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Kolb, Robert

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CHAPTER 13

THE PROTECTION OF THE INDIVIDUAL IN TIMES OF WAR AND PEACE

ROBERT KOLB

1. INTRODUCTION

SINCE antiquity, public international law has dealt to some extent—at least secondarily—with rights and duties of individuals. Institutions such as postliminium or the suppression of piracy *iure gentium* bear testimony to this ancient lineage. In classical authors such as Grotius, we still find many passages, reminiscent of the medieval and scholastic world, where the status of individuals is at stake.¹ During the 17th–19th centuries, the question of torts committed against subjects of a foreign king and the ensuing remedy of the letters of reprisal were much discussed.² Since ancient

¹ See eg the chapter on the rights of parents, marriage, associations, and the rights over subjects and slaves: H Grotius *De iure belli ac pacis* (1625) book 2, ch 5.

² See eg *De iure belli* (n 1) book 3, ch 2; E de Vattel *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (London 1758) vol 1, book 2, ch 18, paras 342 ff; see L Oppenheim *International Law* (RF Roxburgh ed) (3rd edn Longmans London 1921) vol 2 (*War and Neutrality*), at 47–8; G Clarke ‘The English Practice with Regard to Reprisals by Private Persons’

times, the protection of merchants had been the object of keen attention. In the 19th century, the 'minimum standard of treatment' of foreigners was developed and international humanitarian law to take care of the victims of war emerged.

Thus, as a whole, the statement that the individual has long been deprived of standing in international law has been at least partially a doctrinal oversimplification. It gained popularity during the apogee of the state-centred phase of international law, at the end of the 19th century and at the beginning of the 20th. At that time, the national states developed and consolidated themselves on the European continent. As newly independent entities, often rooted in democratic institutions, they cherished their sovereignty. The State, dominated by its own constitution, became the dominant perspective of the times, the major political fact of the era. International society was thenceforth neatly separated from internal society. On the one hand was the State, with its vertical legal order and concentration of powers; on the other was the international space, with its horizontal legal order and its dispersion of power. This was at once order and anarchy. If the State was the dominant political feature of the times, a neat separation between its internal and external side was imposed also as to the 'subjects of the law' (legal persons). On the one hand, in municipal law, the relations between the State and its citizens, and among private persons; on the other hand, in international law, the relations between States or powerful entities (*ius inter potestates*). Rights and duties for individuals could therefore be only a matter for municipal law. These were essentially internal affairs. To be more precise, international law could 'indirectly' deal with individuals. Thus, a treaty could foresee that certain rights must be granted to certain persons; but in order to grant those rights as enforceable legal positions, the municipal law of the concerned State must enact the necessary legislation. The individual could thus not derive directly rights and duties from international law; international law could only oblige the States to take action in order to realize certain goals of protection.³ This dual reality was framed in the known phrase of Oppenheim's *International Law* according to which the individual can only be the 'object' but not the 'subject' of international law.⁴

The dualistic model, described here with regard to the sources (vertical in municipal law: legislation; horizontal in international law: treaty and custom, the last being at those times framed as a tacit agreement) and the subjects (States and powers in international law; individuals in internal law), has been only a transient phase in the development of international law. Since the beginnings of the 20th century, many critical schools sought to re-assert a place for the individual in international law,

(1933) 27 *American Journal of International Law* 694–723 at 700 ff; WG Grewe *The Epochs of International Law* (M Byers trans) (Walter de Gruyter Berlin 2000) at 201–3; see also P Lafargue *Les représailles en temps de paix* (A Rousseau Paris 1899).

³ See eg G Jellinek *System der subjectiven öffentlichen Rechte* (Mohr Siebeck Freiburg 1892) at 310 ff; but see also A Peters 'Das subjektive internationale Recht' (2011) 59 *Jahrbuch des öffentlichen Rechts* 411–56.

⁴ *International Law* (n 2) vol 1, 460.

sometimes as the ultimate and true subject of all legal orders: one may here quote the Vienna School around Hans Kelsen⁵ or the sociologic solidarism of Scelle.⁶ Moreover, at the same time, many moderate authors rejected the 'dualistic' approach to international law, preferring 'monistic' constructions.⁷ If international law and municipal law are part of one single great legal phenomenon, there is no reason to exclude that international law, as well as national law, could deal with individuals. These considerations were initially essentially theoretical. They gained practical momentum consequentially to the policies of oppression and the atrocities of the Axis Powers. Thus, since 1945, it was understood, politically as well as legally, that international law as well as municipal law could and should deal with the individual. Henceforward, the branches of international human rights law, international humanitarian law and international criminal law developed considerably. In a historical perspective, public international law thus first touched to the individual; than, during a short time-span the individual was eclipsed; and in the last phase the individual became an essential part of the international legal order.

The concrete approach of the law towards the individual, however, changed. It would be wrong to affirm summarily that classical international law did not seek the protection of individuals (even if this protection was generally achieved through some participation of the State, for example, the *lettres de marque*, whereas today it is autonomous, for example, through human rights complaints by the aggrieved individual himself). However, the amount and the modalities of the protection have undergone profound changes. The legal regime protecting the individual (or sanctioning him, which is but another aspect of a will to protect) has been considerably strengthened. Haphazard and punctual institutions of the past have been transformed in ever-growing and fully fledged regimes of protection. The modalities of protection have also changed. Modern international law is predicated upon the idea that the individual has 'fundamental rights': this stance can be seen in international human right law as well as in international humanitarian law (law of war). Fundamental rights are but a variant of 'subjective rights'. Now, the idea that a subject of the law is invested with a series of subjective rights which he may claim at its own will is a modern conception.⁸ It did not exist in antiquity, or in the Middle Ages; it emerged

⁵ On Kelsen and his doctrine, see A Truyol y Serra and R Kolb *Doctrines sur le fondement du droit des gens* (A Pedone Paris 2007) at 77 with further references; on his treatment of legal personality in particular, see JE Nijman *The Concept of International Legal Personality* (TMC Asser Press The Hague 2004) at 149 ff; R Portmann *Legal Personality in International Law* (CUP Cambridge 2010) at 173 ff.

⁶ *Doctrines sur le fondement du droit des gens* (n 5) 94 ff; see also A Wüst *Das völkerrechtliche Werk von George Scelle im Frankreich der Zwischenkriegszeit* (Nomos Baden-Baden 2007); on the treatment of legal personality in particular, *The Concept of International Legal Personality* (n 5) 192 ff.

⁷ See eg the nuanced arguments presented by M Bourquin 'Règles générales du droit de la paix' (1931-1) 35 *Recueil des cours* 1-232 at 135 ff.

⁸ For a powerful refutation C Donahue 'Ius in the Subjective Sense in Roman Law. Reflections on Villey and Tierney' in D Maffei et al (eds) *A Ermio Cortese* (Il Cigno Edizioni Rome 2001) 206-20

in Enlightenment and is codified in the modern law, its hallmark being precisely the 'rights of man'. Modernity has shifted the paradigm. Antiquity and Middle Age think in categories of cosmic order. The law is a reflection of this order. It is therefore objective law. Modernity performs the anthropocentric revolution. The individual and his representation of the word become the centre of things. It was thus only a question of time for the 'subjective rights' of man to emerge. Doubtless, it is this relative absence of 'subjective rights' comparable to our own ones of today which renders more difficult for the modern man discovering the protections the old law granted to the individuals. These protections were more hidden in the wood of objective norms and were not formulated as powers of the individual under the guise of subjective entitlements. Therefore, only a studied eye will find the relevant links, whereas the time-constrained superficial observer will think that the era of protection of the individual in international law has started in 1945. With respect to a certain quality of protection, this is certainly true; but it is untrue if the question is considered from a global perspective avoiding retro-projection of modern legal tools and perspectives.

The protection of the individual is today performed mainly by two branches of international law: international human rights law and international humanitarian law. The first includes areas such as the protection of workers (International Labour Organisation (ILO)), refugees, internally displaced persons, indigenous peoples, etc. The second concerns protection of civilians, persons *hors de combat*, but also military persons still in combat: for example, when they are protected against the effect of certain weapons causing unnecessary suffering. This chapter will concentrate on the historical development of the law of war. It will focus on the phase prior to 1945 but include some short incursions into later times.

By approaching the subject-matter under the perspective of the protection of individuals, there is moreover the pitfall of not doing true and full justice to the history of certain branches of the law. Hence, international humanitarian law before 1945 was not the core of the branch of the law dealing with warfare. The older law was still centred on means and methods of warfare, that is, on military concerns. It was a law designed for military personnel and their fighting methods. The main point was to secure military honour (as derived from old chivalric traditions) and only as an annex to maintain some humanity in warfare. The civilian was largely absent from the law of war of that day. In other words, 'Hague Law' predominated largely over 'Geneva Law'. Moreover, this Hague Law remained under the sway of a largely applied exception of military necessity. It was understood at these days—even if not at all uncontroversial—that military necessity could derogate from any rule of the law of armed conflict. This body of law thus remained always under the control of a sort of subjectively appreciated *rebus sic stantibus*. This applied also to

the protection of individuals under the 'Geneva Law' limb. Hence, a much discussed question of the 19th century was that of a small military detachment happening to capture a great number of prisoners of war, which it could not keep under control or bring to a camp without putting into jeopardy its own security. Some authors propounded for the rule that the prisoners should then be released, eventually disarmed and even naked. Others argued that military necessity prevailed and that it was allowed to kill them. There is thus a danger of reconstructing the old law of war retroactively and anachronistically by putting too great an emphasis of the 'protection of war victims' or of 'individuals'. In this case, the law of war is excessively perceived and analysed through the lens of our individual-centred approach of today. In reality, the 'humanization' of international humanitarian law has been a slow progress. The same could be said for human rights law. Many forerunners of it can be found before 1945—and yet none is truly human rights law. In a somewhat retroactive perspective, all the punctual institutions that can be identified are nevertheless enrolled as nurses of infant human rights law. To some extent, this sort of anachronism seems inevitable.

2. THE HISTORY OF INTERNATIONAL HUMANITARIAN LAW (LAW OF WAR)

2.1. General Aspects

Rules as to the conduct of warfare (rather than the treatment of enemy persons) have existed since most ancient times in all civilizations. These rules are of four types: (i) rules of chivalry for combat tactics, oscillating between phases of peaks and then again phases of weakness; (ii) rules as to the prohibition of certain weapons, for example, poisoned ones; (iii) rules as to the protection of certain persons (for example, monks) or places (for example, temples) or objects (for example, fruit-trees); (iv) rules as to *commercium belli*, that is, conventions concluded between belligerents (armistices, truces, exchange of prisoners, etc.). In the *ius publicum europaeum* these rules were consolidated since antiquity and especially in the Middle Ages. But there existed such rules also in other civilizations: the Jewish (see the Old Testament), the powers of the Middle East (Persia, Mitanni, the Hittites, etc.), ancient India, ancient China, Black Africa, or Pre-Colombian America. Thus, for example, in the 'spring and autumn' period of ancient China (771 BC to 481 BC), characterized by the existence of a series of independent States, chivalry was at its heyday. Aristocrats fought the combat, each one followed by a number of commoners. War was highly ritualized and guided by ethical considerations. This ethic of war

faded away in the next phase, those of 'States in War' (481 BC to 221 BC), where war became a struggle for conquest of territory and resources. The war became now licentious and brutal. Such oscillations between phases of constrained and then again unbridled war can be found in all civilizations. In some areas of the world quite special rules had emerged. Thus, in Pre-Colombian Mesoamerica, there has been an agreement among the Aztecs and some other powers to fight 'Flower Wars' where the object was essentially to capture prisoners alive for human sacrifice. Thus very specific rules of warfare developed for such wars. They were aimed at avoiding killing and privileging capturing.

The restrictions on belligerent violence of these ancient times do however not truly aim at the protection of 'individuals' in the modern sense of the word. In no ancient civilization a sacralisation of human life and integrity of limb, as it is in modern times, can be found. The limitations on belligerent licence flow from two considerations: (i) notions of military honour and chivalry, which can be found in all cultures; (ii) self-interest in limiting warfare, be it to secure a better peace by not inciting to hatred for excessive destruction committed on the vanquished community, to secure a better booty and conquered territories not entirely destroyed, or to extract financial advantages. Hence, for example, prisoners of war were initially killed, later enslaved and sold, still later released against ransom, and finally humanely treated in prisoners of war camps (Geneva Law). This evolution spans from antiquity to modern times. This is not to say that human treatment episodes could not occur: prisoners were graciously released or well treated (one may recall the legendary generosity of Saladin). This was not however a matter of culture, social norm or legal obligation. It was a matter of personal choice and policy.

The history of modern international humanitarian law has been exposed many times. Before passing to that history, it might be useful to insist on the importance of military necessity in the old law of war. This pivotal principle of the 19th century law did not only allow action derogating from the law, it also served to limit bellicose licence.

The law of war of the second part of the 19th century was replete with gaps and uncertainties.⁹ The older 'usages' of war were considered not to be fully legal. They were a mixture of religious, moral and other practices, falling short of the modern legal concept, purportedly strictly scientific, which set its benchmark in the 19th-century positivistic ideal. On the other hand, legal codification was only at its earliest stages. Since one could not rely on a ready-made, lock, stock, and barrel set of

⁹ This is also noted in various preambles of international instruments, eg the Brussels Declaration (Project of an International Declaration concerning the Laws and Customs of War (adopted 27 August 1874) published in D Schindler and J Toman (eds) *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher Leiden 2004) at 21 ff) or the Oxford Manual (Laws of War on Land (adopted by the Institute of

precise rules, it became essential to encapsulate the whole subject matter within some guiding principles. Rapidly, 'military necessity' or 'war necessity' became the hallmark of the whole system. This 'necessity' obtains at once a positive, expansive, licence-to-violence role, and also a negative, restrictive, limiting-violence role. The equation reads as follows: (i) everything which is necessary to overpower the enemy must be granted to the military branch, and it would be pointless to attempt to prohibit it, even on account of humanity; (ii) but everything which is not so necessary remains alien to war and must be considered a superfluous, inhuman and prohibited, destruction. The first is thus always lawful; the second is always unlawful. In case of absence of concrete prohibitive rules, this principle offered criteria for deciding on lawful and unlawful means of warfare. The principle of necessity played an essential residual role in a legal environment where detailed rules were rare and gaps frequent. It kept clear from prohibitions all means and methods thought to be indispensable to achieve the war aim. The principle of humanity and all the restrictions on warfare blossomed in the second branch of necessity, the one of a restrictive nature. This restrictive 'necessity'-philosophy of the modern law of war is admirably summarized in the preamble of the St Petersburg Declaration (1868). Overall, 'necessity' was thus a complex principle inextricably linking together two opposite sides of the coin: it means first licence to act with regard to all violence indispensable for securing the war aim, but at the same time only that much violence and no more. The principle is dualistic, at once liberal and restrictive; it is thus at once flexible and firm. However, the principle could only produce increasingly significant clashes in a world where military conceptions and configurations of *raison d'état* widely differed: what could be common to a German militaristic conception of war (and thus of necessity), an Anglo-Saxon commercial conception of war (and thus of necessity), or a French, at that time more moderate, conception of defensive patriotic war (and thus of necessity)? Moreover, evolutions in warfare, new weapons systems, changes in the configuration of the relationships between civilians and combatants, all these and other factors constantly shift the demarcation lines between what appears 'necessary' or not at a certain time. Where exactly could the line be drawn at a certain moment? It was thus understood, at the turn of the century, that the 'necessity' criterion was too vague and open to abuses, and had to be complemented (and to some extent superseded) by a codification of particular rules in international conventions.

2.2. Specific Institutions

2.2.1. Lieber Code

The code of Francis (Franz) Lieber, a Prussian subject having left Prussia for the

comprehensive codification of the laws of war, drafted during the War of Secession. These instructions mainly codify the existing laws of war of the time. They served as an example for numerous pieces of legislation in the municipal law of various States, in the second half of the 19th century. Moreover, these instructions were used as a direct source of inspiration for the following efforts to draft international conventions on the laws of war. The Lieber Code served not only in the civil war, but was used by the US also in its international wars of the 19th century, in Mexico or in Cuba. The focus of the code is on military law, not on protection of individuals. It is a curious mixture of conservative (even harsh) and progressive elements. Its gist is not truly humanitarian in the modern sense. It rather reflected an acute sense of military honour and fairness. In that context a series of prohibitions were inserted into it, which it is possible, in the light of today, to interpret as expressing 'humanitarian' concerns. Hence, for example, article 11 recalls that the law of war 'disclaim all cruelty', going on to add quite significantly 'and bad faith' (which again shows the sense of honour). Article 15 underlines that direct destruction of life and limb is directed to armed enemies, and to other persons only when destruction is incidentally unavoidable in the armed contest. The civilian is largely absent from the code, it being understood that he is outside the war and not the object of attack.

2.2.2. *First Geneva Convention of 1864 on the Wounded and Sick*

The Geneva Convention of 1864 ('Convention for the Amelioration of the Condition of the Wounded in Armies in the Field')¹⁰ is the offspring of the Solferino events and the initiative of Henry Dunant and Gustave Moynier. Dunant had been struck that so many soldiers died because of the absence of any organized sanitary service. With the large conscription armies of republican times, interest in care of individual soldiers had vanished. In the mass armies of the time, one soldier could easily replace any other soldier. Moreover, the rudimentary sanitary services existing did not benefit from protection against attack. They did not have a uniform distinctive sign, which would make them recognizable. The 1864 convention in its ten articles addresses these questions. Its object is to secure care for wounded or sick military persons being thus *hors de combat*. Certain gaps left by the convention gave rise to additional articles adopted in 1868. The point was mainly to extend the benefit of the convention of 1864 to naval forces at sea. The 'Additional Articles relating to the Condition of the Wounded in War' were however not ratified and did not enter into force. There was in 1864 a first breakthrough in the humanitarian protection of individuals during war, even if restricted to military personnel in certain specific contexts.

¹⁰ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted on August 26, 1864, and entered into force on January 26, 1866), published in *The Journal of Armed Conflict* (1982) 1, 105.

2.2.3. *Declaration of St Petersburg of 1868*

The Declaration of St Petersburg ('Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes of Weight') is known today essentially for its preamble, in which the old Rousseau/Portalis maxim, namely that soldiers are enemies only by accident of the battlefield, found a glaring application. It reads as follows:

Considering: 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 endeavor 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 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.¹¹

This text can be read as a first attempt at humanization of the law of war. It was directed against the Clausewitzian and other military doctrines having pleaded for a 'brutal', 'massive', or 'total' war in order to keep the armed contest as short as possible. To the maxim 'the most humane wars are the shortest ones', the declaration opposes or adds the maxim that the 'wars have to remain limited and humanitarian'. The fact that only military personnel is being directly considered by the declaration is in line with the conception of the time. The civilians are envisioned as being completely alien to the armed contest. The declaration thus limits itself to a military law perspective. The clause 'weaken the military forces of the enemy' at once shows this concentration on the military personnel and confirms implicitly that civilians are not to be made the object of attacks, being outside the sphere of belligerent violence. Overall, the declaration is one of the first hallmarks of a 'humanitarian' approach in the law of war. It consolidates within the Hague Law what had been achieved in the Geneva Law. It also admirably reflects the 'civilization' idea of the 19th century.

2.2.4. *Brussels Conference of 1874*

In 1874, the time had been considered ripe to try to codify the laws of warfare at the international level. Indeed, much national legislation had been adopted and was continuing to be adopted at a quick pace. Consequently, it was considered necessary to tame and to direct these different laws within the four corners of some internationally common law. However, there was finally no agreement at the Brussels Conference on some crucial points, in particular on the definition of combatants: could these only be military personnel of professional armies, or could civilians take up arms for fighting a patriotic war under certain conditions? Great powers leaned

¹¹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted and entered into force 11 December 1868) published in *The Laws of Armed Conflicts* (n 9) 91 ff.

towards the first, small powers towards the second. The Brussels Conference Draft¹² however inspired future attempts at codification. It directly served for the adoption of the Hague Conventions of 1899/1907. From the point of view of protection of individuals, the draft does not expand notably beyond the Lieber Code. It continues to be centred on military law, rather than on protected persons. It is however the first international draft to contain a section on the protection of prisoners of war (articles 23 ff).

2.2.5. *Oxford Manual of 1880*

Another effort of the same type is the manual of 'Laws of War on Land' prepared by Gustave Moynier for the Institut de droit international (1888).¹³ The aim was to furnish to governments a practical manual, reflecting the customs of land warfare, in order to serve as a basis for national legislation in each State. Humanitarianism in this text is again directed essentially to the military personnel. The civilian remains largely absent, apart in occupied territories where some rudimentary protections are devised (especially in article 49). Article 7 recalls that 'it is prohibited to maltreat inoffensive populations'.

2.2.6. *Hague Conventions of 1899 and 1907*

The Hague Conventions (1899/1907) are the first comprehensive treaty codification of the laws of war on land and on the sea.¹⁴ The most important piece is convention II of 1899; it led to convention IV of 1907, which is a revised version, both 'respecting the Laws and Customs of War on Land'. This convention took over the contents of the Lieber Code, the Brussels Draft and the Oxford Manual. It contains rules on the protection of prisoners of war (articles 4 ff), limits the permissible means and methods of warfare (articles 22 ff) and contains some (not sufficiently developed) rules on the protection of civilians in occupied territory (articles 42 ff). Its stress lies still on military law, that is, on what the military personnel may do when fighting, when occupying, and on the duties they have one with regard to the other among themselves. The modern 'protected person' is still absent. The most remarkable humanitarian feature in this convention is the famous 'Martens Clause':

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 included in the Regulations adopted by them, 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.¹⁵

¹² *The Laws of Armed Conflicts* (n 9) 21 ff.

¹³ *ibid* 29 ff.

¹⁴ *ibid* 41 ff.

¹⁵ Convention (IV) respecting the Laws and Customs of War on Land (adopted 18 October 1907,

The present clause flows from the principle of humanity. The laws of war contain a series of prohibitions for conduct during warfare. The clause secures that the gaps of the laws of war do not automatically lead to a licence for inhuman action according to the principle that 'all what is not prohibited is allowed'. The belligerent is required first to check if its prospected behaviour, even if not expressly prohibited in the positive body of the law, can be conciliated with dictates of humanity. If not, he should either abstain from it, or at least give due weight to potential humanitarian temperaments in the prospected action. The clause had no true practical weight before 1945. It became a part of positive law in 1949, but is still perhaps not as much taken seriously as it could and should.

2.2.7. *Geneva Conventions of 1906 and 1929*

A progress in humanitarian protection of military personnel was achieved in 1906 and later in 1929, through a development of the Geneva Law. The 1906 Convention for the 'Amelioration of the Condition of the Wounded and Sick in Armies in the Field'¹⁶ develops the 1864 Convention in the light of the Additional Articles 1868 and of the Hague codification. The 1906 text is more detailed and more precise than the *torso* of 1864. There were new provisions, such as on burial of the dead, on transmission of information and on voluntary aid societies, which has in the meantime flourished. On the other hand, the provisions on aid to the wounded provided by the inhabitants were reduced to more realistic proportions. This convention was amended again in 1929 on the basis of the new experience of the First World War. New provisions were inserted on the protection of medical aircraft and the use (or abuse) of the distinctive emblem in times of peace. New protective emblems were also recognized; for example, the Red Crescent. Moreover, in 1929 a new Geneva Convention on the Treatment of Prisoners of War was adopted. The provisions of the Hague Convention had proved to be insufficient in the light of the First World War. Some important innovations in this convention had a distinctive humanitarian reach, namely the prohibition of reprisals (article 2) or collective penalties (article 46). Moreover, the convention expanded on the organization of prisoner's labour, the designation of prisoner's representatives and the control exercised by protecting powers.

2.2.8. *Improving Humanitarian Protection*

The protection of the individual during warfare was the main preoccupation of the ICRC (Geneva Committee) since its creation. The first great gap to fill after the 1864 Convention was that of prisoners of war who were not injured or sick. The ICRC took action during the Franco-Prussian War (1870–71) and in a series of later armed conflicts. Eventually, rules were adopted on that question in the Hague

¹⁶ See Amelioration of the Condition of the Wounded in Armies in the Field (signed 22 August 1864, entered into force 22 June 1865) published in *The Laws of Armed Conflicts* (n 9) 365 ff.

Convention II of 1899/IV of 1907,¹⁷ later in the Geneva Convention of 1929.¹⁸ The next great gap was the protection of civilians, in and outside the context of combats. Some rules were devised for civilians in occupied territory, thus outside combat contexts (Hague Convention II/IV).¹⁹ For the situation during combats, the ICRC concentrated much effort during the 1920s and 1930s. This was without immediate success: some important States did at that time strenuously resist to any international regulation on the matter. The breakthrough came only with Geneva Convention IV of 1949, after the appalling experiences during the World War. Finally, there was the gap in non-international armed conflicts. It was partly filled in 1949, in common article 3 of the Geneva Conventions, later in Additional Protocol II of 1977,²⁰ and still later by a conspicuous development of customary international law.²¹ It is sufficiently known how precarious the application of these humanitarian norms is, especially in non-international armed conflicts. This is however no reason not to fight for their better dissemination and implementation.

2.2.9. *Geneva Conventions of 1949 and Evolutions since Then*

The adoption of the Geneva Conventions in 1949 (to which were later added the two major Additional Protocols of 1977) marked a radical departure from old conceptions and ushered in a new universe regarding the law of war. Essentially, the Geneva Conventions transform the law of armed conflict in a 'humanitarian law'. The protection of the individual war victims becomes the pivotal centre of the system; international humanitarian law ceases to be merely (or even essentially) the old 'military law'. The law is now clearly predicated on the idea of a thorough international codification of mandatory norms of behaviour engrafted on belligerents, norms moreover locked up against derogation and reprisals. These are the three main features of this third phase: (i) humanitarian protection; (ii) friendly and co-operative relationships with human rights; (iii) detailed international

¹⁷ Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 February 1900) published in *The Laws of Armed Conflicts* (n 9) 55 ff; Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) published in *The Laws of Armed Conflicts* (n 9) 55 ff.

¹⁸ Convention Relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) in *The Laws of Armed Conflicts* (n 9) 271 ff.

¹⁹ arts 44, 45, 50 and 52 of Convention (II); art 50 of Convention (IV).

²⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

²¹ J-M Henckaerts and L Doswald-Beck *Customary International Humanitarian Law* (3 vols CUP Cambridge 2005).

codification. The protective rules are now progressively extended to non-international armed conflict (article 3 common of the Geneva Conventions; Additional Protocol II of 1977; and other sources). Rules on means and methods of warfare, not revised since the Hague Codification and some punctual later treaties (for example, the Geneva Gas Protocol of 1925) are made the object of a new rules in Additional Protocol I of 1977, especially in articles 48 ff. As times goes on, the arm of international human rights law has grown longer. Thus, international humanitarian law and international human rights law start to interact together. The complex relationships of international humanitarian law and international human rights law are today on of the paramount fields of study in the context of the protection of the individual.

3. THE HISTORY OF INTERNATIONAL HUMAN RIGHTS LAW BEFORE 1945

3.1. General Aspects

Human rights law emerged in Europe in the wake of the subjectivist revolution of Enlightenment. Man, with his inalienable and pre-positive rights, was now put at the centre of the new 'natural law constructions'. However, for a long time, such rights were limited to 'civil society', that is, to municipal law, where they were guaranteed by Bills of Rights²² and organs of judicial control. International society was since the Westphalian Peace (1648) progressively restricted to inter-state relations. Moreover, it was held to be a 'natural society', deprived of guaranteed individual rights.

Some degree of protection of individuals was nonetheless developed. It was often collective rather than individual (thus not a human rights device), and linked to nationality rather than granted to every human being (again unlike human rights). In the period of modern international law before the League of Nations (17th century to 1919), there were essentially three modalities of protection: (i) particular rights granted to individuals by treaty, such as a right of option for nationality; (ii) forcible or non-forcible humanitarian intervention; (iii) the

²² Eg the Petition of Rights (England, 1628) or the Habeas Corpus Act (England, 1679); the Virginia Bill of Rights of 1776; or the Déclaration des droits de l'homme et du citoyen (France, 1789). Such a Bill of rights was proposed also for international law (and it became reality with the Declaration of 1948); H Lauterpacht *An International Bill of the Rights of Man* (OUP London 1945).

minimum standard of treatment for aliens. In the period of the League of Nations (1919–46), three new instruments were added to the old ones (but forcible humanitarian intervention was now progressively rejected): (i) the protection of workers through ILO; (ii) the protection of minorities through a series of particular treaties; (iii) the protection of formerly colonial peoples through some supervision of the international ‘mandates’ (article 22 of the League of Nations Covenant). At the same time, a human rights movement proper was set in motion, as is shown by the work of the *Institut de droit international* of 1929. It would however be realized in positive law only through the Charter of the UN (1945), the Universal Declaration of Human Rights of 1948 (which was ‘only’ a resolution of the General Assembly and not, initially, binding law), the European Convention on Human Rights (1950), and later through the UN Covenants of 1966. Apart from the mentioned regimes and institutions, there were some other new areas of action protective of the individual. Thus, for example, at the beginning of the 20th century, the law relating to refugees was in the phase of birth; and action had been taken to abolish slavery and slave trade.

3.2. Specific Institutions

3.2.1. *Rights of Nationality Option*

In ancient treaties, the right was granted to persons to retain their old nationality in case of cession or conquest of a territory.²³ The exercise of this right was sometimes linked to emigration.²⁴ The law relating to the option of nationality was fixed in an exemplary way in the Peace Treaty of Zurich (1859),²⁵ putting an end to the Italian War in which, accidentally, the battle of Solferino had taken place. The rights of option thereafter arrived at a peak in the peace settlement after the First World War.²⁶ The right of option was thus linked with the right to freedom of religion and to choice of nationality.

²³ See already F Stoerk *Option und Plebicit bei Eroberungen und Gebietscessionen* (Leipzig 1879); for more recent account, see Y Ronen ‘Option of Nationality’ in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (OUP Oxford 2008) at <www.mpepil.com>.

²⁴ Conversely, emigration was sometimes the hallmark of religious freedom, in application of the principle *cuius regio, eius religio*. The person who wanted to retain his religious belief contrary to that of the new rules was granted the right to emigrate. This was the system of the Peace Treaties of Augsburg (1555) and of Westphalia (1648); for the Westphalian Treaties, see art 5 of the Treaty of Osnabrück (1648) and its confirmation in the Treaty of Münster (1648) para 47.

²⁵ Zurich, Austria–France (signed 10 November 1859) 121 CTS 145.

²⁶ See JL Kunz ‘L’option de nationalité’ (1930-I) 31 *Recueil des cours* 107–76.

3.2.2. *Humanitarian Intervention*

In the 19th century *ius publicum europaeum*, the practice emerged to allow humanitarian interventions in favour notably of persecuted Christians, notably in the Ottoman empire. In a series of old treaties, dating back to the 17th century, the Turks had accepted that France, Austria and Russia could protect orthodox or catholic Christians, even of Ottoman nationality, when domiciled on its territory. In the Treaty of Vienna of 1856 and the Treaty of Berlin of 1878, the Ottoman empire had formally promised to grant these Christians equality of treatment. It also guaranteed to offer them the necessary protection against assaults and inhuman treatment by Turkish nationals. It is on the basis of that particular law that the European powers intervened more than once in the empire, at a time when general international law did not prohibit the use of force. There was here, to some extent, a double permissive title for action: (i) the treaties granting supervisory rights to the powers; (ii) the freedom to use force in international relations, especially for cases of urgent necessity such as the protection of life and limb. However, humanitarian interventions, forcible or not, took place also in other areas, and even in Europe itself, for example, in the Two Sicilies. Overall, there is thus little doubt that a permissive custom of intervention existed at the time, condoned by the powers in Europe, and thus rooted in the *ius publicum europaeum* (to which Turkey had been admitted since 1856). Among the examples of such interventions are the intervention of France and Britain in Greece (1827) ('in order to stop the shedding of blood and mischiefs by the Turks') and that of France and Britain in 1856 in the Kingdom of the Two Sicilies following a series of politically motivated arrests and alleged cruel and arbitrary treatment of these political prisoners.

Even outside the larger European context, intervention was justified on the same lines. The intervention of the United States in Cuba in 1898 was, among other things, justified on humanitarian grounds. It is true that these interventions were never pursued *only* for purely unselfish reasons, but that should come as no surprise. It is also true that they were predicated on the protection of Christians, and were thus selective. However, some interventions also corresponded, at least in part, to genuine humanitarian concerns. They were rooted in an ideological stream of opinion, widely shared in the 19th century that was centred upon humanitarian values. This was part and parcel of the concept, widely held at that time, of 'civilized nations'. The idea of civilization, on which Europe prided itself, had given rise to the fight against slavery and diseases, to the effort to protect the wounded and sick in war (Henry Dunant's Red Cross Movement), and to a series of other agendas. It also found a kind of natural playground in the field of humanitarian intervention. At bottom, this humanitarian ideology finds its root in the idea of civic liberalism and of the rule of law, of paramount importance to the 19th century. By the end of the 19th century, doctrinal support for humanitarian intervention was split. Anglo-Saxon writers generally supported humanitarian intervention by invoking natural law precepts: one may

recall here ES Creasy,²⁷ WE Hall,²⁸ H Wheaton,²⁹ or TJ Lawrence.³⁰ Continental writers, on the other hand, had started to contest the principle as being incompatible with positive international law and the equality of States: such was the position of P Pradier-Fodéré,³¹ AW Heffter,³² F von Liszt,³³ T Funck-Brentano and A Sorel.³⁴ Other authors believed that humanitarian intervention could not 'be called legally right, but [could] be morally justifiable and even commendable'; they were thought to be an act of policy above and beyond the domain of law.³⁵ Still others, like E Arntz thought that humanitarian intervention should be admissible, but that it should not be exercised unilaterally. Rather, such a right should only be exercised in the name of all humanity, presupposing a collective decision by all States except the tortfeasor, or at least of the greatest number possible of civilized States.³⁶ Finally, the issue of humanitarian intervention became intermingled with (and indeed pushed back by) the newly developing *ius contra bellum* of the League of Nations Covenant, the Pact of Paris (Briand-Kellogg) and the UN Charter. Under the charter, it was held that humanitarian intervention could be lawful only if decided (or authorized) by the UN Security Council (and eventually by the General Assembly under the Dean Acheson Resolution). Action should thus be taken, but under a collective umbrella (see also the notion of 'Responsibility to Protect'). Forcible action should be only the *ultimissima ratio*. The Kosovo episode of 1999 showed that the concept of humanitarian intervention remains to some extent controversial. It was mentioned here as a forerunner of international human rights only in the sense that it at least also served to protect groups of individuals against persecution and death.

3.2.3. *The Minimum Standard of Treatment of Aliens*

The concept of a 'minimum standard of treatment of aliens'³⁷ was developed in the diplomatic practice of States since the 18th century. It grew out of the old practice of

²⁷ ES Creasy *First Platform of International Law* (John van Voorst London 1876) at 297.

²⁸ WE Hall *A Treatise on International Law* (Clarendon Press Oxford 1880) at 247.

²⁹ H Wheaton *Elements of International Law* (2 vols B. Fellowes London 1836) at 69.

³⁰ TJ Lawrence *The Principles of International Law* (5th edn Heath Boston 1913) at 66.

³¹ PLE Pradier-Fodéré *Traité de droit international public européen et américain* (A Durand & Pedone-Lauriel Paris 1885-1905) vol 1, at 663.

³² AW Heffter *Le droit international de l'Europe* (J Bergson trans) (HW Müller Berlin 1883) at 113.

³³ F von Liszt *Das Völkerrecht* (Haering Berlin 1898) at 122.

³⁴ T Funck-Brentano and A Sorel *Précis du droit des gens* (E Plon, Nourrit et Cie Paris 1877) at 223.

³⁵ CH Stockton *Outlines of International Law* (C Scribner's Sons New York 1914) at 100.

³⁶ See E Nys *Le droit international* (Marcel Rivière Paris 1912) vol 2, at 232, quoting Arntz; see also eg WE Hall *A Treatise on International Law* (P Higgins ed) (8th edn Clarendon Press Oxford 1924) at 344.

³⁷ See A Roth *The Minimum Standard of International Law Applied to Aliens* (Sijthoff The Hague 1949); E Borchard *The Diplomatic Protection of Citizens Abroad* (The Banks Law Publisher New York 1915); the term 'minimum standard' comes from the idea that a State may treat foreigners as he treats its own citizens, since discrimination may be resented as being unjustified (standard of national treatment). However, this standard may not fall below a minimum of civilization. In other words, it would not be

reprisals for the torts committed on the subjects of a king abroad, initially often merchants. If *lettres de représailles* could be meted out in order to recover the losses illegally suffered by a citizen abroad, it was implicit that a ruler could first complain to the other that a tort had been committed and require that the matter be investigated and eventually the tort repaired. Hence, diplomatic protection developed under the umbrella of restrictive necessity: reprisals were not lawful if there had not been an attempt to obtain peaceful reparation from the wrongdoing collectivity.³⁸ The claim brought forward in such cases was, from the point of view of substantive law, that some rights of the foreigner under international law (that is, due to his State of origin) had been violated. This, in turn, progressively produced a catalogue of substantive rights, which has been progressively claimed in diplomatic protection. Roughly speaking, these rights concentrated around the following four spheres: (i) life, liberty and honour (for example, habeas corpus); (ii) property; (iii) freedom of religion and creed; (iv) denial of justice (fair trial: access to a local tribunal and also a substantively due process of law). The minimum standard of treatment was thus the international legal institution coming closest to modern human rights law. It differed structurally from human rights law only in the restricted entitlement to the granted rights: these were rights only of the foreigners. International law thus in that time uphold the rule that the treatment of its own nationals by a State was a domestic affair which it could not regulate. Conversely, the treatment of foreigners was not a simply domestic affair since the rights of other States (through their nationals) were at stake. Hence, international law could deal with these aspects. After 1945, it has been claimed that the minimum standard was abandoned. Its discriminatory edge (foreigners/nationals) was henceforth resented. Thus, the minimum standard has been held to have merged into the more general human right law movement and indeed it has been progressively retreating in State practice. However, diplomatic protection for violation of granted rights (be they minimum standard rights or human rights) has remained frequent.

3.2.4. *Workers Protection through ILO*

During the 19th century, the spread of industrial work had brought to a glaring light the necessity to improve the condition of the masses of industrial workers if social peace and justice were to be secured. The rise of communism had made that approach to some extent popular also in the spectrum of the moderate conservatives, since it

standard' must thus always be guaranteed; see H Kelsen 'Théorie générale du droit international public' (1932-IV) 42 Recueil des cours 248-9.

³⁸ See *Le droit des gens* (n 2) vol 1, book 2, ch 18, para 338: 'Son propre avantage [of the aggrieved party] et celui de la société humaine l'obligent à tenter, avant que d'en venir aux armes, tous les moyens pacifiques d'obtenir ou la réparation de l'injure, ou une juste satisfaction.... Souvent, même, il arrive que l'injure est faite par des subalternes, sans que leur Souverain y ait aucune part: et dans ces occasions, il est naturel de présumer qu'on ne nous refusera pas une juste satisfaction.'

was perceived as a bulwark against communist agitation. The Preamble of the Constitution of the ILO (1919), incorporated into the Versailles Treaty (Section XIII), expressed this endeavour in clear terms: universal peace could be established only if it was based on social justice; conditions of labour existed which involved such injustice, hardship and privation imperilled the peace and harmony of the world. Moreover, it was acknowledged that action could only be taken through international cooperation: the failure of any nation to adopt humane conditions of labour was an obstacle for other nations which desired to improve conditions in their own countries (through 'social dumping'). The ILO was thus set up. Under its aegis, a series of conventions and control mechanisms were set up in order to improve the condition of workers. The conventions touched upon a series of typically 'human rights' questions in the area of labour: protection of women and children; non-discrimination; safety at work; freedom of association and belief; etc. There are today roughly 200 such protective treaties concluded under the arm of the ILO.

3.2.5. *Protection of Minorities*

The protection of minorities falls into two great phases. The *first phase*, from the times of the Treaties of Westphalia to the end of the First World War was based on a series of conventional provisions guaranteeing freedom of religion for certain religious minorities. These provisions were however relatively vague, haphazard, and fragmentary. They did not constitute a system for the protection of minorities. Moreover, there was no institutional control for their implementation. Such provisions can be found, amongst others, in the Treaties of Osnabrück and Münster (1648), protecting catholic or protestant minorities finding themselves in territories dominated by the 'adverse' faith ('*cuius regio, eius religio*'). Another example is the Treaty of Oliva (1660), by which Poland and the Great Elector (Prussia) ceded Pomerania and Livonia to Sweden, but at the same time guaranteeing the inhabitants of the ceded territories the enjoyment of their existing religious liberties. Such provisions can also be found in a series of treaties of the 17th and 18th centuries, such as Utrecht (1713) and Paris (1763) on the protection of religious minorities in the North American colonies, concluded between France and Great-Britain; the treaties between Russia and Poland (1773, 1775) on the protection of religious minorities; the treaty of Küçük Kaynardji (1774) between Russia and the Ottoman empire, on the protection of Christian minorities in Turkey; the Treaty of Vienna (1815), including clauses on the protection of Poles inhabiting States parties to the treaty; or in the Treaty of Berlin (1878), concerning the Turkish, Romanian, and Greek minorities in Bulgaria. The *second phase* is the system of protection created after the First World War within the framework of the League of Nations. Territorial changes in Europe, due to the collapse of the Austro-Hungarian and the Ottoman empires, brought to the fore acute problems of minorities in most parts of Eastern Europe. The peace treaties concluded with the various vanquished States of the region (Austria, Bulgaria, Hungary, Turkey) con-

tained clauses for the protection of minorities. Further agreements of this type were concluded with the five States where the problems of minorities were acute: Poland, Czechoslovakia, Yugoslavia, Romania and Greece. For certain other States, the acceptance of obligations with regard to minorities was made the condition for their membership to the League (Albania, Estonia, Finland [Åland Islands], or Iraq). The obligations assumed spanned from fundamental freedoms to equality before the law, prohibition of discrimination, freedom to use one's own language, and freedom to run one's own minority schools. The undertakings assumed were the object of two guarantees. First, the States concerned had to recognize, in their respective legal orders, that provisions relating to minorities were fundamental laws not liable to be modified or abrogated by ordinary laws. Amendments had moreover to be approved by the Council of the League of Nations. Second, complaints for breaches could be brought to the Council of the League of Nations and, if the dispute was between States and persisted, to the PCIJ. The minorities regime of the League worked approximately well at the beginning of the 1920, despite of many political tensions. It came into crisis at the end of the 1920s. One of the difficulties was that it was based on discrimination contrary to equality between States: some States, especially the vanquished ones, were subjected to international scrutiny of their minority obligations; other States were not subjected to such obligations.

3.2.6. *Protection of the People of Mandated Territories*

The territories detached from Germany and Turkey after the First World War were not annexed by the victorious powers but placed under the control of a trustee under the supervision of the League of Nations (article 22 of the League of Nations Covenant). The administration of these territories had to be performed with a view to insuring the well-being and development of such 'backward' peoples. The economic exploitation of the territory or its population was forbidden. The Council of the League of Nations was to control the way in which the mandated powers would perform their administration. In its task, the Council was assisted by a Permanent Mandates Commission (see article 22, § 9 of the covenant). The Commission and the Council received some petitions from the inhabitants of the mandated territories, through the channel of the mandatory government. The Mandates Commission or the council could then influence the policy of the mandatory power towards an improvement of the rights of the local inhabitants. Overall, this was only timidly done, but it must be noted that the Mandates Commission exerted a significant influence during the 1920s.

3.2.7. *The Resolution of the Institut de Droit International of 1929*

In the 1920s, the most progressive international lawyers fought for a generalization of the minorities protection regime. The regime of protection should first cast away the

limitation to minorities in order to embrace all human beings. Second, the regime should not apply only to some States bound by a particular treaty, but to all States as a minimum standard of civilization. André Mandelstam, member of the *Institut de droit international*, has been particularly active in this effort.³⁹ After some drafts he presented to the *Institut de droit international*, this institution adopted in 1929 its resolution bearing the title 'Déclaration des droits internationaux de l'homme'.⁴⁰ The Preamble states that: 'Considérant que la conscience juridique du monde civilisé exige la reconnaissance à l'individu de droits soustraits à toute atteinte de la part de l'Etat...; qu'il importe d'étendre au monde entier la reconnaissance internationale des droits de l'homme'. Article 1 of the resolution then proceeds to require from States that they recognize to every person the right to life, to freedom, to property, and to grant the person the protection of the law without any discrimination. Article 2 concerns the freedom of religion or creed. Article 3 guarantees the free usage of one's own language and the related freedom to teach this language. Article 4 touches upon the right to access to different professions and schools, without discrimination. Article 5 concerns non-discrimination and material (not only formal) equality. Finally, article 6 prohibits any forfeiture of nationality for minorities on a State's territory, reserving only motives provided for in general laws, applicable to all persons. This resolution thus embodies a short Bill of Rights fusing together the minimum standard of treatment and the minority protection regimes. However, it constituted in 1929 only a recommendation to governments. It did not reflect, at that time, the positive law of nations. The treatment of its own nationals remained for every State a matter of domestic jurisdiction to the extent it had not undertaken international obligations by way of binding conventions. It was only with the Charter of the United Nations in 1945 that the legal position would change and that human rights became not only a matter of international concern, but also, progressively, a matter of positive international law.

4. CONCLUSION

Overall, it can thus be seen that a full-fledged protection of the individual at the international level arrives relatively late in legal history. It began in the 19th century and grew enormously in the 20th century. Keen attention for the fortunes of individuals

³⁹ AN Mandelstam 'La protection internationale des droits de l'homme' (1931-IV) 38 *Recueil des cours* 125-232 at 129 ff.

⁴⁰ Institut de Droit International 'Déclaration des droits internationaux de l'homme' (1929) 35

supposes a high degree of civilization. At early stages, social ideology is caught up in the categories of group solidarity and *morale close*. Only through a long historical evolution morality develops into the more refined flower of compassion and care for the individual and its personal fate. The international society is no exception to that rule. Its all-embracing character and its great spatial extension explains its slower evolution. The greater a space is, and the slower time flows for it. It is therefore only in the last two centuries that the individual could fully catch the attention of its particular legal order, namely public international law.

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ANNE PETERS

Assistant Editors

SIMONE PETER

DANIEL HÖGGER

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