



HISTORICAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

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ABSTRACT

This paper concerns with the historical development of IHL. Rules of IHL in Greek era, in middle ages and during the renaissance period from the battle of Solferino to the four Geneva conventions and the additional protocols how the development of international humanitarian law took place. Efforts in this paper has been made to alleviate human pain and suffering resulting from armed conflicts. IHL operates during the times of war only. This paper is an effort to make the historical development of IHL. 'Protection rules' and combat rules were also developed during the second half of the 19th century. The four Geneva Conventions apply to all cases of declared war or any other armed conflict between contracting parties, "even if the state of war is not recognized by one of them".

1. Introduction

Individual efforts to alleviate human pain and suffering resulting from armed conflicts are almost as old as war itself. They were shared by different civilizations¹ and led to the adoption of various practices and texts in many parts of the ancient world. Thus, in ancient India, the book of Manu prohibited the use of barbed arrows. In antiquity, the practice between Greek States was to refrain from poisoning wells and to bury enemy dead.²

In the Middle Ages, Christian States were bound by rules developed by the Church. These rules prohibited the use of the crossbow; provided for the protection of civilians, of churches; prohibited fighting on certain days, etc. The institution of Chivalry contributed to

¹*International Dimensions of Humanitarian Law, op. cit., note 9, Part. I*

²*Ibid.*

the development of early rules of humanitarian law. However, all these rules did not prevent Crusaders from committing atrocities the consequences of which are still felt today.³

In the 18th century, during the so-called century of enlightenment, humanitarian values made a leap under the influence of liberal philosophers, like Jean-Jacques Rousseau.⁴ In *Le contrat social* (1762), Rousseau developed the idea that wars are conflicts between States which oppose men as soldiers, not as individuals. Therefore, he argued that civilians are not concerned by wars and that they should be protected. Likewise, Rousseau maintained that wounded soldiers and soldiers who surrender cease to be enemies and should also be protected and cared for.⁵

2. Solferino and its repercussions

The battle of Solferino took place in 1859 in Northern Italy between Austro-Hungarian armies on one side and the Franco-Sardinian Alliance on the other. The battle lasted ten hours. The casualties were heavy: more than 45,000 dead, wounded or missing. Most wounded were left to die without help for want of adequate medical resources. It is at this point that Henry Dunant came into the picture. Henry Dunant was a Swiss businessman who was travelling back to Geneva through Northern Italy when he arrived in Solferino just after the battle was over. Dunant, who was shocked by the agony of the wounded soldiers, interrupted his trip back to Geneva. For several days, with the help of women from a neighbouring village, he tended to the wounded and the dying without any distinction based on uniform.⁶

Later on, back in Geneva, Dunant wrote a short book entitled *A Memory of Solferino* in which he gave a vivid account of his experience in Solferino.

In his book, Dunant also developed two seminal ideas:

- a relief society for wounded soldiers should be created in each country in times of pence to supplement army medical services in times of war;
- some principles should be adopted by way of an international treaty to govern the activities of national relief societies in times of war.⁷

³*Ibid.*, at pp. 23 *et seq.*; J. PICTET, *op. cit.*, note 72, at pp. 16-17. On the law of war in the Middle Ages, see also Theodore MERON, *Henry's Wars and Shakespeare's Laws. Perspectives on the Law of War in the later Middle Ages*, Oxford, Clarendon Press, 1993; L.C. GREEN, *op. cit.*, note 319, at pp. 23 *et seq.*, and 287-288.

⁴ Translated into English by G.D.H. Cole, on line: www.constitution.org/jjr/socon.htm. See G.I.A.D. DRAPER, *loc. cit.*, note 20, at pp. 68-69.

⁵*Ibid.*, at p. 68.

⁶ See F. BUGNION, *op. cit.*, note 216, at p. 6

⁷*Supra*, note 293.

3. Original protection and combat rules

The Geneva Convention of 1864 included ten articles formulated around four basic principles:

- army medical personnel are non-combatants. If captured by the enemy, they must not be held prisoners;
- all wounded and sick soldiers must be cared (or without any adverse distinction);
- civilians who tend to wounded soldiers must be respected;
- field hospitals and ambulances are neutral. They are identified by a red cross on a white background.⁸

Ratified by more than ten States within one year of its adoption, the 1864 Geneva Convention is a landmark. For one thing, it is the first multilateral treaty concluded in times of peace to govern future armed conflicts between the contracting parties. For another thing, it marks the beginning of IHL. A draft convention extended the provisions of the first Geneva Convention to naval warfare in 1868. However, it was never ratified. The extension eventually took place through the conclusion of Hague Convention III, adopted in 1899.⁹

Other Hague Conventions concluded in 1699 and 1907 dealt with various subjects, including naval warfare and neutrality. Declarations on various means and methods of warfare were also adopted along with the Hague Conventions of 1899 and 1907. In the meantime, the 1864 Geneva Convention was revised in 1906. The new Convention was intended to replace its predecessor between States parties to both texts, Its provisions were extended to naval warfare by Hague Convention X of 1907.¹⁰

4. Between the two World Wars

In the wake of the First World War, the Geneva Protocol of 1925 prohibited the use in war of asphyxiating, poisonous or other gases as well as of bacteriological methods of warfare. The Protocol completed Hague Declaration 2 on asphyxiating gases (1899) and introduced new prohibitions on the use of bacteriological weapons. The application of the Geneva Protocol raises the question whether it covers tear gas and other usually non-lethal gases.¹¹

During the same period, further efforts were accomplished to regulate naval and air warfare. Thus, the 1936 London Process-Verbal On submarine warfare reconducted the

⁸*Ibid.*, at pp. 22-23; in D. SCHINDLER and J. TOMAN, *op. cit.*, note 9, at p. 365.

⁹*Ibid.*, at p. 66. In D. SCHINDLER and J. TOMAN, *op. cit.*, note 9, at p. 373.

¹⁰ See F. BUGNION, *op. cit.*, note 216, at p. 67, In D. SCHINDLER and J. TOMAN, *op. cit.*, note 9, at p. 397.

¹¹*Ibid.*, at p. 59. See also L.C. GREEN, *op. cit.*, note 319, at p. 39.

provisions of Article 22 of the 1930 London *Treaty for the Limitation and Reduction of Naval Armaments*. Under its provisions, submarines, when attacking merchant vessels, are bound by the same rules as those applicable to surface vessels. As a rule, they may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ships papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board." In practice, the rule was very rarely respected and seems quite difficult to apply in most cases. It may have become obsolete in spite of fact that it is reaffirmed by the San Remo Manual.¹²

In turn, the 1906 Geneva Convention on wounded and sick in armies in the field was revised and enlarged in 1929. The 1929 Convention replaced earlier versions of the same text. At the same time, a Geneva Convention dealing with the treatment of prisoners of war was adopted to supplement the Hague Rules introduced on the subject in 1899 and 1907. On the other hand, a draft Convention on the protection of civilians behind enemy lines, prepared by the ICRC, could not be adopted before the outbreak of the Second World War. The only applicable rules were thus found in some provisions of the Regulations annexed to the Hague Conventions of 1899 and 1907 dealing with land warfare. They proved insufficient to protect the millions of civilians who found selves in the power of the enemy during the Second World War.¹³

5. The Geneva Conventions of 1949

In 1949, four new Geneva Conventions were adopted, Geneva Convention I revises and enlarges the provisions of the 1929 Geneva Convention on wounded and sick in armies in the field. Geneva Convention II replaces Hague Convention X of 1907 and adapts to naval warfare the provisions of Geneva Convention I. Geneva Convention III complements the corresponding provisions of the Regulations annexed to the Hague Conventions of 1899 and 1907 on land warfare. It replaces the 1929 Geneva Convention on prisoners of war. Geneva Convention IV is new, since it is the first one dealing exclusively with the protection of civilians in times of war. Indeed, until 1949, IHL was mainly concerned with the protection of combatants, However, the Convention supplements some Hague Regulations on land warfare relating to civilians. The Convention focuses on the treatment of civilians who are

¹²*Supra*, note 2, at paras. 45 and 139.

¹³ See Arts. 42-56.

under the jurisdiction of the enemy, either in its territory or in occupied territory. To a lesser extent, it also seeks to protect civilians from attacks and other effects of war.¹⁴

The four Geneva Conventions apply “to all cases of declared war or of any other armed conflict” between contracting parties, “even if the state of war is not recognized by one of them”. They also apply “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”. Moreover, they apply between the contracting parties, even if one of the belligerents is not a party to the Conventions (common Art. 2). In so doing, the Conventions set aside the application of the so-called “general participation clause”^o found in some earlier treaties.¹⁵

6. The Additional Protocols

Soon, the Geneva Conventions of 1949 needed, in turn, to be adapted to the changing nature of armed conflicts. After the Second World War, non-international armed conflicts became more frequent. Some took the form of wars of national liberation. In those asymmetrical types of armed conflicts, guerrilla warfare became the method of choice for the weaker party. As a result, the principle of distinction turned out to be more difficult to comply with and civilians ended up being increasingly the object of attacks. To deal with these and other issues, a diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts convened by the Swiss government in 1974.¹⁶

During the Conference, participating States were invited to consider two additional protocols to the Geneva Conventions, which had been prepared by the ICRC. They were adopted in 1977. Additional Protocol I applies to international armed conflicts. It supplements the Geneva Conventions of 1949 (Art. 1(3)) as well as the Hague Regulations on land warfare. Additional Protocol II applies to non-international armed conflicts. It supplements the provisions of Article 3 common to the four Geneva Conventions (Art. 1(1)). Both Additional Protocols are studied below.¹⁷

¹⁴ See F. BUGNION, *op. cit.*, note 216, at pp. 313 *et seq.*; G.I.A.D DRAPER, *loc. cit.*, note 20, at pp. 80 *et seq.*; L.C. GREEN, *op. cit.*, note 319, at pp. 43 *et seq.*

¹⁵ For instance, in the 1907 Hague Conventions on land and sea warfare and the 1906 Geneva Convention. It was excluded from the Geneva Conventions of 1929. See G.I.A.D. DRAPER, *loc. cit.*, note 20, at pp. 74 and 76-77.

¹⁶ See F. BUGNION, *op. cit.*, note 216, at pp. 321-322. Final Act of the Diplomatic Conference in D. SCHINDLER and J. TOMANI, *op. cit.*, note 9, at p. 699.

¹⁷ *Infra*, nos. 300 *et seq.*

7. Modern rules on the conduct of hostilities

In the same vein, new international treaties dealing with the conduct of hostilities were adopted after the Second World War. The 1954 Hague *Convention for the Protection of Cultural Property in the Event of Armed Conflict* applies to international armed conflicts. However, some of its provisions also apply to not-international armed conflicts (Art. 19). Under the Convention, the parties undertake to adopt, in time of peace, such measures which may be needed to safeguard cultural property located within their territory against its foreseeable effects of war (Art. 3). Moreover the Convention prohibits contracting parties from using cultural property that may expose it to destruction or damage in the event of an armed conflict.¹⁸

It also prohibits contracting parties from directing any act of hostility against cultural property. Those prohibitions may be waived only where military necessity so requires. Furthermore, the parties undertake to prohibit, prevent and, if necessary, put a stop to theft, pillage or misappropriation of cultural property, as well as to vandalism against such property. Reprisals against cultural property is prohibited (Art. 4). In situations of military occupation of a territory, the occupying power must, “as far as possible”, help the local authorities safeguard and preserve the cultural property of the occupied country (Art. 5). The Convention creates a distinctive emblem¹⁹ (Art. 16), which may be used to facilitate the recognition of cultural property (Art. 6).

In 1996 the International Committee of the Blue Shield (ICBS) was established by the following non-governmental organizations affiliated with UNESCO: the International Council on Archives, the International Council of Museums, the International Council on Monuments and Sites and the International Federation of Library Associations and Institutions. The main function of the ICBS is to coordinate action in times of emergency, including armed conflicts. It also collects and disseminates relevant information.²⁰

The 1972 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, as well as the 1993 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, supplement the 1925 Geneva Protocol on poisonous gas. While the prohibition of the use of bacteriological weapons is

¹⁸ For the purposes of the Convention, the concept of ‘cultural property’ includes: movables or immovables “for great importance to the cultural heritage of every people”, buildings used to preserve movable cultural property, and “centres containing a large amount of cultural property”.

¹⁹ *Infra*, nos. 644-645.

²⁰ See A. ROBERTS and R. GUELEF, *op. cit.*, note 2, at pp. 372-373.

implicit in the 1972 Convention, the use of chemical weapons by contracting ion is expressly prohibited by the 1993 Convention (Art. 1).²¹

The 1980 *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*. The types of weapons covered by the Convention and limitations affecting their use were originally the object of three Protocols annexed to the original Convention.²²

Protocol I prohibits the use of any weapon the primary effect of which is to injure by fragments which are not detectable in the human body by X-rays.²³

Protocol II regulates the use on land of mines, booby traps and other devices. It prohibits the indiscriminate use of such weapons or their being directed against civilians (Art. 3). In the same vein, Protocol II prohibits the use of booby-traps in the form of apparently harmless portable objects (toys). Booby-traps which are attached to, or associated with, protective emblems; sick, wounded or dead persons; medical facilities and equipment, etc., are also prohibited (Art. 6). Moreover, restrictions are placed on the use of mines other than those which are remotely delivered, booby-traps and other devices in populated areas (Art. 4), as well as on the use of remotely delivered mines (Art. 5). Parties to a conflict must record pre-planned minefields laid by them and areas in which they have made extensive and pre-planned use of booby-traps.²⁴

Protocol III regulates the use of incendiary weapons, such as napalm or white phosphorus. It prohibits attacks against civilians and civilian objects by way of incendiary weapons. Also prohibited are attacks against military objectives located within a concentration of civilians using air-delivered incendiary weapons. Attacks against military objectives within a concentration of civilians by incendiary weapons other than air-delivered weapons are strictly regulated. Likewise, attacks against forests or other kind of plant cover by way of incendiary weapons are only allowed when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives” (Art. 2).²⁵

²¹ See D. SCHINDLER and J. TOMAN, *op. cit.*, note 9, at p. 135. As of 24 January 2009, it is binding on 164 States, including Canada.

²² See F. KALSHOVE and L. ZEGVELD, *op. cit.*, note 31, at pp. 156 *et seq.*

²³ See A. ROBERTS and R. GUELFF, *op. cit.*, note 2, at p. 527; D. SCHINDLER and J. TOMAN, *op. cit.*, note 9, at p. 190. As of 23 January 2009, it is binding on 105 States, including Canada.

²⁴ See D. SCHINDLER and J. TOMAN, *op. cit.*, note 9, at p. 191; A. ROBERTS and R. GUELEF, *op. cit.*, note 2, at p. 528. As of 23 January 2009, it is binding on 92 States, including Canada.

²⁵ See A. ROBERTS and R. GUELFF, *op. cit.*, note 2, at p. 533; D. SCHINDLER and J. TOMAN, *op. cit.*, note 9, at p. 210. As of 23 January 2009, it is binding on 100 States, including Canada.

A fourth protocol Was added in 1995. It prohibits the use and transfer of blinding Laser weapons. The protocol is aimed at weapons intended to cause permanent blindness. It does not cover laser systems which cause blindness “as an incidental or collateral effect of the legitimate employment of laser systems”, such as laser systems used against optical equipment (Art. 3).²⁶

The 2008 Convention on Cluster Munitions

As emphasized by its Preamble, the Convention on Cluster Munitions is mainly concerned with the protection of civilians and the negative consequences of cluster munitions on economic and social development, post-conflict rehabilitation and reconstruction the return of refugees and internally displaced persons, as well as on international peace-building and humanitarian assistance efforts. Under its provisions each party “undertakes never under ally circumstances” to use, develop, produce, acquire, stock-pile, retain or transfer cluster munitions, as well as to “(a)ssist, encourage or induce anyone to engage In any activity prohibited to a State Party under the Convention” (Art. 1(1)). The Convention was adopted on May 30, 2008 by 111 States, and is open for signing since December 2008 (Art. 15). As of 23 January 2009, it was signed by 95 States and ratified by four.²⁷

The Convention provides a definition of a cluster munition, deeming it a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunition” (Art. 2). Limited exceptions to the Convention do exist, inducting munitions designed to disperse flares or smoke, and munitions which contain fewer than ten explosive submunitions when each of these submunitions (a) is designed to locate and engage a single target object” (or “point target”) and (b) is equipped with an electronic self-destruction and self-deactivating feature (Art. 2(a)(c)).²⁸

State parties commit to destroying existing stocks as soon as possible, hut no later than eight years after the entry into force of the Convention for that State (Art. 3(2)). In exceptional circumstances, four-year extensions may be granted (Art. 3(3), (4), (5)). Notwithstanding this prohibition against stockpiling States are allowed to have a limited amount of cluster munitions for training purposes and the development of counter-measures

²⁶ See D. SCHINDLER and J. TOMAN, *op. cit.*, note 9, at p. 212; A. ROBERTS and R. GUELF, *op. cit.*, note 2, at p. 535. As of 23 January 2009, it is binding on 92 States, including Canada.

²⁷ See on line: www.clusterconvention.org/convention/text/; www.stopclustermunitions.org/the-solution/the-treaty/?id=84.

²⁸ These strong terms suggest that the Convention applies to international as well as to non-international armed conflicts.

(Art. 3(6)). State parties also commit to clearing areas contaminated with cluster munition remnants within ten years, as well as provide risk reduction education to promote awareness among civilians living around such areas (Art 4). Of particular importance to international humanitarian law, the requirement to assist cluster bomb victims is provided in the Convention as well (Art. 5).²⁹

Whenever possible, cooperation and mutual assistance between State parties in accomplishing the requirements of this Convention shall be provided (Arts. 6, 8). Moreover to ensure that the Convention is actually implemented by State parties, certain transparency measures are indicated (Art. 7). No later than 180 days after the Convention enters into force for a State party, the State must submit a report to the Secretary-General of the United Nations. The report must detail the measures the State has taken to implement the Convention (see Art. 9), as well as an actual, precise account for the cluster munitions locate within the State. This report must be updated annually (Art. 7(2)).³⁰

State parties may undertake joint military operations with nonparty States which might engage in activities prohibited by the Convention (Art. 21(3)). However, all State parties have the obligation to discourage the usage of cluster munitions in joint operations (Art. 21(2)).³¹

Notably, the United States did not participate in the negotiation of this Convention. Acting Assistant Secretary for Political Military Affairs, Stephen B. Mull, made the following statements right before the adoption of the Convention, detailing the official United States cluster munitions policy:

- “I’d also note that while cluster munitions, as I mentioned at the beginning, there are legitimate humanitarian concerns about their use, they really represent a small percentage of the threat that unexploded remnants of war pose to civilian populations”.
- “We think that it is going to be impossible to ban cluster munitions, as many in the Oslo process would like to do, because these are weapons that have a certain military utility and are of use. The United States relies on them, as an important part of our own defense strategy. Many of our allies rely on them as well.”
- The utility of the weapons are in a conflict zone when you are trying to stop the advance of an enemy onto your territory or against – or against your position.”³²

²⁹ In application of the obligation to ensure respect for IHL.

³⁰ For the complete, on-the-record briefing, see U.S. Department of State, “U.S. Cluster Munitions Policy”, 21 May 2008, on line: <http://www.defenselink.mil/Release.aspx?ReleaseID=120490>

³¹ *Infra*, nos. 192 *et seq.*

³² *Infra*, nos. 700 *et seq.*

Conclusion

Other recent developments of IHL relate to the principles and rules applicable to UN military operations as well as to the prosecution and punishment of war crimes, crimes against humanity and genocide. More recently still, a diplomatic conference of the States parties to the Geneva Conventions of 1949 adopted a third Protocol additional to the Conventions creating a new distinctive emblem, which may replace or be used jointly with traditional ones.³³

³³*Infra*, no. 637.