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Historical Basis and Legal Development [of International Humanitarian Law]

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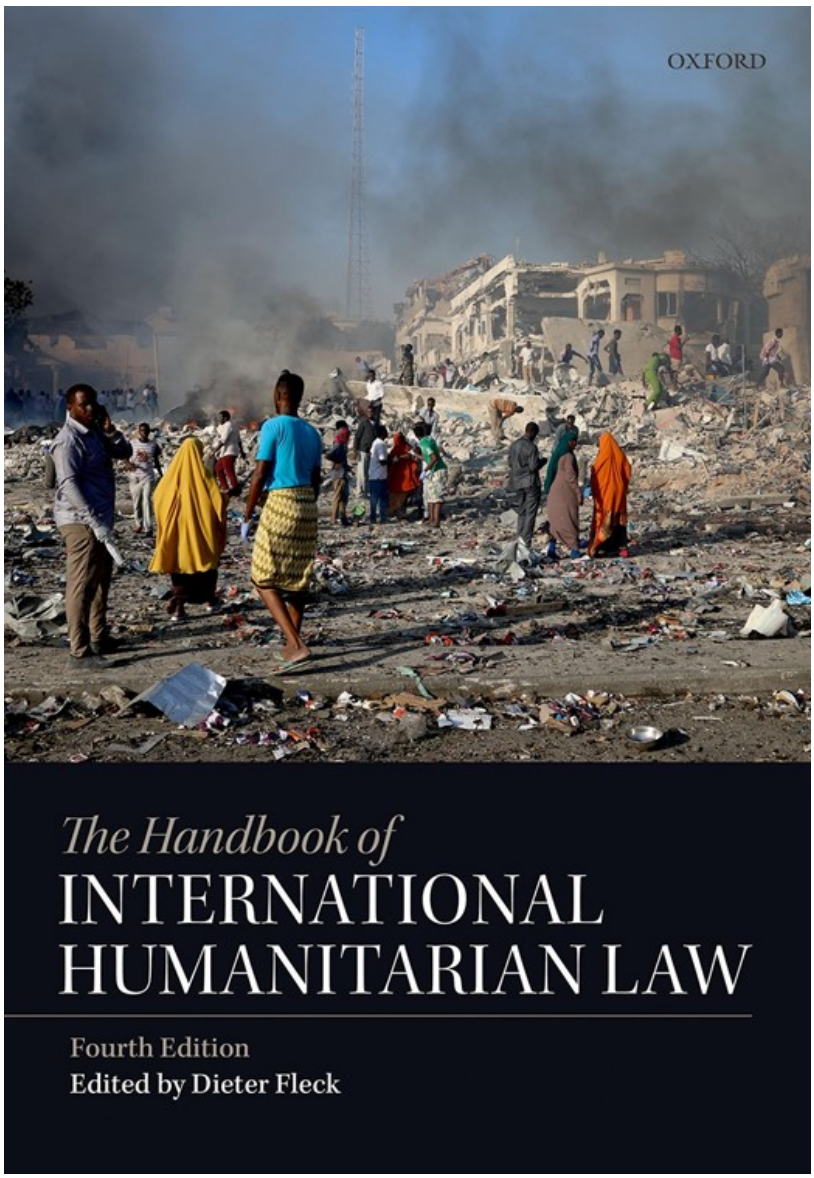

The Handbook of International Humanitarian Law (4th Edition)

Dieter Fleck (ed.)

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CHAPTER

2 Historical Development and Legal Basis

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Abstract

This chapter discusses the historical evolution and the existing legal foundations of international humanitarian law in the light of current practice. In this context, the ethical and political prerequisites for legal development are discussed in their global relevance, as the origins of the fundamental principles of humanitarian law are not exclusively based on a single region, culture, or religion. At a time which is characterized by rapid societal changes and diminishing distances, a good understanding of the multicultural basis for humanitarian rules is of the utmost importance. Although the subject of this handbook is the law applicable to the conduct of hostilities that applies once a party has entered into armed conflict (the *jus in bello*), that law cannot be properly understood without some examination of the separate body of rules which determines when resort to armed force is permissible (the *jus ad bellum*). The *jus ad bellum* has ancient origins but current law is founded on Article 2(4) and Chapter VII of the UN Charter. The chapter then considers the Geneva Conventions of 1949, as well as the Hague Conventions.

Keywords: Necessity, Armed conflict, Conduct of hostilities, Ius ad bellum, Ius in bello

Subject: Warfare and Defence, Use of Force, War, Peace and Neutrality, International Criminal Law, International Humanitarian Law, Air Law and Law of Outer Space, Human Rights

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I. Definition of the Term 'Humanitarian Law'

2.01

> **The use of armed force is prohibited under Article 2(4) of the UN Charter. The Charter provides for two express exceptions only. States may resort to armed force in the exercise of individual or collective self-defence (Article 51 UN Charter) or as authorized by the Security Council (Articles 39–42 UN Charter). International humanitarian law (IHL) applies with equal force to all the parties in an armed conflict irrespective of which party was responsible for starting the conflict. IHL comprises the whole of established law governing the conduct of armed conflict.**

1. *Introduction*. Although the subject of this Handbook is the law applicable to the conduct of hostilities that applies once a party has entered into armed conflict (the *jus in bello*), that law cannot be properly understood without some examination of the separate body of rules which determines when resort to armed force is permissible (the *jus ad bellum*). The *jus ad bellum* has ancient origins but current law is founded on Article 2(4) and Chapter VII of the UN Charter.[1]

2. *The Charter prohibition on the use of force.* Article 2(4) of the UN Charter states that: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.' By prohibiting the use of *force*, rather than *war*, this provision avoids debate about whether a particular conflict constitutes war. Although some writers have endeavoured to read Article 2(4) narrowly, arguing that there are instances in which the use of force may occur without it being directed 'against the territorial integrity or political independence of any state' or being 'in any other manner inconsistent with the purposes of the United Nations',[2] the prevailing view is that Article 2(4) aims to restrict the first resort to significant armed force by a state or states unless it can be justified by reference to one of the specific

p. 11 exceptions to that provision.[3] The UN Charter expressly provides for only two such exceptions: military ↳ action authorized by the Security Council and the right of individual or collective self- defence.[4]

3. *Military actions authorized by the Security Council.* The extensive limitation placed by the Charter upon unilateral resort to force by states is linked to, but not dependent upon,[5] the system of collective security in Chapter VII of the UN Charter. Under Article 39 of the Charter, the Council is empowered to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression'. Once it has taken this step, Articles 41 and 42 give the Council power to take measures to restore international peace and security.[6]

a) Under Article 41, the Council may require member states to apply economic sanctions and other measures not involving the use of armed force, a power which it has used, for example, in relation to Iraq's invasion of Kuwait,[7] Libya's refusal to co-operate with investigations into terrorist attacks on aircraft,[8] the situation in the Former Yugoslavia,[9] and the controversy over Iran's nuclear programme.[10] Where the Council has imposed sanctions under Article 41, it may authorize states to use limited force to prevent ships or aircraft from violating those sanctions.[11] The power extends far beyond the imposition and enforcement of economic sanctions and has been used, for example, to create the international criminal tribunals for the Former Yugoslavia[12] and Rwanda,[13] and to authorize various measures to suppress piracy on the territory and off the coast of Somalia.[14]

b) Article 42 then provides: '… should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.'

p. 12 *c*) To give effect to this provision, Article 43 envisaged that member states would conclude with the UN a series of bilateral agreements under which they would make forces and other facilities available to the Council on call. Articles 46–47 provided that plans for the use of armed force were to be made by the Council with the assistance of a Military Staff Committee which was charged by Article 47 with responsibility, under the Council, for 'the strategic direction of any armed forces placed at the disposal of the Security Council'. Due to Cold War rivalries and different perceptions of the UN's military role, no Article 43 agreements were concluded and the Military Staff Committee has never functioned as intended.[15] Nevertheless, the Security Council has authorized a number of operations which have involved the deployment of military forces.

d) Until the 1990s, most of these were peacekeeping operations, in which UN forces, made up of units contributed on a voluntary basis by various member states, were deployed with the consent of the states in whose territory they operated. The sole purpose of these forces was to police a ceasefire line or to monitor compliance with a truce or deliver relief supplies. The UN forces in Cyprus, Cambodia, Croatia, Lebanon, and on the Iran–Iraq border are all examples of this kind of peacekeeping by consent. Although peacekeeping forces are not intended to engage in combat operations, they have sometimes become involved in fighting when attacked.[16]

e) Increasingly, however, the Council has gone beyond peacekeeping and has authorized enforcement action of the kind envisaged in Article 42. In the Korean conflict in 1950, the Council (which was able to act because the USSR was boycotting its meetings) condemned North Korea's invasion of South Korea, and called upon all member states to go to the assistance of South Korea.[17] Following Iraq's invasion of Kuwait in 1990, the Council adopted Resolution 678, which authorized those states co-operating with the Government of Kuwait to use 'all necessary means' to ensure that Iraq withdrew from Kuwait and complied with the various Security Council resolutions on the subject and to 'restore international peace and security in the area'. It was this resolution which provided legal authority for the use of force by the coalition of states against Iraq in 1991.[18] In the absence of Article 43 agreements, the Council was not able to require states to

take part in these operations. Instead, it relied upon voluntary contributions of forces from a wide range of states.[19] Nor did the Council and the Military Staff Committee direct the two operations. In Korea, the Council established a unified command under the US and expressly left to the US Government the choice of a commander, although the contingents operating in Korea were regarded as a UN force and were authorized to fly the UN flag.[20] In the Kuwait conflict, the Council authorized the use of force, but command and control arrangements were made by the states concerned and the coalition forces fought as national contingents, not as a UN force. Following Kuwait, a number of other operations were organized in a similar way, for example in Libya, Somalia, Haiti, and the Former Yugoslavia.

p. 13 *f*) It was at one time argued that neither the Korean nor the Kuwaiti operation constituted enforcement actions of the kind provided for in Article 42 of the Charter, because neither operation was controlled by the Council and neither was based upon the use of forces earmarked for UN operations under Article 43 agreements. Yet there is nothing in Article 42 which stipulates that military enforcement action can only be carried out using Article 43 contingents, nor does Chapter VII preclude the Security Council from improvising to meet a situation in which military operations can effectively be conducted only by large national contingents contributed by states which wish to retain control in their own hands. Moreover, the Charter expressly envisages that the Council might authorize an ad hoc coalition of states to carry out its decisions, for Article 48 provides that: 'The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.' While the wording of the key resolutions in both Korea and Kuwait leaves room for argument on this point, both operations should be seen as instances of enforcement action authorized by the Council.[21] Moreover, these and other examples of Security Council authorization of ad hoc peacekeeping and peace enforcement missions without reference to Article 43 amount to significant practice, which the Vienna Convention on the Law of Treaties indicates is appropriate to consider in properly interpreting treaty rules.[22]

g) The Security Council may authorize resort to force if there is a threat to the peace, breach of the peace, or act of aggression. States acting without Security Council authorization may only use force in individual and collective self-defence. Clearly, the Council may respond to a wider variety of concerns, but international law scholars continue to debate what the limits of the Council's powers may be under international law. Most would agree with Sir Elihu Lauterpacht's observation in the *Lockerbie* case that the Security Council must respect at least some limits in acting under Article 39. It could not, for example, authorize a coalition to commit genocide in responding to a use of force. Based on the consensus that there are some limits on Security Council authority, commentators have argued that the Security Council must observe the general principles on resort to force, in particular, necessity and proportionality.[23]

In the Kuwait case, for example, military action authorized by the Security Council was limited under the principles of necessity and proportionality to liberating Kuwait and ensuring Kuwait's future security. Resolution 678 authorized the coalition to ensure that Iraq complied with all relevant Security Council resolutions and 'to restore international peace and security in the area'.[24] The coalition acted to move the Iraqi armed forces out of Kuwait and to create a security zone on Iraqi territory. The coalition did not go to
p. 14 Baghdad to attempt to end the regime of Saddam Hussein. This action would ↳ have been beyond the necessity of liberating Kuwait and providing enough security to prevent a repetition of the invasion.[25] As a Human Rights Watch report stated, the principle of military necessity means that military planners have a certain degree of freedom of judgement about the appropriate tactics for carrying out a military operation, '[but] it can never justify a degree of violence which exceeds the level which is strictly necessary to ensure the success of a particular operation in a particular case'.[26]

The Security Council then adopted additional resolutions focused on the threat that Iraq continued to pose, in particular, the danger of Iraq possessing weapons of mass destruction (WMD). The US, France, and the UK continued to use limited force to prevent Iraq from engaging in renewed armed conflict within Iraq or

against neighbours. Other enforcement action was taken to force Iraq into complete WMD disarmament. Advisers to the US and UK governments argued in 2002–2003 that a ground invasion of Iraq was lawful under, among other resolutions, Res. 687 (1991) and 1441 (2002) because those resolutions made clear that the threat to international peace and security had not ended with the 1991 ceasefire. It was on the basis of this argument that the US, the UK, and a number of other states maintained in 2003 that the authorization to use force remained in effect and provided a legal basis for the renewal of military action against Iraq.[27] The alternative view, that a new Security Council authorization for the use force was required in 2003, is now, however, the predominant view.[28]

h) Only the Security Council has the authority to authorize enforcement action,[29] but it may choose to make use of other organizations (or, as in Libya, Kuwait, and Korea, ad hoc coalitions) to carry out such action. Articles 52 and 53 of the Charter provide that regional organizations may undertake enforcement action with the authorization of the Security Council.

i) During the three decades following the end of the Cold War, the Security Council acted under a broad concept of 'international peace and security'. Originally perceived as confined to 'inter-state' threats, the Council is now seen as having the power to take action to respond to threats posed by human rights violations, WMD proliferation, international terrorism, and other categories of illicit conduct.[30] This development also received support in the 2005 World Summit Outcome Document.[31]

p. 15 4. *The right of self-defence*.[32] Article 51 of the Charter provides that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.' The term 'armed attack' is not defined. In its decision in *Nicaragua v US*, the ICJ held that armed attacks included 'not merely action by regular armed forces across an international border', but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [*inter alia*] ... an actual armed attack conducted by regular forces ... or its substantial involvement therein'.[33] On this basis, systematic terrorist attacks organized, or perhaps sponsored, by a state could constitute an armed attack to which the victim state could respond in self-defence. However, the Court went on to set a threshold by ruling that terrorist or irregular operations would constitute an armed attack only if the scale and effects of such an operation were such that it 'would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces'. In other words, the Court considered that the concept of 'armed attack' in Article 51 was narrower than the concept of 'use of force' in Article 2(4).

a) In addition to an attack upon the territory of a state, it is generally accepted that an attack against a state's warships, military aircraft, or troops overseas will amount to an attack upon the state itself. Again, however, the 'scale and effects' of such an attack must be considered before resort to force in self-defence would be justifiable. It is certainly unlikely that an attack upon a merchant ship could be treated as an armed attack upon the state whose flag it flies.[34] During the Iran–Iraq War, for example, states deployed naval forces to the Gulf making it clear that those forces would defend merchant ships flying the same flag but such defence could only lawfully amount to protecting the vessel at the moment of the attack. The US was found to have violated Article 2(4) during the Iran–Iraq War when it attacked oil platforms belonging to Iran. The US could not prove that it had suffered a significant armed attack for which Iran was responsible. In this situation, the US had no basis within Article 51 to use major military force on the territory of Iran.[35]

There have also been a number of cases (of which the best known are the UK's Operation Barras in Sierra
p. 16 Leone and Israel's Entebbe rescue mission in Uganda) in which one state ↳ has used force to rescue its citizens being held hostage on the territory of another state. The legality of such actions has been questioned. Nevertheless, when they involve the minimum amount of force necessary to effect the rescue, the use of force will fall below the Article 2(4) threshold. Force that is less than that prohibited by Article 2(4) is regulated under the principle of non-intervention. The non-intervention principle may, arguably, be violated as a countermeasure in response to a prior violation of an important obligation owed to the enforcing state or the international community as a whole.[36]

b) The military response by the US following the terrorist attacks of 11 September 2001 in the US has given rise to a debate as to whether an armed attack can emanate from non-state actors, such as terrorists, even if their acts are not attributable to a state.[37] The Security Council referred to Article 51 in Resolution 1368 without referring to the need to attribute the attacks to a state. Resolution 1368 has ever since provided the primary evidence to those who argue such attribution is not required. The Resolution, however, is silent on the question of attribution. It only indicates that the 'armed attack' requirement of Article 51 had been meant. The Security Council made no specific statement about attribution, necessity, or proportionality. When the US and the UK undertook Operation Enduring Freedom against Afghanistan, they did so on the basis of a UK White Paper making a case that the Taliban, the *de facto* government of Afghanistan, was responsible for the acts of al-Qaeda.[38] The UK's case for attribution constituted significant state practice and implicit *opinio juris* that such evidence is required prior to the use of force in self-defence.

It has been pointed out that nothing in the text of Article 51 requires that the concept of armed attack be limited to acts for which states are responsible in international law. Nor was such a limitation evident in customary international law prior to the adoption of the Charter; indeed, the famous *Caroline* incident in 1837,[39] which is widely cited for its discussion of the limits on resort to force in self-defence, was itself about a military reaction to attacks by non-state actors. Nevertheless, in *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ appeared to assume that an armed attack had to be in some way attributable to a state. Moreover, the Court has made clear that Article 51 is not a complete statement of the law of self-defence. Necessity, proportionality, and attribution are all additional principles that condition resort to force in self-defence, but are not mentioned in Article 51. The ICJ said in the *Nuclear Weapons* case: 'there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law'.[40]

p. 17 *c*) The ICJ has yet to rule on a case where a state used force in self-defence in anticipation of an armed attack, ahead of one actually occurring.[41] The express terms of Article 51 are 'if an armed attack occurs'. To apply principles of necessity and proportionality to any use of force in self-defence requires that the state acting in defence have factual knowledge about the attack. Jennings asserts that prior to the adoption of the UN Charter states could lawfully resort to self-defence if an armed attack was imminent.[42] Between 1945 and 2010, states for the most part did not invoke a right of anticipatory self-defence as the legal basis of a use of force under Article 51.[43] It is widely thought that Israel asserted such a right in 1967 and received at least the Security Council's acquiescence. In fact, Israel claimed before the Security Council that Egyptian forces had already crossed into Israel when Israel attacked.[44] In 1981, the UN Security Council voted unanimously, the US abstaining, to find Israel in breach of Article 2(4) when it bombed a nuclear reactor under construction in Iraq. Several representatives emphasized that no armed attack on Israel had occurred. The US representative found no necessity to act when peaceful means continued to offer promise. In other words, the bombing was not a last resort.[45]

In its 2002 National Security Strategy, the US asserted a right to use force in self-defence to pre-empt an inchoate future attack.[46] The claim was widely criticized,[47] but was, nevertheless, repeated in the 2006 National Security Strategy.[48] The claim did not appear in the 2010 National Security Strategy.[49] The 2017

National Security Strategy states, 'The US military and other operating agencies will take direct action against terrorist networks and pursue terrorists who threaten the homeland and US citizens regardless of where they are.'[50] This statement of policy is clearly at odds with the law. Given the *jus cogens* status of the prohibition on the use of force, allowing for no derogation, any such expansion of the right to resort to force is invalid.[51]

d) A less controversial aspect of Article 51 concerns the right of collective self-defence. Collective self-defence means that one state may come to the assistance of another which has been the victim of an armed attack. In the *Nicaragua* case, the ICJ held that for a state to be able to justify going to the assistance of another state by way of collective self-defence, two requirements must be satisfied: the second state must
p. 18 have been the victim ↳ of an armed attack, so that that state is itself entitled to take action by way of individual self-defence, and it must request military assistance from the first state. In the absence of a request for assistance from the state attacked, the Court considered that the right of collective self-defence could not be invoked.[52]

e) The right of self-defence under Article 51 is preserved only 'until the Security Council has taken measures necessary to restore international peace and security'. It is not clear what action on the part of the Council will put an end to the right of self-defence. Purely verbal condemnation of an aggressor by the Council cannot be sufficient for, as the UK Representative at the UN stated during the Falklands conflict, Article 51 'can only be taken to refer to measures which are actually effective to bring about the stated objective'.[53] When Iraq invaded Kuwait, however, the Security Council reinforced its immediate demand for Iraqi withdrawal by imposing economic sanctions upon Iraq.[54] When the sanctions and negotiations did not succeed after five months in persuading the Iraqis to withdraw, the Security Council then authorized the use of force. This case indicates that Kuwait and its coalition partners needed Council authorization at that point to begin military action against Iraq.[55]

f) As mentioned above, not all the conditions for a valid exercise of the right of self-defence are stated in Article 51. It was accepted by both parties in the *Nicaragua* case, and confirmed by the ICJ, that measures taken in self-defence must not exceed what is necessary and proportionate. These requirements have been described as being 'innate in any genuine concept of self-defence'.[56] The exercise of lawful self-defence permits only the use of force to put an end to an armed attack and to any occupation of territory or other forcible violation of rights that may have been committed. This does not mean that the state using force in self-defence must limit the force used to the amount used against it. Such a rule would be wholly impractical. The UK, for example, could not have retaken the Falkland Islands after the Argentine invasion of 1982 using only the degree of force which had been used by Argentina. Argentina had placed a far larger force on the Islands than the small British garrison overcome in the initial invasion. Dislodging the Argentine force effectively required an even larger British force. The correct test is that stated by Sir Humphrey Waldock when he said that the use of force in self-defence must be '... strictly confined to the object of stopping or preventing the infringement [of the defending state's rights] and reasonably proportionate to what is required for achieving this objective'.[57] In the case of the Falklands, the UK was entitled to use such force as was reasonably necessary to retake the Islands and to guarantee their security against further attack. The limitations which the principles of necessity and proportionality impose upon the degree of force that may be used have implications for the conduct of hostilities, which are examined in the commentary to Section 2.32 below.[58]

5. *Humanitarian intervention*. It has already been suggested that the Security Council now treats some humanitarian emergencies as threats to international peace and security warranting enforcement action.
p. 19 However, claims by states that they had a right to ↳ use force in extreme humanitarian cases, even without Security Council sanction, were generally rejected prior to 1990.[59] In the 1990s, support grew for unauthorized intervention to advance humanitarian goals.[60] The Economic Community of West African States (ECOWAS) attempted to get Security Council authorization for its intervention in Liberia in 1990. The

Security Council endorsed the action after it began. Some NATO states also asserted such a right during NATO's intervention in the Kosovo Crisis in 1999.[61] The UK government declared in 2004 that 'there is increasing acceptance of the view taken in 1999 that imminent humanitarian crises justify military intervention',[62] and in 2018 the UK Prime Minister's office issued a letter relative to missile strikes on Syria: 'The legal basis for the use of force is humanitarian intervention …'[63] Neither France nor the United States, which also participated in the Syria attack, issued legal justifications.

In 2011, the Security Council authorized the use of force for humanitarian purposes in Libya. The Council passed Resolution 1973, which called for an immediate ceasefire and authorized the establishment of a no-fly zone.[64] The resolution also authorized all necessary means to protect civilians within the country.[65] The Council's action respecting Libya both consolidated the Council's role in humanitarian crises and weakened the claim that a right to unauthorized humanitarian intervention was developing in international law. Such a claim had already been rejected in 2005 in the World Summit Outcome Document.

6. *Other possible justifications for the use of force*. On occasions, a number of other possible justifications for military action have been advanced. Reprisals, the protection of nationals abroad, intervention to promote self-determination, and intervention in an internal conflict at the request of the government of the state have all been cited. Of these, intervention to protect nationals is properly regarded as a minimal or *de minimis* use of force, for the reasons given above. Armed reprisals have been condemned by both the Security Council and the General Assembly as in conflict with lawful defensive action to halt and repel armed attacks occurring.[66] Their legal basis must now be regarded as highly doubtful. Intervention to promote self-determination is also of doubtful legality. Even if it might be said to exist in the classic case of a colonial people fighting a war of independence, it is unclear that it could be extended to more modern cases of pro-democratic intervention. Finally, intervention in a state with the consent of the government of that state has generally been taken as involving no use of force against that state, unless the state concerned was already in a condition of civil war.

p. 20

7. *The equal application of international humanitarian law*. Once hostilities have begun, the rules of international humanitarian law apply with equal force to both sides in the conflict, irrespective of who is the aggressor. On the face of it, this seems illogical. To place the aggressor and the victim of that aggression on an equal footing as regards the application of humanitarian law appears to contravene the general principle of law that no one should obtain a legal benefit from his own illegal action: *ex injuria non oritur jus*. Yet the principle that humanitarian law does not distinguish between the aggressor and the victim is well established. In the Diplomatic Conference which adopted the two 1977 Protocols Additional to the Geneva Conventions,[67] the Democratic Republic of Vietnam argued that states which committed acts of aggression should not be allowed to benefit from the provisions of humanitarian law. This argument was roundly rejected and the Preamble to AP I reaffirms that: 'the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.

A number of war crimes trials held at the end of the Second World War make clear that the provisions of the earlier Hague Conventions on the laws of war[68] are also equally applicable to all parties in a conflict.[69] The reason for this apparently illogical rule is that humanitarian law is primarily intended to protect individuals, rather than states, and those individuals are, in general, not responsible for any act of aggression committed by the state of which they are citizens. Moreover, since in most armed conflicts there is no authoritative determination by the Security Council of which party is the aggressor, both parties usually claim to be acting in self-defence, as Iran and Iraq did throughout the 1980–1988 Iran–Iraq War. Any attempt to make the rules of humanitarian law distinguish between the standards of treatment to be accorded to prisoners of war or civilians belonging to the aggressor and those belonging to the state that was the victim of aggression would thus almost certainly lead to a total disregard for humanitarian law. As

Sir Hersch Lauterpacht said, 'it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them'.[70] After initial hesitation,[71] similar reasoning has led to general acceptance that a UN force, or a force acting under the authority of the Security Council, is also bound to observe the rules of international humanitarian law.

2.02

> **International humanitarian law constitutes a reaffirmation and development of the traditional international laws of war (*jus in bello*). Most rules of the law of war now extend even to those armed conflicts that the parties do not regard as wars. The term 'international humanitarian law' takes this development into account.**

p. 21 1. *The scope of 'international humanitarian law'*. The term 'international humanitarian law' (IHL) is of relatively recent origin and does not appear in the Geneva Conventions of 1949.[72] International humanitarian law comprises all those rules of international law designed to regulate the treatment of persons—civilian or military, wounded or active—in armed conflicts. While the term is generally used in connection with the Geneva Conventions and the Additional Protocols of 1977, it also applies to the rules governing methods and means of warfare and the governance of occupied territory, rules found in earlier agreements such as the Hague Conventions of 1907 and in treaties such as the Inhumane Weapons Convention of 1980. (For a list of many of these treaties, *see* Sections 2.26–2.29.) International humanitarian law also includes rules of customary international law, general principles, and norms of *jus cogens*. International humanitarian law thus includes most of what used to be known as the laws of war, although strictly speaking some parts of those laws, such as the law of neutrality, are not included since their primary purpose is not humanitarian. This Handbook, however, deals with all of the rules of international law that apply in an armed conflict and occupation, whether or not they are considered to be part of international humanitarian law.

A significant development in this law is that, whereas the older treaties applied only in a 'war', today humanitarian law is applicable in any armed conflict, even if the parties to that conflict have not declared war and do not recognize that they are in a situation defined under law as war.[73] This matter is discussed further in the commentary to Chapter 2.

2. *Declining Importance of Reciprocity*. Traditionally, in contrast to human rights treaties, which may extend protections to citizens of a state not party to a treaty in certain circumstances, humanitarian law treaties are binding only between those states parties to them.[74] In the 1991 Kuwait conflict, several of the coalition states (such as Italy, Canada, and Saudi Arabia) were parties to AP I, but they were not obliged to apply its provisions in the conflict because Iraq was not a party.[75] However, once it is established that a humanitarian law treaty is binding upon states on both sides in a conflict, the application of the treaty is not dependent upon reciprocity. As the *ICRC Commentary* to the Geneva Conventions puts it, a humanitarian law treaty does not constitute 'an engagement concluded on the basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties.'[76] The growing influence of
p. 22 human rights law is clear, however, leading to the interpretation that ↳ IHL protections, like human rights, may be claimed by individuals regardless of a state of nationality's treaty status.[77]

Thus, the fact that one side in a conflict violates humanitarian law does not justify its adversary in disregarding that law.[78] Moreover, it is not necessary today that all the states involved in a conflict must be parties to a particular humanitarian treaty for that treaty to apply in the conflict. If there are states on both sides of the conflict parties to a particular treaty, that treaty is applicable between them, even though it does not bind them in their relations with those states which have not become parties. In this respect,

humanitarian law has changed since the beginning of the twentieth century. Older humanitarian law treaties contained what was known as a 'general participation clause', under which a treaty would apply in a war only if all the belligerents were parties to that treaty.

3. *Humanitarian law and the law of human rights*. International humanitarian law obviously has much in common with the law of human rights, since both bodies of rules are concerned with the protection of persons.[79] Nevertheless, there are important differences between them. Human rights law is designed to operate primarily in normal peacetime conditions and within the framework of the legal relationship between a state and its citizens and those under the state's control. International humanitarian law, by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a state and persons associated with its adversary, a relationship otherwise based upon power rather than law. It is now clear that human rights law applies in armed conflict, though derogation from some human rights obligations may be permitted.[80] For example, in its advisory opinion on nuclear weapons, the ICJ held that during armed conflict the application of the right to life provision in the International Civil and Political Rights Covenant was subject to the relevant norms of humanitarian law as the *lex specialis* for such situations.[81] International humanitarian law decriminalizes the taking of life in some circumstances that would constitute a criminal offence in peacetime. Nevertheless, the fundamental human right to life continues in armed conflict as in peace. International humanitarian law and the law of human rights have been called ↳ 'complementary and mutually reinforcing'.[82] For the relevance of human rights in armed conflicts, *see* below, Chapter 14.

p. 23

2.03

> **International humanitarian law sets certain bounds to the use of force against an adversary. It determines both the relationship of the parties to a conflict with one another and their relationship with neutral states. Certain provisions of international humanitarian law are also applicable in the relationship between the state and its own citizens.**

1. International humanitarian law is centrally concerned with the legality of conduct in armed conflict, in contrast to the central focus of the *jus ad bellum*, which is the legality of an initial resort to armed force, as discussed in the commentary to Section 2.01.[83] Humanitarian law sets limits to the way in which force may be used by prohibiting certain weapons (such as poison gas) and methods of warfare (such as indiscriminate attacks), by insisting that attacks be directed only at military objectives, and even then that they should not cause disproportionate civilian casualties. It also regulates the treatment of persons who are *hors de combat*: the wounded, sick, shipwrecked, persons parachuting from a disabled aircraft, prisoners of war, and civilian internees, as well as the enemy's civilian population. Although primarily concerned with the relationship between the parties to a conflict, a distinct branch of the laws of armed conflict, the law of neutrality, regulates the relationship between the belligerents and states not involved in the conflict. Unlike the rules dealing with the relationship between the parties to a conflict, the law of neutrality has not been the subject of much codification and still consists largely of customary international law. It is considered in Chapter 18 of this Handbook.

2. Most rules of humanitarian law concern the way in which a party to a conflict treats the persons loyal to or under the control of its adversary. For the most part, humanitarian law does not attempt to regulate a state's treatment of its own citizens. Thus, it has been held, for example, that a national of one party to a conflict who serves in the armed forces of an adversary against his own state is not entitled to be treated as a prisoner of war if captured,[84] although this decision has been criticized[85] and is probably untenable today for a variety of reasons. For example, many persons have multiple nationalities; nationality is sometimes forced upon people (e.g. as a result of the annexation of the territory in which they reside); and there have been instances where large numbers of people have taken up arms against the state of their nationality.[86] Some provisions of humanitarian law, however, do apply expressly to the relationship between a state and

its own citizens. Article 3 common to the four Geneva Conventions and AP II each lay down a legal regime
p. 24 for non-international armed conflicts. In addition, some provisions of the Geneva ↳ Conventions and AP I require a state to take positive steps in relation to its own citizens by, for example, ensuring that members of its armed forces receive instruction in international humanitarian law, or encouraging the dissemination of the principles of that law among the civilian population.[87] A state is also required to take steps to prevent its citizens from violating provisions of humanitarian law and must, for example, take action to prevent or prosecute grave breaches of that law by its nationals.[88]

2.04

> **While general rules apply to all types of warfare, special rules inform the law of land warfare and the law of air and missile warfare (*see* below, Chapter 7), the law of naval warfare (*see* below, Chapter 17), military uses of cyberspace (*see* below, Section 6.29 and sub-Chapter 7 V), military operations in outer space (*see* below, Sections 3.16 and 18.56), and the law of neutrality (*see* below, Chapter 18).**

The general rules of international humanitarian law and their application in land and aerial warfare are considered in Chapters 3–16 and Chapter 19 of this Handbook. The law of naval warfare is the subject of Chapter 17. Although many of the rules of humanitarian law (e.g., those related to the treatment of prisoners of war) are common to all forms of warfare, naval warfare is in other respects subject to a distinct legal regime. The environment in which naval warfare takes place is very different from that of land warfare, its scope for affecting the rights of neutrals is far greater, and the rules which govern naval warfare have not, for the most part, been the subject of as much attention in recent years as the rules applicable to land warfare. Apart from the GC II, which deals with the wounded, sick, and shipwrecked at sea, none of the post-1945 treaties have been specifically concerned with naval warfare and some of the most important provisions of AP I are not applicable to warfare at sea, except in so far as it may affect the civilian population on land or is directed against targets on land.[89] The result is that much of the law of naval warfare still consists of rules of customary international law. The International Institute of Humanitarian Law has conducted a study on international law applicable to armed conflict at sea.[90] The law of air and missile warfare focuses particularly on targeting and has been the subject of a study by Harvard's Program on Humanitarian Policy and Conflict Research.[91] The law of neutrality is, like the law of naval warfare, also largely a matter of customary law. The entire institution of neutrality has been questioned in recent times, on the ground that the UN Charter has effectively rendered it obsolete.[92] Nevertheless, some scholars continue to see the topic as important.[93]

II. Historical Development

2.05

> **The following historical references may promote appreciation of the development and value of international humanitarian law.**

p. 25 2.06

> **Throughout its history, the development of international humanitarian law has been influenced by religious concepts and philosophical ideas. Customary rules of warfare are part of the very first rules of international law. The development from the first rules of customary law to the first written humanitarian principles for the conduct of war, however, encountered some setbacks.**

The laws of war have a long history,[94] as the following paragraphs show, although it has been suggested that military practice in early times fell far short of existing theory, and that such rules of warfare as can be identified in early times have little similarity to modern international humanitarian law.[95] From the Middle Ages until well into the seventeenth century, discussion of the rules of war in Europe was dominated by theological considerations, although some elements of classical philosophy remained influential.[96] The codification and written development of the law did not begin until the nineteenth century.

2.07

Some rules which imposed restrictions on the conduct of war, the means of warfare, and their application can be traced back to ancient times.

- **The Sumerians regarded war as a state governed by the law, which was started by a declaration of war and terminated by a peace treaty. War was subject to specific rules which, *inter alia* guaranteed immunity to enemy negotiators.**
- **Hammurabi King of Babylon, (1728–1686 BC), wrote the 'Code of Hammurabi' for the protection of the weak against oppression by the strong and ordered that hostages be released on payment of a ransom.**
- **The law of the Hittites also provided for a declaration of war and for peace to be concluded by treaty, as well as for respect for the inhabitants of an enemy city which has capitulated. The war between Egypt and the Hittites in 1269 BC, for instance, was terminated by a peace treaty.**
- **In the seventh century BC, Cyrus I, King of the Persians, ordered the wounded Chaldeans to be treated like his own wounded soldiers.**
- **The Indian epic *Mahabharata* (*c.* 400 BC) and the Laws of Manu (*c.* 200 BC – 200 AD) contained provisions which prohibited the killing of a surrendering adversary who was no longer capable of fighting; forbade the use of certain means of combat, such as poisoned or burning arrows; and provided for the protection of enemy property and prisoners of war.**
- **The Greeks, in the wars between the Greek city-states, considered each other as having equal rights and in the war led by Alexander the Great against the Persians, respected the life and personal dignity of war victims as a prime principle. They spared the temples, embassies, priests, and envoys of the opposite side and exchanged prisoners of war. For example, the poisoning of wells was proscribed in warfare. The Romans also accorded the right to life to their prisoners of war. However, the Greeks and Romans both distinguished between those peoples whom they regarded as their cultural equals and those whom they considered to be barbarians.**

p. 26 1. These examples show that the laws regulating the conduct of hostilities were recognized in many early cultures. The theory that humanitarian law is essentially 'Eurocentric' is in reality more a criticism of most literature on the subject than a reflection of historical fact. Thus, several of the principles of modern humanitarian law have precursors in ancient India.[97] Humanitarian law principles have been identified in African customary traditions.[98] As may be expected, the wide range of cultural traditions to which this paragraph refers displays a diversity of practice. Nevertheless, certain common themes can be identified, several of which continue to enjoy a prominent place in modern international humanitarian law.

a) In many cultural traditions, there was an emphasis upon the formalities for opening and closing hostilities. The Sumerian and Hittite traditions are in this respect similar to the later Roman *jus fetiale* which

required a formal declaration of war at the commencement of hostilities. In part, this tradition reflects the perception of war as a formal legal condition, as opposed to a factual condition, a perception which has only declined in importance in the twentieth century.[99] The attachment to formalities was also important, however, in serving to distinguish between hostilities entered into by a state and violence which had no official sanction.

b) The protection accorded to ambassadors and the respect for truces and for negotiations held during a war was the precursor of modern principles regarding ceasefires and parlementaires.[100]

c) The prohibition on certain types of weapon, particularly poison, is found in many different traditions and is now embodied in a number of important modern agreements.[101]

2. However, while some cultures respected the lives of prisoners and the wounded, the majority of prisoners faced death or enslavement. A similar fate usually befell the civilian population of a city which resisted attack, although in some traditions the population was spared if there was a timely surrender and the city did not have to be taken by storm.

2.08

> **Islam also acknowledged the essential requirements of humanity. In his orders to his commanders, the first caliph, Abu Bakr (about 632), stipulated for instance the following: 'The blood of women, children and old people shall not stain your victory. Do not destroy a palm tree, nor burn houses and cornfields with fire, and do not cut any fruitful tree. You must not slay any flock or herds, save for your subsistence.' While in many cases Islamic warfare was no less cruel than warfare by Christians, under the reign of leaders like Sultan Saladin in the twelfth century, the laws of war were observed in an exemplary manner. Saladin ordered the wounded of both sides to be treated outside Jerusalem and allowed the members of the Order of St John to discharge their hospital duties.**

Several studies have shown that many of the central principles of humanitarian law were deeply rooted in
p. 27 Islamic tradition.[102] Although Saladin was unusual among both ↳ Muslims and Christians during the Crusades in his humane treatment of prisoners and the wounded, he was by no means alone in regarding warfare as subject to principles of law. Three centuries after Saladin, the Turkish Sultan Mehmet extended to the population of Constantinople a greater degree of mercy than might have been expected given that the city had been taken by storm.[103]

2.09

> **In the Middle Ages, feud and war were governed by strict principles. The principle of protecting women, children, and the aged from hostilities was espoused by St Augustine. The enforcement of respect for holy places (Truce of God) created a right of refuge, or asylum, in churches, the observance of which was carefully monitored by the Church. Knights fought according to certain (unwritten) rules which were enforced by tribunals of knights. These particular rules applied only to knights, not to ordinary people. Among the knights' rules was the requirement to regard an enemy knight as an equal combatant who had to be defeated in an honourable fight, and it was forbidden to start a war without prior notification.**

St Augustine's influence on the laws of war during the Middle Ages derived in part from his development of the theory of the 'just war'. Whereas the earliest Christian writers had generally been pacifists, St Augustine reasoned that a Christian could justify fighting for certain limited causes: self-defence, punishment of wrongs, and recovery of property.[104] Augustine's views were later adopted by influential writers such as St Thomas Aquinas, who maintained that a just war required lawful authority, just cause, and rightful

intention.[105] The first requirement was important in distinguishing between hostilities entered into on the authority of a prince, on the one hand, from the lawless activities of brigands and war lords on the other. Once the idea that warfare might have a legal and theological basis was accepted, it followed naturally (at least in conflicts between Christian princes) that considerations of law and humanity should also influence the conduct of war. The rules which developed for the regulation of warfare between knights reflected these considerations as well as a general code of chivalry.[106] These rules undoubtedly had a civilizing effect and were a valuable humanitarian development.[107] It should, however, be borne in mind that this code was largely devised for the benefit of the knights and that the purpose of some of the rules was not so much humanitarian as an attempt to prevent the development of weapons and methods of warfare which would threaten their position. Thus, the attempt by the Lateran Council in 1137 to ban the crossbow was motivated as much by a desire to get rid of a weapon which allowed a foot soldier to threaten an armoured knight as by humanitarian concern at the injuries which crossbow bolts could cause. Moreover, the code was intended to apply only to hostilities between Christian princes and was seldom applied outside that context, for example, in the Crusades.

2.10

> **The 'Bushi-Do', the medieval code of honour of Zen Buddhism in Japan, included the rule that humanity must be exercised even in battle and towards prisoners of war.**

2.11

> **In the seventeenth century, the Confucian philosopher Butsu Sorai wrote that whoever kills a prisoner of war shall be guilty of manslaughter, whether that prisoner had surrendered or fought 'to the last arrow'.**

2.12

> **As a result of the decline of the chivalric orders, the invention of firearms, and above all the creation of armies consisting of mercenaries, the morals of war regressed towards the end of the Middle Ages. Considerations of chivalry were unknown to these armies. Equally, they made no distinction between combatants and the civilian population. Mercenaries regarded war as a trade which they followed for the purpose of private gain.**

For the modern law regarding mercenaries, see Article 47, para. 1, AP I and Section 5.03 below.

2.13

> **At the beginning of modern times the wars of religion, and particularly the Thirty Years War, once again employed the most inhuman methods of warfare. The cruelties of this war particularly led to the jurisprudential consideration of the *jus in bello* and established a number of principles to be observed by combatants. In his work '*De iure belli ac pacis*', published in 1625, Hugo Grotius, the father of modern international law, emphasized the existing bounds to the conduct of war.**

The savagery of warfare in the late sixteenth and early seventeenth centuries is summed up by Grotius in a passage in which he explained why he wrote about the laws of war: 'I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations should be ashamed; men resorting to arms for trivial or for no reasons at all, and when arms were once taken up no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.'[108] In effect, what Grotius described was the breakdown of both the *jus ad bellum* of the Middle Ages (the 'just war' doctrine) and the *jus in bello*. His '*De iure belli ac pacis*' was to have considerable influence on the rebuilding

of the latter body of law, although it was not until the twentieth century that any real progress was made in developing a new *jus ad bellum*. Nevertheless, Grotius was not the only writer of this period to focus on the laws of war. Gentili, who like Grotius was an exile from his own country, published his seminal work '*De iure belli*' in England in 1598,[109] while the Spanish writer Vitoria was also influential in reviving interest in this area of the law, particularly by suggesting that rules of international law might apply to warfare between Christian states and the Indians of the New World.[110]

2.14

> **A fundamental change in the attitude of states to the conduct of war came only with the advent of the Age of Enlightenment in the eighteenth century. In 1762, Jean-Jacques Rousseau made the following statement in his work '*Du Contrat Social*': 'War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders… The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders while they are bearing arms; but as soon as they lay them down and surrender they become once more merely men, whose life no one has any right to take.'[111] From this doctrine, which was soon generally acknowledged, it follows that acts of hostility may only be directed against the armed forces of the adversary, not against the civilian population which takes no part in the hostilities. These ideas also found expression in several international treaties concluded at that time.**

The acceptance during the late eighteenth century of the ideas to which Rousseau gave voice in the passage
p. 29 quoted was a landmark in the development of humanitarian law; it ↳ was the first recognition of the principle that the purpose of using force is to overcome an enemy state, and that to do this it is sufficient to disable enemy combatants. The distinction between combatants and civilians, the requirement that wounded and captured enemy combatants must be treated humanely, and that quarter must be given, some of the pillars of modern humanitarian law, all follow from this principle. While the French revolutionary wars were in many respects cruel by modern standards, they are important for the development of humanitarian law in that they demonstrated in military practice many of the ideas enunciated by Rousseau and other writers of the Enlightenment.[112] The treaty of friendship and commerce between Prussia and the US in 1785, whose most important authors are deemed to be King Frederick the Great and Benjamin Franklin, contained some exemplary and pioneering provisions for the treatment of prisoners of war. It was also one of the first attempts to record new principles of humanitarian law in written form, although it was to be another seventy years before the conclusion of the first multilateral treaty on the subject.

2.15

> **In the nineteenth century, after a few interim setbacks, humanitarian ideas continued to gain ground. They led to remarkable initiatives by individuals as well as to numerous international treaties. These treaties imposed restrictions on both the instruments of warfare and the methods of their use.**

The nineteenth century saw the ideas which had gained acceptance in the late eighteenth century given practical effect. A number of major international treaties, some of which are still in force, were adopted, codifying several of the customary rules of warfare and developing those rules in various ways. In addition, the initiative of a number of private individuals led to the creation of what became the International Committee of the Red Cross, which has played a central role in the development and implementation of the rules of humanitarian law.[113]

2.16

> **Florence Nightingale soothed the sufferings of the sick and wounded through her efforts as an English nurse in the Crimean War (1853–1856). She later made an essential contribution towards the renovation of both the civil and military nursing systems of her country.**

Although Nightingale cannot be said to have had a direct effect upon the development of humanitarian law, her work in developing a military medical and nursing service to care for the wounded and sick on the battlefield (which was also a feature of the American Civil War) was an essential prerequisite to the development of that body of humanitarian law which deals with the wounded and sick and which was the subject of the first Geneva Convention.[114]

2.17

> **In 1861, Francis Lieber (1800–1872), a German-American professor of political science and law at Columbia College, which later became Columbia University, prepared on the behalf of President Lincoln a manual based on international law (the Lieber Code) which was put into effect for the first time in 1863 for the Union Army of the US in the American Civil War (1861–1865).**

The Lieber Code[115] is the origin of what has come to be known as 'Hague Law', so called because the
p. 30 principal treaties which dealt with the subject were concluded at ↳ The Hague. Hague Law is the law of armed conflict written from the standpoint of the soldier, in the sense that it takes the form of a statement of the rights and duties of the military in a conflict. Lieber's Code was the first attempt to set down, in a single set of instructions for forces in the field, the laws and customs of war. Its 157 Articles are based on the philosophy of the Enlightenment described in the preceding paragraph, stressing, for example, that only armed enemies should be attacked,[116] that unarmed civilians and their property should be respected,[117] and that prisoners and the wounded should be humanely treated.[118] The Code is, however, far more than a statement of broad general principles. The treatment of prisoners of war is the subject of detailed regulation,[119] as are the arrangements for exchange of prisoners, truce, and armistice.[120] The Code is the more remarkable for having been issued during a civil war when the Union government had been at pains to insist that no state should recognize the Confederacy. In that sense, it was many years ahead of its time; even today, the treaty rules on humanitarian law applicable in internal armed conflicts are more limited in their scope than the provisions of the Lieber Code.

2.18

> **The Genevese merchant Henry Dunant who, in the Italian War of Unification, had witnessed the plight of 40,000 Austrian, French, and Italian soldiers wounded on the battlefield of Solferino (1859), published his impressions in his book *A Memory of Solferino*, which became known all over the world. In 1863, the International Committee of the Red Cross (ICRC) was founded in Geneva on his initiative (see below, Section 21.24).**

What shocked Dunant after the Battle of Solferino was the lack of any systematic effort by the armies concerned to care for the wounded, who were left to die on the battlefield, and often robbed and murdered by local inhabitants. In so far as medical services were available, their providers appeared unprotected from attack or capture. Dunant organized teams of volunteers to collect and care for the wounded at Solferino. The ICRC, founded largely thanks to Dunant, was and remains predominantly a Swiss organization that has promoted the creation of better medical services in wartime, and the adoption of international agreements dealing first with the wounded and subsequently with the whole field of humanitarian law.[121]

2.19

The 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field defined the legal status of medical personnel. It stipulated that wounded enemy soldiers were to be collected and cared for in the same way as members of friendly armed forces. These rules were extended and improved by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1906.

The 1864 Geneva Convention marks the beginning of the development of what has become known as 'Geneva Law'. In contrast to Hague Law (see commentary to Sections 2.21, 2.27), Geneva Law is written from the standpoint of the 'victims' of armed conflict: the wounded, sick, shipwrecked, prisoners of war, and civilians. It does not purport to define the rights and duties of the military but rather to lay down certain basic obligations designed to protect those victims, while leaving to customary law and Hague Law questions which do not fall within its provisions. The borderline between Hague and Geneva Law has now largely been eroded and AP I contains elements of both these legal ↳ traditions. The 1864 and 1906
p. 31 Conventions have been superseded by the more detailed provisions of GC I and GC II, 1949.[122] Certain principles are, however, common to all these treaties. All provide that the parties to a conflict must not only abstain from attacking the wounded and medical personnel attending them, but must also collect and provide care for them. The use of the Red Cross emblem (and later the Red Crescent and Red Diamond) as a protected sign also stems from these conventions.[123]

2.20

The 1868 Declaration of St Petersburg was the first to introduce limitations on the use of weapons of war. It codified the customary principle, still valid today, prohibiting the use of weapons to cause unnecessary suffering. It also confirmed that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'.

1. The Declaration of St Petersburg was the result of an initiative by the Russian government to obtain the agreement of the major powers to outlaw the use in war between themselves of 'rifle shells', small projectiles which exploded or caught fire on impact.[124] These exploding or inflammable bullets caused far worse injuries than the ordinary bullets of the time (the effects of which were almost invariably disabling and frequently fatal). The Preamble to the Declaration states that: 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; for this purpose it is sufficient to disable the greatest possible number of men; this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable'. It concludes that 'the employment of such arms would, therefore, be contrary to the laws of humanity'. The parties therefore agreed to renounce the use, in conflicts between themselves, of 'any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances'. This provision remains in force and has now acquired the status of customary international law, although the evolution of aerial warfare led to it being interpreted as permitting the use of such projectiles against aircraft.[125]

2. The importance of the 1868 Declaration lies not so much in the specific ban which it introduced as in its statement of the principles on which that ban was based. The Preamble to the Declaration reflects the theories developed by Rousseau nearly a century earlier[126] and is the classic statement of the principle that it is prohibited to employ weapons or methods of warfare which are likely to cause unnecessary suffering.[127] Humanitarian law accepts that one of the legitimate objects of warfare is to disable enemy combatants (and in many cases this necessarily involves killing) but it rejects the use of weapons which cause additional suffering for no military gain.[128] That principle continues today as one of the general principles of humanitarian law by which the legality of all weapons and means of warfare fall to be measured. It also
p. 32 inspired a number ↳ of other international agreements banning specific weapons, such as poison gas and soft-headed or 'Dum-Dum' bullets.[129]

2.21

> **The 1874 Brussels Declaration provided the first comprehensive code of the laws and customs of war. That Declaration was further developed at the Hague Peace Conferences of 1899 and 1907. The most important result was the Hague Regulations Concerning the Laws and Customs of War on Land (HagueReg).**

The conference which drew up the Brussels Declaration was also the result of a Russian initiative, although some of the inspiration for the project lay in the earlier Lieber Code. The Declaration[130] itself was never ratified but many of its provisions were incorporated into the Manual of the Laws and Customs of War adopted by the Institut de Droit International at its Oxford session in 1880 ('the Oxford Manual').[131] The Brussels Declaration and the Oxford Manual, although not legally binding, were highly influential and many of the provisions of the Hague Regulations can be traced back to them. Although parts of the Regulations have been superseded by the Geneva Conventions and AP I, many remain in force and are now regarded as declaratory of customary international law.[132] Thus, the section of the Regulations dealing with the government of occupied territory is still of considerable importance and is generally regarded as applicable to current occupations.[133]

2.22

> **World War I, with its new munitions and unprecedented extension of combat actions, demonstrated the limits of the existing law.**

The most important development of World War I, in so far as it affected humanitarian law, was the evolution of aerial warfare and other forms of long-range bombardment. These took place in spite of the requirement of Article 25 HagueReg, that attacks on undefended towns and villages were prohibited. An undefended town was defined as one which could be captured without the use of force (a legacy of early customary rules which distinguished between the treatment of a city taken by storm and one which surrendered). Aerial warfare opened up the possibility of bombarding towns hundreds of miles behind enemy lines. These towns might be undefended in the sense that no forces were stationed near them, but they did not fall within the terms of Article 25 because they could not be captured without force. Aerial warfare thus posed an unprecedented threat to civilians for which the existing laws made no provision. World War I also revealed deficiencies in the legal protection of the wounded and prisoners of war, which led to the adoption of new Geneva Conventions in 1929 (see Section 2.24). The widespread use of poison gas during World War I also resulted in the adoption in 1925 of the Geneva Gas Protocol.[134]

2.23

> **In 1923, the Hague Rules of Aerial Warfare (HRAW 1923) were formulated, together with rules concerning the control of radio communications in times of war. Although they were never legally adopted, they were influential in the development of legal opinion. Harvard University's Program on Humanitarian Policy and Conflict Research developed a manual in 2010 elaborating on the rules of air and missile warfare (*HPCR Manual*).**

p. 33 1. World War I had highlighted the danger to the civilian population from aerial warfare, and in the aftermath of that war numerous proposals were made to subject aerial warfare to new legal constraints. The obvious military advantages of aerial warfare, however, prevented agreement on a new legal regime at the Washington Conference on the Limitation of Armaments, 1921–1922. Nevertheless, some of the states represented at that conference appointed a Commission of Jurists, chaired by the US lawyer John Bassett Moore, with representatives from France, Italy, Japan, the Netherlands, and the UK, to investigate the subject and to make proposals. That Commission drew up the HRAW 1923 in an attempt to achieve a balance

between military interests and the protection of the civilian population.[135] The rules[136] prohibited attacks on civilians and aerial bombardment 'for the purpose of terrorizing the civilian population'.[137] Attacks had to be confined to military objectives, and in Article 24 the Commission attempted to draw up a list of these. Certain objectives were given special protection and the Rules also included a duty to minimize incidental civilian casualties.

2. The HRAW 1923 were never legally adopted and their principles were widely disregarded during World War II.[138] The attempt to devise a list of military objectives was probably doomed to failure, since objectives which have military value will vary over time and from one conflict to another. Nevertheless, although they never entered into force, the Rules were widely regarded at the time as an important statement of the legal principles which should govern aerial warfare. The basic principles which they laid down, though not the list of targets, were embodied in a resolution of the Assembly of the League of Nations in 1938. That resolution (modelled on a statement by the Prime Minister of the UK to the House of Commons) recognized the urgent need for the adoption of regulations dealing with aerial warfare and stipulated that the Assembly: 'Recognizes the following principles as a necessary basis for any subsequent regulations: (1) The intentional bombing of civilian populations is illegal; (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable; (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence.'[139]

3. After World War II, the ICRC drew up in 1956 the Delhi Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.[140] These Draft Rules and the *ICRC Commentary* upon them show the influence of the HRAW 1923. More importantly, many of the principles laid down in the 1923 Rules have been adopted, albeit in a modified form, in AP I of 1977, and have thus become binding treaty law. In 2010, many of the rules were included in the *HPCR Manual*.

2.24

> **In 1929, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and the Convention relative to the Treatment of Prisoners of War were signed in Geneva. They developed the terms of the Geneva Convention of 1906 and part of the Hague Regulations of 1907.**

The 1929 Geneva Conventions[141] were influenced by the experience of World War I and contained more
p. 34 detailed regulations for the treatment of the wounded and prisoners of ↳ war than their predecessors. Although the Conventions were in force during World War II, some of the major protagonists, including the USSR and Japan, were not parties to them. Nevertheless, at the end of the war, tribunals in a number of war crimes trials ruled that the main provisions of the Prisoners of War Convention had become part of customary international law and were thus binding on all states by 1939.[142] The 1929 Conventions have now been superseded[143] by the 1949 Geneva Conventions.

2.25

> **The first regulations on naval warfare were already developed by the Middle Ages. These regulations, which primarily embodied the right to search vessels and their cargo and the right of seizure, were subsequently changed several times. The treatment of ships belonging to neutral states lacked uniform regulation and was disputed. In the Baltic Sea, the Hanseatic League used its almost unrestricted naval supremacy to enforce embargoes in times of war, which were not only detrimental to its adversary, but also made it impossible for neutral states to trade with that adversary. The ability of neutral states to pursue their maritime trade activities in times of war could only override the attempts by belligerents to cut their adversaries off from ship-to-shore supplies if the position of these powerful neutral states was secured. In the eighteenth century,**

this led to the formation of alliances between neutral states, and to the deployment of their naval forces to protect their right to free maritime trade. The 1856 Paris Declaration Concerning Maritime Law was the first agreement to address the protection of neutral maritime trade. A major restatement of current international principles and rules at sea was achieved by an international group of legal and naval experts with the 1995 San Remo Manual on International Law Applicable to Armed Conflicts at Sea.

1. Although the law of naval warfare has never been subjected to such detailed regulation by treaty as the law of land warfare, the customary law on the subject developed at an earlier date. This development was largely due to the fact that naval warfare involved a far greater degree of contact between combatants and neutrals and so brought into conflict the right of a combatant to conduct war effectively and the right of a neutral state's shipping to enjoy the freedom of the seas. Moreover, the law of naval warfare was unusual in that each warring nation established a tribunal (or series of tribunals) to rule on the legality of interference with neutral shipping. The British Prize Court played a particularly important part in the development of the laws of naval warfare, since throughout the eighteenth and nineteenth centuries Great Britain was the dominant maritime power. Nevertheless, belligerent treatment of neutral shipping remained a source of controversy and the US, which remained neutral throughout the French Revolutionary and Napoleonic wars, engaged in hostilities with France (1797–1801) and Britain (1812–1815) partly on account of what it regarded as the infringement of neutral rights.

2. The influence of neutral states generally declined after the late eighteenth century and the balance tipped in favour of belligerent rights, although the Paris Declaration went some way to arrest this process. The US, which had been a champion of neutral rights in the period 1789–1815, took a broad view of the rights of a belligerent during the Civil War (1861–1865), greatly extending for example the doctrine of continuous
p. 35 voyage. This process was taken even further during the World Wars of the twentieth century, although ↳ some rights of belligerents narrowed. For example, the practice of capturing prizes came to an end, and the extension of the Geneva Conventions to protections of victims of armed conflict at sea introduced new constraints in the waging of war at sea.

3. The Paris Declaration of 1856 was important not only for its provisions on neutrality but also for its abolition of privateering, in which a belligerent authorized private shipping to prey upon the enemy's merchant ships.

III. Legal Sources

2.26

The four Geneva Conventions have come to be internationally binding upon all states:

- **Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I);**
- **Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II);**
- **Geneva Convention III Concerning the Treatment of Prisoners of War (GC III);**
- **Geneva Convention IV Concerning the Protection of Civilian Persons in Time of War (GC IV).**

The Geneva Conventions of 1949 have now achieved universal participation with 196 parties in 2020 (there were 193 member states of the UN). Since the Conventions will therefore apply as treaties in almost any international armed conflict, the question of whether their provisions have achieved the status of customary international law might be thought irrelevant. However, customary law status is still highly relevant. For example, the decision of the International Court of Justice in *Nicaragua v US*[144] shows that an international tribunal may sometimes be able to apply rules of customary international law even though it lacks the competence to apply the provisions of a multilateral treaty. Second, in some states (noticeably the UK and many Commonwealth countries, as well as Israel) treaties do not form part of national legislation and cannot be applied by national courts, whereas national courts can and do apply rules of customary international law.[145] It seems likely that most, if not all, of the provisions of the Conventions would now be regarded as declaratory of customary international law.[146]

2.27

> **The 1907 Hague Conventions are binding not only upon the contracting parties, but are widely recognized as customary law. The documents relevant to international humanitarian law are:**
>
> — **Hague Convention IV Concerning the Laws and Customs of War on Land (HC IV), and Annex to the Convention: Regulations Concerning the Laws and Customs of War on Land (HagueReg);**
>
> p. 36 — ↳ **Hague Convention V Concerning the Rights and Duties of Neutral Powers and Persons in Case of War on Land (HC V);**
>
> — **Hague Convention VI Concerning the Status of Enemy Merchant Ships at the Outbreak of Hostilities (HC VI);**
>
> — **Hague Convention VII Concerning the Conversion of Merchant Ships into Warships (HC VII);**
>
> — **Hague Convention VIII Concerning the Laying of Automatic Submarine Contact Mines (HC VIII);**
>
> — **Hague Convention IX Concerning Bombardment by Naval Forces in Times of War (HC IX);**
>
> — **Hague Convention XI Concerning Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (HC XI);**
>
> — **Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War (HC XIII).**

1. The current importance of some Hague Conventions is greater than others. HC IV and the annexed Regulations remain of the utmost importance. Articles 42–56 HagueReg still constitute the principal text on the government of occupied territory and the treatment of property in occupied territory.[147] In addition, the provisions on methods and means of warfare,[148] on spies,[149] on flags of truce, and on armistices[150] retain importance even though for parties to AP I the sections on spies and methods and means of warfare have now been largely superseded. The International Military Tribunal at Nuremberg held that the provisions of the Regulations had become part of customary international law by 1939 and accordingly they are binding on all states. Their application as customary law has been confirmed by the ICJ.[151]

2. By contrast, the provisions of HC III, which require that hostilities should not 'commence without prior and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war' has lapsed in practicing, rendering the provision obsolete. Since 1945,

declarations of war have become virtually unknown[152] and it is difficult to regard HC III as a rule of contemporary customary international law.

3. In some respects, the most important of the Hague Conventions are those dealing with the law of naval warfare and neutrality, although the status of many of their provisions is uncertain today. Their provisions and current legal status are considered in Chapters 17 and 18.

2.28

> **The three Protocols Additional to the Geneva Conventions are designed to reaffirm and develop the rules embodied in the laws of Geneva of 1949 and part of the laws of The Hague of 1907:**
>
> — **Protocol of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of International Armed Conflicts (AP I);**
>
> — **Protocol of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of Non-International Armed Conflicts (AP II); and**
>
> p. 37 — ↳ **Protocol of 8 December 2005 Additional to the Geneva Conventions of 12 August 1949, Relating to the Adoption of an Additional Distinctive Emblem (AP III).**

1. The Additional Protocols of 1977 have not yet reached the near-universal acceptance achieved by the 1949 Geneva Conventions. By 2020, there were 174 parties to AP I and 169 to AP II. However, the US and a number of other significant military powers (such as Iran, Israel, and India) have so far decided not to become parties to AP I.[153] Protocol III, which is far more restricted in its scope, has seventy-six parties.

2. *The legal effects of Additional Protocol I*. AP I was first applicable in the Kosovo conflict in 1999. It was technically only applicable between the Federal Republic of Yugoslavia and those NATO states that had become party to AP I.[154] However, NATO inter-operability requirements meant AP I was generally applied by NATO member states. Moreover, many of AP I's provisions are declaratory of customary international law or reflect general principles of law and are thus applicable in all international armed conflicts.[155] The influence of the declaratory provisions of AP I is illustrated by the 1990–1991 Kuwait conflict. Although the Protocol was not generally applicable to that conflict, since several of the main protagonists including Iraq were not parties, the targeting policy announced by the coalition states reflected Articles 48–57, most of which are widely regarded as declaratory of custom, or as representing developments of customary law which are generally acceptable to the international community.[156] Thus, the coalition made clear that it would attack only military objectives and its announcement of this policy was in terms very similar to those of Article 52 AP I. Coalition announcements that every effort would be made to avoid excessive collateral damage and civilian casualties were also couched in language very similar to that of Articles 51, para. 5, lit. b, and 57.[157] The ICRC's appeals to the parties during the conflict also reflected the language of the Protocol.[158] Even those provisions of AP I that may not yet have achieved the status of rules of customary international law (e.g. the rules on protection of the natural environment in Articles 35, para. 3, and 55) have influenced public opinion and the perceptions of states as to what is permissible in conflict. Thus, reference was made to the environmental provisions of AP I in a number of governmental and ICRC pronouncements during the Kuwait conflict.[159]

p. 38 3. *Additional Protocol II*. AP II lays down rules for certain non-international conflicts (NIAC), developing them beyond the more general provisions of common Article 3 of the 1949 Geneva Conventions. AP II was applicable in the civil war in El Salvador[160] and in 2012 was being applied in Afghanistan by the United Nations Assistance Mission to Afghanistan (UNAMA), NATO, the International Security Assistance Force (ISAF), and Afghan forces.[161] It is also now accepted that many of the rules reflected in AP II are part of customary international law.[162] Certain conceptual controversies remain, however.[163] Article 1 AP II

stipulates that the rules apply in non-international armed conflicts wherein an organized armed group controls territory within a state party to the Protocol. This raises the issue respecting what rules of international humanitarian law apply in other armed conflicts besides international armed conflicts to which the customary law rules of AP I apply as just described. Would AP II rules that are part of customary international law apply beyond the restrictive scope provision of AP II to all non-international armed conflicts? Another serious controversy concerns the implications of AP II targeting and detention rules. Some scholars contend that only the regular armed forces of a state have the so-called 'combatant's privilege' to kill during armed conflict without facing prosecution, so long as international humanitarian law is followed. This position means that regardless of how carefully members of a non-state actor organized armed group comply with the targeting rules of AP II or other customary international law targeting rules, the members will be subject to prosecution at the conclusion of the fighting. Similarly, despite detailed detention rules in AP II, some contend that regardless of how carefully the non-state actor complies with the rules, the non-state group has no right to detain enemy combatants during a non-international armed conflict. Yet, there is little or no state practice demanding that non-state actors who defeat their opponents are subject to enforcement of laws against unlawful killing or arbitrary detention. The better view may be that within an armed conflict, as defined by international law,[164] members of non-state organized armed groups must obey, at the least, the customary law of non-international armed conflict and may claim the belligerent's privilege to kill without warning and detain without trial.

2.29

Other agreements refer to specific issues of warfare and the protection of certain legal assets. The most important documents are:

- **St Petersburg Declaration of 11 December 1868 Renouncing the Use, in Times of War, of Explosive Projectiles under 400 grammes Weight (PetersburgDecl 1868);**
- **Hague Declaration of 29 July 1899 Concerning Expanding Bullets, so-called 'dum-dum bullets' (Dum-Dum Bullets HagueDecl 1899);**

p. 39

- **↳ Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare—Geneva Protocol on Gas Warfare (GasProt);**
- **London Procès-Verbal on 6 November 1936 Concerning the Rules of Submarine Warfare (LondonProt 1936);**
- **Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict—Cultural Property Convention (CultPropConv) with Protocols adopted on 14 May 1954 and 26 May 1999;**
- **Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction—Biological Weapons Convention (BWC);**
- **Convention of 18 May 1977 on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques—ENMOD Convention (ENMOD);**
- **Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCCW, amended on 20 December 2001) with Protocols adopted on 10 October 1980, 13 October 1995, 3 May 1996, and 28 November 2003;**

— **International Convention of 4 December 1989 Against the Recruitment, Use, Financing and Training of Mercenaries (MercenaryConv);**

— **Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical WeaponsConv);**

— **Ottawa Convention of 3 December 1997 on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on their Destruction (LandMinesConv);**

— **Rome Statute of the International Criminal Court of 17 July 1998 (ICC Statute, amended on 10 and 11 June 2010);**

— **Dublin Convention of 30 May 2008 on Cluster Munitions;**

— **Arms Trade Treaty of 2 April 2013;**

— **Treaty on the Prohibition of Nuclear Weapons of 7 July 2017**

1. Most of the agreements listed in this section concern weapons and means of warfare and are dealt with in greater detail in Chapters 6 and 7. The PetersburgDecl 1868 and the HagueDecl 1899 have already been the subject of comment.[165] Both remain in force and are widely regarded as declaratory of customary law.

2. The GasProt 1925 is also still in force and now has more than one hundred signatories. The ban on chemical and biological weapons which it imposed has generally been observed, although Iraq employed poisonous gas in breach of the Protocol on several occasions during the Iran–Iraq War[166] and threatened to do so during the Kuwait conflict. Following the use of gas in the Iran–Iraq War, the ban on chemical and biological weapons was expressly reaffirmed in a resolution adopted by the Paris Conference on the Prohibition of Chemical Weapons in 1989.[167] In 2013, 2017, and 2018, Syrian government forces were charged with using chemical weapons during the civil war. Although the GasProt has attracted a large number of parties, many states have made their acceptance of the Protocol subject to a reservation to the
p. 40 effect that they retain the right to use ↳ chemical weapons in the event that such weapons are first used against them or their allies.[168] These reservations are based on reciprocity, that is a state engaged in a conflict against one of the reserving states would also be entitled to rely upon the reservation to justify a retaliatory use of chemical weapons. The Protocol is therefore at present effective only as a ban on the first use of the weapons to which it applies. The Protocol bans only the use, not the possession of these weapons. Both the possession and use (including retaliatory use) of chemical weapons are, however, unlawful under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993, which is framed in absolute terms.[169] In 2013, Syria joined the Chemical Weapons Convention.

3. The possession of biological weapons was outlawed by the Biological Weapons Convention of 10 April 1972.

4. The Certain Conventional Weapons Convention of 1980 is an umbrella agreement and provisions banning or restricting the use of specific weapons or means of warfare are contained in a series of Protocols annexed to it. As of 2020, there were five Protocols, dealing with weapons which injure with fragments which cannot be detected by X-rays (Protocol I), mines, booby traps, and other devices (Protocol II),[170] certain uses of incendiary weapons (Protocol III), blinding laser weapons (Protocol IV), and explosive remnants of war (Protocol V). A state must accept at least two of the Protocols if it becomes party to the Convention. The Convention provides for the adoption of additional protocols.[171] In 2013, parties took up the topic of a ban on fully autonomous robotic weapons.

5. The ENMOD Convention is designed to prevent the deliberate manipulation of the environment for military purposes (and is thus distinct from the provisions of AP I which concern incidental damage to the environment).

6. The Cultural Property Convention was adopted in 1954 in order to prevent attacks on and the looting of buildings and works of cultural, historical, and religious significance which had been a feature of World War II. In 2020, the Convention had 133 state parties; most major military powers have joined, including the UK in 2017. The principles underlying the Convention are incorporated in Article 53 AP I. The protection of cultural property is dealt with in Chapter 9.

7. The London Procès-Verbal of 1936 is discussed in Chapter 17. Its requirement that submarines should conform to the rules applicable to surface vessels in their dealings with merchant ships was widely disregarded in World War II, and the status of the Procès-Verbal today has therefore been the subject of some controversy. Nevertheless, it seems that the agreement remains valid, although some of the assumptions on which it was based may have changed.[172]

p. 41 8. The Mercenaries Convention develops the provisions of Article 47 AP I, which is discussed in Section 5.03, below.

9. The Landmines Convention is an absolute ban on the possession or use of anti-personnel landmines to which 164 states were party in June 2020. Unlike most of the other treaties considered here, it binds the states party to it irrespective of whether they are engaged in conflict or not and irrespective of whether their adversary is party to the Convention.

10. The Cluster Munitions Convention is also an absolute ban on the possession or use of cluster munitions. Cluster munitions are bombs containing numerous bomblets or submunitions. Their purpose is to deny access of a wider area than may occur with the use of a unitary munition, but inevitably a certain number of submunitions do not explode when the bomb is dropped. These explosive remnants of war have led to deaths even long after a conflict has ended. In 2020, the Cluster Munitions Convention had 107 states party.

11. The unregulated trade in conventional weapons, especially small arms, has long been linked to the prolongation and exacerbation of armed conflicts. In 2013, after many years of effort and several failures, the Arms Trade Treaty (ATT) was adopted, leaving many issues still unsolved. It remains the case, as of time of writing, the trade in bananas is more highly regulated than trade in weapons.[173] In June 2020, it had ninety parties.

2.30

> **Many rules of international humanitarian law are binding as rules of customary international law or general principles of law.**

The extent to which provisions of humanitarian law treaties have become declaratory of custom is considered above.[174]

2.31

> **If an act of war is not expressly prohibited by international agreements or customary law, this does not necessarily mean that it is actually permissible. The Martens Clause, developed by the Livonian Professor Friedrich von Martens (1845–1909), delegate of Tsar Nicholas II at the Hague Peace Conferences, which was included in the Preamble to the 1907 Hague Convention IV and reaffirmed in the 1977 Additional Protocol I and other international treaties, provides as follows:**

> **'In cases not covered by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'**

1. The Martens Clause[175] was originally devised to cope with a disagreement between the parties to The Hague Peace Conferences regarding the status of resistance movements in occupied territory.[176] Those
p. 42 states which had argued that inhabitants of occupied territory ↳ who took up arms against the occupying forces should be treated as lawful combatants had been unable to obtain a majority for their proposal, and the provisions on combatant status in Articles 1 and 2 HagueReg did not include resistance fighters in the list of those entitled to combatant status. The Martens Clause was seen by many states as a reminder that Articles 1 and 2 should not be seen as the last word on the subject of combatant status and that the question of whether resistance fighters were entitled to that status should not be decided simply by pointing to their omission from Articles 1 and 2 but should be resolved by reference to '*des principes du droit des gens, tels qu'ils resultent des usages établis entre nations civilisées, des lois d'humanité et des exigences de la conscience publique*'.[177] Today, however, the Martens Clause is applicable to the whole of humanitarian law and it appears, in one form or another, in most of the modern treaties on humanitarian law.[178]

2. The exact significance of the Clause is more difficult to assess. It certainly means that the mere omission of a matter in a treaty does not mean that international law should necessarily be regarded as silent on that subject, and serves as a reminder that the adoption of the treaty in question does not preclude protection by customary international law. What is not clear is whether the Martens Clause goes further and introduces into humanitarian law a rule that all weapons and means of warfare are to be judged against the standard of 'the public conscience' even if their use does not contravene the specific rules of customary international law such as the unnecessary suffering principle.[179] Some observers view this standard as impracticable since 'the public conscience' is arguably too vague a concept to be used as the basis for a separate rule of law and has attracted little support.[180] With rapid technological and other developments resulting in dramatic social change, the Martens Clause is being newly appreciated. As new weapons and launch systems continue to be developed, incorporating ever more sophisticated robotic and computer technology, as well as military uses of outer space, the venerable Martens Clause will ensure that that technology will not outpace the law.

IV. Humanitarian Requirements and Military Necessity

2.32

> **In armed conflict, a belligerent may apply only that amount and kind of force necessary to defeat the enemy. Acts of war are only permissible if they are directed against military objectives, if they are not likely to cause unnecessary suffering, and if they are not perfidious.**

1. *Necessity and proportionality in humanitarian law*. The principle that a belligerent may apply only that amount and kind of force necessary to defeat the enemy prohibits unnecessary or wanton application of force and is a long-established principle of humanitarian law. Thus, Articles 14–16 of the Lieber Code[181]
p. 43 make clear that only the necessary ↳ use of force against persons and property is permissible. Similarly, the *US Naval Manual* (1997) states, as general principles of law, that: '(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 partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources is prohibited.'[182] These general principles are the basis for numerous specific rules of humanitarian law, such as the prohibition of the use of weapons and means of warfare likely to cause unnecessary suffering (Article 23, lit. e, HagueReg), the prohibition of

the unnecessary destruction of property (Article 23, lit. g, HagueReg), and the principle that even military objectives should not be attacked if this would cause excessive civilian casualties or damage to civilian objects (Article 51, para. 5, lit. b, AP I).[183]

2. *The effects of the* jus ad bellum. The changes in the *jus ad bellum* brought about by the UN Charter[184] have added a new emphasis to this principle of military necessity.[185] Under the UN Charter, a state which is entitled to exercise the right of self-defence is justified only in seeking to achieve the goals of defending itself immediately and taking reasonable measures to provide for its future security in light of the nature of the violation of Article 2(4).[186] The defending state may use necessary force (within the limits of humanitarian law) to recover any part of its territory which has been occupied as the result of its adversary's attack and put an end to attacks. It is most unlikely that securing the complete submission of the adversary would ever meet the standard of necessity. Thus, the right of the UK to use force in response to Argentina's invasion of the Falkland Islands could not have justified the UK in seeking the complete submission of Argentina. The only legitimate goal permitted by the inherent right of self-defence was the recovery of the Islands and their protection from further attack. Similarly, with respect to the liberation of Kuwait from Iraqi occupation in 1991, invasion for purposes of regime change would have violated the prohibition on the use of force.

3. *Necessity*. The humanitarian law principle of necessity and the limitations which form part of the right of self-defence, taken together, produce the following result: (1) the humanitarian law principle of necessity forbids a state to employ force in an armed conflict beyond what is necessary for the achievement of the military goals of that state; and (2) the modern *jus ad bellum* contained in the UN Charter limits those lawful goals to the defence of the state (including its territory, citizens, and shipping).

a) In other words, a state may use only such force (not otherwise prohibited by humanitarian law) as is necessary to achieve the goals permitted by the right of self-defence.[187] In that sense, the *jus ad bellum* has an effect upon the conduct of hostilities as well as upon the initial right to resort to force.[188] That does not
p. 44 mean that a state which is the victim of ↳ an armed attack and exercises its right of self-defence must always fight on its adversary's terms. A state acting in self-defence may take the fighting to its adversary's territory if that is necessary to recover territory of its own or to ensure its defence. What it does mean is that such action will be lawful only if, in the circumstances, it is necessary for the defence of that state.

b) It follows that, even if the legal basis for the coalition's use of force against Iraq in 1991 had been the right of collective self-defence with Kuwait,[189] that would not have prevented the coalition states from sending forces into Iraq itself rather than launching a frontal attack upon the Iraqi forces in Kuwait, since outflanking the Iraqi forces offered the possibility of achieving the liberation of Kuwait with far fewer coalition and civilian casualties than would otherwise have been sustained. In fact, however, the legal basis for the coalition operations against Iraq was the mandate granted to the coalition states by the Security Council in Resolution 678 (1991). The permitted goals of the coalition states were laid down by the Council in that resolution: the expulsion of Iraqi forces from Kuwait, ensuring Iraqi compliance with all relevant Security Council resolutions, and the restoration of peace and security in the region. Where a state uses force under a mandate from the Security Council, it may use only such force (not otherwise prohibited by humanitarian law) as is necessary to achieve the objectives set out (expressly or impliedly) in that mandate.

The objective in the case of the liberation of Kuwait was to push Iraqi armed forces out of Kuwait and to ensure that they would not immediately retake the country. This second consideration permitted the establishment of a defensive perimeter on Iraqi territory. Holding more Iraqi territory or advancing all the way to Baghdad to topple the government there would have constituted excessive force, well beyond what was militarily necessary in defending Kuwait.[190] The intervention in Libya in 2011, while authorized by the UN Security Council, exceeded the Council's mandate of civilian protection. NATO forces supported the removal of Libya's leader Muamar Ghaddafi. Ghaddafi was murdered by a mob and a civil war ensured,

continuing for years. Regime change did not protect civilians; it led to high numbers of civilian deaths and injury.

4. *Distinction and perfidy*. Section 2.32 also refers to two other general principles of great importance. The principle of distinction requires states to distinguish between combatants and military objectives on one hand, and non-combatants and civilian objects on the other, and to direct their attacks only against the former.[191] The principle of perfidy forbids the use of treacherous methods and means of warfare.[192]

2.33

> **International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity. Considerations of military necessity cannot, therefore, justify ↳ departing from the rules of humanitarian law in armed conflicts to seek a military advantage using forbidden means.**

p. 45

2.34

> **Any exception to the prescribed behaviour for reasons of military necessity shall be permissible only if a rule of international humanitarian law expressly provides for such a possibility. The Hague Regulations Concerning the Laws and Customs of War on Land, for instance, prohibit the destruction or seizure of enemy property, 'unless such destruction or seizure be imperatively demanded by the necessities of war' (Article 23, lit. g, HagueReg).**

1. Although it was at one time contended by some writers that the necessities of war prevailed over legal considerations,[193] this argument has now been decisively rejected.[194] Thus, the US Military Tribunal in *US v List* ruled that 'military necessity or expediency do not justify a violation of positive rules'[195] and a similar approach was adopted in many other war crime trials after World War II.[196] AP I also makes clear that military necessity can never justify the killing of prisoners of war, even when these prisoners have been captured by special forces units who cannot evacuate them in the manner required by GC III. Article 41, para. 3, AP I provides that in such circumstances the prisoners must be released and 'all feasible precautions shall be taken to ensure their safety'. The reference to 'all feasible precautions' illustrates that many of the rules of humanitarian law already make allowance for considerations of military necessity. In such cases, military necessity does not override the law; it is an integral part of it. The existence of these rules shows that considerations of military necessity have already been taken into account in framing the rules of humanitarian law, which are intended to achieve a balance between military necessity and the requirements of humanity. A state cannot, therefore, be allowed to invoke military necessity as a justification for upsetting that balance by departing from those rules.

2. Indeed, as Section 2.32 makes clear, far from justifying a state in acting contrary to humanitarian law, the principle of necessity operates as an additional level of restraint by prohibiting acts which are not otherwise illegal, as long as they are not necessary for the achievement of legitimate goals. Similarly, considerations derived from the Charter cannot justify a departure from the rules of humanitarian law.[197]

p. 46

3. It should not be assumed, however, that humanitarian law and military requirements will necessarily be opposed to one another. On the contrary, most rules of humanitarian law reflect good military practice, and adherence by armed forces to those rules is likely to reinforce discipline and good order within the forces concerned.[198]

V. Binding Effect of International Law for the Soldier

2.35

> **The obligations of a state under international humanitarian law are binding not only upon its government and its supreme military command but also upon every individual.**

It has long been recognized, in distinction to other areas of international law, that international humanitarian law binds not only the state and its organs of government but also the individual. Thus, the individual soldier or civilian who performs acts contrary to humanitarian law is criminally responsible for those acts and liable to trial for a war crime.[199] This criminal responsibility for violations of humanitarian law applies to members of the armed forces of all ranks. By contrast, the trials held after World War II established that only those individuals at the highest levels of government and the supreme military command could be convicted of crimes against the peace, that is, the deliberate violation of the *jus ad bellum*.[200]

2.36

> **Basic rules of international humanitarian law are classic examples of peremptory norms (*jus cogens*), so that any other rule which conflicts with such basic rules is void.**

It can easily be argued that the fundamental principles of the *jus in bello* have become norms of *jus cogens*, that is, norms from which no derogation is permitted.[201] However, many of the more detailed rules of humanitarian law do not have that status. Moreover, while ordinary norms of international law yield if they conflict with norms of *jus cogens*, on closer examination very few norms do in fact so conflict. For example, the rules of international law on state immunity do not conflict with the prohibition of torture[202] or other prohibitory rules since they do not purport to legitimize such conduct, only to determine the forum in which attempts to enforce such norms can be made.

2.37

> **Apart from these basic rules, all members of the armed forces are obliged to comply and ensure compliance with all rules of international humanitarian law binding upon their state.**

The duty not merely to comply but to ensure compliance by others is stated in common Article 1 GC I–IV and Article 1 AP I.

2.38

> **The four Geneva Conventions and the Protocols Additional to them oblige all contracting parties to disseminate the text of the Conventions as widely as possible (Article 47 GC I; Article 48 GC II; Article 127 GC III; Article 144 GC IV; Article 83, para. 1 AP I; Article 19 AP II; Article 7 AP III). This shall particularly be accomplished through programmes of instruction for the armed forces and by encouraging the civilian population to study these Conventions (Article 83, para. 1, AP I). Considering their responsibility in times of armed conflict, military and civilian authorities shall be fully acquainted with the text of the Conventions and the Protocols Additional to them (Article 83, para. 2, AP I). Members of the armed forces shall be instructed in their rights and duties under international law in peacetime and in times of armed conflict.**

2.39

> **Instruction of soldiers in international law should be conducted in the military units by senior officers and legal advisers and at the armed forces schools by teachers of law. The emphasis must be made on teaching what is related to practice. Soldiers should be instructed, using examples, in how to deal with the problems of and the issues involved in international law. The purpose of this instruction is not only to disseminate knowledge, but also and primarily to develop an awareness of what is right and what is wrong. The soldier must be taught to bring his conduct into line with this awareness in every situation.**

2.40

> **The commanding officer must ensure that all subordinates are aware of their duties and rights under international law. Commanders are obliged to prevent, and where necessary to suppress or to report to competent authorities, breaches of international law (Article 87 AP I). They are supported in these tasks by a legal adviser (Article 82 AP I).**

A commanding officer has a duty to ensure that the forces under his command conduct themselves in accordance with the rules of international humanitarian law. In the case of *Yamashita*,[203] the US Supreme Court held that General Yamashita was guilty of a war crime for failing to control the troops under his command and to prevent the atrocities which they committed in areas occupied by the Japanese army. This principle has now been incorporated into the leading texts on international criminal law such as the Statute of the International Criminal Court (Articles 25 and 28) and the International Criminal Tribunal for the Former Yugoslavia (Article 7).

2.41

> **It shall be the duty of a member of the armed forces to follow the rules of international humanitarian law. With whatever means wars are being conducted, the soldier will always be obliged to respect and observe the rules of international law and to base all actions upon them. If, in a situation, there is doubt as to what international law prescribes, the issue shall be referred to the superior officer to decide. If this is not possible, the soldier will always be right to let himself or herself be guided by the principles of humanity and to follow their conscience.**

The statement that the rules of humanitarian law must be obeyed 'whatever means' are used to prosecute a war is of the utmost importance. The fact that a conflict is labelled 'total war', 'guerrilla warfare', 'asymmetrical war', or 'war of national liberation' does not alter the duty to comply with the rules of humanitarian law. The use of nuclear weapons is also subject to the rules of humanitarian law, suggesting to many that the use of such weapons could never be lawful.[204]

2.42

> **The soldier shall avoid inhumanity even in combat and refrain from using force against defenceless persons and persons needing protection, and from committing any acts of perfidy and brutality. Soldiers shall look upon wounded opponents as fellow persons in need. They shall respect prisoners of war as opponents fighting for their country. They shall treat the civilian population as they would wish civilians, civilian property, and cultural property of their own people to be treated by the adversary. Similar respect shall be shown to foreign property and cultural assets.**

This section states some of the basic principles of humanitarian law, the details of which are elaborated in later chapters. The duty to avoid inhumanity even in combat is particularly significant. Although many of the provisions of the Geneva Conventions deal with events outside the immediate combat zone, even in the

heat of combat humanitarian law requires that certain standards be observed, for example that quarter be given to anyone who clearly evinces an intention to surrender (Article 40 AP I) and that enemy combatants who are incapacitated by wounds should not be made the object of attack (Article 12, para. 1, GC I; Article 12, para. 1, GC II). The final sentence of the section should not be read as implying a principle of reciprocity: the soldier is required to treat enemy civilians as he or she would want their own people to be treated by the enemy, not as the enemy actually treats them. Apart from the law of reprisals,[205] failure by the forces of a state to comply with humanitarian law does not release their adversaries from their obligations.

2.43

> **Superiors shall only issue orders which are in conformity with international law. Superiors who issue an order contrary to international law expose not only themselves but also their subordinates obeying these orders to the risk of being prosecuted (Article 86 AP I).**

An officer, of whatever rank, who orders the commission of an unlawful act is guilty of a war crime, as is the soldier who carries out that order. The 'grave breaches' provisions of the Geneva Conventions and AP I stipulate that ordering the commission of an act amounting to a grave breach is itself a grave breach.[206]

2.44

> **An order is not binding if:**
>
> — **it violates the human dignity of the third party concerned or the recipient of the order;**
>
> — **it is not of any use for service; or**
>
> — **in the particular situation, the soldier cannot reasonably be expected to execute it.**

Orders which are not binding need not be executed by the soldier. Moreover, it is expressly prohibited to obey orders whose execution would be a crime.

2.45

> **Grave breaches of international humanitarian law (Article 50 GC I; Article 51 GC II; Article 130 GC III; Article 147 GC IV; Article 85 AP I) shall be penal offences under national law.**

2.46

> **A plea of superior orders shall not be a good defence if the subordinate realized or should have realized that the action ordered was a crime (see also Article 33 ICC Statute).**

2.47

> **Punishment for disobedience or refusal to obey is proscribed if the order is not binding.**

These sections state two principles of particular importance:

a) A member of the armed forces who commits an unlawful act is not relieved of criminal responsibility merely because he or she was carrying out an order. Superior orders do not provide a general defence to liability for war crimes, a point established in the Nuremberg and Tokyo trials and applied in numerous other war crimes trials after World War II.[207] A soldier who carries out an order by action which is illegal under international humanitarian law is guilty of a war crime, provided that he was aware of the circumstances which made that order criminal or could reasonably have been expected to be aware of them. Superior orders may, however, amount to a factor mitigating the level of punishment.

b) A member of the armed forces has no legal obligation to obey an order which would result in a grave breach of international humanitarian law. On the contrary, he or she is legally obliged not to carry out such an order (see below, commentary to Section 21.36).

VI. Tasks of the Legal Adviser

2.48

> **States must ensure that legal advisers are available, when necessary:**
>
> — **to advise military commanders in all matters pertinent to military law and international law;**
>
> — **to examine military orders and instructions on the basis of legal criteria;**
>
> — **to participate in military exercises as legal officers whose duties include giving advice on matters pertinent to international law; and**
>
> — **to give legal instruction to soldiers of all ranks, particularly including the further education in the rules of international humanitarian law.**

2.49

> **Legal advisers should have direct access to the commander to whom they are assigned. The commander may give directives to a legal adviser only with respect to general aspects of duty.**

2.50

> **The legal advisers receive directives and instructions pertinent to legal matters only from their supervising legal adviser, via the legal specialist chain of command.**

2.51

> **A legal adviser may additionally exercise the functions of a Disciplinary Attorney for the Armed Forces. In the case of a severe disciplinary offence the legal adviser may then conduct the investigation and bring the charge before the military disciplinary court. Such a disciplinary offence may include a grave breach of international law which in addition to its criminal quality also has a disciplinary significance.**

Article 82 AP I requires the parties to the Protocol to ensure that legal advisers are available at all necessary times 'to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject'.[208]

Notes

1 For more on the prohibition on the use of force in contemporary international law, *see* O. Corten, *Le Droit contre la Guerre*, 2nd edn (Paris: Pedone, 2014); M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (OUP, 2015); K. Watkin, *Fighting at the Legal Boundaries* (OUP, 2016); C. Gray, *International Law and the Use of Force*, 4th edn (OUP, 2018); C. Henderson, *The Use of Force and International Law* (CUP, 2018); and M. E. O'Connell, *The Art of Law in the International Community* (CUP, 2019), chapters 2–5.

2 For a discussion of this question by various writers, *see* A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*

(Oceana, 1979).

3 On the exclusion of minimal uses of force, *see* M. E. O'Connell, 'The Prohibition of the Use of Force', in N. D. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello, and Jus Post Bellum* (Cheltenham, UK: Edward Elgar, 2013), 107. But *see* T. Ruys, 'The Meaning of Force and the Boundaries of the Jus Ad Bellum: Are Minimal Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108 *AJIL* 159, 163, and response in M. E. O'Connell, 'The True Meaning of Force' (2014) *AJIL Unbound* 108, 141–4.

4 Following NATO's use of force against Serbia in the 1999 Kosovo crisis, several governments raised the possibility of a new exception to the Charter prohibition for the use of force to respond to humanitarian crises. With the adoption of the World Summit Outcome Document in 2005, UN GAOR, 60th Session, UN Doc. A/60/L.1 (15 September 2005), at 22–3, and the Security Council's authorization of humanitarian intervention in Libya in SC Res. 1973 (2011), paras 1 and 6, consensus has developed that the right to use force in such cases is conditioned upon Security Council authorization. In 2018, the UK argued that a missile attack on Syria was justified 'to relieve humanitarian suffering'. The US and France, which joined the operation, issued no legal justification.

7 SC Res. 661 (1990).

8 SC Res. 748 (1992). *See* also the decisions of the ICJ in the *Lockerbie* cases (n. 6).

9 SC Res. 757 (1992).

10 *See* SC Res. 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), and 1929 (2010). Following the 2015 Nuclear Accord, the Security Council lifted most sanctions on Iran by SC Res. 2231 (2015), para. 23.

11 For example, SC Res. 665 (1990).

12 SC Res. 827 (1993).

13 SC Res. 955 (1994).

14 SC Res. 2020 (2011). The resolution only cites Chapter VII in general, not specific articles within Chapter VII, as has been the practice of the Security Council for many years.

15 D. W. Bowett, *UN Forces* (Praeger, 1964), 12.

16 For example, in the Congo. On the application of international humanitarian law to UN forces, *see* below, Section 21.09.

17 Bowett (n. 15), 29.

18 C. Greenwood, *Essays on War in International Law* (Cameron May, 2006), 593.

19 In Korea, sixteen states contributed forces. The coalition forces in the Kuwait conflict were drawn from twenty-eight states.

20 SC Res. 84 (1950).

21 O. Schachter, 'United Nations Law in the Gulf Conflict' (1991) 85 *AJIL* 452; E. V. Rostow, 'Until What? Enforcement Action or Collective Self-Defense?' (1991) 85 *AJIL* 506; C. Greenwood, 'New World Order or Old?' (1992) 55 *Modern Law Review* 153.

22 The Vienna Convention on the Law of Treaties provides that treaties shall be interpreted in light of their context, object, and purpose. Together with the context 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account, Art. 31(3)(b).

23 W. L. Reisman and D. L. Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes' (1998) 9 *EJIL* 86. *See* also J. Farrall and H. Charlesworth (eds), *Strengthening the Rule of Law through the Security Council* (Routledge, 2014).

24 SC Res. 678 (1990), para. 2.

25 J. Gardam, *Necessity and Proportionality and the Use of Force by States* (CUP, 2004).

26 Human Rights Watch, 'Jenin: IDF Military Operations' (2002) 14 no. 3(E) *HRW Report*, http://www.hrw.org/reports/2002/israel3/index.htm (citing ICRC, Commentary on Protocol I, p. 396).

27 C. Greenwood, 'The Legality of the Use of Force: Iraq in 2003', in M. Bothe, M. E. O'Connell, and N. Ronzitti (eds), *Redefining Sovereignty: The Use of Force after the Cold War* (Transnational Publishers, 2005), 387–416. For criticism of this position, *see* Lord Alexander of Weedon, 'Iraq: the Pax Americana and the Law' [2003] *Justice Annual Lecture*, https://justice.org.uk/iraq-the-pax-americana-and-the-law/; V. Lowe, 'The Iraq Crisis: What Now?' (2003) 52 *ICLQ* 859; T. M. Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *AJIL* 607.

28 The support for this view was strengthened by revelations that UK Prime Minister Tony Blair had been advised by the Attorney General that new authorization was needed. *See* R. Norton-Taylor, 'Revealed: The Government's Secret Legal Advice on the Iraq War', *Guardian* (London, 28 April 2005), 1.

29 The General Assembly asserted such a power for itself in its 1950 Resolution on Uniting for Peace, UNGA Res. 377 (V), but this claim was questioned by the ICJ in the *Certain Expenses Advisory Opinion*, *ICJ Reports 1962*, 151, and has not been repeated in more recent times.

30 *See*, e.g., SC Res. 1368 (2001) and 1373 (2001).

31 World Summit Outcome Document (n. 4).

5 ICJ, *Corfu Channel* case, *ICJ Reports 1949*, 3.

6 Decisions of the Council adopted under Chapter VII of the Charter are capable of creating legally binding obligations for

states (*see* Arts 2(5) and 25 of the Charter); by virtue of Art. 103, the obligation to carry out the decisions of the Council, as an obligation arising under the Charter, prevails over obligations under other international agreements; *see* the ICJ Orders in the *Lockerbie* cases (*Libya v UK; Libya v US*), *ICJ Reports 1992*, 3 at para. 39, and 114 at para. 42.

34 M. Bothe, 'Neutrality at Sea', in I. Dekker and H. Post (eds), *The Gulf War of 1980–1988* (Nijhoff, 1992), 209.

35 *Oil Platforms* (*Iran v US*), 2003 ICJ 161, para. 74, (6 November) (citing *Nicaragua v US*, para. 194); C. Greenwood, 'The Relationship Between *jus ad bellum* and *jus in bello*' (1983) 9 *Review of International Studies* 221, 223.

36 *See* Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Arts 22, 49–54. *See* also T. D. Gill, 'The Forcible Protection, Affirmation and Exercise of Rights by States Under Contemporary International Law' (1992) 23 *NethYIL* 105, 125.

37 Greenwood, *Essays* (n. 18), at 409.

38 M. E. O'Connell, 'Lawful Self-Defense to Terrorism' (2002) 63 *University of Pittsburgh Law Review* 889, 889–904. *See* generally M. E. O'Connell, D. Tladi, and C. Tams, *Self-Defence Against Non-State Actors* (CUP, 2019).

39 R. Y. Jennings, 'The Caroline and McLeod Cases' (1938) 32 *AJIL* 82.

40 *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ at 245, para. 41 (quoting *Nicaragua* (n. 33) 94, para. 176). *See* also, E. P. J. Myjer and N. D. White, 'The Twin Towers Attack: An Unlimited Right to Self-Defense?' (2002) 7 *JCSL* 5.

41 Compare D. W. Bowett, *Self-Defence in International Law* (Praeger, 1958), with I. Brownlie, *International Law and the Use of Force by States* (OUP, 1963).

42 *See*, e.g., the *Caroline* dispute between Britain and the US in 1837, Jennings (n. 39).

43 For an assessment of this practice, *see* C. Gray, 'The Charter Limitations on the Use of Force: Theory and Practice', in V. Lowe, A. Roberts, J. Welsh, and D. Zaum (eds), *The UN Security Council and War* (OUP, 2008), 86–98.

44 'Le general Rabin ne pense pas que Nasser voulait la guerre', *Le Monde* (19 February 1968).

45 Debate of 12 June 1981, S/PV 2280, and SC Res. 487 (1981).

46 Office of the President, 'The National Security Strategy of the United States of America' (2002), http://georgewbush-whitehouse.archives.gov/nsc/nss/2002.

47 *See*, e.g., the statement by Lord Goldsmith, the Attorney General of England and Wales, that the UK's position was that 'international law permits the use of force in self-defence against an imminent attack but does not authorize the use of force to mount a pre-emptive strike against a threat that is more remote'. It is important to note, however, that he added 'those rules must be applied in the context of the particular facts of each case', House of Lords debate, 21 April 2004.

48 Office of the President, 'The National Security Strategy of the United States of America' (2006), http://georgewbush-whitehouse.archives.gov/nsc/nss/2006.

49 Office of the President, 'The National Security Strategy' (2010), https://obamawhitehouse.archives.gov/the-press-office/advancing-our-interests-actions-support-presidents-national-security-strategy.

50 Office of the President, 'The National Security Strategy' (2017) 11, https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.

51 O'Connell (n. 1), chap. 2.

52 *Nicaragua* (n. 33).

53 UN Doc. S/15016.

54 SC Res. 661 (1990).

55 For a view that Art. 51 must be referring to 'effective measures' by the Security Council, *see* D. W. Greig, 'Self-Defence and the Security Council' (1991) 40 *ICLQ* 366.

56 Brownlie (n. 41), 434.

57 H. Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 *RdC* 451.

58 For an excellent general overview of these two principles, *see* Gardam (n. 25).

32 The authors cited above (n. 1) all include analysis of self-defence. *See* also, generally, M. E. O'Connell, 'The Right of Self-Defense in International Law', in A. Carty (ed.), *International Law*, Oxford Bibliographies Online (OUP, 2019), https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0028.xml.

33 ICJ, *Military and Paramilitary Activities* (*Nicaragua v US*), 27 June 1986, *ICJ Reports 1986*, 14, at para. 195. The Court cites Art. 3 of the Definition of Aggression, annexed to UNGA Res. 3314 (1975). *See* also T. Ruys, *Armed Attack and Article 51 of the UN Charter* (CUP, 2010).

59 For example, India asserted such a right in the Bangladesh conflict in 1971, Vietnam in the case of Cambodia in 1979, and Tanzania in the case of Uganda in 1979. All three states also claimed self-defence, however. *See* generally, Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP, 2001).

60 *See* Greenwood, *Essays* (n. 18), at 593.

61 Ibid.

62 Lord Goldsmith (n. 47).

63 UK Prime Minister's Office, Syria Action—UK Government Legal Position, 14 April 2018,

https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position.

64 SC Res. 1973 (2011), paras 1, 6.

65 Ibid. Germany abstained in the vote and from participation in the action because it did not meet the principle of necessity, in the German view. Germany was correct in that only a minimal attempt had been made to resolve the Libyan crisis through negotiation.

66 K. Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart Publishing, 2011), 60.

67 *See* Section 2.26 below.

68 *See* Section 2.27 below.

69 *See*, e.g. *US v List*, 15 Annual Digest (1948), 632 and the *Singapore Oil Stocks* case, 23 *ILR* (1956), 810. *See* also the moving argument for equal application of IHL in T. Taylor, *Nuremberg and Vietnam: An American Tragedy* (Random House, 1970).

70 H. Lauterpacht, 'The Limits of the Operation of the Laws of War' (1953) 30 *BYIL* 206, 212; *see* also C. Greenwood, 'jus ad bellum and jus in bello' (n. 35).

71 Bowett, *UN Forces* (n. 15), 484; *see* Chapter 20 below.

72 H. P. Gasser, 'Humanitarian Law, International' (2015), *MPEPIL*.

73 For a description of what constitutes 'war' or 'armed conflict under international law', *see* the International Law Association Committee on the Use of Force, Report on the Meaning of Armed Conflict in International Law (2010), http://www.ila-hq.org/en/committees/index.cfm/cid/1022. *See* also the book written to accompany the report, M. E. O'Connell (ed.), *What is War? An Investigation in the Wake of 9/11* (Nijhof/Brill, 2012).

74 An important exception is some of the weapons treaties, notably the Biological Weapons Convention, the Chemical Weapons Convention and the Landmines Convention, which impose absolute obligations on the states party to them.

75 Many provisions of AP I are, however, declaratory of customary law or were general principles of law and as such applicable to all states in the Kuwait conflict (*see* commentary to Section 2.30 and *CIHL*); in the ISAF mission in Afghanistan, AP II, and all other provisions of Customary IHL applicable to a non-international armed conflict are in force, *see* Rule of Law in Armed Conflicts Project, 'Afghanistan: Applicable International Law', http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=1.

76 J. S. Pictet, *The Geneva Convention of 12 August 1949, Commentary*, Vol. IV (ICRC 1958), 15.

77 R. Kolb, 'The Main Epochs of Modern International Humanitarian Law Since 1864 and their Related Dominant Legal Constructions' in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Routledge, 2013), 52–3.

78 For the special case of reprisals, *see* Sections 7.42–7.45, and 21.08.

79 A. H. Robertson, 'Humanitarian Law and Human Rights', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (ICRC/Nijhoff, 1984), 793 and R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Routledge, 2013).

80 This has been reaffirmed by the ICJ in its advisory opinions on *Nuclear Weapons*, *ICJ Reports 1996*, 226, at para. 25 and *Legal Consequences of the Construction of a Wall*, *ICJ Reports 2004*, 136, paras 102–42 [106]. The ICJ also confirmed the point in contentious cases, *Armed Activities on the Territory of Congo* (*DRC v Uganda*); *ICJ Reports 2005*, 168, para. 216, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (*Bosnia & Herzegovina v Serbia & Montenegro*) *ICJ Reports 2007*, 43, para. 147 and *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (*Georgia v Russia*) *ICJ Reports 2008*, general list 140, para. 182. The same finding has been made by regional human rights courts, most notably by the European Court of Human Rights in *Al-Skeini and Others v UK* Application no. 55721/07 (ECtHR, 7 July 2011). *See* also, L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, 2011). Doswald-Beck discusses Israeli arguments against concurrent application of international humanitarian law and human rights law, as well as the inconsistent positions of the US. She concludes that neither state is a persistent objector to the concurrent application rule. Ibid. at 8.

81 *ICJ Reports 1996*, 226, para. 25.

82 Report of the Office of the High Commissioner on the outcome of the expert consultation on the issue of protecting the human rights of civilians in armed conflict, 2 June 2010, UN Doc. A/HRC/14/40, §§ 1–2.

83 Nevertheless, it would be unrealistic to think that the legality of the resort to armed force has no influence on perceptions and assessments of the conduct of armed conflict or vice versa. For a general discussion of the interrelationship of the three sets of rules discussed in this chapter, *see* W. Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum' (2007) 40 *Israel Law Review* 592.

84 *See* the decision of the Privy Council in *Public Prosecutor v Oie Hee Koi* (4 December 1967), 42 *ILR*, 441.

85 H. S. Levie, 'Prisoners of War in International Armed Conflict' (1978) 59 *International Law Studies* 74–6; R. R. Baxter, 'The Privy Council on the Qualifications of Belligerents' (1969) 63 *AJIL* 290.

86 H. Lauterpacht (ed.), *Oppenheim's International Law. Vol. II: Disputes, War and Neutrality*, 7th edn (David McKay, 1952),

252–3.

87 *See* Section 2.37.

88 *See* Sections 21.10–21.15.

89 *See* Art. 49, para. 3, AP I. The advent of unmanned underwater vehicles may affect these conclusions. *See* M. Schmitt and D. Goddard, 'International Law and the Military Use of Unmanned Maritime Systems' (2016) 98(2) *IRRC* 567–92.

90 *San Remo Manual* 1994.

91 *See HPCR Manual* 2009.

92 *See* E. Lauterpacht, 'The Legal "Irrelevance" of the State of War' (1968) 62 *Proceedings of the American Society of International Law* 58; P. M. Norton 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 *Harvard Journal of International Law* 249.

93 *See* below, Chapter 18.

94 J. H. W. Verzijl, *International Law in Historical Perspective*, Vols IX and X: The Laws of War (Leiden: Sijthoff, 1978); L. Friedman (ed.), *The Law of War: A Documentary History*, two vols (Random House, 1972). A. Gillespie, *A History of the Laws of War*, vols I–III (Oxford and Portland: Hart, 2011).

95 F. Münch, 'War, Laws of History' IV *Encyclopedia of Public International Law* (Amsterdam: Elsevier, 2000), 1386–8.

96 T. E. Holland, *Studies in International Law* (Oxford: Clarendon Press, 1898), 40.

99 *See* Sections 3.03 and 3.47–3.50.

100 *See* Chapter 3 below.

101 Art. 23, lit. a, HagueReg and GasProt.

97 N. Singh, 'Armed Conflicts and Humanitarian Law of Ancient India', in Swinarski (ed.), above (n. 79), 531; *see* also, H. Grotius, *De Jure Belli ac Pacis* (first published in 1625, translated by A. Campbell, London: Hyperion, 1990), Book III, Chapter XI, § XI.

98 E. Bello, *African Customary Humanitarian Law* (Geneva: ICRC, 1980).

102 *See* e.g. M. Khadduri, *War and Peace in the Law of Islam* (Baltimore: John Hopkins University Press, 1955); K. Nabulsi, *Traditions of War. Occupation, Resistance, and the Law* (OUP, 1999); A. Al-Dawoody, 'Islamic Law and International Humanitarian Law: An Introduction to the Main Principles' (2018) 99, issue 906 *IRRC* 995–1018.

103 S. Runciman, *The Fall of Constantinople* (CUP, 1969), 152.

104 J. von Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939) 33 *AJIL* 665; F. H. Russell, *The Just War in the Middle Ages* (CUP, 1975).

105 Von Elbe (n. 104), 669.

106 M. H. Keen, *The Laws of War in the Late Middle Ages* (Routledge, 1965); G. I. A. D. Draper, 'The Interaction of Christianity and Chivalry in the Historical Development of Law of War' (1965) 7 *IRRC* 3.

107 *See* G. Parker, 'Early Modern Europe', in M. Howard et al. (eds), *The Laws of War* (Yale University Press, 1994), 40, 51–5.

108 Grotius, above (n. 97).

109 Holland, above (n. 96), 40.

110 F. de Vitoria, *De Indis De Jure Belli* (originally published 1532, reprinted E. Nys (ed.), Oceana, 1964), http://en.wikisource.org/wiki/De_Indis_De_Jure_Belli.

111 J.-J. Rousseau, *Du Contrat Social ou Principes du Droit Politique* (1762), Livre I, Chapitre IV.

112 G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Methuen, 1983), 31–127.

113 *See* Section 21.24.

114 *See* Sections 2.18 and 2.19.

115 D. Schindler and J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 4th edn (Nijhoff, 2004), 3. *See* also R. S. Hartigan, *Lieber's Code of the Law of War* (Chicago: Precedent Publishing, 1983) and J. F. Witt, *Lincoln's Code, The Laws of War in American History* (Free Press, 2012).

116 Art. 15.

117 Arts 22–3 and 34–8.

118 Art. 49.

119 Arts 49–59.

120 Arts 105–47.

121 *See* the website of the International Committee of the Red Cross, icrc.org; G. Willemin, R. Heacock, and J. Freymond, *The International Committee of the Red Cross* (Nijhoff, 1984); P. Boissier, *From Solferino to Tsushima* (Henry Dunant Institute, 1985); A. Durand, *Histoire du Comité international de la Croix-Rouge*, two vols (Henry Dunant Institute, 1978).

122 *See* Chapter 12 below.

123 The Red Diamond was added in AP III of 2005, which entered into force in 2007.

124 F. Kalshoven, 'Arms, Armaments and International Law' [1985 II] 191 *RdC* 183, 205. *See* also R. L. O'Connell, *Of Arms and Men: A History of War, Weapons, and Aggression* (OUP, 1989).

125 *See*, e.g., Art. 18, para. 1, HRAW 1923. The closest relevant provision in the *HPCR Manual* is Section C, Weapons, 6: 'Specific weapons are prohibited in air or missile combat operations, these include (e) small arms projectiles calculated, or of a nature, to cause explosion on impact with or within the human body.'

126 *See* above, Section 2.14.

127 *See* now Art. 35, para. 1, AP I and Art. 23, lit. e, HagueReg. See also Sections 2.20 and 4.02 below.

128 *See* Chapter 4.

129 *See* Sections 2.29 and 6.05.

130 Schindler/Toman (n. 115), 25.

131 Ibid., 35.

132 Decision of the International Military Tribunal in Nuremberg. *See* A. Basak, 'International Custom and the Experience of Nuremberg' (December 2018) 8(2) *Wroclaw Review of Law, Administration & Economics* 258–86.

133 *See* below, Chapter 9.

134 *See* Section 2.29.

135 *See* above, Section 2.04.

136 For more detailed consideration, *see* Sections 5.26–5.31 and 7.07.

137 Art. 22.

138 *See* J. M. Spaight, *Air Power and War Rights*, 3rd edn (London: Longmans, 1947).

139 Schindler/Toman (n. 115), 221.

140 Ibid., 251.

141 Ibid., 325 and 339.

142 *US v von Leeb*, 15 *Annual Digest* 376; R. R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965–66) 41 *BYIL* 286.

143 While it took some time for states parties to the 1929 Conventions to become parties to the 1949 Conventions, the latter are today universally binding. *See* below, Section 2.26, para. 1.

144 *ICJ Reports 1986*, 14; R. Abi-Saab, 'The General Principles of Humanitarian Law According to the International Court of Justice' (1987) 29 *IRRC* 367.

145 *See* F. Jacobs and S. Roberts, *The Effects of Treaties in Domestic Law* (Sweet & Maxwell, 1987); T. Meron, *Human Rights and Humanitarian Norms as Customary International Law* (OUP, 1989), 3–78; M. Bothe, P. Macalister-Smith, and T. Kurzidem (eds), *National Implementation of International Humanitarian Law*. Proceedings of a Colloquium held at Bad Homburg, 17–19 June 1988 (Dordrecht: Nijhoff, 1990), 1–71.

146 *See* generally on the subject of rules of international humanitarian law as customary international law, *CIHL*. *See* also Meron (n. 145), 61–2 and the Kammergericht Berlin (13 July 1967) 60 *ILR* 208, *Fontes Iuris Gentium, Series A, Section II, I Tomus 6* 234. *See* also Section 2.30 below.

147 *See* below, Chapter 9.

148 Arts 22–8.

149 Arts 29–31.

150 Arts 32–41.

151 ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (*DRC v Uganda*), *ICJ Reports 2005*.

152 *See* Section 3.03.

153 For a statement on the extent to which the US regards AP I reflective of customary international law, *see* M. Matheson, 'The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 2 *American University International Law Review* 419.

154 *See* Greenwood, *Essays* (n. 18), at 631.

155 C. Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', in A. J. M. Delissen and G. J. Tanja (eds), *Humanitarian Law of Armed Conflict—Challenges Ahead: Essays in Honour of Frits Kalshoven* (Nijhoff, 1991), 93; T. Meron (n. 149), 62; D. Fleck, 'The Protocols Additional to the Geneva Conventions and Customary International Law' (1990) XXIX *RDMilG* 497; A. Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (1984) 3 *UCLA Pacific Basin Law Journal* 55.

156 C. Greenwood, 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict', in P. Rowe (ed.), *The Gulf War 1990–91 in International and English Law* (London: Sweet & Maxwell, 1993).

157 *See* the US Department of Defense, Conduct of the Persian Gulf War: An Interim Report to Congress (1991); Greenwood (n. 156).

158 ICRC, 'Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence' (2005) 858 *ICRC* 393.

159 *See* the US Department of Defense (n. 157); ICRC statement at *IRRC* (1991), 25 and 27; but cf. the US Department of Defense *Final Report to Congress: Conduct of the Persian Gulf War* Appendix O, 0–26.

160 *See*, e.g., ICRC, *Annual Report* 1989.

161 *See* UNAMA, *Reports on the Protection of Civilians in Armed Conflicts*, https://unama.unmissions.org/protection-of-civilians-reports. *See* Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on Afghanization of Special Operations on Afghanistan Soil (8 April 2012) on the continued application of AP II after 2014, http://www.afghanistan-un.org/2012/04/memorandum-of-understanding-between-the-islamic-republic-of-afghanistan-and-the-united-states-of-america-on-afghanization-of-special-operations-on-afghan-soil/. *See* also Rule of Law in Armed Conflicts Project, www.geneva-academy.ch.

162 *See CIHL*.

163 *See* below, Section 19.01 and commentary para. 5; M. E. O'Connell, 'Saving Lives through a Definition of International Armed Conflict', 10th Bruges Colloquium Proceedings (ICRC, 2009), 19. *See* also 11th Bruges Colloquium Proceedings, *Technological Challenges for the Humanitarian Legal Framework* (ICRC, 2010).

164 ILA Use of Force Committee, *Final Report on the Meaning of Armed Conflict in International Law* (The Hague Conference 2010).

165 *See* commentary to Section 2.20.

166 *See* UN Docs S/20060 and 20063 (1988).

167 *ILM* (1989), 28, 1020. *Europa-Archiv* (1989), 111.

168 *See*, e.g., the reservations by France and the US, in A. Roberts and R. Guelff (eds), *Documents on the Laws of War*, 3rd edn (OUP, 2000), 144–6.

169 *See* Sections 6.40–6.42.

170 Many states are parties to an amended and more extensive version of Protocol II adopted in 1996.

171 Art. 8.

172 R. Tucker, *The Law of War and Neutrality at Sea* (US Govt. Print Office, 1957), 67; E. I. Nwogogu, 'Commentary on Submarine Warfare', in N. Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Nijhoff, 1988), 359–60.

173 *See* S. Casey-Maslen, *The Arms Trade Treaty. A Commentary* (OUP, 2016).

174 *See* above, Section 2.26 and Section 2.28, paras 1, 2, and 3; *CIHL*; for earlier publications on this issue *see* also Baxter (n. 142), Meron (n. 145), Fleck (n. 155), Cassese (n. 155), Greenwood (n. 156).

175 J. von Bernstorff, 'Martens Clause' (2009), in *MPEPIL*; A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 *EJIL* 187. *See* also T. Meron, 'The Martens Clause, Principles of Humanity and Dictates of Public Conscience' (2000) 94(1) *AJIL* 78–89 and D. Fleck, 'The Martens Clause and Environmental Protection in Relation to Armed Conflict' (2020) 10(1) *Goettingen Journal of International Law*, 243–266.

176 *See* Sections 5.09–5.10 and commentary thereon.

177 The original form of the clause.

178 Art. 63, para. 4, GC I; Art. 62, para. 4, GC II; Art. 142, para. 4, GC III; Art. 158, para. 4, GC IV and Preamble, para. 5, InhumaneWeaponsConv.

179 *See* commentary to Section 2.20.

180 *See*, e.g., ICRC, *Conference of Government Experts on the Use of Certain Conventional Weapons* (Lucerne, 24 September–18 October 1974), Report, 35–6; ICRC, *Second Working Group of Experts on Battlefield Laser Weapons* (Geneva, 5–7 November 1990), Report, 35–6; reproduced in ICRC, *Blinding Weapons* (ICRC, 1994).

181 Schindler/Toman (n. 115), 3.

182 *US Naval Manual*, para. 5.2; *see* also the decision in *US v List*, 15 *Annual Digest* 632 at 646.

183 *See* generally, O'Connell, 'Self-Defense' (n. 32) and Gardam (n. 25).

184 *See* commentary to Section 2.01.

185 C. Greenwood, 'Self-Defence and the Conduct of International Armed Conflict', in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff, 1989), 273.

186 *Oil Platforms*, above (n. 35).

187 The same limits apply to the use of force authorized by the Security Council. O'Connell (n. 1), chapter 3.

188 Greenwood (n. 35); Gardam (n. 25); Lagoni, in W. Heintschel v. Heinegg (ed.), *The Military Objective and the Principle of Distinction in the Law of Naval Warfare* (Bochum: Brockmeyer, 1992), 56; Langdon, ibid. 86; D. P. O'Connell, 'Limited War at Sea since 1945', in M. Howard (ed.) *Restraints on War* (OUP, 1979), 123; N. Ronzitti, in N. Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Nijhoff, 1989), 2–10. For a contrary view, *see* W. Fenrick, 'The Merchant Vessel as Legitimate Target in the Law of Naval Warfare' in Delissen/Tanja (n. 155), 439, and G. J. F. van Hegelsom, 'Comments' in Dekker/Post (n. 34), 127.

189 *See* commentary to Section 2.01 for the view that this was an enforcement action.

190 M. E. O'Connell, 'Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait' (1991) 15 *South Illinois University Law Journal* 453, 479–80. But *see* Dinstein, *War, Aggression and Self-Defence*, 6th edn (CUP, 2017),

281–2.

191 Arts 51–52 AP I; *see* Sections 7.01–7.02.

192 *See* Sections 7.37–7.39.

193 For discussion, *see* H. Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II, 231.

194 Y. Dinstein, 'Military Necessity' (2015), *MPEPIL*.

195 *US v List*, 15 *Annual Digest* 632, 647.

196 For example, *Manstein*, 16 *Annual Digest* 509, 511–13; *Thiele/Steinert*, in *Law Reports Trials of War Criminals*, Vol. III, 56; *The Peleus*, ibid. Vol. I, 1. *See* also, E. R. Fidell, 'More Fallout from Chief Gallagher's Case; This Time It's Political', *Global Military Justice Reform* (14 February 2020), https://www.justsecurity.org/68672/military-justice-reform-the-2020-pledge-and-the-presidents-power/.

197 This point raises the question, what if the UN Security Council authorizes a violation of IHL rules in a particular case? Article 103 of the UN Charter does state: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' In the *Lockerbie* case, the ICJ found that states were obligated to violate certain aviation treaties to comply with a sanctions regime imposed on Libya. Such a conflict of obligations would not, however, arise in the case of fundamental rules of international humanitarian law because the Security Council is bound by such rules equally to individual states. *See* R. Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *ICLQ* 583 and Section 2.36 below. *See* also Section 101 and the view that international humanitarian law applies to UN forces and forces fighting with UN Security Council authorization.

198 *See* A. J. P. Rogers, *Law on the Battlefield*, 3rd edn (Manchester University Press, 2012) and W. H. Parks, 'Teaching the Law of War' (1987) *The Army Lawyer* 4.

199 *See* Sections 21.10–21.18.

200 *Von Leeb*, above (n. 142); Greenwood (n. 35), 221.

201 *See* Art. 53 Vienna Convention on the Law of Treaties of 1969. It is, however, the case that authoritative lists of *jus cogens* norms tend not to include even the fundamental specialized principles of IHL such as those governing targeting: distinction, necessity, proportionality, and humanity. For an argument supporting the inclusion of such fundamental IHL rules in the list of *jus cogens* norms, *see* M. E. O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms', in D. E. Childress III (ed.), *The Role of Ethics in International Law* (CUP, 2011).

202 *See* the judgment of the ICJ in *Jurisdictional Immunities of the State* (*Germany v Italy*) Judgment of 3 February 2012; *see* also the judgment of the ECtHR in *Al-Adsani v UK* (Application no. 35763/97) of 21 November 2001 and the decision of the House of Lords in *Jones v Saudi Arabia* ([2006] UKHL 26) of 14 June 2006.

203 *Re Yamashita*, 327 US 1 (1946) reprinted in *Law Reports of Trials of War Criminals*, Vol. IV, 1–96. *See* also L. C. Green, *Essays on the Modern Law of War*, 2nd edn (Transnational Publishers, 2000), 215.

204 Sections 6.31–6.37. *See* ICJ, Advisory opinion on *Nuclear Weapons*, *ICJ Reports 1996*, 226.

205 Sections 7.42–7.45 and 21.08.

206 Arts 49–50 GC I; Arts 51–51 GC II; Arts 129–30 GC III; Arts 146–7 GC IV; and Arts 85–6 AP I. On war crimes, *see* Sections 21.10–21.18.

207 G. Mettraux, *The Law of Command Responsibility* (OUP, 2009); L. C. Green, *Superior Orders in National and International Law* (Sijthoff, 1976); Y. Dinstein, *The Defence of Obedience to Superior Orders in International Law* (Sijthoff, 1965).

208 A. P. V. Rogers and D. Stewart, 'The Role of the Military Legal Advisor', in T. D. Gill and D. Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP, 2010), 537–64; for the development of the use of legal advisers in the armed forces, *see* W. K. Lietzau and J. A. Rutigliano Jr, 'History and Development of the International Law of Military Operations', in Gill/Fleck, *op. cit.*, 11–31. *See* also G. I. A. D. Draper, 'Role of Legal Advisers in Armed Forces' (1978) *IRRC* 6–17.