national interest of the United States (p. 207).

Aldrich explains the positive features of various Protocol provisions that had been criticized, including those regarding medical aircraft, missing and dead military personnel, protecting powers, indiscriminate attacks, attacks against civilians, prohibition of starvation, objects containing dangerous forces, proportionality and 'collateral damage'. As regards the still contentious Article 1(4), Aldrich rejects the suggestion that it 'affords international status to liberation movements and thereby legitimizes foreign intervention in wars of national liberation' (p. 212) He notes that the applicability of the Protocol is 'irrelevant to the legality of the conflict or participation in it by any Party' and contends that the Preamble and Article 96(3) are sufficient safeguards against 'just war' arguments or unlimited application of the Protocol to wars of national liberation (p. 213). Hence, for Aldrich, Article 1(4) 'poses no threat to the United States and needs no reservation' (p. 215).

With regard to Articles 43 and 44, Aldrich admits that they 'substantially change the law with respect to the rights and obligations of members of irregular armed forces' (p. 215). He stresses, however, that the provisions are meant to provide an incentive for the irregular combatant to comply with the law. It is interesting that Aldrich does not refer to the fact that there was, and is, a widely held view that Article 44(3) only applies to armed conflicts in the sense of Article 1(4).

Aldrich also defends the Protocol's provisions on mercenaries, reprisals, the natural environment, the use of national emblems, the definition of civilians and the rule of doubt, indiscriminate attacks, objects containing dangerous forces, and precautions in attack. After emphasizing that Additional Protocol I does not apply to nuclear weapons, he concludes by characterizing Additional Protocol I as a 'valuable and long overdue addition to ... international humanitarian law' (p. 231).

'The United States Position on the Relation of Customary International Law to the 1977 Additional Protocols Additional to the 1949 Geneva Conventions' (Chapter 8) is Matheson's contribution to the 1987 American Red Cross–Washington College of Law Conference. Despite common perceptions to the contrary, Matheson does not explicitly delineate those Additional Protocol I provisions that the United States believed reflected customary international law. In view of the difficulties in determining the existence of customary rules, as well as the likelihood of disagreement as to the precise statement of a recognized rule, he only identifies those 'principles' which are in the interest of the United States and its allies and which 'should be observed and in due course recognized as customary law, whether they are presently part of that law or not' (p. 236).

Accordingly, he cites the administration's 'support' of a number of 'principles' underlying certain provisions of Additional Protocol I without styling them as reflecting customary international law. Other principles and rules are characterized as having, in whole or in part, the potential for being recognized as customary. Still others are highlighted as 'new rules' that either do not reflect customary international law or are not supported by the United States (those regarding the natural environment, use of enemy emblems and uniforms, mercenaries, reprisals and objects containing dangerous forces). Thus, Matheson's remarks only amount to a definitive statement of what the United States rejects as customary law, not what it accepts. Interestingly, Matheson does state that the United States 'in particular' supports the fundamental guarantees contained in Article 75. The Obama administration has recently confirmed US acceptance of the article as reflective of customary law.

The remarks on the customary status of Additional Protocol II are less explicit. It is noteworthy, however, that in 1987 the US administration intended to submit Protocol II to the Senate for advice and consent to ratification and that Matheson characterizes it as 'a common baseline defining the minimum standards of conduct' and a 'clear indication of the minimum rules that United States forces expect to observe and to be observed by our opponents' (p. 243).

In 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation' (Chapter 9), Dietrich Schindler endeavours to identify the reasons why international humanitarian law, despite its 'remarkable development' since the mid-nineteenth century, has been increasingly violated in recent armed conflicts.

Schindler begins by reviewing the development of international humanitarian law from the 1860s until the present. He identifies phases of progress, neglect, stagnation and, since the end of the Cold War, renewed international interest. Five developments mark the period following the fall of the 'iron curtain': (1) the UN Security Council's determination that large-scale violations of human rights and international humanitarian law constitute threats to international peace and security in the sense of Chapter VII of the UN Charter; (2) the progressive assimilation of the law of non-international armed conflicts to the law of international armed conflicts; (3) the growing importance of customary international law; (4) the increasing influence of human rights law; and (5) the International Court of Justice's qualification of the fundamental principles of international humanitarian law as 'intransgressible principles of international customary law' in its Advisory Opinion on Nuclear Weapons. Whether or not one shares Schindler's positive attitude towards these developments, it must be acknowledged that they have had a significant impact on international humanitarian law.

Schindler is not satisfied with simply deploring the increasing violations of international humanitarian law in recent armed conflicts but, instead, endeavours to identify their causes. In that context, he is correct in observing that there has always been a close link between violations and the progressive development of international humanitarian law because the major codifications have been responses to the experiences of the armed conflicts that preceded them.

Schindler believes that the disregard of international humanitarian law has been caused by a number of factors: (1) an increase of internal armed conflicts, which are fought by non-state actors who lack command structures and disregard the principle of distinction; (2) the declining relevance of reciprocity that, according to Schindler, has become particularly evident in asymmetric warfare; (3) a growing inclination of parties to 'consider their war as *a just war*' (p. 264, emphasis in original); (4) the inability or unwillingness of governments and the UN to adequately respond to humanitarian disasters or the collapse of governmental structures; and (5) insufficient knowledge and awareness of humanitarian law. While one may not fully concur with these propositions, they certainly merit consideration.

Schindler reminds us that the Geneva Conventions and the Additional Protocols contain provisions on measures that can contribute to an improvement in compliance with international humanitarian law, but which have unfortunately not been afforded sufficient attention. He argues for better implementation and suggests that states and international organizations should not only help prevent situations that underpin the increasing violations, but also apply continuous pressure to respect international humanitarian law.

Yves Sandoz, in 'International Humanitarian Law in the Twenty-First Century (Chapter 10), shares Schindler's concerns about the challenges faced by international humanitarian law. Like Schindler, he takes a conservative approach insofar as he is unwilling to question the achievements of the past century and a half. But Sandoz contends that the rejection of international humanitarian law norms on political and military grounds further complicates matters.

Sandoz points to a number of shortcomings in the existing law and offers several options for improvement. First, he pleads for clarification of the existing law and strengthening its implementation. Second, he suggests uniform standards in respect of the scope of applicability. Finally, he demands that military operations be subject to absolute limitations in order to preserve 'planet-wide interests' (p. 297). In that regard, he focuses on nuclear weapons, other weapons of mass destruction, the natural environment and combined military operations with or without authorization by the United Nations Security Council.

In his concluding remarks, Sandoz does not advocate a new 'global legislative effort' (p. 304). For him, any such effort would prove counterproductive. Yet, he cautions against ignoring either the causes of international humanitarian law violations or common values and interests of global significance. Thus, despite his concern about the partial inadequacy of the law in the face of contemporary challenges, Sandoz proves himself a committed and convincing advocate of humanitarian values set forth therein.

In 2005, the ICRC published *Customary International Humanitarian Law*, edited by Jean-Marie Henckaerts and Louise Doswald-Beck. Many, at least by tacit consent, welcomed the 'ICRC Study' as a major contribution to the clarification of the state of customary international humanitarian law. Others, however, have heavily criticized it. Perhaps both groups missed the Foreword by Jakob Kellenberger, President of the ICRC, in which he explains that:

> The ICRC believes that the study does indeed present an accurate assessment of the current state of customary international humanitarian law. It will therefore duly take the outcome of this study into account in its daily work, while being aware that the formation of customary international law is an ongoing process. The study should also serve as a basis for discussion with respect to the implementation, clarification and development of humanitarian law. [1]

Against this background, an understanding of the study's rationale and process is essential. In 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (Chapter 11), Jean-Marie Henckaerts endeavours to explain its necessity, methodology and organization. It goes without saying that the methodology will, in particular, continue to be criticized, for the study's application of the concept of state practice and the relevance of treaties is questionable. Scholars and practitioners of public international law are therefore well advised to thoroughly consider such matters before accepting the normative premises set forth. Nevertheless, Henckaert's essay is a useful tool in better understanding the scope and applicability of the study's conclusions.

Principles

The development of international humanitarian law is closely linked to its basic principles, which are the subject of Part II of this volume. International humanitarian law aims at balancing considerations of military necessity and of humanity. There can be no doubt that humanity is the cardinal principle of modern international humanitarian law. Humanitarian considerations clearly inspired the First Geneva Convention and the ensuing international instruments that aimed at 'alleviating as much as possible the calamities of war' (1868 St Petersburg Declaration).

Despite its impressive development, international humanitarian law remains silent on certain issues. The states party to the 1907 Hague Convention IV were well aware that a codification of the law of armed conflict would never be fully comprehensive because it could not possibly address 'all the circumstances which arise in practice'. The lack of specific rules, however, did not mean that 'unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders'. Rather, they were to be governed by the Martens Clause, which provides for the continued applicability 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'. Although regularly referred to in the literature and state practice, very few authors, the most important of whom are represented here, have shouldered the task of thoroughly analysing the provision's scope and meaning.

There can be no doubt that, since the adoption of the first international humanitarian law treaties, the claim that military necessity supersedes humanity and the rules of international humanitarian law – *Kriegsräson geht vor Kriegsmanier* – is untenable. Nevertheless, military necessity remains relevant, for international humanitarian law not only recognizes the concept of 'military advantage' and the existence of lawful targets, but also expressly points to the 'legitimate object which States … endeavour to accomplish during war' – that is, 'to weaken

[1] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Law*, 2 vols, Cambridge: Cambridge University Press, Vol. 1, p. xi.