What Is—Why Is There—
the Law of War?

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Writing in 1832, Clausewitz maintained that:

[To impose our will on the enemy is [the] object of force. . . . The fighting force must be destroyed: that is they must be put in such a condition that they can no longer carry on the fight. . . .] War is an act of force, there is no logical limitation to the application of force. . . . Attached to force are certain imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. . . . [In fact,] kind-hearted people might . . . think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine that is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst . . . [However,] if civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods [than was the case among savages] and has taught them more effective ways of using force than the crude expression of instinct. ¹

In response to this assertion, it might be said that the very "intelligence" to which he refers as playing a larger part in the methods of warfare, in fact expresses itself in the very rules of international law and custom which he

¹The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
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cynically derides as “hardly worth mentioning.” As if to confirm this, reference may be made to the comment by General Colin Powell when submitting his report to the United States Congress on “The Role of the Law of War” during Operation DESERT STORM. In opening, the general stated, “Decisions were impacted by legal considerations at every level, [the law of war] proved valuable in the decision-making process.”

Before we can legitimately comment on the issue of legal control—the jus in bello—it is necessary to pay some attention to the lawfulness of war itself—the jus ad bellum. In earlier times this meant deciding whether the war was being fought for a “just” cause, a characterization largely dependent on whether the war received the approval of the church. In accordance with the views of Machiavelli, this soon came to mean that any war in which a Christian prince was engaged was obviously “just” and “a necessary war is a just war,” while the “fathers” of international law sought to set out a variety of causes which would enable a ruler—justly—to resort to the use of force, normally in the name of self-defense. With the rise of socialism and the workers’ movement, the concept of “justness” shifted, so that the only “just war” was the “class war.” However, in practice this was shown to be nothing but an ideology, for with but few exceptions even the “workers” were prepared to defend their country when it was a victim of aggression.

The first international steps towards declaring war illegal came with the adoption of the Covenant of the League of Nations. While this did not expressly ban war, it sought to limit the occasions on which a League member could resort to force. In accordance with Article 16, “should any Member of the League resort to war in disregard of its covenants . . ., it shall ipso facto be deemed to have committed an act of war against all Members of the League,” thereby laying itself open to the imposition of economic sanctions. In practice, as demonstrated in, for example, the Italo-Ethiopian war, this did not really amount to a great deal. The practical difficulty of forbidding war and making resort thereto an offense against international law may be seen in the fate of the draft Treaty of Mutual Assistance drawn up by the League Assembly in 1923. This solemnly proclaimed “that aggression is an international crime,” with the parties undertaking that “no one will be guilty of its commission.” The “criminal” penalty envisaged was purely financial. Since it proved impossible to define “aggression,” the treaty remained a draft. The same fate befell the 1924 Draft Treaty of Disarmament and Security. Equally abortive was the League’s Geneva Protocol for the Pacific Settlement of International Disputes of 1924. By this, “a war of aggression constitutes a violation of [the] solidarity [of the
members of the international community] and an international crime; . . . and [with a view to] ensuring the repression of international crimes” the parties forswore war save by way of “resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with provisions of the Covenant and of the present Protocol.” As with earlier exercises, there was no provision for criminal liability, other than financial sanctions. The same is true of the various hortatory or declaratory resolutions to similar effect adopted by both the League Assembly or the Conference of American States. This did not, however, inhibit the International Military Tribunal at Nuremberg from resting part of its finding that aggressive war was criminal at international law on these non-binding instruments.10

It was not until Secretary of State Frank Kellogg of the United States and Foreign Minister Aristide Briand of France proposed the agreement which carries their names, officially the Pact of Paris for the Renunciation of War, that any treaty dealing with the “legality” of war was adopted. The 1928 Pact was somewhat simple in its terms, merely stating that the High Contracting Parties—by the outbreak of World War II this included almost all independent States—“condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy [and] agree that the settlement of or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be brought about except by peaceful means.”11

The sole sanction indicated in the Pact is denial of the benefits provided by it to the offender. An appreciation of what this might mean is to be found in the Articles of Interpretation adopted by the International Law Association at its Budapest meeting in 1934.12 Having stated the obvious, that a party resorting to armed force to solve an international dispute “is guilty of a violation of the Pact,” as is any State assisting such a violator, the Articles go on to provide that a victim of such a violation, as well as all other signatories, “may”—not “shall”—deny the violator all the rights of a belligerent. Signatories are also excused from any of the normal obligations attaching to neutrality, so that they would be entitled to assist the victim with finances, supplies, and even armed forces. Equally, the aggressor would not be entitled to receive recognition either de facto or de jure of any territorial or other advantage ensuing from the aggression. Finally, the aggressor would be liable to pay compensation for all damage incurred by any party as a result of the breach.

It is noticeable that the Budapest Articles of Interpretation say nothing about the criminality of an act of aggression in breach of the Pact.
Nevertheless, the Nuremberg Tribunal apparently found no difficulty in asserting that “the solemn renunciation of war as an instrument of national policy [in the Pact] necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war... are committing a crime in so doing. ... War [is] essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”

This statement calls for comment. In the first place, the Tribunal has ignored the fact that not every breach of an agreement—or even of legislation—constitutes a crime. Second, the interpretation of the Pact in this way is completely gratuitous and unnecessary. By Article 6 (a) of the London Charter establishing the Tribunal, among the crimes against peace over which the Tribunal is granted jurisdiction is “planning, initiation or waging of a war of aggression, or a war in violation of international treaties...” It follows, therefore, that it is the constituent instrument of the Tribunal which has rendered criminal a war of aggression or breach of the Pact, which is merely an “international treaty.” It was thus completely redundant for the Tribunal to go into any detailed study of draft or other documents to ascertain whether such a war was criminal or not.

Not even the Charter of the United Nations, at least not expressis verbis, speaks of the criminality of war. Article 2, paragraphs 3 and 4, simply provide that “all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. [They] 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.” The only clear sanction should these commitments be ignored depends on the Security Council and its decision to invoke the provisions in Chapter VII relating to a threat to the peace, a breach of the peace, or an act of aggression. Should the Council authorize military action in such circumstances, those complying with the decision are not in breach of any legal requirement. Other than this, the only recourse to armed conflict that is permitted under the Charter is by way of self-defense against an armed attack. Other recourse to arms would constitute an act of aggression and a crime in the light of the Nuremberg judgment, for the General Assembly has affirmed the Principles of International Law Recognized by the Charter of the
Nuremberg Tribunal, and authorized the International Law Commission to draw up a Statement of Principles Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal; these Principles are now generally regarded as constituting part of international customary law.

Even if it is claimed that a resort to arms is in accordance with Article 51 of the Charter, problems may arise as to whether the claim is justified and self-defense legally resorted to. By Article 51, it may only occur in response to an armed attack. However, the article describes the right as being “inherent,” which raises the question whether it may be resorted to by way of preventive or anticipatory action, since it is hardly likely that the draftsmen of the Charter intended a “victim” to wait until it was, for example, devastated by nuclear attack before taking steps to defend itself. Moreover, since the right is “inherent,” it cannot be presumed that the members of the United Nations have less right to defend themselves than do non-members. War, other than under these conditions, would constitute aggression and thus amount to an international crime in accordance with the exposition of the law as given at Nuremberg. If war is illegal and criminal, say the cynics, how can one speak of the law of war? Is not this completely out of line with the normal rules concerning criminal law? It is not usual to declare a particular act to be a crime and then lay down rules as to how that crime is to be committed. Such an approach, however, betrays a lack of historical knowledge and any appreciation of the purpose of the law of war.

Even in the Old Testament there are instances of the significance of restraints on the conduct of war. During their conquest of Canaan, the Israelites conducted many campaigns of total destruction, but this only happened when the war in which they were engaged was undertaken at the direct order of God and directed against heathens who had rejected Him. To show mercy would be a sin against the Lord. Even in such a war, however, they were exhorted to have recourse to siege only if the city involved had rejected an opportunity to surrender.

When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And ... if it make thee answer of peace, and open unto thee, then ... all the people that is found therein shall be tributaries unto thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it. And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword: But the women, and little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies. ... When thou shalt...
besiege a city a long time in making war against it to take it, thou shalt not destroy the trees thereof by wielding an axe against them; for thou mayest eat of them, but thou shalt not cut them down; for is the tree of the field man, that it shall be besieged of thee? Only the trees of which thou knowest that they are not trees for food, them thou mayest destroy and cut down, that thou mayest build bulwarks against the city that makes war with thee, until it fall.\textsuperscript{19}

It would appear, therefore, that ecological considerations were significant even then, forbidding destruction of resources essential to the survival of man. Maimonides, perhaps the greatest of Jewish Diaspora scholars, states that the destruction of fruit trees for the mere purpose of afflicting the civilian population is prohibited, and Rabbi Ishmael goes so far as to state that “not only fruit trees but, by argument from minor to major, stores of fruit itself may not be destroyed.”\textsuperscript{20}

Not until Protocol I annexed to the Geneva Conventions of 1949 was adopted in 1977 was a similar principle embodied in the international black-letter law of armed conflict. Even then, “objects indispensable to the civilian population” may not be attacked or destroyed, unless they “are used... as sustenance solely for the members of [the adverse party’s] forces... or in direct support of military action,” but in the latter case care must be taken to ensure that the civilian population is not left “with such inadequate food or water as to cause its starvation or force its movement.”\textsuperscript{21}

The Israelites were also enjoined to restrain themselves in their dealings with enemy combatants. Thus, “rejoice not when thine enemy falleth, and let not thine heart rejoice when he stumbleth; lest the Lord see it, and it displeases Him, and He turn away His wrath from him.”\textsuperscript{22} Moreover, insofar as prisoners of war are concerned, “if thine enemy be hungry, give him bread to eat; and if he be thirsty, give him water to drink.” This injunction goes so far as to inspire the prophet Elisha to reply to the king’s inquiry whether he might kill his prisoners: “Thou shalt not smite them; wouldest thou smite those whom thou hast taken captive with thy sword and with thy bow? Set bread before them, that they may eat and drink and go to their master. And he prepared great provision for them: and when they had eaten and drunk, he sent them away and they went to their master.”\textsuperscript{24} Even in those instances when the Torah or the Prophets indicated that extreme action be taken against an enemy,

the rabbis softened the impact of much of the old law through reinterpretation or imaginative explanation. Due to this it seems that the Israelites were indeed a “merciful” people when compared with their neighbors, such as the Assyrians.
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Although, as in any case, exceptions and violations to regulations occurred, on the whole, the Israelite warriors conducted themselves in a disciplined, restricted manner in accordance with rules and regulations derived from divine inspiration.

However, breaches of these injunctions were, for the main part at least, only subject to divine punishment.

The Israelites were not alone among the ancients whose conduct of war was under restraints. Sun Tzu, in his The Art of War, is one of the most ancient commentators on warfare, and in his view, “Generally in war the best policy is to take a state intact; to ruin it is inferior to this. To capture the enemy’s army is better than to destroy it; to take intact a battalion, a company or a five-man squad is better than to destroy them. . . . To subdue the enemy without fighting is the acme of skill. . . . The worst policy is to attack cities. Attack cities only when there is no alternative.” Even as early as the seventeenth century B.C., the Chinese were applying what may only be described as principles of chivalry when engaged in conflict, it being “deemed unchivalrous . . . [to take] advantage of a fleeing enemy who was having trouble with his chariot. . . . [or to] attack an enemy state . . . when it was divided by internal troubles.”

Similarly, some measures of humanitarianism are to be found in both the Ramayana and the Mahabharata, postulating a series of principles regulating conduct in war, many of which have only recently been accepted as part of the modern law of war: “When he fights his foes in battle, let him not strike with weapons concealed in wood, nor with such as are barbed, poisoned, or the points of which are blazing with fire.” Neither poisoned nor barbed weapons should be used. These are weapons of the wicked. Foretelling the modern rule relating to proportionality, as well as the ideological—and unrealistic—view of those who assert that sophisticated weapons should not be used against unsophisticated peoples,

A car warrior should fight a car warrior. One on horse should fight one on horse. Elephant riders must fight with elephant riders, as one on foot fights a foot soldier. When the antagonist has fallen into distress he should not be struck: brave warriors do not shoot at one whose arrows are exhausted. No one should strike another that is retreating. . . . [L]et him remember the duty of honourable warriors; do not kill a man when he is down, even a wicked enemy, if he seeks shelter, should not be slain.

The Sanskrit writers, in their treatment of noncombatants, remind us of the remark attributed by Shakespeare’s Henry V to Fluellen at Agincourt in 1415:
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"Kill the boys and the luggage! 'Tis expressly against the law of arms: 'tis as arrant a piece of knavery as can be offer'd." 34 These early epics warn us that:

[C]ar-drivers, men engaged in the transport of weapons, . . . should never be slain. No one should slay him who goes out to procure forage or fodder, camp followers or those that do menial service. No one should kill him that is skilled in a special art. He is no son of the Vishni race who slayeth a woman, a boy or an old man. Let him not strike one who has been grievously wounded. A wounded opponent shall either be sent to his own home, or if brought to the victor's quarters, have his wounds attended to, and when cured he shall be set at liberty. This is eternal duty. 35 Night slaughter is horrible and infamous. With death our enmity has terminated.

Thus, any desecration of a corpse, such as taking of ears or other mementos, was forbidden. Finally, as to the treatment of occupied territory and its inhabitants, "Customs, laws and family usages which obtain in a country should be preserved when that country has been acquired. Having conquered the country of his foe, let him not abolish or disregard the laws of that country. A king should never do such injury to his foe as would rankle in the latter's heart." 35

It becomes evident from these examples that many of the rules of the ancients go further than what is to be found in either the Hague or the Geneva law. 36 They indicate that the ancients considered war an unfortunate occurrence, with the ensuing damage to be kept to a minimum and every effort made to secure a peaceful and fruitful future for both the victor and the vanquished. This interpretation accords with that of Gibbon commenting on the behaviour of the Scythians in the fifth century,

In all their invasions of the civilized empires of the South, the Scythian shepherds have been uniformly actuated by a savage and destructive spirit. The laws of war that restrain the exercise of national rapine and murder, are founded on two principles of substantial interest: the knowledge of the permanent benefits which may be obtained by a moderate use of conquest; and a just apprehension lest the desolation which we inflict on the enemy's country may be retaliated on our own. But these considerations of hope and fear are almost unknown in the pastoral state of nations. 37

One is sometimes caused to wonder whether they are any more known or applied in industrial States!

Long before the period to which Gibbon was referring, there was some regulation of what was allowed during war. This becomes clear if one looks to
the practice of ancient Greece and Rome, in which urban centers in the form of cities, and city-states were well established. A leading commentator has said,

The rule and principles of war were considered by both Hellas and Rome to be applicable only to civilized sovereign States properly organized, and enjoying a regular constitution; and not conglomerations of individuals living together in an irregular and precarious association. Rome did not regard as being within the comity of nations such fortuitous gatherings of people, but only those who were organized on a civilized basis, and governed with a view to the general good, by a properly constructed system of law. . . . Hence barbarians, savage tribes, bands of robbers and pirates, and the like were debarred from the benefits and relaxations established by international law and custom. . . . [A]s to the general practice of war in Hellas[,] we find remarkable oscillations of wartime policy. Brutal treatment and noble generous conduct are manifested at the same epoch, in the same war, and apparently under similar circumstances. At times we hear of proceedings which testify to the intellectual and artistic temperament of the Greeks; at other times, we read narratives which emphasise the fundamental cruelty and disregard of human claims prevalent amongst the ancient races when at war with each other. In Homer . . . hostilities for the most part assumed the form of indiscriminate brigandage, and were but rarely conducted with a view to achieving regular conquests, and extending the territory of the victorious community. Extermination rather than subjection of the enemy was the usual practice. . . . Sometimes prisoners were sacrificed to the gods, corpses mutilated and mercy refused to children, and to the old and sickly. On the other hand, acts of mercy and nobility were frequent. . . . The adoption of certain cowardly, inhuman practices, such as, for example, the use of poisoned weapons, was condemned. . . . In reference to the conduct of war in Greece, it is important to remember that it was between small States, whose subjects were to an extraordinary degree animated by patriotism and devotion to their mother-country, that every individual was a soldier-politician who saw his home, his life, his family, his gods, at stake, and, finally, that he regarded each and every subject of the opposing States as his personal adversary. . . . [Nevertheless,] temples, and priests, and embassies were considered inviolable. . . . Mercy was shown to . . . helpless captives. Prisoners were ransomed and exchanged. Safe-conducts were granted and respected. Truces and armistices were established and, for the most part, faithfully observed. . . . Burial of dead was permitted; and graves were unmolested. It was considered wrong and impious to cut off or poison the enemy's water supply, or to make use of poisoned weapons. Treacherous stratagems of every description were condemned as being contrary to civilized warfare. And . . . it is essential to emphasize that the non-existence of the law and universally accepted custom relating to them is not necessarily proved when we point here and there to conduct of a contrary nature.
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This latter point is not always sufficiently acknowledged in our own time. The same commentator goes on to point out that by the time of the Roman empire the nature of the State had changed with Rome a centralized authority. Now, the practices in war varied according as their wars were commenced to exact vengeance for gross violations of international law, or for deliberate acts of treachery. Their warlike usages varied also according as their adversaries were regular enemies . . . or uncivilized barbarians and bands of pirates and marauders . . . The Roman conduct [under Germanicus] far transcended in its civilized and humane character that of the German leader, Arminius, who is reported [by Tacitus] to have burnt to death and otherwise barbarously slain the centurions and tribunes of the Varian legions, and nailed their skulls to trees. Undoubtedly, the belligerent operations of Rome, from the point of view of introducing various mitigations in the field, and adopting a milder policy after victory, are distinctly of a progressive character. They were more regular and disciplined than those of any other ancient nation. They did not as a rule degenerate into indiscriminate slaughter and unrestrained devastation. The ius beli imposed restrictions on barbarism, and condemned all acts of treachery. . . . [Livy tells us] there were laws of war as well as peace, and the Romans had learnt to put them into practice not less justly than bravely. . . . The Romans [says Cicero] refuse to countenance a criminal attempt made on the life of even a foreign aggressor.

In so far as Islam is concerned, the Caliph Abu Bakr commanded his troops, “[L]et there be no perfidy, no falsehood in your treaties with the enemy, be faithful to all things, proving yourselves upright and noble and maintaining your word and promises truly.” The ninth century Islamic statement on the law of nations bans the killing of women, children, the aged, the blind, the crippled and helpless insane. Moreover, while fighting was in progress between the dar al-Islam (the territory of Islam) and the dar al-harb (the rest of the world, also known as the “territory of war”), “Muslims were under legal obligations to respect the rights of non-Muslims, both combatants and civilians.” Booty did not belong to the captor but was to be shared according to set rules. “The prisoner of war should not be killed, but he may be ransomed or set free by grace,” although if it would be advantageous to the Muslims, non-Muslim prisoners could be killed unless they converted, when they would be regarded as booty.

Once we come to the age of chivalry, we find the role of the Church significant, particularly as it frequently reflected the desires of the orders of knighthood. Thus, the condemnation of the use of the crossbow and the arc by the Second Lateran Council in 1139 coincided with the views of the knightly
orders who fought hand-to-hand and considered such weapons disgraceful since they could be used from a distance by an unseen foe, including villains, who could strike without the risk of being struck himself. The axe, mace, halberd, ball-and-chain, military fork, and a variety of lances used by the knights for close combat and dismounting an opponent were merely up-to-date variants of the striking weapons of the ancients, which had been "confined to arm, foot, or mouth-propelled instruments [as well as] war-hammers, battle-axes, and swords; thrusting spears; and missile weapons, such as the hurled spear, or javelin, the arrow propelled by arm- or foot-drawn bow, or the blow-pipe. The striking edge or point of these weapons [had been] of hard wood, stone, bone, or metal."}

As iron-clad warriors disappeared, their specialized weapons fell into desuetude; they are now considered illegal. The process of condemnation and potential rejection was assisted by the Church, anathemizing such weapons as darts and catapults "in order to reduce as far as possible the engines of destruction and death." Despite the condemnation of weapons causing numerous deaths, gunpowder was soon in common use, although in 1439, "when the army of Bologna, using a new handgun, killed a number of plate-armoured Venetians, feeling ran so high at this disregard for the game of war, that the victorious Venetians massacred all prisoners who had stooped so low as to use this 'cruel and cowardly innovation,' gunpowder. It would, if unchecked, they said, make fighting a positively DANGEROUS profession." Such disregard of the rules led Belli to comment a century later that "today regard is so far lacking for this [Church] rule that firearms of a thousand kinds are the most common and popular implements of war, as if too few avenues of death had been discovered in the centuries, had not the generations of our fathers, rivaling God with his lightning, invented this means whereby, even at a single discharge, men are sent to perdition by the hundreds." The "law of chivalry" was nothing but a customary code of chivalrous conduct recognized by the feudal knights as controlling their affairs. This was enforced by arbitrators specially appointed and even by Courts of Chivalry. As early as 1307, such courts were trying breaches of parole, considered a major disregard of the "law of arms"—a system so well recognized that when in 1370 at the siege of Limoges the English commander issued orders forbidding quarter, three captured French knights appealed to John of Gaunt and the Earl of Cambridge, "My Lords we are yours: you have vanquished us. Act therefore to the law of arms." Their lives were spared, and they were treated as prisoners who could, of course, be ransomed. The principles of the law of arms were sufficiently well recognized by the time of Elizabeth that, as has already been
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pointed out, Shakespeare could make specific reference to them when writing of Henry V's conduct at Agincourt.61

By the middle of the fifteenth century, the Constable of France was trying a variety of ecorchéur captains for war crimes.62 Perhaps more significant was the 1474 trial by a tribunal made up of representatives of the Hanseatic cities of Peter of Hagenbach for administering occupied territory in a manner "contrary to the laws of God and of man." His plea that he had been carrying out the orders of his lord was rejected, and he was executed.63

The rules of chivalry did not apply to the ordinary foot soldier, whose conduct was regulated by national military codes giving commanders the "rights of justice" over miscreants. Thus, the 1385 code of Richard II of England forbade pillage of the church, victuals, provisions, or forage; also, among other things it provided for parole by prisoners, who were not to be considered property of their captors, but of the king.64 By the fifteenth century, when nearly all men-at-arms were included in official musters, subject to disciplinary codes of this kind, enforcement of the law became easier. By the seventeenth century most of the countries of Europe had such codes forbidding violence against women, marauding of the countryside, individual acts against the enemy unless authorized by a superior, private taking or keeping of booty, or the private detention of any prisoner.65 Of these codes it has been said that together with the rules of international law, they constitute "le meilleur frein pratique pour imposer aux armées le respect d'un modus legitimus de mener les guerres."66

As to the position of women, the French knights had been adamant in protecting the modesty of those found in surrendered cities, and Coligny made violence against them punishable by death.67 By the beginning of the seventeenth century the honor of women was so well established that Gentili could state that "to violate the honour of women will always be held to be unjust," quoting as evidence the view of Alexander, "I am not in the habit of warring with prisoners and women."68 This would suggest that the rape of women has from earliest times been considered a war crime. Moreover, in the Lieber Instructions for the Government of the Armies of the United States in the Field, 1863, which formed the basis of most subsequent military codes, express provision is made, with respect to providing protection of inhabitants in occupied territories, for the protection of women.69 In 1974, the General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict provided that "all forms of repression and
inhuman treatment of women . . . committed by belligerents in the course of military operations or in occupied territories shall be considered criminal. More recently, 1977 Protocol I annexed to the 1949 Geneva Conventions expressly states, "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault." This series of provisions leads one to question the integrity and purpose of those feminists who now seek to have rape specifically declared a war crime, particularly since it has been charged as such in many of the indictments issued by the Ad Hoc Tribunal for the former Yugoslavia.

In earlier days, combatants were not over-concerned with the fate of the wounded, particularly those belonging to an enemy, and this was especially so during the religious campaigns of the Crusades. Nevertheless, by the twelfth century the knights of the Order of St. John had established a hospital in Jerusalem for the care of the sick and injured, and by the sixteenth century they had established themselves as the Sovereign Order of Malta with the same purpose in mind. About the same time, writers were beginning to assert that doctors, who were often in clerical orders, enjoyed a special immunity. In the early part of the fourteenth century Bartolus maintained they were free from seizure, and Belli used this as a basis for stating that during war, the "persons of doctors may not be seized, and they must not be haled to court or otherwise harassed." By the time of Louis XIV, attention had been directed to providing for the care of the wounded; in a 1708 decree a permanent medical service was established "à la suite des armées et dans les places de guerre." During the siege of Metz in 1552–1553 François de Guise summoned the French surgeon Ambroise Paré "to succour the abandoned wounded soldiers of the enemy and to make arrangements for their transport back to their army"—a practice not embodied into treaty law until three centuries later.

During later conflicts, a variety of reciprocal arrangements were made for the care of the wounded, of which only one or two need be mentioned.

[The] convention made in 1743, between Lord Stair on behalf of the Pragmatic army and the Marshal Noailles for the French during the Dettingen campaign bound both sides to treat hospitals and wounded with consideration. Noailles, when he felt that his operations might cause alarm to the inmates of the hospitals at Techenheim, went so far as to send word that they should rest tranquil as they would not be disturbed. A fuller and more highly developed type of agreement was signed at L'Ecluse in 1759 by the Marshal de Baril, who commanded the French, and Major-General Conway, the British general officer commanding. The hospital staff, chaplains, doctors, surgeons and apothecaries were not . . . to be taken prisoners; and if they should happen to be apprehended within the lines

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of the enemy, they were to be sent back immediately. The wounded of the enemy who should fall into the hands of their opponents were to be cared for, and their food and medicine should in due course be paid for. They were not to be made prisoner and might stay in hospital safely under guard. . . . Peyrille in 1780 proposed international recognition of the principle that the wounded should not be made prisoners of war and should not enter into the balance of exchanges.76

It was not, however, until after Dunant’s Souvenir of Solferino in 1862 that this form of ad hoc arrangement received permanence and international recognition by way of the establishment of the International Committee of the Red Cross.77

The Middle Ages saw other customs developing which have ceased to be of topical importance, although in some instances they have been responsible for current practices. During the Hundred Years War it was possible to distinguish between guerre mortelle, war to the death; bellum hostile, a war between Christian princes in which prisoners could ransom themselves; guerre guerrable, fought in accordance with the feudal rules of chivalry; and the truce, which indicated a temporary cessation of hostilities during which the wounded and dead might be collected. Any resumption of actual fighting following a truce was considered a continuation of an ongoing conflict rather than commencement of a new one—an attitude which applies at present with regard to the relations between Israel and those of her Arab neighbors with whom no peace treaty has yet been signed. Each category of conflict had its own rules, but they were rules of honor rather than of law or humanitarianism. Unless it was a conflict in which no quarter was to be given—and this was indicated by raising a red pennant78—prisoners and others enjoying immunity, such as heralds, carried a white wand or even a white paper in their head-dress—is this the origin of the white flag?—and were frequently allowed freedom of movement under safe-conducts or were employed as messengers between the contending forces.79

In order to appreciate the reasons for and nature of the law of war, it is not enough just to look to the practices of the Middle Ages. Reference must also be made to the writings of the classical writers on international law, for to the extent that these were consistent or expressed commonly held views prevalent at the time, their writings constitute evidence of customary law. Thus, in words which are almost modern, Gentili wrote,

[1]In war . . . victory is sought in no prescribed fashion. . . . Our only precaution must be not to allow every kind of craft and every kind of cunning device; for evil is not lawful, but an enemy should be dealt with according to law. . . . In dealing

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with a just and lawful enemy we have the whole fetial law and many other laws in common. . . . Necessity does not oblige us to violate the rights of our adversaries . . . [but] the laws of war are not observed toward one who does not observe them.\textsuperscript{63} This latter statement is of course not valid today, at least insofar as the Geneva principles are concerned.

Grotius, commonly (though wrongly) described as “the father of international law,” is somewhat self-contradictory. First, he states that “by the Law of Nations any Thing done against an Enemy is lawful . . . It is lawful for an Enemy to hurt another both in Person and Goods . . . [and for] both sides to do so without Distinction.”\textsuperscript{61} However, later, when discussing Moderation concerning the Right of Killing Men in a Just War, he states that “there are certain Duties to be observed even toward those who have wronged us”\textsuperscript{62} and calls for avoidance of useless fighting, which is “wholly repugnant to the Duty of a Christian, and Humanity itself. Therefore all Magistrates ought strictly to forbid these Things, for they must render an account for the unnecessary shedding of Blood to him, whose Viceregents they are.”\textsuperscript{63}

Having pointed out that the man in the field is forbidden from acting as if the conflict were a private affair and so is neither to keep captured property for himself nor commit warlike acts after a retreat or an armistice,\textsuperscript{64} he continues:

It is not enough that we do nothing against the Rules of rigorous Justice, properly so called; we must also take Care that we offend not against charity, especially Christian Charity. Now this may happen sometimes; when, for Instance, it appears that such a plundering doth not so much hurt the [enemy] State, or the King, or those who are culpable themselves, but rather the Innocent, whom it may render so extremely miserable. . . . But farther, if the taking of this Booty neither contributes to the finishing of the War, nor considerably weaken the Enemy, the Gain arising to himself only from the Unhappiness of the Times, would be highly unbecoming an honest Man, much more a Christian. . . . Yet if a Soldier, or any other Person, even in a just War, shall burn the Enemy’s House, without any Command, and besides when there is no Necessity, or just Cause, in the Opinion of the Divines he stands obliged to make Satisfaction for those Damages. I have with Reason added . . . if there be not a just Cause, for if there be, he may perhaps be answerable to his own State, whose orders he hath transgressed, but not to his Enemy, to whom he hath done no wrong.\textsuperscript{65}

Seeking a perspective which largely reflects what States actually did, we might cite the views of Vattel.
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Since the object of a just war is to overcome injustice and violence, and to use force upon one who is deaf to the voice of reason, a sovereign has the right to do to his enemy whatever is necessary to weaken him and disable him from maintaining his unjust position; and the sovereign may choose the most efficacious and appropriate means to accomplish that object, provided those means be not essentially unlawful, and consequently forbidden by the Law of Nations. A lawful end confers a right only to those means which are necessary to attain that end. Whatever is done in excess of such measures is contrary to the natural law, and must be condemned as evil before the tribunal of conscience. . . . As it is very difficult sometimes to form a just estimate of what the actual situation demands, and, moreover, as it is for each Nation to determine what its particular circumstances warrant its doing, it becomes absolutely necessary that Nations should mutually conform to certain general rules on this subject. Thus, when it is clear and well recognized that such a measure, such an act of hostility, is, in general, necessary for overcoming the resistance of the enemy and attaining the object of lawful war, the measure, viewed thus in the abstract, is regarded by the Law of Nations as lawful and proper in war, although the belligerent who would make use of it without necessity, when less severe measures would have answered his purpose, would not be guiltless before God and his conscience. This is what constitutes the difference between what is just, proper, and irreprehensible in war, and what is merely permissible and may be done by Nations with impunity.86

Gentili, too, wrote of restraints in war—[it is] "only when we cannot overcome their resistance and bring them to terms by less severe means, that we are justified in taking away [the] lives" of the enemy.87 Equally condemned were denial of quarter, reprisals against prisoners,88 violence against women, children, the aged and the sick, ecclesiastics, men of letters, husbandmen, and, generally, all unarmed persons. Assassination, the use of poison and poisoned weapons, as well as the poisoning of wells, streams and springs were also beyond the pale.89

Of all classical writers, Vattel was the most concerned in seeking to limit war's horrors:

Necessity alone justifies Nations in going to war; and they should all refrain from, and as a matter of duty oppose, whatever tends to render war more disastrous. . . All acts of hostility which injure the enemy without necessity, or which do not tend to procure victory, are unjustifiable and as such condemned by the natural law. . . As between Nation and Nation, we must lay down general rules, independent of circumstances and of certain and easy application. Now, we can only arrive at such rules by considering acts of hostility in the abstract and in their essential character. Hence, . . . the voluntary Law of Nations limits itself to forbidding acts that are essentially unlawful and obnoxious, such as poisoning, assassination, treason, the
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massacre of an enemy who has surrendered and from whom there is nothing to fear, . . . [and] condemns every act of hostility which . . . contributes nothing to the success of our arms, and neither increases our strength nor weakens the enemy. On the other hand, it permits or tolerates every act which in its essential nature is adapted to attaining the end of the war; and it does not stop to consider whether the act was unnecessary, useless or superfluous in a given case unless there is the clearest evidence that an exception should have been made in that instance; for where the evidence is clear freedom of judgment cannot be exercised. Thus it is not, generally speaking, contrary to the laws of war to plunder and lay waste a country. But if an enemy of greatly superior forces should treat in this manner a town or province which he might easily hold possession of as a means of obtaining just and advantageous terms of peace, he would be universally accused of waging war in a barbarous and uncontrolled manner. The deliberate destruction of public monuments, temples, tombs, statues, pictures, etc., is, therefore, absolutely condemned . . ., as being under no circumstances conducive to the lawful object of war. The pillage and destruction of towns, the devastation of the open country by fire and sword, are acts no less to be abhorred and condemned when they are committed without evident necessity or urgent reasons. 90

It is of interest to note that it was not until the adoption of Protocol I in 1977 91 that impedimenta of the world’s cultural heritage 92 or objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas, crops, drinking water installations and the like, came under treaty protection.

The American Civil War produced the first modern codification of regulations for use during conflict, with the promulgation by President Abraham Lincoln of the Instructions for the Government of Armies of the United States in the Field, 93 which had been prepared by Professor Francis Lieber of Columbia. Lieber’s motivation in preparing this draft may be seen from his Political Ethics: “War by no means absolves us from all obligations toward the enemy. . . . They result in part from the object of war, in part from the fact that the belligerents are human beings, that the declaration of war is, among civilized nations, always made upon tacit acknowledgment of certain uses and obligations.” 94

In accordance with the Code:

[M]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge—. . . the unarmed person is to be spared in person, property, and honor as much as the exigencies of war will admit. . . . [P]rotection of the inoffensive citizen of the hostile country is the rule. . . . The United States acknowledge[s] and protect[s], in hostile country occupied by them, religion and morality; strictly private property; the persons of the
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inhabitants, especially those of women; and the sacredness of domestic relations. Offenses in the country shall be rigorously punished. ... All wanton violence committed against persons in the invaded country; ... all robbery ... or sacking, even after taking a place by main force, all rape, wounding, maiming or killing of such inhabitants, are prohibited under the penalty of death. ... Crimes punishable by all penal codes, such as arson, murder, assaults, highway robbery, theft, burglary, fraud, forgery and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred. 95

The Code also recognized that prisoners were to be protected and that it was forbidden to deny quarter. Further, the rights of chaplains and medical personnel were confirmed, as was the ban on any discrimination in the treatment of enemy personnel. It also forbade the use of enemy colors, which would now be considered as perfidy. While aimed at the conduct of American forces, the Code went further, acknowledging the right to punish what would today be described as war crimes: "A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities." 96 As to the problem of members of a force of an enemy State considered to be engaged in an "unjust" war,

[t]he law of nations ... admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant. 97 Modern wars are not internecine wars, in which the killing of the enemy is the object. 98 The destruction of the enemy in a modern war, and, indeed, modern war itself, are means to obtain the object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful. 99

The rules enunciated in the Lieber Code were so consistent with current military practice that similar codes or manuals were soon issued by Prussia, the Netherlands, France, Russia, Serbia, Argentina, Great Britain, and Spain. 100 But there was no internationally agreed document setting out the rules and principles. However, to the extent that they and the writings of acknowledged international law authorities express agreement, they may be regarded as opinio juris ac necessitatis, thus constituting the customary law of armed conflict. Insofar as they have not been overruled by treaty or expressly rejected by a State, especially a significant military power, they are as obligatory as any other rules of international law. 101
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International efforts aimed at controlling activities in conflict had already begun in the middle of the nineteenth century. The Declaration of Paris of 1856 was concerned with some selected aspects of maritime warfare, but more significant was the 1864 Geneva Convention for the Amelioration of the Wounded in Armies in the Field. Adopted only one year after the establishment of the International Committee of the Red Cross, it recognized the immunity of the symbol and those wearing it. This Convention initiated a series of Geneva Conventions (1906, 1929, and 1949, culminating in the Protocols of 1977) directed at the treatment and protection of those hors de combat—the wounded on land or at sea, prisoners of war, civilians and other noncombatants—and known as the Geneva Law or international humanitarian law.

As to the methods of warfare, the first international effort at control was the 1868 Declaration of St. Petersburg directed against the use of lightweight explosive bullets, and it is worth noting the motive for such ban, as expressed in the Preamble:

[H]aving by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity . . . [the parties] declare . . . That the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.

With these lofty motives in mind, the Declaration banned their use on a reciprocal basis among those States which adhered to the Declaration. In fact, only nineteen European States did so.

Even fewer States attended the 1874 Brussels Conference that drew up a Project of an International Declaration Concerning the Laws and Customs of War. This postulated principles concerning the administration of occupied territory, the distinction between combatants and noncombatants, the conduct of sieges and bombardments, as well as the treatment of spies, prisoners of war, and the sick and wounded. While the Project never came into force, we should not overlook the reiteration of the preambular terms of St. Petersburg, nor the even more significant statement that:
by revising the laws and general usages of war, whether with the object of defining them with greater precision, or with the view of laying down, by a common agreement, certain limits which will restrain, as far as possible, the severities of war, [war] . . . would involve less suffering, would be less liable to those aggravations produced by uncertainty, unforeseen events, and the passions excited by the struggle; it would tend more surely to that which should be its final objective, viz., the re-establishment of good relations, and a more solid and lasting peace between the belligerent States.\textsuperscript{106}

The Project embodied a principle which is to be found in every treaty since. By Article 12,

[T]he laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy . . . [and, Article 13, a]ccording to this principle [the following acts] are especially forbidden:\textsuperscript{107}

(a) Employment of poison or poisoned weapons;
(b) Murder by treachery of individuals belonging to the hostile nation or army;
(c) Murder of an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
(d) The declaration that no quarter will be given;
(e) The employment of arms, projectiles or missiles calculated to cause unnecessary suffering (now understood objectively as relating to what is necessary for the achieving of an operation rather than subjectively as measured by the individual on whom the suffering has been inflicted\textsuperscript{109}), as well as the use of projectiles prohibited by the Declaration of St. Petersburg of 1868;
(f) Making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
(g) Any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war.

Largely building upon the Brussels Project, at its 1880 meeting the Institute of International Law drew up the \textit{Oxford Manual on the Laws of War}. Once again, what is of major significance and reason for the law of war is the Preface to the Manual:

War holds a great place in history, and it is not to be supposed that men will soon give it up—in spite of the protests which it arouses and the horror which it inspires—because it appears to be the only possible issue of disputes which threaten the existence of States, their liberty, their vital interests. But the gradual improvement in customs should be reflected in the method of conducting war. It is worthy of civilized nations "to restrain the destructive force of war, while recognizing its inevitable necessities." The problem is not easy of
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solution; however, some points have already been solved, and very recently the draft Declaration of Brussels has been a solemn pronouncement of good intentions of governments in this connection. It may be said that independently of the international laws existing on this subject, there are today certain principles of justice which guide the public conscience, which are manifested even by general customs, but which it would be well to fix and make obligatory. . . . The Institute does not propose an international treaty, which it might perhaps be premature or at least very difficult to obtain; but it believes it is fulfilling a duty in offering to the governments a Manual suitable as the basis for national legislation in each State, and in accord with the progress of juridical science and the needs of civilized armies. Rash and extreme rules will not be found therein. The Institute has not sought innovations in drawing up the Manual; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable. By so doing, it believes it is rendering service to military men themselves. In fact so long as the demands of opinion remain indeterminate, belligerents are exposed to painful uncertainty and to endless accusations. A positive set of rules . . . if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passions and savage instincts—which battle always awakens, as much as it awakens courage and manly virtue—it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity. But in order to attain this end it is not sufficient for sovereigns to promulgate new laws. It is essential, too, that they make these laws known to all people, so that when a war is declared, the men called to take up arms to defend the causes of the belligerent States, may be thoroughly impregnated with the special rights and duties attached to the execution of such a command. 109

Only a few of the Manual's provisions need be mentioned, and that because they have, in almost identical wording, been embodied in the relevant treaties beginning with the Hague Conference of 1899.

The state of war does not admit of acts of violence, save between the armed forces of belligerent States. . . . Every belligerent armed force is bound to conform to the laws of war. The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. They are to abstain especially from all needless severity. . . . No invaded territory is regarded as conquered until the end of the war; until that time the occupant exercises . . . only de facto power, essentially provisional in character. . . . It is forbidden to maltreat inoffensive populations . . . or employ arms, projectiles, or materials of any kind calculated to cause superfluous suffering or to aggravate wounds . . . or to injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask it for themselves. 110 Wounded and sick soldiers should be brought in and cared for, to whatever
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The population of the invaded district cannot be compelled to swear allegiance to the hostile Power. Family honour and rights, the lives of individuals, as well as their religious convictions and practice, must be respected [again, this would not oblige an occupant to recognize practices repulsive to its own way of life]. Prisoners of war are in the power of the hostile government, but not in that of the individuals or corps who captured them. They are subject to the laws and regulations in force in the army of the enemy. They must be humanely treated. Arms may be used, after summoning, against a prisoner attempting to escape. Prisoners cannot be compelled in any manner to take any part whatever in the operation of war, nor compelled to give information about their country or their army. Offenders against the laws of war are liable to the punishment specified in the penal law.

The penal law cited in the final quoted sentence would be the national law, no provision for trial by any international tribunal having been made. Nor was any obligation imposed requiring a national force to hand an accused offender to the enemy so that he could be tried by an enemy tribunal.

Perhaps at this point it would be in order to comment upon the views as to the law of war of one or two of the major players in international armed conflict. According to Great Britain,

[the laws of war are the rules which govern the conduct of war—rules with which, according to international law, belligerents and neutrals are bound to comply. They are binding not only upon States as such but also upon their nationals and, in particular, upon the individual members of the armed forces. In antiquity, and in the earlier part of the Middle Ages, no rules of warfare existed. During the latter part of the Middle Ages, however, the influence of Christianity as well as that of chivalry made itself felt, and gradually the practice of warfare became less savage. The present laws of war are the result of a slow growth. Isolated milder practices became in the course of time usages, which at first were not

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accompanied by a sense of legal obligation, but which by custom (i.e., constant practice accepted as law) and by treaties, gradually developed into legal rules.

The laws of war consist, therefore, partly of customary rules which have grown up in practice, and partly of written rules, that is to say, rules which have been expressly agreed upon by governments in international treaties and conventions. The development of the law of war has been determined by three principles: first, the principle that a belligerent is justified in applying compulsion and force of any kind, to the extent necessary for the realisation of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources and money; secondly, the principle of humanity, according to which kinds and degrees of violence which are not necessary for the purpose of war are not permitted to a belligerent; and, thirdly, the principle of chivalry, which demands a certain amount of fairness in offence and defence, and a certain mutual respect between the opposing forces. The law of war is inspired by the desire of all civilised nations to reduce the evils of war by:
(a) protecting both combatants and non-combatants from unnecessary suffering;
(b) safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians, and (c) facilitating the restoration of peace.

Although the United States manual, The Law of Land Warfare, is almost identical in its wording, it stresses a point not included in the British statement of underlying general principles:

The prohibitory effect of the law of war is not minimized by "military necessity[,]" which has been defined as the principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.

Since both manuals refer to the importance of customary as well as conventional law, it is useful to cite the comments in the United States text on the sources of the law of war:

The law of war is derived from two principal sources:

(a) Lawmaking Treaties (or Conventions), such as the Hague and Geneva Conventions.
(b) Custom. Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. Lawmaking treaties may be compared
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with legislative enactments in the national law of the United States and the customary law of war with the unwritten Anglo-American common law.\textsuperscript{119}

Despite this statement, it is not always easy to determine what a particular State recognizes as customary law. This may be seen if we refer to the United States attitude to the use of poison gas. As already indicated, poison of any kind was regarded as illegal from earliest times and particularly in the writings of the "fathers" of international law. Moreover, by the Geneva Protocol of 1925,\textsuperscript{120} to which by the outbreak of World War II there were forty parties, with the United States and Japan as the only major powers not ratifying or acceding, the use of poisonous gas and bacteriological warfare was prohibited. Paragraph 38 of the United States manual states:

The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or noxious gases, of smoke or incendiary materials, or of bacteriological warfare. . . . The Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous, or other gases, and of bacteriological methods of warfare, . . . has been ratified or adhered to by and is now effective between a considerable number of States. However, the United States Senate has refrained from giving its advice and consent to the ratification by the United States, and it is accordingly not binding upon this country [emphasis added].

On the other hand, the United States Naval War College was of the opinion that the "use of poisonous gases and those that cause unnecessary suffering is in general prohibited,"\textsuperscript{121} in 1943, during World War II, President Franklin D. Roosevelt stated, in response to reports "that the Axis powers are making significant preparations indicative of [an] intention . . . to loose upon mankind such terrible and inhumane weapons [. . .] use of such weapons has been outlawed by the general opinion of civilized mankind. This country has not used them, and I hope that we will never be compelled to use them. I state categorically that we shall under no circumstances resort to the use of such weapons unless they are first used by our enemies."\textsuperscript{122} Despite the apparent incompatibilities, the United States acceded to the Protocol in 1975, and the Field Manual was amended.\textsuperscript{123} The amendment includes the introductory comment, "Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world"—words which had already appeared in the text of the Protocol and repeated by the president in 1943! It would appear, however, that the official view of the Department of the Army is that gas is forbidden by conventional and not by customary law.
While it is true that the manuals referred to are concerned with land warfare, the principles enunciated are of general application and equally significant as basic principles underlying air and maritime warfare.

By way of contrast, and reflecting the views of Clausewitz, reference might be made to the Introduction of the German War Book:

[T]he “argument of war” permits every belligerent State to have recourse to all means which enable it to attain the object of the war; still, practice has taught the advisability of allowing in one’s own interest the introduction of a limitation in the use of certain methods of war and a total renunciation of the use of others. Chivalrous feelings, Christian thought, higher civilization and, by no means least of all, the recognition of one’s own advantage, have led to a voluntary and self-imposed limitation, the necessity of which is today tacitly recognized by all States and their armies. They have led in the course of time, in the simple transmission of knightly usage in the passages of arms, to a series of agreements, hallowed by tradition, and we are accustomed to sum these up in the words “usage of war” [Kriegsbrauch], “custom of war” [Kriegssitte], or “fashion of war” [Kriegsmanier]. Customs of this kind have always existed, even in the times of antiquity; they differed according to the civilization of the different nations and their public economy, they were not always identical, even in one and the same conflict, and they have in the course of time often changed; they are older than any scientific law of war, they have come down to us unwritten, and moreover they maintain themselves in full vitality; they have, therefore, won an assured position in standing armies according as these latter have been introduced into the systems of almost every European State. The fact that such limitations of the unrestricted and reckless application of all the available means for the conduct of war, and thereby the humanization of the customary methods of pursuing war, really exist, and are actually observed by the armies of all civilized States, has in the course of the nineteenth century often led to attempts to develop, to extend, and thus to make universally binding these pre-existing usages of war; to elevate them to the level of laws binding nations and armies, in other words to create a codex belii; a law of war. All these attempts have hitherto, with some few exceptions . . . , completely failed. If, therefore, in the following work the expression “the law of war” is used, it must be understood that by it is meant not a lex scripta introduced by international agreements [although Germany had become a party to the Hague Conventions in 1909], but only a reciprocity of mutual agreement; a limitation of arbitrary behaviour, which custom and conventionality, human friendliness and a calculating egotism have erected, but for the observance of which there exists no express sanction, but only “the fear of reprisals” decides. Consequently, the usage of war is even now the only means of regulating the relations of belligerent States to one another. But with the idea of the usages of war will always be bound up the character of something transitory, inconstant, something dependent on factors outside the army. Nowadays it is not
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only the army which influences the spirit of the customs of war and assures recognition of its unwritten laws. Since the almost universal introduction of conscription, the peoples themselves exercise a profound effect upon this spirit. In the modern usages of war one can no longer regard merely the traditional inheritance of the ancient etiquette of the profession of arms, and the professional outlook accompanying it, but there is also the deposit of the currents of thought which agitate our time. But since the tendency of thought of the last century was dominated essentially by humanitarian considerations which not infrequently degenerated into sentimentality and flabby emotion, there have not been wanting attempts to influence the development of the usages of war in a way which was in fundamental contradiction with the nature of war and its object. Attempts of this kind will also not be wanting in the future, the more so as these agitations have found a kind of moral recognition in some provisions of the Geneva Convention and the Brussels and Hague Conferences. Moreover, the officer is a child of his time. He is subject to the intellectual tendencies which influence his own nation; the more educated he is the more will this be the case. The danger that, in this way, he will arrive at false views of the essential character of war must not be lost sight of. The danger can only be met by a thorough study of war itself. By steeping himself in military history an officer will be able to guard himself against excessive humanitarian notions, it will teach him that certain severities are indispensable to war, nay more, that the only true humanity very often lies in a ruthless application of them.\textsuperscript{125}

The somewhat cynical and cavalier attitude to the law of war expounded here finds its application as recently as 1941 in the reply of Field Marshal Wilhelm Keitel to the warning by Admiral Wilhelm Canaris that the German treatment of Soviet prisoners of war was contrary to international law: “The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology.”\textsuperscript{126}

Regardless of the German point of view, it is generally accepted that the binding law of war today finds its origins in the Geneva and Hague conventions. The latter are the product of the Conferences of 1899 and 1907 called at the initiative of Czar Nicholas II, and the principles established there underlie what is now known as the “Law of the Hague.” In 1899, in addition to the Declaration against soft-nosed explosive bullets already referred to, there appeared a ban on the diffusion of asphyxiating or deleterious gases, as well as the first elementary effort to deal with aerial warfare by banning the launching of projectiles from balloons.\textsuperscript{127} For the main part, these Declarations were regarded as temporary pending the calling of a third Hague Conference, which has never taken place. However, even though not all the powers have ratified
or acceded thereto, the general view is that they express rules of customary law. That this is so is demonstrated by the Judgment of the International Military Tribunal at Nuremberg with its comment:

Several of the belligerents in the recent war were not parties to the [IVth] Convention. . . . By 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war. . . . The argument in defence of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the U.S.S.R. was not a party to the Geneva Convention is quite without foundation. On the 15th September 1941 Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war. . . . He then stated[,] “The Geneva Convention for the treatment of prisoners of war [to which the Soviet Union was not a party] is not binding in the relationship between Germany and the U.S.S.R.; therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century, these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people. . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.” This protest which correctly stated the legal position, was ignored.

It is now apt that reference be made to Convention II of 1899, as amended as Convention IV in 1907. Many of its basic principles, and especially the Preamble, are applicable mutatis mutandis in any theater of war:

Seeing that, while seeking means to preserve peace and prevent armed conflict between nations, it is likewise necessary to bear in mind the cases where the appeal to arms has been brought about by events which their care was unable to avert; Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization; Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confirming them, within such limits as would mitigate their severity as far as possible. . . . [T]hese provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants. It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice. On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the
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absence of a written undertaking, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not in the Regulations adopted by them [and annexed to the Convention] the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.129

The last sentence is known as the Martens Clause, after the Russian foreign minister who introduced it. Its purpose was to deal with any lacunae or unexpected situation that might arise, thereby preventing the possibility of any belligerent contending that its actions were legitimate since they were not expressly forbidden by the Convention. Today, it is understood to apply to every armed conflict and tends to be embodied, either directly or by way of paraphrase, in every treaty concerning the conduct of hostilities. Thus, Article 1, paragraph 2, of Protocol I, 1977, provides: “In cases not covered by the Protocol or by other 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.” Embodying the principle in the actual body of the Protocol rather than, as had been the practice formerly, in the Preamble, ensures that it has been elevated to become part of the mandatory law. It is unfortunate, however, that no attempt has been made to define what constitutes “the principles of humanity and the dictates of the public conscience.” Presumably, it is assumed that these are so well known and so generally accepted as to render definition superfluous. Interestingly enough, in the case of Protocol II dealing with non-international conflicts, the Clause remains part of the Preamble. Since this is the first treaty effort to deal with such conflicts, other than the short mini-bill of rights found in Article 3 common to the four 1949 Conventions, the reference to “established custom” has, perhaps not unreasonably, been omitted.

In accordance with general treaty practice at the time, the Hague Conventions contain a “general participation” clause, the effect of which is to ensure that the Convention only applies during a conflict in which all the belligerents are parties to the Convention claimed to be applicable. This would mean that if any belligerent, however insignificant, even one only nominally a party to the conflict but not contributing any forces or materiel, has not acceded to the Convention, it would not be applicable even though the “real” belligerents were all apparently bound thereby. This failing tended to give added significance to the Martens Clause, with its reference to custom and the
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like. Moreover, the "real" belligerents in such circumstances have tended to apply the Convention as between themselves, while to the extent that the Convention reproduces customary law or is regarded as having hardened into such custom (as explained by the Nuremberg Tribunal), the "general participation" clause has lost its significance; in fact, it is no longer used. Instead, as is made clear in the 1949 Conventions, the present law operates "in all circumstances . . . [and] though one of the Parties in conflict may not be a Party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations . . . [and] in relation to the said Power, if the latter accepts and applies the provisions thereof."133

While the Hague and Geneva Conventions applied in both world wars, it should be borne in mind that in none of them was any provision made for the trial of individual offenders. The only reference to "liability" in the then-existing black-letter law was Article 3 of Hague Convention IV, which provided that "a belligerent party which violates the provisions of the regulations shall, if the case demand, be liable to pay compensation. . . . It shall be responsible for all acts committed by persons forming part of its armed forces." It is on the basis of this provision that former prisoners of the Japanese are seeking to recover personal compensation—regardless of the fact that unless it is clearly provided otherwise, only the States parties to the treaty acquire enforceable rights thereunder135 and even though the Peace Treaty with Japan136 liquidated personal claims, thus invalidating any claim that might have been created under the 1907 Convention.

Although the Convention provides for state responsibility which, in accordance with the normal rules of international law, amounts to an international tort resulting from breach of treaty, it says nothing about the liability of any officer ordering, nor of personal responsibility of any individual committing, a breach. Therefore, until the establishment of the International Military Tribunals at Nuremberg and Tokyo at the end of World War II, all trials of persons charged with committing breaches of the laws and customs of war were conducted by national tribunals applying customary international law, the Hague Regulations, or, in the case of their own personnel, the national military or criminal code.140

It is sufficient for our purposes merely to mention the offenses within the jurisdiction of the International Tribunals without going into excessive detail. By the London Charter establishing the Nuremberg Tribunal, jurisdiction was granted over crimes against peace, war crimes, and crimes against humanity; the same was done in the case of the Tokyo tribunal. More important perhaps than the judgments, was the General Assembly's Resolution
affirming the Principles of International Law Recognized by the Charter of the Tribunal, especially as these were spelled out by the International Law Commission in 1950:

I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

VI. The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace.
(b) War crimes.
(c) Crimes against humanity.

VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity is a crime under international law.

Perhaps it should be pointed out here that while the Principles deal explicitly with superior orders, they do so only implicitly in so far as the counterpart of command responsibility is concerned. By way of contrast, Protocol I is silent on superior orders, but very specific on command responsibility. Moreover, the Protocol has made it difficult for any superior to claim that he was unaware of the law, since Article 82 requires legal advisers to be "available, when necessary, to advise military commanders at the appropriate level" on the application of the Conventions and the Protocol [as well as] on the appropriate instruction to be given to the armed forces on this subject."

The significance of the Nuremberg Judgment may be seen in the manner in which subsequent national war crimes tribunals have referred to and applied the principles stemming from that Judgment. It has equally proved significant in the jurisprudence of the ad hoc Tribunal established for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, particularly in relation to the concept of crimes against humanity.
A problem that confronts the ordinary man in the field is the legality of weaponry. Some weapons are considered to be illegal per se, particularly those which have become outdated, such as boiling oil (effective against besieging forces) or those useful in dismounting knights in armor, such as the club, battle axe, ball and chain, or heavy lance. While a combatant would probably not be held liable merely because he used the weapons issued to him, since he would almost certainly not know what type of ammunition was in fact permitted, it would be illegal for him, and subject him to trial, to alter the weapons issued so as to cause injuries likely to result in unnecessary suffering, which is forbidden in every text relating to conduct in bello.

Relatedly, particular States have occasionally sought to ban or declare illegal the employment of "barbarian" forces. Thus, the German War Book condemned as "closely connected with the unlawful instruments of war the employment of uncivilized and barbarous peoples in European wars... The transference of African and Muhammedan Turcis to a European seat of war by the French in the year 1870 was... a retrogression from civilized to barbarous warfare, as these troops had and could have no conception of European-Christian culture, of respect for property, and the honour of women, etc." Today it is clear that such discrimination would be completely contrary to the law, and the modern soldier must on no account discriminate among enemy personnel on the basis of sex, race, nationality, religion, political opinion or any other criteria. In other words, in accordance with the basic humanitarian principles on which the law of armed conflict rests, all members of an adverse party are entitled to equal protection. However, by Article 47 of Protocol I, this basic principle of non-discrimination does not extend to mercenaries, who are denied the status of lawful combatants and are therefore not regarded as prisoners of war if captured.

Since the adoption of Protocol II annexed to the 1980 Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, the placing of booby traps—probably one of the easiest weapons for the individual man in the field to make for himself—is illegal if employed as a reprisal against civilians or indiscriminately placed so that it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof." It would not, however, be an offense for him to booby-trap a building that has been evacuated by civilians and which he reasonably anticipates is likely to be occupied by members of the adverse party’s armed forces.
Other than the Conventional Weapons Convention, as amended, little by way of treaty has been introduced to expand the scope of the law of war beyond what is to be found in the Hague and Geneva Law. Perhaps the major development of 1949, arising from the experience of occupied Europe during World War II, was the adoption of Convention IV relating to the protection of civilians in occupied territory, although all that need be said of it here is that it introduced criminal liability for those committing grave breaches against such "protected" persons. The principal innovation of the four Conventions, however, was the introduction of Article 3 into each of them. This promulgated a minimal statement of rights that would apply even in a non-international armed conflict. It is of interest to mention that the majority of the Trial Chamber of the ad hoc Tribunals for the former Yugoslavia in the Tadić case, while recognizing the significance and application of Article 3, rejected in the particular circumstances of that case the contention that the Conventions, including the Civilians Convention, were applicable. Some effort had been made in 1977, with the adoption of Protocol I, to extend the law to certain conflicts previously regarded as non-international. By Article 1, paragraph 4, wars of national liberation were raised to the level of international armed conflicts governed by the provisions of the law of war, although by Article 44, paragraph 3, protection is given to those who might be described as "farmers by day and combatants by night," provided they "carry their arms openly" during an engagement or while visible to the adversary during deployment preparatory to launching an attack.

Extending the effort to humanize non-international conflicts, in which traditionally the horrors are frequently far more grave and extensive than they are in international conflicts, Protocol II elaborates some measures of humanitarian law which are applicable in a non-international conflict not amounting to a war of national liberation, which would fall within the purview of Protocol I. While Protocol II forbids a variety of acts, it makes no provision for punishment of breaches. Nor for that matter is common Article 3 of the Conventions, which also deals with non-international conflicts, included in any of the lists of grave breaches in the four Conventions or in Protocol I. This would imply that there is no way to deal with breaches of the law if committed during a non-international conflict. However, since both Protocol II and common Article 3 forbid certain types of action, it must be presumed that the intention is that such activities must be amenable to trial and punishment. Further, it should be noted that most of the acts forbidden by Protocol II, and especially those listed in common Article 3, would, when directed against humans, almost certainly amount to crimes against humanity, thus giving rise
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to universal jurisdiction. Moreover, the Statutes of both the ad hoc tribunals established to deal with breaches of the law occurring in Rwanda and the former Yugoslavia clearly envisage criminal jurisdiction as being applicable to such conflicts, although the Judgment of the Trial Chamber in the Tadić Case has apparently reduced the significance of the Conventions in such conflicts.

Among other developments in the law introduced in 1977—which to some extent bring the modern law into line with such ecological injunctions as those relating to the immunity of trees and the like in the Old Testament—are those relating to protection of the natural environment. By Article 55 of Protocol I "[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health and survival of the population." Even more in direct line with the Old Testament or the military codes of the feudal period is Article 54, whereby it is forbidden "to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population of the adverse Party, whatsoever the motive."

Perhaps most likely to affect adversely the environment and cause widespread, long-term, and severe damage are nuclear weapons. However, since the Intentional Committee of the Red Cross and the major powers considered the issue to be one of disarmament rather than means or methods of warfare, the Protocol does not deal with them in any way. It does, however, grant protection to "works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations."

However, there have been some developments outside of treaty in relation to nuclear weapons. In 1996, the International Court of Justice handed down its Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons. Pointing out that because it could not find "a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons per se, it [became necessary to deal] with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed
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conflict," bearing in mind the continued significance of the Martens Clause. The court noted that

humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effects on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons does not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law. . . . [Moreover,] these fundamental rules [embodied in the Hague and Geneva Conventions] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

Inasmuch as it has been suggested that the accepted rules were irrelevant since they developed before the invention of nuclear weapons, the Court noted that the conferences of 1949 and 1994-1997 left these weapons aside, and accepted that

there is a qualitative difference between nuclear weapons and all conventional weapons. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflicts did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.

Having thus emphasised the validity of the rules of international humanitarian law, it is perhaps not surprising that the Court found itself unable to:

make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstances owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, . . . the principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity—make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, . . . the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient
elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules applicable in armed conflict in any circumstance . . . 167

In the light of this reasoning, the Court concluded that it
cannot lose sight of the fundamental right of every State to survival, and thus the right to resort to self-defence, in accordance with Article 51 [of the Charter], when survival is at stake. . . . Accordingly, in view of the present state of international law viewed as a whole, the Court is led to observe that it cannot reach a definite conclusion as to the legality or use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake. . . . 168

All one can say on the basis of the Court’s Opinion is that the use or threat to use a nuclear weapon would be contrary to the principles of international humanitarian law and therefore illegal. However, in circumstances in which a state may feel—and this is a matter of pure auto-interpretation for the State itself—that its very survival is at stake, then a recourse to the use of this weapon might nevertheless be lawful!

Just as there is no black-letter law with regard to nuclear weapons, so there is no treaty law concerning aerial warfare. However, in 1923 a Committee of Experts drew up a code of draft Rules of Air Warfare169 which are generally regarded as, “to a great extent, correspond[ing] to the customary rules and general principles underlying the conventions on the law of war on land and at sea.”170 We also find in the decision of the Nagasaki District Court, when considering the legality of the atomic attacks on Hiroshima and Nagasaki, some judicial comment to support this view:

The Draft Rules of Air Warfare cannot directly be called positive law, since they have not yet become effective as authoritative with regard to air warfare. However, international jurists regard the Draft Rules as authoritative with regard to air warfare. Some countries regard the substance of the rules as a standard of action by armed forces, and the fundamental principles of the Draft Rules are consistently in conformity with international law regulations and customs at the time. Therefore, we can safely say that the prohibition of indiscriminate aerial bombardment on an undefended city and the principle of military objective which are provided by the Draft Rules, are international customary law [allowing for developments in terminology, this finding has much in common with the Opinion of the World Court], also from the point that they are in common with the principle in land and sea warfare. Further, since the
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distinction of land, sea and air warfare is made by the place and purpose of warfare, we think that there is also sufficient reason for argument that, regarding the aerial bombardment of a city on land, the laws and regulations respecting land warfare analogically apply since the aerial bombardment is made on land. 171

This last statement prophetically foretells Article 49 of Protocol I, which is part of the Section (Part IV, Section I) relating to General Protection against Effects of Hostilities, and is itself concerned with the definition of attacks and scope of application. By paragraph 3, "[t]he provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air."

From what has been said herein, it is clear that since earliest times there has been recognition that humanity and the future survival of society demand that limitations be placed upon the means and methods of warfare, and that this remains the case today, whether the hostilities take place in international or non-international conflicts. As is made clear by the Martens Clause, which the World Court has indicated is just as significant today as it was when Martens introduced it, when seeking the law of war it is not enough to look merely at the written documents which have been drawn up and accepted by States as treaties. These may be considered as reflecting what has developed in practice as representing what States are prepared to impose upon their armed forces by way of restrictions on their freedom of action. Although it may not always be easy to ascertain what are claimed to be the customary rules in this regard, the principles of humanity and the dictates of public conscience, taken together with consideration of the accepted practices of the most significant military forces, are probably sufficiently well known and accepted to provide the guidance necessary to understand what is meant by those terms. Despite the fact that modern tribal wars seem to suggest that what was formerly regarded as being almost universally accepted behavior may not now be so considered, it may be suggested that the principles referred to are no more or less than what Article 38 of the Statute of the International Court of Justice refers to as general principles of law recognized by civilized nations—even though they may be nothing more than the principles which "we and our friends, all of whom are civilized," generally recognize as constituting principles of law and as such binding!
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Notes

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4. It was rare “that a good man should be found willing to employ wicked means.” The Discourses, bk. I, ch. xvii (1532).


8. Id. at 124.

9. Id. at 132.


14. Res. 95 (I), 1946, reprinted in id. at 921.

15. 1950. Reprinted in id. at 923.


17. Id. at 179–82.

18. See, e.g., Samuel 1:15, wherein the prophet himself kills Agag.


25. Written about the sixth century B.C. (Griffith trans., 1963) at 78–9.


27. Sanskrit epic composed in the third century B.C.

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29. It was not until 1980 (with Protocols II and III annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects [Schindler & Toman, supra note 13, at 185]) that booby traps and incendiaries were placed under any form of restriction.
30. See infra for a discussion of weapons considered anathema to the Church.
32. It is not always easy to determine whether the enemy is retreatting or merely withdrawing to re-form.
33. Act 4, Scene 7, ll.5–10. This statement relates to Henry's order to kill the French prisoners as a reprisal for the slaughter of the "boys." Shakespeare, seemingly, based his account on Holinshed's Chronicles, but a somewhat different version is found in VATTEL, LE DROIT DES GENS, liv. III, ch. VIII, s. 151 (1758). See also, generally, MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS (1993).
35. All these examples are taken from Armour, Customs and Warfare in Ancient India, 8 TRANSACTIONS OF THE GROTTIUS SOCIETY 71, 73–7, 81 (1922).
36. These terms are given to the two branches of the law of armed conflict, the Hague Law being the Conventions of 1899 and 1907, while the Geneva law refers to the Red Cross Conventions of 1949 as amended in 1977. The two together are commonly described as "humanitarian law."
39. A similar tendency is to be found in modern civil wars.
41. See, GERMAN WAR BOOK, infra note 125, on use of colonial African troops in European wars.
42. TACITUS, ANNALS at i, 61.
43. This is the term used by Tacitus.
44. This does not accord with the treatment meted out to Britain after the defeat of Boudicca (or Boadicea).
45. LIVY, HISTORY OF ROME at v, 27.
46. CICERO, DE OFFICIIS at I, 11.
47. PHILLIPSON, supra note 40, at 227, 228–30.
48. ALIB HASAN AL MUTTAQUI, 4 BOOK OF KANZULUMMAN 472 (1949); see also SHAYBAN'S SIYAR, THE ISLAMIC LAW OF NATIONS, sec. 1711 (c. early ninth century, Khadduri trans., 1966).
49. Id. at secs. 29–32, 47, 81, 110–11.
52. WRIGHT, A STUDY OF WAR 81 (1965).
53. For a satirical comment on the appearance of these warriors, see ERASMUS, BELLUM (1515) 17 (Imprint Soc. ed., 1972).

54. BELLLI, DE RE MILITARI ET BELLII TRACTATUS (1563), pt. III, ch. III, p. 29 (Carnegie trans., 1936), citing the CORPUS JURIS CANONICI (1500). See also THE ALEXIAD OF ANNA CONNENA 316-7 (Sewter trans., 1969): "The crossbow is a weapon of the barbarians . . . a truly diabolical machine."


56. BELLII, supra note 54, at 29.

57. See, e.g., KEEN, CHIVALRY (1984); see also Gardot, LE droit de la Guerre dans l‘Oeuvre des Capitaines Français du XVI Siècle, 72 HAGUE RECUEIL 397, 416 (1948).

58. See, e.g., KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 27 (1965); see also CONTAMINE, LAW IN THE MIDDLE AGES 270–7 (Eng. trans., 1984); 2. WARD, THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS IN EUROPE, ch. XIV ("Of the influence of chivalry") (1795).

59. KEEN, supra note 58, at 34.

60. Id. at 1.


62. Literally "skinner," armed bands of free companies. KEEN, LAWS, supra note 58, at 192; see also id. at 97–100.


64. WINTHROP, MILITARY LAW AND PRECEDENTS, app. II (1886).

65. See, e.g., THE ENGLISH LAWS AND ORDINANCES OF WARRE 163, in 1 C.M. COLDE, MILITARY FORCES OF THE CROWN, app. VI (1869).


67. Gardot, supra note 57, at 452–3, 469, citing FOURQUEVAUX, LA DISCIPLINE MILITAIRe (1592).

68. GENTII, DE JURE BELLII, lib. II, cap. xxi, pp. 275, 251 (1612) (Carnegie trans., 1933).

69. Schindler & Toman, supra note 13, at 3, art. 37.

70. Res. 3318 (XXIX), art. 5, reprintedit in id. at 295.

71. Protocol I, supra note 21, art. 76.

72. BELLII, supra note 54, pt. VII, cap. III, at 34.

73. BUTLER & MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW 134 (1928).

74. Id. at 187, n. 28.


76. BUTLER & MACCOBY, supra note 73, at 149–51.

77. For a general discussion of “War Law and the Medical Profession,” see GREEN, ESSAYS, supra note 34, ch. VI.


81. GROTIIUS, DE JURE BELLII AC PACIS (1625), lib. III, cap. IV, secs. xvii, ix, x (Eng. trans., 1738), at 570, 564, 565; (Carnegie trans., 1925), at 654, 648, 649.
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82. Id., cap. XL.
83. Id., sec. xix, at 649, 743.
84. Id. at 684-5, 788-9. See also Grumpelt (Scuttled U-boats) Trial, 13 LL.R. 309 (1946).
85. Id., secs. iv, v, pp. 686, 790-1.
87. Gentili, supra note 68, sec. 39 at 280.
88. Not until the Prisoners of War Convention, 1929, art. 2, reprinted in Schindler & Toman, supra note 13, at 339, was this principle embodied in treaty law.
94. Lieber, Political Ethics 657 (1838).
95. Lieber Code, supra note 93, arts. 16, 2, 37, 44, 47.
96. Id., art. 59.
98. Modern civil wars, such as those in Bosnia or Rwanda, would appear to give the lie to this assertion.
99. Lieber Code, supra note 93, arts. 67-68 (emphasis added).
102. Schindler & Toman, supra note 13, at 787.
103. Id. at 270.
104. Id. at 101.
105. The most “famous” of these is the “dumdum,” invented by Great Britain at Dum-Dum, India. It was generally assumed that ordinary bullets, though they might kill, were not effective in stopping “the onrush of a hardy and fanatical savage.” In 1903, Holland (Letter to The Times, London May 2), maintained that their use was not unlawful so far as the United Kingdom and United States were concerned [Letters on War and Neutrality 53 (1909)] ; “it having been found in the British frontier wars that the impact of an ordinary bullet did not give shock sufficient to stop the onrush of certain assailants, so that the suffering caused to such assailants by their expansion in the body was not useless, and did not bring them within the condemnation of explosive bullets by the Declaration of St. Petersburg,” Westlake, International Law, pt. II (War) 78 (1913). The United Kingdom “withdrew Dum-Dum bullets during the South African War, and it is to be taken for granted that Great Britain will not in future make use of them in a war with civilized Powers,” 2 Oppenheim, International Law, sec. 112 (1st ed. 1906), leaving open whether he considered their use against “uncivilized” powers to be lawful. Now that many police forces are being permitted to use such explosive bullets against their own nationals, and since it is often argued that these weapons are less destructive than ordinary rounds, it may well be
that the ban will fall into desuetude, especially as other explosive weapons, like grenades and mines, are still permitted.

106. Schindler & Toman, supra note 13, at 25 (emphasis added).
107. Emphasis in original.
108. See, e.g., both et al., new rules for victims of armed conflicts 195 (1982): “the principle of humanity complements the principle of necessity by forbidding those measures of violence which are not necessary (i.e., relevant and proportionate) to the achievement of a definite military objective.”
109. Schindler & Toman, supra note 13, at 35 (emphasis added).
110. Such a rule would have been important for the Imperial Japanese Army, whose members regarded surrender or capture as the act of a coward not entitled to treatment as an honorable soldier.
111. In fact, prior to the use of the atomic bombs in 1945, radio messages were broadcast to the Japanese authorities naming a number of cities likely to be heavily bombed and advising evacuation of the civilian populations.
112. Does this mean that an unoccupied hospital, though marked with a Red Cross, is not protected? The Manual makes no reference to the status of civilian hospitals in a city subject to bombardment.
113. Thus, the pressure methods used against members of the British Indian Army by the Japanese in World War II to compel them to join the Indian National Army were clearly contrary to the law of war. See Green, the Indian national army trials, 11 modern L. Rev. 47 (1948), and The Problems of a Wartime International Lawyer, 2 Pace Y.B. Int’L L. 93 (1989).
115. As has been seen, however, this is not completely correct, even though there may have been no written rules generally accepted.
118. In practice, most States ensure that their military advisers are apprised of any proposals that may be suggested for inclusion in a treaty concerning armed conflict. Many delegations to such conferences include representatives of the armed forces.
119. Para. 4.
120. 94 L.N.T.S. 65; Schindler & Toman, supra note 13, at 115.
121. naval war college, international law situations 106 (1935). See also id. at 102; Hyde, 3 international law chiefly as interpreted and applied by the United States 1820 (1947).
122. dept. of state bull., vol. VIII, no. 207, June 12, 1943 (emphasis added).
123. FM 27–10, supra note 117, change 1, July 15, 1976.
124. See supra note 1.
126. Nuremberg judgment, supra note 10, at 91.
127. For a general discussion on the law concerning aerial warfare, see Green, essays, supra note 34, ch. VII (1985).
129. Schindler & Toman, supra note 13, at 63 (emphasis added).
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130. See, e.g., the English prize cases, The Möne [1915] and The Blonde [1922], A.C. 313, in each of which Convention VI (Status of Merchant Ships at Outbreak of Hostilities), reprinted in Schindler & Toman, supra note 13, at 791, was applied, though Serbia and Montenegro were not parties.

131. E.g., Hague IV, Regulations Respecting the Laws and Customs of War on Land: prisoners of war (arts. 4 & 7); the ban on use of poison or denial of quarter (art. 23); or denying protection to a flag of truce (art. 32).

132. See text to note 128 supra.

133. Common arts. 1 & 2.


137. As to German trials held in Leipzig after WW I against German accused, these were in accordance with Article 228 of the Treaty of Versailles, the German authorities having declined to hand them over to the Allied Powers in accordance with the Treaty.

138. See, e.g., the German trial of Captain Fryatt (1916) for attempting to ram a German U-boat while captain of a merchant ship. GARNER, 1 INTERNATIONAL LAW AND THE WORLD WAR (1920), and of Nurse Edith Cavell, who, in breach of her protected status as a medical person, assisted in the escape of Allied personnel. Nurse Cavell was not tried for a war crime as such but for a breach of the German Military Penal Code, to which she was not strictly amenable. Id. at 97. See also Llandovery Castle (1923), in which U-boat officers were tried by a German tribunal for, "contrary to international law," firing upon and killing survivors of an unlawfully torpedoed hospital ship. CAMERON, THE PELEUS TRIAL, app. IX (1948); Trial of Eck (Peleus trial) (1945), id.; and the case of Re Klein for killing civilian nationals contrary to international law, 1 T.W.C. 46 (1949).

139. See, e.g., Drierwalde Case, 1 T.W.C. 81 (1946), for killing captured RAF personnel contrary to art. 23(c).

140. See Muller's Case and Neumann's Case at Leipzig, H.M.S.O., Cmd. 1422 (1921), at 26, 36, for a finding of guilty of ill-treating prisoners of war contrary to German Penal and Military Penal Codes; see also the U.S. trials of personnel accused of crimes against prisoners or enemy civilians during Korean and Vietnam conflicts, e.g., U.S. v. Kennan 14 C.M.R. 742 (1954); U.S. v. Callery 46 C.M.R. 19 (1969-1971). 1 M.J. 248 (1973). For instances of trials by German military courts of members of the German armed forces, with executions in some cases for offenses against Allied personnel, both civilian and military, during World War II, see ZAYAS, WEHRMACHT WAR CRIMES BUREAU 1939-1945, 18-22 (1989).


142. Res. 95 (1), 1946, reprinted in id. at 921.

143. Id. at 923.

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145. During the final session of the Conference, some States, e.g. Canada, made statements indicating that they considered the traditional law denying superior orders as a defense, while accepting it by way of mitigation, to be good law. LEVIE, PROTECTION OF WAR VICTIMS, Supp. 40-1 (1985).

146. Protocol I, supra note 21, arts. 86 & 87.

147. See, e.g., GREEN, ESSAYS, supra note 34, ch. 4; Draper, The Role of Legal Advisers in Armed Services, 18 INT’L REV. RED CROSS 6 (1978).


150. Lists of some of these are to be found in both the British and U.S. manuals, supra notes 116 & 117, paras. 110, 111, and 34, 37 respectively.

151. GERMAN WAR BOOK, supra note 125, at 66–7.

152. Geneva Conventions, 1949, (I, art. 12; II, art. 12; III, art. 16; IV, art. 13; Protocol I, art. 75) which also forbids any discrimination on grounds of "language, national or social origin, wealth, birth or other status, or any other similar criteria."


155. Schindler & Toman, supra note 13, at 495.

156. Supra note 149, Judgment, May 7, 1997.


158. Schindler & Toman, supra note 13, at 689.


160. See note 149 supra.

161. Protocol I, supra note 21, art. 56.

162. 35 I.L.M. 809 (1996)

163. Id., paras. 74, 78.

164. In view of the effects of the nuclear weapon, this implies that even tactical weapons used in the field are likely to be considered illegal, as inhumane. In this connection, see id., para. 94.

165. Id., paras. 78, 79.

166. Id., para. 88.

167. Id., para. 95.

168. Id., para. 96.

169. Schindler & Toman, supra note 13, at 207.

170. Id. See also SPAIGHT, AIR POWER AND WAR RIGHTS 42-3 (1947); 2 OPPENHEIM, INTERNATIONAL LAW 519 (7th ed., Lauterpacht ed., 1952); 2 SCHWARZENBERGER, INTERNATIONAL LAW 153 (1968); 1 LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 207–26 (1985).